Information Law Reforms: Looking to the future

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We might get some insight into what the future holds for information law reforms by identifying what will influence policy development over the next decade from past lessons and from recent developments.

History repeats itself

I'll mention three features of past FOI and privacy reforms

(i) All FOI and privacy reforms have a very long incubation time. Here are three examples.

The Commonwealth

The history of the Commonwealths reforms in FOI is contained in the Commonwealth's first annual report on the Operation of the FOI for 1982-83 written by Gareth Evans

> ***First Annual Report - Foreword***
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> Effective freedom of information (FOI) legislation in Australia has been a long time coming. The Freedom of Information Act 1982 had its origins in a 1972 election policy commitment of the Australian Labor Party. Until that time, FOI had scarcely been part of the academic's prescription for administrative reform, let alone part of the political agenda. It is a matter of regret that the relative brevity of the Whitlam government's term of office did not allow the policy commitment to crystallize into legislation.
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> Subsequently, however, the concept of FOI legislation was also adopted by the Federal Liberal Party and in due course the first FOI Bill in Australia was introduced by the Fraser Government in 1978. The 1978 Bill was exhaustively reviewed by the Senate Standing Committee on Constitutional and Legal Affairs whose 1979 Report resulted in the significantly reshaped legislation which ultimately became the FOI Act 1982.

Queensland

Queensland introduced its FOI legislation in 1992, and has had an Information Commissioner since that time. Queensland at that time lagged the introduction of the New Administrative Law in Anglophone countries and, as in some other jurisdictions, it took a judicial inquiry into police corruption to recommend FOI laws which followed, along with the jailing of the Police Commissioner and several Cabinet Ministers.

Queensland was one of the last Australian jurisdictions to introduce privacy laws in 2009 with the Commonwealth first legislating in 1988, New Zealand in 1993, NSW in 1998, Victoria in 2000 and Queensland in 2009.

UK

In the UK the FOI Act 2000 was according to Bill de Maria the sixth one drafted since 1976, all of the previous five failing to progress to law. The FOI Act received Royal Assent in 2000 however its provisions were gradually phased in over the next five years, making it difficult to assess its impact.

Unlike its earlier reluctance to embrace FOI, Queensland has been in the vanguard of the recent FOI reforms in Australia, 16 years after the introduction of its legislation. The Solomon Review proposed major changes to the FOI Act which were subsequently embraced by government. The obvious conclusion to be drawn from

the history of FOI is that it is likely to be a long incubation period before further major law reform is undertaken in FOI.

(ii) Three steps forward, two steps back

A history of FOI reform shows a pattern of early gains being whittled away by sequential legislative reform. Dr Solomon was particularly critical of the way this had occurred in Queensland for example the repeated amendment of the Cabinet exemption to the point its wording was no longer consistent with the overall objective of the Act. The initial principle-based legislation was narrowed in its application by the removal of agencies and types of documents from its scope, as well as by a narrowing of the application of particular exemptions.

There is now a long history of applying the principle-based legislation, since 1982 in the Commonwealth and since 1992 in Queensland. That experience has shown that the public interests identified in the legislation have stood the test of time and that there is little in need of additional protection. There is a temptation, particularly in the economic portfolios to seek blanket exceptions in addition to the protections already given for things apparently to deal with anxiety that the current public interests may not afford the kind of protection they are designed to. Unfortunately this type of carving out particular areas of public administration usually also captures within its scope information which would normally be disclosable

There are signs that this dynamic will not cease in for example the Commonwealth government reactions to whether the NBN should be exempt from the FOI Act. This process is not isolated to Westminster countries but is particularly prevalent in systems of government such as Westminster where the executive government controls the Parliament to which it is accountable may be a system of government more prone to the erosion of hard won gains a process of three steps forward, two steps back.

New Zealand's High Court has stated that the *Official Information Act* should be considered one of the constitutional statutes and that it should be a piece of legislation difficult to amend. It remains to be seen if this thinking will in the longer term gain traction in Anglophone countries.

