ENVIRONMENTAL DEFENDERS OFFICE (QLD) INC. and
ENVIRONMENTAL DEFENDER'S OFFICE OF NORTHERN QUEENSLAND INC.

30 Hardgrave Rd
West End, Brisbane 4101
Telephone: 3211 4466
Facsimile: 3211 4655
edoqld@edo.org.au
www.edo.org.au/edoqld
ABN 14 911 812 589

Level 1, 96-98 Lake St
Cairns 4870
Telephone: 4031-4766
Facsimile: 4041-4535
edonq@edo.org.au
www.edo.org.au/edonq
ABN 32 017 484 326

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Review of the Queensland Freedom of Information Act 1992
Freedom of Information Independent Review Panel
G.P.O. Box 5236, Brisbane Qld 4001

Via email: enquiries@foireview.qld.gov.au

Submission in response to 'Enhancing Open and Accountable Government' Discussion Paper - Review of the Qld Freedom of Information Act 1992

The Environmental Defender's Office-Queensland ("EDO-Qld") and Environmental Defender's Office of Northern Queensland Inc. ("EDO-NQ") ("EDOs") welcome the opportunity to provide feedback and responses to the Panel's Discussion Paper on Review of the Queensland *Freedom of Information Act 1992* (Qld).

The EDOs are community legal centres which specialise in public interest environmental law in Queensland. We frequently advise community member clients on their rights to access information through particular environmental statutes or, where no such rights exist, through the FOI process.

Our submission comprises a summary of EDOs' concerns (pages 3-4), then our responses to specific questions posed in the Discussion Paper. We commend the Panel on an innovative, stimulating and well-balanced Paper.

Should you have any queries about any part of this submission please do not hesitate to contact us.

Yours faithfully
Environmental Defenders Office (Qld) Inc. and
Environmental Defender's Office of Northern Queensland Inc.

Adam Millar
Principal Solicitor
EDO-NQ

Larissa Waters
Acting Principal Solicitor
EDO Qld

EDO Submission in response to 'Enhancing Open and Accountable Government' Discussion Paper - Review of the Qld Freedom of Information Act 1992

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Summary of EDO concerns

This submission by the Environmental Defenders Office (Qld) Inc. and the Environmental Defenders Office of Northern Queensland Inc. ("the EDOs") responds to relevant Discussion Questions contained in the Discussion Paper compiled by the Freedom of Information Independent Review Panel in the *Freedom of Information Act 1992* (Qld) ("the Act") review process.

We welcome a comprehensive review of the Act which challenges core legislative presumptions and current paradigms in the administration of freedom of information ("FOI"). We are pleased that this reform aims to provide a number of key improvements for effective FOI legislation to underpin accountability mechanisms for a healthy democracy.

In order to promote a culture of disclosure and transparency, it is imperative that information be readily available to the public, particularly on issues of public interest. Timely supply of information at minimal cost promotes open and accountable government and improves decision-making processes. In this submission we stress the need to make FOI more affordable and to improve access to information by preventing the abuse of exemptions to disclosure.

A number of proposals are necessary for improving upon the current system, including legislative amendments to achieve consistency and certainty, which are outlined in this submission. We agree with the Premier's statement (Discussion Paper page 16) that the legislation needs a complete overhaul to follow best practice examples from Australia and around the world to encourage open and accountable government.

We also commend the Panel for raising ways in which government could make more information available without resort to FOI processes. The EDOs support the UK model, where government and government-funded agencies are required to publish an annual state of affairs online along with an Information Asset Register of unpublished information (Discussion Paper page 57).

Exemption Provisions

? The EDOs acknowledge the importance of exemption provisions in balancing the objective of providing access to government information against legitimate claims for protection. The Discussion Paper states that the application of exemptions represents the core business of FOI as nearly all contested access requests centre on whether an agency has correctly invoked an exemption. In order to maximise availability of information to the public in accordance with the object of the Act, these exemptions must be strictly regulated and monitored.

