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Comments on Consultation drafts of the Right to Information (RTI) Bill and the Information Privacy (IP) Bill

As an overall comment, the re-drafting of the legislation has achieved many valuable and welcome changes in approach, and there are numerous aspects about which I would have no disagreement or negative comment. There are also a number of procedural / technical and minor drafting issues on which I do not propose to comment, partly from lack of time, and partly in the knowledge that they would have been addressed by comments of practitioners more familiar with processing issues.

In light of my time constraints, I would like to focus on a few specific aspects of the draft Bills.

Separation of Access/Amendment Rights

The first and most significant issue is the overarching question of splitting the access provisions across two pieces of legislation. I understand that the basis of the recommendation to do so is in the Solomon Report, and this approach has been taken in other jurisdictions. However, at the same time, there are many jurisdictions which have not taken this approach. Some have maintained all rights of access/amendment in an FOI Act, and placed the Privacy provisions apart from access/amendment in a Privacy/Data Protection Act. Others have had a single piece of legislation combining FOI and Privacy, containing all access provisions. Others allow parallel access provisions in two pieces of legislation. Where there is a rigid separation of the access/amendment rights for personal information (eg: UK), there have been problems in the interface between the two, although a single review body can overcome a lot of these.

Standing back and looking at the two Bills, it is immediately apparent that the size and complexity of the legislation has increased – well over 300 pages in total. Some of this is due to the need to duplicate provisions in both Bills, and there is significant cross-referencing required between them. To combine them into a single piece of legislation, or to leave the access/amendment rights in one Act, would undoubtedly reduce the overall length and complexity. For the public, and for most FOI practitioners who are not lawyers, shorter, simpler, plain English legislation is much preferable.

One reason given by the Solomon Report for separating RTI and IP is to make clearer the accountability and openness objectives of the RTI Act, and to place the access/amendment provisions with the other IPPs in the IP Act. However, the concept of openness and accountability also applies to government's treatment of and keeping of records about individuals. Mixed applications (even 99% personal and 1% non-

personal) will have to be processed under the RTI Act, diluting its focus on government information. In my view, factors such as these weaken the rationale for the separation of access rights.

There is a close relationship between the Acts, and any practitioner working with either must be knowledgeable about the provisions of both Acts. In making a decision under IPA, the decision maker must be familiar with and refer back to the RTI for the exemption/ refusal provisions. As it stands, there are some inconsistencies in several parallel provisions which need to be addressed if the split is maintained.

There are many duplicated or parallel provisions, but with different numbering it is harder for practitioners to "learn" and cite them correctly even after the transition period when they had known the numbers of the corresponding FOI provision.

Difficulties in dealing with "mixed" applications

I recognize that there are difficulties in any system which treats applications for personal vs non-personal documents differently. All systems which involve different fee scales feature many appeal cases on this point (as Queensland has in the past) and there is no easy solution. However, I would like to make a few points about this issue.

The Bills require an agency to contact an applicant within 10 days of receiving a mixed application to advise of fees payable. That means the agency has to retrieve and at least conduct a preliminary assessment of the responsive documents within 10 days in order to determine whether or not it is mixed. If the assessment is based on the terms of the application, there would be a very high error rate in making this assessment. Consider the following examples:

- Request for their medical file by a patient:
    - Documents on file include information received from family member about themselves and also about the patient eg: a patient's mother advises medical staff in confidence about her own gynaecological history which is relevant to the patient's treatment

- Request for their file by former ward or child in need of protection:
    - Documents contain information about the child, their parents, other family members, alleged abuser/s

- Request for documents concerning complaint made to local council about the applicant:
    - Documents contain information about the complainant, the matter complained about (eg: construction, waste) and the applicant

- Request for documents concerning investigation of the applicant:
    - Documents contain information about the applicant, informants, witnesses, procedural documents

