

No 26

RECEIVED  
27 MAR 2008  
LEGAL, CONSTITUTIONAL AND  
ADMINISTRATIVE REVIEW  
COMMITTEE

**Submission: to Legal Constitutional and  
Administrative Review Committee  
Queensland Parliament**

**Topic: Freedom of Information**

**From: John Glyn Tusler**

**PETRIE 4502**

**Tel. 07 552 2222**

**Email: j.tusler@petrie.com.au**

Contents

Page

1. This Submission.....	2
2. My Background.....	2
3. Why is Freedom of Information Important?.....	2/3
4. Fitzgerald Commission.....	4
5. State Perspective on Freedom of Information.....	4
6. Queensland Parliament's 2001 Review.....	4
7. The Information Commissioner and the CMC.....	4/5
8. Some Consequences of the Subversion of Freedom of Information.....	5/6
9. Why Freedom of Information has been so Unpopular with Queensland Governments.....	6/7
10. Conclusions.....	7
11. Recommendations.....	7

## 1 This Submission

This submission does not aspire to be an academic review of Freedom of Information. It reflects simply the view of a concerned voter. I have made extensive use of quotations because the arguments being presented are not new and have often been expressed by others better than I could say them myself.

Apart from a brief period under the first Beattie Labor Government, the public, Parliament and press of Queensland have been denied the standard of Freedom of Information that a modern society demands. Stifling criticism by concealing information works for a time. In the long term it makes the problems being concealed more difficult to correct and it undermines public confidence in the Parliament.

## 2 My Background

Most of my working life has been in management and management consulting in Local and State government. My interest in Freedom of Information is part of (i) a general interest in the principles of good governance in a developed, free society and (ii) a particular interest in the efficient running of large bureaucracies.

I was working in local government when Freedom of Information was first introduced. I attended a budget meeting where Council struggled with balancing the costs of providing information and the perception that the laws were enabling some lawyers to get discovery work done 'on the cheap'.

I found State government bureaucracy at senior levels not interested in costs but to be focussed on political aspects of decisions, with senior staff reluctant to bring problems to the highest level, despite the clearly expressed desire of the Director-General to be kept informed.

## 3. Why is Freedom of Information Important?

The ethical and legal justifications for Freedom of Information are touched upon in this submission. There is also justification in political theory, which is where I should like to begin.

In 1945, Sir Karl Popper published one of the most influential books written on the topic of protecting democracy, *The Open Society and its Enemies*.

In an essay on Popper, Peter Singer summarised the relevant central argument:

*"In contrast to the common belief that dictatorship is a more efficient form of government than democracy, Popper argues plausibly that an open society, with free institutions and ample opportunity for criticism, is likely to find better ways of doing things in the long run. Free institutions allow us to change our minds about how the nation should be run, and to put this change into effect without bloodshed. Given a political system that functions in this manner, anyone who uses force to promote his own policies is, like it or not, abandoning a peaceful method of making decisions in favour of one that must ultimately rely on force to resolve conflicts."*

(Peter Singer *New York Review of Books* May 1974)

As noted below, Commissioner Davies found that the 'force' being used to curb dissent in Queensland Health was quite overt. In this case it was the threat of retribution.

#### **4 Fitzgerald Commission**

Freedom of Information came to Queensland from recommendations of the Fitzgerald Inquiry (1989)

In the Report of his Commission of Inquiry, Commissioner Fitzgerald made this comment about Freedom of Information:

*"The importance of the legislation lies in the principle it espouses, and in its ability to provide information to the public and to Parliament. It has already been used effectively for this purpose in other Parliaments. Its potential to make administrators accountable and keep the voters and Parliament informed are well understood by its supporters and enemies."*

(Fitzgerald inquiry p.129)

Even before any legislation had been drafted, Commissioner Fitzgerald was conscious that Freedom of Information would have powerful enemies.

