

[OBSERVER: JACK WATERFORD]

Queensland leads on FOI reform

Freedom of Information

Twelve years of Howard government paranoia have made a culture change necessary – the Rudd Government should look north for some inspiration

My cynicism last year to the contrary, the Rudd Government is quietly moving to draft its amendments to Freedom of Information laws. But just as it prepares its modest reforms, the Queensland Government is contemplating a far more fundamental and worthwhile set of changes to its rules.

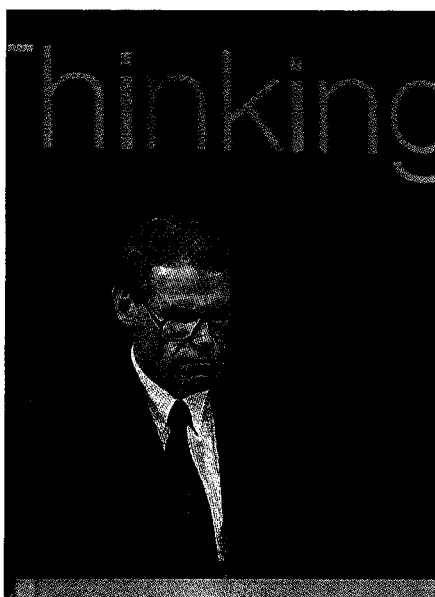
The Queensland review is being conducted by lawyer, political scientist and journalist Dr David Solomon who, during the period that Kevin Rudd was chief vizier in the Queensland Goss Government, was the chairman of the post-Fitzgerald-inquiry Electoral and Administrative Reform Commission. (Solomon as it happens was political correspondent for *The Canberra Times* in the early 1970s, before becoming Gough Whitlam's press secretary.)

The Solomon review is so far only at the discussion paper stage. But it is clear from the paper, issued last week, that Solomon is canvassing fundamental changes to FOI. These, recognising that FOI has been around in Australia for more than 25 years, could switch the gearing on FOI requests in significant respects:

□ There would be a much stronger assumption that documents ought to be accessible. Solomon suggests that the "default setting" in Queensland is an assumption that documents are inherently confidential, and asks whether this is still appropriate.

□ The overriding question should be whether any harm would come from release. Exemption provisions would be the guide to possible forms of harm, but the mere fact that a document falls into an exemption area would not resolve whether it was exempt. The "good reason" for withholding would be more focused on the nature of the information than the class of document into which it fell.

□ All of the exemptions would be subject to an overriding public-interest test. Thus even if a document fell into an exemption category, and even if it were possible to identify some harm or damage from disclosure, a decision-maker would still have to balance that harm against any



Early task: Integrity Minister John Faulkner will take charge of FOI reform in the federal arena.

benefit which might flow from disclosure.

□ The objects clause part of the Act, explicitly made as guidance for decision-makers and courts, might say that the Act intends that "unless disclosure is likely to injure the public interest, it will not be protected". And the Act might refer to explicit public interests weighing in favour of disclosure, including promoting the accountability of ministers and officials and allowing citizens to be able to participate more effectively in public decision-making.

□ Solomon seems to have a disposition to think that any body exercising government functions should be covered. This could include private-sector bodies with contracting-out functions, and government-owned corporations.

□ Like the Rudd Government policy, he favours abolishing conclusive certificates, particularly given the High Court decision suggesting that review of such certificates involved no balancing tests.

□ Even with cabinet documents, he quotes approvingly the quite different conceptual approach of New Zealand, where the appropriate question would be, "What are the consequences of revealing this particular cabinet information?", rather than the Australian position which would say, in effect, "This is a cabinet document; therefore it must be exempt."

□ And he is critical of Queensland's "Cabinet tea trolley exemption" – sometimes ascribed to Rudd himself – allowing a document to be exempted as a cabinet document if it had even been in the cabinet room.

□ "Business privacy" exemptions might have a public interest test.

And he canvasses, in a somewhat neutral fashion, a division between requests for access to personal files, which might go over into a privacy rights package, and requests for information about government generally, as the "purer" FOI zone. This division is the usual one overseas, but not in Australia.

The Solomon committee has set the end of March for submissions in response to its discussion paper.

By contrast, the Federal Government has a more modest agenda for reform, though it has shown it means business by making it an early task for Rudd's Integrity Minister, John Faulkner. The policy is to bring together the functions of privacy protection and FOI in an Office of the Information Commissioner – with a function of "streamlining and fast-tracking information policy across government".

The Privacy Commissioner position would be retained, in this new office, to protect individual privacy issues. There would be also an FOI Commissioner, who would take over appeals from the Administrative Appeals Tribunal (and without AAT filing fees).

Conclusive certificates would be abolished. On the other hand, nothing explicit has been promised about amending or changing existing exemption areas, introducing overriding public interest tests, or anything resembling the New Zealand consequential approach. (Though the general policy has vague words about "driving a culture shift across the bureaucracy to promote a pro-disclosure culture" and promises to make it clear that disclosure outside FOI, or even when there are arguable grounds for exemption, is protected.)

The policy is also joined with promises of public interest disclosure reform for whistle-blowers, and further reforms for shield protection for journalists and other professionals.

The early cynicism about the policy, when it was announced, was whether it would ever happen. Oppositions are famous for reforming zeal; in government

they more often see the virtues of secrecy, as Gareth Evans (a founding father of FOI) once admitted.

Perhaps the cynic, or the sceptic, should have a focus on somewhat different risks.

Rudd, by all reputation and by the way in which he is organising his office, is a centraliser who wants nearly all decisions checked through his office.

It is no great step from this to demanding close information management, and that all disclosure of information be centrally coordinated. When that happens there is an inevitable tendency to regard FOI disclosure (even if required by law) as part of the general package of information and spin fed out by the Government's press secretaries, public relations and marketing gurus and spin doctors. And that, inevitably, leads to disclosure by discretion. Ask anyone near the centre of the Howard

If Rudd wants a more open public service in his new rational and evidence-based paradise, he must not only say so, but show himself relaxed in practice, even when marginally embarrassed

government! In this sense phrases about "streamlining information policy within government" can sound sinister.

A culture change is now necessary. Twelve years of Howard government paranoia, AFP leak inquiries and witchhunts, and the promotion of the impression by some top public servants that any disclosure of information is a breach of the Crimes Act or public service guidelines have made many public servants gun-shy about discretionary release of information. If Rudd wants a more open service in his new rational and evidence-based paradise, he must not only say so, but show himself relaxed in practice, even when marginally embarrassed. Otherwise a change in the law will mean nothing.

Jack Waterford is editor-at-large of *The Canberra Times*.

WHH
PUBLISHING
Brisbane Ave BARTON
6273 3048
www.whh.com.au

RESEARCH
WRITE
EDIT
DESIGN
INDEX
PRINT
WEB
DISTRIBUTE

annual reports
magazines
brochures
manuals
books
research papers
posters
guidelines

WHH Publishing
the government
communications specialist

WHH Publishing offers a fully integrated publishing service or separate services according to your needs.

We help government agencies communicate effectively with key audiences in print and online.

With 10 years of experience publishing for more than 35 government agencies, we know government communications.

Contact us today about writing, editing, design, print management, and online publishing.