FOI Independent Review – Response to Discussion Paper

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The announcement of the Independent Review last year was very welcome, and the publication of the Discussion Paper even more so, as it canvassed a wide range of matters relating to FOI, addressing many of the long-standing criticisms of the Queensland legislation. Although time does not permit me to address every question raised in the Paper, or in as much detail as I would have liked, I will attempt at least briefly to address the majority of them.

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?

Yes.

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"?

Yes

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

Yes.

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

Either in a Preamble or within the Objects section.

6.2 Objects of the Freedom of Information Act 1992

6.2.1 Better governance

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. However it is important that FOI is not seen alone in this context. Many of the benefits, such as improved quality of decision making, come from other elements of administrative law reform, such as the Judicial Review Act, and accountability mechanisms such as the Ombudsman, as well as Public Records and related legislation.

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

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?

Although this has often been said, I think that the position of the FOI Act is that a document is available unless the agency can demonstrate reasons to refuse access. The onus is clearly on the agency to support a refusal with sound reasons, based on the Act. Of course the appropriate setting is of openness: in some cases after a period of time has elapsed, in others, when specified harm will no longer occur.

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?

Should the period be reviewed in relation to Cabinet decisions and documents, and more generally for other public records? If so, to what extent should it be reduced?

Yes, the period should be reviewed and reduced. Other jurisdictions have reduced the period of protection for Cabinet documents to 10 years (NSW, Victoria, WA, Tasmania, NT, Ireland) or 20 years (SA, ACT). Some have set a limit for exemption of internal working documents (10 years in Victoria, WA, Tasmania, NT; 20 years in ACT). However in some cases of sensitive personal information (eg: mental health records), it would be appropriate for an even longer period than 30 years to apply before open access.

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

To assist Queensland Archives to plan for such changes, this could be phased in over a period of say 4 years. In the first year it could be reduced to 25 years, in the second to 20 years and so on.

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?

For personal information, access schemes should make it as easy and affordable as possible to obtain access to one's own personal information. Because of the need to check identity etc, there would still need to be some paperwork. Whether this is an FOI scheme, or an Administrative Access scheme, or another statutory access mechanism does not matter as long as the applicant is given a high quality, affordable means of access.

However not all requests can be dealt with under an admin access scheme. Because

FOI has a system of appeal rights, where any of the requested information is refused, I would recommend it being handled under the FOI Act to maximize the applicant's rights of review. In some cases, FOI is the only option, due to its legislative protections – for example, access to health records of the deceased in Queensland Health has to be handled under FOI rather than Admin Access. Where applications involve third party information, FOI is preferred as it has specific provisions for third party consultation and appeals. For straightforward first-party requests for access, however, admin access is usually adequate and this should be encouraged.

For non-personal information, publication on websites of catalogues and indexes of available information, or even full-text versions of certain documents, would be the best means.

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

In some cases this might require amendment of the various secrecy/confidentiality provisions of their agency's legislation, which at present prohibits disclosure other than through operation of law. Where that is not a barrier, there would be no reason why FOI Officers could not be encouraged to release information outside FOI, once the legal protections were in place. (See also below.)

However, FOI Officers need a clear statement of support from the top to encourage them to release information both under FOI and outside FOI. In cases where the applicant is an Opposition MP, a journalist, or a client in conflict with the agency, senior managers are usually reluctant to release information even under FOI.

One aspect of increasing release outside FOI is monitoring the workload. Some agencies have resisted release outside FOI as it reduces their FOI statistics, with a risk of the dedicated FOI resources being reduced accordingly. One solution to this is to track the outside-FOI releases as well as the FOI requests, although (in the case of the former) without the additional statistics required under section 108.

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

Yes. This is frequently expressed as a reason to make applicants use their rights under FOI rather than an administrative access scheme. The legal protections for FOI Officers and agencies should be the same whether information is released under FOI, an administrative scheme, or other statutory access provisions.

Although this question only addresses the legal protections, it could be said that FOI Officers also need protection from the internal consequences of disclosures which have the effect of embarrassing their agencies or Ministers. One option may be to give the Information Commissioner a role to accept complaints from FOI Officers about threats and reprisals in an FOI context, similar to the support sometimes given in cases of whistle-blowing.

6.2.6 Publication schemes

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

The UK and Scottish Information Commissioners have issued extensive guidance on what should be included in the publication schemes. A review of the websites of most

UK government agencies reveals more published documents than is the case for the corresponding Australian agencies. For example, the level of detail disclosed in publication of financial details such as travel and other expenses or contracts is typically much greater. Another initiative is that of Disclosure Logs: publication on the government agency's website of material made available under an FOI request.

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

With web-based publication, it is much easier to keep material up to date. All agencies should keep their websites up to date on a regular basis – at least monthly. Significant information (fees and charges, statutory or administrative deadlines, changes in application requirements etc) should be amended as soon as the change takes effect.

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

Since most of the Australian FOI Acts were drafted, internet technology has advanced dramatically. The use of government websites to publish, rather than hard-copy publication methods, should be the default. For clients without web access, web pages or PDF files could be printed and mailed out.

On websites, the greatest challenges are those of ease of location and access to information on the site. The UK Information Commissioner studied a number of government websites and found that on some, users had to drill down up to 30 levels to locate documents. Improving search engines, better control of terminology and indexing, and redesign of websites structure and navigation are some of the solutions, though they involve significant resources. Savings in terms of phone enquiries and complaints would almost certainly be able to offset much of the expense of such improvements.

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

Both should be able to require publication of additional information, particularly information unique to one agency which may not have been specified sufficiently in the general guidelines on publication.

Would there be any 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?

An Information Standard would probably be the most appropriate method of providing this guidance.

