

## **ECONOMIC DEVELOPMENT AND INFRASTRUCTURE COMMITTEE**

### **Inquiry into Improving Access to Victorian Public Sector Information and Data**

Melbourne — 30 September 2008

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Mr M. Pearce, SC, Vice-President, Liberty Victoria.

**The CHAIR** — I would like to welcome Mr Michael Pearce, SC, Vice-President of Liberty Victoria, to the all-party parliamentary committee and its hearing today, which is to receive evidence on the Inquiry into Improving Access to Victorian Public Sector Information and Data. Mr Pearce, you are very welcome. We appreciate your time today. For the record could you please state your name and, if you are appearing in an official capacity, the address of Liberty Victoria and your position within that organisation?

**Mr PEARCE** — My name is Michael Pearce. I am Vice-President of Liberty Victoria. Our address is GPO Box 3161, Melbourne, Victoria 3001. I appear today on behalf of Liberty.

**The CHAIR** — Thank you. Now we will pass over to you for any comments you would like to make.

**Mr PEARCE** — On behalf of Liberty let me first of all thank the committee for this opportunity and for the opportunity to put in a written submission. Let me also commend the committee for taking on this extremely important, if not daunting, subject matter. I need to begin, though, with a disclaimer and an apology. I am really the B-team from Liberty Victoria. Our A-team is Georgia King-Siem, who unfortunately is overseas for another week and so not available to attend here today. Georgia is much better versed in the detail and technicalities of these issues than I am. If the committee has an opportunity to take some evidence from her, I would encourage it to do so at some future stage. I will do the best I can to assist the committee, but it will be at a level of generality and on matters of principle more than detail and technicality.

There is an error, which I expect some of you have picked up, in our written submission. If you have it handy — on page 2 in the second paragraph, the first line of that second paragraph reads, ‘As noted by the discussion paper, the push model’; that should be ‘the pull model’. I hope it makes more sense now with that correction.

With that correction, Liberty Victoria does support moving to a push model. We see a push model as more consistent with open and accountable government, and we see it engaging and furthering a number of important civil liberties and human rights, some of which are contained in the Charter of Human Rights and Responsibilities — for example, the right to engage in public life, which is enshrined in section 18 of the charter. A number of other important rights are affected by such a model — for example, freedom of expression in section 15, which includes not only the freedom to make expression but the freedom to receive information as well, freedom of assembly, equality before the law.

We see a number of other things as being affected by a push model and affected advantageously. It is natural that this committee will focus on the economic benefits of a move to such a model. We understand that, and we understand that is the remit of this committee, but it will be important for Parliament generally to consider the wider non-economic benefits. We see there is a very substantial public benefit in the more accountable government that would be obtained through a push model. That is a benefit that is difficult to quantify and difficult to value with any precision at all. Nevertheless we would see some value in some comparative cost-benefit analysis being undertaken by the committee or certainly as part of this process in one way or another. For example, the current system can fairly be described as the predominant pull model, and the predominant mechanism there, as we all know, is FOI. I do not know if a costing of FOI to the government has ever been undertaken, but it ought not to be too hard to get a reasonably accurate idea of the cost to the government of FOI. All departments have an FOI officer, for example, and it ought to be possible by surveys and other means to work out the cost for the amount of administrative time that is devoted to FOI.

On the one side of this cost-benefit comparison you would have the current cost of FOI, and then you would want to try and make an estimate of what the cost would be of going to a push model. Admittedly, it would be difficult to get a very accurate idea of that. The difficulty about that sort of costing exercise is that it is usually undertaken with a preconceived outcome in mind, and you

are usually looking for support for a particular decision that has already been made. You would really want to try and get a genuinely detached, objective and reliable estimate of the sort of costs that would be involved. But there are existing isolated examples of push models in Australia and in Victoria that would give you some guidance there, I think. For example, corporate affairs operates predominantly on a push model. There are public databases with information about companies that are available to be searched. That is a federal matter, of course, but at the state level we have land titles information, which operates essentially on a push model. We have the register of births, deaths and marriages. So there are some examples here that could provide a basis for some kind of meaningful comparative cost-benefit analysis to be done, and we would encourage the committee to do that, bearing in mind that we see a big part of the benefit not necessarily being quantifiable in that fashion. Such an analysis would be needed anyhow if you were going to be looking in any depth at pricing models. We certainly would not favour anything more than a cost-recovery basis for pricing.

