FOI: KENNETT STYLE

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Introduction

When the Kennett Government's new freedom of information legislation was introduced earlier this year, it was met with mixed reviews. In the press, critics praised the extension of the Act to Local Government but expressed powerful reservations about many other changes that were proposed.

In response, the Government has issued a number of statements in its defence. The nature of this defence may be summarised in the following set of propositions each of which has been contained in one or another of the Government's written statements about the recent amendments:

1. The new freedom of information legislation strengthens the operation of the FOI Act.

2. In the alternative, if it does not strengthen the Act, then at least it does not detract from it.

3. In the alternative, if it does detract from the Act, then it does not do so to nearly the extent that the Cain Government before it had planned to do.

4. In any case, even if one accepts that the Act has been weakened it remains the most liberal in Australia.

At least three of these propositions are contestable. These are that the changes strengthen freedom of information, that they do not detract from if and that they make the legislation the most liberal in Australia.

The changes weaken the legislation both theoretically and practically and it is no longer the most liberal piece of legislation in the country as it once was.

To illustrate that argument I refer to three of the changes in particular - the abolition of the ceiling on charges, the exemption of state owned business enterprises and the expansion of the Cabinet documents exemption.

Before doing so, however, I want to make clear the areas of amendment with which I agree.

Areas of Agreement

First, there is no doubt that the extension of the Freedom of Information Act to local government is a major achievement. It corrects a longstanding anomaly. While the Commonwealth and Victorian Governments have been covered by FOI Acts for more than a decade, local government fought a long, fierce and poorly justified campaign against its own inclusion. To its discredit, the Cain Government succumbed to this pressure. The Kennett Government has not.

Prompted by parliamentarians like Victor Perton and Mark Birrell, the Kennett Opposition promised that, if it were elected, local government would be covered. It has now delivered on that promise.

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For the first time, Victorians will have access to municipal documents. Armed with that information they will be in a far better position to challenge local government decisions. One may quarrel, as I do, with the inclusion of special exemptions for certain categories of local government documents but nevertheless it needs to be recognised that the extension of FOI to local government is a major victory for more open government.

Second, the inclusion of a provision to control voluminous requests is long overdue. When I administered freedom of information in Victoria, vast undifferentiated requests were the bane of my existence.

I remember vividly, Alan Brown's request for all documents that related to the redevelopment of Flinders Street Railway Station, a request on which he would not negotiate for many months. Or even worse Bruce Reid MLC's request for access to every account the Victorian Government had not paid within six weeks of its receipt - and he wanted to see the originals. That again took months to resolve.

Third, the restriction on repeated requests for the same information is also sensible. Under the FOI Act there was nothing to prevent an applicant from making a request, having it refused, taking the matter to the Administrative Appeals Tribunal and, on having their appeal rejected, beginning the whole process again - and there were some that did.

Fourth, the amalgamation of the publication requirements of Part II of the Freedom of Information Act with those of departmental annual reports also makes a great deal of sense. There had been substantial overlap between the two, leading to considerable, unnecessary work.

The amalgamation should remove the duplication and, incidentally, make it easier for members of the public to access information about a department's structures and functions.

Fifth, in a letter to 'The Age' Victor Perton argued that the changes made by the amending Bill were in many respects far less draconian than those proposed by the Cain Government. On that we are also agreed. John Cain argued, for example, that there should be no judicial review whatsoever of the government's decisions to exempt Cabinet documents. The only avenue of review, he thought, should be to that most disinterested of tribunals, the Premier him or herself. This position is not, thankfully, one which Mr Kennett has embraced.

However, it is one thing to say that the changes that have been made are less restrictive than those the Cain Government might have introduced. It is quite another to assert that the changes, taken as a whole, do not detract from and indeed strengthen open government in the State. This view is, at best, questionable.

Areas of Disagreement - Fees and Charges

If the freedom conferred by the Act is to be meaningful, it must be capable of exercise. A freedom that is unaffordable is no freedom at all. The new legislation removes the ceiling on fees replacing it with a charging regime based on the user pays principle. In doing so, it will inevitably and significantly deter requests for policy and administrative documents, those which, more than any other, should be disclosed in order to enhance government's accountability to its constituents.

To demonstrate this proposition one need only look to the Commonwealth's experience since 1986 when a similar user pay system was introduced.

Reviewing the first year of the new fee regime, the Senate Standing Committee

on Constitutional and Legal Affairs (1987) concluded that too much emphasis had been placed on the costs of FOI at the expense of the social, administrative and political benefits that had resulted from it. Therefore, it recommended that clear, maximum limits be placed on charges.

