

FREEDOM FROM COVER-UPS

The Mercury
By Wayne Crawford
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BURIED in Premier Paul Lennon's State of the State address this week was a pledge which has the potential to introduce an unprecedented level of transparency in government decision-making.

Although it got little attention -- overshadowed as it was by the surprise announcement of a new hospital for Hobart, which will probably cost close to \$1 billion by the time it's built -- Lennon's promise of a package of reforms aimed at increasing the levels of accountability, transparency and responsibility in government has the makings of a transformation which, if honoured, could lead to a degree of political openness not previously experienced.

Naturally enough, the opposition parties were sceptical. Liberal Opposition Leader Will Hodgman said it was hard to take seriously the Premier's commitment to higher standards of governance when he was still holding out the possibility of reinstating disgraced former deputy premier Bryan Green, despite his acknowledged incompetent and inappropriate behaviour in overseeing building industry accreditation; and Greens Leader Peg Putt noted, similarly, that a glaring omission from the promise of more accountable government was any mention of upgrading, or even enforcing, the ministerial code of conduct.

Nonetheless, if Lennon is to be taken at his word, there will be an extensive package of changes which will reform not only government budgeting and financial management but also the levels of accountability and openness and, of importance, make it far easier for electors to get information about whether a government's stewardship of our tax money is up to scratch.

Taking the Premier's commitments at face value, the national and international authority on Freedom of Information laws, University of Tasmania senior law lecturer Rick Snell greeted the projected reforms as a "huge boost" in the decades-long battle he's led for the "right to know" to be entrenched as a political entitlement.

It was a positive ray of hope at a time when, nationally, the Freedom of Information (Fol) scene was looking decidedly grim after a High Court decision that effectively gutted the Commonwealth Freedom of Information Act by giving ministers virtually unlimited power to block Fol requests for the release of sensitive and potentially embarrassing documents. Also, by coincidence, Lennon's announcement came in the same week as the internationally-celebrated "Right to Know Day", marked each September 28 by the Freedom of Information Advocates Network, which includes more than 90 groups on four continents who campaign for stronger, more effective Fol regimes.

In the State of the State address -- the Premier's annual report to Parliament -- Lennon outlined a legislative program which would include the removal of requirements which at present allow companies to insist on confidentiality in their contracts with the Government, on the basis of commercial interest. Under the new arrangement the presumption will be that contracts entered into by the Government with private companies will be fully open to public scrutiny except where it can be demonstrated that confidentiality is justified. A standing committee of the secretaries of the departments of Justice, Premier and Cabinet, and Treasury and Finance will decide on applications for confidentiality but, in general, the hoary

excuse of "commercial in confidence" as a means of keeping contracts secret will no longer be available.

Among other budgeting and financial management reforms will be ensuring the total independence of the Auditor-General and Ombudsman -- both of whom are responsible directly to Parliament -- by giving them their own budgets, separate from other government agencies. The Auditor-General, responsible for providing Parliament with independent advice and recommendations on the performance of the public sector, is also to be given added powers to oversee government entities.

The office of the Ombudsman -- the watchdog tasked with investigating complaints about the administrative actions of government departments, councils and public authorities, and which also administers Freedom of Information disputes and appeals -- will be given its own budget to further entrench its independence. At present, the Ombudsman is merely a sub-agency in the big Justice Department and has to compete with other departmental branches, such as the prisons and courts, for its slice of the annual financial cake.

Rick Snell says the Ombudsman has never been adequately financed to deal properly with Fol appeals. He has long campaigned to have the Ombudsman's office given its own budget, better resources and total independence.

Even setting aside the reforms announced by the Premier, Snell says there have been other positive developments in the administration of the state's Freedom of Information Act. Recently, he won an Fol test case, which he says could lead to a revolution in the way Tasmanian government decision-making can be scrutinised.

Tasmania's Fol Act does not allow access to Cabinet and internal working documents until 10 years after the information has become incorporated into a record. Last year, Snell sought to test the 10-year rule by applying for copies of the agendas of the Groom Liberal Cabinet from 1993-95. He says the Department of Premier and Cabinet (DPAC) refused to provide them and got Solicitor-General's advice to back them up. However, he appealed to Ombudsman Simon Allston, who upheld his appeal and directed DPAC to provide documents. The process took about nine months.

Allston took over a year ago as Ombudsman from Jan O'Grady who, in her final report to Parliament, accused the State Government of compromising the independence and integrity of the office. She refused to elaborate, except to say small, even trivial events could have an important symbolic impact on the public perception of the Ombudsman's independence.

In public statements Allston, formerly the principal Crown counsel with the Solicitor-General's office, has indicated in no uncertain terms he would take "independence of mind" to the job and not be backward in taking on the Government if necessary.

Rick Snell was working as a Commonwealth public servant when the Fraser government introduced the federal Fol Act in 1982 and among his responsibilities in the Australian Taxation Office was dealing with Fol requests. He moved to academia at the University of Tasmania's Law School just as the state legislation was introduced by the Field government in 1991 as part of the Labor-Green Accord; he developed a strong interest and now internationally recognised expertise in Fol law. He has been consulted by governments about Fol in such countries as New Zealand, Canada, Indonesia, Mexico, Britain and the US.

Snell says the Australian Act -- the stated objective of which is to, as far as possible, create a general right to access of information -- has become almost useless as a tool for accessing documents, partly because of the culture among politicians and public servants (who see their main objective as finding reasons to withhold information) and partly because of strict legalistic interpretations of the law.

The latest of these was a High Court decision early this month which upheld the right of Treasurer Peter Costello to refuse a request by *The Australian* newspaper for information which would show whether rich Australian families were rorting the first-home buyers scheme, which provided \$7000 grants; and for documents detailing revenue projections which would show how much the Government was benefiting from so-called "bracket creep", by which taxpayers are penalised by moving into a higher tax bracket when they get a pay rise.

The Australian's FoI editor Michael McKinnon asked for the information in 2002. Two elections and four Budgets later (and after legal action which cost the paper upwards of \$1 million and the Government even more) Costello was still refusing to provide the information, claiming it would not be in the public interest. Three weeks ago the High Court agreed with him in a 3-2 decision. Snell says it provides a large loophole which this and all future governments will use to avoid meeting FoI requests. One effect will be that journalists will see it as a waste of time to even make FoI requests and rely instead on leaks from public servants (which could land them in court in breach of the Crimes Act).

In a cheeky celebration of "Right to Know Day" on Thursday, Snell prepared a list of nominations for "The Freedom FROM Information Awards". Top of his list was Costello for spending about \$1.5 million of taxpayers' money to hide "rapidly ageing policy documents"; the three High Court justices (Callinan, Heydon and Hayne) who found in favour of Costello and thus neutered Australia's Freedom of Information Act; and Treasury secretary Ken Henry, who in an interview bemoaned the practice of pesky journalists seeking information that might embarrass the Government.

The ridiculous irony is the information sought by *The Australian* is so out of date as to be only of historical interest. To expose the gulf between the application of the Australian law and the equivalent FoI act in New Zealand, Snell notes that when *The Australian* applied in NZ for similar information, it was provided within 24 hours. There, a totally different culture of transparency exists -- a willingness to find ways to provide information, even when it might prove embarrassing to government or the public service.

Snell says the Tasmanian legislation could do with a decent overhaul but, even so, is superior to the Commonwealth act.

Meanwhile, we can but pray that Premier Lennon remains true to his word: "The community has every right to expect the highest levels of accountability, transparency, responsibility and governance from their elected representatives."

It's up to us to hold him to that.

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