Turning then to the question of coverage, again we see obvious benefit in having the maximum coverage available — that is, having the maximum number of bodies and agencies subject to this push model but bearing in mind that the wider the coverage, probably the greater the range of exemptions that will be available. It is possible that by extending the coverage into certain areas you are going to create exemptions that will apply across the board, so you might find that ultimately by increasing the coverage you actually reduce the total amount of information that goes out under that sort of a model. So it will be important to strike the right balance in that area, and clearly there are sensitivities around things such as commercial-in-confidence material, but it would be important to ensure that the coverage does extend to those private organisations which deliver public services. An obvious example, of course, is in the public transport area. Of the available statutory models, the one that appeals most to us is the one under the privacy information act. It does cover private contractors performing public services, but we understand that for bodies such as universities, for example, there will be intellectual property that they will want to protect and not have subject to public availability through a push model. There are difficulties there that we do not underestimate.

An important exemption under any system, of course, will be for private and personal information, and there is no doubt that the biggest area of concern, certainly for Liberty Victoria, in moving to a push model will be around the privacy issue. We endorse a lot of what has been said by the Privacy Commissioner in that submission to the committee, and we think that there needs to be a recognition that if you move from a pull model to a push model, the likelihood is that there will be more invasions of privacy. That is, I think, something that has to be confronted and dealt with.

It will never be fully compensated, I do not think. I think this is one of those situations where you have a conflict, or a competition, between different rights — different civil liberties and human rights — but we see a similar kind of resolution in this area to the way that it is resolved, say, in the justice system. The legal system or the justice system is a part of government, and it is a part that is recognised as needing to be open and accountable, and therefore in almost every case — not quite every case, but in almost every case — court proceedings are conducted in public. That results in the public disclosure of a lot of personal and private information, but it is recognised that the public benefit from having open justice outweighs the private disadvantage from the disclosure of those items of personal and private information. Nevertheless it will be important that there be strict controls and strict procedures which seek as much as possible to minimise the invasions of privacy that would occur from moving to a push model. Again, as in so many things, it is a matter of striking the right balance.

Those are the comments that I wanted to make, and I am obviously happy to answer any other questions that you might have or assist in any other way.

**The CHAIR** — Could I go to your two examples where we have got what you call the ‘push model’ operating within Victoria — in land titles and in the registration of births, deaths and marriages. Could you outline what you see as the benefits of that, make any comments on where it

may be improved and, thirdly, make any comments on how to resolve contentious issues about what would be contained in that registry?

**Mr PEARCE** — With land titles, of course, it is necessary to have that information publicly available because our land title system is a system of title by registration. You get your title by registering it, and the purpose of it is to operate as notice to the world that you are the owner of that particular land. I have given it as an example of a push model, but it is in a sense inherent in the nature of land title law that it must be a public register and it must be publicly available. Obviously what it does is contain personal information that enables people to work out what property you own and where that property is. So there you see some encroachment on privacy, but it is necessary for the system of land titles that we have under our law that it be a public register. People lending money on the strength of mortgages, for example, need to be able to know that.

I know there has been a lot of difficulty with an attempt to move to conveyancing by an electronic mechanism that is connected with that register. I will not buy into those difficulties. I do not know that there is a lot that needs to be improved. I do not deal in practice in that area so I cannot really talk about the practical difficulties of getting access, but as I understand it, it is relatively straightforward. You can go online, you pay a fee and you can download the information. That is the sort of model that I think could be looked at whereby information is uploaded; it is on databases. The old title system, you would be aware, was an old paper system. That was abolished some years ago, as I understand it, and it is now an entirely electronic system. But that is an example of how you can simply upload paper records onto a publicly available electronic database. It would give you some indicative idea, I imagine, of the sort of pricing that is involved and of cost-recovery methods as well.

**The CHAIR** — And births, deaths and marriages?

**Mr PEARCE** — Births, deaths and marriages — what are the advantages of that? It is just good to be able to know who is who, is it not? In a society, as much as we like to guard our privacy, there are certain things about us, such as who we are and where we were born, that ought to be publicly available and that there is a benefit for people in being able to get that basic information. It is necessary, if you like, as a primary identification mechanism for when people, for example, need to apply for passports and various things like that. There is a whole issue of identification and mechanisms of identification that certainly the federal government has been very interested in over a number of years. I suppose it is a kind of bedrock identification mechanism that is provided by that register.

