

AUSTRALIA'S RIGHT TO KNOW

Response to NSW Ombudsman Discussion Paper: Review of Freedom of Information Act 1989

Australia's Right to Know is a coalition of 12 major media companies formed in 2007 to address concerns about a deeply troubling deterioration of free speech in Australia.

One of the issues the coalition is particularly focused on is reform of Freedom of Information legislation across all jurisdictions of Australia.

Over recent years, FOI law and practice has become moribund and the ability of the media to access details of how taxpayers are being governed has been seriously inhibited. This is particularly evident in NSW.

Early in her tenure, Queensland Premier Bligh made it publicly clear she was determined to comprehensively review and improve Queensland's FOI law and practice. Demonstrating her will to make substantial changes, in just nine months a review was commissioned, released and endorsed.

Attached is a copy of the response made by the coalition to the discussion paper released by the review panel in January 2008.

This root and branch review led by Dr David Solomon recommended a comprehensive rethink of Freedom of Information law and practice in Queensland. The recommended model offers return to transparency and is designed to create a system that is practical and effective in making sure public information is accessible.

It is the coalition's view that similarly, NSW needs a comprehensive review and overhaul of FOI. The starting point for reform should be the new model recommended in Queensland.

Right to Know strongly supported the majority of Dr Solomon's recommendations. However, we believe there are a number of significant flaws within the model proposed. Attached is the coalition's response to the recommendations setting out our views on the model.

Dr Solomon also recommended improvements to the office of the Queensland Information Commissioner and an increase in its power.

It is vital that NSW appoint an Information Commissioner to deal with FOI applications. Whilst acknowledging the invaluable current FOI role of the NSW Ombudsman, we strongly believe a well resourced, dedicated Commissioner with comprehensive powers, is necessary for FOI to work effectively.

The Federal Government has committed to creating an Information Commissioner which is underway as part of its review of Commonwealth legislation and practice.

31 October 2008



AUSTRALIA'S RIGHT TO KNOW

Dr David Solomon AO

Freedom of Information Independent Review Panel

GPO Box 5236

Brisbane QLD 4001

Dear Dr Solomon

Review of the *Freedom of Information Act 1992 (Qld)*

Australia's Right to Know (**RTK**) welcomes the opportunity to make submissions to the review of Freedom of Information law in Queensland (**Review**).

1. Preamble

- 1.1 RTK endorses strongly the Queensland Government's commitment to the review of Freedom of Information (**FOI**) law in Queensland. RTK supports the measures the Queensland Government is taking pursuant to its recognition that access to government information is an essential right of every person and fundamental to openness, transparency and accountability in government.
- 1.2 RTK has had the benefit of preparing these submissions with reference to the Discussion Paper prepared by the Independent Review Panel. The Discussion Paper is clearly the product of extensive research and presents a wide range of views on the implementation of FOI laws in many jurisdictions and innovative approaches to FOI law reform. RTK supports the various initiatives identified in the Discussion Paper to make FOI legislation more effective in providing access to government information quickly and cheaply.
- 1.3 RTK shares the view of the Government, as expressed in the Discussion Paper, that a complete and wide-ranging review of the current *Freedom of Information Act 1992 (Qld)* (**QLD FOI Act**) is in order. The FOI reform process in Queensland offers a unique opportunity to lead other Australian Governments to a new and higher benchmark for access to government information.

2. Australia's Right to Know

- 2.1 RTK is a coalition of Australia's largest media organisations. RTK was formed in response to the large number of threats to freedom of speech and access to information in Australia. The independent organisation, Reporters without Borders, recently ranked Australia only 35th in relation to press freedom around the world. Effective Freedom of Information legislation is an essential component of an open democratic society with a transparent accountable system of government. It enhances the ability of ordinary citizens to scrutinise government activity and express more informed views and choices about the issues and policies which affect them.
- 2.2 The media in particular plays a crucial role in accessing, analysing and disseminating information about issues and events which affect our community. Media organisations and journalists have a particular concern in the proper and efficient administration of Freedom of Information law. A key issue is the observance of the spirit of the law by government agencies by making government information freely accessible to the public to the greatest extent possible, subject to limited and essential exceptions.

- 2.3 RTK notes that government information is owned by the public and its timely and efficient release will ensure open and accountable government and enhance representative democracy.

3. Executive Summary of Submission

In RTK's submission:

- 3.1 FOI laws work poorly because a culture of secrecy continues to pervade many areas of Government, to the significant detriment of good government. This culture needs to be addressed through a combination of legislative change, agency management and political leadership.
- 3.2 Like other FOI legislation, the QLD FOI Act is overly complex. It has 18 exemptions which contain overlapping and unnecessary exemptions, particularly in relation to internal Government documents. A single test – protecting only essential public interests - could be applied to all of those documents, thereby greatly simplifying the operation of the Queensland Act.
- 3.3 The specific exemption for documents prepared for submission to Cabinet in section 36 of the QLD FOI Act does not require the decisionmaker to consider the public interest in disclosure. The public has a particular interest in accessing information about government decisionmaking at the highest level. The Review should give particular weight to RTK's general submission in paragraph 3.2 as it relates to Cabinet documents.
- 3.4 The power to issue Ministerial certificates under sections 36, 37, 42 and 42A of the QLD FOI Act removes documents from any effective review process. Certificates should be abolished, so that documents cannot be shrouded in secrecy without any account of the public interest in disclosure.
- 3.5 Furthermore, the public interest test which is applied to internal Government documents should not permit weight to be given to generalised claims of a public interest against disclosure. A "direct and tangible harm" approach should be adopted and confined to essential public interests. Generalised contentions about "candour", seniority of office and similar arguments should be excluded by statute.
- 3.6 The public's right of access to Government information can be strengthened by use of information technology. Government agencies in Queensland should endeavour to manage and store all documents electronically and create a centralised and freely accessible online database to allow the public to identify relevant information about documents and submit requests for documents online.
- 3.7 The position of Government-Owned Corporations and entities which contract with Government should be clarified so that the QLD FOI Act fully captures the wide range of entities which may perform public functions or operate with the benefit of public funds.
- 3.8 Both the FOI legislation and associated procedures should be streamlined to address a wide range of administrative issues associated with accessing government documents, including with respect to:
- (a) processing and reviewing applications; and
 - (b) fees and charges.

Each of these points is developed below.