In all these cases, the application is expressed to be and appears to be for personal information. In all cases, the responsive documents would include non-personal documents, making them mixed applications. The provisions in s.42 IPA are not

sufficiently clear - I think the section intended to say that applications which were solely for the applicant's personal information would be processed under IP, regarding the other (non-personal or other person's personal) information as irrelevant / out of scope. Under s.80(2) IPA such a decision appears to need the applicant's consent. If the applicant puts this other information into scope explicitly, then it is a mixed application and must be handled under RTI. The point at which the applicant is explicit is problematic: – is it their first expression of the terms of the application? (which is usually expressed in broad terms such as "my medical file"). Or after clarification/consultation of the terms of the request prior to any search being conducted? Or after the search has been conducted and the responsive documents examined as to whether they are personal or otherwise? Can this decision be revisited at a later point? This illustrates the complexity of a system which requires agencies to determine which of two possible access regimes apply to an application.

I believe the majority of FOI applications currently characterised as 'personal' would actually be "mixed" if the current criteria were strictly applied. Anything which is an entirely straight-forward, purely first-party-personal set of documents could be accessed through an administrative scheme and would need neither RTI nor IP, although of course the right of access must be guaranteed in legislation. It is virtually impossible for a receiving agency to make an accurate assessment when it has to transfer the application to the correct agency, as it cannot assess any responsive documents. The characterization of a request as personal (IP) or other (RTI) appears to be non-reviewable.

At present, charges can be pro-rated for mixed applications, whereas under the proposed scheme, applications under RTI incur full charges for every document considered, which is a big disadvantage for applicants with a small proportion of non-personal documents covered by their applications. I realize that the scope can be renegotiated to exclude such documents, but this would take time. Also, some applicants would wish to maintain their multi-topic request, including their own personal information. Their cheapest option would be to split their request into one purely personal (free, under IPA) and the other non-personal (under RTI, with charges). However, from the agency's point of view, this may prove more difficult to manage, in terms of the timeframes, clock stopping, document handling and scheduling, and appeal rights. There may be overlapping third party consultations. It is also confusing for the applicant.

Definition of "personal information"

I agree with the aim of making the terms, and their definitions, consistent between the two Bills. I am also very familiar with the debate around the terms "personal affairs" and "personal information" in an FOI context. Changes made in the Commonwealth FOI Act in 1991 to accommodate their new Privacy Act lead to this same change being made, which led to a number of difficulties. One of the most significant is the unintended inclusion of benign information concerning public servants.

As it stands, the definition of "personal information" would include the name, title and signature of a public servant whose name appears on a document in an applicant's file. Strictly interpreted, this would make virtually every personal application a mixed application. It also opens the door to consultation and exemption for this information,

which would be inappropriate in most cases. There may be some cases, especially the risk of harassment exemption, which may require consultation and exemption, but these would be rare. Deletion of staff names and details is contrary to the principles of accountability and openness which underpin FOI/RTI.

I strongly recommend consideration be given to a definition of "personal information" which excludes the name, position title etc of public servant along the lines of the Canadian and Irish definitions (relevant portion of the Irish definition only is quoted):

> *"but does not include:*
> *(I) in a case where the individual holds or held office as a director, or occupies or occupied a position as a member of the staff, of a public body, the name of the individual or information relating to the office or position or its functions or the terms upon and subject to which the individual holds or held that office or occupies or occupied that position or anything written or recorded in any form by the individual in the course of and for the purpose of the performance of the functions aforesaid,*
> *(II) in a case where the individual is or was providing a service for a public body under a contract for services with the body, the name of the individual or information relating to the service or the terms of the contract or anything written or recorded in any form by the individual in the course of and for the purposes of the provision of the service.."*

Without such an exclusion in the definition, it will also needlessly reduce the effectiveness of the Disclosure Log provisions, where publication is limited to documents which do "not contain personal information" (s.75(1)).

Disclosure Log

See note above re "personal information" and the Disclosure Log. The Disclosure Log exceptions should also include business information which was released only to the business owner/representative, or information released to the provider of confidential information or the researcher themselves.

