QUEENSLAND
Nurses' Union
IN ASSOCIATION WITH AUSTRALIAN NURSING FEDERATION QLD. BRANCH
ADDRESS ALL CORRESPODENCE TO THE SECRETARY, G.P.O. BOX 1289, BRISBANE, Q, 4001.

QNU
Just Rewards for Professional Care

IN REPLY PLEASE QUOTE:

14 May 1999

All enquiries regarding this correspondence should be directed to: _____

Ms Kerryn Newton
Research Director
Legal, Constitutional and Administrative Review Committee
Parliament House
George Street
Brisbane Q 4000

Dear Ms Newton,

Re: Review of *Freedom of Information Act 1992* (Qld)

Please find attached a submission from the Queensland Nurses' Union (QNU) into the review by the Legal, Constitutional and Administrative Review Committee of the *Freedom of Information Act 1992*.

The QNU represents in excess of 26,000 nurses employed in both the public and private (for profit and not for profit) sectors in Queensland.

The union has a keen interest in Freedom of Information (FOI) matters and has made a number of submissions in the past on the issues of FOI and privacy. The QNU has utilised both state and federal FOI legislation to advance the collective and individual interests of membership. In our submission we will draw on this past experience to highlight particular issues of concern.

Officials of the QNU are willing to appear before public hearings held by the committee.

Should you require any additional information or clarification of issue raised in our submission please do not hesitate to contact QNU Project Officer Beth Mohle or QNU Industrial Officer Steve Ross on (07) 3840 1444.

Yours sincerely,

Gay Hawksworth
SECRETARY

Queensland Nurses' Union

Submission on the Review of the

Freedom of Information Act 1992

Submitted 14 May 1999

A. Whether the basic purposes of the freedom of information legislation in Queensland have been satisfied, and whether they now require modification.

> *"A popular government, without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy; or perhaps both. Knowledge will forever govern ignorance: and a people who mean to be their own governors, must arm themselves with the power which knowledge gives." US President James Madison – 1822*[1]

Access to information relating to decision-making processes is essential to the appropriate functioning of a healthy democracy. Freedom of Information (FOI) legislation is pivotal to ensuring openness, accountability and responsibility in government and meaningful participation by the public in the political process. Indeed, following the Fitzgerald Inquiry the Electoral and Administrative Review Committee (EARC) correctly identified FOI as a "foundational matter" that needed to be addressed as a matter of priority. The introduction of such legislation was central to the Fitzgerald reform process and the democratisation of this state.

The FOI Bill was introduced to State Parliament on 5 December 1991 by the then Attorney General Hon Dean Wells. In his second reading speech the Attorney General stated:

> *"The Bill enables people to have access to documents used by decision-makers and will, in practical terms, produce higher level accountability and provide a greater opportunity for the public to participate in policy-making and government itself."*[2]

Attorney General Wells concluded the second reading speech:

> *"... this Bill will effect a major philosophical and cultural shift in the institutions of Government in this State. The assumption that information held by government is secret unless there are reasons to the contrary is to be replaced by the assumption that information held by Government is available unless there are reasons to the contrary. The perception that Government is something remote from the citizen and entitled to keep its processes secret will be replaced by the perception that Government is merely the agent of its citizens, keeping no secrets other than those necessary to perform its functions as an agent. Information, which in this modern society is power, is being democratised."*[3]

In the absence of any meaningful performance data on the operation of the Act, it is difficult to actually measure to what extent the implementation of FOI legislation has increased accountability and public input into the policy-making process. There is no disputing that improvements have been made but the base from which comparisons can be made was a very low one. It must also be remembered that, although important in itself, FOI legislation was merely one plank of a significant public sector reform agenda implemented by the Goss government. It is difficult therefore to ascertain with any certainty the part that FOI alone has played in bringing about cultural shifts within the government departments.

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[1] Quoted in *Freedom of Information Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978, and aspects of the Archives Bill 1978* - Australian Government Publishing Service, Canberra 1979, page 23.

[2] Queensland Legislative Assembly *Hansard*, 5 December 1991, page 3848.

[3] Queensland Legislative Assembly *Hansard*, 5 December 1991, page 3850.

Given the difficulty experienced accessing meaningful performance data, our submission to this review of the Queensland FOI legislation will be based on the experiences of the Union and our observations of the operation of the Act.

The existence of FOI legislation certainly has improved access to information, especially information relating to the personal affairs of an applicant. For example, Queensland Health has made great efforts since the implementation of the FOI Act to assist individuals to obtain access to their medical records held by the department. This information is now usually provided by less formal administrative access arrangements. In the vast majority of cases it is no longer necessary to utilise FOI legislation to obtain access to personal medical records. While there is still some resistance on the part of individual health care providers, by and large there has been a significant attitudinal change on the part of health care providers in the public sector with regard to this issue in recent years. Unfortunately, in our opinion, the same cannot be said for the approach to providing access to information that is not of a personal nature. Much more needs to be done to promote a "pro-disclosure" culture within the Queensland public sector.