4. A Culture of Secrecy

- 4.1 In 2007 RTK commissioned an independent audit into freedom of speech in Australia. The audit was chaired by Ms Irene Moss AO. As part of its review, the audit considered the extent to which State and Federal laws limit public access to information held by Government bodies. The audit found in relation to FOI laws that:
- *"A continuing culture of secrecy is evident in some areas of government."* The experience of the members of RTK is that this culture continues to pervade many layers and areas of government, including in Queensland. FOI decisionmakers are resistant to making information publicly available, because of an emphasis on the short-term political consequences of doing so, rather than the long-term policy objective of open accountable government. Rudimentary and flawed notions that release of information could be harmful, because the information will not be understood, or will be misinterpreted, or taken out of context, remain pervasive.
 - *"Political intervention, or the significance that may be attached to political considerations in the course of decision-making, gives rise to a perception that in some cases these factors outweigh the public interest in disclosure."* The comments made above apply to this finding.
 - *"The laws in most instances do not require a pro-disclosure bias in making decisions on access. Often technical legal considerations override the objectives and the spirit and intention of legislation."*
- 4.2 In RTK's submission legislative amendment is required to strengthen the public interest in disclosure and the underlying policy benefits of a pro-disclosure approach to the administration of FOI laws. While Section 4 provides that the object of the Act is to extend as far as possible the right of the community to access information held by the Queensland Government, this object is not reflected in the drafting of many exemptions or the approach to administration of the Act.
- 4.3 The history of the QLD FOI Act, introduced following recommendations of the Fitzgerald Report, shows the progressive tightening of disclosure, higher costs and an increase in exempt organisations. Amendments to the QLD FOI Act in 1994 and 1997 reduced the scope of FOI in relation to government-owned corporations, with agencies allowed to recover some costs for FOI administration following the 2001 amendment to the QLD FOI Act. Other amendments to the QLD FOI Act in 2004 and 2005, once again, further reduced the scope of the FOI Act.
- 4.4 Every amendment has fostered a culture within the Queensland Government which is antithetical to the objects of FOI. There can be little surprise that agencies adopted an anti-disclosure ethos.
- 4.5 RTK believes that since the introduction of FOI legislation in Queensland, the scope and efficiency of the QLD FOI Act have been progressively reduced, almost inevitably to protect the Government's political interests and conceal public service failings and incompetence. This has occurred despite the overwhelming evidence proffered in the Discussion Paper on the importance of FOI to open and transparent government and the importance of the rights of citizens of access to information.
- 4.6 Secretive government not only permits poor policy to flourish and flawed allocation of taxpayer resources but logically, given the findings of Commissioner Davies, can be

directly responsible for major, and in some cases life-threatening, failures by Government. The progressive diminution of the scope of Queensland's FOI laws has underpinned an entrenched resistance to FOI in the Queensland bureaucracy. Given the flawed QLD FOI Act and attendant bureaucratic culture of secrecy, wide-ranging reform of the legislation is warranted. The objects of the FOI Act should acknowledge "openness" specifically as an aim of the Act and as a contribution towards more accountable government. A formula similar to that adopted in section 4(c) of the New Zealand *Official Information Act* might prove a useful guide for this reform.

5. Unnecessary complexity

- 5.1 RTK is extremely concerned that freedom of information legislation in Australia is unduly complex. This legislation poses a significant barrier to members of the public who wish to access information about the Government decisions and processes which affect them. This in turn reduces the accountability, transparency and efficiency of Government.
- 5.2 The 18 exemption provisions in Division 2 of the QLD FOI Act frequently cover overlapping subject matter. 11 of the exemptions relate to internal government documents (sections 36 to 42A, 47 and 49). The exemptions relating to law enforcement and security may attract special consideration, but the other exemptions could be covered by a single exemption for internal government documents. This would greatly simplify the operation of the Act. This single exemption would be subject to a simplified public interest test, as outlined below.
- 5.3 The broader point is that Cabinet, Executive Council and other documents should not be subject to an automatic exemption. Accountability and transparency are even more important for higher levels of government, where decisions have wide social and economic ramifications. At the same time, the Act's complexity both for administrators and access-seekers would be greatly reduced. In summary, there is a compelling case for review of the exemption provisions of the QLD FOI Act in order to:
- (a) clarify the public interest test which Government agencies and Ministers are to apply in determining whether a document is exempt under the Act (as discussed below); and
 - (b) consolidate provisions which can be invoked in the same or similar circumstances and thereby reduce the potential for overlap among different exemptions.

6. Exemption of matter prepared for Cabinet

- 6.1 Following the enactment of the QLD FOI Act on 5 August 1992, the 1993 and 1995 amendments dramatically increased the scope of the Cabinet exemption in section 36. As noted in the Discussion Paper, the extension of the Cabinet exemption led to a:

"...tendency of administrators to ignore or suppress criticism. Recognition of these and other problems in the public hospital system was made very much more difficult by a culture of concealment of practices or conduct which, if brought to light, might be embarrassing to Queensland Health or the Government".¹

¹ Davies AO, Hon. G., Queensland Public Hospitals Commission of Inquiry Report, November 2005, p. 345.

In particular, Commissioner Davies found that the conduct by successive governments of taking documents to Cabinet to avoid their release under FOI was:

*“...inexcusable and an abuse of the Freedom of Information Act. It involved a blatant exercise of secreting information from public gaze for no reason other than that the disclosure of the information might be embarrassing to Government.”*²

RTK submits that in determining whether section 36 applies to exempt matter prepared for Cabinet, the decisionmaker must give weight to the public interest in disclosure. As submitted below, the specific exemption for Cabinet documents should be replaced with a single, broad exemption for internal government documents, which is subject to an overriding public interest test.

7. Review of exemptions permitting the issue of Ministerial certificates

- 7.1 In RTK's submission, the exemption provisions³ which empower Queensland Ministers to sign certificates to specify that certain matter is exempt from disclosure under sections 36, 37, 42 and 42A, are contrary to the objects and spirit of the QLD FOI Act. While RTK notes that section 84 of the QLD FOI Act allows review of the issue of certificates by the Queensland Information Commissioner, it is subject to an overriding power of the Minister to confirm the certificate. Furthermore, the review by the Information Commissioner is a very limited one - to determine whether there were no reasonable grounds for the issue of the certificate. This is an extremely narrow test, which only requires a ground that is not unreasonable or fanciful and does not involve consideration of competing public interests in favour of disclosure.
- 7.2 In RTK's view, it is inappropriate that Government Ministers should have the power to determine that certain categories of documents are exempt from public scrutiny. It is contrary to the object of fostering public participation in and scrutiny of Government to allow individual Ministers to withhold information relating to their functions and responsibilities. RTK submits that the Ministerial certificate regime should be abolished. This will increase government accountability and do much to address the concern that FOI processes are always vulnerable to political intervention.

