Freedom of information in Queensland

A preliminary analysis of the Report of the Queensland Legal, Constitutional and Administrative Review Committee

Introduction

This is a summary of the Queensland Legal, Constitutional and Administrative Review Committee Report 32 'Freedom of Information in Queensland' released in December 2001. While issue can be taken with many of the recommendations (and omissions) the primary task of this article is to give readers a general sense of the contents of the Report. The Report in conjunction with its Discussion Paper and submissions to the Committee will provide a rich source of ideas and information about current FoI practice at the state level in Australia.

The Report also reminds us of the lingering legacy of the Australian Law Reform Commission and Administrative Review Committee Report 77 (1995). The ALRC Report is still used as a starting point for discussions and ideas about FoI reform in Australia. Yet the Commonwealth *FoI Act* is allowed to creak on with little in the way of essential maintenance or necessary refits. It would be a major cause for regret if a number of the suggestions made in the Report do not make it into legislation and/or operational practice in Queensland.

History and background

This review by the Legal, Constitutional and Administrative Review Committee (LCARC) of Queensland was initiated by the then minority Labor Government in March 1999. Research began as a Discussion Paper (published 8 February 2000) but was reconstructed in May 2001 and expanded into an examination of the health of Freedom of Information in Queensland under the new majority Labor Government (published December 2001).

General comments

The Report was preceded, by a number of weeks, by the passage of the *Freedom of Information Amendment Act 2001*. This Act made a number of important changes to the fees and charges regime in Queensland.

Three members of the Committee (two Independents and one National party member) chose to include a Statement of Reservation. This statement criticised the introduction and subsequent passing of the *Freedom of Information Amendment Act* into the parliament on two fronts. First, the amendments contained in the Bill for introducing new charges for processing FoI requests and supervising access to documents pre-empted the Committee's findings. Second, by introducing a Bill during the final stages of the Committee's inquiry, serious questions were raised about the legitimacy and role of the Committee's report in the parliamentiary process.

It is a pity the government has pre-empted the LCARC report. The Report contains a series of well-researched, balanced recommendations for improving the current FoI regime. Operating within a limited time frame, and having to pick up from the work of the 1999–2000 Committee, the current Committee has adopted a similar philosophy to the previous Committee. The current Committee did not conduct any additional hearings. The high quality of the final report was attributable to two points:

- the quality of the submissions (especially from the state departments and the Information Commissioner) and the number of submissions received from individuals and community organisations; and
- the Discussion Paper presented a series of well-presented questions, supported by thorough research, that engendered full and frank discourse by getting the submitters to concentrate on establishing the basic principles and political foundation of FoI in Queensland.

The two roads of FoI law reform

FoI law reform can be seen as a parliamentary and political process dominated by the Executive arm of government. Reforms that impede the democratic objectives of FoI legislation and assist the Executive retain power of the disclosure of official information seem to require less consideration, time and formal processes than reforms designed to make the process operate more in favour of disclosure. Academic analysis (i.e. public policy theory) suggests that a distinct comparison can be formed between the type of law reform recommended (for instance by bodies similar to the LCARC) and the type of law reform implemented by governments. In effect, while recommendations for law reform have consistently highlighted the defects in the FoI process and advocated changes that would improve the quality of the Act, the amendments have, in general (and especially where majority governments are involved), decreased the accessibility of information through tighter exemption clauses and higher, or additional, fees for processing requests.

Summary of the Report

The Report maintains a focus on the intention and objectives of the Act but is aware of the practical difficulties that a bureaucracy will intrinsically have in processing FoI requests. The Committee has attempted to facilitate access in a way that is beneficial to the applicant and the agency. By minimising the resource drain that is inherent in the FoI requests process the Committee is creating a more conducive, user-friendly environment.

The Report has adopted a similar approach to other reports (Australian Law Reform Committee No 77, and South Australia's Legislative Review Committee Report 2001) in that it has recognised the general dissatisfaction with the way FoI operates is a product of the political and bureaucratic sphere, not just deficiencies in the legislative architecture. The Report is more comprehensive than the South Australian report, but less extensive than the current Canadian Access to Information Task Force. See <http://www.atirtf-geai.gc.ca/home-e.html>.

The Report recommends a combination of legislative and bureaucratic amendment. Some of the ideas show a strong level of understanding of the difficulties involved in the Queensland jurisdiction.

