Submissions concerning the proposed reform of Freedom of Information (FOI) legislation

The following submissions are made in response to the invitation made by the responsible Minister to comment upon the exposure drafts of proposed legislation to this effect.

Commentary is made upon the following draft legislation:

Freedom of Information Amendment (Reform) Bill 2009

1. Cl. 8C(2) - carve-out of exemptions arising under other enactments

The potential of this provision, by reason of the mere force of another enactment to contrary effect, is to gut the whole policy aim articulated by the Ministerial Statement accompanying the exposure draft.

On the proper construction of the provision, the other enactment, whatever it is (which may be a regulation or a statutory rule), operates to relieve the relevant agency of any obligation to disclose.

This provision ought be amended, so that there is a presumption in favour of the overriding operation of the amended FOI legislation. This presumption ought be made rebuttable, but upon the footing that the relevant agency has an obligation to demonstrate on reasonable grounds that the restriction or prohibition arising under the other enactment properly ought be permitted to have effect in the circumstances of the application made for access.

Absent such a change in the draft language, the whole proposal for a change in policy stance toward FOI management. and bureaucratic compliance with it, will be set at nought. It will matter not that all of the factors contained within cl. 11B direct the attention of the relevant decision maker to a more critical method of assessment, for they will be irrelevant to the dictates of the other enactment.

Left in its current form, it is virtually beyond argument that Sir Humphry Appleby would smile upon it. Administration of the regime contemplated by the Bill, having been defenestrated in that way, would be a solemn farce when compared with the statement of ministerial intent.

2. Cl. 34 - dominant purpose test applied to Cabinet documents

In a broadly analogous fashion, the application of a "dominant purpose" test to Cabinet documents is a mechanism by which the veneer of access to such materials will be applied but by reason of which the uniform result will be the denial of access.

If, indeed, one of the purposes of the legislation is to overcome irrelevant concepts such as political embarrassment in the assessment of whether documents are produced or withheld, then the approach must be that a document was brought into existence for the *sole* purpose of submission to cabinet or briefing to a Minister.

The application of a sole purpose test will compel the creator of such documents, at or before the time of their creation, to assess their content, without the comfort of knowing that meeting the dominant purpose test will be a very low hurdle, and reflexively conclude that a document is protected. It will also prevent the de facto rolling up of documents into such a category, whatever the dictates of the Bill to the contrary might be.

Again, this is a provision that it may confidently be assumed will receive the Humphry Appleby seal of good administration.

3. Cll. 47B, 47C, 47D, 47E - public interest conditional exemption - government related activities

While these matters are a restatement of the provisions of the current Act, there is lost an opportunity to take such matters out of the automatic rendering of them as exempt, with the presumption in favour of disclosure being established, and rendered subject to an objective mechanism, which only if satisfied, may result in exemption.

Such mechanisms ought be incorporated into these provisions of the Bill.

4. Cl. 47F - public interest conditional exemption - personal privacy

The gravamen of this clause in the Bill, which purports to confer expertise of a type that is unlikely to reside in the principal officer or the Minister, is the filtration out of a document that might be detrimental to the applicant's physical or mental health or well-being.

Such a prima facie assessment looks to be suspiciously like a mechanism for the defeat of the asserted purpose of avoiding political embarrassment. Yet more defenestration of the substance of the Bill, and yet more pleasure conferred on Sir Humphry Appleby, under the ostensibly laudable purpose of protecting the applicant. Conformably with the mental health bias of the provision, it would appear that the psycho-pathology underlying it is not promising.

It is much more rational to assume that most applicants will not be rendered unwell by being confronted by the documents that their Government has gathered about them. If a public servant or Minister has been sufficiently indiscreet as to record personal opinions about an applicant, there ought not be any escape from the consequences of such conduct. This provision is quite retrograde and ought be omitted.