8. Clarifying the public interest test

- 8.1 At both the Federal and State level, there have been considerable debate and a multiplicity of approaches to the application of public interest tests under FOI legislation. In older cases such as *Re Howard and the Treasurer (Cth)* (1985) 3 AAR 169 (**Re Howard**), review bodies tended to take the approach that the more senior the decision-makers involved, and the more important the decision-making process, the more likely that disclosure of the document would be contrary to the public interest. The Tribunal in *Re Howard* also found that disclosure which would inhibit the candour and frankness of future pre-decisional communications would be contrary to the public interest.
- 8.2 The more recent cases, exemplified by *Re Eccleston and Department of Family Services, Aboriginal and Islander Affairs* [1993] 1 QAR 60 (**Re Eccleston**), tend to reject the traditional, formulaic approach to public interest considerations in *Re Howard*. The Appeal Panel in *Re Eccleston* considered the question to be whether any “tangible harm” would result from the release of the documents (at [68]). The New South Wales Court of Appeal cited these comments with approval in *Workcover Authority (NSW) v Law Society of New South Wales* (2006) 65 NSWLR 502,

² Davies AO, Hon. G., Queensland Public Hospitals Commission of Inquiry Report, November 2005, p. 345.

³ *Freedom of Information Act 1992* (Qld) ss 36, 37, 42 and 42A.

emphasising that the FOI legislation established a "general policy of disclosure", in recognition of the public interest in accessing official information to facilitate discussion, review and criticism of Government action. In RTK's view, these later decisions recognise the express object of the QLD FOI Act that the public right of access to documents should be subject only to *essential* public interests and the interest in protecting the private or business affairs of members of the community.⁴ Arguments relevant to the importance of access being subject to essential public interests can also be found in *McKinnon v Department of Prime Minister and Cabinet* [2007] AATA 1969.

- 8.3 The Queensland Office of the Information Commissioner does not usually accept high office or the possibility of inhibiting candour and frankness as factors in favour of non-disclosure.⁵ RTK agrees with this approach. In RTK's submission, this approach should be given statutory recognition. It is to be expected that Government officials will give candid and impartial advice, whether or not they believe that the advice will be accessible to the public. Most Government officials would be well aware that in performing public functions, their activities will be subject to a higher level of public scrutiny. The comments in the Discussion Paper by Marie Shroff, New Zealand's Privacy Commissioner, who served for 16 years as Cabinet Secretary, warrant reiteration. Ms Shroff notes:

*"Even at the hardest end of FOI – access to Cabinet documents – the benefits are clear. If I, as a civil servant, write a Cabinet paper which I expect to be sought for public release I am going to be extraordinarily careful to get my facts right, to avoid trespassing into politics, to give comprehensive reasons for and against a proposal, and to think very carefully about my recommendations. My advice will therefore be balanced, accurate and comprehensive. Sometimes I will put in more detail than might formerly have been the case: I might quote from sources rather than summarising them, especially when unpalatable advice might be needed; and I might clearly identify legal advice and separate it from policy advice to allow for possible legal protection under legal professional privilege. I will record carefully the reasons for my particular recommendations – although this will largely be to ensure that my reputation as a professional and neutral public servant will be enhanced if the advice is released. I will avoid the temptation to make cute remarks. I will often have robust face-to-face discussions with my Minister on the way towards a final piece of advice or a Cabinet paper."*⁶

- 8.4 The point made by Ms Shroff directly contradicts abiding arguments against document disclosure that if documents produced by public servants are held to the light of public scrutiny, then public servants will be less candid than otherwise, despite a duty to provide candid advice to Government. This thesis is flawed. Lawyers, journalists, teachers and many other occupations and professions are all rightly judged on performance. The public has a right to judge the quality of advice given to politicians and whether politicians have acted responsibly in relation to that advice – this is an essential public interest.

⁴ *Freedom of Information Act 1992* (Qld) s 4(3).

⁵ Office of the Information Commissioner Queensland (2006) "FOI Concepts: Public Interest Balancing Tests" <http://www.oic.qld.gov.au/indexed/pdf/FOI_Concepts_-_Public_interest_balancing_tests_-_Ver_1.0_-_05-10-06.pdf> (27 February 2008).

⁶ Marie Shroff "The *Official Information Act* and Privacy: New Zealand's story" Presentation to the FOI Live 2005 Conference, London 15 June 2005, 9 – 10.

- 8.5 Division 2 of the QLD FOI Act takes an inconsistent approach to balancing competing public interests. Many of the exemptions impose a requirement that the decisionmaker exempt matter falling within the terms of the exemption unless disclosure would, on balance, be in the public interest.⁷ In RTK's view, this wording is inconsistent with the presumption that the release of documents of a Government agency or Minister will be in the public interest, which underpins the right of access to documents in section 21 of the QLD FOI Act and the objects expressed in section 4. It is also in stark contrast with the public interest test in section 41(1)(b), which provides for the exemption of certain matter to do with the deliberative processes of an agency if its disclosure would, on balance, be contrary to the public interest.
- 8.6 In this context, RTK submits that the factors identified in the more recent cases on the meaning of "public interest" be taken into account with a view to codifying what "the public interest" means under the QLD FOI Act. RTK supports the adoption of a uniform public interest test for all categories of exempt matter, which permits the exemption of documents if disclosure could reasonably be expected to cause direct and tangible harm to an essential public interest.
- 8.7 RTK further submits that the public interest should be clarified to exclude expressly generalised notions of public interest, such as the interest in the candour of communications and other factors identified in *Re Howard*. On the current drafting of section 41, for instance, there would be scope to expand subsections (2) or (3) to provide that matter will not be exempt merely because senior decisionmakers were involved in the creation or communication of the document in question. These amendments would encourage the decisionmaker to focus on the subject matter of the documents rather than factors which merely privilege the communications of high-level decisionmakers.
- 8.8 Additionally, RTK notes that several exemption provisions in the QLD FOI Act are not subject to an express public interest test.⁸ RTK recognises that the subject matter of certain documents will, of its nature, suggest that disclosure would likely be contrary to the public interest – such as matters of state security or advice subject to legal professional privilege. However the very broad exemptions for documents submitted to or prepared for Cabinet and the Executive Council should require the decisionmaker to give weight to the public interest in giving access to these categories of documents. RTK submits that Cabinet and Executive Council documents should not be given a "halo" of secrecy, but instead be included in a single exemption for internal government documents, which includes a public interest test.

