REPORTING ON NEW FOI PROPOSALS FOR QUEENSLAND

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Yesterday (20 August 2008) Premier Anna Bligh announced the results of a line-by-line review of the report by the independent Panel that reviewed Queensland's Freedom of Information law. The score was quite remarkable: of 141 recommendations, 116 were accepted in full, 23 either partially or in principle, while only two were rejected. Those two were of no consequence: one concerned charges the Information Commissioner should apply for use of office facilities by applicants; the other whether the Act should contain a schedule listing secrecy exemptions.

Of the 23 partially accepted recommendations, none of the changes that may emerge when we see detailed legislation will affect the general thrust of the legislation. For example, the costing regime will be based on the simple proposal that applicants should pay for each full page they receive, but this will be adjusted to take account of some possible anomalies that have been brought to the Government's attention particularly by the Australia's Right to Know group.

I propose to concentrate on the major matters dealt with by the Panel dealt, mentioning where the Government is proposing changes.

But first, a little history. Anna Bligh became Premier in mid-September 2007. Two days later, on a Saturday, she phoned me and asked if I would like to head a Panel to review Freedom of Information in Queensland. Two days later she took to her first Cabinet meeting as Premier a proposal to establish an independent FOI review Panel with terms of reference that could hardly have been more extensive. They included, twice, the marvellous phrase 'the Panel is to consider (but not limit itself to)…'. The Panel comprised me, as full-time Chair, and Simone Webbe and Dominic McGann who were both part-time.

My background is essentially in journalism, where I specialised in politics and law. I retired from full-time journalism several years ago. I moved from Canberra to Queensland in 1992 to become Chair of the Electoral and Administrative Review Commission (EARC). As it happens, both the other members of the Panel had worked with EARC during earlier periods. Simone Webbe moved on to become a deputy Director-General of the Department of the Premier and Cabinet. She had responsibility for management of FOI among other things and had on a number of occasions acted as the internal reviewer in FOI matters. Dominic McGann is a partner in the law firm McCulloch Robertson. In the early 1990s he had been in various departments in the State government and in 1995, while in the Department of Justice and Attorney-General, conducted a review of the FOI law as it then was.

The Panel was presented with a huge task. We had to produce a discussion paper by the end of January this year – that is, in four months – with our final report four months later, at

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the end of May. The first turned out to be more than 200 pages long and the second twice that size. The report included 141 separate recommendations.

I don't think that anyone – certainly not the government, and not even the members of the Panel – could have envisaged quite what would be the nature of those recommendations.

I should try to put our proposals in context: Modern FOI began with the legislation of the early 1980s in places such as the Commonwealth and New Zealand, derived in part from the earlier US legislation. The Queensland Act, building on the experience particularly of the Commonwealth Act, was in effect the beginning of stage 2 of FOI. It was highly regarded, particularly overseas, and the original 1992 Act became a model for FOI in places like Ireland. Stage 3 of the FOI legislation began with the 21st century legislation of Britain, Ireland and India. The legislation we are proposing wouldn't so much be the start of stage 4, as the beginning of Mark 2. This is a fundamentally different model. In some respects, it is not so much evolutionary as revolutionary.

It wasn't our aim to produce radical recommendations. They eventuated because of the way we approached the review, encouraged by the broad mandate given to us in our terms of reference.

Throughout our review we were concerned with the problems with the existing legislation – problems for end-users, for Ministers and for the bureaucracy. We came up with solutions that should provide answers for the biggest problems that each group has under the present law.

We did that by trying to find what the flaws were in the current arrangements and trying to fix them by going back to basics, to first principles, rather than applying Bandaids. It was not a legalistic review analysing sections seriatim, but a policy formulation approach driven by our understanding of the law, politics and bureaucracy. We were prepared to question, and in a few cases reject, some of the accepted wisdom surrounding FOI.