The Queensland Nurses' Union (QNU) has used FOI legislation while acting in the individual and collective interests of membership. When the union has assisted members to use FOI to access information of a personal nature there has generally been no difficulty in gaining accessing this information. For example, the Union has in the past advised members to gain access to their WorkCover files via both administrative access arrangements and FOI processes when appealing a decision of that body. In these cases recourse to FOI is required because under administrative access arrangements information relating to internal decision making processes is not provided. There are also inconsistencies relating to the timeframes that apply to the processing of FOI applications (generally up to 45 days in these cases) and the timeframes for lodging WorkCover appeals (28 days). Administrative access to files (excluding information that is often of particular relevance in appeal processes) is usually granted within 28 days. In our view there is an urgent need for bodies such as WorkCover to adopt a more "pro-disclosure" approach and grant access to complete information via administrative access arrangements in the first instance. This information is currently being obtained under FOI anyway. If this information were made available via administrative access then unnecessary duplication of effort would be avoided.

The QNU has also successfully assisted members to use FOI to amend false or misleading information contained on personnel files. In these cases members were unable to gain access to their files via administrative access arrangements and therefore were forced to utilise FOI processes to amend records. Although members have been satisfied with the outcome in these instances, it seems time wasting for both parties to resort to the formality of FOI in these circumstances. Again, in our opinion a "pro disclosure" culture needs to be promoted and adopted within the Queensland public sector.

The QNU has however experienced difficulty in obtaining access to information in the collective interests of our members. This information can usually be categorised as information that is not of a personal nature and relates to the policy decision making processes of government. In our view this is where the basic purposes of the FOI Act are not being met. There is still an assumption that information relating to the decision-making processes must be kept secret. This reluctance to provide information is a serious impediment to open and accountable government in this state.

The way in which FOI legislation is an essential accountability tool not only for the public but also for government ministers was highlighted in the 1979 Senate Standing Committee report on Freedom of Information:

> *"Freedom of information legislation is a means not only of ensuring the more direct accountability of public servants to the public, but also of ensuring greater accountability of public servants to their ministers. It is in the interests of ministers themselves to expose the advice of their officials to wider public scrutiny so as to improve the quality of that advice and ensure that all possible options have been canvassed. Freedom of information legislation can be in the interests of the public services and agencies whose processes are opened up to the public gaze too, for it will lead to more adequate recognition of the effectiveness of the public service."* [4]

Based on our experience with departments such as Queensland Health, the QNU believes however that the cultural shift required of public servants that would ensure greater public accountability for advice given and decisions made has not occurred to a great extent. Certainly the Administrative Law sections within departments have a greater understanding of this essential rationale for the implementation of FOI legislation. This appreciation unfortunately often does not extend beyond FOI practitioners within departments. (This sometimes results in considerable tension and frustration within agencies when the FOI decision makers have to deal with resistance from other sections of their department who are reluctant to act in accordance with the spirit of the FOI legislation.) There is not, in our view, the general promotion of a "pro-disclosure" culture within many departments. More needs to be done in the area of training of all staff (from Director General level down) on the philosophical foundations and appropriate application of FOI legislation in order to promote the adoption of a "pro-disclosure" culture.

Difficulties in affecting cultural change can not be attributed to attitude alone. It is however important to also consider the impact that information management practices and policies have on the administration by agencies of the FOI Act. The QNU is unaware of a consistent approach to information management across agencies. From our experience it certainly appears that there is no consistent approach. The manner in which information is stored and retrieved by agencies often makes the job of the FOI decision-maker more difficult. We therefore believe that it would be appropriate to review information management processes and policies to ensure that these facilitate the release of information via FOI or administrative arrangements. The way in which agencies communicate information about their FOI processes also needs to be reviewed. A simple examination of departmental websites, for example, reveals that there is no consistent approach to the advertising of agency FOI processes.

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[4] *Freedom of Information Report by the Senate Standing Committee on Constitutional and legal Affairs on the Freedom of Information Bill 1978, and aspects of the Archives Bill 1978* – Australian Government Publishing Service, Canberra 1979, page 26.

The QNU has experienced (and continues to experience) considerable difficulty in accessing meaningful information on Queensland Health decision making processes. We have sought access to information pertaining to issues that are of direct relevance to our membership but are seen, in the eyes of Queensland Health officials, as being in some way "controversial". The department has in these cases exhibited extreme reluctance to release all the relevant information. The QNU has been most dissatisfied with the extreme secrecy exhibited and the reluctance to open up their decision-making processes to public scrutiny. Examples of QNU FOI applications of this nature include our application for access to information about the 1993 decision to slash nursing career structure positions, our 1993 and 1994 applications (under both state and federal FOI legislation) for information about to the privatisation of Greenslopes Repatriation Hospital and most recently our late 1998 (pending) application relating to the collocation of public and private health facilities. In all of these instances we encountered extreme reluctance on the part of Queensland Health to release meaningful information in the context of the established industrial relations consultative processes. We were therefore forced to utilise FOI processes in order to scrutinise the deliberative processes of the department and the advice given to the Minister and Cabinet on these matters.

