PRESENTATION TO CEO COMMITTEE- 30 JUNE 2010

I am first going to take you back, then I will take you forward.

In the words of David Solomon, the Independent FOI Review Panel was asked "Has FOI in Queensland brought about a "major philosophical and cultural shift in the institutions of government and the democratisation of information in the last 15 years?". The Panel said "No".

Nationally we've had a commitment to FOI and open government for the past 40 years. In Queensland for the past 20 years. While the Independent FOI Panel considered the objectives of the FOI had not been achieved, undoubtedly the flow of information to the community has improved. In his 1972 book entitled *Secrecy: Political Censorship in Australia* now Chief Justice Spigelman of the NSW Supreme Court highlighted significant examples of public servants who were sacked for making public information such as crime statistics and examples of documents that could not be seen then but are now on the public record: department procedures manuals, public service employment statistics, the register of health funds, consumer test reports, Aboriginal health surveys, membership of Cabinet committees etc. There was an autocratic fixation with control over government information.

As a child protection worker in Inala, I recall trying to obtain a statement of my Qsuper account and information about Qsuper's investment strategies in the early 1980s and being told if I wanted a copy I would have to visit the Qsuper Office in the city. On visiting the Office I was told that information was not available to members. In the seventies and eighties secrecy for public servants was congruent with professionalism. Today we recognise such a lack of openness as unnecessary, even unhealthy.

Since that time a number of structures and systems have been built over what has been called the "moat of executive silence"[1]. These include:

- A more open approach to information management. As a child protection worker, I witnessed changes in practices including the importance of children maintaining contact with family and a knowledge of their family background, children leaving care were given access to the history and files which often contained disturbing information and closed adoptions were replaced by open adoption.

- judicial review of administrative decision making set a new standard of openness requiring government to give reasons for decisions.

- The Courts have played a role in reaching over the moat of executive secrecy. In *Commonwealth v John Fairfax*[2], Justice Mason, in considering whether to

[1] Per Deane J., *Minister for Immigration and Ethnic Affairs v Pochi [1980] FCA 85; (1980) 44 FLR 41 (31 July 1980) at 17:* "The Administrative Appeals Tribunal Act 1975 …did, however, effect a quiet revolution in regard to such decisions. The Act lowered a narrow bridge over the moat of executive silence in that, subject to limited exceptions, it conferred upon a person entitled to apply to the Tribunal for a review of a decision, the right to be supplied with a statement in writing prepared by the person who made the decision and setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based, and giving the reasons for the decision (s. 28)."

[2] *Commonwealth v John Fairfax and Sons Ltd ("Defence Papers Case") (1980) 147 CLR 39 (1 December 1980) at 27*

grant an injunction against the publication of previously unpublished information concerning the "East Timor Crisis" Mason J, sitting alone said

> *27. It may be a sufficient detriment to the citizen that disclosure of information relating to his affairs will expose his actions to public discussion and criticism. But it can scarcely be a relevant detriment to the government that publication of material concerning its actions will merely expose it to public discussion and criticism. It is unacceptable in our democratic society that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticize government action. (at p52)*
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> *28. Accordingly, the court will determine the government's claim to confidentiality by reference to the public interest. Unless disclosure is likely to injure the public interest, it will not be protected. (at p52)*
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> *29. The court will not prevent the publication of information which merely throws light on the past workings of government, even if it be not public property, so long as it does not prejudice the community in other respects. Then disclosure will itself serve the public interest in keeping the community informed and in promoting discussion of public affairs. If, however, it appears that disclosure will be inimical to the public interest because national security, relations with foreign countries or the ordinary business of government will be prejudiced, disclosure will be restrained. There will be cases in which the conflicting considerations will be finely balanced, where it is difficult to decide whether the public's interest in knowing and in expressing its opinion, outweighs the need to protect confidentiality. (at p52)*

Incidentally, it is this formulation of the principle in equity that is now reflected in the approach taken in the *Right to Information Act 2009* to the disclosure of public sector information.

- The 1992 FOI legislation was one bridge over the moat and FOI units themselves provide a bulwark.

Much of the secrecy of the past has been stripped away and what have we learnt? The release of information doesn't hurt. More open government improves the quality of the public service by making it more accountable, transparent, accessible, and responsive. However in finding that the FOI revolution had not come about, Solomon was indicating that government was not as open as it should be. We are now engaged in brokering a new settlement about what information should be published. In twenty years time, we will look back and recognise that concerns about what we currently don't publish were unnecessary and harmful.