I should say something about some of the problems we saw with the current law. The past 15 years had seen the original Queensland legislation changed in a number of ways, many of them, arguably, contrary to the objects of the original Act, and certainly contrary to its spirit. There is no doubt that in some cases Ministers thought they were restoring the original intention of the Act to overcome unexpected and unwelcome decisions by the Information Commissioner. However the current form of the Cabinet exemption has been soundly and rightly criticised as allowing Ministers to undermine the intent of FOI. Essentially, Ministers could hide anything by wheeling it into the Cabinet room. The matter didn't have to be on the Cabinet agenda, or be considered in any way by Cabinet. One Minister told me of an occasion when he took a number of boxes into the Cabinet room to exempt their contents from FOI, telling his colleagues they could look at the material if they wanted to. No-one did.

Another problem area concerns the administration of the Act. There can be no doubt that the message many FOI officers received from the changes to the Act made by governments and from the concerns of Ministers and senior officers, where there was any possibility of an adverse media report, was a negative one. The atmosphere did not encourage a fearless application of the legislation. The culture in some agencies was very antagonistic towards FOI.

No matter how adequately any FOI law is expressed to promote openness and accountability, it won't work that way unless there is political will for that to happen. You can adopt a host of information strategies and policies to improve FOI, and try to change the culture of the administration of FOI, but they are going to be ineffective unless, centrally

driven, there is the political will to give effect to the objects and spirit of the Act. There was no evidence of any leadership from successive governments – quite the reverse in fact – till Anna Bligh took over from Peter Beattie as Premier.

Let me now give you an overview of the legislative architecture we are proposing.

The fundamental premise of the legislation, the starting point, is the presumption that all non-personal documents are open. (I should interpolate here that we are proposing that most personal information should be accessed under a new Privacy Act, rather than under FOI.) The presumption that non-personal documents are open, is enhanced and achieved in large part through proactive disclosure of information by agencies through such policies as publication schemes, administrative release, administrative access schemes and a series of what are referred to as 'push models' that make information available either generally through an agency's website, for example, or directed to specific interest groups, for example, by email. Information also becomes available if it was restricted through being covered by an exemption, but the time dictated by an early release schedule has expired.

If information has not been made public in one of these ways, then the new Act comes into play. It provides for release of the information unless -

a) matter is exempt because it satisfies one of a limited number of exemptions and the time during which the exemption applies has not expired – the time can be extended by the Information Commissioner on public interest grounds.

OR

b) the disclosure, on balance, would be contrary to the public interest.

I will come back later to mention some important changes in the public interest test and the way it is applied. For the moment I just want to emphasise that what we are proposing is a simple two-stage test once FOI is engaged by someone wanting information. First there is a decision as to whether it falls within an exemption. If it does not, the only issue then is whether its disclosure, on balance, would be contrary to the public interest.

Let me refer to some of the exemptions that we propose to retain.

The first, and probably most important, is the Cabinet exemption. It is this that has caused so many of the problems and angst about the law and the administration of FOI.

We adopted a principled approach to the Cabinet exemption that has interesting, and very beneficial, flow-through effects for individual ministers. We decided not to recommend a return to the 1992 Queensland Act Cabinet exemption, because that would have resulted in too much uncertainty about outcomes of FOI applications. Instead, we looked at the purpose of the exemption. That purpose is about protecting the collective ministerial responsibility of ministers in Cabinet. As it happens, in Queensland, fairly uniquely, that principle is not merely an unwritten convention of Westminster government. In Queensland the principle is enshrined in the State's Constitution. What we are proposing is that the exemption for Cabinet documents is based not on the description of a particular document, but on the effect of releasing it – would its release impact on collective Ministerial responsibility? We don't recommend there should be a public interest test for this exemption. The result of applying this approach will be to wind back the exemption to something like what was intended in the 1992 legislation, though there would be much more certainty in the application of the exemption.

Individual Ministerial responsibility also needs to be protected under FOI. We proposed that principle be used to provide protection for three classes of documents. They are incoming Ministerial briefs, estimates briefs and question time briefs. There would be no need to take these to Cabinet to hide them from disclosure as happens now in some cases. We proposed the legislation should be upfront about providing them with exemption status and our report explains the principled reason for doing so.