Our most recent pending application for information about collocation arrangements should be of particular interest to members of this committee given its relevance to the current inquiry by the Parliamentary Public Works Committee into the Noosa and Robina hospitals projects. The QNU is still awaiting the outcome of our FOI application on this matter. We relayed our experiences with respect to undue secrecy by Queensland Health in relation to this matter to the Public Works Committee. This Committee also who appeared to be experiencing difficulty in accessing meaningful information from the department in relation to the contractual arrangements for the Noosa and Robina projects. We expressed to that committee our fear that they may experience the same difficulty accessing information that was experienced by a South Australian parliamentary committee investigating the privatisation of Modbury hospital. The health department in South Australia had consistently refused to provide relevant information to the parliamentary committee, thereby placing these contractual arrangements above the scrutiny of the parliament and the public. We await with considerable interest the report of the Public Works Committee on the Noosa and Robina projects. These could be of relevance to the deliberations on the review of the FOI Act.

These types of examples are now quite familiar given the grossly inappropriate trend of governments across Australia to "contract out" the provision of government services. Unfortunately governments have largely failed to put in place the necessary legislative framework to meet the significant challenges posed by the blurring of the boundaries between public and private sectors. (Later in this submission we will make specific recommendations pertaining to the extension of FOI provisions in circumstances where government services have been contracted out to the private sector.)

Before concluding this section of our submission we wish to briefly comment on one particular issue of concern that we believe is central to the consideration of whether the basic purposes of the Act have been satisfied – the issue of the abuse of the Cabinet processes to ensure that documents are excluded from public scrutiny. This activity has been facilitated by the 1993 and 1995 amendments to the FOI legislation that resulted in a broadening of the Cabinet/Executive Council exemption provisions of the Act. Governments of both major parties in recent times have in our opinion, abused these provisions.

The Information Commissioner has commented in a number of his annual reports on the need to wind back the overly broad exemption provisions of the Act. The QNU supports the concerns raised by the Information Commissioner in his 1995-96, 1996-97 and 1997-98 Annual Reports relating to these issues. We welcome the initiative of Premier Beattie when he introduced in 1998 (as Opposition Leader) a private member's bill aimed at preventing the abuse of Cabinet secrecy provisions. To quote from his second reading speech:

> *"This Bill amounts to a legislative promise that my Government will not sneak documents into Cabinet meetings as a device to hide them from the public. The Bill makes it clear that the Cabinet exemption from FOI does not arise when material is submitted to Cabinet for the improper purpose of avoiding FOI access."*[5]

We wholeheartedly welcome the spirit of this initiative of the Premier. Considerable cynicism exists within the general community at present given the often blatant past abuses of the Cabinet exemption provisions. There are far too many examples of documents literally being "wheeled in" to the Cabinet room (but not being genuinely considered by Cabinet) in order to qualify for the exemption provisions. Is it any wonder that there is an estrangement of the community from the political process and a general lack of faith in the openness and accountability of government in this state? We believe it is essential that the faith that the public has lost with respect to the efficacy of FOI legislation be restored as a matter of urgency.

The QNU believes that it is essential that urgent action be taken to address this issue. We believe there is a need for bipartisan support of legislative amendments to restore community faith in the efficacy of FOI legislation. We believe the government must demonstrate their commitment to FOI by "winding back" the current exemption provisions relating to Cabinet processes so they can not be abused. The QNU would defer to administrative law practitioners with respect to the best mechanism for achieving this desired outcome. We therefore refer the committee to Chapter 3 of the 1997-98 Sixth Annual Report of the Information Commissioner and the recommendations contained therein relating to the winding back of Cabinet exemption provisions.

To conclude our submission on this section of the inquiry we wish to place on record that we believe certain significant purposes of the FOI Act have not been met. Some of these deficiencies have been highlighted above. The QNU believes it is necessary to strengthen aspects of the current legislation so that a consistent "pro-disclosure" culture is promoted across the public sector. Suggested amendments to the relevant sections of the legislation will be made later in this submission. The QNU also wishes to make some recommendations relating to strategies that may assist to promote a "pro-disclosure" culture within the Queensland public sector. These recommendations are as follows:

Recommendation 1: **That a whole of government approach be adopted to develop strategies aimed at promoting an open and accountable culture within government agencies. This should include improved training for departmental officials at all levels on the philosophy underpinning FOI legislation and the importance of such legislation as an accountability mechanism.**

[5] Queensland Legislative Assembly *Hansard*, 4 March 1998, page 119.

Recommendation 2:	**That performance criteria for Director Generals/CEOs and agencies be reviewed to ensure that these include a commitment to the principles of openness and accountability.**
Recommendation 3:	**That as a matter of urgency current "administrative access arrangements" be reviewed to ensure that these facilitate the release of <u>all</u> relevant information of a personal nature via these arrangements (rather than having to resort to FOI processes) wherever possible. Further to this, that a central agency develop standardised guidelines for agencies promoting disclosure of information of a personal nature via administrative access arrangements.**
Recommendation 4:	**That public sector information management processes and policies be reviewed to ensure that they facilitate (rather than hinder) the release of information via FOI of administrative access arrangements.**
Recommendation 5:	**That as a sign of commitment to the principles underpinning FOI legislation that government "lead by example" and amend the provisions of the current act to ensure that the exemption provisions relating to Cabinet matters are not abused.**

B. Whether the FOI Act should be amended, and in particular:

(i) whether the object clauses should be amended;

As discussed elsewhere in this submission the QNU believes that the principle of access to information is critical to effective and democratic government. This review is occurring at a time however when the boundaries of government are becoming less easy to define as a consequence of , for example, contracting out of government services, the corporatisation of some governmental functions and authorities, joint ventures between government and the private sector and privatisation.

