

Freedom of Information (FOI) Reform

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These written comments are intended to supplement comments made verbally at your consultation session in Canberra last week.

A Information Commissioner Bill

I do not propose to comment in any detail on this Bill. I have long argued that the FOI Act needs to have an oversight body such as an Information Commissioner, which can play an active role in publicising its existence, monitor compliance with its provisions and initiate actions to remedy factors which are found to inhibit its effective operation. The creation of new office of FOI Commissioner is there a very welcome development.

The concept of a new office overseen by three statutory office holders as specified appears sensible. Privacy and FOI regimes ideally should exist within an integrated information management regime but their essential focus is different (ie, promoting transparency and accountability as opposed to providing individuals with an appropriate measure of control over their personal records). It is therefore important to have an individual champion/regulator for each within any coordinated regime.

B Freedom of Information Amendment (Reform) Bill

The package outlined in this exposure draft contains an impressive set of reforms which address many of the key deficiencies in the current Freedom of Information Act and its administration. Provided that they are accompanied by a pro-disclosure cultural shift within agencies, these reforms have the potential to substantially invigorate the Act's operation and better enable it to achieve its democratic objectives.

It would, however, assist to promote a more pro-disclosure culture within agencies if the package contained additional measures which attached appropriate sanctions for non-compliance. The requirement to forgo charges in the case of delay should offer an important incentive to comply with response requirements. However, there are no similar incentives to comply with new publication requirements or to ensure that contractors' documents are made available as required.

As discussed at the consultation session, the Act as amended would also benefit from streamlining to reduce unnecessary complexity in its language and structure. I understood that this was not feasible at this stage but would suggest that it might be a task for the ALRC when it reviews the operation of the amended Act.

Preliminary matters

Objects clause

The new objects clause is a very positive aspect of the Bill. Given the longstanding tradition of public sector secrecy and the natural tendency for agencies not to expose their activities to public scrutiny, it is very important that freedom of information

legislation should clearly mandate a pro-disclosure stance. The current objects clause has not had this effect due to the proviso in the existing s 3(1)(b) which has generally been interpreted as requiring a more neutral stance.

Contractors

The new s 6C is also a positive feature of the package given the extent of outsourcing of government functions, including the provision of core government services and facilities such as welfare services. However, while this provision is useful, it is also important to 'close the loop' by providing for some feedback mechanism in situations where an agency has failed to implement the required contractual measures or where it is unable to recover a document from a contractor despite taking reasonable steps to do so. Arguably there should be some procedure whereby the Information Commissioner is informed of these circumstances and required to implement appropriate measures to redress them. For example, a refusal or inability by a contractor to provide documents as required should be taken into account in deciding whether to renew its contract or to allow it to bid for other contracts.

Publication of information outside the Act

This is another welcome aspect of the package which reinforces the requirement that information be provided to the public on the initiative of agencies as distinct from their simply responding to specific obligations in the Act.

Exclusions

I would argue as a matter of principle that it is preferable to redraft or expand exemption provisions to provide appropriate exemption for documents that need to be withheld from access rather than excluding specific bodies from the Act either totally or in relation to specified documents.

Removing a body entirely from coverage under the Act has the consequence that all aspects of its activities are removed from public scrutiny irrespective of whether or not their disclosure is likely to cause harm.

The exclusion of bodies based on national security concerns has assumed greater significance in light of the recent increases in the powers of security bodies post September 11 and the attendant importance of ensuring accountability for their activities. The anti-terrorism measures introduced to address perceived terrorism threats in Australia have been the subject of extensive criticism because of their potential to undermine civil liberties.¹ Increases in the surveillance powers of security and law enforcement bodies add to the imbalance in power between citizens and their governments and it is therefore especially important that such bodies are subject to scrutiny to ensure that they are not abusing their powers

¹ See, for example, Claire Macken, "Preventative detention in Australian law: issues of interpretation" (2008) 32 *Criminal Law Journal* 71-89; Michael McHugh, "Protecting democracy by preserving justice : 'even for the feared and hated'" (2007) 8 *Judicial Review* 189-213; Sarah Joseph, "Australian counter-terrorism legislation and the international human rights

Publication requirements

The new and expanded publication requirements are another welcome feature of the reform package. Publication has a vital role to play in promoting transparency. However, the existing publication regime neither provides for any centralised coordination nor contains any mechanism for enforcing compliance. Consequently, this aspect of the Act's operation has been one of the most disappointing. Information is not always made available as required, and even where it is its existence is not well known and, not surprisingly therefore, not well utilised.² Moreover, there has been an overwhelming failure to make effective use of new technologies to ensure the widespread dissemination of this information.