Similarly, the Legal and Constitutional Committee of Victoria's Parliament heard and accepted copious evidence that the effect of the Commonwealth's user pay system had been to discourage many public interest groups from pursuing their rights under the Act; that the charges levied had been prohibitive and that estimates of charges had sometimes been deliberately inflated to deter applicants from pursuing contentious requests.

To quote the former Shadow Attorney-General, Neil Brown:

> "From examining ... responses from agencies, I have concluded that the charges levied are in some cases deliberately inflated to make the application as expensive as possible. In other words, not only are the charges a deterrent to the use of the Act, but they are, at least in some cases, being used with the intention that they will be a deterrent."

In the face of this evidence, and with the support of all Liberal and National Party members, the Legal and Constitutional Committee rejected the adoption of the Commonwealth scheme for Victoria. Yet it has been resurrected in the new legislation.

It is sparse consolation that an exception will be made where a person lodges a request in the public interest.

Which Minister or senior public servant is likely to acknowledge the existence of such an interest where the documents requested are sensitive or contentious?

Which applicants will have the personal commitment and financial resources to pursue through the courts an argument that their request is in the public interest without any clear assurance that the argument will be successful and with the almost certain knowledge that, even if it were, the request itself will still be vigorously resisted?

Perhaps only the media will do it. And yet the Attorney has already stated that requests from the media are unlikely to meet the public interest requirement.

The public interest exception has been with us for some time. It is rarely invoked and even more rarely accorded.

So, the cardinal fact remains that, in the absence of some assurance that the costs they incur will be capped, individuals and public interest groups will shy away from exercising their right of access to important state and local government information.

Had the Government wished to obtain more revenue from FOI, it should, in my view. have retained the ceiling but indexed it to the rate of inflation.

It could also have backdated the indexation to 1982 leaving Victorians with a maximum fee of some $250 instead of the present $100. This would have been equitable and kept the price of FOI within range.

But, by adopting a policy of full cost recovery, the Government has not strengthened the FOI Act. It has weakened it substantially.

Areas of Disagreement - Exemption of Agencies

The Victorian Freedom of Information Act confers a legally enforceable right of access to documents in the possession of government agencies. This right, objects of the Act assert, is to be limited

only by exemptions necessary for the protection of essential public interests.

Prior to recent legislative amendments, the right extended to all agencies over which the government was in a position to exercise control. Regrettably this is no longer the case.

Following a trend established by the Cain Government which exempted the State Bank and the Rural Finance Commission from its ambit, the Kennett Government has gone further and paved the way for the exemption of other state owned business enterprises. This is despite the fact that it was the Cain Government's mismanagement of such enterprises that led, in part, to its downfall.

Agency based exemptions of this kind are wrong in principle. There should be no agency in which the government has a significant interest, whether commercial, semi-commercial or public, that should be free from the structures of accountability that freedom of information imposes.

This is not to say, however, that the competing public interest in maintaining the confidentiality of commercially sensitive documents should be ignored.

This confidentiality must, of course, be protected and upheld. But the way to do this is not to exempt agencies but rather to ensure that the existing exemptions in the Act which protect commercial confidentiality are sufficiently robust to achieve the degree of secrecy that is required.

If there are defects in the existing exemption provisions they should quickly be rectified. But, in the absence of evidence that the exemptions are in any way deficient - I am not aware of any and the Legal and Constitutional Committee could not find any - the exemption of state owned business enterprises is both unnecessary and undesirable.

Agency based exemptions compromise the generality of FOI's application and, given the trend - come avalanche - to corporatisation, deprive the public of an extremely important avenue through which the operation of an increasing number of its enterprises may be scrutinised.

Areas of Disagreement - Cabinet Documents

Finally, I turn to the most important deficiency in the amending legislation. This is the very substantial expansion which if effects in the scope of the Cabinet documents exemption. Having fought tooth and nail to oppose the Cain Government's attempts to widen the Cabinet exemption, the Kennett Government has introduced a new definition of Cabinet documents which closely resembles that which it had previously rejected. In doing so, it has provided a ready avenue by which almost any sensitive document can be removed from public view.

Now Cabinet secrecy is, of course, necessary. It is the natural corollary of collective ministerial responsibility. the convention that each member of the Cabinet assume personal responsibility for government policy serves an important political purpose in that it ensures that all members of the government can be held accountable to parliament and the public. The routine disclosure of Cabinet's deliberations would, therefore, bring an abrupt end to the convention and defeat the purpose it serves.

In addition, the preservation of Cabinet secrecy ensures that decision making and policy development by Cabinet is uninhibited. The quality of Cabinet decision making would be prejudiced severely if options before the Cabinet could not fully and freely be canvassed.

