

Transcript of Proceedings

FREEDOM OF INFORMATION PUBLIC SEMINAR

A DISCUSSION JOINTLY HOSTED BY THE AUSTRALIAN LAW REFORM
COMMISSION AND THE FREEDOM OF INFORMATION INDEPENDENT REVIEW
PANEL

THURSDAY, 6 MARCH 2008

1.30 P.M. - 4.30 P.M.

ROOM 2, ENTRANCE A, 80 GEORGE STREET, BRISBANE 4000

MR DAVID SOLOMON AM (Chair FOI Independent Review Panel)

1

PROFESSOR DAVID WEISBROT AM (ALRC Commissioner)

MS SIMONE WEBBE (FOI Independent Review Panel Member)

MR MICHAEL MCKINNON (FOI, Seven Network)

MR RICHARD SNELL (Senior Lecturer, Faculty of Law, University of Tasmania)

10

THE SEMINAR COMMENCED AT 1.35 P.M.

DR SOLOMON: Good afternoon everybody and welcome to this joint meeting, seminar, with the Australian Law Reform Commission and the Queensland FOI Review Panel. With us today, in various places around the room, are Professor David Weisbrot, the President of the Australian Law Reform Commission who will speak to us shortly. Professor Ros Croucher, who is the Commissioner for the ALRC and is primarily responsible for the reference on freedom of information that the ALRC is currently conducting and my colleagues who constitute the remainder of the panel inquiring into Queensland's FOI laws, Simone Webbe and Dominic McCann.

20

There are two non-institutional experts we've asked to speak. The first will be Michael McKinnon, a journalist whose name has become synonymous with freedom of information in recent years. I'll say a little bit more about Michael shortly. For the moment I say merely that he's the National Freedom of Information editor with the Seven Network and he's based here in Brisbane. The other expert is Rick Snell, a lecturer based at the University of Tasmania, who spends much of his time advising Governments around the world about freedom of information.

30

Depending on how long earlier speakers keep to the not very rigid schedule we've drafted, Rick will speak either immediately before or after the afternoon tea break. That item in the schedule can't be changed. Before introducing David Weisbrot I should make one housekeeping announcement and then I'll make a general comment about the process.

40

I should explain that this seminar is being recorded by the Court Reporting Bureau and I've been asked to say that a transcript will be made of the recording. Any transcript and or recording may be used as part of the review process and any transcript and or the recording may be made public or disclosed either in whole or in part. I should also say that the transcript will necessarily be edited if anything is said that is defamatory or in any other way contrary to the dictates of the law. This meeting is not protected by any kind of privilege so we'll all need to be careful in what we might say.

50

It's a happy coincidence that we have these two inquiries into freedom of information being conducted simultaneously. The Queensland Inquiry was initiated by the new Government within a few days of Anna Bligh becoming Premier. Our terms of reference are extremely broad. Our discussion paper was published at the end of January. Submissions are due in tomorrow and our report is scheduled to be completed by the end of May.

1

The Australian Law Reform Commission Review was initiated shortly after Queensland's and is due to be completed by the end of the year. I don't want to intrude on what David and Simone have to say, but I think the fact that these reviews have both been established, suggests that Governments have come to appreciate that the various freedom of information regimes are not operating as well or as effectively as is desirable and they want proposals that will improve the delivery of public sector information in all its forms.

10

Now, let me introduce the first speaker. David Weisbrot has been President of the Australian Law Reform Commission since 1999. He's an emeritus Professor of Law at the University of Sydney, where he was Dean of the Faculty of Law from 1994 to 1997. He's a foundation member of the Australian Academy of Law, and having looked up who's who, I should say that he lists as recreations sport, the arts and I think it says massage. Professor David Weisbrot. Thank you.

20

PROFESSOR WEISBROT: Thanks very much, David. The two of us have been circling each other on this area for a little while. David's reference, the Queensland Review, was announced before the ALRC had any idea that we would be revisiting this field and David came to see us and said I'm about to head up this Queensland Review. I know that the ALRC has worked in this area, what can you provide me with? So we gave him copies of reports. We didn't need an FOI request, I should say, to do any of this. We gave him copies of reports, archival materials, anything we could get our hands on that was part of the policy formulation and information from the previous inquiry that I'll talk about in a moment.

30

40

And then very shortly thereafter, I got a call from the then Attorney-General, saying do you want to do another review of FOI and given that nothing much at all had happened with the ALRC's previous work I thought it was a good time for us to provide another spur to the Federal Government to try to get some reform in this area. And I'll give you a little bit more of the detail on that in a moment, if I can actually get this onto the screen.

50

So, there seems to be an area that is internationally up for grabs at the moment. There's nothing new about FOI. The first regime came in in Sweden about 250 years ago, about the same time that Sweden also gave the world the Office of the Ombudsman and other mechanisms to ensure an open and transparent Government, and much of the rest of the world has been slow to follow, but a lot of activity in recent times.

So that Jimmy Carter, former US President Jimmy Carter, recently convened a conference which Rick Snell was one of, was the only Australian participant in, which talked about a campaign to establish FOI legislation around the world, not only as an important administrative arrangement but actually as a human right. Just a little trawl on what's been happening over the last few years, the US has brought in something called the Open Government Act 2007 and with a lot of legislation it's hard to tell whether that was someone's idea of irony or not. But there are initiatives in the US and cross-cutting ones in an era where there's obviously a substantial interest also in national security, but to try to make the mechanisms of American Government more open and accountable.

1

10

The UK brought in new freedom of information legislation quite recently and it's already being expanded in a number of areas, partly legislatively or administratively and partly through recent decisions. So you may have noticed just in the papers the other day that the Information Commissioner in the UK made a decision to release Cabinet documents that were in relation to decisions made about the UK's entry into the Iraq war. Very controversial, but very, very strong push towards FOI, even in relation to cabinet documents.

20

In Ireland the Labor Party has just launched a major call for an FOI review. I don't follow Irish politics, but I'm guessing that means they're in opposition because normally we get the strongest calls for FOI from oppositions. In our region, Papua New Guinea and Vanuatu, the Ombudsmen in those jurisdictions have renewed a call for FOI laws to be part of greater accountability of their Government institutions and the UNDP, the UN Development Program, has also focussed specifically on FOI as a mechanism for improving openness accountability in Governments.

30

In Fiji, in particular, but also more generally across the Pacific Islands. The Philippines has just brought in a new law and in Africa, Kenya and Nigeria and Zambia have just brought in - have just introduced bills into their legislatures and the Cook Islands in the Pacific has done the same. In Pakistan recently the media have been lobbying very strongly for FOI legislation there and a number of cases and controversies, again you may have followed the Wikileaks.org case in the US, in which a Judge actually shut down a website that had been set up as basically a website to large documents pursuant to whistleblower activity. And not only were those documents removed but the Judge shut down the whole website, which has created a lot of controversy, but focused a lot of attention on this area at the same time.

40

50

So, as I mentioned we were given fresh terms of reference just about a week or so after the Queensland Review was announced, and they are very broad and open terms of reference, contrary to some of the media representation. For example, by the otherwise estimable right to know coalition, I can't see how they could be more broad and indeed they contain my favourite

all time provision, as a law reformer, which is lastly any other related matter. So, pretty much anything there, unless they consider it is important, we have legislative authority to look into in this field.

1

To summarise broadly, we're simply being asked to say, "To what extent does the FOI Act 1982 and related laws, provide an effective framework for access to information in Australia?" Probably the most important part of that is that it's the FOI Act 1982 and indeed the Law Reform Commission has subsequently reported in that area, and I'll talk about that a little bit later, but without government implementation to date.

10

And our terms of reference say, and this is partly why this area needs to be refreshed at the Federal level, we need to look at all the effect of the rapid advances in information and communication technology. So, although the '95 Report was excellent and it was only done twelve and a-half years ago, everything at that time - the focus of that time was on paper documents, even that recently ago. And so, of course, we need to look at whether the legislation is adequate, robust enough to deal with issues of electronic capture - capture and discovery of information.

20

We also have a harmonisation aspect to our reference in fact the then Attorney-General focused very strongly on that, that there are FOI laws in most State and Territory jurisdictions and Federally and how do we make sure that we harmonise those and at a high level, not lowest common denominator, and then of course the inevitable balancing of interest. It's inherently part of FOI, but inherently part of every law reform inquiry that we do.

30

We're told that we must consider, obviously, all of the legislation that's out there in Australia with that harmonisation aspect and there's a specific reference to whether that involves any Constitutional issues so I guess it would be open to us to recommend a referral of powers or any of those things if we felt that this was an area where the common law should cover the field. I doubt that that's where we will go, but it's very early days.

40

We're asked to look, of course, at Federal government agency practices and other FOI reviews. We're also asked to look at comparable information access regimes and as I mentioned that the evolving technological environment at minimising or at least moderating the regulatory burden on agencies and the legitimate interest a government that balance, the legitimate interest a government in obtaining forthright advice.

50

The time line for us is, those terms of reference were signed on the 24th of September. You might notice just on the eve of the election. We then had a change of government shortly thereafter. We are proposing to follow the standard ALRC iterative process. That is we will release an issues paper which will scope out the area and ask lots of questions and calls for information and feedback. We'll then produce a discussion paper which is in effect a draft report. It will

contain proposals for reform, but is still genuinely open for community response and then a final report. And our current reporting date, or the specified reporting date, is at the end of this year. I'll talk a little bit about whether it's a likely proposition in a moment.

