T R A N S C R I P T

INTEGRITY AND OVERSIGHT COMMITTEE

Inquiry into the Operation of the *Freedom of Information Act 1982*

Melbourne – Tuesday 12 March 2024

MEMBERS

Dr Tim Read – Chair
Hon Kim Wells – Deputy Chair
Ryan Batchelor
Jade Benham
Eden Foster
Paul Mercurio
Rachel Payne
Belinda Wilson

WITNESS

Dr David Solomon AM.

The CHAIR: I declare open this public hearing for the Integrity and Oversight Committee's inquiry into the operation of the *Freedom of Information Act*.

I would like to welcome the public gallery and any members of the public watching the live broadcast, and I also acknowledge my colleagues participating today, and thank also Ms Payne and Ms Wilson for their apologies. I will introduce you. First, online we have Jade Benham from Mildura, and then, from the right, Eden Foster; Ryan Batchelor; me, Tim Read; Deputy Chair Kim Wells; and Paul Mercurio.

On behalf of the Committee, I acknowledge the First Nations people, the traditional owners, and I acknowledge and pay respects to the elders of First Nations in Victoria, past and present, and welcome any elders and members of communities who may visit or participate in the hearing today.

Dr Solomon, before you give your evidence there are some formal things to cover, so bear with me. Evidence taken by this committee is generally protected by parliamentary privilege. You are protected against any action for what you say here today, but if you repeat the same things anywhere else, including on social media, those comments will not be protected by this privilege. Any deliberately false evidence or misleading of the committee may be considered a contempt of Parliament.

All evidence given today is being recorded by Hansard, and you will be provided with a proof version of the transcript for you to check once available. Verified transcripts will be placed on the Committee's website. Broadcasting or recording of this hearing by anyone other than Hansard is not permitted.

Today I welcome Dr David Solomon AM. Thank you very much for both your submission and appearing today. Do you have any brief opening comments, Dr Solomon?

David SOLOMON: Not really. Everything I want to say really is in the written submission, but I should say that I am a bit out of date. It is 16 years or so since we presented our report on freedom of information – 'right to information' [RTI] in Queensland. I have not had much to do with RTI since then, apart from meeting people from time to time. I am certainly not up to date with the latest developments in Queensland, because I actually moved from Queensland to Canberra about 18 months ago. So, I am a bit out of touch.

The CHAIR: Dr Solomon, I think you were there at a very important time, and I suspect you are not as out of touch as our legislation might be. First question, Mr Mercurio.

Paul MERCURIO: I was going to say good evening, but it is good morning. My question goes to what you just said a moment ago. You talked about the right to information, or the freedom of information, just then, and it is interesting there is that distinction. I guess my question really is about how you think the term 'right to information' is preferable to 'freedom of information' and how in your view you think it helped Queensland transition from a pull model to a push model.

David SOLOMON: I think it was very important. I should say that I chaired a small committee. There were two other people. I was full time, and they were part time. We spent quite a bit of time after we had developed the system discussing whether a name change was appropriate or, as we decided, really necessary to indicate to everyone that there had been a significant change in the way information should be accessed and made available by government to the public. So, it was an important marker of that change. Secondly, the term 'freedom of information' does not really mean much, particularly as people tended to say that 'freedom from information' summed it up better. We looked around the world at legislation elsewhere. The Indian Parliament adopted 'right to information' for their Act, and it seemed to us that that conveyed the right idea of what we were trying to get across – that the public had a right to their own information about themselves and that the onus was really on government to say why it should not provide information. So, we wanted the idea established that people had rights in relation to information. The name change was important, we thought, just to help bring about cultural change within government as well, so that people handling requests for information would approach it slightly differently.

Paul MERCURIO: And just a follow-up: Did that change help to push the cultural change in the way you thought or wanted?

David SOLOMON: We thought so. The impression I got immediately afterwards, particularly from the people who were handling requests, was that they had noticed a change in the way their bosses were approaching the whole idea. So, it did change the culture of government quite significantly, and that change of culture was necessary for it to work properly.

Paul MERCURIO: Great. Thank you.

The CHAIR: Thank you. Dr Solomon, I might ask first of all, briefly: What considerations were important in formulating the public interest test proposed in your report?

David SOLOMON: Well, we had problems with the existing Act in Queensland. There were three actually different public interest tests: one of them favoured disclosure, sort of; one of them did not really say much at all; and one of them was very negative towards disclosure, so we had to sort that out. The approach was very basic: we thought if there was to be a balance between different factors, then the right to get the information should triumph. So, the public interest was in disclosure, basically.

The idea of formulating the various matters that should be taken into account in determining what the public interest we thought was extremely important; this was an innovation so far as we could see. Previously, decisions by the information commissioner in Queensland – who was actually the Deputy Ombudsman; he was not a full-time information commissioner – tended to be quite legal. I mean, you really needed to be a lawyer to read and understand what the decisions meant, and you needed to have access to judgments of various courts and tribunals to understand what the particular finding by the commissioner was. Given that most of the people who were making decisions about granting access to information were not lawyers, this just seemed a crazy way of handling things. That was one basic reason why we thought it would be important to list the various factors that go towards determining where the public interest lies.

