

## Queensland's Freedom of Information Inquiry

**Editor's note:** Because FOI is a fundamental building block for democracy, this edition has included both the discussion by the Chair of the Inquiry into Freedom of Information (David Solomon) of the Report and the Government's response, and the Introduction and Executive Summary of the Report of the Inquiry. While there is some overlap and repetition involved in including both, I decided, given the length of time which has passed since the first steps in Australia towards freedom of information, that the material in the Report itself which discusses accountability and freedom of information, and the role of, and impact on agencies was well worth including, to remind ourselves of the arguments, if nothing else.

### Queensland's Inquiry into the State's Freedom of Information (FOI) law and the Government's Response

**David Solomon**\*

The Queensland Government responded with remarkable speed in producing a detailed and very favourable response to the report by the Panel it appointed to review the *Freedom of Information Act 1992* (Qld). The Panel's report was given to Cabinet on 10 June 2008. On 4, 11 and 18 August Cabinet considered a line-by-line response to its recommendations. Premier Anna Bligh made the Government's response public on 20 August.

In June the Premier indicated that her Government would adopt the basic thrust of the report. It did so to an extent greater than most people would have anticipated. Of the 141 recommendations proposed by the Panel, 116 were accepted in full, 23 either partially or in principle, while only two were rejected. Those two were of no

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\* David Solomon was the Chair of the independent Panel the Queensland Government appointed to inquire into that State's FOI law. In this article he discusses the Panel's work and the Government's response to its recommendations. Dr Solomon AM is a long-time member of the ASPG, and was national president for several years.

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, none of the changes that may emerge when the detailed legislation is tabled later this year will affect the essential features of the Panel's proposals. 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 were brought to the Government's attention particularly by the Australia's Right to Know (media) group.

What I propose to do here is concentrate on the major matters the Panel dealt with, mentioning where the Government is proposing changes to them.

But first, a little history. Anna Bligh became Premier of Queensland in mid-September 2007. Two days later, on a Saturday, she phoned me and asked if I would like to head a review of Freedom of Information in Queensland. Two days after that 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 empowering 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 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 2008 — that is, in four months — with our final report four months later, at the end of May. The first turned out to be more than 200 pages long and the second twice that size.

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 the recommendations we would make.

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 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 21<sup>st</sup> 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 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 Band-aids. 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 (to Ministers) 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 that governments kept making and from the concerns of ministers and senior officers where there was any possibility of an adverse media report — was a very 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 provide an overview of the legislative architecture the Panel proposed.

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 pro-active 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* — 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 want to emphasise that what we proposed 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.

Here are some of the exemptions we proposed 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 with 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 proposed was that the exemption for Cabinet documents be 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 did not 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 to use that principle 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 up-front 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. The Government decided that incoming ministerial briefs would be protected from disclosure for 10 years, rather than the three years we proposed.

We decided to 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 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, of some importance. Our report contains 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.

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 *do* 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 considered 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 ALRC 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 in August. We didn't know what would be in it but we anticipated it would largely follow the proposals outlined in the discussion paper. That led 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 adopt this separation of personal and non-personal information, leaving FOI to deal with governance and other non-personal information.

However the ALRC didn't 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 Government 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 up front which in 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 noted earlier, the Government has 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 proposed 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 report for an FOI monitor. They also reflect the experience in such places as Britain, Scotland and Ireland. The model that made the Department of Attorney-General and Justice a lead agency for FOI matters 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 proposed 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 considered 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 proposed a number of ways to reduce the need for FOI, through the pro-active release of information by agencies. We also dealt 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 media 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 included 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 up front 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 proactive 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.

As the Panel said in its report —

For the public generally, the greatest benefit of the changes proposed by the Panel would be the provision of a much greater amount of information outside the FOI regime. This will occur through a new proactive disclosure regime guided by the Information Commissioner requiring agencies to publish far more information about the agency and its activities than is currently required. Agencies will also publish on their websites information they have already provided through FOI.

For people using FOI to make requests, the benefits will be considerable. More information should be made available as a result of the proper application of the public interest test. Information should be made available more quickly and it should be more responsive to the request that has been made. The applicant will be able to choose the material and will only have to pay for what is requested. The charge should be lower than currently applies, for most users. A new review system should result in quicker results where an agency's decision has been disputed. Questions of law will be able to be resolved more cheaply, and quickly, than at present.

In general, the law will be more upfront and honest, with a new architecture and greater definition that removes the structural bias and advantage that currently favours agencies. Access to restricted information about Cabinet and other governmental decisions will be available sooner, such as for Cabinet after 10, rather than 30, years.

For Ministers

The main advantage for Ministers will be that there will be much more certainty about which documents are exempt, and about how the public interest will be determined...