It is vital that these developments do not result in a restriction of access to information, yet increasingly this appears to be the case.

In order to retain participation in government, let alone extend it, access should be available to information on the functioning and functions of government irrespective of how or where they are carried out.

Therefore the object clauses of the Act need to reflect these developments and ensure access to information at the broadest possible level.

Recommendation 6:	**That the object clauses of the Act reflect the right of access of the community to information on all the functions and processes of government irrespective of whether they are carried out by a government body.**

(ii) whether, and to what extent, the exemption provisions in Part 3 Division 2 should be amended

It is the view of the QNU that the current exemption provisions are too broad. In an environment where there remain cultural and attitudinal barriers to the release of information (see discussion above) the broad scope of the current Part 3 Division 2 matters gives excessive licence to restrict access to requested information. Specifically we make comments in relation to the following provision:

Section 36

See discussion above.

The QNU believes that the scope of this exemption should be restricted to the following:

(a) it has been submitted to Cabinet at the time the FOI application is made
(b) it is in the possession of a Minister for the purposes of Submission to Cabinet at the time the FOI application is made

(NB: Definitions to be amended accordingly)

This would have the effect of preserving Cabinet confidentiality while preventing reactive actions seeking to prevent access to information.

Section 37

See discussion above.

The QNU believes that the scope of this exemption should be restricted to the following:

(a) it has been submitted to Executive Council at the time the FOI application is made
(b) it is in the possession of a Minister for the purposes of Submission to Executive Council at the time the FOI application is made

(NB: Definitions to be amended accordingly)

This would have the effect of preserving confidentiality while preventing reactive actions seeking to prevent access to information.

Section 38

The operation of the section is dependent upon the understanding of the public interest. The presumption should be that it is in the public interest to release the information.

Section 40

(d) delete

The operation of the section is dependent upon the understanding of the public interest. The presumption should be that it is in the public interest to release the information.

Section 41

The operation of the section is dependent upon the understanding of the public interest. The presumption should be that it is in the public interest to release the information.

Section 45

The QNU believes this section should be broken up into its component parts, ie trade secrets, research and business affairs. In addition further distinction needs to be made between individual and corporate or agency interests. In addition definitions should be provided for the terms used. It has been our experience that increasingly terms such as 'commercial in confidence' have become a handy generic excuse to prevent access to information.. It is vital that this trend be stopped.

As elsewhere the operation of the section is dependent upon the understanding of the public interest. The presumption should be that it is in the public interest to release the information.

Recommendation 7: **That as a matter of urgency guidelines for a standardised public interest test be developed for use across agencies. Such guidelines for a public interest test should be developed following public consultations and should be made known to the public.**

(iii) whether the ambit of the application of the Act, both generally and by operation of section 11 and section 11A, should be narrowed or extended;

As mentioned above the QNU supports a narrowing of the existing exemptions. It follows therefore that we believe the ambit of the application of the Act should be extended. In particular we have concerns over access to information pertaining to privatisation and contracting out.

We draw the Committee's attention to the Administrative Review Council's recommendations to the Federal Attorney General contained in their report on the contracting out of government services. (A copy of these recommendations can be found as an attachment to this submission).

The Committee's attention should also be drawn to the definition of "Public Authority" contained in the Act which states in part that a public authority is:

> *"(c) another body (whether or not incorporated) – (i) that is (A) supported directly or indirectly by government funds or other assistance or over which government is in the position to exercise control".*

There are two possible options to address our concerns regarding access to information held by private sector operators providing government services. Firstly, the definition of a "public authority" could be extended to ensure that it covers private sector organisations in some form of contractual arrangement with government. Secondly, that all information generated and relating to an arrangement with a private sector organisation is deemed to be in the possession of the government, (and therefore accessible under FOI) other than that created by the private sector organisation.

We do not support any expansion of either section 11 or 11A of the Act either by legislation or regulation.

Recommendation 8: **That the ambit of the Act be expanded so that it applies to private sector organisations in a contractual arrangement with the government to provide some form of service.**

(iv) whether the FOI Act allows appropriate access to information in electronic and non-paper formats;

The QNU believes there should be no distinction between paper, non-paper and electronic information.

Recommendation 9: **That there should be no distinction between paper, non-paper and electronic information.**

(v) whether the mechanisms set out in the Act for internal and external review are effective, and in particular, whether the method of review and decision by the Information Commissioner is excessively legalistic and time consuming;

It is difficult to make a general assessment of whether the internal and external review mechanisms are effective given the limited information made available via the FOI reporting processes in Queensland. The information only allows us to make an extremely broad assessment of the appropriateness of these processes. This assessment can also only be made on 1996-97 data given that the 1997-98 Freedom of Information Report provided by the Department of Justice is not yet publicly available. It is also difficult to make a valid assessment of those matters dealt with via internal and external review for the 1996-97 year given the significant backlog of cases within the office of the Information Commissioner. Our comments on this particular term of reference will, therefore, be brief and broad.