As I have previously noted, the current Act depends too much on 'a 'pull model' which focuses on the dissemination of information in response to the making of individual requests for access rather than on a 'push model' which emphasises the proactive publication of information'.³ The proposed reforms introduce an important element of "push", although they are dependent for their effective operation on the issuing of guidelines by the Information Commissioner to ensure consistency and on a regime which is as informative as possible to potential users. As discussed at the consultation session, there should be a positive obligation for the Commissioner to publish guidelines as soon as possible.

Access provisions

Section 11

I note that the reform package does not involve any change to s 11(2). The Commonwealth FOI Act differs from other Australian FOI Acts in specifically providing that an applicant's right of access is not affected by any reasons that he or she gives for seeking access or by a decision-maker's belief as to what those reasons might be. As I have previously explained this is problematic for the following reasons:

"There is a general public interest in promoting the public disclosure of government information but its weight will vary according to the context, which may include the personal circumstances of the individual. Arguably therefore an individual's interest should be taken into account to the extent that it adds to the overall interest in disclosure. To allow it to operate as a negative factor, however, arguably threatens to undermine the basic principle of universal access."⁴

I would therefore recommend that s 11(2) should be amended to include the preliminary words "Subject to (3)," and that a further sub-section should be added as follows:

11(3)A person's identity or reasons for seeking access may be taken into account in the context of evaluating the public interest in relation to

² See ALRC/ARC, *Open Government*, at [7.7] – [7.8].

³ M Paterson, *Freedom of Information and Privacy in Australia: Government and Information Access in the Modern State* (LexisNexis/Butterworths, 2005) [12.11].

⁴ Moira Paterson, *Freedom of Information and Privacy in Australia: Government and Information Access in the Modern State* (LexisNexis/Butterworths, 2005) [5.34].

conditional exemptions, but only where those reasons add to the public interest in disclosure or reduce the public interest in withholding access.

I realise that this issue may become of less significance if and when access to an applicant's own personal records is administered via the privacy regime. However, there may be situations where an applicant requires access to records which do not qualify as his or her own personal records but which shed light on a matter personal to that applicant. Moreover, there would be advantages in aligning the two regimes as far as possible (for example, to deal with the situation where the documents to which an applicant requires access contain a mixture of personal documents and non-personal documents).

Charges

The removal of the application fee and charges for personal access are both welcome as is the free amount of time for processing charges.

Concerning the proposed review of charges mentioned in the Companion Guide, I would suggest that one matter which is not specifically listed which deserves consideration is the merit of a system based on the time spent in locating documents.

As I noted in my submission to the Moss enquiry:

“The ability to charge for the time spent in locating documents does nothing to encourage agencies to adopt more efficient information handling procedures. Current methods used to calculate costs are open to criticism on the basis that they provide no incentive to improve inefficient record-keeping systems (because they allow agencies to charge for the time spent in searching for documents). They may also result in charges that are both substantial and difficult to predict, thereby providing scope for charges to be used as a means of deterring unwelcome requests.”⁵

To the extent that charges are still calculated on the basis of the time involved in processing requests, I would suggest that it is important to ensure that the Information Commissioner exercises an active role in monitoring the amounts of time claimed for searches and in ensuring that agencies implement appropriate information management systems where those amounts appear to be excessive.

The requirement to consider imposing differing charges for journalists and others is important. The media, in particular, have an important role to play in enabling the Act to achieve its objectives. As described in the context of the US FOI Act:

“One individual, even a trained researcher, can track down only a limited number of leads upon which to base an FOIA request, while newspapers and television stations, with large staffs, can put teams to work on a problem; they also have the resources to pay for the copying costs of large numbers of documents.”⁶

⁵ In the case of the Commonwealth Act, the Commonwealth Ombudsman has suggested that the large discrepancy between the amount of charges notified and those ultimately collected lends weight to criticisms that some agencies may be setting unreasonably high charges to process requests: Commonwealth Ombudsman, *Needs to Know; Own Motion Investigation into the Administration of the Freedom of Information Act 1982 by Commonwealth Agencies*, Canberra, 1999, at [4.14].

⁶ See US Department of State, ‘Freedom of the Press’ in ‘Rights of the People: Individual Freedom and the Bill of Rights’ (Washington, DC 2003)

However journalists generally have limited budgets to pay for FOI searches.