  In the EDOs' experience, existing exemption provisions are routinely abused, in particular the Cabinet exemption. The Queensland FOI provisions exempting Cabinet matter must be amended to disallow a Minister from taking documents into the Cabinet room for no purpose other than to avoid them being accessible through FOI (such as by invoking the "noting without discussion" provision). The EDOs' strong view is that the Cabinet exemption should be tightened or removed entirely.

  As a model for comparison, New Zealand's cabinet documents are routinely released in response to requests without delay. We suggest that a similar "consequential" approach be adopted in Queensland where the focus is on the likely consequences of disclosure, as opposed to the current "categorical" approach used in Queensland.

? The EDOs' firm view is that instances of public interest FOI access should be expanded. Currently, a public interest test is not applied to many exemptions, such as for Cabinet or Executive Council documents which are class exemptions lacking a public interest balancing test. The presumption that there can be no public interest arguments that would overcome the

public interest in maintaining Cabinet confidentiality and collective ministerial responsibility is of great concern to the EDOs. The fact that release of certain information may give rise to criticism or embarrassment of the government is not an adequate reason for withholding it from the public. We are also concerned and agree with the Panel that there is a risk that FOI officers may neglect to consider the public interest test because a request falls within an exemption.

We suggest that public interest considerations be given a greater role in determining whether information is released, similar to the New Zealand legislation. In New Zealand, unless information falls within a very limited number of exemptions, agencies must show that the information satisfies one of a number of criteria and then apply a test balancing the harm of releasing the information to determine whether this outweighs the public interest in keeping the information confidential.

Time and Costs of Applications

? Since the Act was amended in 2001, the government has had much stronger powers to deal with generalised applications through the imposition of fees for processing FOI applications, subject to a financial hardship exemption. The Discussion Paper observes that fees and charges have been a substantial contributing factor to a reduction in the use of FOI legislation for purposes other than access to an applicant's own personal information[1]. Further, experience suggests that there is often a degree of inconsistency between agencies in relation to the application fees and charges regime which gives rise to inequities between, and confusion amongst applicants. Such disputes about fees and charges have the potential to unsettle the initial relationship between the applicant and an agency.

? The EDOs strongly believe that accessing documents through FOI needs to be more affordable. The current fees and charges need reviewing given the Panel's evidence that they act as a hindrance or deterrent to FOI applicants. Fees and charges should be removed or kept to an absolute minimum if FOI is intended to encourage open and accountable government. In particular, fees should be waived where information is sought for public interest purposes such as environmental issues by community or conservation groups or individuals. Currently such groups or persons are forced to depend on a broad interpretation of the financial hardship exemption to avoid oppressive FOI fees.

? The current FOI legislation is impeded by unnecessary complexities and time delays in processing applications. The EDO commends the Panel on its proposals to speed up and simplify the application process.

[1] For FOI requests lodged with a Queensland government agency or Minister, the application fee is $33.50 unless the documents requested relate to the "personal affairs" of the FOI application, in which case there is no application fee. The agency has a discretionary power to impose a charge of $5 per 15 minutes in relation to the time taken to search for the requested documents and the time taken to supervise inspection if the requested documents do not relate to the personal affairs of the FOI applicant. However, special consideration is given to non-profit organisations and these organisations can apply to have fees waived if it can be shown that the fee will cause financial hardship.

EDO Responses to Discussion Questions

The questions raised for discussion follow in italics, with the EDOs' response to each in plain text.

Chapter 6 Purposes and principles of FOI

6.1 Preamble – why FOI?

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

Yes. The EDOs believe there is a public right to information held by government, including information about the way government is conducted. The EDOs do not believe there is a public right to access information about the personal affairs of other people. Individuals are entitled to know that any personal information held by the government is "accurate, complete, up-to-date and not misleading" and also that the confidentiality of that information is protected from access by other individuals through FOI.

By the very implementation of the FOI Act in 1992, the Queensland government agreed with LCARC that there is a public right to access information held by government. The Act itself states in section 4(2) that in a "free and democratic society" members of the public are entitled to access government information because this leads to open and accountable government dealings with community members.