#### **5 State Perspective on Freedom of Information**

A letter published in *the Courier Mail* on September 8 2005 confirmed my own experience. It said, in part:

*About a dozen years ago I attended a joint state and federal public service managers' training workshop. One topic was Freedom of Information.*

*When the respective presentations were delivered we feds basically said that 'we initially were threatened by it, but discovered that if you made every decision expecting to have it become public you made much better decisions'.*

*The state submission followed ours and said that 'we have developed these strategies to prevent it from working and found various ways to block scrutiny'.*

*Several of my staff members are now attending the same program and find that nothing has changed, with the state managers still obsessed with working outside of public scrutiny.*

(Daryl Saal, Toowoomba)

#### **6 Queensland Parliament's 2001 Review**

A comprehensive review of Freedom of Information legislation and operations was last carried out by LCARC in 2000-2001. That review proposed 20 recommendations including rewriting the legislation to make it easier to understand.

The thrust of the recommendations was support for the principles of Freedom of Information and for training of departmental officers in how to work with Freedom of Information.

The Government rejected this approach and instead introduced amendments to the existing Act, one of which had the effect of widening the range of documents that would be exempt from Freedom of Information.

#### **7 The Information Commissioner and the CMC**

Subsequently, the Freedom of Information role was split out from the Ombudsman's office and a new Information Commissioner position established. The holder of this position is not required to have any legal qualification.

A function of the Crime and Misconduct Commission is to investigate complaints about alleged misconduct of parliamentarians. Such investigations are confidential and are not subject to Freedom of Information. It is conceivable that, should an MP wish to deflect attention from some potentially embarrassing inquiry about their conduct, referring the matter to the CMC could be a way to close off the matter.

Such changes in Freedom of Information have aggravated public perceptions that the Executive will go to great lengths to avoid the scrutiny of Parliament and of electors.

## **8 Some Consequences of the Subversion of Freedom of Information**

### **- Commissioner Davies and Freedom of Information**

In his Report on the Queensland Public Hospitals Commission of Inquiry (2005) Commissioner Davies exposed some of the ways various governments have subverted the aims of the Freedom of Information Act and how this has in turn led to further excesses. He summarised the issues thus:

#### *8.1 A culture of concealment*

*(Another) problem was a tendency of administrators to ignore or suppress criticism. Recognition of these and other problems in the public hospital system was made very much more difficult by a culture of concealment of practices or conduct which, if brought to light, might be embarrassing to Queensland Health or the Government. This culture started at the top with successive governments misusing the Freedom of Information Act 1992 to enable potentially embarrassing information to be concealed from the public. Unsurprisingly, Queensland Health adopted a similar approach, and because inadequate budgets meant there would be inadequate health care, there was quite a lot to conceal. Again unsurprisingly, the same approach was adopted by administrators in public hospitals, and this, in turn led to threats of retribution to those who saw it as their duty to complain about inadequate health care.*

(Davies inquiry p. 345)

Evidence to the Davies inquiry from Professor Stable, former Director-General of Queensland Health highlighted other specific problems caused by the way the system currently works.

*Having regard to your comments earlier about the publication of outpatient specialist waiting lists and the enhancement to the argument for better funding that would ensue from their publication, why is it that the politicians of the day haven't disclosed them? –In discussion I've had at both state level and nationally as Chair of the Australian Health Ministers Advisory Council, I don't think politicians have wanted to admit – I'll call it political honesty. Either the funding has to be there or there's a limit on services, or maybe even both, and I think there needs to be quite a serious debate in this country to actually bring that to the fore about what actually can be afforded, or are governments going to put in the necessary funding. That's the issue...*

*Quite apart from the funding – the important funding issue that you've raised, you would agree that there would be other advantages in the publication of specialist outpatient surgical waiting lists? – Oh, I think there are clear indications. It means, doctors out there in practice can look and say, 'Well, there's a wait at this hospital. I'll refer you to another hospital', or can say to the patient, 'Look, there's a significant wait, a 12 month wait for this procedure in the public system. I can arrange for you to go privately, but of course you're going to have to pay.' But then there can be an informed decision, and of course the public, at each election, can decide whether they want to elect someone who is going to put more money into – and significant and honest more money, not this stuff where it's to cover the labour costs, which just enables us to stand still...*

