

A slow Tasmanian train finally reaches the wrong destination (missing the point about open government) An initial response to the review of Fol in Tasmania

The Tasmanian Legislative Council (Upper House) established a select committee to examine the State's Freedom of Information legislation on the 22 November 1994. The Committee arose out of a fierce controversy about the changes to Fol introduced by the Liberal Government's proposed *Freedom of Information Amendment Bill 1994*. The report of the Committee was finally handed down on the 12 February 1997. The report is 122 pages long and contains 64 recommendations.

In a remarkable bout of Orwellian newspeak the Chairman of the Committee in his Foreword suggests that the findings of the Committee are best summarised in the following way:

With many new enactments, there is inevitably a need to revise and review the initial Act, to fine tune, and to facilitate the technical changes identified during the early practice of the law. This fine tuning is part of the evolutionary process of establishing Fol in Tasmanian public administration.

Instead of being a fine tuning the report is a major, savage and poorly considered pruning of what has to date remained a contender for the best piece of Australian Fol legislation. In general, the only recommendations that we agree with are those which support the retention of provisions in the current Act, those which reject the more outlandish amendments proposed by the Government or its agencies, or those which are attempts to modify the Government's proposals. There are three major exceptions to this generalised reaction to the report which are outlined later in this article.

The fate of open government in Tasmania now rests in the hands of the ALP opposition and the Tasmanian Greens. These political foes have the numbers to reject any resurrection of the now lapsed *Freedom of Information Amendment Bill 1994*. In the past it has been the hope of open government advocates in Tasmania that the ALP and Greens would join forces and pass reforms to the *Freedom of Information Act 1991* in line with the positive reforms suggested by the ALRC/ARC review, by the Commission on Government (WA) and the NSW Ombudsman. The Select Committee's report displays such an abject abandonment of the core principles of Fol legislation that such a daydream ought to be forgotten.

Our greatest fear is that this report will be used by those keen to cripple Fol in other jurisdictions. The report will be sold as equal, if not more so due to being the latest, in value and authority to the plethora of pro disclosure reviews and reports that have been made around Australia in recent years.

The background

After 12 months of secret preparation the Tasmanian Government tabled its *Freedom of Information Amendment Bill 1994* to a parliamentary and media uproar. The extent of the opposition to its proposals caught the Government by surprise and a lack of detail to justify those changes forced the Premier to endorse the creation of an Upper House select committee. The committee had the following terms of reference:

To inquire into and report upon the operation of the Freedom of Information Act 1991, as amended by the Freedom of Information Act 1992, with particular reference to —

- the effectiveness of the Act in providing access to information required by the public;
- the type of information that should be exempted from the provisions of the Act;
- the fees, if any, that should be levied for access to information under the Act;
- the Freedom of Information Acts applying in other jurisdictions, including a comparison with the Tasmanian Act; matters incidental thereto;

The main recommendations

The positives

- Extension of Fol to cover all Government Business Enterprises (GBEs)
- Rejection of the proposal to remove the Ombudsman's ability to scrutinise Conclusive Certificates issued in relation to Cabinet documents
- Continued free access for lawyers to prosecution briefs.

The negatives

- A \$25 application fee
- Widening of the Cabinet Exemption
- Extension of the existing 10-year rule for releasing Cabinet papers to 20 years
- Removal of the public interest test for internal working documents
- Removal of the \$400 ceiling on fees
- State MP's to pay for Fol after the first five requests

Anyone aware of the general nature and reputation of the Tasmanian Upper House would know how steep the learning curve was that faced the members of the Committee about open government, freedom of information and the vital necessity of effective access laws in the scrutiny of government and bureaucracy. Even critics are dumbfounded by how far short of the mark the Committee fell in trying to move along that learning curve. In our view many of the deficiencies in the Committee's recommendations stem from a combination of three factors:

- the use of the *Freedom of Information Amendment Bill 1994* as the default standard;
- a rejection of the key finding of the ALRC/ARC finding that a culture of secrecy still persists in Australian public administration; and
- a lack of analysis

The use of the Freedom of Information Amendment Bill 1994 as the default standard

The major deficiency in the Committee's deliberations was the decision to use the *Freedom of Information Amendment Bill 1994* as the default standard for its review. In other words the Committee, if all other things were equal, endorsed the Government's proposed amendment over current provisions of the *Freedom of Information Act 1991*. Therefore, the onus was on those

resisting change or proposing changes along the lines of the Commonwealth Report to substantiate their case. In the view of the Committee this approach was merely a fine tuning of the 1991 Act.