9. Opportunities presented by new technology

- 9.1 In RTK's submission, the statutory right of access to government information would be strengthened by adopting new modes of providing access to information. Government information is stored in an increasingly wide range of formats and the ability to digitise information should make the process of accessing documents under FOI legislation quicker and more cost-effective. As a starting point, Government agencies in Queensland should introduce options for electronic lodgement of FOI applications, electronic payment of fees and electronic access to documents which are released.
- 9.2 Additionally, RTK submits that advances in information and communications technology present opportunities for better storage, search and retrieval of government information. RTK notes that it is technically feasible to make information

⁷ *Freedom of Information Act 1992* (Qld) ss 38, 39, 40, 42AA, 44, 45, 46, 47, 48 and 49.

⁸ *Freedom of Information Act 1992* (Qld) ss 36, 37, 42, 42A, 43, 47A and 50.

in Government databases accessible over the Internet. RTK submits that Queensland Government departments should make metadata in relation to documents, such as the title, subject, author and date of creation (as referred to on page 114 of the Discussion Paper), publicly and freely available through a centralised, online database. The online resource should also set out information on how to access unpublished government information, similar to the "inforoute" service offered by the Office of Public Sector Information in the United Kingdom. To implement such measures, Government agencies should ensure that to the greatest extent possible, information about documents is stored electronically and categorised in a way to facilitate quick and accurate retrieval.

- 9.3 Apart from the potential for cost and time savings, better electronic document management is likely to equip government agencies to identify the documents which fall within the scope of FOI requests with greater precision. This is likely to help FOI applicants access information which is more relevant to the terms of their request.
- 9.4 RTK recognises that any online system for identifying and releasing government information would need to incorporate measures to protect personal privacy. RTK supports technology-based reform of the QLD FOI Act and associated government procedures which includes appropriate safeguards to restrict access by the public to the personal information of individuals.

10. Fees, charges and time-frames

- 10.1 Costs and charges remain one of the major constraints to the media's effective use of FOI law in Queensland. Agencies can and do charge exorbitant costs, thwarting any realistic option for payment by individuals seeking to use FOI. Even relatively well-resourced media companies struggle to meet the costs which are imposed by agencies.
- 10.2 From the Fitzgerald Inquiry into corruption through to the so-called "Dr Death" hospitals commission, the media have been and remain the single most important external body to government in exposing failings, corruption and misadministration by Government. The media, while motivated by commercial reasons, performs a role in essential public interest through its scrutiny of the Government without fear or favour and at no cost to the public purse.
- 10.3 There should be recognition of the essential public interest in the media's performance of its watchdog role. RTK's view is that the cost of providing information about Government to inform the public should be borne by the Government, particularly as media organisations invest significant funds in training and employing journalists using FOI. Media organisations often receive little benefit from the investigations that produce no result.
- 10.4 Agencies also need to develop and maintain effective record keeping practices and ensure appropriate staff training which would enhance openness and accountability and also reduce the cost of FOI.
- 10.5 RTK accepts abuse of FOI legislation can lead to frivolous, vexatious, repetitious or voluminous requests and supports measures to reduce the impact of these requests on effective administration. However, the decision to decide any applicant has engaged in such a manner should be reviewable by an appropriate court or tribunal.
- 10.6 RTK also notes that under Section 27(7) of the FOI Act, the agency has 45 days from receipt to decision. This should be brought down to 30 days in line with best practice in Australia.

11. Commercial in confidence claims and GOCs

- 11.1 One of the major failures of the QLD FOI Act is the diminished scrutiny through commercial in confidence claims against the release of information. This failure comes as all Australian Governments have significantly increased the extent of contracting and consultancies used in the public sector.
- 11.2 As a bare minimum, Australian Law Reform Commission (**ALRC**)/Administrative Review Council (**ARC**) recommendations should be implemented. Those recommendations included requirements that:
- agencies include provisions in contracts requiring that contractors record and provide adequate information to the agency and to allow Parliamentary scrutiny as well as public information access rights;
 - complaint procedures be adequate and not lost or diminished as a result of a service being provided by a contractor rather than the Government; and
 - contractors' documents that directly relate to the performance of contractual obligations be deemed to be in the possession of the relevant agency.
- 11.3 RTK supports the ARC view that that the QLD FOI Act should require contractors to provide documents to the agency when an FOI request is made. In addition, all contractors should be advised that they fall within the scope of FOI legislation and that any documents produced as a result of a consultancy fall within the scope of the QLD FOI Act. An essential public interest test should apply in this area and the onus for proving that release should not occur should be with the agency and the contractor.
- 11.4 The Discussion Paper notes that a Government Owned Corporation (**GOC**) is a government-controlled entity established as a body corporate by an Act. The exclusion of GOCs from the scope of the QLD FOI Act is of major concern.
- 11.5 Public agencies owned by the taxpayer carrying out public functions must be open to the QLD FOI Act, given the considerable expenditure of public money, their accountability to Ministers and ultimately, the public. Importantly, GOCs are normally involved in public functions or service delivery often in a less competitive or monopoly market and therefore need to be accountable on performance and administration. Any GOC failings present significant political problems for the relevant Minister and Government and a vigorous FOI regime reduces the temptation for secrecy.
- 11.6 RTK also contends that other bodies in receipt of government funding should fall within the scope of the QLD FOI Act. For example, significant public funding is provided to the private school sector in Queensland, yet parents of students in the private school system cannot access records through FOI, which is available to parents in the public school system. Organisations in receipt of government funding need to be accountable for that funding, funding disbursements and related decisions, administration and management - not only to the Government but to citizens. Given the extent of public funding into the private sector, issues like teacher and school performance standards must be available to citizens.
- 11.7 As a general rule, any organisation receiving government funding and established by an Act of Parliament should be accessible under Freedom of Information laws.

12. Information Commissioner and review options

- 12.1 As the Discussion Paper notes, all jurisdictions provide for a review of FOI decisions by a person aggrieved by a decision. Initially that review is conducted by the agency

to which the original application for FOI was made (internal review). A second appeal is normally available to an independent body of some kind (external review).