✍ *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. A 'public interest' test should balance any withholding or exemption interest against public interest to disclose that information. Information should be released that is clearly in the public interest even if it causes some harm to the public body releasing it (Discussion Paper pages 26 and 74).

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

Yes. FOI contributes to a healthier democracy and enhances its practice through greater openness and transparency, increased government accountability, effective public participatory democracy, better government decision-making, and greater trust and confidence in government.

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

Yes. The Act needs a Preamble to enshrine commitment to open and participatory decision-making. As Marie Shroff, NZ's Privacy Commissioner, stated when a culture of open government becomes ingrained, those producing government information do so knowing that such information will likely be used in a consultation process between government representatives and interested members of the public. They produce balanced, accurate and comprehensive advice to engender trust and confidence in government (Discussion Paper pages 51-52).

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. The Objects section of the Act should be expanded to reflect the aims of better public administration and improved quality of decision-making. Ease of public access to government information improves government administration and encourages public servants to carry out their duties competently and carefully, mindful of their duty to serve the public rather than the Minister of the day (Discussion Paper page 52). The transparency provided by FOI leads to better informed and more professional advice being provided to government by public servants.

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. Open government leads to improved government administration and enhances participatory democracy through government and community cooperation and informed debate. In the words of the NZ Law Commission, the Act should make the open government principle central to the ethos of public administration (Discussion Paper page 53).

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?*

No. Such a default setting should be removed and information should be made available unless there is a good reason for withholding it. Government information should be accessible on agency websites using the UK Information Asset Register as a model. The *Public Records Act 2002* (Qld) already requires public authorities to keep their records accurate and publicly accessible to some degree. With such records being 'reasonably' available on agency websites, there would be no need for a confidentiality 'default' (Discussion Paper page 54).

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?*

The 30-year rule militates against encouraging government and public sector openness and should be either abolished or in sensitive cases (such as Cabinet documents that it is not in the public interest to release contemporaneously; see our comments in EDO summary on the Cabinet exemption) reduced to 7 years (as with taxation documents).

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?*

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

Yes. The culture of secrecy within the government and public service needs to be replaced with a culture of disclosure, through informal administrative means as well as through FOI. As currently happens with Queensland health and education records, access to all forms of government information should be encouraged through policy statements advising applicants how to access such information on government websites. Such advice should include conditions of release (Discussion Paper page 55).

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

Yes. Currently an FOI request may be refused because the information is available through other statutory means. Rather than refusing to supply the documents, the FOI officer should supply the documents under those other statutory means (or through administrative processes where relevant).

Additionally, FOI Officers should be better trained and their roles should be senior positions with a fiduciary duty of care (as with Public Officers in incorporated groups) allowing them to release agency information they believe is reasonable to release. Each agency's Information Officer should come under the auspices of the State Information Commissioner.

6.2.6 Publication schemes

- ✍ *Is the statement of affairs the best format for publication of this information?*
- ✍ *Should agencies be required to include more information in their statements of affairs, and if so what?*
- ✍ *Should they be required to keep these genuinely up-to-date (revised, if necessary, every week/month)?*

A Statement of Affairs is a basic need. It should be a summary of all that the agency has achieved in language that everyone can understand. It should also have links to more technical information for those interested. All government and government-funded agencies should also be required to publish information held by them on their websites and update this information weekly. Section 18 of the Act should also include that all documents be published and updated regularly on agency websites (Discussion Paper page 56).

A good example of open, user-friendly access to information can be found on the Commonwealth Department of the Environment, Water, Heritage and the Arts ("DEWHA") website[2]. It includes easily-accessible contact details of officers able to help with additional environmental information.

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

Yes. The Information Commissioner should be given the power. Additional information should include an Information Asset Register indexing all unpublished information (as in the UK) and the 'public text' of all large contracts (as in the ACT) (Discussion Paper page 57).