6.2.7 Negating access

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

I tend to agree with LCARC that without some reference to the competing interests, an Objects clause would give a false impression of total availability. And yet in terms of the balance within the Act, there is one page setting out the Object of increasing access, compared with 15 pages setting out restrictions, so that it is vitally important to get a clear statement of maximizing disclosure in the Objects clause.

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

6.2.8 Interpretation

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

Yes.

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? Should it move towards the Swedish approach?

A change to allow access to "public records" rather than "documents" would have a number of advantages for FOI Officers within agencies. The time to search for records would be reduced, and the exclusion of multiple non-significant drafts and emails would reduce the volume to be read and edited (if required). If time-based processing charges remain, then this is an advantage for applicants as well, in reducing time spent on fairly fruitless and valueless near-duplicates. The amendments to the FOI Act concerning material on "back-up" tapes was brought in response to difficulties experienced by FOI Officers as applicants began actively seeking such ephemeral material.

However, given the relatively poor state of most agencies' record systems, it cannot be assumed that all "public records" are presently captured and retained according to the disposal schedules. The most troublesome forms of records are drafts and emails. This would also mean that I am not confident that the Swedish approach would be successful at this stage in Australia.

On balance, I think there is benefit to administrators in excluding ephemeral material as a general rule. However, similar to the exceptions for back-up tapes, perhaps there could be a provision allowing an applicant to appeal to the Information Commissioner to obtain documents claimed to be "ephemeral" which are in fact material to an issue.

A change to allow access to "information", including of course information not in a recorded form, would require a number of changes in approach within agencies. In effect, applicants could simply ask a series of questions of agencies, requiring creation or compiling of responses. Much of this would have to be done by people with a detailed knowledge of the subject matter, rather than by centrally located FOI Officers with knowledge of FOI rather than specific topic areas. FOI Officers could still co-ordinate, but they could not easily compile such responses. It is akin to the requirement under section 32 of the Judicial Review Act (s.13 of federal AD(JR) Act) on providing statements of reasons (which, by the way, is a heavily under-promoted and under-utilised accountability mechanism). I think this may have advantages for applicants, but would have significant resource implications for agencies.

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?

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?

Yes. Consider provisions such as:

NT Information Act:

> *s.5 (7) A reference to a public sector organisation includes a reference to the following:*
>
> *(a) the chief executive officer of the organisation;*
>
> *(b) an officer, employee or agent of the organisation;*
>
> *(c) a contract service provider to the extent of the services it provides under the service contract;*
>
> *(d) an employee or agent of a contract service provider to the extent of the employee's or agent's involvement in collecting or handling personal information under the service contract;*
>
> *(e) a person (other than a contract service provider) who provides services to the organisation under a contract between the organisation or the Territory and that person or another person to the extent of the services provided.*

Irish FOI Act:

> *"s.6(9) A record in the possession of a person who is or was providing a service for a public body under a contract for services shall, if and in so far as it relates to the service, be deemed for the purposes of this Act to be held by the body, and there shall be deemed to be included in the contract a provision that the person shall, if so requested by the body for the purposes of this Act, give the record to the body for retention by it for such period as is reasonable in the particular circumstances."*

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

They should be covered by FOI in respect of:

- publication requirements (statements of affairs);
- all personal information; and
- all other information apart from that where disclosure would damage their competitive commercial activities.

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 or GOCs?

It is true that such a definition raises certain difficulties, but I think it is worth attempting. One approach would be to say that governmental functions are any functions performed at the government's direction, with public funds. Language would have to be found to clarify the FOI responsibilities (if any) of recipients of grants. Transport-related "government functions" would be an area of particular ambiguity.

From a practical point of view, what each GOC and other organisation needs to know (far in advance of any cases brought) is whether it is subject to the Act and if so, to what extent and what is the timetable for compliance. In the early days of FOI in Queensland it took months to identify and advise all of the "public bodies" covered by the Act (over 900 as I recall), and with some there was still debate about their inclusion years later.

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?

Yes. For example, see NT Information Act: s.5(4). This should be subject to exactly the same exemptions as personal information held by other government agencies.

(iv) Other bodies

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

In general, I would agree with the Canadian approach: inclusion on the basis of developing and applying public policy, operational and financial. However there may need to be caveats on this approach. In Ireland, for example, FOI has been extended to the voluntary sector, that is, charitable and other bodies who are in receipt of government funding in excess of a set amount per year. (Examples covered include the National Council for the Blind, the Irish Wheelchair Association, and religious orders providing services for people with an intellectual disability). All of the organizations would provide access to personal information for their clients under Data Protection legislation in any case. The administrative burden placed on such relatively poorly-resourced organizations by FOI is perhaps disproportionate to the increase in accountability.

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

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?

As long as the concept of "harm" is being applied properly, and with full knowledge of the impact of release, then technically-exempt material could be released.

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

The present drafting should be sufficient to ensure this, although I will give further thought to whether there are better international examples to achieve this.

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

Virtually all FOI Acts around the world have some absolute exemptions, usually those concerning security, Cabinet, law enforcement. When Queensland's FOI Act was enacted, it was in the forefront in terms of the greatest number of exemptions subject to a public interest test. It is still very good in this regard. I doubt that it would be politically acceptable to have all of the exemptions subject to an overriding public interest test; however, I agree with expanding the number of exemptions subject to the public interest test.

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

If Privacy legislation is enacted, with the usual penalties for breaches, then FOI Officers may need protection from this in addition to those protections already specified.

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?

As a general answer to the question, FOI officers can be made more aware through clearer guidelines issued by DJAG on this point, and through training which explicitly raises the issue in practice examples.