1

As I mentioned the ALRC produced - it was before my time there, but what I think is quite an excellent report, in association with the Administrative Review Council, ALRC 77, and that was in 1995 and it was called "Open Government - A Review of the Federal FOI Act 1982" and the ALRC report then focused very much - or obviously made a lot of recommendations for reform of the law, but it also focused appropriately on agency culture and said, just to read that out quickly:

10

"The culture of an agency and its understanding and acceptance of the philosophy of FOI by individual officers can play a significant part in determining whether the Act achieves its objectives."

20

So, I think the ALRC and the ARC were right then in saying it's one thing to get the Act reading correctly:

"It's another thing to make sure that agencies have that culture of openness and accountability imbued as part of their day to day practice."

And the ALRC Report at that time was also critical of what it described as "a culture of secrecy." And so, again, that's a direct quote from the Report, "A major hindrance to achieving open government is" - sorry, it should be, "is the continued existence of what is often referred to as the secrecy regime" and it elaborates on that.

30

The basic approach, according to that report, was, and the Commission still believes and any FOI advocate would believe, the starting point is that an applicant has a right to obtain the requested material. The ALRC then made 106 specific recommendations for reform and just the highlights package, were strength in the objects clause and that was again to emphasise that basic premise information should be available to an inherent part of openness, transparency, accountability and so on and that agency culture should reflect that.

40

There were recommendations in relation to fixing that articulation between the Archives Act and the FOI Act. I think a critical one was that the ALRC called for the establishment of an Independent Information Commissioner. There were quite a few recommendations calling for an overhaul of the various exemptions and exceptions in the Act, and then finally, the ALRC put a premium on the availability of early quick cheap and effective external review rather than forcing people to wade through a series of internal review steps, both as good customer practice, a citizen practice, getting people information quickly, but also having that external review sitting outside the agency to try to enforce better decision making by primary decision makers.

50

Well, this change, the environment change, at least at the Federal level with the election and the ALRC policy platform - we have special software at the ALRC that allows us to read what the Prime Minister is thinking, which is very helpful from time to time, and the ALRC campaigned on one of its major policy - election policy documents was on open and accountable government and that quoted, now Prime Minister Rudd, saying "The FOI Act has become sclerotic."

1

And an umber of promises were made which obviously now impact very directly on what the - what action the government will take and what's left for the ALRC to do in this project. So, among the promises, and these were again - and these are inverted commas because they're direct quotes from the policy platform. There was a promise "to revise the FOI Act and to promote a culture of disclosure and transparency, to appoint an FOI Commissioner, to rationalise the exemptions, very critically to abolish conclusive certificates" - I should say all of these are recommendations that the ALRC made in its 1995 report. And finally, the parallel area, cognate area, "To encourage and protect public interest disclosure."

10

20

So to date we took the terms of reference in September. We told the then Government that because of our huge Privacy Act Review as well as our now completed review of legal professional privilege that we wouldn't commence this project until earlier this year and then in the intervening time the policy said the Government and policy settings have changed.

So what we're doing at the moment is getting our advisory committee settled and there's a standard operating procedure for the ALRC. We set up a broad base expert advisory committee for every project. Everybody's sitting there, except Simone which we'll have to change later today, is a member of our advisory committee as it happens and so we got FOI practitioners, experts, lawyers who practice in the field, are both in favour of applicants and those who represent Government, media and journalists people who are seeking FOI applications, agency heads including the heads of some of the largest and most - the Government - the Federal Government Departments that receive the most FOI applications like the Department of Immigration and Citizenship.

30

40

So all those people are on our advisory committee just feeding information about policy priorities, practice who we should be talking to. They don't have a decision making capacity obviously. That remains with the independent Commissioners but very important in helping us get our project through and particularly in a relative short amount of time.

50

We're doing research on FOI law and practice in Australia including a mapping exercise of all the different bits of legislation to say what do all of these laws say about the main issues? Are they in sync or out of sync? Are there some provisions that we might regard as model ones that we would urge all of the jurisdictions to lock behind and, as I mentioned at the beginning, we are looking at the proliferation of initiatives around the world in this area and

trying to determine what we would regard as world's best practice.

1

At the same time we're just moving a little more slowly than we normally would because we're waiting to see the details, hopefully in the next - some weeks or months, of what the Government will do in this area given it's campaign promises so there's no point in us investing a lot of energy trying to convince the Government to establish a Federal Information Commissioner if that's what they're about to do anyway.

10

I'll just mention, and I think most people here probably are aware, but in the event you're not, FOI and privacy, in fact, information law generally, in the Federal arena has moved from the A-G's Department to Prime Minister and Cabinet. Territories has moved to the Attorney's Office if you're worried they're not going to have enough work but that's an important change and that emphasises, I think, again, the Prime Minister's commitment to FOI and also giving it that level of elevation. It's specifically responsibility resting with a special Minister for State and Cabinet Secretary, John Faulkner, but within the PM and seaport folio.

20

So we have a website. Part of our website that's devoted specifically to this. If you want to follow any of the activities or documents that we prepare along the way, changes in timelines, public consultation program, all of those will be available there. As David mentioned at the beginning, Professor Ros Croucher, who's sitting in the front row, is the Commissioner in charge of this project for the ALRC and all of our stuff is out there.

30

I should say, as the recipient of FOI requests, I've never once said "No" and, in fact, I don't think I've ever forced anybody to file a formal FOI application. I've had that long standing commitment myself if people want stuff we just give it to them and even better than giving it to them individually we try to put everything on the web and all of those things are freely available there and - at the www.ALRC website and I'll leave it there and I hope we'll interact in future with you on this project.

40

Thank you very much.

DR SOLOMON: Thank you, David. Our next speaker is Simone Webbe. Simone is a former Deputy Director-General of the Department of Premier and Cabinet where her responsibilities included leadership of State affairs which included constitutional and administrative law, international collaborations, State projects, Ministerial Services, the Government Airwing and Executive Services including Cabinet legislation and liaison plus events co-ordination, protocol Queensland and Business Services involving the full range of corporate support including records and information management.

50

With her various departmental responsibilities including delegated decision making Simone has extensive practice

experience with freedom of information law and administration. She previously, before joining the Premier's Department, worked with the Electoral and Administrative Review Commission, which is something that all members of the panel did, and with the Commonwealth Administrative Appeals Tribunal.

1

She's a barrister with public administration qualifications and is Director of Ratio D Pty Ltd, Strategic Business Consulting Services. Simone is going to talk on the paper which is titled "FOI takes centre stage". Simone?

10

MS WEBBE: I don't wish to be upstaged so I'll just wait a minute. Okay. Thank you, David, for that introduction. Well, in September 2007 the Queensland Freedom of Information Independent Review Panel entered stage right. The script found in our broad terms of reference and the Premier's publicly expressed wishes in her first week of office was to move left across the stage to find the best expression of balance, in the centre somewhere, but the stage was not an easy one, as we've heard.

20

It was marked by so many significant reviews and inquiries yet so little significant reform across all Australian jurisdictions. Typically, it could be said, Governments would pick out just those recommendations that it could stretch to that was still in the comfort zone like fees and charges, timeframes, appeal mechanisms but key recommendations, like introducing an FOI champion or a monitor role extending the scope of the Act or narrowing the effect of exemptions, didn't get a play.

30

In the Commonwealth three major pieces of work spread about five years apart from each other the ALRC/ARC Review report in 1995 followed by the Ombudsman own motion inquiry and then a Senate Inquiry into a Private Member's Bill, all exited with applause but no reform. However, as David has outlined, the new Rudd Labor Government did announce its commitment to significant recommendations of the ALRC Review during its recent election campaign.

40

Of course there has been plenty of amendment activity. On Government's own initiative to clarify the meaning of the original script which have required, in some cases, new exemptions or broadening the scope of existing ones. For Queensland the panel's discussion paper sets out, in detail, the legislative and review history of the Freedom of Information Act 1992. The discussion paper then provides a snapshot of the FOI experience in Queensland where we take stock of current usage patterns at original and review stages including the nature and extent of the exercise of personal information rights under the existing regime.

50

We note the Nobel Prize winning concept of information asymmetry and its extension to the public sector where FOI can be seen as inter-related with other areas and plays a critical role in both offsetting information asymmetry and leading to improvements in policy and decision making. We also examine

the comparative design differences in the FOI legislation of other countries and then we pause, but for a theatrical moment, and think about how to move across that stage.

1

If we ask the same questions we're likely to get the same answers. That of course in itself is not so much of a concern as this. What can we offer that will make a difference? What can we recommend that responds directly even better with solutions to, for example, the competing interests involved in the current use of the Cabinet exemption in Queensland. How can we capture the imagination of a new Premier, who did commission our work, and the political will of her long-serving Government to adopt a whole reform package that responds to our terms of reference and not just cherry-pick out those amendments that are a compromise in what is comfortable?

10

Well, we don't start with a statute in case law review. We don't start with a line-by-line analysis of the existing legislative provisions. It's been done before by some and done well enough already. We go back to first principles and we start again.