[2] http://www.environment.gov.au/index.html

- *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?*

The issue is not necessarily whether a standard, scheme or regulation would be best but that the legal instrument used provides clear and unambiguous guidance to allow agency Information Officers to work out what information would be reasonable to publish to promote open and accountable governance.

6.2.7 Negating access

- *Should the Objects clause include reference to factors that are used to balance against a right to access information?*
- *Would this be better achieved with a formula such as that adopted in the New Zealand Official Information Act, s. 4 (c)?*

This would be better achieved with a purposes section such as that adopted in the New Zealand *Official Information Act,* section 4 (Discussion Paper pages 58-59).

6.2.8 Interpretation

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

In the interests of open, accountable government, there should be a separate *Privacy Act* to handle section 4 (3) (b) and 4 (5) (c) privacy issues. Section 4 can then be redrafted to simply follow the principles of section 4 (1).

6.3 Ambit of the Freedom of Information Act 1992

6.3.1 Document

- *Would there be any advantage in changing the Act to provide that a person may seek access to public records, rather than documents, or even to official information?*
- *Should the Act specifically exclude "ephemeral" material?*
- *Should it move towards the Swedish approach?*

The Act should state that a person may seek access to all public records other than internal non-official documents such as drafts, memoranda and outlines that have not already been registered (Discussion Paper page 60).

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?*

No. The private sector should be in the reach of the Act with a general duty to act reasonably in the interests of the community it operates in. When mining operators take out mineral or exploration leases or rights over someone else's land or private developers destroy other landholder's amenity or large-scale industrial polluters expect the community to pay for the

effects of their pollution and their degradation of significant areas of the natural environment, those affected by such actions should be able to access relevant and reasonable information from members of the private sector responsible for this without resorting to expensive court action. The private sector should be open and accountable in its dealings with the community it benefits from.

✍ *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. Private sector bodies with government service contracts – and those sub-contracted to them out of the same government funding – should be as accountable as the government agencies they service (Discussion Paper page 63). Government/private sector contracts should include conditions that clearly set out agency FOI obligations that will also apply to the contractors and sub-contractors.

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

No. Government Owned Corporations ("GOCs") were constituted to continue to provide public utility services in the face of encroaching privatisation of public resources. GOC shareholders are ministers of the state who are also elected representatives of the people. GOCs are fully government-funded public entities and should be fully accountable to the public for any decisions their government-funded directors, employees and shareholders make, and GOCs should be subject to the Act (Discussion Paper pages 64-65).

✍ *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?*

`Government functions' in a democratic country should be those functions that are funded from government revenue and operating through government processes to provide services for public purposes or utility (Discussion Paper page 68). Unless private sector bodies now exercising government functions can show that they could operate as competitively in the market-place without government funding or functions (subject to our response to 6.3.2 above), they should have FOI obligations fully extended to them.

✍ *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.

Further, individuals should be able to access their personal information from any organisation. This would be better dealt with by separate provision under a State *Privacy Act* rather than the Act.

(iv) Other bodies

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

Principles that should be applied to determine whether a body is covered by the Act should take into account whether the body would operate independently and efficiently in the market-place without government funding or applying government policy to their operations.

The raft of agencies exempted from the purview of the Act needs review, with an intention to bring in as many agencies as possible to promote open and accountable government.

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

If there is such a body as a fully privately run and funded enterprise that leaves a negligible human footprint on the earth, then that body should be excluded from coverage of 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?*
- *Should exemption provisions be rewritten to ensure that FOI officers apply such public interest tests as they contain?*
- *Should there be an over-riding public interest test covering all exemptions?*

As a model for comparison, New Zealand's cabinet documents are routinely released in response to requests without delay. We suggest that a similar 'consequential' approach be adopted in Queensland where the focus is on the likely consequences of disclosure, as opposed to the current 'categorical' approach used in Queensland. If no harm would follow from the release of material (Discussion Paper page 74) that would otherwise fall within an exemption provision, it is reasonable that it should be released – without a public interest test. If there is harm to the public official, agency, Minister or government of the day responsible for negligent or reckless conduct exposed by the material to be released, then it should be released – with a public interest test.