To acknowledge this, however, does not resolve the dilemma with which we are

concerned. That is, which documents should properly be considered as Cabinet documents? The answer is, I think, straightforward.

Only those documents whose disclosure would prejudice the operation of collective ministerial responsibility should be kept secret. That is, only those documents the release of which would have the effect of fracturing Cabinet's unity should be exempt. Only those documents which would disclose the 'views or votes of Ministers in Cabinet', to use Justice Blackburn's terms, warrant protection as Cabinet documents.

Recently, and fortunately for me, this view received the High Court's endorsement in its decision in *The Commonwealth and the Northern Land Council* (1993) 67 ALJR 405.

There, the majority drew a distinction between documents which recorded the deliberations and decisions of Cabinet which merited the strictest protection and documents prepared outside Cabinet such as background reports and submissions for which a lesser degree of protection was deemed appropriate.

The reason for the distinction was that, in the first case, it was clear that the convention of ministerial responsibility would be prejudiced if the actual discussions and resolutions of Cabinet were disclosed. In the second case, it was far less likely that Cabinet's deliberations would be impeded since background papers do not, in and of themselves, disclose the nature and content of Cabinet's discussions.

It is somewhat ironic that at the very time the High Court was clarifying its position as to Cabinet documents, the Victorian Government was formulating an exemption that goes far beyond what is required to ensure that Cabinet solidarity is secured.

The existing exemption properly exempts from disclosure any documents that reveal the deliberations and decisions of Cabinet and any documents prepared by a Minister for the purpose of submission to Cabinet.

To this, the new section has added a clause exempting any documents that have been considered by Cabinet and which relate to matters that are or have been before Cabinet.

It also exempts documents prepared for the purpose of briefing a Minister for the purpose of Cabinet discussion whether or not these documents are actually considered by Cabinet.

It goes further and abolishes the requirement that in order to qualify for protection, a document must have been prepared specifically for the purposes of consideration by Cabinet.

What this means in theory is that, with the not unimportant exception of factual documents, any document that a Minister or Cabinet considers, whether or not it discloses Cabinet's deliberations or decisions and hence fractures Cabinet's unity, will be exempt from disclosure.

What it means in practice is that any documents that Ministers or officials wish to hide can now be hidden either by a Minister organising for a document to be seen as a briefing document, for example, by depositing a copy on the relevant departmental file, or by adopting the simple expedient of passing the document over the Cabinet's table or the table of its many committees.

Let me illustrate the dangers of this by reference to FOI's first cause celebre, the case of *Public Service Board v. Wright* (1986) 160 CLR 145. Mr Max Wright was a courageous and independently minded public servant who, in 1984, was regional director of the then department of Community Welfare Services. This department then consisted of the Office

of Corrections and the Department of Community Services.

The Government took a decision to split the two. This disadvantaged Mr Wright because his regional responsibilities were diminished. So, he sought access to documents which would enable him to determine the rationale for the division.

In particular he sought access to an options paper on the subject which had been prepared by a Committee known as the Effectiveness Review Committee. This consisted of the Secretary of the Department of Premier and Cabinet, the Secretary of the Treasury and the Chairman of the Public Service Board.

Access to the document was refused initially on the ground that it was an internal working document and so was exempt under s.30 of the Act. When this began to look shaky, it was exempted on the ground that it was a Cabinet document. Just to make sure of the situation, the Secretary of the Department of Premier and Cabinet issued a conclusive certificate with respect to the document on the day prior to the hearing of the case before the County Court.

This case was fought all the way to the High Court and the document was finally released to Mr Wright. But, under the newly drafted Cabinet exemption it is unlikely that it would be today.

This is because either the relevant Minister could assert that it was a document prepared to brief him or her in relation to matters which may be discussed by Cabinet, or because the Minister or the Secretary could simply attach it to the relevant Cabinet submission and so put it beyond the Act's reach.

This could be done even though the document:

- was not prepared for the purpose of consideration by Cabinet;

- did not contain any record of the decisions or deliberations of the Cabinet and, as such, could in no way be regarded as a document which would undermine the unity of Cabinet since it revealed neither the views nor votes of Ministers in Cabinet.

This new exemption, then, clearly detracts from the public's right to know. It does not strengthen the Act. It weakens it significantly.

And it topples the Act from its position as Australia's most liberal by introducing an exemption for Cabinet documents considerably wider than its Commonwealth and inter-state counterparts, an exemption that will allow this and future governments to see out any problematic and potentially embarrassing requests.

Conclusion

We should, then, applaud the Act for the significant advances it makes particularly in bringing open government to Local Government. Nevertheless, as 'The Age' so cleverly put it, we should remain concerned that the Kennett Government while prising open one cabinet has chosen to lock up its own.