The Independent FOI Review Panel reminded us about the importance of information which has long been recognised. Information is a dimension of all government activity: how a society is governed, who participates in government, how decisions are made, and how information is managed. The Panel recommended that further bridges needed to be built over the moat to overcome executive secrecy.

Firstly, the Panel recommended a governance structure with clear roles and responsibilities for the PSC, QGCIO, State Archives, DPC and OIC. I'll come to the role of the Office shortly. The Panel recommended a strategic information policy which has been achieved by QGCIO. QGCIO has also taken the approach of integrating the RTI and privacy principles into its architecture. This has gone part of

the way to address what he identified as a lack of government priority being given to the 'I' in 'ICT', that is the accessibility of government information had to become a priority. There is now a very large task ahead for QGCIO together with agencies in shifting some of the IT spend into improving information management practices, a necessary task for the RTI reforms to be achieved.

To do this agencies need a plan to steadily improve the availability and accessibility of information over time. One of the key take away messages of the IM for non-IM Manager's breakfast session for CEOs and SES staff sponsored by the PSC, State Archives and the Office of the Information Commissioner, is that information should be managed with equivalent systems and processes that are used to manage other organisational assets, like finance and human resources. A second take away message was that the place to start is to identify the one or two things that will make a significant difference to your services and the objective of an informed community.

You will have your own sense of priorities in relation to the strategic use of information, particularly with respect to achieving Q2 targets. My own thoughts of information to make a key difference if published are these:

- the integration of and open access to spatial information to help achieve important economic goals,
- quality improvement data in hospitals and hospital rankings,
- the publication of community based social disadvantage assessments and
- the publishing of crime statistics by locality.

What these data sets have in common is that they can inform allocation and strategy decisions, activate the community in problem solving, and provide information to better balance economic, environmental and social perspectives.

Another bridge over the moat of executive secrecy, is the requirement for agencies to have a publications scheme, designed as a mechanism to require agencies to 'push' information out into the community rather than have it 'pulled' from them. A number of agencies are of the belief that they already publish sufficient information on their websites and nothing much more is required of them. However such a view sheds no light on how useable the community finds the information. After all, the RTI reforms are about improving the flow of information to the community and for an informed community, not just for the sake of pushing information out. The objective is to inform the community in a way that the community can better:

- scrutinise government making government more accountable
- ensure its rights and entitlements are respected
- contribute to public debate
- build knowledge and innovate
- solve problems, or partner with government to resolve issues it can't resolve alone
- better prepare itself for future challenges, and
- improve its resilience.

The utility of information in the hands of the community is largely determined by the following range of factors: legal restrictions on making information public including 'information exemptions'; availability; currency; searchability; discoverability; transparency of public language; transaction costs; the preservation of information and conditions on the use of the information. The RTI reforms require agencies to improve on each of these dimensions of accessibility and QGCIO has an ongoing role in assisting agencies move to maximise disclosure. The Office intends to in its auditing role obtain views from stakeholders about the utility of the information each

agency provides. If you believe you have good record keeping and information management practices, you need to spend a day in the RTI unit.

The Premier has issued Guidelines on how the Publications scheme is to operate. The information published must be 'significant, appropriate and accurate'. These words need to be interpreted in light of the FOI/RTI context and the object of the reforms. I'll briefly remind you of three features of the context:

In recognition that the control government exercised over public sector information was unhealthy in a democracy, the FOI Act sought to remove the practice that people were only informed when government decided they would be informed. Times when people needed to know were frequently overlooked. The FOI Act removed the prerogative of government to decide what information to release.

The twin pillars of professional public service were traditionally anonymity and confidentiality. They still are, except the legislation has removed the prerogative to keep information secret. Many codes of conduct require public servants to be responsive to the government of the day. They are still required to be, but such an obligation is always subject to the law. Prior to the FOI Act, it was ministers who exercised the prerogative of deciding when and how information should be released. The FOI Act removed the Minister's prerogative when it came to information being 'pulled' from government. This did not stop interference with decision makers by either Ministerial staff or senior departmental officials. The RTI reforms include significant offence provisions for the interference with RTI decision making and this should minimise interference.

The 2nd point with respect to the context for publications schemes is that, in recommending further structures and systems to improve the flow of information to the community had the Fitzgerald inquiry Report in mind and its view that:

> *The ultimate check on public administration is public opinion which can only be truly effective if there are structures and systems designed to ensure that it is properly informed. A Government can use its control of Parliament and public administration to manipulate, exploit and misinform the community, or to hide matters from it. Structures and systems designed for the purpose of keeping the public informed must therefore be allowed to operate as intended*.