(iii) Reforms in one jurisdiction usually follow another

The Commonwealth FOI Act was initially based on the US FOI Act. The Queensland reforms are largely modelled on the UK reforms. Reform in one Anglophone country is usually followed by similar reforms elsewhere. Some of the future law reforms for Australian jurisdictions will already be in place in the English speaking jurisdictions. These might include matters covering scope: whether parliamentary departments should be covered by the reforms as they are in Tasmania, UK and Scotland; whether state owned companies like Australia Post and NBN should covered; a further narrowing of the Cabinet exemption in keeping with that adopted by New Zealand and Wales; and information rights as a constitutional or bill of rights issue. The right to information is now enshrined in over 50 national constitutions, most recently Pakistan's. Sadly little progress is being made in any jurisdiction around budgetary matters in any jurisdiction. One of the primary tasks for government is to reallocate resources. That the community is informed of how wealth is being distributed and the reasons behind decisions that change the distribution pattern is crucial information to assist the community decide whom it wants to represent it in government.

What can be discerned from these historical patterns? Firstly, further major reform in Right to Information will be a long time in the making. Perceptions that the privacy law reform may water down existing protections need to be addressed in the coming period. Secondly, recent gains are likely to be wound back over time however maybe to a lesser extent than before, given the current context, which I am about to talk about. Thirdly, short to medium term reform options are known to us in some of the Anglophone countries and are likely to be adopted over time.

Current context

What future information law reform can be divined from the current context?

In Queensland there are three developments worthy of mention but I won't elaborate on them. Firstly, the clear articulation by government of its targets in Q2 and a performance measurement framework which provides direct accountability to the people on progress towards those targets. They are concrete targets like cutting obesity, smoking, heavy drinking and unsafe sun exposure by a third, and having the shortest public hospital waiting times in Australia. Secondly, there is a policy consensus around a citizen centred focus to service delivery, one of a number since the seventies but this together with the other reforms might be longer lasting. This means better participation by the community in planning and decisions. Thirdly, the integrity reforms in which the Queensland government is leading nationally. They include the requirement for lobbyists to register, election funding, codes of conduct and clearer delineation of responsibilities of departments, Ministers and ministerial officers.

All these things contribute to a positive policy context for proactive disclosure regimes, Dr Solomon thought was necessary for successful RTI implementation.

From COAG one development is worthy of mention without elaboration. We are seeing a commitment to increased transparency around the comparative performance of public services as in MySchool and the recent health agreement. Transparency works to improve the performance of public services. The mechanism by which this works may be through engendering competition through public shaming however comparative results is the mechanism used in benchmarking as a continuous improvement process.

From a global perspective, we are living through the information revolution. Again much has been said and written about how IT is fundamentally changing community attitudes, patterns of organising, means of engaging and communicating etc. Rapid change across borders will force governments to continue to review the approach being taken to regulating across a range of activity including copyright protection, privacy protection, authentication etc. One suspects the information revolution and social networking sites are changing cultural norms with respect to personal privacy which may not become apparent or reflected in law until tech savvy kids become the policy makers of the future.

I will elaborate on three aspects of in the current policy context: simultaneous reform, the new role of the Information Commissioner and Wikileaks.

<u>Simultaneous reform</u>
An obvious point of differentiation to the initial implementation of FOI in Australia is that we now have similar reforms being implemented in almost every Australian jurisdiction and every Anglophone jurisdiction simultaneously.

Queensland's RTI laws commenced on 1 July 2009. In the same year prior to that:

- President Obama issued a memorandum requiring agencies to take affirmative steps to make information public and the USA Government launched *data.gov*.
- The UK Information Commissioner's *Model Publication Scheme* came into force
- The European Court of Human Rights confirmed for the first time that the right to freedom of expression included a right to access to public sector information.
- The first treaty concerning access to information and proactive disclosure, the Council of Europe Convention on Access to Official Documents, opened for signature.

Many things have also occurred since Queensland's RTI laws commenced.

The revival enjoys simultaneous political support in a number of jurisdictions. It is supported by a revival in interest in open government. There will be a national discourse about Right to Information and FOI. This will lead to inevitable comparisons of regulatory frameworks and public pressure on the government to be more open and accountable.

A new role for the Information Commissioner

It is a self evident truth, variously attributed, that "what gets measured, get's done". Absent from the *Freedom of Information* laws was any mechanism to monitor agencies compliance with the law. To ensure *Right to Information* gets done, the Queensland Government has put in place regulatory monitoring and support by the Information Commissioner.

