Address by Dr David Solomon AM*
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FOI reform or political window-dressing?

The *Right to Information Act 2009* is now law in Queensland. It came into effect on 1 July this year, a little more than 12 months after the independent review Panel that I chaired published our report. That report was in essence, adopted by the Government. After the exposure draft of the legislation was presented towards the end of last year some further relatively minor changes were made, some enhancing FOI, none restricting it.

The Government has now formally appointed the Information Commissioner and I believe will soon move to fill the two deputies' positions – the RTI Commissioner and the Privacy Commissioner. The Office of the Information Commissioner was provided some time ago with substantial additional resources so that it could research and develop documentation and provide assistance for agencies dealing with the new Act.

The Government has made it very clear to all agencies that it wants the new Act to work. There are training programs and also meetings at which the new philosophy that the reforms are based on are explained. The Premier has taken the lead issuing a "Statement of Information Principles for the Queensland Public Service". I should read out just a few paragraphs of the statement that was circulated throughout the Public Service last month. It begins –

> Information is the lifeblood of democracy. To reach its full potential, a State like Queensland needs citizens who are informed and a government that is open and responsive.

Later –

> At the heart of these reforms will be a public service that conducts itself in the most open and transparent way possible, because that openness and transparency are fundamental to good government.
>
> The processes of government should operate on a presumption of disclosure, with a clear regard for the public interest in accessing government information. The Queensland public service should act promptly and in a spirit of cooperation to carry out their work based on this presumption.

And then –

> It is the Queensland Government's expectation that the Queensland public service recognises and respects that Government is the custodian of information that belongs to the community and will:

- maximise the public's access to government information by administratively releasing information where ever possible, so that recourse to the Right to Information Act 2009 and the Information Privacy act 2009 is a matter of last resort.

And

- act to process requests for information rapidly and fairly, rendering all possible assistance to the community in responding to their requests for information.

This isn't the place – and there isn't time – to go through all the changes to the information regime in Queensland that accompany the move from Freedom of Information to the Right to Information, but they are real and substantial, and, as can be seen, they are accompanied by the necessary drive from the top to change the public service culture.

Similar changes, though possibly not quite as far reaching, are occurring elsewhere in Australia. The New South Wales Premier, Nathan Rees, acting on a report by the State Ombudsman, introduced draft Bills that, after public submissions were received, went through the Parliament and were assented to in late June this year. They won't come into effect, however, until early next year. In the meantime the NSW Government will establish the Office of the Information Commissioner. It has committed $3 million to establish it in this financial year with on-going funding of $4 million a year.

Tasmania commenced a review of its FOI law last year. It produced a directions paper in March and an exposure draft of its Bill is scheduled to be made public next month, with a final Bill going into Parliament in late October. Based on the exposure draft it would seem Tasmania is generally following the Queensland model, though the external reviewer in that State will remain the Ombudsman. The Government would like the legislation passed before the end of the year or early next year.

The Commonwealth has also been active. Its legislation to establish an Office of the Information Commissioner (on much the same lines as that in Queensland) and to extensively amend the existing FOI law, were made public towards the end of March. The Government hopes the legislation will be brought into Parliament in the second half of the year.

Is all this window-dressing? I think not – definitely not. Will it deliver everything journalists dream about? Certainly not. But nor should it.

Let me give you two pieces of personal history that make it particularly clear to me that the reforms in Queensland are absolutely genuine and will work.

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. She assured me this was to be a genuine review. There were no restrictions on what we might consider and recommend. 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 marvelously

empowering phrase "the panel is to consider (but not limit itself to)…". And I am told that this FOI proposal was actually the very first agenda item, on that her first Cabinet meeting.

When we delivered our report, the Premier took the most unusual course of inviting the Panel to address Cabinet. We spent about 45 minutes explaining what was in our report and its implications, and then were quizzed by Cabinet Ministers for more than an hour. Then, two months later, the Premier took detailed recommendations to Cabinet on which of our recommendations should be adopted. It was a line-by-line analysis conducted by her Department, and the discussion in Cabinet was spread over three successive meetings. This was a really serious and deliberate exercise that everyone knew would make major changes to FOI as it then existed.

