

Review of Freedom of Information - Exposure Draft
Freedom of Information Amendment (Reform) Bill 2009

To Senator Faulkner, Special Minister of State

Submission by

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Introduction,

The Rudd Government's undertaking to reform the FOI Act is very praiseworthy. For years it was obvious that the FOI Act and the associated processes had failed. The failure of the previous Government to deal with the deplorable state of the FOI Act has been roundly condemned. Similarly, the manner in which public sector bureaucrats had deliberately thwarted the object, purposes and intent of the FOI Act has drawn very justifiable criticism from every quarter.

Therefore the development of the Exposure Draft as part of the Government's reform policy is a certain and positive move in a new and progressive direction. The idea of a Public Information Office with Commissions addressing aspects of relevant public information is very innovative and commendable. Cost reductions are similarly noteworthy. And the clarification of improperly claimed exemptions based on 'irrelevant factors' is most welcome.

Without further comment about those matters which will improve the FOI Act it is necessary to highlight issues which do not appear to have been resolved by the Exposure Draft or which need to be resolved in connection with the draft.

This submission is intended as a constructive criticism of the Exposure Draft and an opportunity to raise matters outside the draft legislation, which will have a direct bearing on its use and effect.

Overview

The Rudd Government's declared policy shift towards a 'pro-disclosure' environment would seem to reverse the policy position of earlier Governments. However despite widespread criticism of the previous government's policies toward a pro disclosure FOI Act, the fact is that there were pro disclosure policies. Proof of those pro disclosure policies are declared in the Objects of the current Act and are also available in the FOI Memoranda currently located on the PM&C's web site.

Those pro disclosure requirements provided “a right of the Australian community to access to information” and required that refusals to disclosures were to be limited only if such refusals were “necessary for the protection of essential public interests....” (see s3 Objects).

We see these two principles as the cornerstone of FOI legislation. It was an expectation that in reforming the FOI Act, the Rudd Government would simply make these principles work effectively in the interest of the Australian (public) community.

Unfortunately the reform proposal seems to have softened those “rights of access”. More concerning is the dropping of the principle that refusing access to information must only occur if it is “necessary for the protection of essential public interest”.

These are indispensable and fundamental principles which must underpin any FOI Act.

We commend the Rudd Government for its commitment to address and rectify the abysmal state of our federal FOI legislation. But nonetheless we are greatly concerned that the proposed method is more about clarifying administrative procedures and processes than the fundamental issue of ensuring the public’s right to access information about government activities, particularly in respect of public sector administration.

Critique

This emphasis on procedures and processes smacks heavily of public service bureaucracy involvement in the development of the Exposure Draft. The political policy commitment of promoting public rights to open government with the focus on accountability and transparency appear to have been appreciably weakened.

The focus of the Exposure Draft is not on what must be made accessible but rather the focus is on what and how access to information can be managed.

Our preferred position is that all information held by government or its agencies should be accessible to the public unless it was (objectively) necessary to deny access for the protection of essential public interests. The FOI Act should be written in a straightforward way that simplifies processes and procedures and ensures appropriate public access.

Furthermore it seems, the Exposure Draft has virtually abandoned the political principle of the ‘rights’ of citizens to access information held by the Government and its agencies. There is an Exposure Draft reference at s3(1)(b) to a ‘right of access to documents’ but that is a significantly watered down version of the term used in the current Act , i.e. ‘the right of the Australian community to access information’.

Similarly, the Exposure Draft- s3(2), only seeks to ‘promote Australia’s representative democracy’. It does not seek to ‘ensure and reinforce the public’s right to participate in

Australia's representative democracy by appropriate access to information held by the Government or its agencies.'

The public's 'right' to access information is subsumed within a complex nest of procedural processes. Rather it should take centre stage within the Act and be expressed as a precise legal status with absolute pre-eminence over every aspect of the Act's objectives and functions.

The basis of that legal status should have been that all information held by the Commonwealth should be made available, **limited only by necessary and compelling reasons for the protection of essential public interests.**

Recommendation

The public's right to access information must be established and described in precise legal terms as part of the Act. Those terms must make reference to the system of representative government, the implied constitutional rights of freedom of political communication and the International Covenant on Civil and Political Rights.

Any derogation of that right must also be enshrined in the Act. Any derogation must be limited strictly to matters which are necessary for the protection of essential public interests.

Why the previous legislation did not work.

Presumably the reform process started from the question, '*why didn't the previous legislation work?*' However based on the Exposure Draft, if any answer was obtained, it was wrong. In all probability the question was put to the bureaucrats who administer the act. Certainly it seems that those who have repeatedly been denied access to information were not asked.

The Exposure Bill contains good practices and procedures to enable those seeking information to have their requests dealt with in a fair and sensible fashion. But the existing legislation and guidelines and their stipulated practices and procedures could have worked also - but they didn't.

Therefore the problem was not the technical aspects of the legislation relating to practices and procedures. The problem arose specifically from bureaucrats who frustrated the intentions of Parliament for their own vested interests. The powers vested in bureaucrats to carry out the intentions of the Act were too broad and totally lacked any accountability.

Unfortunately that situation has not been addressed in the Exposure Draft. Therefore the same problems of unaccountable bureaucratic misconduct afflicting the previous Act will flow into the new Act.

The first problem was that the bureaucrats were given extra ordinary discretionary powers which enabled them to deny or frustrate public access to information. Exemptions were claimed because they were available, and not because they were 'necessary for the protection of essential public interests'.

In fact, most exemptions claimed were simply for the protection of bureaucrats, and in some cases, their political masters. Or in other words, the exemptions were persistently claimed to avoid transparency and evade accountability.

But simply claiming exemptions for those matters would highlight those accountability issues and attract attention to them. In so doing, it would actually cause questions to be focused on those particular exemptions. So the trick used by bureaucrats was to claim every exemption possible, thereby burying the specific accountability issues in a forest of other exemptions.

The second and more important problem was that there was nothing to stop bureaucrats from following this course of action. It was not an offence to wilfully and deliberately obstruct access to information which should have been provided under the act.

The 1986 Brazil Direction was a direction of Cabinet. It required that "agencies are not to assert legal professional privilege unless *real harm* would result from disclosure of the information (see Brazil Direction). The phrase *real harm* distinguishes between substantial prejudice to the agency's affairs and mere irritation, embarrassment or inconvenience to the agency."

The direction was binding on all agencies and it remains in force (see [FOI Memorandum at PMC web site](#)). Yet it has been totally ignored by agencies since 1986. Agencies flagrantly disobeyed that direction at will. As a consequence that unchallenged disobedience has rendered impotent the powers of the Parliament, Cabinet, Ministers, and the courts and tribunals. Yet not one bureaucrat has been held to account for a breach of that lawful direction. This conduct is clearly a breach of the Code of Conduct yet no disciplinary action has been taken against any bureaucrat for breaching that code.

This is a single but powerful example of the contempt shown by bureaucrats for directions, policy statements and guidelines issued by the Government, the Cabinet and Ministers.

Because bureaucrats or agencies were never sanctioned for non compliance with lawful directions they have continued to flagrantly ignore the Objects of the Act, the FOI guidelines and Memoranda, the model litigant policy and/or the directions under the Judiciary Act.

There is no record of any bureaucrat being held to account under the Code of Conduct for abuse of process under the FOI Act. This is despite repeated complaints by the courts and the media and the public about the abuse and misuse of the FOI Act by bureaucrats.

