# AUSTRALIA'S RIGHT TO KNOW

## Submission on the Queensland Government Right to Information Bill 2009

**7th April 2009**

**Summary**

- The Government's commitment to a more open and transparent system of freedom of information has failed to translate into the drafting of the Right to Information Bill 2009 (the Bill).
- Whilst the Bill makes a number of improvements to the current regime, overall it is seriously flawed due to the drafting and practical affect of the new public interest test.
- The most concerning deficiency in the Bill is the creation of a new public interest test for information that falls within Schedule 4 Part 4 (including deliberative documents) that is weighted to a presumption that the documents should not be disclosed due to the harm they would cause if disclosed.
- The failure to adopt a single public interest test favouring access to information (as committed to by the Government) will increase the ability for decision makers to exclude documents on the basis of factors favouring secrecy.
- The public interest test recommended by the Solomon Review and adopted by the Government which favours disclosure, should be incorporated into the drafting of section 48.
- The factors listed in Part 4 should be incorporated into Part 3 and treated in the same manner as other factors when balancing the public interest.
- In addition, fees and charges remain excessive although we understand the regime is to be reviewed.

## Introduction

Australia's Right to Know (ARTK) is a coalition of 12 major media organisations formed in 2007 to address the poor state of freedom of speech in Australia including increasing government secrecy.

ARTK has strongly endorsed the Queensland Government's recognition that access to government information is an essential right of every citizen and fundamental to openness, transparency and accountability in government. ARTK has applauded the Government's decision to review and reform the Queensland Freedom of Information (FOI) regime.

ARTK acknowledges the Solomon Report, delivered on June 10, 2008, provided a welcome and comprehensive rethink of Freedom of Information law and practice in Queensland. It provided recommendations aimed at creating an improved system of meeting the public's right to information.

On 20 August 2008, the Queensland Government released its response to each of the 141 recommendations contained in the report, supporting in full 116 of the Report's recommendations and either partially or in principle supporting another 23 recommendations. Only 2 recommendations were not supported (recommendations 45 and 70).

In its response, the Government gave a commitment to provide exposure drafts of the Right to Information Bill, to replace the current *Freedom of Information Act 1992*, and the Information Privacy Bill for consultation. This submission addresses issues raised by the draft Right to Information Bill.

The Queensland Premier Anna Bligh noted in the foreword of "The Right to Information – A response to the review of Queensland's Freedom of Information Act" published in August 2008, that "openness and accountability are the cornerstones of good government''.

Premier Bligh also noted that the "overriding principle will be that the community has a right to information held by government'' and promised "when these reforms take effect, Queensland will be the most open and accountable government in Australia''

## ARTK's key points

The Premier's very positive intentions and promise fail unless they are translated successfully into legislation and into practice. The Right To Information Bill 2009 (Bill) must actually improve access to government information in Queensland including information best able to assist the public in judging the government on accountability, performance, efficiency and honesty.

At this stage, despite the stated best intentions the Queensland Government, the Bill fails to meet this test of improving access as its proposed design will in practice increase secrecy compared to the current Freedom of Information Act 1992.

In addition, it also has the potential to fail to make Queensland the most open and accountable government in Australia given the framework for Commonwealth Freedom of Information recently outlined by Cabinet Secretary John Faulkner.

The most concerning deficiency in the Bill is the creation of a new public interest test for information that falls within Schedule 4 Part 4 (including deliberative documents) that creates a starting presumption that the documents should not be disclosed due to the harm they would cause if disclosed.

In relation to all information, the Bill fails to create a single public interest test which starts from the presumption that information will be released unless its disclosure on balance would be contrary to the public interest.

These failures will increase the ability for decision makers to exclude documents on the basis of factors favouring secrecy.

Other flaws include excessive fees and charges (which we understand will be reviewed); the ambit of the Act and the Cabinet exemption.

## Commonwealth FOI

In March 2009, Commonwealth Government Cabinet Secretary Senator John Faulkner released draft Bills on information access reform. Those bills are: the Information Commissioner Bill, the Freedom of Information Amendment (Reform) Bill 2009 and a Companion Guide.

The Commonwealth's proposed FOI reform bill will provide greater openness and transparency, as well as improved access and efficiency in key areas compared to the proposed Queensland bill. ARTK strongly urges the Queensland Government to reopen consultation to address flaws in the proposed bill outlined in this submission and to consider adopting elements of the Commonwealth reforms.

## Public interest test and the "harm factors"

### Public interest test

The Solomon report recommended the following public interest test should be adopted:

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

This recommendation was accepted by ARTK on the basis that the starting presumption is that access to information is to be provided. This reflected the government's stated intention to overhaul freedom of information and create an open and transparent regime.