5. Cl. 47J - Public Interest conditional exemptions - the economy

The vice in this proposed clause is that the notion which is connoted by the phrase Australia's economy is so ill defined, and potentially touches or concerns so many elements of day-to-day activity within Australia, that the application of the objective test of "substantial adverse effect" is rendered almost wholly meaningless.

In the fashion, for example, that a substantial adverse effect upon a company is accorded materiality if it affects more than 5% of its share capital or 10% of its assets, a mechanism which is quantitatively relevant and referable to the extent and scale of the Australian Economy, rather than merely a statement of qualitative intent, suggests itself.

Again, the potential for matters to be carved out, which really out be within the ambit of operation of the Bill, is quite profound. The corollary, of course, is for the further defenestration of the effect of the provision.

Such a mechanism, triggering this provision only when its threshold requirements are met and which otherwise would not be enlivened, should accompany this machinery provision. By way of example, documents that relate to the non accelerating inflation rate of unemployment, would appear to demonstrate this point.

6. Part VI - Internal Review of Decisions

There is little to recommend internal reviews of decisions to deny access to documents.

If the intention is truly that a certain amount of sunshine is to be permitted to fall upon the documentation generated by Government, and that external scrutiny is desired, there really is no basis for other than the making of a decision by an appropriate decision maker, and thereafter for any review to be external in its entirety.

There ought be no second bites at the cherry. The only effect is one of delay. The Part ought be omitted.

7. Part VII - Review by Information Commissioner

The nature of the review mechanism would appear to be a stripped down form of that available under the *Administrative Decisions (Judicial Review) Act*.

It would seem more sensible if the process to be conducted by the Information Commissioner was less bureaucratic and more streamlined, with the emphasis rather on speedy determination than an administrative counsel of perfection.

Appeal can still proceed to the Administrative Appeals Tribunal

Further, any judicial review of administrative decisions in the ordinary course really ought be matters for the Federal Magistrate's Court, with its lower overall costs of litigation.

The machinery, with respect, does not appear to match the evident enthusiasm of the Ministerial Statement accompanying the exposure draft. It ought be streamlined, if that concept and administrative decision making are not oxymoronic.

8. Div. 9 of Part VII - Evidence by Inspector General of Intelligence and Security

It is quite difficult to comprehend why, in the case of such documents as relate to national security under cl. 33 of the Bill, it is necessary for the Information Commissioner to take oral evidence from the Inspector General of Intelligence and Security. The matters which are apt to arise in such circumstances would fall from the papers, and can be rendered no more compelling by being delivered *ex tempore*.

The potential for delay, at least, in such a mechanism is self-evidently profound.

Moreover, this assumes that the Director General does not afford himself his or her own determination under cl. 55ZB that he or she cannot give evidence at all, which conclusion does not even require the imposition of an objective test. The setting up of a Kafkaesque straw man/woman to be knocked down at will appears to be in prospect.

The provisions in the Division ought be omitted in their entirety.

9. General

While the commitment of the Government is stated to be the restoration of trust and integrity to the use of Australian Government information, and the promotion of greater openness and transparency (presumably also to Australian Government information), the form of the Bill, which is clunky and bureaucratic, really rather is a case of old wine in new bottles.

If this Bill represents the pinnacle of citizens' rights to know (whatever that might mean), that it would appear that all such citizens are destined only for disappointment.

There is also an element about this exercise of the placement of the cart before the Horse.

If there is to be the introduction of further Bills into the Parliament on this issue later in the year, it is not at all clear as to why submissions are required by 15 May 2009.

What appears to be in the offing, under the rubric of high minded generalisations and statement of principle, is an exercise directed more to form, than substantive improvement in the mechanisms by which it is intended that Australian Government Information will become (if it not be already) a national resource managed in the public interest.

The contemplated Bill, regrettably, is neither a thing of beauty, nor is it a joy forever.

The better approach would be to conduct the whole of the exercise under the auspices of the Australian Law Reform Commission, so that the Government would have the basis, rooted in past practice, of ignoring independent recommendations for change in their entirety.