20

Our discussion paper asks why FOI? What are the objects? And, importantly, what do they really mean? What should the scope be for contemporary Government of the Act? Should access rights pertain to just public records which would exclude the ephemeral material or as far as official information which would require the creation of documents to respond to FOI requests. If the ambit is documents, as at present, what's the best definition for documents? Particularly where information and communication technologies so expand the ease and extent of evidence of Government activities.

30

To which bodies should the Act apply? What are the principles in this determination? How should FOI law respond to Government trends towards contracting out Government functions? Should Government owned corporations, however constituted, be exempt and, if so, to what extent? Nothing gets a free ticket.

40

It's time to challenge some core presumptions. Our discussion paper provokes discussion about the 30 year rule for restricted access periods. Open and shut default settings for Government documents. The design architecture of exemptions, process versus substance, class versus adverse affect, absolute versus relative test.

We seek debate on the role and definition of public interest test. We ask, should there be an overriding public interest test covering all exemptions or all but a few specified exemptions? If no harm would follow from the release of material that would fall within an exemption provision should it be released? As I've quoted, the public interest is an amorphous concept which is not defined in the FOI Act or any other statute.

50

In Australia it has been left to the Courts to provide a Common Law definition. The High Court in the 2006 Commonwealth FOI case of McKinnon v The Secretary of Department of Treasury did not take the opportunity to provide guidance on the meaning of public interest. The 1995 ALRC report did not consider that public interest should be defined in the FOI Act but that an FOI commissioner should issue guidelines on how a public interest test should be applied. The 2001 Queensland Parliamentary Committee FOI Review Report also recommended against a legislative definition but for guidelines and training by an FOI monitor. Although, ALRC did support a new provision in the Act that would expressly provide that for the purpose of determining whether the disclosure of a document would be contrary to the public interest it is irrelevant that the disclosure may cause embarrassment to Government.

Our discussion paper also notes one FOI commentator's suggestion that:

"A phrase that is not defined and capable of wide range of definitions has the potential to work to the disadvantage of applicants".

Leaving aside the problem of what a public test - public interest test involves, there are a number of ways in which a public interest test is applied in FOI legislation and a number of ways in which the test is expressed. All providing a different way in which it might be applied. Legislation can provide a public interest test covering a specific exemption cause. It can include a public interest test for all exemption clauses or it can provide a general public interest override governing the application of the FOI law generally.

The law can be expressed in a way that will allow release of information if there is a balance of interest or, more often, where the public interest outweighs other considerations. Some tests suggest that reasonableness rather than the public interest is what must be determined by the decision maker. Even the way the test is expressed may also determine which party has the onus to demonstrate the benefit or the detriment.

Our discussion paper asks should there be guidelines to help the public interest? Should these be provided by the information commissioner or should they be in the Act as at least some of the factors that should be taken into account in determining what the public interest is in a particular case.

In our discussions on exemptions we ask too whether there should be class exemptions for Cabinet and Executive Council matter. And, if so, how should the exemptions be defined and managed within the scheme of the Act? And, more generally, which exemptions in the Act are necessary? Are they achieving their objective? What about time limits on exemptions, public interest and harm tests? And, finally, is the provision for conclusive certificates necessary and, if so, on what terms and on what conditions?

When it comes to the administration of FOI in Queensland, moving on from an examination of core principles and questions of legislative design and content, our discussion paper offers an understanding of some of the drivers in public sector culture today as they relate to the balancing of bureaucratic and political interests in the application of FOI law. We observe the paradox with Freedom of Information law is the ever competing tension involved in its administration between the legislative objective in favour of disclosure and the persuasive reality that information is power, time is currency and secrecy enables political advantage.

10

And this, in a contemporary content where advances in information and communication technologies enable news reporting around the clock and to the minute. The business of media and politics tends to be fast paced and intense. The urgency of the every day in Government. In this contemporary media frame can pull the public sector's information culture towards information protection in the interests of issues management at the expense of the important but less urgent information goals for transparency in Government.

20

The reality is that access to Government information reaches to the core of political and bureaucratic interests and it operates beyond purely legal considerations and any dispassionate calculation on the public interest. No matter what balance pose we can suggest a new FOI Act take on centre stage the pose will surely slip if the public sector culture, in all its manifestations of political and bureaucratic interests is not in a position to support the lead Act.

30

In the discussion paper we seek an examination of administrative compliance behaviours. To what extent are post sticks used to avoid FOI and pre-emptive exploitation of exemptions. A leading commentator calls this "malicious non-compliance". Automatic resort to exemptions is described as adversarialism. Inadequate resourcing and deficient record management is administrative non-compliance. We ask, where do cultural behaviours in Queensland relate on a compliance behaviour spectrum that can be described as ranging from malicious non-compliance to the positive ideal end of proactive compliance. Are there shortfalls in Queensland? What are the steps to address the shortfalls that exist however described? And then, how can FOI decision makers be supported in their vital role under the Act? What change management strategies, incentives - such as including FOI in the performance agreements of senior officers - and indeed sanctions such as making certain activities in direct contempt of the FOI Act an offence.

40

50

Which ones are reasonably available to affect outcomes more consistent with the objects of the FOI law of the Parliament and indeed of the people.

Our discussion paper also reflects that the Panel considered that information policy plays no bit part in the success of an improved and modernised FOI. The nature and extent of the

public policy that exists to govern all aspects of the information lifecycle is a valuable tool in leveraging both FOI successes, and successes in other policy arenas and Government activities.

1

For example, the efficiency and effectiveness of a records management system directly affect freedom of information outcomes. Freedom of information outcomes affect non-Government users of information in social, economic, cultural, commercial as well as political spheres.

10

We seek to test the opportunities and challenges raised by the new information and communication technologies. And what of FOI's major support act? Enhancing open and accountable Government through proactive disclosure strategies by Government. Chances of upstaging are not likely here. Are enough even bothering to attend the first act? And how can it perform better?

The protection of privacy interests is another key relationship for FOI in the information policy matrix that the discussion paper seeks to reconcile. Should Queensland consider adopting a scheme like that operating in New Zealand in which people seeking personal information about themselves may do so mainly under a new Privacy Act rather than through FOI. Queensland currently just has an administrative regime for privacy. If there was 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 as for the Commonwealth, and if so how far?

20

30

The panel's discussion paper also considers in some detail internal and external review processes, FOI costs and time regimes, and handling of voluminous and/or vexatious requests. These weigh just as heavily on what is the FOI experience for both users and Government and we ask should internal review be mandatory? Are fees and charges reasonable and balanced? What better alternatives exist? Are existing time limits reasonable and consistent with the objects of FOI? What initiatives exist which could improve early disclosure under the Act? Should the Act contain a power to declare an applicant or application for information vexatious or too voluminous? If so, on what grounds and who so declares? And we examine comparative external review models and roles for information commissioners and we ask which are the best for Queensland? So some back to basics and some big questions have been asked. Public submissions have been sought and are eagerly awaited. The audience might even have some raised expectations.

40

50

So what's after intermission? In the supreme balancing act that is FOI the panel is all too aware that success means different things to different people. Working with the first principles and consciously trying to review the FOI experience from all stakeholders' perspectives, the Panel is now working through a policy formulation approach driven by problem-solving analyses, defining and understanding problems and

perceived problems, identifying the possible sources and drivers. Where are the interconnections? What can be changed in influence? Assess and rank options? And then we will need to decide not just whether we can find centre stage but whether others can see it there too. Thank you.

1

DR SOLOMON: Thank you, Simone. Our next speaker is Michael McKinnon. In the early years of Freedom of Information another journalist, Jack Waterford, made his mark as he tried to extract information from the Commonwealth using the legal system to challenge decisions of administrators.

10

In recent years the task, the same task, has been taken on with a great deal of enthusiasm by Michael McKinnon. He has tested boundaries in the AAT, the Federal Court and the High Court with the support, most of the time, of his various employers. Michael's current employment with Channel 7 has meant that he now operates across almost all Australian FOI jurisdictions, Federal and State. He's the ideal user of FOI to provide us with a commentary under the title What the Reports Should Recommend. Michael.

20

MR MCKINNON: Good afternoon. Thanks to Dr Solomon for the kind invitation to speak today. I'd also like to compliment the Review Panel on the report they produced. I think it's a superb report and will serve as a useful document in the debate across States and the Commonwealth that appears to be occurring on FOI reform.

More importantly I want to commend the Queensland Premier, Anna Bligh, for having the courage and commitment to establish a review panel. That in itself creates a momentum for reform. I don't use the term courage lightly. FOI reform by any politician is an incredibly brave and confronting process. There's competing forces of secrecy and accountability at the heart of politics and Government in a democracy.

30

Freedom of information, as you've heard earlier, has been around since 1766 because of even the recognition then that most if not all politicians come to see their political interests as being synonymous with the public interest. Inevitably a Government seeks to hide its mistakes and errors to protect its political support and reputation. Similarly public servants also opt for secrecy rather than face the harsh light of scrutiny where a politician's instinct is to blame the release of the information and therefore the public servant than oppose to accept their failings which have led to poor policy.