My second story concerns a significant error that occurred in our report. I only became aware of it at a briefing that the Premier arranged for me to give to members of the Queensland delegation to the 2020 conference. She pointed out that the 141 recommendations that we detailed in our report did not include a rather significant issue that we dealt with in our executive summary.

What that summary said was

> …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)

But if you check the footnote and go to the chapter that is indicated (as I did immediately) you will find nothing about this. Somehow, the relevant section of our report was lost in the editing or printing process, along with the two relevant recommendations. The Premier said the Department had picked this up, and the Government had dealt with the issue that we raised anyway.

In fact the Government did not accept our precise recommendations. It decided that a 20-year rule should replace the 30-year rule applying to material in the Queensland Archives. And it decided that the relevant ministerial briefs that we referred to should be able to be accessed after 10 years. More important perhaps, it decided that specific Cabinet documents that were sought under the RTI process, could be obtained after 10 years.

The fact that the Government decided to deal up-front with these non-recommendations I think demonstrates how sincere the Queensland Premier and her Government were in wanting to overhaul and improve the FOI process.

Is there any common element about the FOI reforms that are being introduced in Queensland, the Commonwealth, NSW and Tasmania that might indicate whether they represent a genuine commitment to reform? I think there is.

What is important to note is that it has been new political leadership, rather than media, Opposition or public pressure, that is delivering the massive changes in FOI currently occurring in Australia.

Bligh, Barnett, Rees (who was able to capitalise on the initiative of the NSW Ombudsman) and Kevin Rudd, backed by John Faulkner (who pushed for Federal Labor's pre-election commitments and then expanded on them when he took office as Cabinet Secretary) and Joe Ludwig, all committed themselves at the very beginning of their respective terms or beforehand, to making government more open and accountable than it had been under their predecessors.

FOI is only one of a number of accountability regimes that most of these new leaders have embraced. For example, at the Federal level, the Rudd Government promoted (or even introduced) changes to the 30-year (archival) rule, codes of conduct for Ministerial staff, registration of political lobbyists, restrictions on post-departure employment of senior public servants and ministers, whistle-blowing, transparency and merit based selection when appointing senior public servants, political donations and electoral reform and controls over government advertising. Tasmanian Premier Bartlett's plan to strengthen trust in democracy included reviews of whistleblower laws, registering lobbyists and codes of conduct for MPs, ministers and ministerial staff. The Queensland and NSW Premiers are also involved in implementing reforms in some or many of these areas.

The focus of this discussion however is FOI. There is no reason to doubt the fact that each of the leaders is committed to serious reform in this area. Of course it is easier for them to do so than it would be for a leader who has been in government for some time and who might by more exposed to embarrassment from the FOI process. But I am sure that would be and is a far too cynical suggestion. The fact is they are all experienced politicians who know how FOI may be used, by the media, lobbyists, pressure groups or by the Opposition, to hurt a government. But openness has become a virtue, they seem to believe, in political terms. And in my view it can be made to work as an instrument of good government, not least to keep Ministers and senior public servants up to the mark.

There have been politicians in the past who have been committed to FOI, and wanted to advance openness and accountability in Government. But I think it is fair to say they have often been outflanked and outnumbered by those whose main concern was to avoid political embarrassment that might follow disclosure of some of the internal workings of government.

On the other hand, there have been some politicians who never hid their disapproval of this American fad, as they might have considered it to be. Let me remind you of a quote that I came across when we were working on the Queensland review. This was the verdict on FOI expressed by the then Queensland Premier, Sir Joh Bjelke-Petersen, in 1978 at a Senate committee hearing considering the first draft of the Commonwealth legislation. He claimed that FOI legislation in principle represented "an attempt to graft upon the

governmental structure of Australia, which is modelled upon the Westminster system … ideas and concepts which are alien to that system".[1]

We have come a long way in 31 years. Alien or not, FOI has now been grafted onto the governmental structure of every country with a Westminster system, including that based in Westminster itself, where by all accounts, it is operating reasonably effectively – though I will say something shortly about a recent hiccup in the English process that is relevant to the systemic improvements in which we are currently engaged in Australia. We have reached the point where changes in freedom of information are concerned not with a legislative add-on to the Westminster system but with what most of us regard as a fundamental part of it, namely the move towards more openness and hopefully better accountability.