For some years, it has been the practice in the Commonwealth to allow the release of information which is technically exempt, such as for example information which is technically covered by legal professional privilege, to be released under FOI if no harm will come from the release. This brings a "harm test" into an otherwise absolute exemption but with a discretion to exercise or not. For legal privilege specifically, it must be made clear exactly who in an agency has the authority to claim or waive privilege – is it the FOI Officer, the CEO, the Minister? In Queensland for some years there has been a belief that Crown Law advice cannot be released without the permission of the Attorney General, so no FOI Officer would consider such a waiver.

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 documents?

As large a role as possible.

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

See my response in the preceding section – all but a few specified exemptions.

How should the public interest test be expressed?

I believe the public interest test is of such importance to FOI that I wrote a book about its application, which contains many specific examples from Queensland. (A table of contents and the two initial chapters can be downloaded at http://www.freedomofinformation.com.au/ .) My co-author and I found that best practice from English-speaking Westminster style jurisdictions is that the phrase "public interest" is not further defined. This requires the FOI Officer (and all others involved) to be as specific as possible about the public interests for and against disclosure; in other words, it focuses attention back on the specifics of each individual case, which is optimal.

Therefore in my view the current expression of the public interest test in the Act does not require any change. Improvement can come in the way the public interest test is applied, as described below.

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

The factors to be considered in determining the public interest usually involve the concept of detriment or harm – harm to persons, business interests, processes etc. This has emerged from years of decisions by courts, tribunals and Commissioners, not just in the realm of FOI.

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

The weight to be given to any of the factors being balanced in the public interest determination will be influenced by the time at which the decision is being made to release, and the precise impact of that release at that time. The same document may be exempt at the age of 2 weeks old, partially exempt at the age of 3 months, and fully releasable at 12 months, because the weight of harm in the public interest assessment has changed over time. This is one reason why simply classifying/marking documents as "Exempt" in the records system does not work for other than the absolute exemptions.

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

Guidelines on the matters which should be considered in assessing the public interest would be useful and indeed there have been attempts at this in the Information Sheets issued by the Information Commissioner and in the Guidelines issued by Department of Justice and Attorney Generals. Several jurisdictions have stated various factors within their legislation (see for example NSW FOI Act s.59A; NT Information Act s.50 (2); NT Information Act s.52(5)), covering those which may be taken into account, and those which explicitly must not be taken into account. I think it is too difficult and overly prescriptive to try and capture the range and nuances of public interest arguments in a legislative form, but this is more achievable in the form of

guidelines with examples.

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?

If so, then this should be done for all exemption provisions. It would be more efficient to have this spelled out only once in the Act, applying to all exemption provisions.
Should a class exemption for Cabinet matter be maintained?

The New Zealand harm-based approach would be preferable; however, it has no parallel within Australia and is a radical move forward from the present exemption.

Should a public interest test be introduced?

This too would be a radical move. It would also have an impact on the level of officer delegated to make the FOI decisions on Cabinet documents. It is unfair and probably inappropriate to expect junior and middle-ranking FOI Officers to make decisions to release Cabinet documents in the public interest without fear of reprisals.

Should the exemption include a purposive element?

Yes. At minimum, return the Queensland provision to its form when originally enacted.

Should there be a factual/statistical material exception?

Definitely.

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

No.

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

Yes. Consider a 5 or 10 year period, for which there is ample precedent.

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

(See above.)

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?

Similar to the Cabinet provision: 5 or 10 years.

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?

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

Yes. If the time limit is not set in years (as in the NT Information Act s.52(4) – 10 years), but expressed in terms of implementation, then this term would need some definition and guidelines issued.

7.4 Personal affairs

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

The case law which has developed in Queensland on the meaning of "personal affairs" is fairly comprehensive, and covers quite well the matters needing protection. Most FOI Officers in Queensland are quite familiar with and comfortable with its interpretation and application. However, there is also merit in using the term "personal information". If this were to be done, I would strongly recommend defining the term to specifically include certain aspects, and exclude others (particularly those relating to public officials.) A good example is in the Irish FOI Act (based on the Canadian Privacy Act s.3):

> *s. 2 "personal information" means information about an identifiable individual that:*
>
> *(a) would, in the ordinary course of events, be known only to the individual or members of the family, or friends, of the individual, or*
>
> *(b) is held by a public body on the understanding that it would be treated by it as confidential,*
>
> *and, without prejudice to the generality of the foregoing, includes:*
>
> *(i) information relating to the educational, medical, psychiatric or psychological history of the individual,*
>
> *(ii) information relating to the financial affairs of the individual,*
>
> *(iii) information relating to the employment or employment history of the individual,*
>
> *(iv) information relating to the individual in a record falling within section 6 (6) (a),* [(a) is a personnel record, that is to say, a record relating wholly or mainly to one or more of the following, that is to say, the competence or ability of the individual in his or her capacity as a member of the staff of a public body or his or her employment or employment history or an evaluation of the performance of his or her functions generally or a particular such function as such member,]
>
> *(v) information relating to the criminal history of the individual,*
>
> *(vi) information relating to the religion, age, sexual orientation or marital status of the individual,*

(vii) a number, letter, symbol, word, mark or other thing assigned to the individual by a public body for the purpose of identification or any mark or other thing used for that purpose,

(viii) information relating to the entitlements of the individual under the Social Welfare Acts as a beneficiary (within the meaning of the Social Welfare (Consolidation) Act, 1993) or required for the purpose of establishing whether the individual, being a claimant (within the meaning aforesaid), is such a beneficiary,

(ix) information required for the purpose of assessing the liability of the individual in respect of a tax or duty or other payment owed or payable to the State or to a local authority, a health board or other public body or for the purpose of collecting an amount due from the individual in respect of such a tax or duty or other payment,