40

I give the example of the Golden Casket agency in Queensland. On December 24, 2001, following an FOI request, I reported for The Courier-Mail that the Queensland-owned Government - Government-owned Golden Casket had been caught out deceiving needy overseas villagers into thinking they had won a fortune. The story, as it went, which I think was a cracker at the time, was that a remote Pakistani village had been planning a new school after receiving advertising material from Golden Casket saying, "Congratulations, you've won a First Division

50

prize, \$9 million." We're all used to that in Australia, receiving those sorts of notices, but the Pakistani village started laying out the groundworks for the new school.

1

Naturally once the story emerged Golden Casket promptly apologised, said it was an oversight, agents running amuck, it would never happen again, which was all good and well, but if the same thing is occurring now I can't find out and nor can anyone else external to Government because the response of the Government to that story, because I think it's the only story on the Golden Casket doing something like that, was to exempt the agency from the Act in 2005. And that, I think, illustrates better than most issues what the problem is with politicians and FOI.

10

Politicians claim to support freedom of information. That's why I am so - I am praising the current Premier even as they work towards stopping it work properly, and I think few are more hypocritical or have been more hypocritical with greater consequences than the former Premier of Queensland.

20

In July '98 Mr Beattie, shortly after taking office, vowed his Ministers would not be able to stop FOI searches by tabling politically sensitive documents at a Cabinet meeting. His commitment was so strong he introduced a private member's bill into State Parliament outlawing the practice obviously while in opposition. He promised the new Government would push to amend the FOI Act so Cabinet documents were not protected unless they directly pertained the Cabinet decision. It's a commendable sentiment. It never translated into reality, and Beattie happily adopted a cover up approach.

30

The report, by a respected lawyer, Geoffrey Davies, QC, on the Queensland Cabinet following the Dr Death Inquiry, as it's euphemistically known as, showed that Beattie and Gordon Nuttall had a culture of concealment in which hospital waiting lists and other material were hidden. Davies found the conduct of the Cabinet and its Coalition predecessor in hiding documents was inexcusable abuse of FOI. He also found successive State Governments had followed a practice of concealment and suppression of elective surgery waiting lists and measured quality reports.

40

This in turn, he said, encourages similar practice by Queensland Health staff, and in my view, it is an irresistible conclusion there is a history of culture and concealment within and pertaining to Queensland Health.

I say that really it's difficult to blame Queensland Health staff when it's quite clear the Minister and the Premier are actively taking that philosophy.

50

A cult of secrecy is not however confined to Queensland Health as the coalition of Free Speech which I agree has done commendable work. I think in an aside its attack on the ALRC during the election campaign was well probably aptly aimed at Mr Ruddock for not doing anything for 11 years, but I think it may have been what's called, "friendly fire"

As that coalition's report found, a continued culture of secrecy is evident in areas of government. The culture continues to pervade many layers in areas of government including in Queensland. FOI decision-makers are resistant to making information publicly available because of the emphasis on the short-term political consequences of doing so rather than the long-term policy objective of open and accountable government.

10

Rudimentary and flawed notions that release of information could be harmful because the information will not be understood or will be misinterpreted or taken out of context, remain this way pervasive. And in terms of the case that I was involved in in the AAT, we had Professor Dickson, arguably the leading economic modeller in the country from the Monash University as our expert witness who in the box tore apart Treasury witnesses on their understanding of their own documents. Nevertheless it was found that Professor Dickson was an expert witness for purposes of that case and certainly the AAT gave no great merit to his views.

20

It's no surprise given the audit findings that secrecy among politicians is by no means confined to Queensland; the Commonwealth Government has an appalling record. One simple example of the value of Freedom of Information to open accountable government and the secrecy of politicians also touches on the health area.

In early February 2003 as I was in the Australian's FOI, I obtained Health Department documents showing "Bulk Billing Rates were in freefall" was the direct quote with "rates dropping by as much as one per cent a month. Bureaucrats unable to predict how far the decline would go." Two months earlier, the Prime Minister had advised Parliament that any suggestion that Bulk Billing has disappeared or is disappearing is infactually incorrect. Upon the release of my story, the Federal Health Minister, Kay Patterson at the time immediately announced reform plans and Bulk Billing became a key election issue. Those Bulk Billing figures are now published routinely by Government despite the battle I had with the Department of Health in the Commonwealth to get the documents in the first instance. The sky didn't fall down and in fact the outcome of that actual enquiry and I don't put it down just to my FOI, but the fact that the information was put to the public on how they were falling led to an opposition response on the issue, led the Government to address the issue and ultimately, I think, last year Bulk Billing rates were on their way back up. And it shows the value by removing the right from politicians to decide the public interest to some extent because their political interest to a large degree I contend, is synonymous with their view of the public interest.

30

40

50

I want to however stress that improved FOI Laws don't present a problem I think for the bureaucracy. Not that the bureaucracy have to process those FOI reports and I apologise to everyone in this room I've abused over the years on FOI; nor to bureaucrats developing other policy. And I'm of that

view because good FOI Laws foster the public service's ability to provide full, frank and fearless advice contrary to the re Howard arguments relating to those issues that have flaunted good FOI in this country for decades, in my view. Because it's only an environment of guaranteed secrecy that a politician's sweet-heart deals and vote saving can flourish and such advice can be ignored and a career can be affected by the provision of that such advice.

1

If a politician is aware that those documents will be released at some stage then they have to deal with the fact they should be getting the best advice and more importantly, public servants are then confident that they should be giving the best advice.

10

I think the Queensland Public Service can be well guided by the sentiments expressed by Maree Shroff, the New Zealand Privacy Commissioner, and I'm almost certain Rick Snell was the man who rolled that into the discussion paper because Rick has the sad duty of being the support to most journalists in Australia on FOI on legal and academic sense. I don't use him anywhere near as much as when I started but if Rick will recall, back in 2002, it was a fairly constant phone call - "What does this mean, Snell?"

20

He rightly puts that quote out to the submission. I think it's very important what is said by Shroff that,

"As a Civil Servant, knowing that my work can be produced I will be extraordinarily careful to get the facts right to avoid trespassing into politics, to give comprehensive reasons for and against a proposal. To think very carefully about my recommendations. My advice will therefore be balanced, accurate and comprehensive. Sometimes I might put in more detail than might formally have been the case. I might quote from sources rather than summarising them especially when unpalatable advice might be needed. I might clearly identify legal advice and separate it from policy advice. I will record carefully the reasons for my particular recommendations and I will ensure my reputation as a professional and neutral Public Servant will be enhanced if the advice is released."

30

40

It seems to me fundamental that the points that she is making is that a Public Servant can in fact have an improved role because of FOI, allowing them to do their jobs properly despite the interference from the Minister's office or the fresh-faced new Press Secretary telling you how to do your job.

50

The point Shroff makes directly contradicts abiding arguments against document disclosure. Somehow if documents produced by Public Servants are held to the light of public scrutiny then Public Servants will cease to perform their duties. This thesis is flawed, massively flawed; given the lawyers, journalists, teachers, plumbers and shop-keepers and many other occupations and professions are rightly judged on their

performance. The vast bulk of people working out there in the economy are judged on what they do and people don't say, "No, look I think it looks pretty good. I'm not going to actually see what your work is; I hear it's pretty good but I'm not going to look at it." No. They're judged on what they do and I don't think Public Servants, as opposed to anyone else, would be in any way hampered by the fact that their work is out there and accountable. It would certainly assist with the public judging the work of Public Servants and it assists Public Servants judging their own work too.

1

10

The public has a right to judge the quality of advice given to politicians and whether politicians have acted responsibly in relation to that advice. It is an essential public interest that I think overwhelms the flawed arguments of candour arising from the Howard re case in '85.

Public Servants should also be aware as the broader community should, but the concept of Freedom of Information as a philosophy is crucial to affective democracy and society's respect and support for the political system and Government.

20

Commentators have been arguing of late that they're concerned that dwindling numbers in political parties, less interest in the political process. Well the reason I think - largely is that people feel they can't control the process, have no involvement in the process because they don't know about the process. FOI has, I think, a real role in restoring the trust between the electorate and politicians which I think has been damaged by excessive secrecy at least in the last 10 years.

30

As Malcolm Fraser, 1982, in introducing the Act - introducing the '82 Act - he's noted this in '76 sorry this is a Commonwealth Act.

"If the Australian electorate is able to make valid judgments on Government policy, it should have the greatest access to information possible. How can a community progress without continued, informed and intelligent debate? How can there be debate without information?"

40

It leads me to the High Court challenge which was about Commonwealth Treasury documents showing the extent of Bracket Creek in the economy. How much extra tax the Government expected to collect as workers were pushed into higher wage brackets by inflation; inflation related wage increases. I could not think of a - and the reason why News Limited backed the case to the High Court, we couldn't conceive of something more in the public interest than the truth about how much tax people pay; how much income tax every person in this room pays. However, the case went down and I think fundamentally it - it speaks to the need for fundamental perform of FOI in this country.

50

Justice McHugh said it in the Australian High Court in the Capital Television case,

"If the institutions of representative responsible Government are to operate effectively as the Constitution intended the business of Government must be examinable and the subject of scrutiny, debate and ultimate accountability at the Ballot Box. The electors must be able to ascertain and examine the performance of their elected representatives and the capabilities and policies of candidates for election. Before they can cast an effective vote at election time, they must have access to information, ideas and arguments necessary to make an informed judgment on how they have been governed."