Neither of these problems have been resolved in the Exposure Draft. Most importantly, the Information Commissioner has been denied powers to directly act against such misconduct.

Addressing the first problem: the current Act, *Section 61- Onus*, requires that a decision to claim an exemption must be 'justified'. But there is no benchmark against which this 'justification' must be tested. Simply because a matter falls within the scope of an exempt document is not justification to claim the exemption – it is a ground on which a claim for an exemption is made but it is not a justification.

The Onus test requiring agencies to prove 'justification' has been abused relentlessly and persistently. Provided that an agency was able to show that the information contained in a document met the grounds for an exemption then that was sufficient justification to claim an exemption. But there was absolutely no regard for the provisions of the Objects of the Act (s3(1)(b) requiring that the exceptions were limited to the extent that they were **necessary** for the protection of essential public interests....' No agency has been required to prove that their claim for an exemption was 'necessary' on any grounds let alone for the protection of essential public interests.

There was no legislative tie binding the requirements of the Objects to the provisions of any section of the Act. Section 3 was taken as a 'stand-alone' provision which had no bearing on other sections. Tribunals and courts gave no force in law to the provisions of the Objects. Even in regard to s3(2), which required any interpretation of provisions (by a court or tribunal's) to favour disclosure of information.

Pointing out that any claim for an exemption must be tested against the requirements of the Objects of the Act, necessitating a test that the exemption was necessary for the protection of essential public interests was consistently rejected out of hand by courts and Tribunal's.

That same flaw remains within the Exposure Draft.

Recommendation.

The test of a justified claim for an exemption must be whether the exemption (on balance) is necessary to protect an essential public interest. If the exemption claim is not necessary to meet that end then the exemption is not justified and it cannot and must not be claimed.

It would be better still to clarify this justification for exemption test by applying a second test. That test should be whether the disclosure of the information would cause real and significant harm to the public interest.

If the answer to the first test question is 'Yes' then the second test question should be used. If the answer to the second test question is 'NO' then the information should be disclosed.

Section 61 must be amended in a way that gives effect to this recommendation.

Addressing the second problem: When bureaucrats claim an exemption against a document without proper justification that conduct must be seen to be contrary to the public interest. Such conduct must be categorised as an offence under the Public Service Act, Code of Conduct.

The FOI Act will continue to fail to provide the public with its right to access information until bureaucrats are compelled to act in accordance with the intention of the Act.

It must be said that making policy statements and giving unenforceable Cabinet or Ministerial directions about pro-disclosure policies is a façade unless it is backed by enforceable law. In the absence of that compulsion, such statements and directions are little more than ‘political speak’, where the appearance is all glossy and goodwill, while it appears that there is indifference to the avoidance of accountability and protection of wrongdoers.

The proposed Act imposes no enforceable duty on any bureaucrat to comply with the Act (with the exception of penalty provisions under s79, 82 and 83). The Exposure Draft refers to ‘obligations’ in some sections, but such obligations are not enforceable, and any non-compliance with those obligations carries no penalties.

Having strong penalty provisions applying to three sections and three section only of the act for non compliance while at the same time having no other provision for penalty or disciplinary action is beyond comprehension.

The failure of the current Act can be solely attributed to bureaucrats working against the intention of Parliament. Unless there is a penalty for so doing then there is nothing to stop the bureaucrats continuing those practices and to effectively undermine the new act.

Therefore it is vital that if it is the genuine intention of the Rudd Government to reform the FOI Act then the new act must include sanctions against those bureaucrats who, without reasonable excuse claim exemptions, which are not justified.

As stated, at s79, 82 and 83 the Exposure Draft contains ‘offences’ in relation to the act. These are significant offences and penalties for failures to comply with certain obligations under the proposed Act.

Yet strangely there are no other penalty provisions or powers vested directly in any authority to take direct action against other breaches of duties or obligations under the proposed Act.

There is no logical reason why the Information Commissioner is not provided with relevant powers to take action against breaches of duties or obligations under this proposed Act.

Under the proposed new section s55N [– enforcement of decision against agency]. The proposed remedy for non-compliance with particular directions is to refer the matter to the Federal Court.

In respect of Ministers who fail to comply with section 55M. It would seem there is no alternative other than to apply the current proposed provisions of s55N. Clearly Ministers do not

fall within the jurisdiction of the Public Service Act and therefore non-compliance could not be dealt with by any means other than a referral to the Federal Court.

In respect of public servants who have failed to comply with section 55M, this is a nonsensical proposal. This process would be farcical.

This process would be enormously costly and time-consuming. It would be a field day for the AGS, supplying legal advice for two government agencies to engage in a public battle about the public's right to access information.

The whole purpose of creating an Office of the Information Commissioner is to provide specialist advice in respect of the public's right to access information. Permitting agencies to disobey a decision of the Information Commissioner, until the decision is resolved by the Federal Court completely undermines the whole intent of the Information Commission. It also seriously undermines the authority and credibility of the Information Commissioner.

Noting that sections 79, 82 and 83 provide considerable penalties for offences against specific misconduct under the Act it is beyond comprehension that similar provisions are not available to the Information Commissioner for other breaches of the proposed act.

At least the Information Commissioner must be empowered to institute proceedings under the Public Service Code of Conduct in relation to any failure by any public servant to carry out any formal requirements under the act. This would specifically apply to matters arising from non compliance with s55M.

Recommendation

When bureaucrats claim an exemption against a document without proper justification that conduct must be seen to be contrary to the public interest. Such conduct must be categorised as an offence under the Public Service Act, Code of Conduct.

The new act must contain statutory duties on officers to comply with specific duties under that Act. In particular claims for exemptions from disclosure, which do not meet a test to justify a claim for exemptions must attract an appropriate penalty.

Similarly, if agencies evade, obstruct or frustrate access to information to which the public or a member of the public is entitled such conduct must attract some form of penalty under the Code of Conduct.

The information Commissioner, must be empowered to impose penalties and give directions, in accordance with the Code of Conduct for breaches of statutory duties or formal requirements under the act.

If involvement of the Federal Court is considered necessary it should only be available to the Information Commissioner to enforce decisions made in respect of specific matters such as those arising from s55M.

A right of appeal to the Federal Court by an agency or a bureaucrat may be warranted only in respect of the correctness or severity of any penalty imposed by the Information Commissioner under the Code of Conduct.

Exemptions must be based on subject matter

Client Legal Privilege is not a subject - it is a process for dealing with subjects.

As stated, it is our view that information held by government agencies is public information which must be released or disclosed upon request, unless there is a necessary and compelling reason to deny access in the public interest.

That principle is not fully embraced by the Exposure Draft in relation to all exemption sections. Having public interest exemptions are appropriate and necessary. The matters listed within the public interest exemptions are not in dispute. As discussed above, claims for exemptions must be tested to prove justification for non disclosure. The most objective test should be to determine whether the disclosure of any particular information would cause real and quantifiable harm to the public interest.

The existing exemption sections 32,33,(36A?),37,38 and the proposed sections 47B,C,D,E,F,G,H and J all have an adverse interest test which does not permit disclosure if to do so would cause real and quantifiable harm to those concerned.

However s42 (Legal Professional Privilege – hereafter referred to as Client Legal Privilege) does not contain an adverse interest test as to whether real and quantifiable harm would ensue if the information was disclosed. This exception to the rule proves a weakness in the Exposure Draft. There is no justification as to why has s42 been omitted from a sound approach to accessing public information by means of a ‘harm’ test.

