

ALRC 77

Open government: a review of the federal *Freedom of Information Act 1982*

Terms Of Reference

Overview

1. INTRODUCTION

A review of the Freedom of Information Act 1982 (Cth)

Why review the FOI Act?

The FOI Act is here to stay

The Review's work

Draft legislation

Structure of report

Recommendations

2. GOVERNMENT INFORMATION IN A DEMOCRATIC SOCIETY

Introduction

The importance of government information being accessible

Government information is accessible in many ways

The FOI Act provides a statutory right of access

Is the FOI Act working?

3. BACKGROUND TO FOI IN AUSTRALIA

Introduction

Background to the introduction of the FOI Act

Amendments to the FOI Act

State and Territory FOI legislation

FOI in other countries

4. GIVING EFFECT TO THE OBJECTIVES OF FOI

Introduction

Interpreting the Act in a way that will promote its objectives

A public sector that accepts and is committed to open government

A better understanding of the philosophy of the Act

More 'authorised officers'

FOI and performance agreements

Greater disclosure outside the FOI Act - s14

Secrecy provisions - a deterrent to openness

5. FOI, ARCHIVES AND PRIVACY

Introduction

FOI, Archives and Privacy Acts all deal with government records

Archives and FOI

Privacy and FOI

6. AN FOI COMMISSIONER

Introduction

DP 59 proposal - an independent monitor

A new statutory position: FOI Commissioner

The FOI Commissioner's role

Monitoring agencies' administration of the Act

Promoting the objectives of the Act and providing advice and assistance

Legislative policy advice

Interaction between the FOI Commissioner and the Ombudsman and the AAT
Role for FOI Commissioner in broader information policy
Review of FOI Commissioner's role after five years
No existing organisation could perform the role proposed for the FOI Commissioner
Location of the FOI Commissioner

7. USING THE FOI ACT

Introduction
What is accessible under the FOI Act
Making an FOI application
Processing FOI requests
Use of FOI in litigation

8. EXEMPTIONS - GENERAL PRINCIPLES

Introduction
The philosophy and interpretation of exemption provisions
Public interest test
Conclusive certificates
Information as to the existence of a document
National uniform exemption provisions

9. SPECIFIC EXEMPTIONS - RESPONSIBILITIES AND OPERATIONS OF GOVERNMENT

Introduction
National security and defence - s 33
Intergovernment relations (domestic) - s 33A
Cabinet documents - s 34
Executive Council documents - s 35
Internal working documents - s 36
Law enforcement and public safety - s 37
Financial or property interests of the Commonwealth - s 39
Operations of an agency - s 40
Documents affecting the national economy - s 44

10. SPECIFIC EXEMPTIONS - THIRD PARTY INFORMATION

Introduction
Personal privacy - s 41
Legal professional privilege - s 42
Business affairs - s 43
Material obtained in confidence - s 45
Electoral rolls and related documents - s 47A

11. OTHER EXEMPTIONS AND EXCLUSIONS

Introduction
Secrecy provisions - s 38
Documents relating to research - s 43A
Contempt of Parliament or court; Royal Commission orders - s 46
Companies and securities legislation - s 47
Documents of courts, tribunals and the Official Secretary to the Governor-General - s 5, 6 and 6A
Parliamentary departments
Territories
Schedule 2

12. AMENDMENT AND ANNOTATION OF PERSONAL INFORMATION

Introduction
The importance of amendment and annotation of personal information
Overlap between the FOI and Privacy Acts
Current FOI Act provisions for amendment or annotation

- Access as a prerequisite to amendment
- Relevance as a ground for seeking amendment or annotation
- An obligation to amend
- Amendment by deletion
- Review of decisions to amend or annotate
- Rejecting amendment applications on resource grounds

13. REVIEW MECHANISMS

- Introduction
- The ARC's Better Decisions report
- Internal review
- AAT review
- Investigation by the Ombudsman

14. THE COST OF SEEKING ACCESS TO INFORMATION UNDER THE FOI ACT

- Introduction
- Fees and charges and the objects of the FOI Act
- Current fees and charges regime
- Criticisms of the current system
- Applicant's personal information
- Information other than the applicant's personal information
- A new fees and charges regime for information other than personal information of the applicant
- Alternative modifications to current regime
- Fee for internal review
- Remission of fees and waiver or reduction of charges

AAT review

15. PRIVATE SECTOR

- Introduction
- Current access to private sector documents
- Views on extending the FOI Act to the private sector
- The Review's view on general extension
- Private sector bodies contracting with government
- Information privacy protection in the private sector

16. GBES

- Introduction
- Personal and non-personal information
- Defining GBES for administrative law purposes
- Accountability of GBES
- DP 59 proposal and response
- The Review's position

Appendix A: Participants

Appendix B: Abbreviations

Appendix C: List Of Submissions

Appendix D: List Of Recommendations

Appendix E: Information Privacy Principle 11

Table Of Legislation

Table Of Cases

Select Bibliography

Index

This Report reflects the law as at 31 December 1995

© Commonwealth of Australia 1995

This work is copyright. Apart from any use as permitted under the *Copyright Act 1968*, no part may be reproduced by any process without written permission. Inquiries should be directed to the Manager, Commonwealth Information Services, Australian Government Publishing Service, GPO Box 84, Canberra ACT 2601.

ISBN 0 642 24477 4

Commission Reference: ALRC 77

The Australian Law Reform Commission was established by the *Law Reform Commission Act 1973*. Section 5 provides for the Commission to review, modernise and simplify the law. It started operation in 1975. The main office of the Commission is at Level 10, 133 Castlereagh Street, Sydney, NSW, 2000, Australia. The Commission also maintains a small office in Canberra.