The potential for charges to influence usage of FOI by the media is graphically illustrated by the Irish experience following the introduction of charges into the Act in April 2003. In his review of the change in the law, the Irish Commissioner found that usage by journalists declined steadily throughout 2003, falling by 83% between the first quarter of 2003 and the first quarter of 2004 with the number of requests continuing to decline.⁷

Under the US FOI Act, charges for search and retrieval do not apply to requests for access by educational or non-commercial scientific institutions, whose purposes are scholarly or scientific research, or by representatives of the news media unless they are made for commercial purposes.⁸

Time limits

It is unclear why there has been a failure to reduce time limits to 14 days consistently with the recommendation in the ALRC's Open Government report, especially given improvements in computer technology which should have made it easier and faster to search for and locate documents.

If time limits are too long, this may have the consequence that issues are no longer of current interest by the time the information about them becomes available. Expedited searches provide a useful mechanism for addressing this problem. The US Act permits an expedited search where both the request is made by a person primarily engaged in disseminating information to the public and the information sought is urgently needed to inform the public about some actual or alleged federal government activity.⁹

Exemptions

The redesign of the exemption regime has a number of very positive features although it arguably does not go far in enough to address issues that inhibit the Act's potential to make government agencies more accountable for their activities.

Positive aspects including the following:

- the simplification of the public interest test adds clarity to Act except in the case of the personal privacy and business affairs exemption provisions as outlined below.
- the specific requirement to assess whether a document is conditionally exempt *at the time* provides a worthwhile reminder that the status of a document as conditionally exempt may change with the passage of time.
- the insertion of an inclusive list of factors favouring disclosure reinforces the objects clause but without limiting the range of factors that may be potentially relied upon.

⁷ <<http://usinfo.state.gov/products/pubs/rightsof/press.htm>> accessed on 1 August 2007.
Office of the Irish Information Commissioner, 'Review of the Operation of the Freedom of Information (Amendment) Act 2003' (Dublin 2004) 1–2.

⁸ 5 U.S.C. s 552(a)(4)(A)(ii)(II).

⁹ 5 USC § 552(a)(6)(E)(v)(II) (2000). For further details see US Department of Justice, 'Freedom of Information Act Reference Guide' (2006)
<<http://www.usdoj.gov/oip/referenceguidemay99.htm#expedited>> accessed on 1 August 2007.

- the inclusion of a list of factors puts to rest several of the more problematic of the so-called Howard factors which have commonly been relied upon in relation to the deliberative processes provision in s 36(1). While its inclusion will have most application in relation to s 36(1)(b), it also serves to reinforce the irrelevance of these factors in relation to other provisions such as s 40(1)(d).

My main criticisms relate to failure to narrow the potential scope of candour and frankness arguments in relation to the deliberative processes provision, the apparently dual nature of the public interest tests in the s 33(1) and part of s 43(1) and the failure to narrow the operation of ss 42 and 45.

Candour and frankness

A notable omission from the list of factors in s 11B(4) is the inappropriate use of candour and frankness arguments. I realise that there would be a potential problem with excluding candour and frankness arguments altogether as they lie at the heart of the deliberative processes exemption. However, given that the first leg of the test in s 36(1) encompasses most of the decision-making documents of agencies, it is important to delimit the scope of the public interest test so that it cannot be used to justify non-disclosure simply on the basis that some public servants might feel less comfortable if their deliberations were subjected to public scrutiny. To allow it to operate in this way has the consequence of removing from scrutiny the very documents to which members of the public need to have access in order to be able to participate meaningfully in, or to be able to understand and evaluate, the decision-making of government agencies. Public officials are generally required to provide reasons on request for decisions that affect individuals; arguably it is not unreasonable to expect them to account more generally for their decision-making.

In my view it is important to confine the operation of that provision to cases where there is clear evidence that, despite the contractual duties of public servants, the contents of a specific document are of such a nature that their disclosure is likely to impact adversely on deliberative processes of the agency. I would therefore suggest that it would be appropriate to include a further paragraph in s 11B along the lines of the following:

(e) argument based on candour and frankness, in circumstances where these arguments are not based directly on the specific contents of the any document claimed to be exempt and are not supported by evidence that disclosure of that document will impact adversely on the deliberative processes of an agency or Minister.

Failing that, it is important to explicitly require the Information Commissioner when providing guidelines about the operation of the exemptions to specifically address this issue (including the interrelationship between candour and frankness claims and the contractual obligations of public servants).