1

10

It seems to me that there can be no more fundamental statement on what the rights of a citizen are to - to information about their Government. They need to cast an informed vote at the Ballot Box. Where Governments seek to stop the release of information - I have never yet had a legal battle about a document that showed a Government in a good light. Funnily enough, never been to the AAT to get a document that said, "No the Government's done brilliantly on this."

20

Every single case, ultimately when the documents have emerged, have shown government failings and there has been an entrenched and bitter legal battle to stop the release of document showing the government failings.

FOI certainly hurts politicians and ministers. In the general course of public debate the opposition says "x", the other side says "y", the public are left there going, "Oh, yeah, they would say that and they wouldn't say that, that's fine" and walk away.

30

But for a journalist an FOI document is gold because it's not a "he said" or a "she said" argument. This is what the government is saying about its own performance. Now the minister will explain that. Thanks very much. I think it performs an incredibly useful service above and beyond the standard political debate and the political commentary and coverage by the media in this country because media - political coverage is generally sports orientated, I think. "He said, she said, they won the debate. Yesterday Nelson was on seven per cent, he's a loser, Rudd's what? He's a winner."

40

It tends, to my mind, and because of the 24/7 time frame forced on media which we live in, everything happens very, very quickly, you have to respond very, very quickly. There's not necessarily the time for a more considered approach to the reporting. FOI allows that more considered approach to reporting. It allows us to address policy issues far better than they can be in a normal course of events in my view.

50

The High Court in its judgment in that case, Commonwealth-v-John Fairfax and Sons, added further weight to this right to know. It can scarcely be a relevant detriment to the government that publication of material concerning its actions will merely expose it to public discussion and criticism. It's unacceptable in our democratic society that there should be restraint on the publication of information relating to

government when the only vice of that information is that it enables the public to discuss review and criticise action.

1

That, to some extent, once again goes to public service culture and Queensland is not the only place with a bad culture in relation to FOI. Dr Ken Henry who is the Secretary of the Commonwealth Treasury is on the record as saying that he believes some FOI applications to the department were motivated by a view to embarrass the government.

10

It was widely understood to be referring to my FOI's given I'm the one who has given him the most grief I suspect. However, Section 11 of the Act is very, very clear. You won't look at the motive of the applicant. You will not and cannot look at the motive of the applicant for lodging the request. Nevertheless we've got the Secretary of the Commonwealth Treasury saying, "I'm looking at the motive. I'm saying his motive is to embarrass the government and we're going to issue conclusive certificates to stop that occurring" is what he said.

20

You'd appreciate a conclusive certificate removes the right to look at the public interest in the release of a document, it can only then look at the public interest in stopping a document being released.

And it is a problem in Australia, not only in Queensland, where the culture is so entrenched against FOI that arguably one of the most senior public servants in the Commonwealth can blandly state that he's going to break the law by looking at Section 11 and secondly, he's going to make sure embarrassing documents come out.

30

I've looked up embarrassing in the dictionary on the strength of all that and found that really it isn't a good thing, so what he's saying is that there's negative documents that would lead the government to be embarrassed because of its failings as a government, we're going to stop them from being released. That, to me, speaks of a culture that is not in keeping with open and transparent government.

40

Despite my views that FOI is in trouble and has proved a failure there has been some upsides to it and I think probably the best is the advent of the coalition of free speech, the Australia Right to Know campaign, which is a - in itself an amazing thing because it's a coalition of Australia's largest media organisations and therefore a coalition of probably Australia's largest egos.

Nevertheless we've all managed to sit down and play together like good kids and as a result a audit was commissioned which I thought produced a very, very good and timely document. It was chaired by Irene Moss and as part of that review the audit considered the extent which State and Federal laws limit the public's access to information held by government bodies.

50

The audit found in relation to FOI laws that there was a continued culture of secrecy evident in areas governed and

that the experience of this culture continues to pervade many layers in areas of government, FOI decision makers are resistant to making information public available because of the emphasis on short-term political consequences of doing so, rather than the long-term policy objective of open and accountable government and I might add to that the fact that once it gets out there in the light the government is obliged to fix the problem.

1

The only reason that hospitals were fixed ultimately is because enough people died to set up a Commission of Inquiry, but I would contend if the information had been available through FOI, the issue would have been dealt with far earlier, at far less cost and particularly, at far less cost to the individuals who suffered poor medical treatment and negligent medical treatment.

10

The Coalition of Free Speech Report went on to say that laws in most instances don't require a pro-disclosed bias in making decisions on access and often technical legal considerations override the objective, the spirit and the intent of the Act. The fact is that Australia, one of the world's oldest democracies, has been ranked as only 35 in the world on press freedom, is, I think, a disgrace and part of the reason why the Coalition of Free Speech was spurned into existence.

20

I don't speak on behalf of the Coalition, but I've had a very close involvement in it from its inception to - to date and I've had a very close involvement in the response to the discussion paper produced and I'll just foreshadow some of the views that are going to come out of that submission, though getting the media to agree on a submission is, in itself, quite an interesting process.

30

The Coalition believes very strongly that the history of the Queensland FOI has - since its introduction, shows a progressive tightening of disclosure, high cost and an increase in exempt organisations. Amendments in '92, '93, '95, '94 and '97 have all diminished the original intent and object of the Act. All of them have sought to diminish government transparency, all of them have been an attack on open government and every amendment has therefore fostered a culture of contempt for FOI within the Queensland government.

40

If a government, over a period of ten years, and governments of various political persuasions choose to tighten access under FOI, choose to make FOI harder, it is impossible for a public servant not to think to themselves, that's what we're doing in here. The Coalition believes since the introduction of legislation in Queensland the scope and the efficiency of the Act has been progressively reduced, almost inevitably to protect government's political interest, conceal public service failings and incompetence.

50

The mis-momentum has occurred despite overwhelming evidence - in the report on the importance of FOI to open and transparent government and the importance of the rights of citizens to access the information. The Coalition believes the Act is

overly complex, it's aid in exemptions contain an overlapping, unnecessary exemptions particularly in relation to internal government documents. We believe a single test protecting only essential public interests should be applied to all documents and therefore greatly simplifying the operations of the Act. The Coalition believe the public should be clarified to expressly exclude generalised notions of public interest, such as the CANDA arguments and the other dreadful factors from Howard Re - or Re Howard.

1

Several exemption provisions in the Queensland Act aren't subject to express public interest tests and should be and the Coalition recognises the subject matter of certain documents will, of its nature, suggest the disclosure will be likely to be contrary to the public interest, such as matters of State security and advice relating to legal profession or privilege. So, we do accept that there are areas where we can't get the information because it's so crucial to the fundamental functioning of government.

10

However, those areas need to be massively constrained, need to be massively constrained. For example, Auditor-Generals, Ombudsmen are officially exempt from FOI because they have an investigative capacity. That's fine. CMC the same. However, the CMC exemption has spread out so widely that a politician - a political staffer giving evidence about possible corruption or fraud administration in a given political office, we could not FOI that because that exemption is spread so widely.

20

So, while we accept that certain exemptions need to exist to effect - to protect the effect of functioning of government, particularly Section 33 in the Commonwealth Act, it springs to mind national security for example, but certainly police in telling us those sorts of issues. It has to be massively constrained and it needs to be ensured that there can't be an inch back process over following years.

30

The broad exemptions for documents submitted to appear for Cabinet and Executive Council should require the decision maker give weight to the public interest in giving access to these categories of documents. The sky has not fallen down in New Zealand where Cabinet documents are released. There's a big long white cloud still there. I suspect it'll still be there irrespective of what Cabinet documents will be released.

40

The Coalition submits that the Cabinet and Executive documents should not be given a halo of secrecy but instead be included in a single exemption for internal government documents, including a public interest test and to some extent I think this argument was lost with the Dr Death saga, where documents were taken into Cabinet, where people died as a result of those decisions, ultimately died and poor people are still suffering from the consequences of the decision to be secret about the standards of health in Queensland Health.

50

Naturally as a journalist who has the dubious distinction of receiving the most conclusive certificates in the Commonwealth, I'm also pleased but not surprised that

Coalition supports a view to remove the certificate from the Queensland Act, suffice to say any law that removes the right to look at public interest in favour of release is a disgrace in a democracy and really should never have been on the books.

1

Other issues addressed in the paper include fees and charges and the Coalition believes that on occasions agencies do use exorbitant costs to thwart any realistic option of payment by media organisations. This direct stymieing of the media's role to scrutinise Government is, despite the fact from a Fitzgerald Inquiry into corruption through to the Dr Death's Hospital, the media has been and remains the single most important external body to Government to exposing failings, corruption and misadministration by Government.

10

Is the media, more often than not, breaking the story about, for example, Mark Phail going to Dubai on a week's holiday, that has forced changes. That has said that the standard in terms of our politicians isn't high enough. This person is not reaching our standard and then the politician's held accountable for their failings to the public, where they should be held accountable.

20

The media, and I accept we're motivated by a commercial interest, apart from the ABC, performs a role in as a central public interest through it's treating of Government. And I say that there is a public interest in the media being allowed to perform that role and there should be - and it should be encouraged to perform that role. Often the arguments seem to hook on the fact that media, like other companies, make a profit and they're commercial organisations. And certainly that is true of media organisations.