- 12.2 Unfortunately, while internal review is cost effective and relatively quick, agencies are placed in a position of conflict-of-interest in considering whether their initial decision was flawed. The more politically sensitive the subject matter of the request, the less likely an agency is to substantially change its decision - although some less relevant documents may be released in an attempt to appear fair and balanced.
- 12.3 Applicants should have the option of bypassing internal review and proceeding directly to external review. Agencies need to place more emphasis on getting the decision right in the first instance.
- 12.4 The Discussion Paper notes that in four Australian jurisdictions, the external review function is conducted by a tribunal – at the Commonwealth level by the Administrative Appeals Tribunal, in NSW by the Administrative Decisions Tribunal, in Victoria by the Victorian Civil and Administrative Tribunal and in the Australian Capital Territory by the Administrative Appeals Tribunal.
- 12.5 In three jurisdictions, external review is the responsibility of an Information Commissioner – Queensland, Western Australia and the Northern Territory. In two the function is performed by the Ombudsman – South Australia and Tasmania.
- 12.6 RTK supports the retention of a review capacity for the Information Commissioner in Queensland. However, applicants should have an alternate option of appealing directly to a Queensland Administrative Tribunal.
- 12.7 While Information Commissioners do have the capacity to assist with external review, the option of tribunal review is an important component of any effective scheme. A hearing in an independent tribunal would allow applicants to directly hold public servants accountable for FOI decisions in a public forum. The value of the AAT in the Federal jurisdiction in improving FOI through decisions has been significant in recent years.
- 12.8 The Information Commissioner should also be empowered to:
- audit agencies' FOI performance and compliance;
 - prepare an annual report on FOI;
 - collect statistics of FOI requests and decisions;
 - publicise the QLD FOI Act in the community;
 - issue guidelines on how to administer the QLD FOI Act;
 - provide FOI training to agencies;
 - provide information, advice and assistance in respect of FOI requests at any stage of an FOI request, at the request of the applicant, the agency or a third party; and
 - provide legislative policy advice on the QLD FOI Act.

13. Conclusion

- 13.1 In making these submissions, RTK recognises the general public interest and interest of the media in particular in simpler and more uniform Freedom of Information law at the State and Federal level. In this vein, RTK notes that the views expressed in these

submissions are consistent with the Federal Government's planned review of the *Freedom of Information Act 1982* (Cth) later this year. As set out in the Discussion Paper, the Federal Government proposes, among other things, to:

- revise the Commonwealth Act to promote a culture of disclosure and transparency;
- rationalise the exemption provisions; and
- abolish the power to issue Ministerial certificates.

13.2 RTK wishes to signal its support of these proposals and requests that the Review consider the Federal Government's reform agenda in making its recommendations for review of the QLD FOI Act.

AUSTRALIA'S RIGHT TO KNOW

Response to the Report by the FOI Independent Review Panel The Right to Information Reviewing Queensland's Freedom of Information Act

INTRODUCTION

Australia's Right to Know (AARTK) is a coalition of 12 major media organisations formed in 2007 to address the troubling state of freedom of speech in Australia including increasing government secrecy.

ARTK strongly endorses the Queensland Government's recognition that access to government information is an essential right of every Australian and fundamental to openness, transparency and accountability in government. ARTK applauds the Government's decision to review and reform the Queensland Freedom of Information (FOI) regime.

In response to the review discussion paper: *Enhancing Open and Accountable Government*, ARTK provided a written submission. ARTK would now like to comment on the final report (the Solomon Report) provided by the Independent Review Panel to the Government.

The Solomon Report provides a welcome comprehensive rethink of Freedom of Information law and practice in Queensland. It returns to first principles, providing recommendations designed to create a system that is practical and effective in ensuring public information is accessible.

In particular, ARTK strongly supports the Panel's Recommendations to:

- introduce a single public interest test that states: "Access is to be provided to matter unless its disclosure, on balance, would be contrary to the public interest." The test's starting presumption that access to information is to be provided is a very positive step towards openness;
- revise the method for assessing the public interest test;
- introduce a whole of government strategic information policy moving to a "push" model where government routinely and proactively releases information without the need for FOI applications;
- legislate that the Object of the Act is to provide the right of access to information held by government unless on balance it is contrary to the public interest and legislate "Reasons for enactment of Act" recognising inter alia; the value of freedom of information, importance of openness, accountability and public ownership of information;

- make bodies established or funded by government and certain documents relating to privately contracted government services and government-subsidised private sector bodies subject to FOI;
- abolish conclusive certificates;
- reduce time limits for supplying documents (45 days to 25 days) and introduce a range of measures including a Schedule of Relevant Documents that will practically reduce the time taken to provide documents;
- revise internal and external review processes; and
- improve and increase the powers of the Information Commissioner

ARTK urges the Government to accept these Recommendations.

However, there are several significant flaws within the Recommendations which if adopted would undermine the invaluable reform outlined by the Panel. They relate to:

- **Fees and charges.** ARTK welcomes the recommendation to abolish fees for decision making, retrieval and search by FOI officers. However, the recommended per folio charge would be a barrier to access. Lengthy documents, for example complex policy review and analysis documents would attract exorbitant fees. These are precisely the documents that need to be released to improve transparency, accountability and understanding of government;
- **Cabinet documents exemption.** Whilst the recommended new exemption for cabinet documents (Recommendation 32) is a considerable improvement on the current exemption, ARTK submits that a public interest test should be applied in determining whether cabinet documents should be released.

Where in extraordinary circumstances the public interest in releasing documents outweighs the potential harm to the collective responsibility of the Cabinet, the documents should be released.

Recommendation 33 is ambiguous in its treatment of extracts of factual/statistical documents contained in Cabinet documents and whole documents attached to Cabinet submissions. It is also opaque on dealing with factual/statistical documents produced for a dual purpose. The Recommendation should be clarified to remove the ambiguity and to ensure documents prepared for a dual purpose are not exempt.

- **Ministerial documents exemption;** Question time briefing notes, estimates briefing notes and incoming ministerial briefs, should not be subject to a FOI exemption.
- **Other exemptions:** The existing modified public interest test for matter relating to law enforcement or public safety and matter relating to national or State security should be retained in the legislation;
- **The ambit of the Act:** Section 11 should be reviewed to ensure the FOI regime applies to all appropriate aspects of government information including;

administrative details of the Parliament and Governor and systemic information about performance of students and schools.

This document will deal with each of these in detail.

FEES AND CHARGES – CHAPTER 14

Right to Know proposal

ARTK submits the cost of providing information to inform the public about government should be borne by the Government. Reform of Queensland's FOI regime should recognise the right to information as a democratic right. All charges and fees should be removed given the importance of open administration and information access to good government.

As the Australian Press Council stated in its submission to the Panel :

“Since the citizens pay taxes, they have in a sense already paid for the information that is sought through FOI, the media that publish information acquired by FOI are simply a vehicle for delivering that information to its ultimate customers.”

And as ARTK has stated, costs remain one of the major constraints to the media's effective use of FOI.

The Solomon Report noted the United States FOI model which recognises the value of access to information, where no charges apply to information in the public interest because it is:

“likely to contribute significantly to public understanding of the operations or activities of the government”.