There were a couple of other reasons. Some of the decisions that had been made, particularly in the AAT [Administrative Appeals Tribunal], about what constituted the public interest seemed to us to be wrong, completely wrong. The only way to overturn that was to put it in legislation, in particular the so-called 'Howard factors', which were named after the former Prime Minister, which included that releasing the information might embarrass the government. We thought that was not a reason to be taken to an account.

Similarly, the seniority of the decision-maker – we thought that was irrelevant. So, we sat down and tried to list all of the factors that we thought were important pro disclosure, against disclosure and irrelevant for disclosure. This was to help decision-makers, FOI [Freedom of Information] people, on the ground make their decisions. They would list the factors that they had taken into account and show the balance that they had arrived at on paper. This way the person who was seeking the information, if they were knocked back, could look at it and see – 'Well, I disagree with that, I can challenge on that,' or 'They've ignored something that's really important among all of these factors.' So, it gave everyone the same sort of basis for considering where the public interest lay, whether the right factors had been considered and so on. It meant that there was far more consistency within an agency about decision-making, and across agencies as well, particularly if decisions were taken on appeal up to the information commissioner level.

The CHAIR: I just wanted to pick you up on the consistency. So, it is a series of longish lists of factors –

David SOLOMON: They are.

The CHAIR: favouring disclosure and factors favouring non-disclosure and a more succinct list for irrelevant factors. I could easily see scenarios where you would have several factors applying and being pertinent that were on both lists opposing each other.

David SOLOMON: Indeed.

The CHAIR: How did that lead to consistency?

David SOLOMON: Well, it just did. People tended to pick the same things and give the same amount of weight to them, and, the more they were used, the more people knew how to weight them. And, of course, if

there was a balance, if they seemed to be balanced, then the public interest favoured disclosure in a balanced situation. And that was an important part of the formula that we reached and which was written into the aim of the legislation I think at section 1 or section 2 of the legislation.

The CHAIR: Importantly, you said that the applicant received a written reason for the decision, which would –

David SOLOMON: Detail –

The CHAIR: Detail which points –

David SOLOMON: These are the main factors that we have considered – boom. These are the ones against, and on balance we have decided – boom.

The CHAIR: And in your role you were able to look at these decisions in the years after the legislation came.

David SOLOMON: I was not, but there were meetings that I attended which were attended by FOI people in agencies, and quite a few of them told me that the system worked so much better. And the information commissioner people looking at it from on top certainly felt that there was much more consistency coming through within and across agencies.

The CHAIR: Wonderful. Okay, I might go to Mr Batchelor.

Ryan BATCHELOR: Thank you, Chair. In Victoria the bulk of our requests under our FOI laws are for personal information, and your report and the scheme adopted in Queensland separated out personal information from 'government documents', to use an ill-defined term. I am keen to understand the rationale for that and any reflections you have got on that rationale given where the Queensland government is now with moving back, because it seems to me there is an experiment there that might not have worked very well.

David SOLOMON: I think that is correct. We were flying blind because there was no privacy legislation at that stage. The Commonwealth had been talking to all of the states about privacy legislation. There seemed to be agreement that there would be legislation, that the Commonwealth were certainly going ahead and that the states would be producing legislation which fitted in, but it did not exist at the time we wrote our report. We made assumptions about how it would work, and they proved not to be as happy as we had hoped. And the report into the operation of the RTI Act suggests that it should go back to information being requested through RTI rather than privacy. I have not been convinced. In practical terms it seems not to have worked, so the theory did not come through.

Ryan BATCHELOR: What do you think the requirements are at a principles level between personal and non-personal information that we should think about when we are trying to figure out how to solve this question?

David SOLOMON: The presumption in favour of disclosure for personal information should be much, much stronger. I really cannot take it much further than that, and that was what we were operating on – that essentially, if you are after your own information, you are entitled to it. There have got to be very good reasons why you should not have it.

Ryan BATCHELOR: That is useful. Thanks very much.

The CHAIR: Thank you. We might go to Ms Foster.

Eden FOSTER: Sure. Thank you, Dr Solomon. Can you offer any insights on recent reforms to Queensland's *Right to Information Act* and whether they raise important considerations for this inquiry?

David SOLOMON: I am not up-to-date enough, really. I know that Professor Coaldrake, for example, has recommended far more activity by government in releasing information about Cabinet decisions and so on, and the government says they are working on it. I think the answer is that there has got to be someone in government who actually has a job of looking at what Cabinet is doing with a view to how much can be released and how quickly it can be done. But I must say I had no success when I tried to revisit, for example,

one of our recommendations, which got twisted in our report because it was finished in quite a hurry, which concerned the release of archival material after instead of 30 years, cutting it back to 20 or even 10 years. And I wrote to the government on the 10th anniversary of the legislation coming into effect saying, 'Hey, how about having another look at this?' Not interested. But, of course, the Commonwealth did bring it back from 30 to 20 years, and no-one has been damaged.

