Balancing responsibilities

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(Paper delivered at the EDOTasmania conference, "Information: A Privilege or a Right?" 6 April 2009)

There is always a spoilsport – whenever people begin talking about privileges and rights, someone will come along and say, "ah, but what about responsibilities". I thought I would get in first and try to deal with some of the ramifications of that issue right at the beginning. And I want to talk specifically about the responsibilities of those who deliver information, those who seek it, those who make the rules and those who enforce them.

I have also been asked to say something about the Queensland review process and any relationship it might have with the Tasmanian review that is currently well advanced.

Could I begin by sharing with you 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 very effectively – though I will say something a little later about a recent hiccup in the English process that is relevant to the system improvements in which we are currently engaged in Australia. We have reached the point where those changes are concerned not with a

[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.

legislative add-on to the Westminster system but with what most of us regard as a fundamental part of it.

Twenty years ago, Tony Fitzgerald QC, whose Commission of Inquiry into police and other corruption in Queensland helped bring down the National Party government in that State and destroy Bjelke-Petersen's reputation, wrote in his report –

> Secrecy and propaganda are major impediments to accountability, which is a prerequisite for the proper functioning of the political process. Worse, they are the hallmarks of a diversion of power from the Parliament.
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> Information is the lynch-pin of the political process. Knowledge is, quite literally, power. If the public is not informed, it cannot take part in the political process with any real effect.[2]

As the Electoral and Administrative Review Commission said in its report when it recommended the legislative scheme of FOI largely accepted in Queensland –

> …the Commission considers that information is the grist of government processes. The fairness of decisions made by government, and their accuracy, merit and acceptability, ultimately depend on the effective participation by those who will be affected by them. Further, when access to information is denied to the public it is thereby denied its right to exercise control over government. FOI legislation is crucial if access to information is to be obtained, and thereby participation in the processes, and control of, government is to be achieved.[3]

Unfortunately, in Queensland at least, those noble sentiments were accepted less and less by successive governments. The legislation was changed to allow governments to resist providing people with access to important information and the administration of the legislation reflected the increasingly jaundiced view of governments towards it.

However, times, or rather, political leaders, change. The Terms of Reference issued to the Panel established by the Queensland Government under Premier Anna Bligh on

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[2] Fitzgerald 1989, p. 126
[3] EARC 1990, p. 16

17 September 2007 – just four days after she was sworn in – began with this statement –

> The Queensland Government recognises that freedom of information is an essential right of every person and that access to government information is fundamental to openness, transparency and accountability in government. [4]

A very straightforward proposition – "an essential right". The other recent and current reviews of FOI in Australia have adopted a similar approach and I'll say something about them a little later. But I should add that the Queensland Government qualified its statement about the nature of the right to freedom of information by pointing out that the disclosure of particular information could have a prejudicial effect and it was necessary for FOI to balance these competing interests.

What all the reviews have done or are doing is to try to change the balance that was achieved in the old legislation, and change it quite significantly. They have also sought to change the obligations or responsibilities of the parties involved. Again, in a very significant way.

The providers

I will begin with the responsibilities of government and other agencies covered by FOI. I do so because I have no doubt that although others will play an important part, the ultimate success of the new FOI regimes will depend on the response of those responsible for providing information.

One of the central messages of our report to the Queensland Government was that freedom of information legislation should be a last resort, in terms of the provision of government information to the public. We argued for what we and others have described as a "push" model, replacing the existing "pull" FOI model.

We argued that the "push model" should include (but not be limited to) the following elements –

- publication schemes and proactive decision-making processes that routinely release information (including documents themselves or public

[4] 2007 FOI Independent Review Terms of Reference, p. 1.

editions thereof) at large, or to specific interest sectors, as enabled by a range of ICT features;

- disclosure logs that provide online access to information already released under freedom of information. (The Government of the day may also wish to add supplementary contextual information providing greater balance or depth to the issue(s));
- greater administrative release through the exercise of executive discretion in good faith and in the appropriate circumstances (with sufficient legal protection) rather than the current tendency to refer all requests for documents to be managed through the longer and more expensive FOI processing model; and
- administrative access schemes for appropriate information sets, such as Queensland Health (health records) and Queensland Police Service (criminal records).[5]

This "push" model would be supported by sufficient legal protections, and through the active monitoring efforts and collaborative approach of the Information Commissioner in a revamped role.[6]

We also recommended other measures for informing people what their government was doing, including release by the Premier of Cabinet agenda items and decisions. We proposed that the freedom of information legislation would impose a mandatory obligation for agencies and public authorities to develop and implement a publication scheme taking into account the public interest in access to the information it holds.