*What sort of pressure does the non- publication of lists place on the individual hospital? -- Well, because they have to continue to present the public face that they can do everything – and of course there's been periods where hospital superintendents have done a letter to say, 'We can't take this booking', it gets in the media and the politician of the day gets all upset about it. But that's the pressure that hospitals are under.*

(Davies Commission page 476)

## **9 Why Freedom of Information Has Been So Unpopular with Queensland Governments**

When the funeral of Sir Joh Bjelke-Petersen was televised in 2005, an interviewer chatted with some of the senior public servants of Sir Joh's time. They recalled how they had all watched the television program *Yes Minister* and spoke about some of the strategies they had used to thwart some of the Premier's schemes.

It was not only the bureaucrats who learned from that tv program. The politicians did, too, and took steps to make the public service 'more responsive' in carrying out the policies of the government.

The introduction of confidential contracts for senior public servants, with substantial bonuses for 'performance', as was intended, destroyed the independence of senior officers. An unintended consequence was that what Commissioner Davies calls the culture of concealment was created, and with it a culture of retribution on anyone who, as they say in the USA, was straying 'off message'.

A Director-General will surely be tempted to bury bad news rather than risk a handsome performance bonus, especially since there is a fair chance the Minister will move on before long. (Anecdotal evidence suggests new ministers commonly find their predecessor has left behind a mess. Possibly, the truth is the previous Minister was never fully briefed).

Ministers rely on the frankness of their senior departmental staff, and while there may be times when a Minister would be happier 'not to know' about an issue, equally, the Minister who is caught out not being aware of major problems in the Department risks being seen as a fool by the electorate.

Freedom of Information has the potential to expose matters that senior staff would prefer to conceal. They can hide behind the excuse that the matter is politically sensitive, when the truth may be that the matter is an example of departmental bungling. If it's concealed, how can anyone judge?

A further layer of contention has been added by the growth in the numbers of Ministerial Advisers. This adds a review of information flowing to the Minister for example on issues within the Department. It only needs a briefing note to be returned once from a Minister's Adviser with the comment "You can't tell the Minister that." for the content of notes to be sanitised before they even go to the Adviser.

Now it must be recognised that the behaviours that have been revealed in the Davies Inquiry and that I have observed by personal experience, are those of people who are frightened. Commissioner Davies has gathered evidence that, for example, there was a wide perception that hospital administrators who failed to keep within budget, even though the budget had no foundation in genuine needs of the community, had been fired. (Davies Commission page 189).

My belief is that in many cases, the fears are mistaken and are rooted in the psychology of the individual managers. The type of personality that is assertive and likes control, and therefore is selected for senior management roles, is a type of personality that is extremely sensitive to criticism. For such people, being right is the most important thing for their self-esteem, and is much more important than popularity. (*People Styles at Work*, Bolton & Bolton American Management Association 1996).

## **10 Conclusion**

My suggestion is that the unintended consequence of blocking Freedom of Information and attempting to pretend that everything is always perfect is that potentially manageable problems turn into major crises and then disasters because the problems are concealed rather than managed.

As noted above, the closing off of Freedom of Information originates in fear of exposure, of criticism and of losing one's job.

On the other hand, closing off Freedom of Information leads to poorer decision making, slows reaction to changing environmental constraints and in fact impairs the ability of both the Executive and Parliament to control Departments.

## **11 Recommendations**

1. That Parliament commits to Freedom of Information through revising the legislation so that the recommendations previously made by LCARC are implemented.
2. That the status and powers of the Information Commissioner be reviewed so that the role has the same independence as a senior legal officer.
3. That avenues to conceal information such as reference to the CMC, to Cabinet or 'commercial in confidence' arrangements, or attempts by legislation to exempt certain activities such as those of NGO's be outlawed.
4. That Directors-General in all State Government be required to report to the Information Commissioner annually on programs to ensure ease of access of the public to information, such programs to include the provision of employee training approved by the Information Commissioner.

John G Tusler

Monday, 27 March 2006