30

But having worked extensively in FOI, both in newspapers and television, no media organisation lightly embarks on an FOI investigation and most don't because of the cost and the trouble. You need well-trained staff to be able to do it. You need administrative support to be able to do it. Ultimately the media's use of FOI isn't an issue of money and profit because in an environment where there has been migration of advertising revenue to the internet, traditional media companies are under pressure on their costs and FOI would be the first thing to go.

40

That being the case, you'll not see internet companies doing FOI the way, for example, Seven does, The Australian, The Courier Mail, which is systematically under the guise of a political round so that it's relevant to the current events and incessantly. Mainstream media are the ones who are actually FOI in this country, in terms of the media doing it. It's still the traditional media companies doing it and I think there needs to be a recognition that there is a public interest in the media doing that because there would be an enormous gaping hole in Government accountability if the media left the scene.

50

Naturally given the competitiveness of the media, it's unlikely that they all would and I'd certainly still be there

in any case. Similarly, I think there needs to be some understanding about the motives that drive the media in relation to FOI. One of the worst things that can happen to an FOI journalist or someone using FOI is that you finally gets the documents, it's one of 18 FOI's you've done over a number of a range of areas and this one actually works and you've actually got a yarn. And then they ring up and say yep, and we've just released it to everyone else as well, let's see you do another FOI. And then you have to go and explain to your Editor why you spent three to four months doing an FOI investigation but everyone's got the story.

1
10

So I think there needs to be some understanding on that issue that the media needs to get a 24 hour news cycle, if you will, that the person who did the hard work and got the yarn, or the information I should say, though we always think of it in terms of yarns, who's got the information deserves the time, at least some time to work that story up and get it out there because there is a public interest in the media doing FOI. And if you do a same day release the media won't. And it's used quite effectively, or has in the past by the Commonwealth.

20

The ATO did it to me when I was on The Australian about four years ago. I got a great story on a failing of the ATO, they released it generally. I rang them up and advised them that I was a new - newly appointed FOI Editor (ATO) for The Australian. I lodged some 14 FOIs into the ATO over the next two weeks and they folded on the issue when their PR person rang me up and said, "Can we cut a deal on this?" And I said, "Yes. Give me my year 24 hours early, then I can get it out there first." Naturally the FOI's kept running into the ATO and did for some years actually.

30

The Coalition's view is that the cost for providing information about Government to inform the public should be borne by the Government, particularly as media organisations invest significant funds in training and employing journalists using FOI. Media organisations often receive little benefit from the investigations that produce no results and my experience is that the vast - well, not the vast but the bulk of FOI investigations don't yield anything publishable. Either the documents aren't there, they don't exist. The document, when they do exist are so bland that there's nothing in them, that in fact the Government's been doing the right thing or exemptions mean a protracted legal battle and by the time you finish that legal battle the information is irrelevant.

40

I had a win in the AAT last week in a matter called McKinnon v Families. It was on documents relating to an Edith Cowan University's consultancy on Indigenous childcare needs across Australia. I understand The Australian's still trying to get the documents from the Department, even though it's been told by the AAT to hand them over. But as someone said to me, "Can we just employ you for a day to go and badger them?" I said, "No, do you own badgering." But the point is that last year indigenous health and

50

children's indigenous health was a crucial issue of public debate. Crucial, we had a massive intervention in the Northern Territory. All while that was happening we had a document, paid for by public money, produced by academics, that would have informed the public incredibly well on the issue. It was in the Courts. I think the request from go to woe was about two, two and a-half years. By the time we've gone through their review process, blah, blah, blah, a hearing in the AAT, et cetera, et cetera, and a reasonably delayed judgment; but I have no problems with that because I actually said you can get the WorkChoices judgment out first and that's why was a bit delayed. But it shows that without timely information the public's ability to bow an issue is hampered.

1

10

I sat there that whole time going, "I wonder what's in that report about indigenous childcare needs across Australia." And it still hasn't come out. One of the other areas which the report points to is the issue of frivolous, vexatious, repetitious or voluminous request and I suspect I'm guilty of all of those on occasion. But the Coalition actually supports this measure we don't think that the media would ever fall within but we also do think it needs to be reviewable by a Court or a Tribunal. If that - and should only ever be used in the most rare events. But I do know talking to Centrelink and Veteran's Affairs FOI Officers, if they had a provision like this there lives would be so much easier and the system would operate so much better because people do become obsessed about issues, he said.

20

The Coalition believes the bare minimum that the ALRC and ARC recommendations in relation to commercial incompetence should be implemented. Those recommendations relate to provisions in contracts for requirements about FOI, complaint procedures, et cetera, et cetera. The Coalition supports the view that the Act should require contracts to provide documents to an agency when an FOI request is made. Similarly, the Coalition believes Government owned corporations are public agencies. They're owned by the taxpayer and by the public. They carry out public function, more often than not they're carrying out public functions in a less competitive or monopoly market. They should, too, be accessible under FOI.

30

40

The discussion paper also addresses the issues of review of FOI decisions. While internal review can be cost effective and relatively quick, agencies are placed in a position of conflict of interest in considering whether their initial request was flawed. In my experience it's rare that you get significant release on internal review. It's very rare. The more politically sensitive the subject, the less likely that there would be any change in position from the original determination maker and that's why I think there should be a knocked-out provision where I can go straight to an external review function.

50

And on the issue of external review I think the Information Commissioner should have a external review capacity, however, applicants need to have an alternative option of appealing

directly to a Queensland Administrative Tribunal similar to an AAT.

1

The reason for that is very simple. Both in Western Australia and Queensland arguably there have been politically-related appointments in relation to an Information Commissioner and I think that you need to ensure that if there is a political appointment to an Information Commission, to make sure for the next three years there's not going to be any problems. I can appeal direct to an independent Tribunal. Moreover it might well be useful for media companies to have a right to cross-examine in the Tribunal which has proved very useful in my experience in the AAT, in helping to develop interpretations of law that I think will foster increased disclosure.

10

Finally, I'd like once again to thank the Panel for doing such a superb job. There's very few people involved in it and it really was a breath of fresh air to read that report.

Thank you very much for your time today as well.

20

DR SOLOMON: Thank you, Michael. I think we might break for afternoon tea now and Rick Snell will be able to start off at about strictly 20 past 3, so if everyone could be back by then. Thank you very much.

THE SEMINAR ADJOURNED AT 2.57 P.M.

30

THE SEMINAR RESUMED AT 3.21 P.M.

DR SOLOMON: Well, thank you for all being so prompt in coming back from afternoon tea. Our first speaker is Rick Snell, a Senior Lecturer in Law at the University of Tasmania. As I mentioned earlier, Rick is one of the leading academic commentators on freedom of information in Australia and a major contributor to the development of freedom of information throughout the world.

40

As David Weisbrot mentioned earlier, Rick was the sole Australian invited to attend the recent conference on freedom of information at the Carter Centre in the United States. I'd ask you to welcome Rick.

MR SNELL: Okay, thank you very much, David and the Panel, it's lovely to be here. If you notice me glancing at the clock it's because they've booked a taxi for me at 3.45. I've got to run off almost immediately after this, that's why my bag is packed and I'm ready, ready to go in the process, so if I speed up my delivery a little bit you'll understand why in the process.

50

Just a brief bit about my background, just to give you a viewpoint of where I come from in terms of this discussion about freedom of information.

1

It's a very multi-faceted background. I've been an FOI officer very early on in my employment career. I've been a major user of freedom of information, especially within Tasmania. As David points out I've been an academic, I've been a commentator, I've been a policy adviser, I've played the various roles in the background with people like Michael McKinnon and Mathew Moore and a number of other journalists. Certain applicants I've been a kind of adviser to, Ombudsmen, Information Commissioners, et cetera, so I wear different hats across the way.

10

It occasionally complicates things because ethically there's certain problems arise when you suddenly find yourself on three or four sides of the same issue, having had your fingers somewhere involved in that particular process.

20

But I've also been involved in the design of freedom of information, most recently in - with the Governments of Bermuda and of Cambodia, two very different places and two very different types of Government, but both of them are seriously considering introducing some type or form of freedom of information into their political systems.

But also from speaking today I've also been a Devil's advocate in terms of freedom of information because I think freedom of information has to earn and justify its keep. I think there's a lot of problems with freedom of information on the basis that there's a lot of assumed benefits but very rarely do we call freedom of information to account to say it has actually delivered those particular benefits or not in the process.

30

A number of years ago I was flown to South Africa for - it took me 24 hours to get there, I was in the country, in Cape Town, for 24 hours, I got to speak for 10 minutes, and at the end of the process I said, "Why did you fly me all this way to hear me speak for 10 minutes and then I fly back again?" and they said, "Well, that's easy. After the Government has heard you speak then our views are going to be seen very moderate and reasonable in terms of the propositions that we put up," and I think that's part of the reason I've been brought here today, much the same type of way.

40

Can I just have a show of hands who here are from the Government? Just so I can get a perspective. Okay. In large part that's who I'm addressing, okay. I think the discussion paper has been a terrific discussion paper and if only half of it is adopted users will benefit enormously from the outcome of the process.