(x) the name of the individual where it appears with other personal information relating to the individual or where the disclosure of the name would, or would be likely to, establish that any personal information held by the public body concerned relates to the individual,

(xi) information relating to property of the individual (including the nature of the individual's title to any property), and

(xii) the views or opinions of another person about the individual,

but does not include:

(I) in a case where the individual holds or held office as a director, or occupies or occupied a position as a member of the staff, of a public body, the name of the individual or information relating to the office or position or its functions or the terms upon and subject to which the individual holds or held that office or occupies or occupied that position or anything written or recorded in any form by the individual in the course of and for the purpose of the performance of the functions aforesaid,

(II) in a case where the individual is or was providing a service for a public body under a contract for services with the body, the name of the individual or information relating to the service or the terms of the contract or anything written or recorded in any form by the individual in the course of and for the purposes of the provision of the service, or

(III) the views or opinions of the individual in relation to a public body, the staff of a public body or the business or the performance of the functions of a public body;

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

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

This has been a vexed question since the beginning of FOI in the Commonwealth, made more acute by the heavy usage of the FOI Act by public servants seeking

information about themselves in the context of workplace disputes and promotions. There is undoubtedly information about government employees which is appropriately covered, and exempt, under section 44 (health, sick leave, family matters, harassment complaints and allegations). There is other information which does not qualify for exemption: an officer's name, job title, responsibilities, salary range and entitlements. These should be available to achieve accountability. An officer's identity when making decisions which affect a member of the public should normally be disclosed unless there is a genuine risk of harm. (Such cases are relatively rare).

The area of greatest difficulty is that of work performance and assessment. Early Commonwealth case law excluded this from the definition of "personal affairs" (as it then was), and Queensland case law followed this line of authority. The Irish FOI Act definition cited above includes such material within the definition of "personal information" (by incorporating a definition from s.6(6)(a)) but it is still subject to the public interest test. I would recommend this latter approach be adopted in Queensland.

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

My personal view is that any public official who believes they have privacy while using work facilities such as their work email account, is in a fool's paradise. However, it is fair to say that there are differences in agencies' acceptable use policies and staff ignorance of such policies. I would entertain an argument if the content of the document were genuinely personal (eg: discussion of a sensitive health matter with a family member via work email), but not if the officer was expressing a strong personal opinion about a work-related matter.

"Webmail" (e-mail addresses which can be managed wholly within a web browser) and SMS are now so widespread and robust that in offices with internet access I believe it reasonable to tighten acceptable use policies, clarify that all messages are work-related and potentially public records, and further reduce the use of the work email account for personal content. Family medical emergencies can be discussed via webmail, SMS and phone.

7.5 Commercial-in-Confidence

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

There is international precedent for having all parts of the commercial information exemption subject to a public interest test. In the early days of FOI it was thought that this would result in a loss of confidence by the business community in giving its information to government bodies. However, in the past 25 years I have seen little evidence to support these fears.

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

If "confidentiality" here refers to contractual confidentiality (s.46(1)(a)), then one option would be to have all confidentiality clauses reviewed by the Information Commissioner prior to the contract being signed by the government agency concerned. This was proposed in Ireland, although not ultimately enacted. It is one

aspect of an increasing trend to "contracting out" of FOI.

If this is referring to whether exemption under section 45 should be available only if disclosure would cause harm to the competitive position, (or prejudice future supply to government – s.45(1)(c)) then I agree with this.

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

In the NT Information Act, the equivalent provisions to Queensland's Sections 45 and 46 are subject to a 5-year time limit, which is open to extension by the Information Commissioner. To date I am not aware of any cases where this has occurred, so it is difficult to assess the impact of the selection of a 5 year period. However, it would be fair to generalize that most commercial and confidential information loses its sensitivity over time. (This is less true of personal confidential information in, for example, a medical context). It is difficult to put a figure on the appropriate time limit. A proper application of the harm and public interest tests should result in release if there is insufficient harm to warrant the exemption being invoked.

7.6 Other exemption provisions

Is each of these exemptions necessary?

Section 42AA should be incorporated with s.42, if it is considered that the issues to be protected by it are not sufficiently protected by the provisions within section 42(1) as it is.

Section 47A has no counterparts in other FOI legislation and it is questionable whether it is really necessary.

Is the public interest test appropriate?

There is international precedent for extending the public interest test to two of the currently absolute exemptions: s.43 (Legal professional privilege) and s.46(1)(a) (Breach of confidence).

Would a "harm" test be more appropriate?

The public interest test contains within it the notions of harm and detriment, so as long as it is present, a separate harm test is not required.

7.7 Conclusive certificates

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

Yes. All should be abolished.

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

(See above.)

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

Yes, if the power to issue them is retained in the Act.

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

If conclusive certificates are retained, then the issuing of one should be reported to Parliament at the first available sitting.

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?

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?

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?

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

Almost all of the behaviours described in Table 8.1 have been practiced in Queensland at some time, sometimes simultaneously within the same agency. (I should add that I am aware of jurisdictions which are much worse than Queensland in this regard). It is true that where the majority of FOI requests are for personal information, even where there are problems (such as vexatious and voluminous requests), there is a greater degree of administrative and proactive compliance. However even in such otherwise compliant agencies, requests for sensitive policy / deliberative documents give rise to the non-compliant behaviours. Part of this is that such requests have to be dealt with or referred to more senior officials for decisions (or approval of the more junior officers' decisions). Such requests are usually known to the Minister's office and as such, subject to greater scrutiny and potential involvement of Ministerial staffers in the decision making process.

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?