Terms of reference

Law Reform Commission Act 1973

REVIEW OF FREEDOM OF INFORMATION LEGISLATION

1. I, **Duncan Kerr**, Acting Attorney-General of Australia, having regard to:

- (a) the basic purposes of, and benefits intended to be conferred by, the provisions of the *Freedom of Information Act 1982*, as identified in:
 - (i) section 3 of the *Freedom of Information Act*, namely:
 - to extend as far as possible the right of the Australian community to access to information in the possession of the Government of the Commonwealth;
 - (ii) the Attorney-General's first Freedom of Information Annual Report, 1982-83, including:
 - to make government more accountable by making it more open to public scrutiny;
 - to improve the quality of decision making by government agencies in both policy and administrative matters by removing unnecessary secrecy surrounding the decision-making process;
 - to enable groups and individuals to be kept informed of the functioning of the decision-making process as it affects them and to know of the kinds of criteria that will be applied by government agencies in making those decisions;
 - to develop further the quality of political democracy by giving the opportunity to all Australians to participate fully in the political process; and
 - to enable individuals, except in very limited and exceptional circumstances, to have access to information about them held on government files, so that they may know the basis on which decisions that can fundamentally affect their lives are made and may have the opportunity of correcting information that is incorrect or misleading; and
 - (iii) the Report of the Senate Standing Committee on Constitutional and Legal Affairs on Freedom of Information (1979), including:
 - to increase the level of public participation in the processes of policy making and government;
- (b) the principles and provisions of the various State and Territory Freedom of Information Acts;
- (c) the principles and provisions of the *Privacy Act 1988*;
- (d) the principles and provisions of the New Zealand *Privacy Act 1993*;
- (e) the *Report on the Operation and Administration of the Freedom of Information Legislation* (1987) by the Senate Standing Committee on Legal and Constitutional Affairs and the Government's response to that report (Senate Journal, 1 June 1989); and
- (f) the Administrative Review Council's inquiry into Government Business Enterprises;

refer to the Law Reform Commission, for inquiry and report under the *Law Reform Commission Act 1973*, section 6, the following matters:

- (g) whether the basic purposes and principles of the freedom of information legislation, in Australia (including the external territories) as set out above, have been satisfied and whether they require modification;
- (h) whether the Act should be amended to achieve those purposes better, in particular,
 - (i) whether the objects clause fully reflects the purpose of the Act;
 - (ii) whether the ambit of the application of the Act should be extended to cover
 - private sector bodies;
 - Government Business Enterprises;
 - (iii) to what extent the existing exemption provisions of the Act should be amended to improve public access to government held information, in particular,
 - whether any existing ground for exemption should be removed or amended;
 - which exemptions, if any, should be subject to a public interest test and whether that test should be standardised for each exemption to which it applies; and

- whether conclusive certificates are justified or whether they should no longer be provided for;
- (iv) whether the interest of the applicant can be a relevant consideration in granting access to the applicant's own personal information;
- (v) the appropriateness of, and need for, the existing regime of fees and charges;
- (vi) whether external review of decisions should be conducted by a specialist tribunal or an independent person (for example, an Information Commissioner) and, if so, whether that person should be the Privacy Commissioner; and
- (vii) the need, if any, for alternative mechanisms for the disclosure of particular categories of information, in particular, environmental information;
- (i) whether the structure and wording of the Act can be simplified to make it more easily understood by the public; and
- (j) any related matter.

2. The Commission is to conduct this inquiry jointly with the Administrative Review Council.

3. The report and advice should include draft legislation.

4. The Commission is to prepare and release an issues paper by 30 September 1994 and is to report by 31 December 1995.

Acting Attorney-General

8 July 1994

Overview

The Australian Law Reform Commission and the Administrative Review Council (the Review) have carried out a comprehensive review of the Commonwealth's *Freedom of Information Act 1982*.

A summary of the Review's recommendations is set out in Appendix D.

The Review considers that more must be done to dismantle the culture of secrecy that still pervades some aspects of Australian public sector administration. The recommendations in this report are designed to give full effect to the Australian people's right of access to government-held information. They include:

- retention of the FOI Act as an instrument of public sector accountability
- creation of a new statutory office of FOI Commissioner to monitor and improve the administration of the FOI Act and to provide assistance, advice and education to applicants and agencies about how to use, interpret and administer the Act
- revision of the object clause to promote a pro-disclosure interpretation of the Act and to acknowledge the important role of freedom of information in Australia's constitutionally guaranteed representative democracy
- a review of all secrecy provisions in federal legislation to ensure that they do not impose prohibitions on the disclosure of government-held information that are broader than the exemption provisions in the FOI Act
- several amendments to the FOI and Privacy Acts to ensure the continued smooth operation of the overlap between the two Acts in respect of access to, and amendment of, personal information and to clarify the interaction between the two Acts in respect of the disclosure of third party personal information retention of the Administrative Appeals Tribunal as the sole determinative reviewer of FOI decisions
- not applying the FOI Act to the private sector or to government business enterprises that are engaged predominantly in commercial activities in a competitive market.

1. Introduction

A review of the Freedom of Information Act 1982 (Cth)

1.1 The federal Parliament passed the *Freedom of Information Act* (FOI Act) in 1982.¹ On 8 July 1994 the Acting Attorney-General, Mr Duncan Kerr MP, asked the Australian Law Reform Commission (ALRC) and the Administrative Review Council (ARC) (referred to collectively throughout this report as 'the Review') to review the Commonwealth's freedom of information (FOI) legislation. The principal purpose of the review was to determine whether the FOI Act has achieved the purposes and objectives it was designed to achieve and, if it has not, to recommend changes to improve its effectiveness. The Review was also to consider whether the FOI Act should extend to the private sector.² The terms of reference are reproduced at page 3.