As stated in our Summary above, the EDOs' firm view is that instances of public interest FOI access should be expanded. Currently, a public interest test is not applied to many exemptions, such as for Cabinet or Executive Council documents which are class exemptions lacking a public interest balancing test. The presumption that there can be no public interest arguments that would overcome the public interest in maintaining Cabinet confidentiality and collective ministerial responsibility is of great concern to the EDOs. The fact that release of certain information may give rise to criticism or embarrassment of the government is not an adequate reason for withholding it from the public. We are also concerned and agree with the Panel that there is a risk that FOI officers may neglect to consider the public interest test because a request falls within an exemption.

We suggest that public interest considerations be given a greater role in determining whether information is released, similar to the New Zealand legislation. In New Zealand, unless information falls within a very limited number of exemptions, agencies must show that the information satisfies one of a number of criteria and then apply a test balancing the harm of releasing the information to determine whether this outweighs the public interest in keeping the information confidential.

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

  Yes. The law can be expressed so as to allow information to be released either where there will be no harm in releasing it, or where the public interest in releasing it outweighs any harm that may occur from releasing it (Discussion Paper page 78).

- ✍ *How can FOI officers be made more aware of the fact that they can release information that falls within an exempt category?*

  As senior public officials in each agency also under the auspices of the state Information Commissioner, agency information officers would be under similar strict guidelines as public prosecutors – to be impartial, fair and balanced, with regular and continuing training and meetings with other IOs and the state IO to ensure this.

- ✍ *What test should they apply if they consider exercising this discretion?*

  In all of the circumstances, does the public interest in observing the exemption outweigh the public interest in releasing the information? (i.e. the default position is that the release of the information is in the public interest unless, in all of the circumstances, it can be demonstrated that the public interest would be better served by observing the exemption). (Discussion Paper pages 78 and 81)

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?*
- ✍ *Should there be a public interest override covering all exemptions? Or, all but a few specified exemptions?*
- ✍ *How should the public interest test be expressed?*
- ✍ *To what extent should the notion of detriment or harm be involved in determining the balance of public interest?*

  See responses given under ***Exemption provisions*** above.

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

  This should only be a factor if the timing of release has a genuine impact on the public interest.

- ✍ *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 provided by the Information Commissioner and revised regularly by an elected committee of agency IOs should be available on the Information Commissioner's website for public access, and consultation.

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?*

Yes, this should be strongly encouraged for effective FOI laws. The EDOs' strong view is that the Cabinet exemption should be tightened or removed entirely.

- *Should a class exemption for Cabinet matter be maintained?*

No. New Zealand's cabinet documents are routinely released in response to requests without delay. We suggest that a similar 'consequential' approach be adopted in Queensland where the focus is on the likely consequences of disclosure, as opposed to the current "categorical" approach used in Queensland.

- *Should a public interest test be introduced?*

Yes. The presumption that there can be no public interest arguments that would overcome the public interest in maintaining Cabinet confidentiality and collective ministerial responsibility is of great concern to the EDOs. The fact that release of certain information may give rise to criticism or embarrassment of the government is not an adequate reason for withholding it from the public.

We suggest that public interest considerations be given a greater role in determining whether information is released, similar to the New Zealand legislation. In New Zealand, unless information falls within a very limited number of exemptions, agencies must show that the information satisfies one of a number of criteria and then apply a test balancing the harm of releasing the information to determine whether this outweighs the public interest in keeping the information confidential.

- *Should the exemption include a purposive element?*
- *Should there be a factual/statistical material exception?*
- *Should a Minister/Cabinet/Governor in Council be able to issue a conclusive certificate?*
- *Should there be a time limit on how long Cabinet matter can be exempt from FOI?*

After applying the consequential approach, Cabinet documents that are not in the public interest to release contemporaneously should be released within 7 years.

