Submission to the Department of Prime Minister and Cabinet on the Exposure Draft Freedom of Information Amendment Reform Bill 2009

Introduction

The proposed reforms to the federal FOI Act are very welcome and long overdue. The first steps, to repeal the provisions concerning conclusive certificates, were a great beginning, and will allow the proper functioning of the exemption provisions, especially relating to deliberative process claims. This is an area where the development of case law at the federal level lags behind that of most of the state jurisdictions, where the public interest arguments can be fully debated without the restraining aspect of the conclusive certificate.

The reforms in the present Bill are in the right direction of opening up government information to improve accountability. In particular I applaud the increased emphasis in the drafting favouring disclosure, the expansion of the proactive publication scheme, the increased role given to the public interest test and the establishment of the Information Commissioner.

Although time and other commitments prevent me making as detailed a submission as I would have wished, I have some comments on specific aspects of the legislation which are below. I would be happy to elaborate on any of these or be contacted for further comments if that would assist.

Procedural Matters

Protections and Offences

Consideration should be given to enacting the provisions of the draft NSW Open Government Information Bill, which protect decision makers from undue influence being brought to bear by senior officers:

> ***111 Offence of acting unlawfully***
> *An officer of an agency must not make a reviewable decision in relation to an access application that the person knows to be contrary to the requirements of this Act.*
> *Maximum penalty: 100 penalty units.*
>
> ***112 Offence of directing unlawful action***
> *A person (the **offender**) must not:*
> *(a) direct an officer of an agency who is required to make a decision in relation to an access application to make a reviewable decision that the offender knows is not a decision permitted or required to be made by this Act, or*
> *(b) direct a person who is an officer of an agency involved in an access application to act in a manner that the offender knows is otherwise contrary to*

the requirements of this Act.
Maximum penalty: 100 penalty units.

113 Offence of improperly influencing decision on access application
*A person (the **offender**) who influences the making of a decision by an officer of an agency for the purpose of causing the officer to make a reviewable decision that the offender knows is not the decision permitted or required to be made by this Act is guilty of an offence.*
Maximum penalty: 100 penalty units.

I agree with the expansion of the protection from legal liability for decision makers giving access to information other than under the Act (sections 90-92). This is essential to facilitate and encourage routine access and increased publication of information. I also recommend including an offence provision similar to that proposed in NSW for destruction or concealing of records:

115 Offence of concealing or destroying government information
A person who destroys or conceals any record of government information for the purpose of preventing the disclosure of the information as authorised or required by or under this Act is guilty of an offence.
Maximum penalty: 100 penalty units.

Vexatious Applicants

I agree with the inclusion of provisions (sections 89K – N) to deal with vexatious applicants. Although such a situation is rare for most agencies, there has always been a need for these provisions. I would recommend also giving the power to agencies to refuse to deal with a request on the ground that an application or applicant is vexatious. This refusal would of course be subject to review.

Neither confirm nor deny provision (s.25)

This should be applicable to any ground of exemption, as required. The UK Act allows the application of this provision across the board. Historically in Australia it has been limited to a few provisions, but in practice, it is needed for many others. It has been extended in the recent Queensland amendments to cover additional exemptions. I would argue that it is necessary in particular for the personal information exemption, for example to deal with a request for records concerning the psychiatric or sexually transmitted diseases history of another person.

Third Party Consultation provisions (Ss. 26A- 28)

Confidential information is an area to which the third party provisions should be extended. Most confidential information may be covered by personal privacy or by commercial information, but there would be some situations where it is not (for example, an informant providing allegations of wrong doing about another person, or a confidential submission to a government inquiry). Although this could be argued to be an issue of personal privacy, I think it is more accurately seen as relating to a confidential transaction and the provider should be consulted as a third party. The

Queensland third party consultation provision (s.51 in the current Act) is a possible model, not requiring the decision maker to link the third party to a specific exemption.