Why review the FOI Act?

1.2 The FOI Act is now 13 years old. The purpose of the Act was novel. It was designed to make government more open and accountable by providing a right of access to information in the possession of government. It is time to consider whether it has achieved, and is continuing to achieve, what Parliament intended. Concerns about the operation of the Act include the number and breadth of the exemptions, the high cost of obtaining information and the quality of the current review procedures.³ Since 1982, the States and the ACT have introduced FOI legislation.⁴ The drafting of this legislation took account of the experience of the Commonwealth. The Commonwealth in turn can benefit from the experiences of the States and the ACT. A number of factors, including the increased blurring between the public and private sectors,⁵ raise issues about the rationale for restricting the application of FOI to government agencies and departments.

The FOI Act is here to stay

1.3 The FOI Act is now accepted as a part of the legislative landscape of Australia. There has been no suggestion from any person or sector during this review that the Act ought be abolished. Australian society and politics have clearly moved a long way since those tentative years leading to the introduction of the Act.⁶ The FOI Act is now an integral part of Australia's democratic framework. This is not to say that the Act is working perfectly or that it is not susceptible to attack or weakening. It is often said that Oppositions are fond of FOI but 'the longer a government is in office, the less its enthusiasm, typically, for open government.'⁷

The Review's work

Publications

1.4 In September 1994 the Review released an issues paper (IP 12). The paper sought to identify problems with the FOI Act and sought comment on how it could be improved. In June 1995 the Review released a discussion paper (DP 59) setting out the Review's current thinking. It contained a number of proposals to change the FOI Act. Both publications were distributed widely throughout the community and the government. 120 written submissions were received in response to IP 12 and 100 in response to DP 59.

¹ The Act came into force on 1 December 1982.

² See ch 16.

³ See, eg, Paul Villanti 'Comment' (1994) 50 *FOI Review* 1; K Harrison & A Cossins *Documents, dossiers & the inside dope* Allen and Unwin Sydney 1993, 9; R Snell 'Hitting the wall: does Freedom of Information have staying power?' *Paper AIAL Conference Brisbane* July 1994; P Bayne 'The FOI laws - instructive comparisons and contrasts' *Paper AIAL Conference Brisbane* July 1994. These concerns have been borne out in submissions received by the Review.

⁴ Freedom of Information Act 1982 (Vic); Freedom of Information Act 1989 (ACT); Freedom of Information Act 1989 (NSW); Freedom of Information Act 1991 (SA); Freedom of Information Act 1991 (Tas); Freedom of Information Act 1992 (Qld); Freedom of Information Act 1992 (WA). The NT and Australia's external territories do not have their own FOI legislation: see para 11.9-11.12.

⁵ See ch 15.

⁶ It was over 10 years in the making - see ch 3 for a brief history of the development of the Act.

⁷ Justice M Kirby 'Summing up: FOI in Australia - First term report' *Speech Seminar on access to government information*, Australian National University 27-29 May 1983, 14.

Consultations

1.5 ***Honorary consultants.*** Honorary consultants from business organisations, consumer groups, academia, government departments and the legal profession were appointed to assist with this inquiry. They are listed at Appendix A. Three meetings of honorary consultants were held, on 11 August 1994, 2 February 1995 and 18 August 1995. The Review acknowledges the consultants' important contribution and the valuable comments they made on various draft proposals.

1.6 ***Public consultations.*** The Review held public seminars on IP 12 in Sydney, Melbourne and Brisbane and on DP 59 in Canberra. It held a one day forum with government agencies in Canberra in July 1995. A number of meetings and discussions were held with organisations and individuals with a particular interest or expertise in FOI.⁸ The ALRC appeared before the Tasmanian Legislative Council's Select Committee on FOI.⁹

Draft legislation

OPC to draft the Review's recommendations

1.7 The Review's terms of reference ask that its report include draft legislation. The Government's Justice Statement, released in May 1995, announced the establishment of a unit within the Office of Parliamentary Counsel (OPC) to revise legislation with a view to simplifying it. One of the first tasks allotted to this Unit is to draft the amendments arising from the recommendations in this report. As a consequence, and with the Attorney-General's agreement, this report does not include draft legislation.

Simplifying the Act

1.8 Given that the role of the new unit in OPC is to simplify legislation, the Review anticipates that it will, at the same time as it drafts the recommendations arising from this report, look at the entire Act to ensure that it is drafted in plain language. During this project the Review received a number of submissions that consider the Act is difficult to interpret and not user friendly.¹⁰ These concerns should be addressed by the work of OPC.

Structure of report

1.9 Chapter 2 outlines the objectives of the FOI Act and identifies a number of deficiencies in the Act and its administration. Chapter 3 provides a short history of the developments leading to the passage of the Act in 1982 and a brief outline of FOI regimes in other jurisdictions. Chapter 4 makes recommendations to ensure that the Act is interpreted in a way that gives effect to its objectives. Chapter 5 discusses the various interrelationships between the FOI Act, the *Archives Act 1983* (Cth) (Archives Act) and the *Privacy Act 1988* (Cth) (Privacy Act). Chapter 6 recommends the creation of an FOI Commissioner to monitor the administration of the Act. Chapter 7 discusses a number of practical issues relating to FOI requests, such as the definition of document, time limits and statements of reasons. Chapters 8, 9, 10 and 11 discuss the exemption provisions. Chapter 12 makes recommendations to improve the amendment provisions of the FOI Act and Chapter 13 discusses review mechanisms. Chapter 14 deals with the cost of using the Act. Chapter 15 discusses the private sector and FOI and Chapter 16 GBEs.