For agencies

The new system will make it much easier for agencies to apply the law and to administer the system. It will mean decision-makers will not be subjected to undue pressure to keep secret material that might be embarrassing for government. It will mean more assistance is available to decision-makers from the Office of the Information Commissioner and cross-agency support will become available if it is needed. A simplified charging regime will reduce pressure on FOI officers.

For the members of the Panel, this was an extraordinarily stimulating exercise. For some FOI people in agencies in Queensland it was an unwelcome challenge to the system to which they have become accustomed. For the Bligh Government — and particularly the Premier herself - it was an extraordinarily brave leap of faith. As I said at the beginning, no-one knew what we would propose, including ourselves.

The independent experts on FOI seem impressed. Sydney consultant Peter Timmins, who has a blog dedicated to FOI and secrecy, produced this summary on the day the Premier announced the Government's intentions —

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 regards the Panel's report as 'the starting point' for 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 by 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.

## **The Right to Information: Report delivered in 2008 of the review of Queensland's Freedom of Information Act (FOI Act) 1992**

### ***Introduction and Executive Summary***

The Panel has carried out a fundamental and comprehensive review of freedom of information in Queensland. It began by looking at the problems the law currently presents for end-users, for government and for the bureaucracy. It went back to first principles in searching for the way to resolve the conflicts and difficulties that had emerged in the more than 15 years since the law was enacted and crafted solutions that should provide answers for the biggest problems that each group has under FOI. The Panel was prepared to question, and in several areas reject, some of the accepted wisdom surrounding FOI.

The result is not merely an upgrade of the legislation, but a new model. It includes some unique features that are designed to overcome problems that appear to be inherent in most systems. Not everything is new – there are many sections of the legislation that would not be changed at all – but in a number of important and key areas the changes proposed are quite profound.

### ***The Public Interest***

The public interest is the central, unifying feature of freedom of information. As the Australian Law Reform Commission/Administrative Review Council Report said in 1995, 'What most distinguishes the approach to disclosure of government information in the FOI Act from approaches taken prior to its enactment is its focus on the public interest.'<sup>1</sup> It headlined its discussion of the public interest test, 'The availability of government information should be determined by the public interest'<sup>2</sup>

But the application of public interest tests has always been one of the most significant weaknesses of FOI. Again, as the ALRC/ARC Report said, 'Public interest tests allow all considerations relevant to a particular request to be balanced ... it can at times be difficult to perform this balancing exercise.'<sup>3</sup>

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<sup>1</sup> 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, December 1995, p. 95 (hereinafter referred to as the ALRC/ARC Report).

<sup>2</sup> ALRC/ARC Report, p. 95.

<sup>3</sup> ALRC/ARC Report, p. 95.

One problem is that 'the public interest' has been regarded as 'an amorphous concept', undefined, and dependant on the application of subjective criteria.<sup>4</sup> Another is that most FOI laws include at least several different public interest tests. Some put a small emphasis on disclosure, others tip the balance heavily in favour of withholding information. Yet another problem in Queensland (and in some other jurisdictions) is the way the role of the public interest has been downgraded by assuming that if a document can be classified as falling within the bounds of an exemption, there is a prima facie case against disclosure under a public interest test. That does not give the public interest a fair chance in the balancing exercise, contrary to the original intention of the legislation.

The proposals the Panel is putting forward are designed to overcome these difficulties.

First, the essential features of the public interest, relevant to FOI, will be listed in the legislation. This will allow decision-makers to more easily identify the relevant public interest factors that need to be balanced. It will also allow applicants to decide whether their application has been properly assessed on public interest grounds.

Second, a single public interest test will be applied. It is in the form, 'Access is to be provided to matter unless its disclosure, on balance, would be contrary to the public interest.'

Third, all exemptions in the present legislation that include a public interest test will no longer be exemptions. Instead, the harm each exemption was intended to protect against will be included in the public interest factors that have to be weighed.

These changes are designed to simplify the administration of the public interest test by making it more transparent, understandable and credible, to make it more likely that it will be applied in the way the legislation intended.

The consequence of not including exemptions containing a public interest test is to create a radically different but more effective legislative architecture for FOI, involving just two stages. When an applicant makes a request for a document, the agency first assesses whether it falls within one of the small number of true exemptions – those without a public interest test.<sup>5</sup> If the matter is not exempt then access is available unless disclosure, on balance, would be contrary to the public interest. In making that decision, the agency would check the factors listed in the legislation to see which are applicable to the particular document being assessed and, if relevant also consult a time and harm weighting guide that particularises

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<sup>4</sup> ALRC/ARC Report, p. 95.

<sup>5</sup> These exemptions do not include a public interest test because the Parliament has, in effect, decided that the public interest in the exemption is of such importance that it would not be outweighed by other factors.

some harms as being more critical to the public interest and indicates how some harms may cease to carry any weight after a suggested number of years.<sup>6</sup>

### ***The Main Game***

The Panel's own assessment of the FOI experience, and its Terms of Reference, have required it to ensure that the right to access information is balanced with the need for government to preserve the integrity and confidentiality of certain information in order to govern effectively.