One issue with the drafting of all of the consultation provisions is that they require the decision maker to have made a determination that "(ii) subsection 11A(5) does not apply to the document", that is, they have already made a decision concerning public interest arguments. It may be a fairer process if the consultation could occur prior to this determination, as the views of the third party could then be taken into account by the decision maker before reaching this decision.

In relation to section 27A, Consultation – Documents Affecting Personal Privacy, I would recommend altering the term "person's legal personal representative" to "eligible family member", as for example in Queensland's section 51(3). Many deceased persons would not have a legal personal representative, and there are issues involving payment for costs incurred in consultation with solicitors acting in this role.

(3) In this section--

adult child means a child who is 18 or more.
adult sibling means a sibling who is 18 or more.
eligible family member, of a deceased person, means--

(a) a spouse of the deceased person; or
(b) if a spouse is not reasonably available--an adult child of the deceased person; or
(c) if a spouse or adult child is not reasonably available--a parent of the deceased person; or
(d) if a spouse, adult child or parent is not reasonably available--an adult sibling of the deceased person; or
(e) if a spouse, adult child, parent or adult sibling is not reasonably available and the deceased person was not an Aboriginal person or Torres Strait Islander--the next nearest adult relative of the deceased person who is reasonably available; or
(f) if a spouse, adult child, parent or adult sibling is not reasonably available and the deceased person was an Aboriginal person or Torres Strait Islander--a person who is an appropriate person according to the tradition or custom of the Aboriginal or Torres Strait Islander community to which the deceased person belonged and who is reasonably available.

person concerned, in relation to a person who has died, means the deceased person's eligible family member, or, if 2 or more persons qualify as the deceased person's eligible family member, 1 of those persons.

review period means the period within which any application for review under this Act may be made.

(4) For the definition eligible family member, a person described in the definition is not reasonably available if--
(a) a person of that description does not exist; or

(b) a person of that description can not be reasonably contacted; or
(c) a person of that description is unable or unwilling to act as the person concerned for this section.

Exemptions

Cabinet / Deliberative Process

The exemption in section 34 has been expanded from its original form to include: "(c) it was brought into existence for the dominant purpose of briefing a Minister on a document to which paragraph (a) applies". While this was also done in the amendments made to several of the state FOI Acts some years ago, it increases substantially the amount of material now covered by this absolute exemption and goes beyond its purpose of protecting Cabinet confidentiality.

Cabinet documents should be exempt for a period of only 10 years, in keeping with legislation overseas and in Australia (eg: NSW, WA).
The exceptions in s.34(6) and 36(2) should be expanded to include: "purely factual or statistical material".

Law Enforcement

The exclusion enacted, for example, in the Queensland FOI Act Section 42(2), should be included in s.37, as was recommended by the ALRC.

(2) Matter is not exempt under subsection (1) if--
(a) it consists of--
(i) matter revealing that the scope of a law enforcement investigation has exceeded the limits imposed by law; or
(ii) matter containing a general outline of the structure of a program adopted by an agency for dealing with a contravention or possible contravention of the law; or
(iii) a report on the degree of success achieved in a program adopted by an agency for dealing with a contravention or possible contravention of the law; or
(iv) a report prepared in the course of a routine law enforcement inspection or investigation by an agency whose functions include that of enforcing the law (other than the criminal law or the law relating to misconduct under the Crime and Misconduct Act 2001); or
(v) a report on a law enforcement investigation that has already been disclosed to the person or body the subject of the investigation; and

(b) its disclosure would, on balance, be in the public interest.

The threshold of harm for the application of S.37(1)(c) – *"(c) endanger the life or physical safety of any person"* - is very high, and based on case law from several jurisdictions, has little likelihood of success. The situations causing most concern amongst agencies are closer to the risk of stalking / harassment rather than a threat to

life or physical safety. Many of the (relatively rare) situations which cannot otherwise be protected consist of the names of public officials dealing with clients who may be mentally ill or aggrieved with an agency's staff. The staff names would not usually qualify for exemption under s.41 and their information would not usually be regarded as obtained in confidence. An amendment which was made in Queensland, and in Ireland, and is proposed for NSW, addresses this. The additional ground of exemption is:

> *"A document is an exempt document if it contains matter the disclosure of which could reasonably be expected:*
> *.....to result in a person being subjected to a serious act of harassment or intimidation".*

Personal Information

I understand that some of these comments may be redundant when the review of privacy is completed and the access and amendment rights may be relocated to the Privacy Act. (I have a number of comments I would like to make about such a change, however I will wait until the discussion paper or draft legislation is released).