Recommendations

1.10 Most recommendations are joint recommendations and have the support of both the ALRC and the ARC. In the few cases where a recommendation is not joint, that is clearly indicated.

⁸ These included the federal Administrative Appeals Tribunal (AAT), the Cth Ombudsman, the President of the ACT AAT, the Privacy Commissioner, the NZ Privacy Commissioner, the NSW Ombudsman's office, the Qld Deputy Information Commissioner, the WA Information Commissioner, the Australian Bankers' Association and the Credit Reference Association of Australia.

⁹ 16 June 1995.

¹⁰ eg Confidential *Submission 70*; Dept of Social Security *IP Submission 39*; Health Insurance Commission *IP Submission 51*; Dept of the Environment, Sport and Territories *IP Submission 64*; AConway Jones *IP Submission 14*

2. Government information in a democratic society

Introduction

2.1 Since the development of the system of democratic government, tension has existed between the elected and the electorate as to how much the former should tell the latter.¹ The enactment of the FOI Act in 1982 brought about a fundamental change in the law in Australia relating to access to government-held information and challenged the boundaries of government secrecy.² It had particular significance because it was the first national FOI legislation in a country with a Westminster style of responsible government. This chapter outlines the objectives of the FOI Act, explains why access to government information is important and identifies a number of deficiencies in the Act and its current administration.

The importance of government information being accessible

The objectives of the FOI Act

2.2 The FOI Act provides a right of access to information in the possession of government departments and agencies. The fundamental reason for providing this right is to ensure open and accountable government. In 1979 the Senate Standing Committee on Legal and Constitutional Affairs identified three objectives of FOI legislation: to increase public scrutiny and accountability of government, to increase the level of public participation in the processes of policy making and government and to provide access to personal information.³ The objectives cited in the first annual FOI report include

- to improve the quality of agency decision making
- to enable citizens to be kept informed of the functioning of the decision making process as it affects them and to know the criteria that will be applied in making these decisions and
- to develop the quality of political democracy by giving all Australians the opportunity to participate fully in the political process.⁴

It is clear that access to information is closely related to the notion of a healthy democracy.

Information and representative democracy

2.3 Australia is a representative democracy. The Constitution gives the people ultimate control over the government, exercised through the election of the members of Parliament. The effective operation of representative democracy depends on the people being able to scrutinise, discuss and contribute to government decision making. To do this, they need information. While much material about government operations is provided voluntarily and legislation must be published, the FOI Act has an important role to play in enhancing the proper working of our representative democracy by giving individuals the right to demand that specific documents be disclosed. Such access to information permits the government to be assessed and enables people to participate more effectively in the policy and decision making processes of the government.⁵

Citizens in a representative democracy have the right to seek to participate in and influence the processes of government decision-making and policy formulation on any issue of concern to them ... The importance of FOI

¹ T Riley 'Accountability of government: an international perspective' (1987) 11 *FOI Review* 54.

² Ch 3 provides a brief history of the events leading to the passage of the Act in 1982.

³ Senate Standing Committee on Constitutional and Legal Affairs Freedom of Information. Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978, and aspects of the Archives Bill 1978 AGPS Canberra 1979, 21-22. (Senate Standing Committee 1979 Report.)

⁴ Attorney-General's Dept *FOI Annual Report 1982-83* AGPS Canberra 1983, xi.

⁵ The demand for accountability often goes beyond the government and beyond Ministers to the bureaucracy. This is due to an increasing perception that the Executive is not sufficiently responsible to Parliament (because the two party political system means that in reality the Executive has significant control over Parliament, or at least the House of Representatives) and from a more general demand for better service stemming from the consumer movement.

legislation is that it provides the means for a person to have access to the knowledge and information that will assist a more meaningful and effective exercise of that right.⁶

Without information, people cannot adequately exercise their rights and responsibilities as citizens or make informed choices.⁷ Government information is a national resource. Its availability and dissemination are important for the economic and social well-being of society generally.

Information is the currency that we all require to participate in the life and governance of our society. The greater the access we have to information, the greater will be the responsiveness of our governments to community needs, wants, ideas and creativity. Alternatively, the greater the restrictions that are placed on access, the greater the feeling of 'powerlessness' and alienation.⁸

Information enhances the accountability of government. It ensures that members of Parliament are aware of the activities of the Executive, which is especially important in light of the imbalance in power between them.⁹ Information is an important defence against corruption.

Freedom of information is but one important weapon in exposing potentially corrupt activity.¹⁰

Access to one's own personal information not only promotes government accountability but also enables individuals to protect their privacy.¹¹ Some commentators regard such access as particularly important in light of developments in information technology, which have significantly increased the volume of information government can collect and the ease with which it can be transferred and manipulated.

The High Court on representative democracy

2.4 The High Court in the 'free speech cases' demonstrated the importance it places on ensuring the proper working of representative democracy.¹² The Court determined that freedom of public discussion of government (including the institutions and agencies of government) is not merely a desirable political privilege, but inherent in the idea of a representative democracy. It held that the Constitution contains an implied freedom of political speech and communications. Although the High Court did not go so far as to suggest that a right of access to government information is constitutionally guaranteed, the view of the Court indirectly supports FOI objectives and suggests that it is important for Australia that the FOI Act functions properly and is interpreted in a way that promotes the disclosure of information.

The reasoning in the political speech cases is very relevant for FOI and requires that the democratic rationale of the Act be given more weight than in the past. The AAT must now err more on the side of disclosure to ensure that the important values identified in the political speech cases are complemented by the right conferred by the Act.¹³

The Constitutional implication of free speech identified by the High Court also casts doubt on the appropriateness of those legislative provisions founded on the exaggerated notion that executive secrecy is in the public interest.¹⁴

⁶ *Re Eccleston and Dept of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60, 86. The democratic basis of the FOI Act has been accepted by the AAT: see, eg, *Cleary and Dept of the Treasury* (1993) 31 ALD 214, 217-18.