Argument 1 - to limit claims for Client Legal Privilege in public administration.

It is acknowledge that Client Legal Privilege (CLP) is a matter of public interest – the right of a client to seek and receive legal advice in relation to a matter is a matter which serves the public interest. The public interest is the right for individuals or private organisations to protect their interests in litigation or in preparation for litigation regardless of whether those other parties involved in the litigation are other private parties or government agencies.

The right to privacy, concerning the legal advice sought and received continues to apply for as long as the individuals or private organisation requires.

Similarly, government agencies should have a right to claim Client Legal Privilege when in litigation or preparing for litigation with individuals or private organisations.

However, government agencies do not require ongoing privacy in relation to the legal advice sought or received once the litigation has been resolved. In fact the reverse of privacy should apply. It is important that when a government agency litigation matter is resolved or abandoned, all the legal advice sought and received should be open to scrutiny. This would facilitate transparency and where needed, it may assist in relation to accountability.

There is no justification to protect bureaucrats in respect of legal questions they ask and legal responses received. To the contrary, it would be of great assistance to the public to know that bureaucrats were asking proper questions and receiving good advice in respect of matters of public administration.

The only exception to this principle would be at a time when there was litigation between a government agency, and another party. Therefore, it is not proposed that CLP be denied to a government agency during the course of or in preparation of a matter of litigation with another party.

But there should be no CLP in respect of public administration after the completion of any litigation. Working on the basis that litigation carried out by government agencies is litigation on behalf of the public, it is reasonable and appropriate for the public to have access to any legal advice sought or received once the litigation has ceased.

Therefore, CLP in respect of public administration should not be treated as the same as CLP in the private sector. As part of this Government's enlightened approach to FOI, the operational conduct of agencies must be open to public scrutiny when to do so does not prejudice a matter pending or before the courts.

Argument 2 - to limit claims for Legal Privilege in public administration.

Information subject to Client Legal Privilege in public administration must only be protected from access/disclosure depending on the subject under consideration. Protection from access/disclosure should not apply simply because it originates between public administrators and legal advisors unless it is in the course of litigation.

The aforementioned exemption sections already provide protection for information which if accessed/disclosed would harm particular public interests. All subject matter which warrants exemptions from disclosure are already exempt from disclosure under their own specific provisions.

Therefore the 'subjects' already covered by exemption provisions do not need further exemption provisions through the application of CLP. Privacy, law enforcement, national security, financial affairs, and so on, are all protected by their respective exemption provisions. The fact that information subject to those exemptions may also be discussed between a bureaucrat and a legal officer does not make the subject exemptions warrant greater protection from access.

If a matter, other than those for which other exemptions have been claimed has been litigated and resolved, then claims for Client Legal Privilege are not necessary in relation to matters of public administration.

Yet bureaucrats insist on claiming legal privilege contrary to the intentions of the act, contrary to High Court rulings, contrary to FOI memoranda and contrary to Cabinet decisions.

One can only speculate why bureaucrats are behaving in this fashion. However, it is reasonable to suspect that a major reason is to avoid disclosure of their own incompetence, maladministration or misconduct.

In many cases discovered by whistleblowers, CLP is used by bureaucrats to cover up unethical, improper, prejudicial or illegal conduct. CLP is the bureaucrat's best weapon to avoid transparency and accountability.

It is the most flagrantly abused section of the FOI Act. Despite repeated complaints from tribunals and courts about agencies deliberately claiming CLP over documents, which do not meet the legal qualification for that privilege, the practice continues unabated.

There are examples of agencies wheeling documents into their legal section for the sole purposes of claiming CLP, when there is absolutely no justification for such a claim. In other instances agencies ask unnecessary legal questions about matters which do not need such advice for the sole purpose of being able to consequently claim legal privilege about the matter.

CLP is a catchall provision, which does not rely on the subject matter when claiming an exemption. Furthermore it can easily be manipulated to apply to any matter so that a wrongful exemption can be claimed.

Unless the subject matter should not be disclosed for the necessary protection of essential public interests, including the subject matters arising from or during the course of a matter of litigation, Client Legal Privilege should not be provided as a means to avoid access to documents.

Recommendation

Under the proposed new FOI Act, the general public interest protection that applies to CLP should be abolished. Appropriate amendments should be made to the existing s42.

A new standard for public sector, Client Legal Privilege should be established.

The new standard would not allow CLP to be claimed in conjunction with another exemption sought on specific subjects. If the individual subjects did not qualify for exemption on their own merit then the fact that legal advice had been sought or given in relation to the matter should not prevent disclosure or access to the information.

Client legal privilege may still be claimed as an exemption but only on grounds related to the subject of the legal advice sought or received. If the disclosure of the subject matter adversely affected public safety or well-being, then the subject matter, including the legal advice would be exempt from disclosure or access.

Further comment about s42 - Client Legal Privilege is provided elsewhere in this submission.

Irrelevant factors

It is extremely pleasing to see the “irrelevant factors” clause in the Exposure Draft, Schedule 3, Part 2, Clause 11 B, - these excuses have long been used by agencies to avoid accountability and public scrutiny.

It is strongly recommended to the Government that a Public Service Instruction be issued to all agencies that they must cease and desist from using these ‘irrelevant factors’ in communications with members of the public for any purpose, and specifically as a means to withhold or deny information under the proposed Act.

If an instruction to that effect was circulated to agencies, it would be helpful if the instruction also carried advice that if in fact, those ‘irrelevant factors’ were used contrary to the instruction, such conduct would amount to a breach of the Code of Conduct.

Recommendation

As per our general stance about duties bearing penalties for non compliance – it would be desirable to make it a Code of Conduct offence to use these ‘irrelevant factors’ or any newly developed excuses of a similar nature as a means to obstruct access to information.

Justification for using such excuses must rest on those using such excuses. Failure to reasonably justify the use of such excuses should be considered a breach of the Code of Conduct.

Precedents - public administration v private matters

Dealing next with matters outside the draft; over many years legal precedents have been established by the courts and tribunals in dealing with matters of public administration, and in particular, with FOI legislation. The courts and tribunal's are not empowered to make a

distinction between legal precedents affecting matters of public administration and general matters affecting the public. This is a major failing in law.

Matters of public administration are public matters. Laws which relate to the rights and benefits of individual citizens or private organisations have been misused by bureaucrats (with the assistance of the AGS) as legal precedents in matters of public administration. The 'private' rights to which a private person, or private organisation is entitled are not transferable to a public agency. The fundamental right underpinning public agencies, is the right of the 'public or all citizens' to see and be made aware of all matters related to those organisations.

There is a clear legal distinction between matters of public administration and private matters such as the interests of a member of the public or private organisations. But tribunals and some courts are not empowered to enforce or maintain that legal distinction. Legal argument during proceedings often transposes precedents about private matters to matters of public administration. Over years this intermixing of dissimilar (private and public) law has blurred the distinctions. This has now got to the point that in some cases, precedents which were clearly intended to address criminal law matters relating to private individuals is now inappropriately used as precedents in relation to matters of public administration. Some significant examples of this intermixing arise out of agency or bureaucrat's claims for Client Legal Privilege.

Due to this lack of distinction, laws which apply to members of the public or private organisations are applied equally and without distinction, to matters of public administration.