**The CHAIR** — Developing that a bit further on the bedrock principle and where we are and where we have come from, there has been quite a bit of discussion about people having identifying information on their birth certificate about who they are genetically. At the moment that is not listed. If you go to the bedrock of who we are, there is quite a bit of discussion on that, so what benefits are there in having this utterly accurate?

**Mr PEARCE** — There are obvious private and public health benefits. You would certainly have to acknowledge that, but you then get into very difficult areas of privacy, in our view, about this sort of thing — about people being genetically branded and having to carry that throughout their lives. It is pretty intensely private information, a lot of that, and you have got to draw the line at some point between what ought to be public and what ought to be private. There is a public database that does contain a lot of genetic information about people who have been born within the state. I do not have the full details of that available now.

**The CHAIR** — That is at the Murdoch at the Children's.

**Mr PEARCE** — I think that is right. Yes.

**The CHAIR** — You made the comment about the land titles, for example, and lending is done on the strength of knowledge. An emerging issue is in terms of children of genetic donation reaching an age of partnering with others who may well be their siblings.

**Mr PEARCE** — If you are curious, you can have a DNA test done, and there is a certain amount that is available to you if you personally want that information about yourself. The issue that I am focusing more on is about others finding out that information. I think that is where you start getting into difficult ethical questions.

**The CHAIR** — But if the person does not know and they are never told — —

**Mr PEARCE** — But they have a means of finding out. There would be, through DNA testing, a means of finding out a lot of that — perhaps not all of it, but a lot of it.

**The CHAIR** — Some 99.99 per cent have no reason to doubt that their birth certificate is anything other than accurate. It is just like land titles. We start with the presumption that the information provided at the land titles office is accurate.

**Mr PEARCE** — Correct.

**The CHAIR** — And you buy and make business decisions on that basis.

**Mr PEARCE** — It is a slightly different thing to be talking about buying and making business decisions on the strength of a birth certificate, if you know what I mean.

**The CHAIR** — One might say that a lifetime partnership is that very thing!

**Mr PEARCE** — I understand the analogy, but I think you do then move into areas where privacy concerns become more acute. It is one thing for somebody to find out about themselves, but it is another thing for a potential employer, for example, to find out about their potential employees.

**Mr CRISP** — Boundaries is the area that I am interested in — the boundary between privacy and transparency — and that is something which you have been discussing. We will need to look at setting some overall rules. I am concerned that when you delve into a lot of these issues it seems that each one has the same set of special circumstances. I am interested in your views on how we can make general rules and not have a whole heap of exceptions that will make the system more complex and bog it down and destroy what we are trying to achieve, which is to get value.

**Mr PEARCE** — There might be an analogy in the planning system. It has only just occurred to me and I have not really thought this through, but with the planning system you have your statewide principles, and then you have planning principles for regions and then principles for particular municipalities. You might find that a similar kind of system can be adopted here that you have overall protocols and guidelines that apply statewide. But then when you break it down department by department and then possibly agency by agency, you will need perhaps more particular protocols and guidelines applying at that level. I do not underestimate the complexity involved.

**Mr CRISP** — We are looking at what the social benefits are versus the social costs.

**Mr PEARCE** — Yes.

**Mr CRISP** — We have had a lot of evidence about the complexity of the existing system and we are aiming to make it simpler.

**The CHAIR** — We are really looking to Liberty Victoria to give us some signposts.

**Mr PEARCE** — As I said, I am constrained by my ignorance of a lot of the technical aspects.

**The CHAIR** — Okay; fair enough.

**Mr PEARCE** — But at a level of principle and generality we support the push model, and we support making available as much information as possible. That, if you like, is a default position. At the moment it is the opposite. At the moment information is not generally available; if you want information you have got to try to get it, and it is fair to say that there are a lot of obstacles put in your path of getting it. I do not underestimate the difficulties involved in moving from the current situation to a push-based model, and it is something that I think would probably happen progressively over time. Ultimately we see the benefits of doing that to be worth the investment, but we certainly see a lot of benefit in undertaking at least some preliminary comparative cost-benefit analysis to try to work out just where the costs are likely to fall and what ultimate cost it is going to be to the taxpayer.