The recent hiccup I am referring to is a case considered by the Information Commissioner in England, and then on appeal by the Information Tribunal, about the release of the minutes of two Cabinet meetings in March 2003 when the U. K. Cabinet considered the Attorney-General's legal advice concerning military action against Iraq. The Information Commissioner, and then the Information Tribunal by a two-one majority, decided that the public interest fell in favour of release of the minutes. Cabinet then decided that the Minister should override the Tribunal's decision. The Minister – the Lord Chancellor and Minister for Justice, Jack Straw – made a statement to the House of Commons and tabled an extensive statement of reasons explaining the override decision. He made the point that the actual decision of the Cabinet had been made public immediately, and the Attorney-General's advice had later been made public. He pointed out that s. 1.2 of the Ministerial Code states –

> Collective responsibility requires that Ministers should be able to express their views frankly in the expectation that they can argue freely in private while maintaining a united front when decisions have been reached. This in turn requires that the privacy of opinions expressed in Cabinet and Ministerial committees, including in correspondence, should be maintained.

He said –

> Although Cabinet minutes do not generally attribute views to individual ministers, divergence of views can still be clear and speculation over who made various comments would be inevitable if they were to be released. Their disclosure would reduce the ability of Government to act as a coherent unit. It would promote factionalism, and encourage individual Ministers to put their interests above those of the Government as a whole. Such an outcome would be detrimental to the operation of our democracy, and contrary to the public interest.

In his statement to Parliament Mr Straw said –

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[1] Senate Standing Committee on Legal and Constitutional Affairs, *Freedom of Information*, Report on the Freedom of Information Bill 1978, and aspects of the Archives Bill 1978, Australian Government Publishing Services, Canberra, 1979, p. 34.

> In summary, the decision to take military action has been examined with a fine-tooth comb; we have been held to account for it in this House and elsewhere. We have done much to meet the public interest in openness and accountability. But the duty to advance that interest further cannot supplant the public interest in maintaining the integrity of our system of Government. The decision to exercise the veto has been subject to much thought, and it will doubtless—and rightly so—be the object of much scrutiny. I have not taken it lightly, but it is a necessary decision to protect the public interest in effective Cabinet government.[2]

One consequence of this episode has been an important change in the British FOI law – and of course I should explain that by British I mean the FOI law that operates in England and Wales, because Scotland has its own FOI law. However, to complicate matters further, for some years there has been an inquiry into whether the 30-year rule that covers the release of United Kingdom archival materials, including Cabinet documents. An extensive independent review resulted in a recommendation that the period should be reduced to 15 years. But in June this year the UK Government announced that it would instead reduce the period to 20 years – this being, of course, the period that is being widely adopted in Australia at the Commonwealth and most state levels.

Accompanying that announcement was a further decision that Cabinet documents and information relating to the Royal Family would also be made exempt altogether from the FOI Act for 20 years. In other words the UK will follow the practice in Queensland and elsewhere of not making the release of Cabinet documents subject to a public interest test.[3] This is not to say that Cabinet materials may not be released earlier, but the decision accepts there is an abiding public interest in preserving the secrecy of the internal workings of Cabinet. In Queensland and some other States Cabinet documents will be accessible under RTI after 10 years, even though the new 20-year rule will apply generally to material in the archives.

The Tasmanian Directions Paper went much further, and recommended that the withholding period for Cabinet materials should be five years. It pointed out that this reduction from 10 years to five, was consistent with the new direction of the legislation and a 5 year exclusion period "would be appropriate and consistent with the parliamentary cycle".[4] This suggestion really tests the time limits that should be applicable to the Cabinet exemption. If implemented it would mean that, given the 5-year term of the Parliament, every incoming government would have access to the documents of its predecessor from 5 years earlier. So as well as getting its own briefing notes, the incoming government can obtain the briefing notes that were given to the previous government. I think this might be a step too far. I think it would make a significant difference to what senior public servants would be prepared to put in briefing papers for an incoming government, and that would be to the detriment of the system generally and the effectiveness of the briefing that would be provided.

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[2] The statements were made on 24 February 2009 and can be accessed through www.justice.gov.uk.

[3] See, www.justice.gov.uk/news/newsrelease160709b.htm

[4] At p. 47.