It is vitally necessary that part of this FOI reform process establishes (through the Information Commission) the differences in the practice, application and precedents of law between matters of public administration and those matters affecting private persons or private/corporate organisations.

Public administrative law, including this current prospective FOI legislation must stipulate and emphasise (through the Information Commission) that matters of public administration must not be bound by legal judgements or precedence which are specifically intended to apply to matters dealing with individual private members of the public or non-government organisations.

Precedents set in courts or tribunals dealing with private or non-government issues should not generally be taken as precedents in administrative law. Exceptions to that rule could apply if and only if the distinction between the specific matters of public administration and private or non-government issues were not relevant.

Agencies (particularly with the assistance of the AGS) have repeatedly misused valid legal precedents concerning the justifiable and intrinsic rights of individuals or private organisations, as grounds for avoiding disclosures concerning public administration.

Valid legal precedents have arisen in matters such as defamation suits, public interest matters and client legal privilege matters. In each of these examples, it is easy to distinguish between the rights of individuals or private organisations and issues concerning public administration.

The fact is that government agencies do not own information they hold. They simply administer and manage it on behalf of the public. Therefore, legal precedents affecting rights of individuals or private organisations are generally not relevant in relation to matters of public administration.

The proposed new FOI Act must set out a legislative framework, which disengages the existing restrictive legal precedents involving the rights of individuals or private organisations from matters concerning public administration.

The framework must stipulate that precedents which have been created specifically in relation to individuals or private organisations are no longer considered to be valid in relation to public administration (or at least in respect of the FOI Act). All future precedents, which are to be applied in matters of public administration, should be declared to be administrative law precedents by the relevant court. If such a declaration is not made, then the precedents cannot be used in matters of public administration.

Recommendation

The Attorney General or the Information Commission must make a direction to agencies that all legal precedents established in relation to the (current) FOI Act must not be used in relation to the new proposed FOI Act.

The nature and intent of the new Act is so significantly different from the effect and use of the current Act as to make those earlier legal precedents unworkably restrictive under the new Act.

That any legal precedents which exist or may arise from matters not directly related to matters of public administration must not be used in relation to matters of public administration concerning the new FOI Act.

An exception could apply if a court or tribunal made a ruling that the precedents arising from a matter which was not directly related to public administration could be used as a precedent in relation to a matter of public administration. Such a ruling would need to be based on the fact that in relation to the particular precedent the distinction between matters of public administration and private non government matters was not relevant.

Critique of proposed sections

Only those Sections or subsections requiring comment have been included.

3 Objects—general

(1) The objects of this Act are to give the Australian community access to information held by the Government of the Commonwealth, by:

- (a) requiring agencies to publish the information; and
- (b) providing for a right of access to documents.

(2) The Parliament intends, by these objects, to promote Australia's representative democracy by contributing towards the following:

- (a) increasing public participation in Government processes, with a view to promoting better-informed decision-making;
- (b) increasing scrutiny, discussion, comment and review of the Government's activities.

Critique; Nothing in the s3 Objects acknowledges the fact that exemptions can be claimed or that limitations can be put on those exemptions.

There is no reference to exemptions being claimed only if they are 'necessary' for specific reasons.

Therefore the new Act entitles an exemption to be claimed without the exemption being necessary for any purpose under the Act – specifically having regard for the new sections; s3 and s11A. It simply requires that an exemption be available for an exemption to be claimed.

There is no test for justifying an exemption and no requirement to test justification by proving that the exemption claimed was necessary. This is a backward step. It sets the bar considerably lower than was stipulated under the s3 provision of the existing Act.

Discarding the requirement for an exemption to be 'necessary' lowers the threshold for claimed exemptions. It is easy to justify an exemption if it is in the Act. But it is harder to prove that the exemption is justified if the Objects also require proof that the exemption is necessary.

Adopting this Exposure Draft approach where 'justification' is not necessary and proof of 'necessity' is not required does little more than formalising what has been improperly happening for the last 20 years.

According to the existing Act, agencies were only entitled to claim exemptions if (as s3 Objects required) the exemptions were 'necessary.' And despite the existing s61 –Onus' (both in the previous and the current Exposure Draft) all that an agency has to prove is that the exemption

claimed is 'justified' (i.e. that it is available) – and not that it is 'necessary' to achieve the specific exemption reason.

Hammering the point home; 'Justified' simply means that there are grounds to claim an exemption – but justification does not mean that the exemption was 'necessary' to achieve the purposes of the Act.

Recommendation; an additional sub clause.

(2a) The Government acknowledges that information held by the Government is a public asset and must be accessible to the public unless there is a compelling and necessary reason for non disclosure. The onus of proving that information should not be released rests on the Government and its agencies (see s61 and the new s55D).

(3) The Parliament also intends, by these objects, to increase recognition that information held by the Government is to be managed for public purposes, and is a national resource.

(4) The Parliament also intends that functions and powers given by this Act are to be performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost.

CRITIQUE: These objects are regarded by the Courts and the AAT and agencies as extraneous hyperbole and 'motherhood' statements which have no bearing on any obligations or duties under the Act. Without giving these Objects the force of law by locking them to each section, they are simply disregarded by the Courts and have no standing in law. It would be best to either drop these Objects because they are a useless waste of paper OR make them an effective part of the Act.

To make the Objectives effective it is necessary to amend this section to make it similar to the old s3(2) but given legally binding force under the Act.

Recommendation; an additional important sub section.

(5) These objects are to be read as one with each section of the Act and must be given effect in relation to every interpretation and application of each and every section of this Act.

3 Part II Repeal the Part, substitute:

Comment; relating to the current s9 and the proposed Exposure Draft replacement s8A.

The existing Part II included s9. This section should have been used in a manner similar to the proposed use of s8A in the Exposure Draft.

However agencies (with the assistance of the AGS) 'read down' s9 in a fashion that limited its

use to 'generic matters' (including rules, guidelines, practices and precedents). There is nothing in s9 which limits these matters to documents, which only contain generic material. If the material was provided by the agency for the use of, or a used by, the agencies or its officers than those rules, guidelines, practices or precedents were applicable under s9.

To reinforce the point, precedents are clearly not a generic matter. They are specific and particular, because they set an initial point concerning any matter.

Rules, guidelines, practices or precedents applying to a particular matter were read down by agencies and the AGS so that they were considered not to fall under s9. However, a precedent applying to a particular matter invariably creates a rule, guidelines or practice , which is then available for general use thereafter. This is yet another example of bureaucrats perverting the intention of the act to limit exposure to transparency and accountability.

Agencies, successfully argued that s9 only applied to generic matters. As can be seen from the FOI memorandum extract below agencies (in this case, the Customs Service) only those rules, guidelines, practices or precedents, which were deemed to be 'generic' were considered to apply to s9.

FOI Memorandum - 13.3.1 Section 42(2) provides that a document which is required to be published under section 9(1) is not an exempt document under section 42(1) by reason only of the inclusion in that document of matter that is used or is to be used for the purpose of the making of decisions or recommendations referred to in section 9(1) of the Act (*Bennett v Australian Customs Service* as restated in *Re Albanese and CEO Officers of the Australian Customs Service*). This would usually concern generic legal advice, eg on the interpretation of legislation and would not extend to advice given for a particular matter, even where that advice included interpretation of legislation, unless the advice were subsequently used for s 9 purposes (Full Federal Court in *Bennett v Australian Customs Service*).