⁷ For detailed discussion of the importance of information in enabling Australians to participate fully in society and to access services and entitlements and the need to increase the community's use of information see House of Representatives Standing Committee for Long Term Strategies *Australia as an information society: grasping new paradigms* AGPS Canberra 1991.

⁸ Cth Ombudsman *Annual Report 1994-95* AGPS Canberra 1995, 33.

⁹ Opposition members usually use the FOI Act but there is no reason in theory why a government backbencher may not also need to rely on the Act to obtain information. L Tsaknis claims that the new managerialism in the public sector demands increased scrutiny for which access to information is essential: 'Commonwealth secrecy provisions: time for reform' (1994) 18 *Criminal Law Journal* 254.

¹⁰ L Stirling Submission 3.

¹¹ See further at para 4.10.

¹² *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104. Note also the decisions of the High Court in the 1970s dealing with representative democracy. In what are known as the electoral cases, the High Court acknowledged that the Constitution establishes a system of representative democracy and determined that Parliament must enact laws consistent with the existence of representative democracy as the chosen mode of government: see *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1; *Attorney-General (NSW); Ex rel McKellar v Commonwealth* (1977) 139 CLR 527.

¹³ *D Murphy Submission 120*. See also *A Cossins Submission 27*. The High Court cases have already been used in argument before the AAT. In *Cleary and Dept of the Treasury* (1993) 31 ALD 214, Peter Bayne, now a member of the AAT, argued that the right of access to government documents under the FOI Act is premised on the same considerations of democracy and representative government which underpin the implied constitutional right of free speech. For a discussion of FOI and democracy see P Bayne & K Rubenstein 'Freedom of information and democracy: a return to the basics?' (1994) 1 *AJAL* 107.

¹⁴ See discussion at para 4.22.

International covenants and FOI

2.5 Australia's accession to the International Covenant on Civil and Political Rights (ICCPR) may also be relevant to the interpretation of the FOI Act. Article 17 supports the right to have access to one's own personal information and to have it amended if it is incorrect. Article 19(2) of the ICCPR guarantees a right to freedom of expression, which expressly includes freedom to seek information. It is not clear, however, whether the right to seek information obliges States to guarantee access to State-held information. For jurisdictions like Australia that already have FOI legislation the question whether a right of access is guaranteed by the ICCPR is, as a practical matter, relevant only from the point of view of interpretation. If the right of access provided by the FOI Act were to be recognised as a fundamental human right, it is possible that the content of that right may influence the interpretation of the Act.

Government information is accessible in many ways

2.6 There are numerous avenues by which government information is accessible to members of the public. The Parliamentary system, including the expanding parliamentary committee system, promotes the transfer of information from the government to Parliament, and then to the people. Members of the public can seek information through their local Member. Annual reporting requirements, community consultation, publication of information and administrative law requirements increase the flow of information from the government.¹⁵ The ways in which the government provides information are being enhanced by technological advances. More information is being made available electronically at the Australian Government Publishing Service (AGPS), libraries and on the Internet.¹⁶ The Government has acknowledged that as well as having great potential to improve society, technological advances have the potential to increase the existing gap between the 'information rich' and the 'information poor'. Many initiatives, for example the legislative instruments register and the Community Information Network, are aimed at reducing that gap.¹⁷

The FOI Act provides a statutory right of access

2.7 Clearly then, the FOI Act is not, and should not be, the only, or even the primary, way of gaining access to government information. Nor was it ever intended to be.

The Act is not a code of access to information and does not prevent or discourage the giving of access - it sets a minimum not a maximum standard.¹⁸

Accordingly, it is not the only mechanism by which the objectives of government openness and accountability, dissemination of information and protection of privacy can be achieved. Its importance lies in the fact that it provides an enforceable right of access to government-held information.¹⁹ It enables members of the public to obtain access under the law to documents that may otherwise be available only at the discretion of the government. It is with this in mind that the success or otherwise of the Act must be assessed.

¹⁵ Increasingly use is made of exposure Bills. The Government proposes to require consultation on delegated legislation: see Legislative Instruments Bill 1994 (Cth). The Attorney-General has undertaken to make all proposed changes to the Corporations Law publicly available for consultation three months before introducing them in Parliament.

¹⁶ eg, the Legislative Instruments Bill 1994 (Cth) proposes the establishment of an electronic register of legislative instruments. The National Library has established the World Wide Web Server which helps locate Australian government information on the Internet. The Government recently announced the *Accessing Australia* initiative: Prime Minister *Innovative Australia. Information technology and communications* 6 December 1995, 8. This program will provide electronic links to and public access facilities in public libraries. It will evolve to accommodate other government services and to take account of market developments such as the provision of new services by carriers. It will build on the Dept of Social Security's pilot Community Information Network which was established in June 1995. The Network is intended to provide information about government services, Web pages and E-mail facilities for community groups. It will be installed in libraries and community centres throughout Australia and will support private dial-in access.

¹⁷ See Prime Minister *Innovative Australia. Information technology and telecommunications* 6 December 1995, 7-8.

¹⁸ Attorney-General's Dept *FOI Annual Report 1982-83* AGPS Canberra 1983, 2. See further discussion of release of information outside the FOI Act in ch 4.

¹⁹ Subject to the protection of specified interests such as personal privacy and national security: see discussion of exemption provisions in ch 9 and ch 10.

Is the FOI Act working?