> The publication schemes must be approved by the Information Commissioner in a similar model to that operating in the United Kingdom which recognises flexibility and capacity building imperatives in the system and includes development of model publication schemes by the Information Commissioner for different classes of public body such as for local government, the health sector and education.

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[5] The Panel considered that "appropriate information sets" does not include personal affairs information for which a fee is levied under an administrative access scheme where it would otherwise have been a *free* entitlement under FOI.

[6] 2008, "The Right to Information", Report of the FOI Independent Review Panel, p. 19.

> Published information should be made available electronically wherever possible. [7]

In one sense, these recommendations are peripheral to FOI. In a sense they are a substitute for FOI. They are also much more challenging than FOI for government and other relevant agencies. They are, however, at the very heart of the delivery of open and accountable government. It was the view of the Queensland Panel, that FOI should be only a backstop, used in those (hopefully) relatively few cases where government and agencies have not, whether of their own initiative or after prompting by media, Opposition or public inquires, released information voluntarily to the world.

Where FOI is invoked it should be the duty of relevant officers to find and make available the information that has been sought unless the legislation says it should not be released. That will generally depend on the application of the various exemptions and of the public interest test, where that is relevant.

It is the duty of the officer to apply the law. In Queensland we have proposed, and the government has accepted, that it should be an offence for a more senior officer or minister to give directions that would override the officer's obligation to apply the law as he or she sees fit.

The responsibilities or obligations of government and officials are spelt out in far more detail than in earlier legislation. The hope and intention of these and some other important aspects of the new legislative architecture that I will mention later, is to promote cultural change. Most commentators have seen t to be important to address the problem of a culture that was in some cases hostile to FOI.

Let me quote briefly from evidence given by the retiring Information Commissioner in England and Wales, Richard Thomas, to the Justice Select Committee. He said that Freedom of Information "calls for culture change. Cultures do not change overnight, but laws can accelerate culture change."[8]

The requesters

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[7] Ibid, p. 35.
[8] Thomas, 2009, p. 7.

Those who seek information using FOI also have some responsibilities, most of which are or should be detailed in the legislation. The first is to try to specify just what it is that they want. As the draft Queensland Right to Information Bill puts it, the application must –

> (b) provide sufficient information concerning the document to enable a responsible officer of the agency or the Minister to identify the document[9]

In some circumstances there are provisions for contact between the requester and the agency, for example, to narrow the range of documents being sought, where the failure of the requester to co-operate may lead to the request being denied.

There are two other legislative requirements of a requester in Queensland that I should mention. The first concerns the external review process. Clause 96 (1) says –

> During an external review, any participant must comply in a timely way with a reasonable request made by the information commission(er) for assistance in relation to the review.

The second is dealt with in Part 10, and concerns vexatious applicants. By implication a requester should avoid conduct that might result in them being declared vexatious.

The rule makers

Those who set the rules, strictly speaking, are the various parliaments who legislate and the governments that produce regulations under the Acts. But I really want to cast the net a little wider, and include those who make recommendations to government about what the laws should be.

I find it interesting that four different processes have been involved in the reform proposals that have emerged in Australia over the past year. As I mentioned earlier, the Queensland review involved the appointment of an independent panel of three people. In New South Wales the review was initiated by the State Ombudsman, very much against the wishes of the then Premier, but his report was warmly welcomed by his successor. In Tasmania the review is being conducted within the Attorney-General's Department, with some insiders and two outsiders brought in as advisors.

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[9] clause 23.

While in the Commonwealth, the review has essentially been conducted within the relevant Minister's private office, though those responsible have consulted (and questioned) far and wide.

I think it is very encouraging that we have all come up with fairly similar recommendations, though of course each has been influenced (and properly so) by circumstances relevant to its own jurisdiction. That, of course, is one of the primary responsibilities of the rule makers – uniformity has its merits, but it is unrealistic to ignore the unique characteristics of the different State and Territories and the Commonwealth.

There are other obligations and responsibilities for which governments must answer. In the Australian Financial Review last Tuesday [10] Tony Harris, a former NSW Auditor-General and former senior Commonwealth public servant, wrote, concerning FOI laws –

> … there is a chasm between good intentions and practice. Departments know they have their minister's support when they refuse to abide by the spirit of the law. What we do not know yet is whether the same disjunction will exist under Faulkner's proposed legislation.