The QNU believes it is necessary to maintain the current arrangements for internal and external review of FOI decisions. It is essential to maintain the office of an independent Information Commissioner. Based on the recent experiences of delays in the processing of FOI applications, as well as delays in the internal and external review processes, the QNU believes that it is essential there be a review of the adequacy of resources currently provided for the operation of the FOI Act. It appears some agencies are currently experiencing extreme difficulties in meeting statutory obligations because of excessive workload demands. We are advised, for example, that the Queensland Health Administrative Law Unit has been under considerable pressure over the last six months given that they have been inundated with complex requests for information. Given the peaks and troughs of demand it may be appropriate for a centrally established "pool" of experienced FOI practitioners to be established for agencies to access at times of extreme demand.

The QNU has experienced delays in the processing of reviews via the Office of the Information Commissioner. Given the complexity of some of these cases delays are to be expected to some extent. However, undue delays in dealing with matters have caused unnecessary stress to QNU members. The QNU believes the current delays are unacceptable and action must be taken to address this issue. We believe that delays experienced in the external review process could possibly be addressed by the provision of a further small increase in review staff. The considerable increase in output from the Office of Information Commissioner that has occurred in the 1997-98 reporting period should be acknowledged. This has made inroads into the backlog of cases and was achieved with a modest increase in staff via additional temporary funding. The Information Commissioner should be consulted about whether the resourcing requirements of this office are currently being met.

The QNU believes a statutory time frame should be established for external review with a decision required between 30 and 60 days after an appeal is made.

In order to assist the Information Commissioner the provision of investigative powers should be considered where the Commissioner is of the opinion they are being obstructed in their function and/or the exercise of such powers would assist the speedy resolution of the matter.

The QNU does not find the method of review or decisions made by the Information Commissioner unduly legalistic. Support for our view is best evidenced by the significant number of cases referred to the Information Commissioner that are resolved following mediation.

Recommendation 10:	**That the current internal and external FOI review arrangements be maintained but that time limits be established for external review as suggested above.**
Recommendation 11:	**That there be a review of the adequacy of FOI resources currently provided by agencies.**
Recommendation 12:	**That consideration be given to the establishment of a central "pool" of experienced FOI practitioners be established so that agencies can access the additional FOI services in times of extreme demand.**

Recommendation 13: **That as a matter of urgency, the Information Commissioner be consulted regarding the adequacy of resources and investigative powers provided to that office and that additional resources be provided where necessary/appropriate to deal with the current backlog of cases.**

(vi) the appropriateness of, and need for, the existing regime of fees and charges in respect of both access to documents and internal and external review;

The QNU takes the Committee to the 1991 Report of the Parliamentary Committee for Electoral and Administrative Review *Freedom of Information for Queensland,* which states:

> *"The Committee acknowledges that the fee charges proposed by EARC will not make the administration of freedom of information self funding. It should be frankly conceded that freedom of information costs money and that the competing demands on government resources, for example, for schools, hospitals and police are considerable. The Committee considers, however, that a well-resourced, system of freedom of information is essential for enabling citizens to gain access to government information, which is in turn an essential prerequisite for a health democracy."*[6]

The QNU believes that the cost of administration and access to FOI should never be an impediment to the principles behind the provision of information and government should commit adequate resources to this end.

Recommendation 14: **That there be no increases to charges for access to information and that Government commit adequate resources to ensure the appropriate operation of FOI legislation in this State.**

(vii) whether amendments should be made to minimise the resource implications for agencies subject to the FOI Act in order to protect the public interests in proper and efficient government administration, and, in particular:

- *whether section 28 provides an appropriate balance between the interests of applicants and agencies;*
- *whether data collection and reporting requirements, which inform the parliamentary and public understanding of how well the FOI Act is operating in Queensland, exceed what is necessary to achieve their legislative purpose;*
- *whether time limits are appropriate.*

[6] *Freedom of Information for Queensland* a Report of the Parliamentary Committee for Electoral and Administrative Review, Brisbane, 1991, Page 32.

It is difficult to make a definitive statement on the resource implications for agencies given that current reporting on the operation of FOI in Queensland fails to provide sufficient detail on the issues raised. According to the *Freedom of Information Annual Report 1996-97* only a handful of cases that went to internal review were denied access to information under Section 28 of the Act. There is no other readily available data to back up an assertion that the processing of FOI applications is placing an unreasonable demand on the resources of agencies. Indeed this report is not detailed enough to make a definitive statement on the matters raised above. This report should be compared to its federal counterpart, the *Freedom of Information Act 1982 Annual Report.*

The report on the operation of the federal act is much more "user friendly" and provides more detailed information than the Queensland annual report. In the Federal report, for example, the estimated costs attributable to the administration of the federal legislation, for the 1997-98 year was $12,191,478. Reports were also provided on an agency-by-agency basis. These costs are based on estimates provided by agencies and although they are not exact they provide a valuable insight that is not available in the Queensland jurisdiction. The report does express some concern about the inadequacy of the data collected and states that the Attorney General's Department is currently implementing strategies to improve the quality of statistical information. For example, they are planning to implement an Internet-hosted data base system for the electronic lodgement of statistics.

Given that the report on FOI data collected in Queensland is less comprehensive than its federal counterpart, the QNU believes that it would be difficult to sustain an argument that these data collection and reporting requirements "exceed what is necessary to achieve their legislative purpose". It may be the case that the current FOI reporting systems in Queensland are not efficient or effective, and if this is the case it would be appropriate to investigate strategies to improve processes and the quality of statistical data available, (for example, the potential use of Internet-hosted data base systems).