Impact of the Act

2.8 In the absence of any systematic or meaningful performance data about the operation of the Act,²⁰ and in view of the fact that many of the benefits of the Act are intangible, the Review has based its assessment of the effectiveness of the Act on submissions, consultations, FOI decisions and comparisons with other FOI legislation. The Review considers that the Act has had a marked impact on the way agencies make decisions and the way they record information. Along with other elements of the administrative law package,²¹ the FOI Act has focused decision-makers' minds on the need to base decisions on relevant factors and to record the decision making process.²² The knowledge that decisions and processes are open to scrutiny, including under the FOI Act, imposes a constant discipline on the public sector. The assessment is not entirely positive, however. A number of people, many of them dissatisfied users of the Act, consider that a more accurate title for the Act would be Freedom From Information.²³ There is a perception in certain quarters that the Act is not achieving its objectives.

There is little or no research to demonstrate that the Act's objectives of increasing scrutiny and accountability of government have been met. My experiences with attempting to use FOI to scrutinise policy decisions has been one of frustration, delay and haphazard provision of information.²⁴

The Ombudsman reports that

many government agencies still do not operate within the legal framework and certainly not the 'spirit' of the ... FOI Act.²⁵

One submission suggests the Act may in fact be an obstacle to openness.

In some ways the Act actually undermines efforts towards increased openness. The seriousness with which it is taken by government (witness [this] review ...) is often used to suggest that openness is the rule; this is not so. There are innumerable other ways to achieve openness, many of which are not even on the political agenda because in part of the way FOI is mobilised to provide semblance of government activity on openness. This Review should not aid such political spinning and should be quite clear about the place of FOI in the overall regime of government information, government communication and community relation with government.²⁶

Outcomes of FOI requests

2.9 **Numbers of requests.** In 1994-95, 35 690 FOI requests were processed by 83 government agencies. 77% were granted in full, 18% were granted in part and 5% were refused.²⁷ As statistics are not kept on which exemptions are claimed it is difficult to ascertain the reason why these requests were unsuccessful.

2.10 **Personal information requests.** Although the statistics collected by the Attorney-General's Department do not categorise the types of requests, it is clear that the majority of FOI requests are for the applicant's personal information. Over 90% of requests are made to four agencies that predominantly receive requests for the applicant's personal information.²⁸ Consultations and submissions indicate that on the whole people are satisfied with the way the Act works in providing access to their own personal information.²⁹

2.11 **Requests for other information.** The predominance of requests for the applicant's personal information means that requests relating to policy development and general government decision making represent a

²⁰ See discussion of FOI statistics at para 6.9.

²¹ The Administrative Appeals Tribunal Act 1975 (Cth) (AAT Act), the Ombudsman Act 1976 (Cth) (Ombudsman Act) and the Administrative Decisions (Judicial Review) Act 1977 (Cth).

²² The possibility that the FOI Act has had a negative effect on records management has been raised: R Snell *The effect of freedom: is FOI a benefit or threat to record management practices?* National Convention of the Records Management Association of Australia September 1993. Recordkeeping and records management are discussed in ch 5.

²³ A participant in the Review's public seminar in Sydney noted that Telecom Australia's 1994 Sydney Yellow Pages actually refer to the NSW FOI Act in that way!

²⁴ R Snell IP Submission 31.

²⁵ Cth Ombudsman *Annual Report 1994-95* AGPS Canberra 1995 33.

²⁶ G Terrill IP Submission 17.

²⁷ Attorney-General's Dept *FOI Annual Report 1994-95* AGPS Canberra 1995 Appendix B.

²⁸ The ATO and the Depts of Veterans' Affairs, Social Security, and Immigration and Ethnic Affairs.

²⁹ Applications for joint personal information seem to be the most difficult of this type of request. They are discussed at para 10.18.

small minority of FOI requests. Yet it could be said that these requests provide the real test of whether the Act is serving its purpose of keeping the government accountable and facilitating participation in government. The reasons for the small proportion of this type of request are not clear. It could indicate that there is not a great demand for this type of information beyond what is already made available generally. Alternatively, it could indicate lack of public awareness of the legislation or that the FOI Act is not generally seen as a viable mechanism for obtaining policy or decision making information. Some factors suggest that the small percentage is more a measure of the failure of the FOI Act than a reflection of true demand. The Review has been told, for example, that cost can be a significant deterrent to making an request.³⁰ People may also be deterred if they lack confidence in the outcome of the request. Consultations and submissions reveal that even when requests for non-personal information are made they bear insufficient fruit to encourage further use. The relatively low number of challenges to adverse decisions does not, in the Review's view, necessarily indicate a high degree of satisfaction with the outcome of FOI requests. Other factors including cost, a perception that an appeal is not worthwhile, inconvenience and frustration with delays may better explain why so few appeals are lodged.

Deficiencies in FOI

2.12 The Review considers that there are a number of deficiencies in the current FOI system, some of which affect whether a person who seeks information will use the Act, others of which affect the success of a request. The following are the more important of these deficiencies.

- There is no person or organisation responsible for overseeing the administration of the Act.³¹
- The culture of some agencies is not as supportive of the philosophy of open government and FOI as the Review considers it should be.³²
- The conflict between the old 'secrecy regime' and the new culture of openness represented by the FOI Act has not been resolved.³³
- FOI requests can develop into legalistic, adversarial contests.
- The cost of using the Act can be prohibitive for some.³⁴
- The Act can be confusing for applicants and difficult to use.
- The exemption provisions are unclear, open to misuse by agencies and, because of their prominence, tend to overwhelm the purpose of the Act.³⁵
- Records management, which is fundamental to the effectiveness of the FOI Act, is not given sufficient prominence.³⁶
- Current review mechanisms could be improved.³⁷
- There are uncertainties about the application of the Act as government agencies are corporatised.³⁸
- The interactions between the FOI Act and the Privacy Act, and the potential conflicts they give rise to, have not been adequately addressed.³⁹

These and other problems are addressed in this report.