There are many excellent suggestions outlined in the Discussion Paper. There is no one quick fix, so a wide range of measures is best. The importance of top-level support for FOI concepts and good FOI behaviour cannot be overstated and it is very difficult to achieve. Strong statements of support for openness from the Premier, Ministers and CEOs would be a great start. Including FOI as a performance measure for senior managers is useful, although the tendency has been towards the quantifiable aspects of FOI performance (meeting statutory deadlines, rates of reviews etc) as it is difficult to evaluate and pay bonuses on the more qualitative, less tangible aspects.

Sanctions are an unpleasant but necessary element to achieve the change. Information Commissioners rarely if ever invoke their powers in this regard, not only in

Queensland but internationally. (The example from India was startling as almost unprecedented). As a trainer I have often wished for just one salutary example where an official was fined for destroying documents, or obstructing a proper decision, to convince any sceptics on the training course.

Ongoing support for FOI Officers, through training, advice and network meetings, is essential. Some initiatives employed elsewhere include accreditation of FOI officers (South Australia) and the creation of the role of Information Rights Professional (Canada) so that the FOI Officers are given more authority and respect for the work they do. Professional programs of study, supported by government, to upgrade the skills of FOI Officers, have been set up at the University of Alberta and the University of Northumbria.

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 impacts 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?

Definitely.

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

Yes

Recordkeeping meets FOI and ICT

Are records management protocols and standards accessible, widely known 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?

Records management as a function has traditionally been regarded as low-level, staffed by the most junior officers, neither time-critical nor mission-critical. It is frequently poorly resourced, in terms of staff as well as facilities. Years of neglect have led to problems in records management not just across Australia but internationally. The advent of FOI highlighted these problems, and in some cases was the catalyst for remedial action.

However, in general staff have low levels of skills and knowledge of good records management practices. Even at the simple level of putting proper titles on emails, or version control of draft documents, very few agencies have good records practices in place. There is very little training for the Records staff themselves or for staff generally in records management. Practices in records retention cover the entire spectrum from keeping everything "just in case", to premature destruction of important public records. During FOI training, I include a segment on Records Management as it is quite clear that few of the FOI trainees are aware of even basic records management issues such as the existence of the Public Records Act and disposal schedules.

Induction training for all staff should have a segment on records management, including aspects such as handling emails. Specific short training sessions on records management should be offered as part of departmental training schedules. Periodic audits should check compliance with policies and practices.

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

A variety of planning and assessment tools might be helpful if properly used. It would be useful to launch small pilot programs in which promising approaches are used in/on a defined area, and then the results evaluated and shared.

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?

ICT has improved our ability to control and locate records, at the same time as dramatically increasing the volume of records to be managed. There are many good examples of policies and practices on handling drafts and emails from around Australia and the world. Much of the solution lies in the hands of each individual staff member, who creates and controls their own records. Apart from locking documents as non-printable and removing photocopiers from government buildings to limit proliferation of duplicates, individual officers must be made aware of the necessary policies and practices, and there needs to be some monitoring to check compliance.

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

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?

Discussion of metadata can quickly become highly technical. Let's use the example of "tagging" which is now (thanks to its use in blogs and photo libraries) making a simple records management concepts ("keywords") part of the general knowledge of the public. Here are my brief thoughts on tags (as an example of one amongst the many kinds of metadata that could be addressed):

- It is good practice to tag information (with keywords or whatever other methods are available) for later retrieval. Best practice is to have a standard list or thesaurus of approved and non-approved tags (keywords), with the ability of staff to add to the list after reviewing all the existing tags.
- If it is determined that applicants should be able to access "raw data", then it would be helpful to publicise the list of tags, or at least a publicly-accessible sub-list. (Obviously not a "report of child abuse" tag; privacy guidelines would be complied with.)
- It would be possible to "process" data for applicants to the extent of finding all records tagged in such and such a way (including dates); this semi-automatic report-running is probably all the processing I'd be willing to ask a body to do. (One day this would all be possible on the internet, in self-service form, but for now we'd frequently have to run the reports ourselves, depending on the state of

each body's records.)

- Would I allow applicants to make up their own additional tags, and request them to be added to specified existing records? No. (Or at least, not for free.)

These or similar boundaries would be able to be stated, and the use of tags on the internet makes it easier to explain now than it would have been ten years ago.

Another common type of metadata is contained in the File Properties of Microsoft files, which purport to give each document's registered author and other facts about its creation. Due to the fact that MS-Word's template facilities are very powerful, but difficult for average users, many document creators actually start new documents by opening a similar old document, saving a copy and then removing the pieces that don't apply (and so on). As a result the File Properties metadata is often either confusing or downright erroneous. I do not think releasing it to applicants serves any useful purpose. (And because of the prevalence of viruses which target Microsoft Office files, as well as concerns about integrity of documents and availability of recently clipped contents, I applaud the common practice of releasing electronic copies primarily in PDF format. If an editable copy is required, RTF is preferred.)

The extent to which agencies should be obliged to process the data to provide the information relates to the questions of voluminous requests and charges. The current provisions of s.30(1)(e), concerning "equipment usually available" to the agency to retrieve and collate information, mean that it should be done to the extent possible within existing software and hardware resources. Beyond this, if an applicant were willing to pay for a programmer's time and an agency willing to allow this, then that should be permissible. If the work involved were voluminous then it could be dealt with under the same provisions as for normal voluminous requests.

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"?

A single entry point would have great utility. As a practitioner who has maintained an FOI-related web site since 1995, it is not possible to overstate the extent to which requesters are unaware of their FOI rights, of which jurisdiction holds the information they seek or how to obtain it. People are confused between the federal, state and local levels of government; they are unclear whether private sector bodies (banks, insurance companies, golf clubs) are required to provide access even to personal information. My page at http://users.bigpond.net.au/mcarter/foi/public.html attempts to assist requesters in a general way, however the numerous email requests I receive show that many people do not understand how government affects them. Sadly, some requesters send me their requests believing I am the repository of all government information. I believe a single entry point for the State would do much to support the public in using the system, and support us in tracking requests as well. (Victoria allows online lodgement of requests at : http://www.foi.vic.gov.au) The issue of a single entry point for Australia (with direct links to each State/Territory page) is beyond the scope of this review, but would be a valuable counterpart at the federal level.