By accepting the ill-intentioned amendments put forward in the *Freedom of Information Amendment Bill 1994* as the template upon which to conduct this review, the Committee commenced its operations from the wrong premise. Given that the 19 members of the Upper House have been remarkably reticent about their usage of FoI, it is not surprising that this happened. As members of an institution often described as a gentlemen's club, Legislative Councillors are most likely to view FoI as a very uncouth way of dealing with government and its servants.

No culture of secrecy

Unlike the review into Commonwealth FoI the Tasmanian Upper House Committee was not distressed or bothered about the persistence or otherwise of a traditional approach to secrecy in a Westminster-based system of government. Indeed, the Committee readily endorsed the submissions made to them by a handful of Tasmanian agencies that there was little need for any FoI legislation because wherever necessary they provided ample information to one and all without any technical requirement of the *FoI Act*. The Committee concluded at p. 34 that:

While some witnesses felt that the Act was not being sufficiently promoted throughout the State, it is the Committee's opinion that the Act is being used effectively by the limited number of people with a need to access government information and that it is unlikely that a large number of Tasmanians have a need to use the Act. It appears that the general public do not have a high need to utilise the provisions of the FoI Act to access information. This may be explained by the fact that many agencies adopt a pro-disclosure philosophy towards the provision of information to the public, and provide information without the need for an FoI request.

The Committee accepted the actions of a minority as the norm for the majority despite ample evidence to the contrary.

Lack of analysis

The report is written on the basis of a summary of the main points for and against each proposal and then a quick run down of the Committee's views on a particular proposal. With one or two exceptions, notably the recommendations in relation to GBEs, the Committee does not bother rebutting the proposals or evidence put before it. Chapter 6 of the report on the role of the Ombudsman is indicative of its general approach. The chapter is three and a half pages long despite dealing with the key mechanism of FoI legislation in Tasmania. The arguments in support of an Information Commissioner model are simply listed, no objections to this model are given, and the Committee merely recommends continuing with the current Ombudsman model but increasing the time required to conduct an external review from 30 days to 60 days.

In granting the extension in time limits, the Committee made no mention of the drastic cuts to the staffing of the Ombudsman's Office over the previous three years or other matters raised in the annual reports of the Ombudsman. Despite having a year to study the ALRC/ARC Report 'Open Government: A Review of the Federal Freedom of Information Act 1982' chapter on the need for an independent monitor to examine issues like training, agency audits, publicising the Act and providing policy

advice, the Upper House Committee makes no mention of these matters.

This shortcoming is magnified by the fact that during the time span of the committee's operations the government had transferred the responsibility of the one person FoI Unit from the Department of Premier and Cabinet to the day to day supervision of the Ombudsman. The committee failed to investigate the merit of this transfer and whether the necessary resources have been provided to support it.

By unreasonably narrowing its focus the Committee failed to adequately fulfil its first term of reference namely evaluating 'the effectiveness of the Act in providing access to information required by the public'. The role, efficacy and functions of the external review body ought to have been a central feature of the Select Committee's final report as it was with the ALRC/ARC review of the Commonwealth legislation.

The proposals

Extension of FoI to cover all GBEs

The Committee recommended that the TT-Line, Forestry Tasmania, Works Tasmania, Private Forests Division of Forestry Tasmania should be subject to FoI and that all GBEs should remain under or return to the coverage of the *FoI Act*. To defer opposition to this proposal the Committee also recommended that the CEO of each GBE be able to issue conclusive certificates in relation to exemptions claimed for commercial in confidence, trade secrets and confidential information.

The Committee makes the point that because GBE's are organisations that are to some degree, funded by the public purse, taxpayers should have a right to access information in order to facilitate public accountability. It is the Committee's view that all GBE's should be treated equally in being subjected to the Act (ie in response to the claims by TT-Line and Works Tasmania that grave harm would be caused to their organisations should they be made subject to the Act). The Committee drew on the experience of the Hydro-Electric Corporation and Forestry Tasmania (GBEs that are currently subject to the Act) and states that the processing of FoI applications by these organisations has not caused any great commercial inconvenience.

Continued free access for lawyers to prosecution briefs

The Committee concludes that the availability of prosecution briefs, after the acceptance of the *Sobh* decision by the Ombudsman in 1993, has enhanced the lower court system in Tasmania by reducing wasted court time and allowing defendants to better prepare their cases. The Committee believes that this access should continue, but that it should be the result of a deliberate policy decision, rather than the present de facto means. The Committee suggests that the Magistrates Court of Victoria is an appropriate model on which amendments to Tasmania's legislation could be based. The Committee accepts that given the cost benefits to Tasmania's lower court system in making prosecution briefs available under FoI, at present there exists a *prima facie* case to provide the information free of charge. However, the Committee does not rule out the likelihood in the future that the Act may be amended to include a fee for this type of information, should it prove necessary to recover costs associated with providing such information.