However I understand the Government was advised that estimates briefs and question time briefs are covered by the current parliamentary privilege exemption and therefore do not need to be dealt with as we proposed. It decided incoming Ministerial briefs would be protected from disclosure for 10 years, rather than the three years we proposed.

We retain the exemption for the Executive Council and create a new exemption for material flowing between the Governor, as the Queen's representative, and the Premier. While the Governor is covered by an exclusion under the Act, this does cover vice-regal material in the hands of the Premier.

We balanced these exemptions in a number of ways. First, we disposed of the provisions allowing conclusive certificates to be issued. In Queensland there had only ever been two such certificates issued and that was relatively early in the history of the legislation. The Panel considered there was no justification for their continuation, not least because they allow a Minister to override decisions properly taken under the law by the relevant, designated authorities.

Next we proposed, as the Electoral and Administrative Review Commission had recommended on two occasions, that the Premier and Cabinet secretariat should regularly consider releasing Cabinet material, including an edited version of the Cabinet agenda.

Then, again guided by the meaning of the principles of Ministerial responsibility, we also suggested a major reduction in the 30-year rule that protects Cabinet papers and the ordinary papers of agencies to 10 years.

Another interpolation. If you read our report you will see several references to this proposal, not least in our executive summary in Chapter 1. A few weeks ago at a briefing in Parliament House, the Premier told me that this proposal was not reflected in any of our specific recommendations. How this slipped past us I don't know, but given the nature of our task and the pressure to produce our report on time I cannot say I'm surprised that a few things slipped through the net. In any event, the Government did deal with the proposal. It decided that in general the 30-year rule should be replaced by a 20-year rule. But specific Cabinet documents sought under FOI would be available after 10 years.

I should also mention that we proposed that in the transition from the present system to the new one, the existing exemption for Cabinet documents should continue to apply to all material created before the new legislation comes into effect.

We carefully considered the ever-growing list of exemptions in the present legislation. There are two types of exemptions – those that do not include a public interest test (such as the Cabinet exemption) and those that do. We proposed very few changes to the straight, 'no public interest' exemptions.

However the really significant change we did recommend is that those exemptions that <u>do</u> include a public interest test should be treated in an entirely different way from at present.

We believed that these exemptions are frequently applied in a spirit that is not in keeping with the expressed objects of the Act. The tendency in Queensland is for an FOI officer to try

to find an exemption or two, then assume there is a prima facie case against release when applying the required public interest test – that approach has official backing from the Information Commissioner, but some officers don't even bother to apply any kind of public interest test. But when they do, the presumption against release normally carries the day.

What we proposed is that these 'subject to public interest' exemptions should be reframed. Instead, of first working through the often lengthy terms of their exemption provision to see that the particular document falls within its description, and then applying a public interest balancing test after that - the harms that they are directed to preventing, would become part of the one assessment of the public interest exercise, duly and expressly weighted, to be balanced against the other public interest factors including those involved in releasing the document. There would be no prior characterisation of the document as being exempt.

The result of adopting this approach would mean there would be a radical change in the way FOI officers would deal with any application for documents. First, they would see whether it fell within any of the small number of true exemptions. If it did not, then they would apply a public interest test.

The public interest test is the next issue we addressed. At present it is vague and indeterminate. In fact, the current Queensland legislation contains three separate and supposedly distinct formulations of a public interest test. We consider there should be only one public interest test, and it should take the form -

> Access is to be provided to matter unless its disclosure, on balance, would be contrary to the public interest.

The Government supports this recommendation subject only to advice from Parliamentary Counsel.