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

Again, a pilot program to test and shake out problems is highly recommended. One agency could volunteer to be the guinea pig (and be given extra support in exchange for its courage), then the results could be evaluated and the technology (portal) tuned before being rolled out throughout the State.

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?

Yes, FOI should move towards a "push" model of proactive disclosure. One challenge is for agencies to identify the categories of information and the specific documents which need to be made available proactively. Some of the overseas guidelines would assist in this. In terms of technology, apart from posting on websites (with references on the What's New / What's Changed pages), options would include:

- topic-specific mailing lists or discussion groups / forums to which the public could subscribe at no cost
- websites dedicated to specific topics/developments not merely to the Department or agency as a whole (eg: GoldCoastMotorway.qld.gov.au, fluoridation.qld.gov.au, conservation.qld.gov.au). The public could subscribe for email notifications of additions or changes.
- blogs with RSS feeds that would allow interested parties to subscribe to releases on a particular topic.

Re-using government information

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

As one of the important ways by which public resources (in this case information) can be leveraged and shared, FOI definitely has a role to play. Because we FOI practitioners have a comparatively long history of carefully considering release of information, we can be a resource for others who are considering these issues.

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

The European Union has had a Directive on Re Use of Public Sector Information for several years and there are useful materials produced in the UK on this matter.

The Queensland Spatial Information Council is to be commended for its use of creative commons-type licenses for intellectual property generated by its departments (announced last month; details at http://www.qsic.qld.gov.au/qsic/QSIC.nsf/CPByUNID/BFDC06236FADB6814A25727B0013C7EE). This approach to licensing (creative commons, which makes sure that any re-use of information remains itself appropriately re-usable) could be used for a variety of other types of information. As it has in several other areas Queensland has begun to lead here where we hope the Commonwealth and other states will follow.

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

There have been good reasons for watermarking documents in the past, at times

benefiting both applicants and agencies. For applicants, it can act as an authenticating mechanism, proving that their documents are "official". For agencies, seeing the watermarked documents in the hands of a client, they know that the release was governed by FOI principles and was not a leak or forgery.

The risk of providing an editable electronic version of a government document would mainly be that of alteration with a view to mislead or defraud. This is overcome by providing a non-editable format electronically (a PDF with appropriate security settings).

For some databases, the concern has been that electronic access may permit personal or business information to be deduced even though the identifying data fields have been deleted. This risk would be reduced with hard-copy access.

Where applicants seek electronic access and there is no harm in such a form of access, then it should be given.

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"?

8.3 Protection of privacy interests

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

See my response under 7.4

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 far?

A Privacy Act should extend privacy rights as far as possible into the private sector, mindful of the jurisdictional issues with the Commonwealth Privacy Act.

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?

There are many options for dealing with the interface between an FOI and Privacy Act in terms of access and amendment rights. Some jurisdictions permit parallel regimes, allowing the consumer to choose. (Where this is the case, for example, Ireland, it is the cheaper of the two options which is the more popular). Others, like the UK, completely exclude access to personal information from their FOI Act, sending consumers to the Data Protection Act or Health Information Access schemes. (The mechanism for achieving this, section 40 of the UK FOI Act, is very cumbersome and confusing to most people, as it is included as one of the exemptions).

The main areas for ensuring consistency between an FOI and Privacy Act, would be:

1. Scope – definition of documents covered, retrospectivity, definition of "personal information/affairs", agencies covered by each regime.

2. Costs – of an application for access/amendment, processing and copying charges if any.

3. Exemptions on access – should be identical. The Privacy Act should preserve all applicable FOI exemptions including public interests tests. Special FOI provisions such as s.50A (Parent and children) and s.44(3) (health care information) should also be preserved.

4. External review jurisdiction and case law.

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 then through s. 22 of the Freedom of Information Act 1992?

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

Although the secrecy provisions within Queensland legislation were reviewed, and the majority found not to override FOI, they were not amended, merely not included in Schedule 1. As most of these secrecy provisions are worded in absolute terms, it would be useful to review, and amend these provisions, to explicitly allow for release under FOI.

8.5 FOI applications for access

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

The most efficient and user-friendly FOI system in the world is apparently the Mexican system. Requests are lodged through an online portal. As I understand it, non-personal requests can remain anonymous, with the applicant receiving a tracking number, and being able to check on progress online. Once the information is released to one applicant, it is available for all applicants at the same portal.

Online payment options should make it possible to lodge an FOI request via a web portal, with follow up contacts by email or phone. Personal requests require checking of proof of identity (at the start of the process, not at the end as currently set out in s.105 – this requirement should be made part of s.25(2)) and most online systems could not provide this to a reasonable level of certainty.

Encouraging the use of telephone contact at all stages and by all participants, would make the process more efficient and user-friendly. This includes dealings with applicants, third parties, and the Information Commissioner's office. While the final position may need to be recorded in writing, much of the initial discussion and contact could be achieved over the phone.

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

The Commonwealth Ombudsman's advice reflects good practice which is already set out in training and the current policy manuals in Queensland. What may be needed is some monitoring to check to what extent the policies are being put into practice.

8.6 FOI applications for amendment

Should applicants 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?

Yes.

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?

Yes.

8.7 FOI Review process

8.7.1 Internal review

Should internal review remain mandatory? Should applicants have the option of going directly to external review? Should formal internal review be abolished?

