

## Open Government: A Slow Train Coming

### Initial Reactions to the ALRC/ARC Report on Freedom of Information

On Wednesday, 24 January 1995 the Australian Law Reform Commission President and Administrative Review Council member Alan Rose announced the release of the joint ALRC/ARC Report 'Open Government: A Review of the Federal Freedom of Information Act 1982'. The recommendations of the Report (see boxed summary of key recommendations), if implemented, will take Australia a long way towards the ideal of open government.

The press release announcing the Report should gladden the hearts of most FoI supporters in Australia (and other jurisdictions). The press release by Alan Rose states:

A presumption that it is in the public interest to release government information must replace the old 'secrecy regime' according to ALRC President and ARC member, Mr Alan Rose. Today a report entitled Open Government was released by the Australian Law Reform Commission (ALRC) and the Administrative Review Council (ARC).

Coming almost fourteen years after the FoI Act was passed, the report recommends major changes to the federal Freedom of Information (FoI) Act, to make it more effective and accessible.

'The recommendations contained in this report aim to make FoI easier for both applicants and agencies to understand and use, to reduce the cost of FoI applications, to rationalise exemptions and, most importantly, to increase awareness on both sides that Australian people have a legal right of access to government-held information'.

'The culture of secrecy that still pervades much of the Australian public sector must be dismantled if our government is to become truly transparent and accountable' said Mr Rose.

'Without information, people cannot adequately exercise their rights and responsibilities as citizens or make informed choices. The FoI Act is important in providing access to this information'.

'The success of the FoI Act in meeting its objectives is largely dependent on the attitude of the agencies administering it. The report makes several recommendations aimed at fostering a more pro-disclosure approach among FoI decision makers' said Mr Rose.

'We also encourage agencies to act in the spirit of openness even when no formal FoI request has been made — the FoI Act should be a legislative backstop not the principal means of gaining access to information.'

For those who have worked on and written for the *FoI Review* over the past ten years it is pleasing to see many of the criticisms of Australian FoI legislation and practice have been upheld and acknowledged by the Commonwealth review. However, it must give great cause for concern to all those who have worked on the new administrative law program since the early 1970s that Alan Rose can still maintain that the 'old secrecy regime' has not been removed from the citadel of Executive Government.

If the passage of 14 years at the Commonwealth level can still produce an official report which cries out for greater disclosure, for more access, greater transparency and accountability then the warning bells need to be heeded by those involved in the FoI experiment at a State level. A quick glance at a collection of FoI news clippings, from any State, would confirm this concern. For example in my Queensland press clippings file for 1995 I have stories titled 'Crusade to Check FoI', 'Attack on Exemption Changes to FoI Laws', 'CJC must look into abuse row', 'Qld FoI fitted with a muzzle', 'Hobbling FoI'. In a more substantive fashion the Western Australia Information Commissioner Annual Reports for 1994 and

1995 provide evidence of how difficult it is to make FoI work effectively at the State level.

What 'Open Government: A Review of the Federal Freedom of Information Act 1982' does for us is to lay down a clear challenge to all Australian Parliaments to rectify the problems in administration, practice and legislation which confront those who seek to access government information to inform public debate and guide the searchlights of accountability.

Fourteen years after the commencement of the Commonwealth *FoI Act* the Commonwealth Ombudsman can still make the unrefuted claim:

many government agencies still do not operate within the legal framework and certainly not the 'spirit' of the Act . . .<sup>1</sup>

At the very least the Report will serve as powerful weaponry for those in State jurisdictions where the initial afterglow of FoI reform has evaporated and the battle for open government moves into another phase. At one point in the Report it is noted that a number of government agencies still feel they need longer to get used to the requirements and demands of FoI.

The following is a brief exploration of some of the key recommendations made by the Report and my initial reactions and thoughts. I would urge all readers to get a copy of the Report.

#### The FoI Commissioner — someone to bat for FoI

Discussion Paper 59 raised the prospect of some sort of independent monitor to oversee the administration and improvement of FoI. The Report has clarified this proposal and for me the proposed FoI Commissioner is the most welcome reform. The Report fails to replace the AAT as the determinative review body but has come some of the way to adopting an Information Commissioner model.

Many will see the FoI Commissioner as a toothless watchdog but it is my hope that such a statutory position will help us pinpoint deficiencies in administration and go a long way to addressing changes in practices and culture.

The Report proposes that the functions of an independent FoI Commissioner should include:

- auditing agencies' FoI performance
- preparing an annual report on FoI
- collecting statistics on FoI requests and decisions
- publicising the Act in the community
- issuing guidelines on how to administer the Act
- providing FoI training to agencies
- providing information, advice and assistance in respect of FoI requests
  - at any stage of an FoI request
  - at the request of the applicant, the agency or a third party
- providing legislative policy advice on the *FoI Act*.