Section 9 was 'read down' to minimise the likelihood that access would be granted to documents over which Client Legal Privilege had been claimed under s42.

There is every reason to expect that the bureaucrats will again attempt to read down the proposed new s8A. This process will ensure that the references to rules, guidelines practices and precedents will only apply to a narrow band of generic 'operational information' material selectively identified by the bureaucrats. No rules, guidelines, practices or precedents, related to a particular matter will be considered to fall under s8A.

Critique: There was nothing wrong with the previous Part II (and particularly s9) other than a steadfast refusal by the bureaucracy to comply with the statutory provisions.

Section 8A of the Exposure Draft will undoubtedly be perverted and 'read down' by bureaucrats in the same manner as happened to the current section 9. The bureaucrats will determine that only those rules, guidelines, practices and precedents, which they deem to be generic or general in nature , will be accessible (or published).

Rules, guidelines, practices and precedents, which relate to particular matters, and which may be used to perform or exercise the agency functions will be considered to fall outside the scope of s8A. This will include interpretation of legislation.

It is important to note that section 4(1) definition of 'agency' does not include 'officers'. Therefore, rules, guidelines practices and precedents applying to officers are not covered by s8A.

This ensures beyond a shadow of a doubt, that s8A will only apply to generic material issued by agencies 'generally'. It will not apply to particular matters relating to the functions and powers of officers. Consequently, how officers perform their duties, functions and powers will not be available for public scrutiny.

This is a serious diminution of information that was (or should have been available) under s9.

The Exposure Draft does not appear to allow access to how agency officers exercise their functions or powers in making decisions or recommendations.

This needs to be clarified. Is it the intention of the Exposure Draft to refuse access to how officers exercise their duties? Such information was supposed to be available under the current Act. The current Act permits access to manuals, interpretations, statements of administration or manner of enforcement, procedures re investigations and so on. But the Exposure Draft only seems to permit access to how the agency carries out its' functions.

There is a significant difference between the functions and powers of the agency and the functions and powers of officers. The functions and powers of the agency are very generic, they lack specificity and accountability. The powers of officers tend to be particular, specific and accountable.

Unless there are very significant changes to the interpretation of s8A then information, which was supposed to be available under the existing s9 about the powers and functions of officers will be hidden from public access.

Any reduction of access to information about the powers of officers, and how they carry out their functions would be condemned in the strongest fashion. If section 8A remains without assurance that the powers and functions of officers will be caught by this section, then we would in all conscience be duty-bound to strongly and publicly criticise the Exposure Draft and the whole intent of the Act.

Recommendation

It will be necessary to amend s8A to ensure that any rule, guideline, practice or precedents , regardless of whether it is a generic or a specific matter, which is held by the agency for use by the agency or its officers must be published or accessible by means of a request for information.

Further comment and recommendation in relation to s8A is to be found below.

Part II—Information publication scheme

Division 1—Guide to this Part

7A Information publication scheme—guide

This Part establishes an information publication scheme for agencies. Each agency must publish a plan showing how it proposes to implement this Part.

An agency must publish a range of information including information about what the agency does and the way it does it, as well as information dealt with or used in the course of its operations, some of which is called operational information.

In addition, an agency may publish other information held by the agency.

Information published by an agency must be kept accurate, up-to-date and complete.

CRITIQUE: Having ‘guides’ is not effective; they are seen by bureaucrats to be ‘a preferred approach’ rather than a ‘duty to perform’.

‘Guides’ are not seen as statutory duties by judicial authorities or agencies. It is not a Public Service Act offence to ignore or act contrary to a ‘guide’.

However, in this instance the ‘duties’ that **MUST** be carried are also specified in Part II, Division 1 & 2 (including 7A, 8, 8B, and 8D) and therefore reliance on ineffectual ‘guides’ is a moot point.

HOWEVER what happens if the agencies don’t do as they ‘MUST’ under this Division?

There appears to be nothing in this Exposure Draft, which enforces the statutory duties imposed under the act.

It seems an exercise in futility to insist that agencies **MUST** do something if there is no compulsion, and no penalty if those things are not done.

It seem to be an exercise in blind optimism to presume that agencies which have constantly failed to comply with statutory duties will suddenly change years of cultural disobedience and voluntarily comply with statutory duties.

This practice of ignoring statutory duties has been the standard Public Sector FOI operating procedure for the last 23 years.

Agencies are given statutory duties (ie Agencies **MUST**...) and those duties are persistently ignored – with the complicity of the Public Service Commission (an often with the assistance of the Australian Government Solicitor’s office).

Over many years I have repeatedly urged the Public Service Commission to enforce statutory duties under the FOI Act and the Public Service Act s16 (Whistleblowing). With equal consistency, the Public Service Commission has refused to force agencies to comply with statutory obligations and has also failed to notify the Parliament where agencies have failed to meet those statutory obligations.

As an oversight organisation, the Public Service Commission is a blinkered, ineffectual and negligent organisation. The primary task it seems to have adopted is to act as an apologist for public service agency shortcomings.

Recommendation

The new Act must specify duties ('relevant officers shall/must') so as to establish whether a function or duty was obligatory or optional. If the duty is required then the Act must impose that duty and not merely suggest a required course of action.

It must be a Code of Conduct offence for an agency and the officer responsible to fail to carry out the statutory duties, without reasonable excuse. The onus of proving a reasonable excuse will rest on those who bore the duty.

Division 2—Information to be published

8 Information to be published—what information?

(f) details of arrangements for members of the public to comment on specific policy proposals for which the agency is responsible, including how (and to whom) those comments may be made;

CRITIQUE: The principal behind this subsection is commendable, but how is it applied and how it works is somewhat mystifying.

This subsection is an anomaly. It provides a means for members of the public to comment on specific policy proposals. Yet there seems to be no way for a member of the public to obtain specific policy proposals under the Act.

What is a 'specific policy proposal'? Is this a policy circulated publicly by an agency or the government or does one have to do ask for access to 'specific policy proposals'?

Will it be possible for a member of the public to obtain all specific policy proposals, or only some - and what will be the criteria for any distinction between the two?

Could an application for access to a 'specific policy proposal' be denied and if so what exception could or would apply?

Recommendation

It seems what is needed is a sub section of the act providing that “specific policy proposals’ are proposals (meeting certain criteria)...and all such proposals will be posted on the Public Information Office web site under that heading.

8A Information to be published—what is *operational information*?

(1) An agency’s *operational information* is information held by the agency to assist the agency to perform or exercise the agency’s functions or powers in making decisions or recommendations 5 affecting members of the public (or any particular person or entity, or class of persons or entities).

Example: The agency’s rules, guidelines, practices and precedents relating to those decisions and recommendations.

CRITIQUE: This section appears to be an attempt to cover the same subjects as the previous Act’s s9 i.e ‘ Certain documents to be available for inspection and purchase’ ,

The s8A phrase ‘... is information held by the agency...’ has a greater scope than the previous s9 provision.

However the above s8A phrase ‘to assist the agency to perform or exercise the agency functions’ is narrower in another sense than the previous section, which referred to ‘provided by the agency for the use of, or a used by, the agency or its officers’.

Agencies have long insisted that section 9 only applied to generic rules, guidelines, practices and precedence, which did not apply to a particular matter.

At the insistence of the AGS, the AAT agreed with agencies that unless the rules guidelines etc were formerly created for the purpose of general agency instructions then the documents were not covered by s9 and were not to be accessed/disclosed under that provision.