Properly undertaken, internal review is an opportunity for an agency to correct its own errors (if any), search more thoroughly, consider new arguments, re-assess its own position, and present a more favourable decision, or a better set of reasons to the applicant. It should also reduce the number of cases proceeding to external review. If an agency regards internal review as a "rubber stamp" or a "loyalty test", then it simply wastes the time of the applicant and the agency. I support a proper internal review system, and would prefer that it remain mandatory (other than when the original decision was made by the agency head or Minister).

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

Several jurisdictions have a provision for refund in full or in part of any fees or charges in the event of an appeal being upheld in part or in full. Recently in the US, a provision was enacted to require agencies to pay the legal costs of applicants when they settled a case on the court house steps.

8.7.2 External review

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

I have worked with FOI regimes utilizing all of these methods and several hybrid models: the AAT and Ombudsman in the Commonwealth; the Ombudsman, District Court, and Administrative Decisions Tribunal in NSW; Information Commissioner in Queensland, NT, Ireland and the UK.

My personal preference has been for the Information Commissioner model as offering the most accessible, affordable review option for the applicant. Most tribunal systems become legalistic, with both sides frequently engaging legal representation (involving significant costs), and very formal rules and procedures. Both Ombudsmen and Information Commissioners avoid most of these problems and facilitate the ordinary citizen having access to justice.

Information Commissioners have the advantage of concentration of knowledge in the

field of FOI. The case law of the AAT, VCAT, and the ADT is far less consistent than the body of case law decided in Queensland under an Information Commissioner. Inconsistency leads to uncertainty for practitioners and an increase in the appeals to higher level courts.

Delays can affect any of the models, and one does not have to look hard to find examples, not just in Queensland. The Irish and UK Information Commissioners have both suffered serious backlogs, and adequate resourcing for whichever model is adopted is essential.

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?

The supervisory /advisory functions described for the FOI Monitor are crucial to ensuring the success of FOI and yet are not performed in most jurisdictions.

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?

For most of its history, the WA Information Commissioner fulfilled many of the FOI Monitor's roles at the same time as the external review function. With careful separation of the functions of advising and reviewing, it seems to have worked well for them. Again, as above, adequate resources are essential, as combining certain roles in the one person would not be an option to avoid conflicts of interest.

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

The Canadian approach appears to be best approach towards guaranteeing the independence of the Information Commissioner.

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?

Permitting cross-agency support in FOI decision-making is a sensible proposal, and should be possible by redrafting the delegation provisions in s.33. There are times when using another agency's decision maker would solve a problem: machinery of government changes; backlogs in workload; availability of expertise; bias or perception of bias in a particular case. Small agencies could pool their FOI resources into a single person instead of spreading the function across many people (with other responsibilities). This could assist the small agencies in dealing with large requests.

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?

Since the separation of the role of the Information Commissioner from the Ombudsman, there would be no reason why the Queensland Ombudsman could not perform the same functions as the Commonwealth Ombudsman in regard to FOI. It should include "own motion" investigations. Even if there were an FOI Monitor, the Ombudsman could still perform this function with regards to FOI as it does for all

other government administrative functions.

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

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?

The question of fees and charges has been a perennial sore point for FOI. The Discussion Paper does an excellent job of summarizing the various policy positions and arguments for change.

Compared to other Australian jurisdictions, the Queensland fees regime is quite reasonable. However, when all Australian models are compared to most of those in the European Union, they are not reasonable. Most EU countries have no application fees or time-based processing charges for FOI access. They only have charges for providing copies, usually an amount of between A$0.10 and A$1.00 per page.

When FOI was introduced into Queensland, it was the cheapest FOI in Australia and remained that way for many years. It is still far more generous in terms of requests for personal documents than some other jurisdictions such as NSW and SA. It is the cost of requests for non-personal documents where the costs can quickly escalate to a level which is a deterrent to most applicants other than those involved in commercial litigation.

To balance this, waivers on the grounds of financial hardship and public interest exist in most jurisdictions. Queensland presently lacks a waiver on the ground of public interest and this makes the charging regime less balanced. The current approach to assessing financial hardship, by the possession of specified concession cards, is open to abuse ("rent a pensioner"). One solution to this is the provision in the Irish 2003 Fees Regulations section 5, that the decision maker can take into account whether the person is making the request concerned on behalf of some other person who, in the opinion of the head, is seeking to avoid the payment of a fee.

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

From an applicant's point of view, the flat fee model is much fairer, as they only pay for what they get. (Ireland has a version of this in that their time-based processing costs are refunded proportionately if the documents are exempted). If the applicant requests 5000 documents which are all refused as exempt, they would pay nothing. Of course the agency which spent 200 hours deciding the request would not see this as fair compared to the current system, where most applicants would have baulked at paying the $4000 and the 200 hours would not have been spent, or they would at least have collected $4000 towards their costs. (Not that $22 per hour covers the costs of employing an FOI Officer).

The present charging regime has proven complex and hard to administer for FOI officers, and for some requests the work involved in collecting the charges costs more than the charges themselves. One big advantage of the flat fee system is its simplicity and ease of calculation compared to the current time-based system.

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

The UK model is to estimate the work involved in a request at the rate of £25 per hour to a set limit (£450 for local, £600 for central government). All work up to this level is free to the applicant. Above this level, the entire request can be refused, or the applicant may pay the additional cost. (Scotland has a variation on this approach). The biggest area for inconsistency in this model is how the estimates are made, although of course it is subject to appeal.

9.2 Time limits

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

The initial period of 45 days could be reduced to 30 days but I would not recommend a reduction below this level. FOI Officers are encouraged to deal with requests as soon as possible, and with sufficient resources, they would be in a position to do so. Many agencies live in a constant backlog situation and for them, the time limits lose their meaning.