There are a number of procedural issues about the information in the Disclosure Log. One is that there appears to be no charge to subsequent applicants, not even copying charges for large volumes of material. Of course there need be no charges for documents available for download, but there could be a burden on agencies if there is no scope for even reasonable hard-copy reproduction charges over a certain number of pages, or for more expensive formats such as photographs or audiovisual material.

Neither Confirm Nor Deny provision

I am very glad of the extension to personal information. However this provision should also apply to confidential information and business information. For example: a request for a copy of product information from company X – where revealing existence of product would be damaging for the business owner at early stages; confidential information which does not fit into law enforcement but which may reveal confidential source (public service –corroborative information from witnesses in a bullying investigation). It may be easier to simply allow NCND to apply to any

exemption as in the UK. Also, the wording does not address the difficult situations where the statutory lie is required, where even alluding to the possible existence of a document which may be exempt under a specified provision, causes problems.

Exemptions/ Refusals

Although the Solomon Report recommended moving away from the current approach to exemptions, the RTI Bill has produced a more complex approach, but not very different from the current FOI Act. Despite an objects clause suggesting otherwise, it enshrines certain exemptions as absolute, and others as having additional weight against disclosure. The net effect is that virtually no current exemption has been omitted or reduced in force, and there are even new grounds of exemption.

The lists of public interest factors are soundly based in general. However, a decision maker is limited in their ability to base the decision on these factors, in light not only of the absolute exemptions, but also of the "extra weight" factors, which encompass virtually all current exemptions. Other Acts overseas permit a far greater role for the public interest, some even going so far as to allow a total public interest override on all exemptions. While I am not proposing the latter, I am not sure the draft has moved sufficiently in the direction of placing the public interest factors at the centre of the decision making.

I have some concern about the wording of the public interest balancing test in ss. 46(b) / 48. The test needs to be applied separately to each segment of potentially exempt information rather than the document. Think of a document such as a set of minutes of a meeting with multiple topics, raising multiple public interest factors. If the weighing exercise is to be applied to the document, the balance may well come out wrong. I would like to test the application of multiple public interest factors/exemptions to a multi-topic document to be sure this provision works as intended.

Comments on specific public interest factors

Schedule 4 Part 1, Factor 2

This should be broadened to include "any person" misinterpreting or misunderstanding the document.

Time and harm-based factors

Part of the aim of the changes was to specify time and harm-based factors, such as the stage reached in a process when the application is determined. For example: before or after a decision is made, or before a process / investigation has been completed. The timing factors are relevant to many exemptions and should be made much clearer.

I would also recommend altering some aspects of the current factors. Factors such as the nature of the information (whether it is personal, business, confidential etc) should be factors against disclosure in Schedule 4 Part 3. Any additional weight to be accorded those factors in Part 4 should come from the seriousness of the consequences of disclosure, ie: the harm test. Although this does not fit neatly with

the proposed structure of repeating the existing exemptions in Part 4, it is more accurate conceptually about how to make a good decision about the weighting of those public interest factors.

Schedule 4 Part 3: Factor 22: Disclosure of the information is prohibited by an Act.

I do not see why should this be included as a factor when the Acts which override FOI are listed in Schedule 3 Clause 12, and the RTI states in s.7 that it overrides other Acts prohibiting disclosure.

Schedule 4, Part 4, Item 4: Disclosing deliberative processes

I question the inclusion of the deliberative process factor as having extra weight. This makes the exemption stronger than it is in its current wording in the FOI Act. There should not be additional weight given to this merely because of the **form** of the document, rather than any factor of **harm**. The most likely harm is already dealt with in Schedule 4 Part 3 ("Disclosure of the information could reasonably be expected to prejudice a deliberative process of government.").

Also, of all the exemptions, this is one where a TIME-based element would be entirely appropriate. Part of this would be a reference to the stage of decision-making and the level of existing public knowledge about the decision. (Eg: once a decision is made, and announced, most of the potential harm to the decision-making process has disappeared). A second aspect is a specified period of time after which the exemption is no longer available. The period of 10 years is specified for the parallel exemption in the Victorian, Tasmanian, WA and NT Acts. This is the same time limit specified for the exemption of Cabinet documents. It would seem logical that deliberative process documents would receive no higher level of protection than Cabinet documents, which would usually be more sensitive. It is appropriate and necessary to specify the exceptions in relation to the deliberative process but I am not sure that the best way to achieve this is to repeat the entire exemption in Part 4.