At present, what factors might be taken into account in determining the public interest depends on the training of the FOI officers, what law books or Information Commissioner decisions or manuals they have access to, and what the agency's general attitude to FOI is. This leads to enormous differences in the application of the test, even within the one agency. The Panel decided to write a definition of sorts into the legislation, by listing the factors that an FOI officer should consider (though only a few are likely to be relevant to any particular document). These include the harm factors that were previously protected by exemptions, with a time and harm weighting guide to assist people to assess the harm that might be relevant. The other advantage of specifying these factors – those favouring disclosure as well as those telling against it - is that it allows the applicant to know what factors the FOI officer has to take into account.

We assumed that Queensland would introduce a Privacy Act, and in accordance with what the Government told the Australian Law Reform Commission in its official submission to the Privacy inquiry, the Act would conform with a nationally uniform code. The ALRC presented its report on privacy to the Commonwealth Attorney-General at the end of May. That was made public recently. We didn't know what would be in it but we anticipated it would largely follow the proposals outlined in the discussion paper published earlier this year. That leads us to recommend that requests for personal information should be moved out of the FOI system and into the privacy regime. This would have major advantages for users, who sometimes cannot access their material under FOI but would probably get it under privacy, and also for the administration of FOI, because it would remove some of the clutter – about half of all FOI applications in Queensland. Most new FOI legislation internationally adopts this separation of personal and non-personal information, leaving FOI to deal with governance and other non-personal information.

However the ALRC didn't quite match our expectations. Because it had received a reference on FOI – which has since been taken away - it decided to defer making recommendations on the interaction between FOI and Privacy though it did say its FOI review could move access to and correction of personal information from FOI to Privacy, and limit FOI to regulating access to information about third parties and the deliberative processes of government – as occurs in New Zealand. Although the Commonwealth has indicated it will be more than a year before it introduces any changes to its Privacy Act, Queensland has decided to press ahead in the first half of next year with a Privacy Act and the appointment of a Privacy Commissioner, as we proposed.

The Panel considered the ever-growing list of exclusions from the FOI Act. We noted that Britain is currently going through an exercise designed to broaden the coverage of its FOI Act, not least to take account of the way governmental functions are being increasingly performed by corporatised agencies or even private industry. We suggested that Government Owned Corporations - GOCs - should not be automatically excluded from FOI by virtue of the fact that they are created under Commonwealth rather than Queensland legislation. We also thought that many bodies that receive substantial funding from the State should have to answer under FOI at least to the extent of the services the funding enables them to provide.

The Government has gone a long way to adopting our proposals, though it plans a special exemption for the commercial competitive interests of a few GOCs. Our proposal would have given the GOCs that protection under a specific factor in the public interest test.

Time and costs: the present charging system is a disaster. It takes up a significant amount of training time for FOI officers and then a great deal of their time when they have to deal with requests. It takes more time than it is worth. The charging regime only nets a few hundreds thousand dollars each year for the Government but the latest estimates from the Department of Justice and Attorney-General suggest that FOI costs over $10 million a year.

We proposed a simplified charging system based on the number of (full) pages provided in response to a request. But to make sure the person making the request gets what is really wanted, the agency in future should produce, as a first response to a request, its schedule of the relevant documents and engage the requester to decide upfront which from the list of documents it really wants. This will cut processing time and it will cut the costs of providing material. It will reduce disputes as it forces the requester to take some responsibility or partnership in the processing side of the equation. As I mentioned earlier, the Government had adopted these proposals in principle, but will look at them in more detail over coming months.

Our proposals would also allow requests to be dealt with more quickly than at present. We propose the adoption of a shorter time frame for deciding or responding to requests, though it would be based on working days rather than calendar days, to overcome problems that sometimes arise when requests are made shortly before a holiday period.

We propose to revamp the Information Commissioner's Office and expand the functions of the Office. These proposals are not new, but pick up the recommendations in the ALRC/ARC and LCARC reports for an FOI monitor. They also reflect the experience in such places as Britain, Scotland and Ireland. The lead agency model has not worked, and needs to be replaced by an Information Commissioner that is an active and shared resource across government, as the champion of FOI. The Information Commissioner should have the power to monitor and report on the performance of agencies under the legislation and to deal with complaints – in Queensland the Ombudsman is currently prevented by the Act from responding to such complaints. And we would give the Information Commissioner a stakeholder role in information policy generally, across government. We suggest that the

Privacy Commissioner be located within the Office of the Information Commissioner to manage the inherent tensions between information access and privacy protection.