50

What I think needs to be done is there needs to be a focus on both the users and the disclosures of information, and I want to focus very much on the disclosing side of that equation at the moment, and I think we're here today partly because disclosures, i.e you and your Governments, have not seized the

opportunities that have been offered by freedom of information over the last 15 years, and it will be a pity if you don't seize the opportunities that will be offered by this fresh review and what's taking place both at the State level and Federal level in future. 1

I think there hasn't been enough of a culture change. There has been some culture change but there hasn't been enough, and I think it's almost necessary somehow for you as FOI officers and people involved in the Government side to think about how you can actually change the culture, to actually reap some of the dividends and some of the benefits of freedom of information in the process. 10

Just as a little bit of background. I had the fortunate and I still had the fortunate prospect of having in my room all the submissions made to the Parliamentary Inquiry into Freedom of Information from 1999 to 2001, all the non-confidential submissions, and I've read through all those particular submissions, and in terms of tone and content there's a remarkable change of tone from an experience I had when I first visited Queensland in 1993/1994 where freedom of information was very fresh. 20

I went around the streets of Brisbane talking to a number of senior FOI officers at various Government departments, and other people involved in that process. You had put out a video, a little bit quaint at the time, Looking Back To The Future or something like that, but it exuded confidence, it exuded excitement about this possible change that's going to take place with freedom of information, and upon reading those submissions, and you could tell, reading various Government submissions, that some of them had been written by the old hands, the ones who had been there from day one, and they still had a little degree of optimism in them, but there was a number that were written by people who had no experience of the previous regime and no experience of the earlier years of FOI and had a different take and perspective on what freedom of information was all about, and that mission to transform Government, that mission to transform the relationship between the State and the citizen which I detected very strongly in 1994 was largely absent in those submissions at the turn of this particular century. 30 40

And what you could sum up - a sweeping generalisation here, but a basic summary. The majority of them was effectively a begrudging recognition or acceptance that FOI was here to stay, that it wasn't going to go away so it's something that had to be lived with and accommodated in that particular process. But what the agencies wanted was some degree of immunisation or relief from the more adverse consequences of that particular process, so that they had to accept that it was here but they wanted some effectively "get out of jail free" cards to live with it a little bit better in that process. They wanted longer time frames, they wanted more fees, both in the types, levels and ranges of fees being offered, they wanted more or better exemptions than offered at that particular time, they wanted to exclude or restrict 50

particular users or particular types of request. So there was a kind of, if you like, dramatic change in the process. This was something which you had to have, it was a burden, and life would be made much easier if somehow someone would come and ease some of the particular burdens that took place.

1

And if you're putting a case I think it would be that there had been a minimum fulfilment of a set of uncertain obligations that were peripheral to the core business of an agency and there was no substantial benefits to be gained, i.e, FOI was something incidental to the core business and activity of the agencies. There was seen to be very few positive benefits that came from it, so it was a cost of doing business, and if you can minimise that cost in various ways then you ought to take those particular cases.

10

And I think that has profound ramifications in terms of your resourcing, in terms of your training, in terms of the status of FOI officers within particular agencies, et cetera, or even the status of the legislation itself within various agencies, and I think if Anna Bligh had, instead of announcing a review into FOI, had announced FOI was going to drop off the map in Queensland that there would probably be more people in this room and there would probably be more excitement within the ranks of Government than what there has been in terms of "we are going to shake the tree and try to think about some of the fundamental reforms in that particular process.

20

So I want to kind of raise that question just for the discussion about what we should actually be doing in terms of this review and in terms of being Government officers in response in that process.

30

And last week at the Carter conference I had the privilege of going for a walk in the Japanese gardens in the Carter Centre with the head of google.org which is the kind of public benevolent arm of Google, looking to do good things in the world, and he had come to this conference and sat there for two or three days and he came up and said what he wanted to get out of the conference was ways and means of effectively taking information held by Government, digitising it and somehow making that information accessible to the bottom 25 per cent of the most marginalised 25 per cent of people in the world to transform their lives, and he's talking about doing things like digitising it so that it could be transmitted by SMS, it could be transmitted by mobile phones, because while there's high illiteracy rates, while there's high problems about physically moving documents around the place, Google was very much in trying to get up alternative delivery systems, so trying to put useful information in the hands of people who can best use it or need it at that particular time.

40

50

And Peter Timmins once referred to freedom of information as being something designed in the horse and buggy days compared to something that's really necessary for the 21st Century.

I invite the horse and buggy. FOI has often been treated by Governments and their officers as a luxury item, as a kind of

limited range of privileged users. Not everyone's got access in those old days to a horse or buggy, and it's a once off transaction. No one asks you what you actually do with your horse and buggy. Once you've got it, that's it. A little bit like freedom of information. There's been very little emphasis placed on how the information has been used once it goes out of the system in that process.

1

So compared to what Google attempts to do, which is this continual improving of delivery of information on an on time basis to people who really need it and can put it to some particular use.

10

And I'd like to see a change. If anything came out of this discussion paper, anything came out of this change, I'd like to see an emphasis in approach towards much more focus on how to get timely information to people who need it and who can use it in that particular process.

So if we started from scratch, and that's really what the Queensland discussion papers talk about, is that kind of complete blank paper and let's start again with some basic propositions.

20

I think what we'd be attempting to do is design an information system for the 21st century and we've been looking at what some of those major requirements are, and one of those would be an ongoing delivery to a variable number of types of users, taking into account that not all users are the same, not all users are Michael McKinnons who are going to use the particular information certain types of ways, not all users are Rick Snell, who's academically going to use it in certain types of ways, but how best to take that raw information that's within your hands as Government employees to give them - present to people in a much more useful format so that they can get some productive use out of that particular information.

30

So the delivery of timely, reliable, high quality, informative information to people who really need it. And also to manage as an important ongoing public policy program. I think one of the great failures of freedom of information, especially in Australia, has been the treatment of it as something as a kind of indulgence or an afterthought, rather than treating it like any other major infrastructure program or any other major policy program of people who are directly accountable for it. Clear objectives about what you are trying to achieve and being budgeted and resourced to be able to carry out those particular policy objectives.

40

And I think that with a major policy program we would assume the benefits but we would concentrate on ensuring the delivery of the benefits that we've claimed for and that's mentioned in the discussion paper. The kind of benefits that were put forward for freedom of information at the start of the process have been largely fairly airy-fairy and not tangential in terms of being - or not tangible in terms of understanding them. We need much more direct benefits which we can measure

50

and which we can say we are actually achieving. That this information needs to be released. And Michael McKinnon's paper echoed about that.

1

The tangible benefits there about saving people's lives. Tangible benefits about the increasing and improving public debate. At the end of each year we should be able, even in fairly general terms, to be able to turn around and say as public servants using mid-stream FOI, we have contributed to increasing the public benefit in terms of the level of public discussion. The level of debate that's taken place in our particular jurisdictions.

10

I think we don't use, and I'm talking here as in terms of the public service, we don't use freedom of information as an organisational learning tool. In very few jurisdictions there's much effort put into actually deconstructing FOI requests. What was requested, why it was requested, how did the process work and actually feed it back into the organisational learning of the agency or the institution involved in the particular process.

20

And the other aim, I think, if you were starting from scratch what you would attempt to do would be to have an objective roughly along the lines of that some time in the future, five years or 10 years, name your figure as to your far off date, that what you'd like to see is that for about 90 per cent, and it's an arbitrary figure, but say for 90 per cent of public Government information that everyone, including those on the inside and those on the outside of Government, have equal access in terms of time, in terms of quality, in terms of reliability, for the same information. Almost simultaneous ability to access that information because you've identified the information that ought to be out there in the public domain, that can contribute to the public debate. And then the more esoteric ones of us, like Michael McKinnon and myself, can effectively contest the last 10 per cent and say that ought to be out in the public domain.

30

But our rules, our budgeting and our operation wouldn't be confined to that 10 or five per cent of contested information and not trying to protect, often very arbitrarily, 100 per cent of the information. Or in the McKinnon case I think the scandal there, is if you have actually looked at the quality and the types of documents that the Government and News Limited have spent over 1 million to 2 million dollars contesting over, were, if you like, at the rubbish end of the spectrum as far as information quality goes in terms of content, et cetera. What could have been done with that money in a whole dobra of other areas in that process.

40

If the fight had been over really valuable important confidential documents in the process not trying to hide the riff-raff in that particular process. So I think the key points that I want to try to emphasise today is that I don't think that the Public Service has managed or even attempted to reek the benefits - blessings of freedom of information. They have treated it very much as an enemy within the ranks and haven't learned about the quality that can be gained from

50

improving the public policy processes. I'll leave it there to throw open to questions or whatever, because I think part of my idea was - role was to try to provoke debate and discussion in the process and it's been, you know, rude of me just to throw the kind of hand grenades in to it right away. Okay.

1

DR SOLOMON: Well, Rick's here for another five minutes and he's keen to take questions, so are there any questions? If you're going to ask one could you give us your name so that we can make put that in the record.

10

MR SNELL: Well, no, it's actually very hard. I was at a workshop in South Australia once when a public servant literally, she jumped across the table at me and effectively said, "Snell, you bastard" because of something I wrote in the FOI review. She said, "Don't you realise that you're attacking defenceless here?" because it was something negative I'd said about public servants and about their approach, and she said, you know, "We're restricted from what we can say in public, we're restricted by taking a non-agency line in the particular process." And that brought home to me, kind of a responsibility of me as an academic to try and much more - little bit more objective in the particular process.