The Committee has gone beyond the ALRC report by introducing a new element to law reform namely the relationship between the applicant and the agency. This was also a key aspect of the South Australian Legislative Review Committee Report. For instance, Chapter 4 recommends the creation of an FoI monitor who, in part,

would assist members of the community in accessing information, Chapter 6 recommends the public service adopt a more 'Flexible and Consultative Approach' (6.2) in the FoI process and Chapter 8 recommends the Information Commissioner create guidelines relating to any formal external review decisions to create an easier environment for applicants to operate within (8.24). This is a welcome development to law reform recommendations in Australia. Generally, law reform has concentrated on the three domains of law, policy and bureaucracy but this report adds a new dimension (possibly based on an assumption that antagonistic relationships between applicant and agency are a cause of resource and time wastage).

Chapter 3: FoI purposes and principles

This chapter appropriately starts by placing the Queensland *FoI Act* in the political context of the Westminster system. It considers some of the arguments that have been submitted against the proposition that FoI and Westminster are incompatible. In conclusion the LCARC has accepted that some elements of the Westminster system require protection from public scrutiny, but FoI legislation was deemed to be compatible with any system of government that was based on democratic principles (3.3).

A second consideration in this chapter is whether the basic purposes of FoI have been satisfied. While the Committee did recognise that the nature of FoI made this a difficult question to answer (given that many of the benefits of the Act are intangible and not measurable), some preliminary analysis was conducted under 3.4.1: FoI Usage and Outcomes. This evidence shows that FoI has partly attained its objectives yet some barriers exist to accessing non-personal or policy information. Trends in the number of applicants and the type of requests show encouraging signs where the number of applicants, the requests for policy information and the number of documents that are fully disclosed has risen.

The Committee did note (at 3.4.2) that one of the factors influencing the success of FoI related to public perceptions; in particular the level of public education and awareness, and perceptions of how the public service reacts to requests (whether it is positive or negative).

The Committee's preliminary assessment of the Queensland FoI regime was guided by criteria that were deemed to be central to the efficacy of the system:

more accountable government which is more open to public scrutiny;

better understanding by citizens of the decision-making processes;

greater participation in government;

better decision making and records management and;

citizens able to access and amend personal information held by government.

The Committee's conclusion (3.4.4) is that FoI has significantly contributed to open and accountable government, although the original design expectations have not been fully met.

Chapter 4: Enhancing the effectiveness of Queensland's FoI regime

The major recommendation of this chapter is the creation of an FoI monitoring entity designed to:

- promote public awareness of FoI, and provide advice and assistance to applicants; and

  monitor public agencies compliance and rates.

Currently no entity has a full-time legal responsibility for either of these roles, nor has any entity attempted to do so. Neither the Attorney-General's office or the Information Commissioner have any statutory role to play in training, collecting data from agencies or assessing legislative impact. It is argued, at 4.1.2, that the monitoring entity is needed to:

- heighten agencies' attention to how they implement the Act;
- enable the FoI monitor to develop an understanding of each agency's situation and the types of applications it receives; and
- develop and promote government-wide best practices, especially in information management.

These functions have been grouped under the following sub-headings:

1. Monitoring Functions
   a. Conducting agency audits
   b. Preparing annual and other reports
   c. Identifying and commenting on legislative policy issues
2. Advice and Awareness Function
   a. Providing a general point of contact and central resource for agencies and citizens
   b. Promoting community awareness and understanding of the FoI regime
   c. Providing guidance on how to interpret and administer the Act
   d. Educating and training agencies and community groups
   e. Acting as a facilitator in communications between applicants and third parties.

Subsequently, a pro-disclosure attitude would be engendered due to a better understanding of the purpose of the legislation, and resource costs would be reduced (assisting applicants to better draft requests, diverting repetitive work).

Chapter 5: What the FoI Act provides for

Principally, this chapter contains recommendations to amend certain provisions in order to clarify their meaning or increase their scope. For instance, the Report contains recommendations relating to the meaning of 'public authority' (5.2.2) and creating a right of access to *information*, not *documents* (5.3.1).

Chapter 6: The FoI process — access applications

The Committee has recommended that agencies should assist, consult and negotiate with applicants (including when they are not specifically required to under the Act) in an attempt to reduce FoI processing time and costs.

6.2.1 Consultation and assistance

- Inform applicants of the type of information that is relevant and accessible to avoid applicants making excessively broad requests.
- Increase the amount of information routinely, and voluntarily released by agencies.
- Avoid formal written consultative processes where possible in preference for telephone conversations or meetings with applicants.