Cabinet documents

The rewording of s 33(1) effectively addresses the problem that the first leg of the

current provision has been interpreted as covering documents not initially created for Cabinet submission.¹⁰

Ideally the exemption provision should be subject to some form of public interest test (as is the case in the United Kingdom and New Zealand) which serves to ensure that documents are not withheld for longer than necessary to protect the mechanism of collective responsibility. Failing that, it would be appropriate to include some time limit along the lines of those found in both the Victorian and New South Wales legislation. The lack of evidence suggesting that ten-year time limits in the Victorian and NSW FOI Acts has caused any harm to Cabinet government in those states suggests that a de facto time limit of 20 years resulting from the proposed changes to the open access period in the Archives Act is excessively long.

Documents subject to legal professional advice

There are two specific problems with this provision. First, the exemption has expanded in its scope due to a change in the common law test from a test of sole purpose to one of dominant purpose. This is potentially problematic due to the scope for documents to contain general policy advice as well as specific advice in relation to ongoing legal matters. Second, the wording of the provision requires that it be of “such a nature” as would be privileged, not simply that it is privileged. As I point out in my book at [8.116]:

“An issue that may arise is whether an imputed waiver of privilege in respect of a communication affects its status for exemption. In the case of the Commonwealth and Victorian FOI Acts, the requirement that a document must be ‘of such a nature’ that it would be privileged has been interpreted by some review bodies as requiring an assessment based on the initial nature of the documents.¹¹ Others, however, have taken the view that waiver may preclude a claim for exemption.”¹²

There are two possible ways of addressing these difficulties. The first is to implement the ALRC’s recommendations that s 42 should be amended (a) to provide that a document is exempt if it was created for the sole purpose of seeking or providing legal advice or use in legal proceedings and (b) to make it clear that it does not apply if the client has waived legal professional privilege at common law.¹³

The second is to make this exemption provision a conditional one so that the problems can be addressed more indirectly via the public interest balancing test.

Breach of confidence

The current wording of this section is open to criticism on the basis that it requires decision-makers to apply a test established in case law which is both complex and difficult to understand. The Queensland Information Commissioner commented in *Re B and Brisbane North Regional Health Authority* (1994) 1 QAR 279 at [23] in respect of the common law test that:

“Its complexity is compounded by the fact that uncertainty still attends some aspects of its modern development such that not only leading academic writers

¹⁰ See, eg, *Re Porter and the Department of Community Services and Health* (1988) 14 ALD 403.

¹¹ *Re Colonial Mutual Life Assurance Society Ltd and Department of Resources and Energy* (1987) 12 ALD 251 at 252; *Re Prescott and Auditor-General* (1987) 2 VAR 93 at 100.

¹² *Re Sullivan and Department of Industry, Science and Technology* (1997) 49 ALD 743 at 756.

¹³ ALRC/ARC, Open Government Report, Recs 66 and 67.

but also many judges seem to disagree on some points of principle or on methods of approach to some issues.”

A second problem is that the formulation of the test in terms of whether disclosure “would found” an action for breach of confidence leaves it unclear to what extent the common law public interest exceptions are applicable. There are a number of cases where defendants have successfully defended actions for breach of confidence by non-governmental plaintiffs on the basis that disclosure was in the public interest because it revealed some wrongdoing. However, the exact nature of this limited public interest test remains unclear.¹⁴ It has variously been categorised as a matter that operates to deny the existence of a duty of confidence, a defence and a discretionary bar to obtaining equitable relief.¹⁵ As currently worded, s 45(1) is open to interpretation as allowing for a consideration of public interest only if this constitutes an element of the action.¹⁶

Finally, assuming that s 45(1) does not contain a public interest test, its wording leaves it open to agencies and third parties to structure their dealings in ways which allow for the exemption to be claimed thereby shielding their commercial dealings from public scrutiny.¹⁷ For example, it is common practice to include confidentiality clauses in government contracts and for agencies to set up processes which create legitimate expectations of confidentiality on the part of third parties.¹⁸

Personal privacy

The retention of the reasonableness test in a provision which is coupled with an explicit public interest test is potentially confusing given that the test of reasonableness in s 41 has been interpreted as requiring a balancing of public interests for and against disclosure.

I would suggest rewording s 41(1) as follows:

(1) a document is exempt if its disclosure under the Act would involve disclosure of personal information about an individual and that disclosure would be unreasonable in the circumstances.