³⁰ See further in ch 14.

³¹ See ch 6.

³² See ch 4. Not surprisingly, an applicant's perception of an agency's culture is often different from that of the agency.

³³ See ch 4.

³⁴ See ch 14.

³⁵ See ch 8, 9, 10, 11.

³⁶ See ch 5.

³⁷ See ch 13.

³⁸ See ch 16.

³⁹ See ch 5, 10.

3. Background to FOI in Australia

Introduction

3.1 FOI legislation was first considered in Australia in the 1960s following the introduction of FOI legislation in the United States. A decade of discussion and public campaigning followed. FOI legislation was considered by a Royal Commission,¹ two Interdepartmental Committees and a Parliamentary Committee before the FOI Act was finally passed in 1982. This chapter outlines the key stages in the development of the Commonwealth's FOI legislation and the more significant amendments that have been made to the Act. It also provides a brief outline of FOI regimes in other countries and in other jurisdictions within Australia.

Background to the introduction of the FOI Act

The beginnings of FOI in Australia

3.2 It appears that a number of speeches, papers and editorials in Australia in the late 1960s and early 1970s raised the profile of FOI. Support increased with the visit to Australia in 1972 of the prominent US consumer rights advocate Ralph Nader. Introduction of legislation became an issue prior to the 1972 federal election.² Following the election the federal Attorney-General, Senator Lionel Murphy, announced that the Government would enact FOI legislation and established an Interdepartmental Committee to report on any modifications to the United States' *Freedom of Information Act 1966* appropriate for legislation in Australia.

Interdepartmental Committee Report 1974

3.3 In 1974 the Interdepartmental Committee reported on the proposed FOI legislation.³ The report was based on the fundamental proposition that a person 'has an enforceable right of access to an official document without showing special interest or need'.⁴ It concluded that, should the Government decide to enact FOI legislation, it would be necessary to modify the US legislation to take account of Australia's constitutional and administrative structure. It recommended that certain restrictions be contained in the Australian Bill including

- that a decision to exempt documents from access should lie with the responsible minister and
- that in respect of certain documents certification by a minister that a document is exempt should be conclusive.

Interdepartmental Committee Report 1976

3.4 Following criticism of the 1974 Report, a second Interdepartmental Committee was established in 1976 to report on policy proposals for FOI legislation. In announcing the establishment of the Committee the Prime Minister, Mr Malcolm Fraser, expressed his support for FOI.

If the Australian electorate is to be able to make valid judgements on government policy it should have the greatest access to information possible. How can any community progress without continuing and informed and intelligent debate? How can there be debate without information?⁵

This second report developed the proposals contained in the 1974 Report. It maintained the principle that a person should have a legally enforceable right of access to any identifiable document in the possession of a department unless that document is in a legitimately exempt category.

¹ Royal Commission on Australian Government Administration *Report* AGPS Canberra 1976.

² See, eg, E Campbell 'Public access to government documents' (1967) 41 *ALJ* 73; CCameron MP 'Official secrecy, open government and making democracy democratic' *Paper* South Australian Institute of Personnel Management 17 September 1972; JSpigelman *Secrecy: political censorship in Australia* Angus & Robertson Sydney 1972; J Bennet 'Open Government' *Paper* National Convention of Councils for Civil Liberty 29 September 1973; *The Australian* 7 February 1967; *Financial Review* 13 February 1967; *Canberra Times* 9 October 1967, 1 September 1970.

³ Attorney-General's Dept *Proposed Freedom of Information legislation: report of Inter-Departmental Committee* AGPS Canberra 1974.

⁴ Attorney-General's Dept *FOI Annual Report 1982-83* AGPS Canberra 1983 17.

⁵ Report of an address to the Canberra Times' Anniversary Luncheon on 22 September 1976: *Canberra Times* 23 September 1976, 2.

The basic premise from which consideration of the issue in Australia must begin is that in a parliamentary democracy the Executive Government is accountable to the Parliament and through the Parliament to the people. An informed electorate is able to exercise a more informed choice at the ballot box. But, more than that, openness of access to information, in the words of the Royal Commission on Australian Government Administration, 'promotes an aware and participatory democracy'.⁶

The conclusions contained in the 1976 Report subsequently formed the basis of an FOI Bill. The public campaign for FOI intensified in 1976 with significant media interest and the establishment of a committee⁷ and a public interest organisation⁸ to lobby for the introduction of FOI legislation.

Freedom of Information Bill 1978

3.5 In 1978 an FOI Bill was introduced into the Senate by the Attorney-General, Senator Peter Durack QC, who emphasised the ability of FOI legislation to enhance the rights of the public in the area of administrative law.

The Freedom of Information Bill represents a major initiative by the Government in its program of administrative law reform. It is, in many respects, a unique initiative. Although a number of countries have FOI legislation, this is the first occasion on which a Westminster-style government has brought forward such a measure. This Bill, together with the Archives Bill ... will establish for members of the public legally enforceable rights of access to information in documentary form held by Ministers and Government agencies except where an overriding interest may require confidentiality to be maintained.⁹

Senate Standing Committee Report 1979

3.6 The FOI Bill was referred by the Senate to the Senate Standing Committee on Constitutional and Legal Affairs for examination and report.¹⁰ The resulting report discussed in detail the philosophical issues and principles associated with FOI. Many of the recommendations in the report advocated broader application and operation of the proposed FOI legislation. The Committee acknowledged the resource implications of these recommendations but considered that the costs involved could be minimised and that the proposed changes to the Bill were justified in the interest of having a fully effective FOI Act.