Personal Information – Definition

The term "personal information" should be defined to specifically exclude certain aspects relating to public officials. A good example is in the Irish FOI Act (based on the Canadian Privacy Act s.3):

> *s. 2* ***"personal information"*** *means information about an identifiable individual that:*
> *(a) would, in the ordinary course of events, be known only to the individual or members of the family, or friends, of the individual, or*
> *(b) is held by a public body on the understanding that it would be treated by it as confidential,*
>
> *and, without prejudice to the generality of the foregoing, includes:*
> *(i) information relating to the educational, medical, psychiatric or psychological history of the individual,*
> *(ii) information relating to the financial affairs of the individual,*
> *(iii) information relating to the employment or employment history of the individual,*
> *(iv) information relating to the individual in a record falling within section 6 (6) (a),* [(a) is a personnel record, that is to say, a record relating wholly or mainly to one or more of the following, that is to say, the competence or ability of the individual in his or her capacity as a member of the staff of a public body or his or her employment or employment history or an evaluation of the performance of his or her functions generally or a particular such function as such member,]
> *(v) information relating to the criminal history of the individual,*
> *(vi) information relating to the religion, age, sexual orientation or marital status of the individual,*

(vii) a number, letter, symbol, word, mark or other thing assigned to the individual by a public body for the purpose of identification or any mark or other thing used for that purpose,
(viii) information relating to the entitlements of the individual under the Social Welfare Acts as a beneficiary (within the meaning of the Social Welfare (Consolidation) Act, 1993) or required for the purpose of establishing whether the individual, being a claimant (within the meaning aforesaid), is such a beneficiary,
(ix) information required for the purpose of assessing the liability of the individual in respect of a tax or duty or other payment owed or payable to the State or to a local authority, a health board or other public body or for the purpose of collecting an amount due from the individual in respect of such a tax or duty or other payment,
(x) the name of the individual where it appears with other personal information relating to the individual or where the disclosure of the name would, or would be likely to, establish that any personal information held by the public body concerned relates to the individual,
(xi) information relating to property of the individual (including the nature of the individual's title to any property), and
(xii) the views or opinions of another person about the individual,

but does not include: **[my emphasis]**
(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, or
(III) the views or opinions of the individual in relation to a public body, the staff of a public body or the business or the performance of the functions of a public body;

Australian examples can be seen in the WA Act (Schedule 1 Clause 3(3)):

"(3) Matter is not exempt matter under subclause (1) merely because its disclosure would reveal, in relation to a person who is or has been an officer of an agency, prescribed details relating to —
(a) the person;
(b) the person's position or functions as an officer; or
(c) things done by the person in the course of performing functions as an officer.

(4) Matter is not exempt matter under subclause (1) merely because its disclosure would reveal, in relation to a person who performs, or has

performed, services for an agency under a contract for services, prescribed details relating to —
(a) the person;
(b) the contract; or
(c) things done by the person in performing services under the contract."

And in the draft NSW Open Government Information Bill :

"(3) Personal information does not include any of the following:
(c) information about an individual (comprising the individual's name and non-personal contact details) that reveals nothing more than the fact that the person was engaged in the exercise of public functions".

If an exclusion for basic aspects of public servants' information is not incorporated, it will lead to excessive third party consultation, exemption of fairly trivial information, and reduce accountability. Public servants must have appropriate rights of privacy, but where accountability outweighs that, as in most disclosures under FOI where they are simply signing off on documents about other topics, they should not be able to remain anonymous.