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

When I managed a large team of FOI decision makers within a single agency, one method used was to chart our statistics as to who had the fastest rate of release. The team's overall average was reduced significantly, with the fastest decision maker eventually averaging 12 days per request. Rewards were nominal (usually edible), but the competition was fun and the recognition was valued. Good Practice Awards from the FOI Monitor in a variety of forms would be one initiative to improve early disclosure rates. Favourable mentions of Most Improved Agency, Speediest Agency etc in the Annual report could also help.

On the punitive side, one option is to prevent agencies from collecting charges when time limits were exceeded, or even to refund the application fee in those circumstances. The FOI Monitor could also give unfavourable mention to agencies who have been tardy without good reason. Incorporating meeting of deadlines in senior officer's performance agreements has already been mentioned, but there are dangers with too strong an emphasis on timeliness at the expense of accuracy.

9.3 Voluminous and/or vexatious requests

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

Yes.

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

By an agency, with the usual rights of internal and external review. The Information Commissioner should also have this power.

On what grounds should an applicant be declared vexatious?

The current provisions in section 96A and 29B cover most of the grounds on which an applicant should be declared vexatious. In addition, there are provisions in other FOI

legislation:

NT Information Act S.42:

> *(2) The Commissioner may only make a declaration if satisfied that*
>
> *(a) over a period of time, the person has repeatedly applied to the public sector organisation –*
>
> > *(i) for access under Division 2 (Accessing government information) to government information or a number of pieces of government information that share a common characteristic; or*
> >
> > *(ii) for review under Division 4 (Review by public sector organisation) of the organisation's decisions about access to government information or a number of pieces of government information that share a common characteristic; and*
>
> *(b) the repeated applications are –*
>
> > *(i) unnecessary;*
> >
> > *(ii) an improper use of the right of access or review; or*
> >
> > *(iii) made for the purpose of harassing or obstructing or otherwise interfering with the operations of the organisation.*

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

On what grounds should an application be declared vexatious?

The existing section 29B in Queensland is one ground. Also see the Irish FOI Act s.10(1)(e) : *"the request is, in the opinion of the head, frivolous or vexatious, or forms part of a pattern of manifestly unreasonable requests from the same requester or from different requesters who, in the opinion of the head, appear to have made the requests acting in concert"*

However, it should be noted that the Irish have had difficulty applying this provision and would prefer a provision aimed at the requester rather than the request.

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

The provisions dealing with voluminous requests, or the charging regime, should be sufficient to deal with this, rather than the vexatious provision.

Should voluminous applications be able to be refused under a provision such as section 29?

Following a failure to modify the request after consultation, yes.

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?

Although there may be merit in more quantitative tests, there still needs to be an assessment of proportionality in terms of the available resources of the specific

agency. For an agency with 30 staff and .01 FOI officer, dealing with 1,000 pages is probably a substantial diversion of resources, where it would be taken within the stride of a larger agency. The option of pooling FOI decision-making resources across agencies (discussed at 8.8 above) may assist in dealing with requests which would otherwise be rejected as voluminous.

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

Greater care should be taken when assessing the sheer number of requests made in a period of time by a media or MP applicant, as their role requires them to make multiple FOI requests. Guidelines could assist so that agencies did not misuse the provision in this way. To exempt them may lead to the situation where their behaviour is indeed worthy of being called vexatious and the option to sanction this is not available.

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

No. However the fees and charges regime could recognize their special roles as gatekeepers by allowing more charges waivers in the public interest for requests as appropriate.

Chapter 10 Effectiveness and adequacy of data collection and reporting

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

The data required for collection under s.108 in Queensland is more extensive than any other Australian jurisdiction – I would venture to say, than any international jurisdiction with which I am familiar. The fact that virtually no one has ever used the data to evaluate the effectiveness of FOI in Queensland does not make the data of no value. While I am mindful of the work involved in collecting the data, and some of the technical problems, I support collection of the entire range of data as at present.

How can the collection of the data be improved?

How can the integrity of the data be improved?

I believe electronic tools for collection of the data exist, but any tool can benefit from review and standardisation. An e-FOI scheme would ideally have reporting built in (automated).

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 an analysis of that data?

Yes, either the Commissioner or the FOI Monitor.

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?

Yes.

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

Yes, with appropriate and carefully developed guidelines to allow for genuine

performance differences. This should be done by the FOI Monitor or Information Commissioner.

Chapter 11 Conclusion - a new beginning?

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

While it is probably true that "FOI" is not an accurate title, it has the enormous advantage of being recognizable on both a national and an international level as performing the function of providing access to information. The majority of FOI Acts in the English speaking world have "FOI" as the title.

If so, what would be the best title?

If it were to be changed, the best option would be: "Access to Information Act".

Note about the author:

I have been working in the field of FOI since late 1981. Initially I was involved in the implementation of FOI in the Commonwealth government, then in NSW, Queensland, and the Northern Territory; I have also worked on implementing FOI in Ireland, the United Kingdom and China. Much of this time has been as an FOI practitioner, consultant and trainer. I worked with the Department of Justice and the Attorney General on the implementation of FOI into Queensland in 1992-3, and since that time have regularly provided training and advice to decision-makers in Queensland. I have been the Director of Information Consultants Pty Ltd since 1998. I was appointed an Honorary Senior Research Fellow with the Constitution Unit at University College London in 2003. In 2006 I co-authored a book on "FOI: Balancing the Public Interest" (2nd edition, published by UCL London) and my most recent conference paper is at: http://www.icic2007.org.nz/programme_day2.html (link under my name for 1.30 session).