The Solomon Report also referred to the 1990 Electoral and Administrative Review Commission (EARC) recommendation that Queensland should adopt an FOI law:

“Access to information as to what decisions are made by government, and the content of those decisions, are fundamental democratic rights. As such, FOI is not a utility, such as electricity or water, which can be charged according to the amount used by individual citizens. All individuals should be equally entitled to access government-held information and the price of FOI legislation should be borne equally.”

Under the new regime, the cost of administering FOI, which is already modest, will fall further with the recommended “push” management approach to information which will reduce applications and improve efficiency of the regime.

Given FOI's relatively low cost and the importance of an effective system, ARTK submits that the Government should reconsider an ethos it adopted when the legislation was first introduced in Queensland - to process non-personal FOI applications free of charge.

Background

We appreciate that the Panel recognises there should be no charge for

search, retrieval or decision-making by FOI agency officers but the proposed sliding scale per folio would lead to exorbitant fees for applicants including the media, non-government organisations, academics and politicians. We are extremely concerned this would result in many applicants being unable to afford to use the Act, particularly for more complex matters.

Under the recommended charges structure, as soon as an applicant seeks more than hundred pages of any documents, costs will begin to soar beyond the capacity to pay.

Given their typical length, complex policy, data-based analysis, surveys, evaluations and reviews and internal audits will be among the applications too costly to pursue. These are precisely the documents needed to improve transparency, accountability and understanding of public policy.

Examples of lengthy applications that would be prohibitive in cost

ARTK provides two examples of the unwelcome result of the proposed changes – more are available however the crucial point is a flawed costs and charges approach can still ruin a reformed FOI Act despite any other welcome changes to the legislation.

An application was lodged with Queensland Health on February 26 2008 seeking information relating to: *“the extent and nature of any nursing shortages in the public health system and the impact of any such shortages on patient care and patient services”*.

After discussion with Queensland Health, the final scope of the request involved:

- “Nursing Vacancy Data – monthly reports for Statewide and each of the three Area Health Services for the last 12 months; and
- Weekly Service Status Reports for the month of February 2008 only.

This request allowed journalists to accurately assess nurse shortages, agency reporting and methodology and produce a comprehensive and informed news story on an issue of strong public interest. Queensland Health advised there were 1729 documents in scope with all documents to be released. The total charges for processing were \$290.60.

However under the new recommended charging system, this application would cost \$6,457.50.

Also in February 2008, an application was made to the Department of Education, Training and the Arts for information relating to a program trialling computers at a public high school. There were 662 documents in scope and the total charges were advised to be \$397.60.

Under the new recommended regime, charges for the information would be \$1795.50.

Discussion: the recommended costs regime

The Panel acknowledges that given a raft of problems with the existing costing, including inconsistencies, complexity, confusion, delays and excessive estimates of costs, a new simpler approach to charging is needed. But a sound rationale for the recommended new approach is not provided.

The Panel does not suggest the charging regime seeks to recover costs, noting that:

“The amount of money involved in FOI charges is miniscule, at least so far as agencies are concerned...In 2002-2003, the total cost of administering FOI by Government departments and agencies was almost \$9.3 million, while the revenue from fees and charges was just over \$0.25 million.”

And with introduction of the new recommended “push” model of administration, there will be less applications with even less revenue collected.

But the Panel notes that:

“while the charging regime under FOI may not collect much revenue, it does present real problems for administrators and requesters.”

The Panel’s rationale for its recommendation revolves around the Australian Law Reform Commission (ALRC)/Administrative Review Council (ARC) Review in 1995, the Legal, Constitutional and Administrative Review Committee (LCARC) report on “The Accessibility of Administrative Justice” in 2008 and a UK-based review by Frontier Economics.

The ALRC/ARC Report concluded that:

“although charging for access to information undoubtedly reduces its accessibility, some form of contribution from applicants is appropriate.”

In considering this, the Solomon Report acknowledges that charging reduces use of FOI by newspapers and non-government organisations, but provides no rationale for why there should be some form of contribution other than to deter vexatious applicants. On this point, the ARTK supports the introduction of vexatious applicant measures that will solve any existing problems with these applicants.

The UK Frontier Economics considered:

“a more targeted fee aimed at recovering the costs of dealing with persistent and experienced requestors. These types of requestors tend in the majority of cases to be requestors who require information for commercial use: either journalists or businesses wishing to gather information about procurement options in order to create a commercial database”.

However, this focus misses a major point. There is a clear distinction between commercial information, for example, information sought for a commercial database and information, for example, on nursing shortages in the public health system which is sought in the public interest and is not relevant to a discussion regarding fees aimed at recovering costs.

In response to the UK report, the Panel concludes distinction should not be made on the basis of the motive of the person seeking the information but on the type of information which is sought. ARTK does not support this approach.

We are strongly of the view, neither the ALRC/ARC, the LCARC or the UK Review offer a philosophical justification for charging users seeking public policy or accountability related documents and no justification is provided for a sliding fee that penalizes applicants seeking more information.

CABINET DOCUMENTS EXEMPTION – CHAPTER 8

Right to Know proposal

ARTK submits that:

- a public interest test should be applied in determining whether cabinet documents should be released;
- Recommendation 33 should be clarified to remove the ambiguity between treatment of extracts from factual/statistical documents and whole factual/statistical documents; and
- Recommendation 33 should be clarified to ensure documents prepared for dual purposes are not exempt from FOI.

Background

Historically, the Queensland provision on Cabinet matter has been controversial and has been used by ministers to avoid FOI scrutiny for political reasons.

The Queensland FOI regime needs significant structural reform towards transparency to prevent this from happening again. While Cabinet documents may be released by governments, political popularity will always be a lure to secrecy.

ARTK welcomes Recommendation 49 to abolish conclusive certificates and Recommendation 34 for the proactive release of Cabinet material. These are positive steps towards more open government.

The Panel's conclusion that the Cabinet exemption not apply unless a stringent consequence test is satisfied, will go a long way to address the problems experienced in Queensland to date. While the exemption might retain aspects of a "class exemption" the class of documents which attract the exemption would be strictly limited to those the disclosure of which would have the consequence prescribed.

ARTK strongly agrees with the Panel's central proposition that the Cabinet documents exemption should only operate to protect documents the disclosure of which would have the consequence of revealing "any consideration or deliberation of Cabinet, or otherwise prejudice the confidentiality of Cabinet considerations, deliberations or operations".

In light of this, ARTK supports the key aspect of Recommendation 32 that "This exemption applies only to documents brought into existence for the purpose of submission to Cabinet."

Public interest test

The Solomon Report notes the approach to Cabinet documents in New Zealand is different to the recommended approach for Queensland.