This recommendation was accepted by the Government, subject to drafting.

The positive wording has been incorporated into the Preamble to the Bill stating that it is the Parliament's intention to provide a right of access to information under the government's control unless, on balance, it is contrary to the public interest. However, the new single public interest test in favour of disclosure has not been included in the operative provisions of the Bill.

The test favouring disclosure should be incorporated into the drafting of section 48.

Exacerbating the problem, the methodology to be applied to information that falls within the categories in Schedule 4 Part 4 actually reverses the presumption of disclosure making the starting point that access is not to be provided unless its disclosure, on balance, would be in the public interest.

The factors favouring nondisclosure having additional weight because of particular harm in disclosure are:

1: Affecting relations with other governments;

2. Affecting investigations by ombudsman or audits by auditor-general;

3. Affecting particular operations of agencies;

4. Disclosing deliberative processes;

5. Disclosing information created for ensuring security or good order of corrective services facility;

6. Disclosing personal information;

7. Disclosing trade secrets, business affairs or research;

8. Affecting confidential communications;

9. Affecting State economy;

10. Affecting State financial or property interests.

By creating a different test for documents that fall within Schedule 4 Part 4 to other documents, contrary to the recommendation of Solomon and accepted by the government, the Bill has failed to create a single public interest test.

**Harm factors test**

The new test directs decision makers to give additional weight of harm to documents that fall within the categories in Schedule 4 part 4. The effect will be that the starting point for decision makers will be that the document should not be released and accordingly the test for disclosure will be more difficult to meet.

These documents will be treated prima facie as documents that cause harm if released and therefore should not be released.

By giving greater value to secrecy the new test is a substantial shift in favour of non-disclosure.

Of particular concern is the inclusion of deliberative documents.

Deliberative documents reflect the thinking of the government and are documents that contain opinion, advice or recommendations or consultation or deliberation that has been prepared or recorded or has taken place in the course of, or for the purposes of, the deliberative processes of the agency or Minister. They are documents that shine light on why governments make the decisions and the factual material, research and advice upon which decisions are founded and are the subject of the vast majority of non-personal FOI requests.

Politicians, media and community groups all seek deliberative documents in order to ensure the best advice and all options were considered, special interests did not dictate outcomes and public funds were wisely and honestly spent. They are the documents that can show whether public hospitals are properly resourced and if urgent repairs to government housing have occurred as promised.

In our view, by requiring decision makers to consider factors for disclosure and non-disclosure but then give additional weight to some factors, the Bill creates categories of “protected information” subject to a higher test for disclosure.

Section 48 (2) attempts to temper the effect of the methodology but has failed to do so to any degree. The paragraph merely states that non-disclosure for these documents is not automatic.

Decision makers are bound under the current Act to consider public interests arguments for and against release and on balance decide whether or not a document should be released.

However, the effect of the weighting system is that the mere fact that a document is a deliberative document is of itself a factor for non-disclosure to be given additional weight whereas previously the document itself was assessed as to whether or not it is in the public interest that it should or should not be released.

To ensure there is only one balancing test, the factors listed in Part 4 should be incorporated into Part 3 and treated in the same manner as other documents.

## Section 48 (1) (a) irrelevant factors

Schedule 4 Part 1 lists factors that a decision maker must treat as irrelevant in deciding whether or not a document should be disclosed.

The factors listed are to some extent based on the *re Howard* factors which, despite being discredited by courts continue to be relied on by governments to resist the release of deliberative documents.[1].

In particular, the *re Howard* factor:

> "disclosure which will inhibit frankness and candour in future pre-decision communications is likely to be contrary to the public interest:

continues to be relied on despite being discredited.

This factor should be incorporated into section 48(1) (a) as a factor to be disregarded.

Governments and bureaucrats have argued that transparency would inhibit full and frank communications needed to allow for effective government. They claim that if written advice is available under FOI, public servants will cease being frank and fearless, failing to record and write despite legal obligations as employees to the contrary.