He's right. It is that "culture" problem again. Parliaments and governments have a responsibility to make it clear to those who administer information laws that they are serious about the right to information. Parliaments can do it by ensuring that the intention to make government accountable through freedom of information is stated without equivocation in legislation – usually in the section that recites the object(s) of the law. Governments must make it clear to agencies and public servants that they are committed to those objects. It should never be the case (as has happened in the past in some instances) that public servants who released information in accordance with the law be punished or sidelined for doing what the law said they should do. Responsible ministers, and preferably Prime Ministers and Premiers, should make public statements such as those made by Barak Obama on the day after he was sworn in as President of the United States, in which he stated unequivocally –

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[10] AFR, 31 March 2009, p. 62

> The Freedom of Information Act should be administered with a clear presumption: in the face of doubt, openness prevails. …
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> The presumption of disclosure should be applied in all decisions involving FIOA.[11]

And, as he made clear, they should issue directives to agency heads along the same lines.

There are further obligations on governments if these intentions are to be given effect. Agencies need to be adequately funded and staffed for their FOI work and staff need to be properly trained. All FOI laws establish time limits for agencies to deal with requests. It is for government to ensure that agencies have the resources that allow those statutory guidelines to be met. They also need to ensure that agencies have information systems that allow information to be accessed and retrieved.

The enforcers

Parliaments make the rules and governments dictate the practices that should apply. But for FOI to work, there needs to be a body that supplies advice, guidance and assistance to agencies and individual officers and applies discipline. It should also promote FOI in the community at large. The experience in Queensland at least is that these functions are not performed adequately by another government agency, such as Attorney-General's or even Premier's, and probably cannot be, because although they may be given some authority in the area (say, by a Cabinet directive) they do not have the autonomy that is probably required to perform these functions effectively. Our recommendation in this area, was that the Information Commissioner's role should be considerably enhanced to allow – require – the Office to be not just the external reviewer but also the monitor and champion of FOI.

[11] MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES, The Press Office, 21 January 2009. http://www.whitehouse.gov.

In fact we loaded many more responsibilities onto the Information Commissioner and his or her office. And we made sure that they would be detailed in the legislation. I won't go through them specifically here, but in essence we combined the role envisaged by the ALRC/ARC report in the mid-1990s for an Information Commissioner acting as an FOI Monitor, plus additional functions to make the Information Commissioner an FOI champion and then further functions promoting information matters within government and its agencies.

After considerable debate, we unanimously decided that for all practical purposes, the Information Commissioner, rather than a tribunal or court, should have the final say on factual matters on appeal in FOI decisions. Determining whether a matter satisfies that public interest test (of which more later) falls within this category of decision-making, though a question of law might be said to arise as to whether the decision-maker has applied the criteria specified in the legislation. We were partly influenced to take this route because Queensland was in the process of establishing a new combined civil and administrative tribunal. I had a personal interest in this because when I was chair of the Electoral and Administrative Review Commission one of our final recommendations, back in 1993, was for the establishment of a tribunal of the kind being proposed by the government 15 years later. However we decided that it was very important that the Information Commissioner should be the external reviewer because that would provide the commissioner with invaluable information necessary for many of the other functions the Commissioner had to exercise.

As mentioned earlier, we proposed that the Information Commissioner should have a central role in the determination of whether a person should be declared to be a vexatious litigant. In this matter, and in other areas where a question of law might be raised, the Qld Civil and Administrative Tribunal would have jurisdiction. (I should point out that under the old FOI Act any question of law had to be determined by the Supreme Court, a more daunting and expensive experience for requesters.)

One final word on enforcement. We recommended that the transition to the new system, to the development of a new Right to Information Act and to the institution of the new system we had proposed, should be the responsibility of the Department of the Premier and Cabinet. The acceptance of this recommendation has undoubtedly helped in the transition to the new system we proposed.

The Queensland recommendations

I don't intend to go through all our recommendations. There were 141 detailed in our report, of which just two (of no importance whatsoever) were not accepted by the Government, 23 were accepted partially or in principle while the remaining 116 were adopted in full. Actually, that does not tell the full story. Another two recommendations were mentioned in our executive summary, but were somehow lost from the text of the main report. One was to reduce the 30-year rule to a 15-year rule – this government instead adopted a 20-year rule. The other was to allow Cabinet material to be accessible under FOI after 10 years – and this was adopted.