With respect to whether time limits are appropriate, it is again the case that we can only rely on data provided in the Annual FOI Report and our own experience to make a judgement. According to the *Freedom of Information Report1996-97:*

> *"The number of applications processed within 45 days after receipt by an agency fell slightly from 62.8% in 1995/96 to 66.4% in 1996/97. Applications processed within 60 days after receipt by an agency also fell from 11.8% in 1995/96 to 10.6% in 1996/97. Applications processed within 75 days after receipt by an agency increased slightly from 5.5% in 1995/96 to 5.8% in 1996/97 while applications which took longer than 75days to process increased from 14.5% in 1995/96 to 17.2% in the current reporting period."*[7]

The report also states that when the responses from two major agencies (Queensland Police Service and Department of Families, Youth and Community Care) are removed then the response times of all other state government agencies improve markedly.

Based on the information available to us and the experience of the QNU, we believe that the timeframes as they currently stand in the FOI legislation are appropriate.

[7] *Freedom of Information Annual Report 1996-1997,*Department of Justice, Brisbane 1997, page 12.

Recommendation 15:	**That efforts be made to improve the current FOI Reporting arrangements in Queensland, and in particular that the adoption of innovative and time saving reporting arrangements (eg Internet-hosted data base systems) be actively considered.**
Recommendation 16:	**That mechanisms be developed to ensure that timely assistance is provided to agencies identified as being unable to meet statutory FOI timeframes.**
Recommendation 17:	**That there be no change to the timeframes for the processing of FOI applications as they currently stand in the legislation.**

(viii) whether amendments should be made to either section 42(1) or section 44(1) of the Act to exempt from disclosure information concerning the identity or other personal details of a person (other than the applicant) unless its disclosure would be in the public interest having regard to the use(s) likely to be made of the information;

The QNU does not wish to make any submissions relating to amendments to section 42(1) of the FOI Act. We do however wish to make a brief statement about the necessity to amend section 44(1) in light of a recent high profile Victorian case involving the disclosure of information identifying nurses to a convicted murderer.

This particular case, made public early this year, involved the disclosure of the names of 51 nurses on duty at a Melbourne hospital on the night a triple homicide was committed. The convicted murderer claimed he could not have committed the crime as he was visiting his partner who was an inpatient at the Frankston Hospital at the time of the murders. He sought access to the names of nurses on duty at the hospital on that shift in the hope that someone could confirm he was at the hospital at the time the crimes were committed.

This case is of particular concern on a number of levels. Most importantly, it is feared that this case will be used as the impetus for the Kennett government to review FOI legislation in that state and significantly restrict information available under FOI. It is also of concern because of the hospital's failure to mount a satisfactory case against disclosure on behalf of its employees or indeed to ever consult these employees regarding the release of this information. The hospital and the health department also failed to lodge an appeal against the original decision of the Victorian Civil and Administrative Tribunal (VCAT).

This case also highlights the tension that exists between FOI and privacy considerations. It is the view of the QNU that these tensions could be largely resolved if the state FOI legislation were to be amended to reflect the relevant provisions of the federal FOI ACT rather than refer to "matter relating to person affairs"[S44(1) Qld Act]. At Section 41(1) of the *Freedom of Information Act 1982 Clth,* refers to disclosure of personal matter in the following way:

> *"A document is exempt if its disclosure under this Act would involve the unreasonable disclosure of personal information about any person (including a deceased person)."*

The Interpretation section of this Act defines personal information as:

> *"information or an opinion (including information forming part of a data base), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent or can reasonably be ascertained, from the information or opinion."*

This Act has obviously taken into account the provisions of the federal *Privacy Act* and attempts to balance competing rights to privacy and access to information

The QNU believes that, in light of this extraordinary Victorian case and the privacy concerns (amongst others) that it highlights, it is necessary to amend the Queensland FOI legislation to take account of these concerns.

Recommendation 18: **That section 44(1) of the FOI Act be appropriately amended so as to better reflect an intent to ensure an appropriate balance between individual privacy considerations and the right to access of information.**

(ix) whether amendments should be made to the Act to allow disclosure of material on conditions in the public interest (for example, to a legal representative who is prohibited from disclosing it to the applicant);

In light of the recent Victorian case highlighted above, it may be appropriate to consider amendments to the FOI Act that would allow qualified disclosure of material when it is determined to be in the public interest. (For example, it might be appropriate for information to be released to a legal representative in specific limited circumstances). The QNU believes that it would be appropriate to review the current legislation to see whether it would be appropriate to amend relevant sections of the legislation to allow for qualified release of information in certain defined circumstances.

Recommendation 19: **That careful consideration be given to whether relevant sections of the FOI legislation be amended to allow for qualified release of information that is in the public interest.**

C. Any related matter.

At this stage the QNU does not wish to make any further submissions in relation to any other matter.

