

FOI Public Seminar 6 March 2008

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 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 too, that were still in the comfort zone – like, fees and charges, time frames, appeal mechanisms, but *key* recommendations like introducing an FOI champion or monitor role, extending the scope of the Act, or narrowing the effect of exemptions didn't get a play.

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's own motion inquiry, and then a Senate Inquiry into a private member's bill – all exited with applause, but no reform.¹

(However, the new Rudd Labor Government did announce its commitment to significant recommendations of the ALRC review during its election campaign.)²

Of course, there has been plenty of amendment activity on governments' 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. We note the Nobel prize winning concept of "information asymmetry" and its extension to the public sector where FOI can be seen as interrelated with other areas and plays a critical role in both offsetting

¹ Australian Law Reform Commission (ALRC)/Administrative Review Council (ARC) *Open Government: a review of the federal Freedom of Information Act 1982*, ALRC Report No. 77, ARC Report No. 40, November 1995 (hereinafter referred to as ALRC/ARC Report); Commonwealth Ombudsman Report, *Needs to Know*, June 1999; Senate Legal and Constitutional Legislation Committee, Inquiry into FOI (Open Government) Bill 2000, April 2001.

² Rudd, K. and Ludwig, J., "Government Information – Restoring Trust and Integrity," Election 2007 Policy Document, October 2007.

information asymmetry and leading to improvements in policy and decision-making.³ We also examine 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 the stage. If we ask the same questions, we're likely to get the same answers. That 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*, for example, to 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?

We *don't* start with a statute and case law review; we *don't* start with a line by line analysis of existing legislative provisions. It's been done before by some and done well enough.

We go back to first principles and we *start again*.

Our discussion paper asks, “why FOI”, what are the objects and what do they *really* mean?

What should the scope of the Act be for contemporary government – should access rights pertain to just “public records” (which would exclude 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 the extent of evidence of government activities? 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. 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 vs substance, class vs adverse effect, absolute vs relative tests.⁴

³ FOI Independent Review Panel, “Enhancing Open and Accountable Government”, Review of the *Freedom of Information Act 1992* discussion paper, 29 January 2008 (hereinafter referred to as FOI Independent Review Panel discussion paper), p. 43.

⁴ FOI Independent Review Panel discussion paper, pp. 74 – 75.

We seek debate on the role and definition of public interest tests.

We ask, “Should there be an over-riding 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 oft-quoted, the public interest is an “amorphous concept” which is not defined in the FOI Act or any other statute.

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 *Mc Kinnon v Secretary, Department of Treasury*⁵ did not take the opportunity to provide guidance on the meaning of public interest. The 1995 ALRC Report⁶ 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 report⁷ also recommended against a legislative definition but for guidelines and training by an FOI Monitor. Although, LCARC 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 a wide range of definitions has the potential to work to the disadvantage of applicants”.⁸

Leaving aside the problem of what a 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 clause, 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 interests, 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.

⁵ *McKinnon v Secretary, Department of Treasury* (2006) 228 CLR 423.

⁶ ALRC/ARC Report, p. 97.

⁷ Parliamentary Legal, Constitutional and Administrative Review Committee, *Freedom of Information in Queensland*, Report No. 32, p. 185.

⁸ Paterson, M., *Freedom of Information and Privacy in Australia*, LexisNexis, Butterworths, Sydney, 2005, p. 219.

The way the test is expressed may also determine which party has the onus to demonstrate benefit or detriment.

Our discussion paper asks, should there be guidelines to help determine 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 the particular case?

In our discussion 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 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 pervasive reality that information is power, time is currency, and secrecy enables political advantage.

And this in a contemporary context where advancements 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 everyday 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.

The reality is that access to government information reaches to the core of political and bureaucratic interests and operates beyond purely legal considerations and dispassionate calculations on the public interest.

No matter what balancing 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 complex manifestation of political and bureaucratic interests) is not in position to support the lead act.

In the discussion paper, we seek an examination of administrative compliance behaviours⁹: to what extent are poststicks used to avoid FOI and preemptive 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 end of proactive compliance. Are there shortfalls? What are the steps to address the shortfalls that exist, however described?

How can FOI decision-makers be supported in their vital role under the Act? What change management strategies, incentives (such as including FOI in performance agreements of senior officers) and sanctions (such as making certain activities in direct contempt of the FOI Act an offence) are reasonably available to effect 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.

For example, 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.

We seek to test the opportunities and challenges raised by 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 not likely here – are enough even bothering to attend the first act? 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 has just an administrative regime for privacy. If there was to be a Queensland Privacy Act covering access to personal information and the correction of errors,

⁹ FOI Independent Review Panel discussion paper, p.104.

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?

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. 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 or influenced, 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.