Previously the Office of the Information Commissioner performed the single function of independently reviewing the FOI decisions made by government agencies and Ministers in a similar way to that of a Tribunal. Under the RTI and Information Privacy Acts, the Office continues this role and has significantly enhanced functions. The Office will have a lead role in the improvement of public sector privacy and RTI administration in Queensland by

- Promoting understanding of and compliance with the privacy and RTI principles
- Providing best practice leadership and advice including advice on the interpretation of the legislation,
- Training and education
- Issuing guidelines
- Providing an enquiries service
- Conducting compliance audits and reviews and if appropriate report to Parliament
- comment on any issues relating to the administration of privacy in the public sector environment or legislative or administrative changes that would improve the administration of the legislation
- Conciliating privacy complaints and approving waivers of the privacy principles.

Under the RTI legislation the Information Commissioner is to provide report cards to Parliament on the performance by agencies of their obligations under the RTI legislation. The inclusion of a monitor in the RTI regulatory framework has already shown early success. The Office tabled in Parliament its first performance report on agency publication schemes about a week ago. When the Office commenced its desktop review of agency publication schemes, only six out of 74 regional councils

had fully compliant schemes and 44 out of 74 councils did not have a publication scheme with a website presence. We expect this to be much improved when we re-visit this exercise.

Perhaps a little less self evident is the truism, "you have to measure what you want more of". With that in mind the Office of the Information Commissioner has established compliance standards for public sector agencies and has collected baseline data for future comparisons and reporting. Such monitoring will keep agencies focussed on meeting their obligations.

The Australian and New Zealand Information Commissioners have formed the Association of Information Access Commissioners. This network of commissioners will enable cooperation, collaboration and strengthen the system of monitoring and support that operates in any one jurisdiction.

Wikileaks

The unfolding Wikileaks drama has been for me been like living through a film. When I read a 4 March 2011 Courier Mail headline "Spielberg plans Assange thriller", I felt disinterested.

Whatever you think of Wikileaks, it has done more for Right to Information than any Information Commissioner could do with respect to raising public awareness about access to public sector information. The most important aspect has been the public debate about who should decide what information is released and about what information can or should be released and to a lesser extent, the government's responsibility for the security of its information.

Most would agree that the government should in the first instance decide what should not be released, with review by an independent umpire. The community rightly needs to be confident that this process has as its starting point that all documents are open and if they are not, that there is actually a justifiable really good reason for it not to be. The Wikileaks information released to the media has by and large laid bare for the community how hum drum the business of government is, that they don't need to be and don't want to be bothered with large swathes of it, that the community differentiates between titillating gossip and when there is a public interest in it being informed and that government reaction to the release of information is highly conservative and raises concern that all documents are open to the public is yet to become a pre-requisite in decision making.

The messages for agencies, challenged by the presumption that all documents are open, are these:

- The greater the volume of information released, the more underwhelming it is
- The release of information 'normalises' it and lessens interest in it. That is, a general community reaction, that if the government says it is secret, it must be interesting but if the government is happy to release, there is not much there to react to.
- Trust in government can be damaged when the community does not agree with government secrecy claims about information that is subsequently released, emphasising the importance of the setting, maximum disclosure
- Government fears about the impact of the disclosure of information can be overblown. These fears need to be tested.

These messages add up to a single message to agencies: publish more.

In conclusion, I think the points to be discerned from these developments are these:

1) It is unlikely that there will be further major reform in the next ten years however there will be ongoing legislative reform around the ridges in response to advances in Anglophone countries and to perceived risks.

2) With

- simultaneous reform,
- the oversight arrangements for the implementation of the new reforms,
- the congruent changes in other areas of government policy and administration
- the information revolution shaping citizen's expectations of a responsive, accessible government,
- the ongoing public debate
- government continuing to provide the media with 'gotcha' moments which will reinforce the media's use of RTI,

there is now a much better chance that in 10 years time, the criticisms made of the impact of the FOI reforms will not be repeated.

3) The best tool in government's toolbox to combat the 24-hour media cycle and 'gotcha' stories is to publish more.

4) And lastly, the RTI reforms have drawn attention to other areas of information policy in need of reform. These include charging polices for access to government information, reusability and copyright laws. That is a story for another day.