**Mr CRISP** — There is another area I would like to explore with you. When we have large and raw datasets, people access those and then draw some conclusions. They might understand exactly what they are dealing with and they will come to some conclusions, which then may have effects out there amongst people. I am interested in whether Liberty Victoria has some thoughts on that. One of the other areas we are looking at is how much value adding there should be, or should the Victorian Government be putting in to try to minimise that. But then we have an issue with that value adding in trying to eliminate that. There is a cost and where do you begin, whereas the market is taking the data it needs and analysing it. From a legal perspective I am curious about that.

**The CHAIR** — It is not just the market. A good example would be the Royal Women's Hospital's adverse events register, which is looking at the worst-case scenario and risk minimisation. In a political environment it becomes a hot potato, and you decide whether you are going to actually keep that data and try to educate people. Most parties are in opposition at some stage, and I am not having a go, but you have outlined the facts, and how they are interpreted at a business level or at a political level can be quite dramatic and mischievous.

**Mr PEARCE** — I am alive to that problem, but ultimately the truth will out. There might be some damage done along the way through the misuse of particular information in the short term. I think that is a price you need to be prepared to pay for the longer term and for the more lasting benefits of getting more information out there into the public domain.

**The CHAIR** — All right. Given your answer on births, deaths and marriages, on what basis do you decide which area you are going to cop the political or the business risks of misinterpretation of data?

**Mr PEARCE** — The births, deaths and marriages touches on a question of privacy and personal information that raises that particular concern. If you are talking about raw data about hospital waiting lists, to take an obvious example, and the potential for the misuse, either innocent or not-so-innocent, of raw data like that, eventually the true position will emerge, and it will emerge because all the information is out there. Eventually the public will be told what the true position is. There will be some short-term damage, but eventually you just have to put your faith in the public and the methods of public dissemination of information to get the true picture out there. We are seeing it today: you wake up in the morning and Wall Street has gone down by 6 per cent because there is a hit of bad information, but it will come back. Damage will be done in the short term, but eventually the truth will out about these things. You have got to be prepared to bite the bullet on this sort of thing.

As I say, there are particular issues around privacy and the protection of personal information that need to be looked at in this sort of thing, but when we are talking about raw general data —

hospital waiting lists and things like that — that is all part of the give and take of politics and the to-and-fro and hurly-burly of political discourse, and more information is better than less information.

**Mr CRISP** — There are some ups and downs, as Christine has talked about, with hospital waiting lists. You have periods of incredible damage that may be caused by misinterpretation, and it is whether the social benefits of this are worth it or not worth it. That is the area that we have been exploring in trying to work out what the rules need to be for the report that we write.

**Mr PEARCE** — But you know the position I am putting to you is to err on the side of disclosure, and if it is all out there, the truth will emerge from it. Better that all the information be out there and people be able to form correct conclusions on the basis of all that information than there be selective leaks of particular information, which is essentially how things operate at the moment. I think you have just got to bite the bullet on this and get it all out there.

**The CHAIR** — That presumes that information on sensitive items is collected?

**Mr PEARCE** — Yes, and I have no doubt that it is.

**The CHAIR** — Which is another decision that government and business may or may not decide to take. Why collect adverse events if there is a risk that you could be sued or it could indicate poor practice — we have just had a debate on this very thing — and the alternative is you do not collect it and therefore you keep people in the dark, you do not learn and you constantly cover up?

**Mr PEARCE** — Yes, you make a very good point. It highlights the complexity of these issues, and nobody is pretending that these issues are simple and capable of easy and pat answers and resolutions. Whatever the complexity, you need to keep some clear principles in mind, and the principle that Liberty Victoria is putting is more is better than less, err on the side of disclosure, get it all out there. That is really the message. If I have got a single message for you, that is the message I would give on our behalf.

**The CHAIR** — That is probably an excellent one to conclude on. Many thanks. We appreciate your time, Mr Pearce. Within a fortnight you will be provided with a copy of this transcript from Hansard. You will have the opportunity to correct typographical errors but of course not change the substance of your answers.

**Witness withdrew.**