The Exposure Draft exacerbates the problem. Officers are no longer mentioned in section 8A. Consequently, this will entrench the idea that only formal generic documents concerning the agencies’ functions and powers will accessible under the new s8A. This formalises the improper restrictions that agencies have placed on access to the rules, guidelines, etc used by officers in the course of their duties.

There can be no doubt that agencies wanted the term ‘officers’ removed from this section. It is also clear that bureaucrats do not want rules, guidelines etc relating to the functions or powers of officers to be open to public scrutiny.

It simply is not clear whether section 8A’s references to agency’s rules, guidelines, practices and precedents etc applies to all rules, guidelines, practices and precedents whether they

are generic, specific or particular or whether they only relate to the agency or whether the section also applies to agency officers.

Recommendation:

Option 1. Extend the current s8A “*Example*” with the words “regardless of whether they apply to (i) particular matters (ii) specific Officer’s duties or functions (iii) whether they are generic, particular or specific (iv) whether or not they have been formally advised to Officers or (v) whether they are intended for use or are in use.

Option 2. Add an additional explanatory rider which defines ‘Agency’ to include ‘Officers.’

Division 3—Review of information publication scheme

9 Review of scheme—by agencies

An agency must,

Note 2: The agency must have regard to the objects of this Act and guidelines issued by the Information Commissioner in performing functions, and exercising powers, under this section (see section 9A).

Comment : The obligation to comply with the specifications of the Objects must be stated as part of the Objects section.

It is not clear what “must have regard to the Objects of this Act” means. It clearly does not mean that the agency must comply with the Objects. Reading the Objects would seem to qualify as having regard to the Objects. Then the agency has the discretion to completely disregard any part of the Objects that it so wishes. Therefore why bother including the ‘Note’?

Guidelines issued by the Information Commissioner are as useful as the guidelines issued by the Public Service Commissioner. They are used or misused or rejected at the discretion of the agency. Why bother raising any requirement that is not enforceable?

The Objects must be read as one with each section of the Act and have application in relation to each and every section – and not left as a ‘Note’ applied to particular sections.

Division 4—Guidelines

9A Guidelines—functions and powers under this Part

In performing a function, or exercising a power, under this Part, an agency must have regard to:

- (a) the objects of this Act (including all the matters set out in sections 3 and 3A); and

(b) guidelines issued by the Information Commissioner for the purposes of this paragraph under section 93A.

Comment : The obligation to comply with the specifications of the Objects must be stated as part of the Objects as having application in relation to each and every section – and not left as a ‘Note’ applied to particular sections.

CRITIQUE: Guidelines are a convenient discretionary option available to bureaucrats which may be followed if convenient or ignored as required. Guidelines should be followed unless there is a more prevailing and reasonable reason to do otherwise. Failure to follow guidelines without reasonable excuse thereof must attract sanctions under the Code of Conduct.

The AG’s Legal Services Directions and Model Litigation Policy are enforceable directions under s55ZF of the Judiciary Act and Public Service Act respectively. There are court findings and case evidence of repeated breaches of these directions. Yet no bureaucrat has EVER been sanctioned for failing to follow those directions. Similarly FOI memoranda have been issued as formal guidelines and have been ignored with impunity.

There is no Government policy or practice which explains how this proposed new Act will overturn years of public administrative disregard for formal directions. The Exposure Draft provides no information proving that the issue has been addressed let alone resolved.

It is a matter of Public Sector practice that when agencies or bureaucrats are faced with legislation which makes them accountable they simply ignore it and wait for a change of government to develop means to avoid that accountability.

In the absence of legislation which compels compliance under threat of penalties, the bureaucrat’s solution to this current proposed legislation is to simply ignore it as much as possible, test it for weaknesses, fail to respond until the last minute about any matter in question, mislead, obfuscate and delay. The hope is for a conservative Government which will work hand in glove with the bureaucrats to minimise exposure of the government and public administration.

4 Subsection 42(2)

Repeal the subsection, substitute:

(2) A document is not an exempt document because of subsection (1) only because it contains operational information of an agency (see section 8A).

CRITIQUE : What does “only because it contains” mean?

The AAT, the AGS and several barristers could not agree on what the ‘only’ meant in the previous s42(2).

‘Only’ means – Merely, simply, just, single. ‘Only because’ would mean ‘just because’.

This section seriously lacks legal clarity.

It appears the subsection means that;
A Client Legal Privileged (CLP) document is not an exempt document just because it contains (s8A) operational information.

A clearer interpretation would be that “A document that could be subject to an exemption under (42(1) Client Legal Privileged (CLP) not an exempt document if it contains (s8A) operational information.

In relation to the existing s42(2) the AAT with the instance of the AAT has interpreted the subsection to mean the opposite. “A Client Legal Privileged (CLP) document is not an exempt document even if it contains (s9) information (i.e. about the powers or functions of officers, manuals, interpretation of legislation, precedents operational information and so on.

So the question remains – what is the intention of the Exposure Draft substituted subsection 42(2)?

From a cynical viewpoint it could be argued that the intention of the subsection as written is to ensure that any document containing CLP information is exempt in total – despite the document also containing information about (s8Aa) operational information which would not be CLP matters.

If this latter proposition is the case, then that situation makes a mockery of s22 (severance of information) which permits matters which do not amount to exempt material to be ‘severed’ from the exempt matter and released.

It is noted that the Exposure Draft replaces s22 – regardless of that replacement, the proposed new s22 remains just as impotent as the current s22 in respect of s42 CLP matters.

S42(1) allows the entire document to be categorised as an exempt document regardless of s22.

As matters stand (even under the proposed new s22) if there are only a few lines of legal advice in a 10 page document then a CLP exemption is claimed for the whole document. Despite the provisions of s22 the AGS argues that because of s58(2) the AAT cannot force the severance of exempt CLP material from the non exempt material under s22.

Section 58(2) is used to prohibit the AAT from releasing a document if any part of the document contains CLP exempt information.

All this is despite the guidelines in the FOI Memorandum –

13.4.1 In *Waterford v Commonwealth of Australia* (D195), the High Court said that, if only part of a document contains material which is privileged. Under s42, s22 requires disclosure of the part, which is not privileged from production.

This is further proof that agencies (with the assistance of the AGS) are more than willing to act

contrary to formal guidelines issued by the Attorney General's Department, which are based on High Court rulings.

CLP is usually claimed because it can be claimed – not because of any harm likely to be caused to the public interest – but because it is an exercise in power, it maintains a legal exclusiveness but mostly because the information involved usually exposes incompetence or questionable, if not wrongful conduct, by senior bureaucrats.

CLP is the most frequently abused exemption claimed. The Rudd Government must reign in these flagrant abuses exercised for vested interest rather than the public interests.

Recommendation: this recommendation is in addition to the earlier recommendations concerning CLP and s42.

Regardless of whether the earlier recommendations are applied to this section, it is necessary to ensure that s22 permits the severance of information contained within a document, which also contains CLP or other exempt information. The information in a document which is not subject to CLP or other exemption provisions must be accessible.