20

So, what I've attempted to do here is just to, I think, throw open the idea that there is some benefits and dividends to be gained from freedom of information in terms of improved agency management and practices. As an example, when I was a former Tax Officer, when FOI first came in in 1983, as a Regional Officer we had great problems because the documentation that we had from National Office was out of date, incomplete and inadequate, which was a problem for us as a bureaucrat, but a major problem if you were a taxpayer because we were using rulings that were incomplete, that were inconsistent with what had taken place elsewhere in Australia. Every time we put a request into Head Office we never got anything back.

30

Two things happened when FOI occurred. One was that we threatened to use an FOI application through Central office to get that system the most up to date rulings. They laughed it off and we didn't do it but the threat had been made. But secondly, the tax agents, on our behalf, put in an FOI request for all the modern income tax rulings and the Department had to produce a whole set of new income tax rulings then because they had to print them off they then sent them to us in the regional offices. First of all to the tax agents but we were the kind of secondary beneficiaries of that particular process and one of the, you know, major benefits of a good freedom of information scheme. The idea about making it 90 per cent instantaneously available to everybody, as everybody includes people within the public service knowing what other people are doing, what happens in other Government departments, et cetera.

40

50

There's countless times in numerous jurisdictions, I'm always constantly surprised that, because I walk around from Government department to Government department talking to

people, I send my students to do research to do the same thing, you suddenly discover that one arm of Government doesn't know what the other arm is doing with that particular process or that they, you know, they share view points or otherwise in that process.

1

So I think there's - there are some major benefits to be gained and one of the other major benefits is the quality of public debate, the points that was raised by Simone about the Joseph Sticklitt's argument about information symmetry. You know, his basic point is that in an information market place where you've got great barriers about information between users and disclosers of information, then you've got a dysfunctional market place and you've got a dysfunctional public policy process. Because the debate is uninformed, is uncritical in the process and people are arguing and debating about the lowest common denominator because they just haven't got the real information to make informal discussions.

10

And the Dr Death case is a good example in the absence of that material and it's just speculation, it's just gossip, it's unconfirmed or unsubstantiated processes. Getting hold of the information actually what raises that level of debated discussion to take place. And you can have greater and better expectations about journalists, you know. One of the sad things about Australian journalism is that to a large extent for a majority of time it relies very much on secondary hearsay type of information. You know, on the phone call from the Minister to give her background briefing et cetera, and not on the substantial documentation allows a person to make an independent assessment. And there's two different types of stories arising from there, you can hold journalists to two different types of standards. On one they're just a cipher for the person giving the information and the normal kind of caveats about the motives and the reliability that all comes into play. If they've had access to the correct, reliable, verifiable information and they get it wrong, then you can hold them to account.

20

If they misinterpret it you can hold them to account but if I just misinterpret what the background briefing was from the Minister or one - or unnamed advisor, why should I be held to account as a journalist, well, for my activity because it was suspect information in the first place and it's just speculation along there. So I think it improves that public debate and it improves about the expectation of most of the key players in that particular process as well.

30

40

Okay. I'll leave it there.

DR SOLOMAN: Thanks very much, Rick, and have a good trip home. Well, any comments from anyone? We do need your name and we assume, if you're from an organisation, that you will not be representing the organisation, but if you are please say so. No? Well, in that case I'll call on Ros Croucher.

50

PROFESSOR CROUCHER: Thanks.

DR SOLOMAN: Professor Croucher is the Commissioner at the ALRC in charge of the ALRC's venture, latest venture, into freedom of information.

1

PROFESSOR CROUCHER: Thanks. It is a - it is a venture indeed and it's in the nature of a bit of a speculative venture at the moment, until we get clearer riding instructions. When the government was coming in, it said a number of things about what it was going to do as David Weisbrot, the President of the Commission, showed in his presentation at the beginning.

10

As that will have an impact on what we do at the Law Reform Commission, we're kind of doing all of our background work, our scoping work and all of those sorts of various - important aspects of any of our consultative documents, but until - until then the rest of the Commission is engulfed in privacy. But that's an important engulfing process because privacy and FOI are flip-sides of the same coin.

So, while the - and it's a very important flip-side to the FOI coin because as you would all know, I'm sure, the vast quantity of FOI requests are actually "what about me", you know? They are personal information requests. Three-quarters and upwards of FOI requests as reported in all the annual reports are all about personal information, the kinds of almost quixotic missions that Michael McKinnon and others have embarked upon, aren't really about personal information. They are a small and very courageous and actually where the accountability of government is really tested, but the bulk of FOI work is actually a different kind of work.

20

30

And it led me to reflect, and I suppose if I've got an opportunity just to give my two bob's worth as the Commissioner in charge, the kinds of impressions that I have been gathering in relation to key issues and I also commend David Solomon and his panel for the review documents so far. I think this is marvellous. It pitches the question at the right level as a discussion document and I hope that every person in this room puts in a submission either to this panel or preferably to both.

40

And one of the things I should mention in relation to the ALRC inquiry, in addition to the consultative processes here in Queensland, is that the ALRC welcomes input at whatever level one wishes to make it. The ability to make comment online through emails, I think, is a marvellous way of capturing very quick impressionistic but valid contributions to a community consultation process, so I commend that, that avenue.

But in terms of the way that some reflections on FOI as an issue, it's - and you know, people have been playing with the idea, is it freedom of information or freedom from information, whether it's access to documents, whether it's access to information, scenes, I'm sure, that are familiar.

50

But it struck me actually that the real issue at the base of all of this is actually about the provision of information and how is the best way in a democratic environment to provide

information to its stake-holders? And that's where I think we are well served by technology, that if the emphasis is more on the DIY FOI, the do-it-yourself freedom of information, if it's possible to frontload as much information as possible - I mean the FOI legislation is legislation of an era of documents.

1

Its form is more how difficult it is to create documents and how painful it is to manage documents, but that surely is now becoming a lot easier and less time consuming with good record management systems. If more information is frontloaded, it's a more provision of information through the DIY FOI rather than the "Please, sir, I want some more" approach which is the Charles Dickens's approach to a freedom of information request.

10

And it struck me as very interesting reading Chris Wheeler's paper. Chris Wheeler, the Deputy Ombudsman in New South Wales, did a review of applications in - FOI applications in my State and one of the things that was really interesting to observe over a ten year period there, was a huge reduction in the number of FOI requests and that reduction was almost directly attributable to the introduction of a system in the police called "Crimtrack" which enabled people, as I read it, I'm not familiar with it entirely, but as it was described, it facilitated people being able to find out about their own criminal records and because that was about 2,000 applications, all of which went to the police. Once you took that bunch out of the FOI stats it dropped away hugely and hence it struck me that an approach of government which frontloads as much as information as possible, facilitates the provision of information and then heads off at the past the problem of the "Please, sir, I want some more" approach which is really the application route.

20

30

So, just - that was the first observation and the other observation I wanted to make was that I think one of the things that comes out in all of the reviews is the importance of the Freedom of Information contact person within the agency and how if, for that person, it's not a matter of courage but rather a matter of course that they provide the information that's requested, that that achieves the goal of the provision of information which, I think, should be at the heart of this whole thing.

40

And if it should be a matter of course and not a matter of courage, then that taps into a whole range of other issues that have been exposed very well already and that I think would provide a very pointy end for me in relation to submissions that are made to the ALRC inquiry. How do you provide effective training and leadership that generates the culture that has been the subject, or prevents the culture, which has been the subject of criticism in very many of the reports? How do you change a focus from one that says information is free except to a position where information is available and here it is?

50

Hence the focus, I think, in the Queensland discussion paper on the objects of the Act, the model, the design faults or the design model that should be implemented to achieve the provision of information in an appropriate way. So, where the so-called agency culture has been identified as difficult or the kind of bureaucratic osteoarthritis which leads to it, how one heads that off in a way that achieves a goal of provision of information in a way that places the goal of accountable government as achieved in a very real and meaningful way.

1

So, I congratulate the Queensland discussion paper and welcome the report. I see it as being the path-breaker in many ways for some of the work that we'll do and the nice thing about having a State inquiry and a Federal inquiry working, not quite in tandem, but synchronously, then that reinforces the other so that the submissions that are made in one can be referred to in the other and it achieves a much more harmonious and of course that's one of our objects and briefs in the Federal body to be able to harmonise our processes so the comments in one can reinforce the comments in another.

10

20

So, for me, my initial beginnings in FOI were as a Law School Dean. I was a Law School Dean for seven and a-half years in a formal capacity and over a year in an acting capacity before that and there's nothing like being a manager in an organisation, a public organisation, to give you an exposure to how FOI works. But much more importantly, and I think this is where I started - my starting premise, how important it is to run a process well in a way that you know will be, or is, open to scrutiny and one in which you feel that any questions that are asked only underscores the validity of the initial decision.

30

So, I think FOI does serve a very important role in the accountability of Government but I think the focus really ought to be on the provision of information and the best ways to achieve that.

DR DAVID SOLOMON: Well thank you, Roz and thank you everyone for coming along. Unless there is some late contributions I will finish up now. As I say, thank you very much for coming along to what has been to us also an informative, very informative afternoon. Thankyou.

40

THE SEMINAR CONCLUDED AT 3.53 P.M.

50