In New Zealand a public interest test is weighed against, among other factors, collective and individual ministerial responsibility.

The Solomon Report notes:

“In practice, the least secretive provisions are those of the New Zealand *Official Information Act*. This poses not a categorical but a consequential test – it must be shown by an official that withholding the document is necessary to maintain the interest claimed (for example, collective ministerial responsibility). And this harm-based assessment also involves a public interest test”.

ARTK argues that including in the Queensland legislation a public interest test in determining whether “Cabinet documents” should be released (as in the New Zealand legislation) would further support the objectives of the Act and protect against abuse of the Cabinet exemption.

For the reasons referred to by the Panel, without extraordinary circumstances, Australian decision makers are very unlikely to ever conclude that despite the fact that releasing a Cabinet document would cause the harm of compromising collective ministerial accountability would result, nevertheless it was in the public interest that documents be released.

ARTK however believes that the FOI law needs to provide for the extraordinary. Who could have foreseen the Dr Death events? If they were to recur and the Cabinet of the day was fully briefed on them but decided to keep information about the circumstances suppressed should decision makers not be required to consider where the public interest lay?

Recommendation 33

ARTK is concerned at two aspects of Recommendation 33.

First, ARTK is concerned that Recommendation 33 contains an ambiguity.

ARTK understands the Panel’s Recommendation that “An extract of factual/statistical material detailed within a Cabinet submission should be covered by the exemption” to mean that all of the content of Cabinet submission document (which obtains an extract) would be covered by the exemption; but if the same factual/statistical material is contained in other documents, those other documents would not attract the exemption.

On the other hand, if Recommendation 33 is read more broadly to mean that any factual/statistical material which is reproduced in a Cabinet submission attracts the exemption, the Recommendation itself is internally inconsistent. In that case where a small amount of information was drawn from a report and put in the Cabinet submission the report itself would be exempt regardless of the purpose for which it was produced; but where the whole of a report attached to a Cabinet submission would not be exempt “unless disclosure would compromise collective responsibility of

Cabinet requiring proof that any such attachment was prepared for the purpose of submission to Cabinet.”

Second, Recommendation 33 is opaque as to how documents which are produced for multiple purposes, only one of which relates to Cabinet, are to be considered.

For example it is common for Departments with service delivery functions to create planning documents to define services they will provide. For example Education Departments will plan school intakes, class numbers, school sizes and curriculum choices and Health Departments will plan clinical services and other health services.

In many such cases it will be obvious that a step in reaching final decisions will be Cabinet deliberation – and that one of the purposes to which service planning documents will be put will be to inform that deliberation. However in almost all cases the planning documents will also be produced for multiple other purposes: for example, to inform departmental decision making, to provide a framework for public or staff consultation and to guide implementation of service changes.

In such cases the disclosure of the documents of itself discloses nothing about Cabinet deliberations – the reader who is ignorant that the document was considered by Cabinet would learn nothing of Cabinet deliberations but much about the service and the reasons for the services in question. In such a case the fact that one of the purposes for which the document was produced was for submission to Cabinet does not lead to the conclusion that “disclosure would compromise collective responsibility of Cabinet”

To ensure the exemption only applies where, in the circumstances of the particular document, “disclosure would compromise collective responsibility of Cabinet” ARTK submits that the exemption should not apply unless it is proved that disclosure would compromise collective responsibility of Cabinet because any such attachment was prepared for a purpose of submission to Cabinet.

The ARTK understands and supports the importance of collective ministerial responsibility yet unless clarified Recommendation 33 might allow the Cabinet exemption to be wielded deep into agencies far removed from Cabinet’s deliberations.

30 year Time limit

The Solomon Report discusses the increasing trend to limit the period for which the Cabinet exemption might be claimed and notes that the justification for the exemption has largely evaporated after a decade or so. The Panel notes the “Cabinet “oyster” will be well and truly shucked after 10 years” as a result of political memoirs, media reports and work by historians.

Although the Solomon Report does not make a recommendation to reduce the current time limit, ARTK would argue the period should be limited to the end of the current parliamentary term. As noted by the Panel, “it could be argued that strictly speaking Cabinet’s accountability ceases with every new parliamentary election – Cabinet can only be responsible to the Parliament in which it holds office as the Government.”

MINISTERIAL DOCUMENTS EXEMPTION (CHAPTER 8)

Right To Know proposal

ARTK proposes that question time briefing notes, estimates briefing notes and incoming ministerial briefs, should not be exempt from FOI.

The FOI Act exists to improve accountability and transparency and new exemptions should not be created. When a FOI application is considered, the government will have the opportunity, like the public, to argue for exemption on the basis of the public interest.

Background

In reaching its Recommendation, the Panel relies on an incorrect conclusion that in virtually all jurisdictions, the ministerial documents proposed to be exempted are withheld from release.

In response to a FOI application earlier this year for the incoming briefing to the Treasurer, the Commonwealth Treasury granted some access to documents. Further documents were released on internal review with further documents expected to be released in the course of a current AAT appeal.

The Solomon Report characterised this release as an exercise of discretion by the Treasurer commenting:

“in 2008 when the Federal Treasurer decided to release under FOI much of the Red Book

The Panel's characterisation of that decision as the exercise of Ministerial discretion is incorrect.

The information was released following application of public interest test by the decision maker within the Department with no discretion exercised by anyone. The Treasurer himself did not make the decision.

There has been no harm to the relationship of the Treasurer and the Treasury arising from the Treasury's decision in that case demonstrating the fallacy in the Panel's position.

In another example of release, the Commonwealth Department of Education, Employment and Workplace Relations has recently advised an applicant that following an internal review application, there would be a partial release of documents on the basis of the public interest in release. The documents include "in-confidence Question Time Briefs" relating to centralised wage fixing and other issues. This demonstrates that under Commonwealth FOI law question time briefs are accessible.

Denial of similar access by introducing a new exemption would be a backward step for any FOI reform in Queensland.

The Solomon Panel argues for the specific ministerial document exemptions on the basis that:

“a Minister cannot be responsible for his portfolio if he or she does not know what is happening within his or her department. Ministers need to be briefed about what their departments are doing, what problems exist and how they are being dealt with.”

But the arguments appear to confuse the issue of providing free and frank *information* to Ministers, (which is objective) and providing free and frank *advice* to Ministers, (which is subjective).

The Panel comments there would be a real governance problem if the FOI laws inhibited bureaucrats giving free and frank *information* to Ministers and concludes there is a risk of this, if either incoming or estimates briefs are available through FOI.

However, sound argument to support this conclusion is not provided.