In a case involving documents about further Industrial Relations reform by the Howard Government, the Department of Prime Minister and Cabinet was unable to offer any evidence of this "frank and fearless'' claim.[2] In the relevant judgement, the AAT Deputy President rejected claims that public servants have a reasonable expectation the documents they prepared would remain confidential noting: "If the work they did as Australian Public Service officers were revealed they would not in future do the work required of them as APS officers holding senior positions ... whichever way the claim is stated, it cannot be said to have a rational basis." These comments are equally relevant to Queensland public servants and their reflection of modern legal thinking may underpin the government's legislated acceptance of, not only their existence, but a greater weight relevant to non-disclosure. The Queensland Office of the Information

[1] The discredited public interest factors against disclosure are:
1) The higher the office of the persons between whom the communications pass and the more sensitive the issues involved in the communication, the more likely it will be that the communication should not be disclosed;
2) Disclosure of communications made in the course of the development and subsequent promulgation of policy tends not to be in the public interest;
3) Disclosure which will inhibit frankness and candour in future pre-decisional communications is likely to be contrary to the public interest;
4) Disclosure which will lead to confusion and unnecessary debate resulting from disclosure of possibilities considered, tends not to be in the public interest;
5) Disclosure of documents which do not fairly disclose the reasons for a decisions subsequently taken made be unfair to a decision maker and may prejudice the integrity of the decision making process.

[2] See *McKinnon v Department of Prime Minister and Cabinet* [2007] AATA 1969. See also the New South Wales Court of Appeal decision in *Workcover Authority (NSW) v Law Society of New South Wales* (2006) 65 NSWLR 502, which emphasised FOI legislation established a "general policy of disclosure", the public right of access to documents should be subject only to *essential* public interests and the interest in protecting the private or business affairs of members of the community. Re Howard arguments do not meet that test.

Commissioner does not usually accept the possibility of inhibiting candour and frankness as factors in favour of non-disclosure.[3]

### Comparison with proposed reform of Commonwealth FOI

The introduction of more secretive approaches to large of tracts information in Queensland is in stark contrast to the proposed approach adopted by the Commonwealth. In particular, the Commonwealth approach ignores public interest factors against disclosure entirely.

In addition, unlike Queensland, the recently released Commonwealth draft bills adds a public interest test to exemptions for personal privacy (section 41), business affairs (section 43), national economy (section 44), and research (section 43A) and national economy exemption. In addition, the draft Commonwealth bills propose to the repeal of exemptions for Executive Council documents (section 35), documents arising out of companies and securities legislation (section 47), and documents relating to the conduct of an agency of industrial relations (paragraph 40(1)(e)).

## Fees and charges

As discussed in our previous submissions, the regime for fees and charges proposed by the Solomon Review would lead to massively increased costs.

We appreciate the government has recognised the flaws in the proposed model stating: "While the intention of the recommendation to implement a more structured approach to charges for access to documents is supported, the government is concerned that the model proposed could lead to unintended increased costs in many instances''.

And the government has indicated "Consequently, the government will consider options for an appropriate charging regime that does not lead to significantly increased costs for applicants''.

As previously stated, ARTK argues that the cost of providing information to inform the public about government should be borne by the Government given the importance of open administration and information access to good government.

As the Australian Press Council stated in its submission to the Solomon Review:

> "Since the citizens pay taxes, they have in a sense already paid for the information that is sought though FOI, the media that publish information acquired by FOI are simply a vehicle for delivering that information to its ultimate customers."

And as Right to Know has stated, costs remain one of the major constraints to the media's effective use of FOI.

[3] Office of the Information Commissioner Queensland (2006) "FOI Concepts: Public Interest Balancing Tests" <http://www.oic.qld.gov.au/indexed/pdf/FOI_Concepts_-_Public_interest_balancing_tests_-_Ver_1.0_-_05-10-06.pdf> (27 February 2008).

The Solomon Report noted the United States FOI model which recognises the value of access to information, where no charges apply to information in the public interest because it is:

> "likely to contribute significantly to public understanding of the operations or activities of the government".

The Solomon Report also referred to the 1990 Electoral and Administrative Review Commission (EARC) recommendation that Queensland should adopt an FOI law:

"Access to information as to what decisions are made by government, and the content of those decisions, are fundamental democratic rights. As such, FOI is not a utility, such as electricity or water, which can be charged according to the amount used by individual citizens. All individuals should be equally entitled to access government-held information and the price of FOI legislation should be borne equally."

Under the new regime, the cost of administering FOI, which the Solomon Review found to be already modest, will fall further with the recommended "push'' management approach to information which will reduce applications and improve efficiency of the regime.

Given FOI's relatively low cost and the importance of an effective system, we submit that the Government should reconsider an ethos it adopted when the legislation was first introduced in Queensland - to process non-personal FOI applications free of charge.

The Solomon report noted fees and charges caused a raft of problems including inconsistencies, complexity, confusion, delays and excessive estimates of costs. Nor does the existing charging regime seek to recover costs and government FOI compliance costs remain relatively minor. The Solomon Report, the ALRC/ARC, and the LCARC or the UK Review have not been able to offer a philosophical justification for charging users seeking public policy or accountability related documents.