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

Yes, the current 'categorical' approach risks arbitrariness and may be easily abused. A consequential approach is much preferred and has proven itself as effective in New Zealand.

A parliamentary Information Officer should follow guidelines that include the following: In all of the circumstances, does the public interest in observing the exemption outweigh the public interest in releasing the information? (Discussion Paper page 81).

Executive Council matter:

- ✍ *Should a class exemption for Executive Council matter be maintained?*
- ✍ *Should there be a time limit on how long Executive Council matter can be exempt from FOI?*
- ✍ *Should there be provision for a conclusive certificate?*

Our comments regarding Cabinet documents also apply to Executive Council matters.

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?*

All information that is not ‘ephemeral’ material should be released. When documents are still being considered towards making a decision, access should be withheld until that decision is made unless it is in the public interest to release those documents to ensure proper decision making processes are being followed.

7.4 Personal affairs

- ✍ *Should the term “personal affairs” in s. 44 of the Act be replaced by “personal information”?*
- ✍ *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?*
- ✍ *Does acceptance of government-funded equipment affect a claim of privacy by the user of the equipment?*

Under a new *Privacy Act,* personal information should be protected. This includes third party information that is confidential and if released would cause demonstrable harm and is not in the public interest to be released. Duty statements and private use of public equipment by public officials should be accessible information.

7.5 Commercial-in-Confidence

- ✍ *Should the exemptions in s. 45(1) (a) and (b) also be made subject to a public interest test?*
- ✍ *Should confidentiality be available only if it can be shown disclosure would cause demonstrable harm to the competition process?*
- ✍ *Should the exemption contain a specific reference to a time limitation on how long an exemption may continue?*

Confidentiality should only be available if it can be shown disclosure would cause demonstrable harm to the competition process in the long-run. Any exemption should be strictly monitored to allow for changing circumstances (Discussion Paper pages 86-87).

7.6 Other exemption provisions

- ✍ *Is each of these exemptions necessary?*
- ✍ *Is the public interest test appropriate?*
- ✍ *Would a "harm" test be more appropriate?*

If a 'harm' test were applied by the respective well-trained, well-paid Information Officers, these exemptions would not be necessary.

7.7 Conclusive certificates

- ✍ *Should some or all conclusive certificates in the Freedom of Information Act 1992 be abolished?*
- ✍ *If any are retained, should a time limit be applied to any certificate that is issued?*
- ✍ *Should the use of conclusive certificates be monitored by the Information Commissioner?*
- ✍ *Should any use of a conclusive certificate be reported to Parliament, and if so, when?*

The use of Conclusive Certificates should be abolished. They are no longer an appropriate device for open government processes (Discussion Paper page 89).

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?*

There *is* a democratic right for every Australian citizen to reasonably access, and comment on, government information that affects every aspect of our lives. We need to know that our three arms of government are making decisions openly, accountably and inclusively. The government culture of secretiveness – that is still inherent in the linear and excluding clauses of our *Freedom of Information Act* – should be made redundant (Discussion Paper page 91). It is time for a new, more integrated, uniform FOI system to be implemented in Queensland, and every other state and territory as well as nationally.

- ✍ *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?*

Queensland's strong executive will honour a good part of the original intent of FOI and address its anxiety about its capacity to govern effectively in a hungry and geared information age by:

- ? providing an integrated and inclusive legislative process;
- ? providing public access to all information that is reasonable to access on agency websites; and
- ? providing and upgrading ethical training and fair incomes to agency personnel responsible for information dissemination.

- *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?*

Information is power, time is currency and holding onto 'secret government business' for ministerial interests causes public and public service hostility and imbalance. The concept of 'serving the public' in the public interest has to be brought back into public service practice. Fair and open public access to government information operates in a multi-dimensional and transformative way. We elect politicians to represent our interests. By being more responsible for the information parliamentarians and the executive produce for the peace, welfare and good government of all Queenslanders, a general duty of care should keep balance.

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

The Us versus Them mentality is strong while excessive and non-discretionary fees regimes to discourage requests and pre-emptive exploitation of exemptions are typical.