The Panel appears to rely on a New Zealand study which was concerned about “some” negative effects from release of documents. It is debatably not legitimate to base this Recommendation on this study as it dealt with the content and form of *advice* as much as *information*.

The Panel also appears to rely on an argument that public servants will not provide free and frank *advice* if it might be released (a class exemption based on the *Re Howard* factors). Yet the Panel notes the question of whether free and frank *advice* might be inhibited by the release of documents is one the courts and senior officials are becoming less inclined to accept. The Report cites *McKinnon v The Secretary of Prime Minister and Cabinet* which questioned the “Howard factors”.

Parliamentary privilege exemption

As a basis for imposing an exemption on estimates briefing documents, the Panel comments that they are possibly covered by the parliamentary privilege exemption.

This suggestion is based on reasoning in a single decision on an interlocutory application by an Assistant Information Commissioner. While the Assistant Commissioner purported to rely on a Court of Appeal decision that decision does not support the reasoning.

The Court of Appeal held that notes made by a Senator for his use speaking in the Senate attracted privilege. This should be contrasted with notes made by officers of the Executive, which at some time after they are made may be read by a Minister. When the briefing notes are created, no Member of Parliament has created them to be used in the Parliament or decided that they will be used in the Parliament.

The contention that such documents currently enjoy a form of class immunity is incorrect and should be rejected.

OTHER EXEMPTIONS – SECTIONS 42 AND 42a –(CHAPTER 8)

Right To Know proposal

The existing “reasonable test” in sections 42 and 42 needs to be acknowledged as a modified public interest test and retained within the legislation.

Background

Recommendation 39 recommends that the exemptions contained in sections 42, 42A, 43, 46(1)(a) and 50 continue to apply with no public interest test.

ARTK does not dispute that section 43 (legal proceedings) and an amended s. 46 (in confidence) should continue to apply as exemptions with no public interest test. ARTK also supports the removal of section 47A from the Act and the recommendation to apply the public interest test to the whole of section 45.

However, ARTK does not agree with the Recommendation that sections 42 (law enforcement or public safety) and 42A (national or State Security) should continue as exemptions to the Act but with no public interest test.

ARTK contends a public interest test, albeit modified, currently exists for these sections and should be acknowledged in the legislation to ensure the test continues to apply to these two sections.

Section 42 states that:

“Matter is exempt matter if its disclosure could reasonably be expected to” with the section detailing relevant scenarios including “prejudice the investigation of the ... law, Endanger a person’s life” etc;

Section 42A states that:

“Matter is exempt matter if its disclosure could reasonably be expected to damage the security of the Commonwealth or a State”

Use of the term reasonable gives rise to what has been described as a modified public interest test increasing the standard to one of “reasonableness”.

Given the Parliament did not impose a blanket exemption for all information covered by these sections, they have been applied according to the modified public interest test.

For example, courts and tribunals have stated; Decision makers must have real and substantial grounds for the expectation that harm will occur for which, when looked at objectively, articulate and acceptable reasons exist (*Attorney-General’s Department v Cockcroft*⁹; *Searle Australia Pty Ltd v Public Interest Advocacy Centre and Department of Community Services and Health*¹⁰) and must not rely on grounds which are merely speculative, imaginable or theoretically possible.

⁹ (1986) 64 ALR 97 (D131)

¹⁰)1992) 108 ALR 13 (D294)

In relation to freedom of information appeals courts and tribunals have found that something which is *reasonably expected* requires *real and substantial grounds* when looked at objectively which are not irrational, absurd or ridiculous (*Attorney-General's Department v Cockcroft; Re Actors Equity Association of Australia and Australian Broadcasting Tribunal*) or fanciful, imaginary or contrived (*Re Clark v Australian National Parks & Wildlife Service*¹¹).

Decision-makers are required to keep in mind that they are considering the reasonableness of the alleged effect, not the reasonableness of the claim of such an effect (*Searle Australia Pty Ltd v Public Interest Advocacy Centre and Department of Community Services and Health*).

The Solomon Report correctly acknowledges the existence of the modified public interest test stating:

“Subsection 1 does not contain a public interest test in one of the traditional forms. However, matter is exempt only if its disclosure “could reasonably be expected to” result in one or more of the listed prejudices or harms. The prejudices or harms are all of a kind that would rank highly as factors telling against disclosure if they were considered in a public interest test”.

AMBIT OF THE ACT - Section 11 (CHAPTER 7)

Right to Know proposal

The Act should be amended to ensure the administrative details of the Governor and Parliament (including the Speaker's office and Opposition Leader's office, ministerial offices and parliamentarian's electorate offices) by amendments to Section 11(1) sub-sections (a), (b) and (d) are subject to the Act and section 50 is amended to ensure such information is not precluded by this exemption.

Background

ARTK supports the Recommendations in Chapter 7 to make bodies established or funded by government and certain documents relating to privately contracted government services and government-subsidised private sector bodies subject to FOI.

However, the object of the Act is to provide access to information held by the Queensland government (section 4) and yet there are elements of the government which are excluded by virtue of section 11.

It appears from the January discussion paper and the Solomon Report, the Panel has not turned its mind to a number of the sub-sections of section 11. ARTK is of the view further consideration should be given to the ambit of the Act.

Members of Parliament and Parliament

In particular, given their salaries and expenses are paid for by the Queensland taxpayers, Members of Parliament and the Parliament itself should also be subject to FOI. The administration of these funds should be subject to public scrutiny through

¹¹ (1991) 22 ALD 706 (D270)

the FOI Act in the same way as are funds allocated to other government departments.

This has been recognised in a number of overseas countries, including the United Kingdom where politicians are specifically included in the UK Freedom of Information Act. The UK law defines Houses of Parliament as:

“public authorities” and specifically includes them in their Act with Schedule 1 of the UK Act including in its definition of public authority, “Any government department, The House of Commons, The House of Lords, The Northern Ireland Assembly and The National Assembly for Wales. “

In addition, more than a decade ago, the ALRC report into the Commonwealth FOI Act recognized the inclusion of Members of Parliament and the Parliament and said parliamentary departments should be subject to the FOI legislation.

While in some cases the activities of Members of Parliament may be judged to be exempt from release on the basis of the same exemptions that apply to other government agencies covered by the Act, there are no good grounds to exempt them from the Act by way of a blanket exemption.

Section 50 of the Act currently exempts matter that would infringe the privileges of the Queensland, Commonwealth or State or Territory Parliament. We are concerned that this exemption acts to preclude release of information relating to Members of Parliament and the Parliament.

Similarly the administrative activities of the Governor, for example, staffing should be subject to FOI.