We propose that the internal review of FOI decisions by agencies should no longer be mandatory and that a requester should be able to proceed directly to external review by the Information Commissioner. However we propose that time limits should apply to the two stages of external review, mediation and (where necessary) determination.

The Queensland Government is currently considering the creation of a Civil and Administrative Tribunal to take over the functions of several dozen separate administrative tribunals. The proposed jurisdiction of that Tribunal is the subject of a report by another independent committee that the government was due to receive at the end of May. We suggested that the Information Commissioner should not be incorporated into that Tribunal. However we recommended three ways in which the Tribunal should interact with the Information Commissioner.

- First any appeals on questions of law should go to the Tribunal rather than the Supreme Court as is presently required in the legislation.
- Second, we would permit the Information Commissioner to refer questions of law to the Tribunal.
- And third we believe the Tribunal should hear any appeals from people declared by the Commissioner to be vexatious.

The Government adopted these recommendations.

We propose a number of ways to reduce the need for FOI, through the proactive release of information by agencies. We also deal with the issue of contentious issues management, suggesting guidelines for the provision of information additional to that requested, so as to improve the chances of a balanced report.

We proposed a number of sanctions and incentives directed at agencies to try to encourage the proper administration of the Act in accordance with its stated objectives. These include protecting the decision-maker from being overborne by a superior and reinforcing the importance of the penalties for deliberate breaches of the record-keeping requirements of the Public Records Act.

The Panel believes the new legislation it is proposing is more upfront and honest, with a new architectural design and greater definition that removes the structural advantage and bias in favour of government.

For both symbolic and practical reasons we suggested that there needed to be an entirely new piece of legislation to embody the major changes we recommended to FOI. It would help the Government to signal its willingness to adopt a more pro-active approach to the release of information and to move away from the unfortunate reputation now associated with the present Act. As the title of our report suggests, we proposed it should be called the Right to Information Act.

For the members of the Panel, this was an extraordinarily stimulating exercise. For the Bligh Government – and particularly the Premier herself - it has been an extraordinarily brave leap of faith. As I said at the beginning, no-one knew what we would propose, including ourselves.

Some of you may follow what Sydney consultant Peter Timmins says about FOI and privacy on his blog. For those who missed it I should repeat his summary of what the Queensland

Government is doing, and of his verdict. He wrote yesterday, after the Premier announced the Government's decisions (20 September):

> There are still steps to be taken to translate intent into law, and to change attitudes in government about the public right to access information, but this is rolled gold reform.
>
> A whole of government information policy to increase proactive release of information, with CEOs to be told to get cracking now to see what can be done straight away; a new simplified act to be called the Right to Information Act with a strong objects clause to ensure disclosure considerations don't get waylaid by "exemption creep"; clear governance responsibilities for making all this work assigned to the Premier and the Director General of her department. This is seriously good stuff.
>
> Congratulations to the Premier and the many others involved who have brought the reform package to this stage…

Not surprisingly there is room for a few quibbles but not today. For the moment at least, Queensland has set the standard for the rest of the country, where reform is still in the air. Some such as the Federal Minister John Faulkner, the ACT and Tasmanian governments have shown real interest in what's been happening in Queensland.

I should add that Tasmania has already indicated that it will be looking to our report when it conducts its FOI review. I have had some discussions with both Commonwealth and ACT officials who are working on reform proposals, at their request. The Commonwealth plans to produce an exposure draft of changes to its legislation at the end of the year. The ACT is due to produce a statement on what changes to FOI that it is proposing by the end of November.

We really are set for major changes across many jurisdictions with Queensland leading the way.