Solomon's idea of "democratising information" is that information that is material to the electorate should flow to the community in a timely way, irrespective of what the Minister or government of the day thinks and as Justice Mason reflected, irrespective of whether the information exposes the government to criticism. This context sheds light on what information should be considered 'significant' in light of the Premier's guideline for publications schemes. The publication scheme is a bridge over the moat of executive secrecy requiring the 'pushing out' of information material to the electorate.

The requirement in the RTI Act is on the agency to ensure the publication scheme complies with the guideline published by the Premier. Significantly the publications scheme further reduces the Minister's remaining prerogative concerning information that is 'pushed out'.

The third aspect of the context effecting what agencies are required to publish is that the RTI Act makes it clear that it is the Government's new approach to the release of information and it is the Parliament's opinion about making information available, that

information is to be released administratively and 'pushed out' as a matter of course, unless there is a good reason not to, those reasons being public interest considerations.

I've spoken about information policy, information management, publications schemes and lastly I'll touch on the role of the Information Commissioner, another bridge over the moat. What gets measured gets done. Solomon recommended an expanded role for the Information Commissioner to, support, monitor and report on agencies implementation of the RTI reforms. The statutory functions of the Office are summarised in the Office's strategic plan that I've handed out.

We are nearing the end of the first year of operation. What have we been doing? During these 12 months we have supported you by training over 3,500 people, answered over 4000 written and telephone inquiries, and worked with an agency reference group to produce a comprehensive range of guidelines. Our promotional event of the year, the Solomon Lecture, delivered by Dr David Solomon was attended by 150 public servants. The Solomon Lecture this year on the 27 September will be delivered by Mr Don Watson, to be introduced by the Premier.

In external review we received a record number of external review applications, 60% more than usual. There was a marked increase in applications from the media and members of Parliament. At the same time we will achieve around a 33% improvement in timeliness, an achievement most agencies would dream about achieving over a 10 year period. The result is even more impressive as it comes on top of a 35% improvement last year. We were able to resolve over 90% of applications without resorting to a formal decision, an extraordinary result, one which may reflect upon agencies' own ability to resolve matters at an early stage. Improvement in this area by agencies would lead to significant efficiencies for you and less work for us.

I should mention to you a judicial review application concerning one of my decisions and which was dismissed by the Supreme Court. In finding the application to be futile and misconceived, Justice McMurdo awarded costs in the matter against the Office. His reason for this concerned the delay in the Office finalising the matter – nine months to make a decision. In making this finding, Justice McMurdo specifically referred to the justifiable attempts made by the Office to resolve the review with the agency however also commented on the agency's significant contribution to the delays. For years now, the Office has conducted proceedings on the papers and has been operating in a courteous rather than a directive way, seeking to rely on the cooperation of agencies in responding within time frames permitted. As a consequence of agency RTI units having statutory time frames in which to process access applications, agencies have come to consider that complying with Office time frames is discretionary. Staff absences are a common excuse. Courts do not entertain these kinds of excuses and in future neither will the Office. Justice McMurdo has reminded me that agency delays can no longer by justified or tolerated by the Office. In future, where there are delays I will consider holding public hearings. The first public hearing with a CEO from a regional council occurred last week. Phil Clarke is doing some work around funding options for the Office and I will be placing the issue of recovering costs in these circumstances from agencies on that list of options.

In performance monitoring and review we have developed a self assessment tool for agencies to check compliance with the legislative requirements, undertaken research to determine which agencies are captured by the RTI and IP Acts for monitoring purposes, undertaken a desk top review to identify if compliant publications schemes

have been established. A report on these activities will emerge in due course. We have published an RTI standards and measures framework, piloted the audit tool and methodology with a number of agencies, developed a risk profiling instrument to direct our resources, developed a 5 year schedule of activity, and developed two surveys to evaluate community and public sector awareness of RTI and IP rights and responsibilities.

In 2010-11 the surveys will be run by OESR, baseline data will be collected from agencies against the self assessment tool as a measure of implementation and auditing against the assessment tool and with respect to other matters will commence. My first priority will be to examine publications schemes in more detail and I think this examination will inform my views about how the words “significant appropriate, and accurate” are to be interpreted.

Overall, I would like to recognise the great amount of very good work being done by agencies without additional resources. You are building the foundations for better information management which in the long term will reap you benefits of in all sorts of ways, including efficiencies.