History in Queensland, as in many other jurisdictions, has proven unambiguously that there is little point legislating for access to information if there is no ongoing political will to support its effects. The corresponding public sector cultural responses in administration of FOI inevitably move to crush the original promise of open government and, with it, accountability. Thus the Panel sought to understand the reasons at the core of successive governments' anxiety, even hostility, about FOI in the pragmatic attempt to have Parliament (not relatively junior FOI officers) address those concerns directly and transparently, so that the balance of the FOI Act can get on with the job of open government.

The Panel determined that there were two such areas that needed a principled and certain solution:

### ***The Cabinet Exemption Redrafted***

The Panel has approached the Cabinet exemption from first principles. The Panel has not recommended a return to the original 1992 Cabinet exemption, because that would result in too much uncertainty about outcomes of FOI applications and would simply perpetuate the consequences of conflict. What would have changed to give any better outcomes than those that followed 1993?

Instead, the Panel looked at the *purpose* of the exemption. It should be about protecting the collective ministerial responsibility of ministers in Cabinet and no more. As it happens, in Queensland, that principle is enshrined in the Constitution. Applying this principle, the Cabinet exemption is then based not on the description of a particular document, but on the effect of releasing it — would its release impact on collective ministerial responsibility? One consequence of this proposal would be to eliminate the much criticised possibility of documents being taken into Cabinet purely to hide them from public view. It would wind back the exemption to something like the situation that applied when the Act was introduced in 1992, though there would be much more certainty about its application.

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<sup>6</sup> See chapters 9, 10 and 11.

These exemptions have been balanced with a proposal that the Premier (supported by the Cabinet Secretary) should regularly consider proactively releasing Cabinet material, including an edited version of the Cabinet agenda. Similar regular and proactive release of Cabinet material happen in a number of other Westminster jurisdictions in the world.<sup>7</sup>

*Incoming ministerial briefing books, parliamentary estimates briefs and question time briefs — a new exemption*

Just as there is a very high degree of public interest in the effective operation of collective ministerial responsibility, so too there is a compelling public interest in enabling individual ministerial responsibility to operate post-FOI. Anodyne guff is not the kind of information that Ministers want or need from their officials. If Ministers are to be accountable, then they must be informed of the good, the bad and the ugly within their areas of ministerial responsibility. There are three essential occasions when this uninhibited flow of information to the Minister must occur: when the minister is appointed to the portfolio ('red/blue books' — incoming Minister's briefs); when the Minister must account to Parliament in question time ('PPQs'); and when the Minister must account to Parliament for the ministerial portfolio's past and planned expenditure of parliamentary appropriations (estimates briefs). This is not to deny transparency and accountability of Ministers and their portfolio responsibilities as there are alternative existing mechanisms for that to occur but it does enable the assumption of ministerial responsibility by giving the freedom for information to flow through to the Minister at those three critical checkpoints.

In addition, the Panel proposes a reduction in the 30 year rule on Cabinet material, to just 10 years. For exempt incoming ministerial briefs, parliamentary estimates briefs and question time briefs, the Panel proposes that the exemption expire after 3 years (subject to a possible extension of time on public interest grounds by the Information Commissioner).<sup>8</sup>

***FOI Needs Political Support and an Enabling Broader Information Policy Context***

The Panel argues for a whole of government strategic information policy and governance arrangements addressing the lifecycle of government information and interconnecting strategically with other relevant public policies. FOI's place in the government information experience should be recast as the Act of last resort moving the existing 'pull' model to a 'push' model where government routinely and

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<sup>7</sup> See chapter 8.

<sup>8</sup> See chapter 8.

proactively releases government information without the need to make an FOI request.<sup>9</sup>

### ***Personal Information***

In accordance with what the Queensland Government has told the Australian Law Reform Commission on moving towards a nationally uniform privacy code, the Panel has assumed that Queensland will inevitably introduce a Privacy Act and do so, sooner rather than later. The Panel has recommended, as the ALRC is expected to do, that requests for personal information will largely be moved out of FOI and into the privacy regime. This will have major advantages for users, who sometimes cannot access their material under FOI but would probably get it under privacy. It would also benefit the administration of FOI because it would remove some of the clutter.<sup>10</sup>

### ***Exclusions***

The Panel has considered the ever-growing list of exclusions in the FOI Act. 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 by private industry. The Panel has examined the extended 'level playing field' fiction and proposes that all Government Business Enterprises should be covered by FOI, though many of their documents may not be accessible once the public interest test is applied. The Panel also considers that many bodies that receive funding or a fee for service from the State should be accountable under FOI, at least to the extent of the services that public money enables them to provide.<sup>11</sup>

### ***Time and Costs***

The present charging system is a disaster. It requires 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 needs more time than it is worth. The Panel proposes a 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 provide, as a first response to a request, a Schedule of Relevant Documents and engage the requester to decide which of the documents in the list are really wanted. This will cut processing time and it will cut the costs of providing material.