While this formulation still involves the concept of reasonableness, it is arguable that the new formulation coupled with an appropriate explanation in the Explanatory Memorandum would ensure that it is understood as a new and different test.

I would also suggest adding to the list in s 41(2) additional criteria to ensure that (a) the provision and its associated consultation requirements are not automatically

¹⁴ For a very useful discussion of this issue and of the relevant caselaw see the decision of the New South Wales Supreme Court in *AG Australia Holdings Ltd v Burton* (2002) 58 NSWLR 464 at [76]–[223].

¹⁵ See J Pfizer, ‘Public Interest Exception to Breach of Confidence Action: Are the Lights About to Change?’ (1994) 20 *Monash University Law Review* 67, 90–1.

¹⁶ See *Corrs Pavey Whiting and Byrne v Collector of Customs and Alphapharm* (1987) 14 FCR 434 at 451.

¹⁷ See M Paterson, ‘Commercial in Confidence Claims, Freedom of Information and Government Accountability: A Critique of the ARC’s Approach to the Problems Posed by Government Outsourcing’ in *Administrative Justice: The Core and the Fringe* (eds R Creyke and J McMillan), Australian Institute of Administrative Law, Canberra, 2001.

¹⁸ Victorian Parliament, Public Accounts and Estimates Committee, *Commercial in Confidence Material and the Public Interest*, 35th Report to Parliament, Melbourne, 2000, key finding 1.1 at p 1. See also M Paterson, ‘Commercial in Confidence and Public Accountability: Achieving a New Balance in the Contract State’ (2004) 32 *Australian Business Law Review* 315.

invoked every time a public servant's name appears on or at the end of a documents and (b) to promote greater alignment with the Privacy Act 1988 so that s 41(2) would read as follows:

- (2) *In determining whether “disclosure is unreasonable in the circumstances” an agency or Minister must have regard to the following:*
- a. *whether disclosure would be contrary to IPP 11 in s 14 of the Privacy Act;*
 - b. *whether disclosure would reveal nothing more than the fact that an employee or contractor of an agency or Minister made a decision or was responsible for the exercise of a specific function or power;*
 - c. *the extent to which the information is well known;*
 - d. *whether the person to whom the information relates is known to be (or to have been) associated with that person;*
 - e. *any other matters that the agency or Minister considers relevant (including matters relating to any relationship between the applicant and the individual to whom the information relates).*

Business affairs

A similar issues arises in relation to s 43(1)(d)(i) in relation to the use of the words “unreasonably affect that person adversely” which have again been interpreted as involving a public interest test. I would suggest rewording it as follows:

- (i) would or could reasonably be expected to affect that person in a manner which is both adverse and unreasonable in the circumstances in relation to: or*

I would also suggest including a new s 43(3) along the lines of the following:

- (3) In determining whether “disclosure is unreasonable in the circumstances” an agency or Minister must have regard to the commercial sensitivity of the information and the extent to which it is likely to harm the competitive position of the person or entity concerned if it falls into the hands of a competitor.*

Amendments to the Archives Act

The reduction of the Open Access period from 30 to 20 years has the positive consequence of bringing documents much sooner into the less expensive and less restrictive access regime in the *Archives Act* 1983 (Cth).

One issue which may be worth considering, however, is to align the review mechanisms in the two Acts by extending the review functions of the Information Commissioner to cover applications under the Archives Act.

Information privacy rights

Rights of access to, and amendment of, an applicant's own personal records are an important aspect of personal privacy as they relate to an individual's ability to exercise control over his or her personal records. There is therefore logic in making provision for the transfer of the exercise of those rights to the Privacy Act (while making sure that the Privacy Commissioner receives sufficient additional resources to be able to deal with the substantial increase in workload associated with the transfer).

However, the transfer of the exercise of these rights to the Privacy Act will require expanding the Privacy Act's review mechanisms to provide for a regime commensurate with that under the FOI Act; any failure to do so will substantially disadvantage applicants (especially given that the FOI Act will now provide for a free external review mechanism). While the transfer of the exercise of amendment rights should be otherwise comparatively straightforward, the transfer of access rights is potentially more problematic. One issue that needs to be considered is the situation where the documents to which an applicant seeks access fall under both the FOI and Privacy regimes (for example, where some documents relate to a decision affecting the applicant specifically and others shed light on policy issues affecting that decision-making). There is also the practical difficulty involved in determining the appropriate scope of exemptions to IPP 6.