As I suggested earlier, some of our most important recommendation were really outside freedom of information – they were about whole of government strategic information policy and their implementation would reduce the need for FOI. Rather than quoting our recommendations, I include in my paper the Government's response, which unequivocally adopted them. These are some of the relevant statements and headings in that response-

> As a first step, and consistent with the recommendations contained in the panel's report, the government will develop a whole-of-government strategic information policy framework with the following elements:
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> - ***A move to a 'push' model***: It is fundamental to an open and participatory government that information is provided as a matter of course, unless there are good reasons for not doing so. The policy framework will be based on guiding information policy principles, strategies and standards that position legislative access as the act of 'last resort' in accessing government information. These information policy principles, strategies and standards will embed a right to information in the administrative practices and organisational culture of the public service, so that providing information to Queenslanders is recognised as a legitimate and core aspect of every public servant's day-to-day work.
> - ***A clearly articulated governance framework***: The Queensland Government agrees with the panel's recommendation that an integrated and coherent government-wide approach to the challenge of information management is required to provide direction and coordination among those with public administration and information management responsibilities. A critical

component of the whole-of-government strategic information policy will be a governance framework, with clearly articulated roles and responsibilities for all relevant agencies, including the Public Service Commission, the Information Commissioner, Queensland State Archives and the Queensland Government Chief Information Office.

- ***A comprehensive and integrated information policy***: The policy will govern all aspects of the information life cycle, including planning, creating, collecting, organising, using, disseminating, storing and destroying information. A review of all relevant standards and guidelines will commence immediately, with a view to creating an integrated and well-understood framework for the management of information throughout its life cycle.
- ***A clear authorising environment***: The Queensland Government recognises that if real cultural change is to be achieved, and if openness is to become part of the culture of government, it must be championed within government itself. Strong leadership and clearly defined decision-making processes will be essential to creating an appropriate authorising environment to allow this to occur.
- ***Appropriate protection for individuals' privacy***: The Queensland Government holds significant amounts of personal information, and it will be critical to ensure that appropriate administrative and legislative safeguards are in place to promote privacy rights and to improve procedures for providing access by people to their personal information.
- ***Public interest restrictions on the release of information***: There are instances where the disclosure of information could have a prejudicial effect on essential public interests. Examples include matters such as national security, law enforcement, commercial confidentiality or the full and frank communications needed to allow the government to govern effectively. Where appropriate, the legislation will provide for restrictions on access to these types of information. It will be equally important that decision-making processes for the administrative release of information are sufficiently robust to ensure that information that would otherwise be restricted for public interest reasons is not inadvertently released.
- ***Equal access to information***: The policy will also aim to maximize equality of access to information across all sections of the community. Advice on how to apply for information and complaints procedures must be targeted in a way that

ensures that it reaches all sections of the community. Administrative release of information should also occur in a way that meets the needs of those who are at a social disadvantage or who cannot, because of their location or personal circumstances, readily access information through electronic means.

- ***Comprehensive planning and management of resourcing and operational implications***: There will, as a matter of course, be significant resource implications for the government arising from the change to a push regime. Implementation of the whole-of-government strategic information policy will require careful planning, having regard to what can be achieved with current technology, and what the government can responsibly afford without unduly compromising other service delivery priorities.

  Clearly, there is a significant program of work that will need to occur over the coming twelve months in support of a strategic information policy framework, including determining the baseline from which the policy can realistically be implemented and the development of standards and guidelines to provide the framework for the management of information.[12]

Perhaps the most difficult issue the Panel had to face was the exemption in the current legislation for Cabinet material. This was the crunch point. This is where Bjelke-Peterson's problem of whether FOI is alien to the Westminster system of government is truly tested. It is also where previous Queensland Governments had failed the test, providing themselves with an all-encompassing way of hiding material, without resort to a conclusive certificate.

I now going to interrupt my narrative with a story from overseas. As I will explain, it had not been fully played out when the Panel was making its recommendations, though we were aware of its progress. In retrospect, however, I personally feel even more comfortable with what we proposed, and the Queensland Government accepted, on the issue of Cabinet and ministerial exemptions.

What 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 minutes of two Cabinet meetings in March 2003 when the U. K. Cabinet considered the

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[12] The right to information A response to the review of Queensland's *Freedom of Information Act,* Queensland Government, August 2008, p.4

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 pointed out –

> 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 –

> 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.[13]

In Queensland we decided, with the assistance of a provision in our State Constitution that recognises the collective responsibility of Ministers, that there should be no public interest test applied to the Cabinet exemption, and several others. This was because in our view Parliament was entitled to say that the public interest in maintaining the integrity of Cabinet should be manifest. This approach, on what we considered to be an important matter of principle, enabled us to narrow and define the Cabinet exemption, confining it to those matters that truly did need to be protected to maintain Cabinet's integrity. This, we considered, would lead to more certainty on the part of Ministers as to what was covered by the exemption and what was not. It also allowed us to argue that the time for protecting such documents should be drastically reduced – from 30 years to 10.