#### Passing of the torch

In many respects the Report's suggestions in this area mark an upgrading and transformation of the role and practices of the Information Access Unit within the Attor-

ney-General's Department to that of an independent statutory body to be called the FoI Commissioner.

It is to the credit of the staff of the Unit over the years, that they have done so much, so effectively, to lay most of the foundation for the idea of an FoI Commissioner. It is no surprise that the Report contemplates the transfer of staff from the Information Access Unit to the Information Commissioner to carry on their sterling performance.

#### *Empire builder or whistleblower?*

A number of submissions in response to Discussion Paper 59 rejected the need for any type of new statutory authority in the field. A number of government agencies argue the dangers of merely adding a bureaucratic layer to an already cumbersome system. The Law Institute of Victoria argued:

the proposed promotional, training and guideline responsibilities are likely to elevate the role of the independent monitor potentially creating another bureaucratic and expensive empire.

I much prefer the stance of Justice Kirby in considering that FoI needs a strong and independent advocate who will also constantly monitor the performance of agencies on FoI.

It is vital that someone or some agency . . . should be more closely monitoring the experience under the FoI Act . . . Otherwise, the preventative value of legislation of this character would be lost, in a concentration of effort on simply responding to individual claims. We should aggregate experience and draw lessons from it. For example, a persistently recalcitrant government agency . . . should have its attitude drawn to political and public attention so that they can be corrected, to bring even the most obdurate official into line with the new policy.

#### *No more silly games in the paper chase*

At the very least the conducting of agency audits, nay even the potential of an audit, will go a long way to eliminate deficiencies in agency behaviour, practice, culture and attitude to FoI. In my attendances at seminars, conferences and in private conversations with agency officers in the future I can look forward to a decrease in the renditions of *'How to get around FoI, I did it this way . . .'*

Of course the ultimate sanction of an adverse comment in the Commissioner's annual report may be something that can be lived through but it is better than the absence of any such sanction at the moment.

#### **Making the obvious as clear as crystal**

The Report recommends the alteration of the objects clause to make the pro-disclosure interpretation of the Act explicit. The Act would enshrine the concept that information collected and generated by a liberal democratic government is a resource of the people, for the people and accessible to the people.

As I have argued previously, it is a great testimony to the belief in secrecy and a sad reflection on many FoI external review bodies (with notable exceptions) that such an explicit alteration is seen as highly desirable.

#### **Recognising that the Sir Humphrey Factor is still at large**

It is my sad conclusion . . . that with few exceptions the agencies of government have taken the Act as a guide to where they should dig their trenches and build their ramparts.<sup>2</sup>

The Report has accepted that agency culture plays a key role in the efficacy of FoI and that Australian agency culture has a mixed score card. The Report hopes that the activities of the proposed FoI Commissioner will turn the trench mentality around to one that embraces the

#### **An overview of the ALRC/ARC Freedom of Information Recommendations**

1. The *FoI Act* should be retained as a valuable instrument of public sector accountability.
2. A statutory office of FoI Commissioner should be created. The Commissioner's role should include auditing agencies' FoI performance, preparing an annual report on FoI, raising community awareness of FoI, providing advice and assistance to applicants and agencies, issuing guidelines on how to administer the Act and providing FoI training to agencies.
3. The object clause of the *FoI Act* should be revised to promote a pro-disclosure interpretation of the Act and to acknowledge the important role of FoI in Australia's constitutionally guaranteed representative democracy. It should also acknowledge that information collected and generated by government officials is a national resource.
4. Provisions exempting material from FoI should be rationalised so that they only apply to information that there is an overriding public interest in withholding. A number of exemption provisions should be repealed.
5. A review of all secrecy provisions in federal legislation should be undertaken to ensure that they do not impose prohibitions on the disclosure of government-held information that are broader than the exemption provisions in the *FoI Act*.
6. The Administrative Appeals Tribunal (AAT) should be retained as the sole determinative reviewer of FoI decisions. Internal review should not be a prerequisite for AAT review and fees for internal review should be abolished.
7. The *FoI Act* should not be extended to the private sector. Nor should it apply to government business enterprises (GBEs) that are engaged predominantly in commercial activities in a competitive market.
8. FoI charges should not be inconsistent with the objects of the Act. Charges should only be levied in respect of documents that are released. They should be levied in accordance with a fixed scale determined by the FoI Commissioner. Access to an applicant's personal information should be free.
9. The *FoI* and *Privacy Acts* should be amended to ensure the continued smooth operation of the overlap between the two Acts in respect of access to, and amendment of, personal information and to clarify the interaction between the two Acts in respect of third party personal information.
10. A comprehensive national legislative scheme should be introduced to provide information privacy protection in all sectors, including the private sector and those parts of the public sector that are not currently subject to the *Privacy Act*.

attitude advocated by the Canadian Information Commissioner

the key to opening up government is . . . somehow changing the encrusted, timorous old attitudes which see openness as a threat, not an opportunity for both citizens and governments.<sup>3</sup>