The importance of getting the right approach to the deliberative process exemption cannot be overemphasized, when the whole thrust of the RTI reforms is about opening up government. The two key exemptions requiring amendment to achieve this are the Cabinet exemption and the deliberative process exemption.

Other Matters

Third Party Consultation (s.37 RTI)

As drafted, the provision does not appear to cover all possible grounds upon which a third party may reasonably wish to object to disclosure. It should include all elements of Schedule 4, ie: where they could contend that information is exempt or disclosure contrary to the public interest. There are also some issues with definitions here.

Applications on behalf of children

Some of the reasoning behind the current s.50A provision related to the issues raised by the fees and charges regime as applied to applications by parents. However, it is

vital that provisions such as these are not interpreted to deny access to young persons of 15-17 years of age who have previously been properly regarded as capable of making their own FOI applications. Many of these young people have been dealing independently with the government as clients of various agencies. The recent ALRC "For Your Information" Report (at 68.112) recommends the minimum age for presumption of capacity be set at 15. Perhaps this could be reflected in the drafting of this provision.

"Authorised person" (s. 44 IPA, s.23(5) RTI)

I do not see why the fact that someone is appointed under a power of attorney (which may well relate only to financial matters) or an executor under a will (similarly focussing on property and financial matters) should be regarded as prima facie authorised to see all information about the incapable or deceased person. Such information may be highly sensitive and completely irrelevant to their role as executor / attorney. The same tests should be applied to an application by them as to any other application for personal information. Also, does this term include solicitors?

Proof of identity (RTI s.23(2))

Should be a threshold requirement for a valid application that includes **any** personal information under both RTI and IP. Although it was only a requirement under the current FOI Act prior to access being given, in practice, most agencies required POI before commencing processing. Even a preliminary consultation with an applicant to clarify the terms of a request could reveal sensitive information ("Do you want documents concerning your admission to the general hospital ward / the psychiatric ward?"). It appears that POI is required at the start under IPA s.45 - but see 77(3).

Approved form (RTI 23(2)(a))

The aim of the reforms was at least in part to simplify the process of seeking access to information. Whatever "form" is approved should be very flexible so that applicants can write in the form of letters, and not be required to complete a particular pre-printed form. Not all applicants have access to the internet and printing facilities, and the Act should not penalize those already disadvantaged by the Digital Divide.

Summary of personal information (s.83 IPA)

I am not sure how well this would work; a lawful refusal, for example, would often be that it is the personal information of another person or inextricably intertwined with their own. Then virtually any information disclosed in a summary (because it relates to an individual known to the applicant) would be exempt. It should say that the summary should not disclose any exempt information, or specify that it only contains the personal information of the applicant, not otherwise exempt.

Schedule of Documents (RTI s.36)

The requirement to produce a schedule of documents may cause problems. It depends on the guidelines /approved form of the schedule, but unless it is permissible to group/categorise documents fairly broadly, even compiling such a schedule could take

2-3 hours per 100 pages. Scheduling a very complex topic/file/set of documents might require even longer. The compiler has to be careful not to describe documents in a way that may reveal exempt content, and without having determined the documents at this stage of processing, this would be a more difficult and time-consuming task than it would after the exemption status of the documents has been determined. Could also be difficult in situations which ultimately require a Neither Confirm Nor Deny response at least in part, as the specification of the number of pages / categories may make this response redundant. Is scheduling required for applications which are eventually refused under sections 40 or 43?

Previous Applications (RTI S.43(5))

This appears to preclude an application for the FOI processing file ("FOI^2" requests) even if it is the first such application. I am not sure why this should be precluded.

I regret that time did not permit me to address every issue or to comment in more detail. I would be happy to provide further comments if that would be useful during your review process.

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