- *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?*

Certainly, the government showing that it is determined to change the public service culture towards openly serving the public would be an enormous step in the right direction. Upgrading Information Officer positions to senior and fiduciary duty status as suggested by Snell and others (Discussion Paper pages 100 – 102) paper should be essential.

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

Planning, creating, collecting, organising, using, disseminating and storing information for the benefit of the public is interactive (Discussion Paper page 105). Everyone involved in it should be aware of the importance of each other's role. FOI considerations are a vital part of allowing people to participate in decision-making. Government training of all staff should reflect this.

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

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

Government agencies should be creating knowledgeable records for people to access. 'Info-glut' is not power. Not many agency websites are kept up-to-date and this often invalidates information held. There should be up-to-date contact information available on websites, to enable people to email, phone or talk directly with trained Information Officers able to monitor and supply documents and information not yet available on their agency websites.

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?*

By including an 'ephemeral' clause in the FOI Act to make it clear that drafts, memos etc. that have not been written as completed records, this would make it discretionary on the Information Officer whether it is reasonable to release some data or not. Clear protocols on what should be kept as a record would make the process easier to implement (Discussion Paper pages 110-111)

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"?*

Queensland should use a similar model to that of the UK where records on government websites and an information asset register have reduced time and cost.

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

Fully implement electronic lodgement through a central Queensland government Electronic Document and Records Management System ("EDRMS") payments registry.

- *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?*

The Queensland government should be training and employing more Information Officers to produce FOI guidelines and monitor agency websites. Proactive disclosure of electronic agency documents that would be reasonable to release should be encouraged.

Re-using government information

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

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

An open and accessible FOI regime promotes more open government and better community interaction. The more valuable information that the public can access and re-use to build knowledge and empower the community, the healthier the Queensland society, economy and environment will become. There was never a need for documents released under the Act to be watermarked "FOI release", or at all. Whilst information released under the Act should not be able to be "edited" as such, any 'electronic' release of information under the Act should be able to be copied electronically for use by the recipient.

- *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"?*

There should be no 'corporate resources' built from public revenue that are closed to the public interest.

8.3 Protection of privacy interests

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

Personal information should be protected under a *Privacy Act*. The right to correct and amend personal information is inherent in this. This should extend to personal information held by the private sector. There should be guidelines or principles based on what is considered reasonable by the Privacy Commissioner.

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?*

If FOI law is overhauled to provide open and reasonable access to government and agency information, this should be reflected in any other laws of Queensland.

As mentioned above, currently an FOI request may be refused because the information is available through other statutory means. Rather than refusing to supply the documents, the FOI officer should supply the documents under those other statutory means (or through administrative processes where relevant).

8.5 FOI applications for access

- ✍ *How can the application process be streamlined, made more efficient and user-friendly?*
- ✍ *Should agencies adopt guidelines giving effect to the advice given to federal agencies by the Commonwealth Ombudsman in his 2006 report?*

As the Ombudsman said, it takes commitment to open government principles for agencies to add to FOI success (Discussion Paper page 130). To end the culture of secretiveness the guidance list provided by the Ombudsman should be followed.

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?*
- ✍ *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?*

There is no need for FOI to include a privacy section. Personal information should be accessible by the individual it applies to under a *Privacy Act* no matter how that individual became aware of the document containing the information.

8.7 FOI Review process

8.7.1 Internal review

- ✍ *Should internal review remain mandatory?*

Internal review should remain available at the election of the applicant (not mandatory), in order to keep costs to the applicant down, and as long as tight time frames are adhered to. If there is an authorised Information Officer under the auspices of the Information Commissioner, internal review should be conducted by that officer. It is important that the Information Officer in each agency is seen as impartial and that proper records are kept of all reviews.

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

Yes.

- ✍ *Should formal internal review be abolished?*
- ✍ *Should the charging regime be adjusted to favour any particular outcome?*

Formal internal review should not be abolished.