A possible approach is to make some adjustments as outlined below to the FOI Act to allow for the more appropriate exercise of information privacy rights and to leave exercise of those rights to be governed by the FOI Act while providing for, or providing for the option of, a different scheme of review involving the Privacy Commissioner in place of internal review and/or review by the FOI Commissioner (with similar rights of appeal to the AAT and to the Federal Courts on questions on law) in relation to them. It should be noted that the Victorian FOI Act utilises a similar approach in relation to health records, allowing for an applicant to apply for conciliation by the Victorian Health Commissioner in place of internal review (with further rights of review by the VCAT).¹⁹ Alternatively it will be necessary to include within IPP 6 a set of exemptions based on those exemptions in the FOI Act which are likely to be applicable to documents containing individual's personal information.

Ideally what one needs in relation to the exercise of rights of access to personal records is a regime which provides scope for decision-makers to draw on the rich body of FOI jurisprudence to shed light on the scope of specific exemption provisions while allowing for a more nuanced consideration of privacy-based pro-disclosure considerations than has been possible to date within the context of the FOI regime.

Section 11 (2)

A problem in the drafting of the current FOI Act is that s 11(2) specifically prohibits consideration of an applicant's reasons for seeking access, including privacy-based reasons which may add to the public interest in favour of disclosure. While FOI legislation is generally understood as providing for universal rights of access (without regard to an applicant's identity or motives for seeking access), other FOI Acts such as the Victorian and New South Wales FOI Acts which do not contain equivalent provisions to s 11(2) have allowed for more appropriate consideration of factors unique to an applicant to the extent that these add to the public interest in disclosure.²⁰

As I have previously commented:

¹⁹ *Freedom of Information Act 1982* (Vic), s 51A.

²⁰ See: *Re Page and Metropolitan Transit Authority* (1988) 2 VAR 243 at 246; *Re Lawless and Secretary to the Law Department* (1985) 1 VAR 42; *Re Lapidos and Office of Corrections (No 3)* (1990) 4 VAR 150; *Gilling v General Manager, Hawkesbury City Council* [1999] NSWADT 43 at [53]; *Keriakes v Chief Executive Officer, State Rail Authority* [2003] NSWADT 191 at [68]

“There is a general public interest in promoting the public disclosure of government information but its weight will vary according to the context, which may include the personal circumstances of the individual. Arguably therefore an individual’s interest should be taken into account to the extent that it adds to the overall interest in disclosure.”²¹

I would therefore recommend that s 11(2) should be amended to include the preliminary words “Subject to (3),” and that a further sub-section should be added as follows:

(3) A person’s identity or reasons for seeking access may be taken into account in the context of evaluating the public interest in relation to conditional exemptions, but only where those reasons add to the public interest in disclosure or reduce the public interest in withholding access.

The inclusion of a new sub-section along these lines would not only allow for a more appropriate exercise of information privacy rights under the FOI Act but would also address the situation where an applicant has a valid reason for seeking access to documents (for example, to clear his or her name) but the documents sought do not contain information which qualifies as that individual’s personal information.

Amendment of personal records

I would also suggest that there is little logic in retaining the existing amendment provisions in a form which differs in scope from the rights of amendment currently available in IPP 7 of s 14 of the Privacy Act. The provisions in Part V should be rearticulated in the form of a right which is not subject to the requirement that an applicant should have obtained lawful access to the documents to which the application relates and that the grounds for amendment should be expanded to include the ground of irrelevance.

I realise that the concept of relevance is more easily understood in the context of the Information Privacy Principles in s 14 of the Privacy Act (given their emphasis on purpose limitation) but this difficulty could be addressed via a Note at the end of s 48 explaining that relevance needs to be understood having regard to the purpose for which the information was created or obtained.

Review

The proposed review mechanism which now includes an additional tier of FOI Commissioner review will arguably operate to the advantage of most applicants. However, it does create potential problems for applicants such as journalists for whom timely access is of the essence. I would, therefore, recommend the inclusion of a mechanism which would allow for both internal review and Commissioner review to be bypassed with the permission of the Commissioner in cases where time was of the essence.

Other

The extension of the protections against civil and criminal liability more generally to disclosures in good faith is a long overdue aspect of reform which removes an important disincentive to the provision of informal access and the exercise of

²¹ Moira Paterson, *Freedom of Information and Privacy in Australia: Government and Information Access in the Modern State* (LexisNexis/Butterworths, 2005) [5.34].

discretion which resides in FOI officers to provide access to documents which may be technically exempt in circumstances where disclosure is unlikely to result in any harm.