The present rules of the Westminster system hold that an incoming government should not have access to the documents of its predecessor in office. One of the responsibilities of the Department of the Premier and Cabinet/Prime Minister and Cabinet is to bundle up and put away in the archives all the Cabinet documents of the defeated government for whatever period (mostly 30 years) is prescribed. There are rare occasions when a new, (or even not so new) incoming government will want to check what the previous government may have decided or been advised. On such occasions the head of the relevant department will contact the Leader of the Opposition for permission to provide a relevant document or file to the government. That may or may not be granted.

Making a change that allowed incoming governments access to the Cabinet documents of their predecessors would bring about a fundamental change. This really would be the Bjelke-Petersen worst-case scenario, the imposition of a concept quite "alien" to the Westminster system. The incoming Ministers would be able to look not just at positive Cabinet decisions (which might have been announced) but also at decisions where the former Government decided not to take a particular course of action, and at the submissions on which that was based, or where a submission made a proposal the Cabinet decided not to accept. I think this really is pushing FOI too far.

I think the 5-year idea (or one-term of Parliament) would only work if the public service was Americanised – that is, if the top four or five levels in each Department were all political appointments and such officers would expect to look for new jobs when a government changed from one party to another.

We have mostly avoided that kind of approach, though the relatively short periods for which agency heads and senior executive service officers are now appointed may be pushing us in that direction.

Perhaps it is just a matter of degree, and there is no grand point of principle involved. If 10 years is OK, what about 8, 6 etc. But as we lower the bar, its my belief we really are going to have to rethink the principles and practices of our system of government.

Now despite what you might discern to be the tenor of my remarks so far, such radical changes would not concern me at all. I've been thinking and writing about changing our system of governance for many decades. I would commend to you a book I published in 1976 – 33 years ago - called *Elect the Governor-General!* It proposed an elected presidential style republic along American lines – and it sold 20,000 copies in just a couple of months. But until the politicians embrace that, or give the public a chance to vote for something similar, I'm afraid we're stuck with Westminster. And that means we have to make it work properly, including using a public service that is not overtly politicised at the top.

I have spent a long time talking about Cabinet documents but much the same kind of argument applies to the other true exemptions under FOI or RTI, to which in my view no public interest test should apply. I simply refer at this stage to the arguments in the Queensland report and the Commonwealth material also.

If you need a detailed response on why we think there are about a dozen true exemptions that need to be protected and not made subject to a public interest test I would refer you to the Panel's final report.

While these are the matters that journalists and others would like to use FOI and RTI to access, the fact that they cannot get their hands on them does not mean that we have wimped out on reform. The Queensland, NSW, Commonwealth and Tasmanian reforms have taken a quantum leap in advancing freedom of information. I have not spoken about three of the most important aspects of the advances that have been made - the switch to "push" policies and pro-active disclosure by agencies; administrative release of information and making FOI and RTI the last resort; and the development of new government-wide information policies. In most jurisdictions the burden of recommending those last changes is going to fall on Information Commissioners and others over the next year or so. But the Commonwealth is not going to wait that long, and has launched a dedicated Government Web 2.0 Taskforce, to advise it on how public sector information can be made more accessible to, and usable by, Australian citizens online. If I may quote the Secretary of the Department of Prime Minister and Cabinet, Terry Moran,

> The Taskforce will advise on how to establish a public sector culture that favours openness. And how the Government can use new Webb technologies to hear the views of citizens, and to learn from their experience and knowledge.[5]

The taskforce, of which I am a member, is due to report by the end of the year.

While I haven't discussed these other changes to FOI/RTI I regard them as crucial and extremely important. However I thought I should fashion this address on what some people see as the negatives – or to be more accurate, the advances on the Cabinet and similar exemptions that they would have wanted us to push much further.

However I don't believe that anyone can seriously challenge the claim that the overall package that is being implemented is both significant and substantial. I expect it will be quite some time before future reviewers, reformers or governments will be able to make progress again to anywhere near the degree that will have been achieved in 2009-2010.

* Dr David Solomon AM is the Queensland Integrity Commissioner. He was Chair of the Independent Review Panel that was appointed by the Queensland Government to review that State's Freedom of Information Act, in 2007-8. In 1992-3 he was Chair of the Electoral and Administrative Review Commission.

[5] Speech to the Institute of Public Administration Australia, Canberra, 15 July 2009.