> ***"Information is the lynch-pin of the political process. Knowledge is, quite literally power. If the public is not informed, it can not take part in the political process with any real effect." Fitzgerald Report*** [8]

> ***"Without information, there can be no accountability. It follows that in an atmosphere of secrecy or inadequate information, corruption flourishes. Wherever secrecy exists, there will be people who are prepared to manipulate it." Fitzgerald Report*** [9]

[8] Report of *Commission of Inquiry Into Possible Illegal Activities and Associated Police Misconduct,* AG (Tony) Fitzgerald (Chair), 1989, Brisbane, page 126.
[9] Report of *Commission of Inquiry Into Possible Illegal Activities and Associated Police Misconduct,* AG (Tony) Fitzgerald (Chair), 1989, Brisbane, page 124.

RECOMMENDATIONS

Recommendation 1:	That a whole of government approach be adopted to develop strategies aimed at promoting an open and accountable culture within government agencies. This should include improved training for departmental officials at all levels on the philosophy underpinning FOI legislation and the importance of such legislation as an accountability mechanism.
Recommendation 2:	That performance criteria for Director Generals/CEOs and agencies be reviewed to ensure that these include a commitment to the principles of openness and accountability.
Recommendation 3:	That as a matter of urgency current "administrative access arrangements" be reviewed to ensure that these facilitate the release of all relevant information of a personal nature via these arrangements (rather than having to resort to FOI processes) wherever possible. Further to this, that a central agency develop standardised guidelines for agencies promoting disclosure of information of a personal nature via administrative access arrangements.
Recommendation 4:	That public sector information management processes and policies be reviewed to ensure that they facilitate (rather than hinder) the release of information via FOI of administrative access arrangements.
Recommendation 5:	That as a sign of commitment to the principles underpinning FOI legislation that government "lead by example" and amend the provisions of the current act to ensure that the exemption provisions relating to Cabinet matters are not abused.
Recommendation 6:	That the object clauses of the Act reflect the right of access of the community to information on all the functions and processes of government irrespective of whether they are carried out by a government body.
Recommendation 7:	That as a matter of urgency guidelines for a standardised public interest test be developed for use across agencies. Such guidelines for a public interest test should be developed following public consultations and should be made known to the public.
Recommendation 8:	That the ambit of the Act be expanded so that it applies to private sector organisations in a contractual arrangement with the government to provide some form of service.

Recommendation 9:	That there should be no distinction between paper, non-paper and electronic information.
Recommendation 10:	That the current internal and external FOI review arrangements be maintained but that time limits be established for external review as suggested above.
Recommendation 11:	That there be a review of the adequacy of FOI resources currently provided by agencies.
Recommendation 12:	That consideration be given to the establishment of a central "pool" of experienced FOI practitioners be established so that agencies can access the additional FOI services in times of extreme demand.
Recommendation 13:	That as a matter of urgency, the Information Commissioner be consulted regarding the adequacy of resources and investigative powers provided to that office and that additional resources be provided where necessary/appropriate to deal with the current backlog of cases.
Recommendation 14:	That there be no increases to charges for access to information and that Government commit adequate resources to ensure the appropriate operation of FOI legislation in this State.
Recommendation 15:	That efforts be made to improve the current FOI Reporting arrangements in Queensland, and in particular that the adoption of innovative and time saving reporting arrangements (eg Internet-hosted data base systems) be actively considered.
Recommendation 16:	That mechanisms be developed to ensure that timely assistance is provided to agencies identified as being unable to meet statutory FOI timeframes.
Recommendation 17:	That there be no change to the timeframes for the processing of FOI applications as they currently stand in the legislation.
Recommendation 18:	That section 44(1) of the FOI Act be appropriately amended so as to better reflect an intent to ensure an appropriate balance between individual privacy considerations and the right to access of information.
Recommendation 19:	That careful consideration be given to whether relevant sections of the FOI legislation be amended to allow for qualified release of information that is in the public interest.

Attachment

Recommendations from the Report to the Attorney General From the Administrative Review Council titled

The Contracting Out of Government Services

RECOMMENDATIONS

Recommendation 1

Agencies should be required to keep relevant information relating to the management and monitoring of contracts such as will enable the evaluation of the effectiveness of the delivery of particular services. Such information should include details about the performance standards required of contractors, the actual performance of contractors and the number and types of complaints received by the agency and the contractor. The information kept by agencies should be publicly available. Agencies should include provisions in their contracts to ensure that they are able to comply with this recommendation.

Recommendation 2

Agencies should include provisions in their contracts that require contractors to keep and provide sufficient information to allow for proper Parliamentary scrutiny of the contract and its management. The information required to meet this need will vary from contract to contract according to a number of factors including the value of the contract, the nature of the service to be delivered under the contract and the characteristics of the service's recipients.

Recommendation 3

Agencies should include provisions in contracts which require contractors to provide sufficient information to the agency, to enable the Auditor-General to fulfil his or her role as the external auditor of all government agencies.

Recommendation 4

Agencies should consider when letting a contract whether it would be appropriate to require the contractor to agree to the Auditor-General carrying out a performance audit of their performance under the contract.

Recommendation 5

When preparing contracts, agencies need to be satisfied that contractors will be able to deal with complaints properly. Contractors' complaint-handling procedures should normally satisfy the standards identified by Standards Australia including the recording of complaints and their outcomes. Where the contractor is a small business, simpler complaint-handling procedures may be appropriate. Agencies should also consider what information they should require from contractors about complaints to ensure that contractors' performance can be properly monitored.