6.2.2 Negotiation

Legislative amendment to recognise the right of parties to negotiate

Negotiation between applicant and agency for extended time frames, prioritising the search for particular documents, internal review processes, fees and charges

Chapter 7: Internal review

Given the Committee's approach of examining each step in the information request process, it is surprising that relatively little attention has been given to the topic of internal review. This chapter contains mostly minor bureaucratic and legislative amendments.

Chapter 8: External review

In line with the Committee's attention to improving the accessibility of the Act, especially for citizens with little legal knowledge, the methods of the Information Commissioner in producing decisions were examined with a view to simplifying them. The Committee endorsed the Information Commissioner to:

employ information dispute resolution methods where possible;

produce practice guidelines to assist agencies and applicants to understand, interpret and administer the Act;

produce succinct, reader-friendly decisions that are easily accessible to agencies and applicants;

- publish all decisions either in full or abbreviated, summary or note form; and

reform the Internet website to increase its prominence and accessibility.

Chapter 9: Fees and charges

The Committee recommends that no fee or charge should apply to an applicant who is an individual to make an application that relates to documents concerning their 'affairs' and should not be limited to their 'personal affairs'. 'A document that affects an individual's affairs is not necessarily a document that concerns that individual's "personal affairs"'. The benefits of this suggestion are that it would be more equitable to citizens; reduce any administrative burden on FoI decision-makers in applying fees and charges; and remove a significant source of dispute from the Act (9.5.1).

The Committee found several faults with the 'time spent' basis for calculating charges for information requests. The process could result in an applicant paying for inefficiencies in records management which increase the time spent searching for documents. It does not take account of the extended time inexperienced officers may take in finding a document, and, in extreme cases, is open to abuse by officials who wish to prevent certain information from entering the public arena. An alternative to this system is to calculate costs on the basis of the number of documents/pages considered by an agency or number of documents/pages authorised for release. Both of these alternatives have their advantages and disadvantages for both agencies and applicants. The former would reflect the level of resources dedicated to discovering the documents, but would require the applicant to pay for documents that they did not receive, for instance, because of exemption clauses. The latter alternative would create the reverse scenario.

Chapter 10: Exemptions — general principles

In relation to exemption provisions the Committee came to the following conclusions:

A single, general exemption provision based on 'social harm' or the 'public interest' was rejected because it, potentially, would result in agencies developing new reasons for withholding information, and would either substantially favour disclosure or non-disclosure, and would result in uncertainty for agencies and applicants, leading to inconsistent application of the exemption provision by decision makers (10.2.1).

- A general overriding public test would not create the necessary level of flexibility for Cabinet exemptions (10.2.2).
- The Committee rejected recommending a reform that would retain specific exemptions but frame each exemption provision to focus on the harm that would result from disclosure, rather than the type or class of document (10.2.3).

Chapter 11: Specific exemption provisions

As the 'Statement of Reservation' outlined, the Committee was not supportive of the current Cabinet exemption, claiming that it was too broadly worded, allowing for significant amounts of information to be kept beyond the scope of FoI laws. The Committee, in response to claims that documents were placed before Cabinet for the sole purpose of preventing access to them via FoI, not for consideration by Cabinet, has recommended the insertion of a purposive test. The Committee was mindful of the central role of Cabinet, but the potential for abuse/misuse of this exemption warranted some narrowing of its range.

Chapter 12: Scope of the Act

- Questions were raised over the number of agencies and corporations excluded from the ambit of the Act (subsequently undermining the objectives of the Act) and the lack of a consistent policy approach in deciding which agencies warranted exemption from the Act (12.3.2).
- The LCARC confirmed the suitability of certain exemptions for government-owned corporations (GOCs) from the Act when they interfere with commercial activities. However, the use of a document-based exclusion (where the exemption travels with the document, regardless of which agency possesses the document) warrants amendment of the legislation to limit the exemption to documents concerning 'competitive commercial activities' (12.4.2).
- In relation to contractors, the LCARC has followed the Administrative Review Council's lead by recommending that documents in a contractor's possession that relate directly to the performance of their contractual obligations are deemed to be in possession of the government agency (12.7.1).
- The Committee found no fault with the provisions that could be used in commercial-in-confidence cases, but said more guidelines were needed for agencies to prevent the exemptions being claimed when insufficient consideration had been given to the effects on public accountability. The Committee envisaged a central role for the 'FoI monitor' here, through issuing guidelines and offering training on the interpretation and application of the exemptions (12.7.2).

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