Section 58(2) must also be amended to ensure the AAT (and the Information Commissioner) have the power to adjudicate on whether information which is not covered by an exemption can and should be severed (under s)22 from an otherwise exempt document,

11C Publication of information in accessed documents

Publication

(2) The agency, or the Minister, **must** publish the information to members of the public generally on a website by:

(a) making the information available for downloading from the website; or

(b) publishing on the website a link to another website, from which the information can be downloaded; or

CRITIQUE

Throughout the Exposure Draft there are numerous references to people who “*must*” carry out some act or function.

Yet there is nothing in the Exposure Draft, which explains what happens if those acts are not carried out (other than the provisions of s79, 82 and 83).

This is like setting a speed limit, without imposing penalties on the assumption that the speed limit will never be breached.

The bureaucracy has persistently failed to meet obligations under the existing FOI Act such as those required under section 8 or section 9.

Yet for some strange reason, the current government continues to rely on bureaucrats who have a history of non-compliance with statutory obligations to voluntarily and miraculously change that entrenched 23 year old culture.

If this government does not intend to make it an offence for non-compliance with statutory obligations or duties then it would be best to avoid using terms such as '*must or shall*' within the legislation.

Having public servants disobey statutory obligations with impunity simply makes lawmakers look like impotent scriptwriters. It brings the whole process of law making into disrepute and discredits parliament as a lawmaking body.

Recommendation

Do not use terms such as '*must or shall*' within legislation, unless provision is made to penalise those who, without just cause or reasonable excuse, breach those provisions. It would be better to replace the words '*must or shall*' with the word '*should*', thereby leaving it as a discretionary option available to bureaucrats to either comply with the requirements of the act and the intention of Parliament, or to simply ignore them.

14 Section 22

Repeal the section, substitute:

22 Access to edited copies with exempt matter deleted

Scope

(1) This section applies if:

(b) it is possible for the agency or Minister to prepare a copy (an *edited copy*) of the document, modified by deletions, ensuring that:

(i) access to the edited copy would be required to be given under section 11A (access to documents on request); and

(ii) the edited copy would not disclose any information that would reasonably be regarded as irrelevant to the request; and

Critique;

As stated above, s22 does not apply to s42. Once a document is claimed to be an exempt CLP document, the AAT has ruled that despite the High Court ruling in *Waterford v Commonwealth*

of Australia the AAT does not have the power to force the (severance) disclosure of the those parts of the document which do not qualify as client legal privileged matter.

Recommendation;

If it is intended that section 22 should apply to all claims for exemptions then s22 must be amended. The amendment must advise that severance of non-CLP material must occur wherever possible and that the information office or the AAT or the courts have the power to assess whether that severance has been applied in a manner consistent with the Objects of the Act

Division 6—Procedure in IC Review

55D Procedure in IC review—onus

(1) Subject to subsection (2), in an IC review the principal officer of the agency, or the Minister, to whom the request was made has the onus of establishing that:

- (a) a decision given in respect of the request was justified; or
- (b) the Information Commissioner should give a decision adverse to the IC review applicant.

(2) In an IC review of a decision for which an IC review application is made under section 54M (access grant decisions), the affected third party for the document in relation to which the decision was made has the onus of establishing that:

- (a) a decision refusing the request is justified; or
- (b) the Information Commissioner should give a decision adverse to the person who made the request.

Note: For *affected third party* see section 53C.

Critique;

The issue of ‘justifying’ an exemption is raised above under the heading ‘Why the legislation didn’t work’ and the sub-heading, ‘Addressing the first problem: the current Act, *Section 61-Onus*.

The critique below includes a restatement of the same argument in respect of having to ‘justify’ an decision to deny access.

A decision to claim an exemption must be ‘justified’. But there is no benchmark against which this ‘justification’ must be tested. Simply because a matter falls within the scope of an exempt document is not justification to claim the exemption – it is a reason to claim an exemption but it is not a justification.

The Onus test requiring agencies to prove ‘justification’ has been abused relentlessly and persistently. Provided that an agency was able to show that the information contained in a document met the grounds for an exemption then that was sufficient justification to claim an

exemption. But there was absolutely no regard for the provisions of the Objects of the Act (s3(1)(b) requiring that the exceptions were limited to the extent that they were necessary for the protection of essential public interest....’

There was no legislative tie binding the requirements of the Objects to the provisions of any section of the Act, including s61. Tribunal's and courts gave no force in law to provision of the Objects. Even in regard to s3(2) , which required any interpretation of provisions (by a court or tribunal's) to favour disclosure of information.

Pointing out that any claim for an exemption must be tested against the requirements of the Objects of the Act, necessitating a test that the exemption was necessary for the protection of essential public interests was consistently rejected out of hand by courts and Tribunal's.

Section 55D is not bound to s3 or s3A Objects of the Act. Agencies or Ministers are not compelled to ‘justify’ their decisions in respect of a request against the Objects of the Act as a basic criteria for justification. There is no standard for proving adequate justification for decisions made. It seems that any reason must be accepted as justification for any decision to deny access. There is no justification test available to the courts or Tribunals, so any excuse must be considered to be ample justification.

Recommendation.

The process of justifying a reason for a decision (s55D) must involve testing the decision against the Objects of the Act. If the decision is not consistent with the objects of the act then the decision should not stand because it has not been justified. The information should be disclosed.

The second test of a justified claim for an exemption must also consider whether the exemption (on balance) is necessary to protect an essential public interest. If the exemption claim is not necessary to meet that end then the exemption is not justified and it cannot and must not be claimed.

It would be better still to clarify this justification for exemption test by applying a third test. That test should be whether the disclosure of the information would cause real and significant harm to the public interest.

If the answer to the second test question is ‘Yes’ then the third test question should be used. If the answer to the third test question is ‘NO’ then the information should be disclosed.

Similarly Section 61 must be amended in a way that gives effect to this recommendation.

55E Procedure in IC review—inadequate reasons from decision maker

(1) This section applies if:

- (a) an IC review application is made in relation to an IC reviewable decision made by an agency or a Minister; and

- (b) the agency or Minister was required to provide a statement of reasons under subsection 26(1) for the decision to the person who made the request; and
- (c) the Information Commissioner believes that:
 - (i) no statement has been provided; or
 - (ii) the statement that has been provided is inadequate.

(2) The Information Commissioner may, by notice in writing, require the agency or Minister to provide an adequate statement of reasons as mentioned in subsection 26(1).

(3) If the Information Commissioner gives notice under subsection (2), the agency or Minister must provide the adequate statement of reasons to the IC review applicant and the Information Commissioner within:

Critique:

There is nothing in the Exposure Draft to indicate precisely what happens if the agency (or the Minister) fails to produce reasons for the decision or delivers an inadequate reason for the decision.

The Information Commissioner must be able to take some action – but if some action is available to the Information Commissioner it does not seem to have been spelt out in the Exposure Draft.

Recommendation:

Given that there are no obvious consequences for failing to carry out the obligations under this section it would be best to amend the word ‘must’ to ‘should’ there by avoiding any embarrassment when such notices are ignored.

55K Decision on IC review—no power to give access to exempt (material)

(1) This section applies if it is established in proceedings on an IC review that a document is an exempt document.

(2) The Information Commissioner does not have power to decide that access to the document is to be given, so far as it contains exempt matter.

Critique;

This section 55K seems to duplicate s58(2) but in this case, it applies to the Information Commissioner.

Section 58(2) is used as a means to interfere with the use of section 22 (severance) matters. Once a document is identified as having exempt material, (using 58(2)) the whole of the document is categorised as an exempt document. The Tribunal does not have the power to grant access to the document – even to the extent of using s22 (severance) on those parts which are not exempt material.