Personal Information Exemption

To assist decision makers in assessing the applicability of the exemption in section 41, it may be necessary in guidelines to make clear that the prohibition on taking the applicant's reasons into account in section 11(2) does not prevent the decision maker taking into account for section 41(2) any relationship between the applicant and the third party or factors which may be set out in the applicant's reasons for seeking access.

Consideration could also be given to a provision similar to that enacted in the Queensland FOI Act to protect the rights of children as applicants and as third parties:

50A Applications on behalf of children and matters affecting personal affairs of children

(1) Without limiting the ability of persons to make applications on behalf of children, an application may be made under section 25 on behalf of a child by a parent or a person having guardianship of the child.

(2) If an application made under section 25 states that it is made on behalf of a child by a parent or another person having guardianship of the child--
(a) the application must state the name of the child and the name of the parent or other person; and
(b) the child is the applicant for the purposes of division 1A; and
(c) section 105 does not apply in relation to the application but, if the application is for documents that relate to the personal affairs of the child and that contain matter that would be exempt matter if the application were made by a person (other than the child or the child's agent), an agency or Minister--
(i) must not give access to the information unless the agency or the

Minister is satisfied of the identity of the child and the parent or other person; and
(ii) must ensure, by the adoption of appropriate procedures, that any information intended for the child is received only by the parent or other person.

(3) If an application is made under section 25 by, or on behalf of a child, then, despite section 44(2), if a document contains information concerning the personal affairs of the child, the agency or Minister may refuse access to all or part of the information if the agency or Minister considers access would not be in the best interests of the child.

(4) If an application is made under section 25 by a child, the agency or Minister, in deciding whether to give the child access to all or part of the information, must consider whether the child has the capacity to--
(a) understand the information and the context in which it was recorded; and
(b) make a mature judgment as to what might be in his or her best interests.

(5) In this section--

child means an individual who is under 18.

guardianship includes guardianship, whether sole guardianship or otherwise and whether for a particular purpose or otherwise, under a law of the Commonwealth or of a State or Territory.

parent see the Child Protection Act 1999, section 11(1) to (4).

Note--
Child Protection Act 1999, section 11(1) to (4)--
11 Who is a parent
(1) A parent of a child is the child's mother, father or someone else (other than the chief executive) having or exercising parental responsibility for the child.
(2) However, a person standing in the place of a parent of a child on a temporary basis is not a parent of the child.
(3) A parent of an Aboriginal child includes a person who, under Aboriginal tradition, is regarded as a parent of the child.
(4) A parent of a Torres Strait Islander child includes a person who, under Island custom, is regarded as a parent of the child.

Personal Information – Access via qualified person

Section 41(5) should be amended to allow the access to be given to an appropriate qualified person, not necessarily only to a person qualified in the discipline of the document concerned. By way of illustration: it would usually be more appropriate, and convenient, for a patient to have access to their medical information through a nurse, who could explain information created by medical and other health practitioners. Medical practitioner resources are scarce and expensive and not necessary to provide access in every situation (although for some information, such as mental health information, a psychiatrist may be the most appropriate person).

Exemptions and Public Interest Test

The public interest test should be applied to a number of exemptions which are currently absolute: legal professional privilege, and breach of confidence. There is precedent for both of these overseas (in the UK, legal privilege, and in Ireland for breach of confidence being subject to the public interest test).

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Note about the author:
I have been working in the field of FOI since late 1981. Initially I was involved in the implementation of FOI in the Commonwealth government, then in NSW, Queensland, and the Northern Territory. I have also worked on implementing FOI in Ireland, the United Kingdom, Cayman Islands and China. Since leaving the public service in 1993 I have been an FOI practitioner, consultant and trainer in several jurisdictions in Australia and overseas. I have been the Director of Information Consultants Pty Ltd since 1998. I was appointed an Honorary Senior Research Fellow with the Constitution Unit at University College London in 2003. In 2006 I co-authored a book on "FOI: Balancing the Public Interest" (2nd edition, published by UCL London) and my most recent conference paper is at: http://www.icic2007.org.nz/programme_day2.html (link under my name for 1.30 session).