We decided that the ministerial responsibility principle should also be applied to protect the documents of individual ministers. In particular we thought that briefings for ministers where departments needed to fully inform them of what was happening – incoming ministerial briefs, question time briefs and estimates briefs – should be specifically declared to be exempt. The government accepted our reasoning but decided that the latter two species of briefings were already protected by parliamentary privilege.

There is not time to deal with all the issues we addressed where we proposed answers that were not mainstream, but I will mention a few.

First, we decided that the public interest test needed to be changed, and that the factors that needed to be taken into account in determining the public interest should be detailed, preferably in legislation.

We settled on a public interest test formula that favoured discosure. The terminology we adopted was –

> Access is to be provided to matter unless its disclosure, on balance, would be contrary to the public interest.

We developed an extensive list of public interest factors that might be taken into account in carrying out the balancing task. This is far longer than the list developed in the Tasmanian Directions Paper, because it has an additional function. What it does is

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

list the harms at which some of the former exemptions in Queensland were intended to be taken into account when deciding whether in a particular case there was a public interest in disclosure. By listing these harms we were able to eliminate all those former exemptions that included a public interest test.

We did this because it was our experience that the general rule in Queensland was that if an FOI officer decided an exemption was applicable there was a presumption that the public interest would normally favour non-disclosure. Indeed we were aware of cases where officers thought they need not even consider public interest issues, once it was found that a document fell within an exemption, even though the Act said a public interest test should be applied.

By including the relevant harms in the public interest test, we were able to in effect abolish those categories of exemption that included a public interest test. This meant that for any information that was sought that did not fall within a true exemption, the only question the FOI officer would ask him or herself would be whether disclosure, on balance, would be contrary to the public interest, and they would decide that question by looking at the listed public interest factors.

I was interested to see that the Commonwealth has also addressed this issue of trying to ensure that the public interest was properly considered, though it found a slightly different way of doing so. To quote Senator Faulkner

> The draft legislation divides exemptions into those which are subject to a public interest test (called conditional exemptions) and those that are not, and then applies a single simple, strong and clear test to all conditional exemptions, which requires an agency to give access to a document unless giving that access would at the time, "on balance, be contrary to the public interest" (*Open and Transparent Government – the Way Forward* 24 March 2009, emphasis added).

So the type of exemption that we abolished will, in the Commonwealth scheme, be labeled conditional exemptions.

Another problem that had developed in Queensland concerned the ever-growing list of exclusions in the FOI Act. The old Act was constantly being amended to exclude corporatised bodies and other groups that were able to persuade Ministers that they should not be subject to FOI. We were also concerned that the reach of FOI was being reduced as more and more governmental functions were performed by corporatised agencies or even by private industry. We proposed 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 considered 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. The Government largely adopted our proposals, though it decided that private bodies should be accountable through contractual and other arrangements to relevant agencies and that their documents should be accessible through the agencies.

I mentioned earlier the far more extensive role that will be played by a revamped Information Commissioner's office. In that regard I should also say that we proposed, and the Government accepted, that most applications for personal information should be handled under a new Privacy law – it will be called the Information Privacy Act. The new Privacy Commissioner will be located within the Office of the Information Commissioner so that the inherent tensions between information access and privacy protection can be best managed. The Commonwealth is proposing a very similar establishment – an Information Commissioner heading the office assisted by an FOI Commissioner and a Privacy Commissioner.

Lessons?

I was delighted to be asked by the Tasmanian review to act as a consultant, and I am pleased that some of my suggestions have actually been incorporated into the Directions Paper. However I don't intend to provide a commentary on what that paper contains. Queensland's contribution is contained in the very detailed reasoning and proposals of our final report. Everyone can judge whether they think we were wrong or right, and can select, modify or reject what we said as suits their needs and particular circumstances.

What I should say is that we in Queensland were given a mandate for radical change in the terms of reference that the government approved. What we did was to look at the problems in the current system for end-users, for government and for the bureaucracy and we went back to first principles in an attempt to resolve the conflicts and difficulties that had arisen. We did not feel bound by what had been decided by our predecessors if we thought that the system could be improved.

We were fortunate to have had a government that wanted us to recommend fundamental changes if we thought they were necessary and desirable. I am really

pleased that the Government adopted so much of what we recommended and will soon enact them.

I wish Tasmania well with its review of freedom of information.