It is worth noting the Commonwealth Government's proposed new model for fees and charges. No application fee (including for internal review) will apply to access requests. Applicants who seek access to their own personal information will not pay any charges. For all other applications (other than those applications made by journalists and not-for-profit community groups) the first hour of decision making time will be free of charge. For applications made by journalists and not-for-profit community groups the first five hours of the decision making time will be free of charge.

In our view this is a preferable model than the current Queensland model or the proposed Solomon Review model.

The Commonwealth Government has also indicated that the newly appointed Commonwealth Information Commissioner will be requested to undertake a comprehensive review of charges within 12 months of the Commissioner's appointment. The terms of reference include consideration of: the Government's objective of facilitating and promoting access to information at the lowest possible cost; whether the decision to impose charges, or the nature or level of charges imposed, should vary according to the purpose for which the request is made or by whom it is made, for example: public interest reasons; community or not-for-profit groups; commercial organisations; and, journalists.

## Cabinet Exemption

Section 2 of Schedule 3 of the Queensland Bill provides an exemption for Cabinet information.

Historically, Queensland legislation and practice on releasing Cabinet matter has been controversial and has been used by ministers to avoid FOI scrutiny.

Right to Know has argued that including in the Queensland legislation a public interest test in determining whether "Cabinet documents" should be released (as in the New Zealand legislation) would further support the objectives of the legislation and protect against abuse of the Cabinet exemption. We acknowledge this argument has not been accepted by the Solomon Review or by the Government.

The Solomon Review concluded that an exemption for cabinet information should operate to protect documents the disclosure of which would have the consequence of revealing "any consideration or deliberation of Cabinet, or otherwise prejudice the confidentiality of Cabinet considerations, deliberations or operations". Accordingly, a cabinet exemption must be strictly limited to the class of documents, the disclosure of which would have this consequence.

Section 2 of Schedule 3 of the Bill refers to documents" created for the consideration of Cabinet". Whilst this definition is a significant improvement on the current exemption, to ensure the exemption cannot be misused to apply to documents which are not genuinely Cabinet documents, it should be limited to information prepared for the *dominant* purpose of submission to the Cabinet.

This would be consistent with the proposed Commonwealth Government's proposal. Announcing the proposed change, the Commonwealth Government claimed it would ensure the Cabinet exemption only covers "documents at the core of the Cabinet process" and that "consistent with this amendment is an explicit provision that documents are not exempt merely because they are attached to an exempt document''.

This should be a welcome improvement to the Cabinet exemption and worthy of consideration by the Queensland Government.

## Secrecy

Schedules 1 and 3 of the Bill refer to documents created under other Acts to which the Right to Information Act will not apply and information the disclosure of which is prohibited under other Acts.

This approach is contrary to the principle that all government information should be available unless there is a clear public interest to the contrary.

Rather than automatically adopting these exclusions from other legislation and from the previous Freedom of Information Act each of these secrecy provisions should be comprehensively reviewed with a view to treating the documents in the same manner as other government documents. Accordingly they would be available for release subject to the public interest test.

It is worth noting, the ALRC is currently undertaking a review of secrecy provisions in Commonwealth Acts. Right to Know has made a submission to the review arguing that blanket secrecy laws should be removed and replaced with provisions that permit disclosure unless it is contrary to the public interest.

## Scope

Schedule Two of the Bill exempts a wide range of agencies and entities from its operation.

As previously stated in ARTK submissions, we believe the administrative details of the Governor and Parliament (including the Speaker's office and Opposition Leader's office, ministerial offices and parliamentarian's electorate offices) should be made available.

In addition, as stated in the past, RTK does not consider Grammar schools should be excluded.

The Solomon review recommended that the new legislation apply to the documents of non-government organisations that relate to government functions the company is carrying out on behalf of the government,

The government indicated that it would not deem these documents of private organisations to be documents of the relevant agency but would ensure documents in the control of the relevant agency would be subject to the Act. In addition, the government would evaluate the reporting, accountability and contractual arrangements with the companies to ensure there is sufficient access.

ARTK will be interested to see the practical effect of this aspect of the new regime to determine whether it actually results in transparency of the activities of these non-government organisations.

## Giving access to others

Section 75 sets out a procedure for making some documents, publically available 24 hours after release to the applicant. Whilst we do not oppose public release of such documents we consider the timeframe should be extended to 7 days.

We do not oppose the public interest in publishing the material broadly but as recognised in the Bill there is an assumption that information sourced by the applicant, who has paid fees, should be able to publish the information (in the case of the media) exclusively ahead of its public release.

Considerable time is often needed to analyse and process often complex quantities of material received from the government. To avoid unrealistic production timeframes and possible failure to understand documents fully in an attempt to rush a story to print during the exclusive period the time frame should be extended.