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<sup>9</sup> See chapters 3, 5, 16 and 17.

<sup>10</sup> See chapter 4.

<sup>11</sup> See chapter 7.



And it will reduce disputes. The Panel is proposing a shorter period for agencies to process requests and is changing 'calendar days' to 'working days'.<sup>12</sup>

### ***Office of the Information Commissioner***

The Panel wants to revamp the Information Commissioner's office. These proposals are not entirely new, but build on the recommendations in the 1995 ALRC/ARC and 2001 LCARC reports for an FOI monitor. They also reflect the experience in such places as Britain, Scotland and Ireland. The current lead agency model has not worked, and needs to be replaced with the Information Commissioner who is an active and shared resource across government, as the champion of FOI and responsible for helping agencies implement it. The Office would run a help-line for applicants and agencies. The new Privacy Commissioner should be located within the Office of the Information Commissioner so that the inherent tensions between information access and privacy protection can be best managed.

External review should continue to be conducted by the Office, under an FOI Commissioner. However there should be the possibility of questions of law going to the proposed new Queensland Civil and Administrative Tribunal. A new Act would prescribe a capped mediation period with a determination within 40 working days thereafter.

The Panel proposes to give the Information Commissioner a significant role in information policy generally, across government. The Information Commissioner would take a leading role in encouraging the proactive release of information by agencies. The Panel also deals with the problem of contentious issues management, suggesting guidelines for the provision of information additional to that requested, so as to ensure a balanced context is provided. Contentious and other interesting material released to applicants should be posted on an agency's website, but only after a 24-hour moratorium.<sup>13</sup>

### ***Agency Culture***

The Panel is proposing a number of sanctions and incentives to encourage the proper administration of the Act. 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 2002*. The Panel is also proposing that the Information Commissioner should provide annual report cards on agencies to the Parliamentary Committee, reviewing the way agencies meet their obligations under the Act.

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<sup>12</sup> See chapters 13 and 14.

<sup>13</sup> See chapter 20.

More important, however, would be the adoption by the Government and the Parliament of a publicly proclaimed pro-disclosure, pro-FOI policy approach. This would be assisted by the adoption of a new FOI Act (with a new name),<sup>14</sup> and public commitments by the Premier and by the Parliament to the new information disclosure regime.<sup>15</sup>

### ***Consequences — What's In It for Stakeholders?***

#### *For end users of information*

For the public generally, the greatest benefit of the changes proposed by the Panel would be the provision of a much greater amount of information outside the FOI regime. This will occur through a new proactive disclosure regime guided by the Information Commissioner requiring agencies to publish far more information about the agency and its activities than is currently required. Agencies will also publish on their websites information they have already provided through FOI.

For people using FOI to make requests, the benefits will be considerable. More information should be made available as a result of the proper application of the public interest test. Information should be made available more quickly and it should be more responsive to the request that has been made. The applicant will be able to choose the material and will only have to pay for what is requested (and only for material that is provided without deletions). The charge should be lower than currently applies, for most users. A new review system should result in quicker results where an agency's decision has been disputed. Questions of law will be able to be resolved more cheaply, and quickly, than at present.

In general, the law will be more upfront and honest, with a new architecture and greater definition that removes the structural bias and advantage that currently favours agencies. Access to restricted information about Cabinet and other governmental decisions will be available sooner, such as for Cabinet after 10, rather than 30, years.

#### ***For Ministers***

The main advantage for Ministers will be that there will be much more certainty about which documents are exempt, and about how the public interest will be determined. The system will keep three specified categories of essential ministerial briefing documents from release for three years. The exemption of documents on a principled basis will mean that Ministers will not have to resort to what are perceived to be improper means of avoiding FOI through the system adopted in recent years of pushing them into the Cabinet room.

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<sup>14</sup> See chapter 25.

<sup>15</sup> See chapter 24.

***For Agencies***

The new system will make it much easier for agencies to apply the law and to administer the system. It will mean decision-makers will not be subjected to undue pressure to keep secret material that might be embarrassing for government. It will mean more assistance is available to decision-makers from the Office of the Information Commissioner and cross-agency support will become available if it is needed. A simplified charging regime will reduce pressure on FOI officers.

The Panel was invited by its Terms of Reference and comments by the Premier to produce recommendations that would look at best practice around Australia and the world. Whilst it has done that, in some respects it has gone beyond best practice, in the belief that it can produce a better, more effective model that, in the public interest, will improve the delivery and availability of information held by government. ▲