8.7.2 External review

- *Should external review be conducted by the Ombudsman, the Information Commissioner or by an Administrative Tribunal?*

The EDOs recommend that either the Information Commissioner or the Ombudsman conduct the external review, with the focus on timeliness and simplicity of process.

- *What are the advantages/disadvantages of each method of providing external review?*
- *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?*
- *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?*

If external review is done by the Ombudsman, the Information Commissioner should also have an FOI monitoring and mediator role (Discussion Paper page 135).

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

Any conflict of interest can be resolved by the Attorney General and the role of the Information Commissioner in all respects should be clearly defined under legislation (Discussion Paper page 137).

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

Each agency should have an Information Officer who comes under the auspices of the Information Commissioner's Office and who advises that Office of FOI statistics and cases on a regular basis.

The Information Commissioner's obligation to report to parliament should remain, but review of the Information Commissioner's decisions or conduct should lie with the Ombudsman. The Ombudsman's existing own motion jurisdiction should be expanded to include FOI matters. The more checks and balances which are available to ensure FOI is properly applied, the more confidence the public will have in the process.

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?*
- *What are the comparative merits of a flat fee scaled by volume and the current time-based charging model?*
- *What alternatives exist to ensure consistency in the application of any fees and charges regime?*

An open and accountable FOI system should not require a fee recovery system. It should promote a public right to access government information freely and reasonably. The current fee system has severely restricted the public right to access government information and should be abolished. The current system of inconsistent fees and charges has added very little to public revenue (Discussion Paper page 140). To develop a culture of openness, electronic and other efficient alternatives to record, store and retrieve information should be encouraged and the fees and charges system discouraged (Discussion Paper page 141).

9.2 Time limits

- *Are the existing time limits reasonable and consistent with the objectives of the Freedom of Information Act 1992?*
- *Beyond amendments to the existing time limits, what initiatives exist which could improve early disclosure under the Act?*

Time limits often deliberately negate the urgency of the request (Discussion Paper page 146). If the search is lengthy and frustrates democratic principles of FOI, all fees and charges should be refunded. An expedited search should be available where the application is to disseminate information to the public about an actual or alleged breach of duty by the government - as with the US FOI Act (Discussion Paper page 146).

9.3 Voluminous and/or vexatious requests

- *Should the Act contain a power to declare an applicant for information vexatious?*
- *Should that power be exercisable at first instance by an agency or by the Information Commissioner?*
- *On what grounds should an applicant be declared vexatious?*
- *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?*
- *Should it be possible to declare an application vexatious because it is voluminous?*
- *Should voluminous applications be able to be refused under a provision such as section 29?*
- *Should a more definitive test be applied when determining whether a voluminous application might be refused, such as the number of Discussion Paper pages it would produce, the number of days it would require to process or the cost of processing it?*
- *Should journalists and/or MPs be exempt from provisions concerning vexatious requests?*
- *Should journalists and/or MPs be exempt from provisions concerning voluminous requests?*

The Information Officer's guide to what is a reasonable request should be adhered to. Unnecessarily complex applications or access to voluminous documents unreasonably taking up agency time would be judged by the Information Officer in the agency. The EDOs are concerned at the potential for misapplication of any power to declare an applicant for information vexatious. We strongly reject the suggestion that the power to so declare be added to the Act.

Chapter 10 Effectiveness and adequacy of data collection and reporting

- *What data should be collected for the annual s. 108 reports?*
- *How can the collection of the data be improved?*
- *How can the integrity of the data be improved?*
- *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?*
- *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?*
- *Should the data be used to benchmark the performance of individual agencies? If so, who should perform this role?*

Agency Information Officers under the auspices of the Information Commissioner's Office should be upgrading, monitoring, advising reform using data from panel reviews and public access consultation from agency websites.

Chapter 11 Conclusion - a new beginning?

- *Should a new Act be called something other than the Freedom of Information Act? If so, what would be the best title?*

Access to Information Act or *Freedom of Information Act* would be the EDOs' two choices.