Section 55K will have the same effect on s22 matters. The Information Commissioner will not have the power to grant access to non exempt material within an exempt document.

Recommendation

Amend the section to the effect that the Information Commission may grant access to any non exempt material even if it is located in an exempt document.

55N Decision on IC review—enforcement of decision against agency

(1) If the principal officer of an agency or a Minister fails to comply with section 55M, an application may be made to the Federal Court of Australia for an order directing the principal officer or Minister to comply.

(2) The application may be made by:

- (a) the Information Commissioner; or
- (b) the IC review applicant.

Critique:

The Exposure Draft processes intended for use under this section are of great concern. This Federal Court referral process suggests that the government is completely incapable of constructing legislation capable of controlling recalcitrant, disobedient or unmanageable bureaucrats.

It is totally improper to place the Information Commissioner in a position where he or she can issue directions or monitor compliance with the act and yet be totally incapable of taking action against bureaucrats who fail to follow the directions or who breach compliance requirements.

The CEO of any Commonwealth agency may institute proceedings under the Public Service Code of Conduct against officers, who breach directions or fail to carry out duties.

The Information Commission has been established to resolve 23 years of bureaucratic abuse of the FOI Act. Yet, the Information Commissioner is denied the same powers available to heads of agencies to institute proceedings under the Code of Conduct.

There is no reason why the Information Commissioner should not be entitled to institute proceedings under the Code of Conduct against any officer, who fails to follow proper directions or who breaches requirements under the Act.

It is imperative that the powers which are provided to the CEOs of any agency, be provided to the Information Commissioner (and other Commissioners working through the Public Information Office).

However in respect of Ministers who fail to comply with the Information Commissioner's directions, it is reasonable for such matters to be referred to the Federal Court.

And in circumstances where a Minister is referred to the Federal Court for non-compliance, abuse of process or other misconduct, the Federal Court should be empowered to impose orders, directions or appropriate penalties, as it sees fit.

Recommendation;

In respect of Ministers it would seem there is no alternative other than to apply the current proposed provisions of s55N.

However in addition to the powers conferred on the court under s55N(3), the court should also be entitled to impose a fine or penalty if the Minister is found guilty, equivalent to the powers of the court to impose a penalty against a person who is guilty of contempt of court.

In respect of public servants, the process proposed under this section is incongruous.

The Information Commissioner must be empowered to institute proceedings under the Public Service Code of Conduct in relation to any failure by any public servant to carry out any formal requirements under the act.

The Information Commissioner must be empowered to impose penalties, in accordance with the Code of Conduct for breaches of statutory duties or formal requirements under the act.

The option to refer a matter to the Federal Court should remain if the breach of directions or offences against the act are serious enough to warrant such action.

Division 3—Powers of Tribunal

36 Subsection 58(7)

Repeal the subsection

Section 58(2)

In the Exposure Draft there is no reference or amendment suggested for s58(2)

Where, in proceedings under this Act, it is established that a document is an exempt document, the Tribunal does not have the power to decide that access to the document, so far as it contains exempt matter, is to be granted.

Critique

Subsection 58(2), concerns the Tribunal (AAT), but it is matched by the new s55K in respect of the Information Commissioner.

This section is used as a means to interfere with s22 (Severance) matters. The section is clear and unambiguous. A document is an exempt document if any part of the document contains

exempt material.

Despite the provisions of s22 and High Court decisions, the AGS persistently and successfully claims that s58(2) prohibits the AAT from making a decision to sever non-exempt material from a document containing exempt material.

Recommendation;

S58(2) be amended in terms, which ensures that the AAT (and the Information Commissioner) has the power to grant access to any part of an exempt document that does not specifically contain exempt material.

42 Subsection 61(2) – no comment required

Section 61(1)

In the Exposure Draft there is no reference or amendment suggested for s61(1)

The comment hereunder duplicates in part similar arguments previously raised in relation to s61(1)

The current Act, *Section 61(1) - Onus*, requires that a decision to claim an exemption must be 'justified'. But there is no benchmark against which this 'justification' must be tested. Simply because a matter falls within the scope of an exempt document is not justification to claim the exemption – it is a ground on which a claim for an exemption is made but it is not a justification.

Justification requires a reason, a validation, an explanation.

The Onus test requiring agencies to prove 'justification' has been abused relentlessly and persistently. Provided that an agency was able to show that the information contained in a document met the grounds for an exemption then that was sufficient justification to claim an exemption. But there was absolutely no regard for the provisions of the Objects of the Act (s3(1)(b) requiring that the exceptions were limited to the extent that they were necessary for the protection of essential public interest....'

There was no legislative tie binding the requirements of the Objects to the provisions of any section of the Act. Tribunal's and courts gave no force in law to provision of the Objects. Even in regard to s3(2) , which required any interpretation of provisions (by a court or tribunal's) to favour disclosure of information.

In the application of s61(1) an agency or a relevant Minister must justify any decision to deny access to information or a document. The justification must include an objective test consistent with the Objects of the Act and the rights of the public to access information, unless to do so would cause harm to the public interest.

Failure to meet that test must of itself, be sufficient grounds to grant access to documents or information.

Recommendation.

The test of a justified claim for an exemption must be whether the exemption (on balance) is necessary to protect an essential public interest. If the exemption claim is not necessary to meet that end then the exemption is not justified and it cannot and must not be claimed.

It would be better still to clarify this justification for exemption test by applying a second test. That test should be whether the disclosure of the information would cause real and significant harm to the public interest.

If the answer to the first test question is 'Yes' then the second test question should be used. If the answer to the second test question is 'NO' then the information should be accessed or disclosed.

In relation to Sections 79, 82 and 83.

79 Information Commissioner investigations—obliging production of information and documents

and

82 Information Commissioner investigations—obliging persons to appear

and

83 Information Commissioner investigations—administration of oath or affirmation

All the above sections contain penalty provisions in relation to offences against this Act.

Penalty for a contravention of this subsection: 6 months imprisonment.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

Comment

There seems to be no logic to have offences and penalties related to these specific sections when there are equal if not stronger grounds to have offences and penalties applied to other sections.

It is very inconsistent to have strong offences and penalties in relation to these particular sections of the Act, while totally disregarding any form of penalty (including action under the Code of Conduct) in relation to many other sections of the act.

The contradiction between these two positions seems to show some significant uncertainties by the government as to its intentions under the act.

89 Information Commissioner investigations—failure to implement investigation recommendation and

89A Information Commissioner investigations—failure to take action in response to implementation notice

COMMENT;

Both sections 89 and 89A are very praiseworthy provisions which are long overdue.

93A Guidelines

(1) The Information Commissioner may, by instrument in writing, issue guidelines for the purposes of this Act.

Note: For variation and revocation of the instrument, see subsection 33(3) of the *Acts Interpretation Act 1901*.

(2) For the purposes of the performance of a function, or the exercise of a power, under this Act, regard must be had to any guidelines issued by the Information Commissioner....

Comment

Guidelines are a discretionary option available to bureaucrats to use or reject at will. Despite the terms of this section that “regard must be had” – there is no compulsion for force compliance and no penalty if the guidelines are ignored or breached.

Recommendation

In subsection (2) change the word “must” to “should” OR
Add a further subsection requiring compliance with these guidelines under threat of penalties for non compliance.

Submission ends

P.P.Bennett