Eden FOSTER: Thank you.

The CHAIR: Interesting point. Mr Wells.

Kim WELLS: Thanks. My question is also in regard to Cabinet documents. The release of Cabinet documents is always a hot topic regardless. If you are in opposition, you want everything released. If you are in government, you do not want anything released. My understanding is that Queensland is looking at what New Zealand does in regard to the release of Cabinet documents. How do you balance good government decision-making – Cabinet members being able to be full and frank when they are making their decisions – with the public's right to know about how that decision in Cabinet was made? How do you balance that?

David SOLOMON: It is very difficult. No easy answer. There is also a question of how soon information and decisions should be made public, and it depends on the nature of the decision more than anything else. The ideal should be: government makes a decision, it is announced, full stop. As to how the decision is reached, no, our system of government requires secrecy in relation to some decision-making – how decisions are made – to allow Cabinet to operate as a Cabinet instead of as a dictatorship, so that people can discuss things freely. It is necessary that there be Cabinet secrecy in relation to how decisions are made – who is on which side, which arguments came forward and even which departments favoured X and which would have said, 'No way.' That is inherent in our system of government, and I think there is a limit to how far right to information can get into the Cabinet process.

Kim WELLS: Do you have a view of how long Cabinet documents should remain secret before they are released?

David SOLOMON: My personal opinion is that there is no reason that they should be kept secret for long. My ultimate thing is three terms of Parliament. We were working on 10 years, because at that stage Queensland had a three-year parliamentary term, but now it has joined Australia with four-year terms. But I think three terms of Parliament is sufficient to protect the system.

Kim WELLS: Okay. Thanks.

The CHAIR: Do you want to ask a bit more?

Ryan BATCHELOR: Yes. You made a comment that there is a limit to how much right to information can step into the Cabinet process, and obviously you have focused there on the importance of ministers being able to have a contest of ideas around the Cabinet table and thrash out issues. That seems to be the core of it. And the departments each put their advice in, and the decision space is one that is, in a sense –

David SOLOMON: It binds everyone.

Ryan BATCHELOR: Yes, it binds everyone, and the concept of collective ministerial responsibility rests on that principle. I am interested in the inputs to that, because it is one thing to not record what was said in the Cabinet room; it is another – what is the advice that is being given?' How far out do you think the Cabinet deliberations, the question of deliberative processes, should extend, because it seems to me that there is information and advice – noting that they are probably two separate things – that do help inform the positions that are taken in the Cabinet room, and also the scheme and the legislation in Queensland warranted a degree of protection. How far out do you think that protection should travel from the centre?

David SOLOMON: I am avoiding the question by saying as far as is necessary to protect the system. You need to protect people at the top of agencies. You need a system which – and I am talking mainly about public servants – does not encourage public servants to write notes, or not write notes at all, about advice that is part of the deliberative process for fear that they will be obtained by the public. So, your record keeping does not exist because of the fear that the record will be seen by someone and used in a way that inflicts political damage but

also damages the process. In Queensland there is a public records Act which spells out – well, generalises – the need to record decisions but also to record process and advice. There is no doubt that in other levels of government, in the Commonwealth, for example, it is quite clear that there are many – this has emerged from recent royal commissions and so on – decisions where advice is simply not put on paper for fear that it will be discovered through FOI.

Ryan BATCHELOR: So, you think we need to find a space where we ensure that advice is put on paper?

David SOLOMON: I think it is essential that the system does not encourage people to avoid keeping proper records – absolutely essential.

Ryan BATCHELOR: Thank you.

The CHAIR: Jade Benham, do you have any questions, having listened to all of that?

Jade BENHAM: I was actually just making notes on all of that. I do not at this stage, thank you, Chair.

The CHAIR: No pressure. Dr Solomon, you have been very helpful and informative. Any other questions from the Committee at this point?

Paul MERCURIO: I know I asked this the other day, but I am just wondering if you have got any thoughts about the use of artificial intelligence within the realm of freedom of information or right to information? And if you do have thoughts, I would like to hear them.

David SOLOMON: No, I am terrified.

Paul MERCURIO: Yes, okay.

David SOLOMON: I have been doing some writing and journalism about AI [artificial intelligence], and I am just speechless. I am just really, really worried about where that is going to take us. It is not going to help. I think there should be people paying a lot of attention to what should be done and keeping an eye on what is happening. I do not know. As I say, I have no contribution that I can make on that.

Paul MERCURIO: Well, I think that contribution is terrific, really. I think it is something that a lot of people are sharing at the moment.

The CHAIR: And in fact, Dr Solomon, it has been very helpful hearing from you this morning. So, thank you very much. I think we might suspend the hearing at this point. I think we are hearing from some people about AI a bit later today.

Paul MERCURIO: Are we? Excellent.

The CHAIR: Yes. Thank you. Let us close this section of the hearing, and we will reopen again in a few minutes.

Witness withdrew.