Recommendation 6

Where an industry-based complaint mechanism is in place, people with a complaint about a contracted service should have the option of using that mechanism rather than complaining to the relevant agency or to the Commonwealth Ombudsman. Where appropriate, the Commonwealth Ombudsman should be able to refer a complaint about a contractor to the industry body in the first instance.

Recommendation 7

Industry groups, contractors, service recipients, peak organisations and government agencies should work together to develop industry-based complaint-handling systems that comply with benchmarks identified in *Benchmarks for Industry-Based Customer Dispute Resolution Schemes*.

Recommendation 8

Agencies should be responsible for ensuring that service recipients are made aware of all of their avenues of complaint, either by providing this information directly to service recipients or by requiring contractors to do so.

Recommendation 9

Members of the public who have a complaint about a government contractor should be able to make the complaint to the Commonwealth Ombudsman.

Recommendation 10

The jurisdiction of the Commonwealth Ombudsman should extend to the investigation of actions by a contractor under a government contract. The Ombudsman should also be able to deal with contractors informally to resolve complaints under the *Ombudsman Act 1976*. Any statutory extension or clarification of the Ombudsman's jurisdiction should recognise that government agencies retain responsibility for proper management of their contracts.

Recommendation 11

In dealing with complaints against contractors the Ombudsman should have the same powers to obtain information and documents from government contractors as he or she currently has in respect of agencies under investigation.

Recommendation 12

Where the Ombudsman is unable to resolve a complaint about a contractor informally, the Ombudsman should be able to make a formal report to the agency, the Prime Minister and the Parliament about the complaint.

Recommendation 13

It would be appropriate and desirable for agencies to draft contracts in such a way that contractors would be contractually obliged to act on the recommendations of the Ombudsman.

Recommendation 14

The option of complaining to the Ombudsman should be in addition to avenues of complaint which should be provided by the contractor and any complaint-handling mechanisms provided by government agencies or industry arrangements. The Ombudsman should have a discretion to redirect complainants to contractors, industry-based complaint-handling schemes or the agencies where appropriate.

Recommendation 15

The *Freedom of Information Act 1982* should be amended to provide that all documents in the possession of the contractor that relate directly to the performance of the contractor's obligations under the contract would be deemed to be in the possession of the government agency.

Recommendation 16

The *Freedom of Information Act 1982* should be further amended to require contractors to provide these documents to the government agency when an FOI request is made.

Recommendation 17

All agencies involved in contracting out should regularly provide training to staff on the meaning and operation of the FOI Act and in particular the meaning and application of the exemption provisions.

Recommendation 18

The Council reiterates the recommendation in the FOI Report for the establishment of an FOI Commissioner who would be able to assist agencies in dealing with FOI requests relating to contracted out services. In the absence of an FOI Commissioner, the Attorney-General's Department should issue guidelines to government agencies on how the exemptions in section 43 and 45 should be interpreted and applied by government agencies.

Recommendation 19

Guidelines should be developed and tabled by the Attorney-General setting out the circumstances in which Commonwealth agencies will treat information provided by contractors as confidential.

Recommendation 20

Where a contractor exercises statutory decision-making powers that would be subject to merits review if the decision were made by an agency officer, the decisions of the contractor should also be subject to merits review.

Recommendation 21

Where a contractor is to exercise statutory decision-making powers, agencies should ensure that the contractor is required under the terms of the contract to give effect to any decision of a merits review tribunal reviewing the contractor's decision.

Recommendation 22

The *Administrative Decisions (Judicial Review) Act 1977* should extend to include a decision of an administrative character made, or proposed to be made, by an officer under a non-statutory scheme or program, the funds for which are authorised by an appropriation made by the Parliament.

Recommendation 23

Where there is a change in a service from a statutory scheme to a non-statutory scheme, access to effective merits review of decisions relating to that service should not be lost or diminished.

Recommendation 24

Where services are delivered under a new non-statutory scheme, the agency should ensure that effective merits review of decisions under that scheme is available where appropriate.

Recommendation 25

Agencies should consider when contracting out a service, whether legislation should, in appropriate circumstances, provide third parties with the ability to enforce particular terms of the contract. Any contractual remedies so provided should not detract from other remedies such as complaint-handling mechanisms and should not relieve the agency from responsibility of enforcing the contract itself.

Recommendation 26

Agency heads should be empowered under the existing arrangements for the Chief Executive's Instructions to be able to make payments to people who have suffered loss or damage as a result of the actions of a contractor where as a matter of common sense either the contractor or the agency is liable for the damage.

Recommendation 27

The Ombudsman should monitor claims and payments under the scheme.

Recommendation 28

As a general rule, where an agency's contract involves the provision of services, the agency should develop effective mechanisms for obtaining information from service recipients, either directly or through community groups or peak organisations, which can be used in defining the service.

Recommendation 29

Agencies should require contractors to keep and make available records to enable the agencies' accountability for management of the contract to be maintained.

Recommendation 30

As a general rule, where an agency's contract involves the provision of services, the agency should develop effective mechanisms for obtaining information from service recipients, either directly or through community groups or peak organisations, which can be used to monitor and evaluate the performance of particular contractors.