Freedom of Information Act 1982

3.7 The government introduced a revised FOI Bill into the Senate on 2 April 1981. The Bill did not reflect the majority of the Senate Standing Committee's recommendations.¹¹ Following a number of minor amendments to the Bill, the FOI Act was passed. It commenced operation on 1 December 1982.

Amendments to the FOI Act

A number of amendments

3.8 The FOI Act has been the subject of substantive amendments in 1983, 1986 and 1991 and of lesser procedural amendments in other years. The substantive amendments are outlined in the following paragraphs.

1983 amendments

3.9 In 1983 the Act was amended to

- provide a greater right of access to documents created before the enactment of the FOI Act¹²

⁶ Interdepartmental Committee *Policy proposals for Freedom of Information legislation: report of Interdepartmental Committee* Parliamentary Paper 400/1976 Canberra 1977, 13.

⁷ The Freedom of Information Legislation Campaign Committee, members of which included the chief officers of the ACTU, ACOSS, Australian Conservation Foundation, Library Association of Australia, Australian Union of Students, Australian Consumers' Association, Council of Australian Government Employee Organisations, Australian Journalists' Association and Women's Electoral Lobby; politicians (Senator John Button, ALP and Senator Alan Missen, Lib) and academics (Gareth Evans and John McMillan).

⁸ The Rupert Public Interest Movement. It published a newsletter between February 1976 and January 1986.

⁹ *Hansard* (Sen) 9 June 1978, 2693.

¹⁰ Senate Standing Committee 1979 Report.

¹¹ See the government response to the Senate Standing Committee's Report, tabled in the Senate on 11 September 1980.

- transfer the review functions under the Act to the AAT
- empower the AAT to consider whether there are reasonable grounds for a claim that a document is exempt in cases where a conclusive certificate has been issued and to require the relevant Minister to consider whether to revoke a certificate if the AAT finds no reasonable grounds for its issue¹³
- apply an overriding public interest test to the Commonwealth/State relations exemption (s 33A)¹⁴ and
- require the time for compliance with requests to be reduced progressively from 60 days to 30 days.¹⁵

1986 amendments

3.10 In 1986, application fees for processing FOI applications and for internal review of a decision by an agency were introduced.¹⁶ In addition, a \$20 an hour charge for time spent deciding whether information should be released was introduced and the hourly charge for search and retrieval of documents was increased from \$12 to \$15.¹⁷ Requests for personal information that had been provided to the government for the purpose of obtaining income support from the government were not subject to fees or charges.¹⁸ The amendments also reduced the obligations on agencies to provide statements and statistics under the FOI Act.

1988 amendments

3.11 Amendments to the FOI Act were made by the Privacy Act. These included

- a requirement for consultation with a third party prior to a decision to release a document where disclosure of that document might involve the unreasonable disclosure of personal information about that person¹⁹ and
- a right for third parties to seek review of a decision to release a document following the process of consultation.²⁰

Senate Standing Committee 1987 Report

3.12 In November 1985 the Senate referred the review of the operation and administration of the FOI Act to its Standing Committee on Legal and Constitutional Affairs. The Senate Standing Committee reported to the Senate in 1987.²¹ It did not examine the philosophical foundations for the FOI Act because it considered that the history of FOI in Australia and the terms of reference suggested that a fine-tuning of the FOI Act was required, rather than a re-examination of the basic principles underlying the Act.²² For this reason, most of its recommendations related to processing FOI requests.

1991 amendments

3.13 Amendments were made in 1991 to implement the recommendations of the Senate Standing Committee.²³ The amendments

- simplified the procedure for making a request
- simplified the procedure for imposing charges

¹² *Freedom of Information Amendment Act 1983* (Cth) s 32(f).

¹³ id s 32(c).

¹⁴ id s 17.

¹⁵ id s 10.

¹⁶ id s 4, 24.

¹⁷ id s 19.

¹⁸ *Freedom of Information (Fees and Charges) Regulations* reg 6.

¹⁹ FOI Act s 27A.

²⁰ id s 59A.

²¹ Senate Standing Committee on Legal and Constitutional Affairs *Freedom of Information Act 1982. Report on the operation and administration of the Freedom of Information legislation* AGPS Canberra 1987 (Senate Standing Committee 1987 Report).

²² Senate Standing Committee 1987 Report para 1.20.

²³ *Freedom of Information Amendment Act 1991* (Cth).

- clarified the interpretation of some of the exemption provisions in the Act
- widened the provision that allows a request to be refused if processing it would involve a substantial and unreasonable diversion of agency resources
- clarified the operation of provisions permitting members of the public to seek the amendment of records containing personal information that is incomplete, incorrect, out of date or misleading and
- clarified the operation of provisions allowing review by the AAT of decisions made by government agencies on requests for access to documents.

In addition, the amendments replaced the phrase 'information relating to personal affairs' with the phrase 'personal information', which was defined in the same way as it is in the Privacy Act.²⁴

State and Territory FOI legislation

All States and the ACT have FOI legislation

3.14 Since the Commonwealth introduced the FOI Act in 1982, all States and the ACT have introduced FOI legislation.²⁵ Each Act is modelled on the federal FOI Act, although a number have sought to improve upon the federal provisions. The approach towards the availability of information has varied over time in some jurisdictions. This section gives a brief outline of FOI in each jurisdiction.

Victoria

3.15 Victoria was the first State to introduce FOI legislation. The *Freedom of Information Act 1982* (Vic) was enacted shortly after the federal Act and followed the introduction of three FOI Bills in 1981.²⁶ It is closely modelled on the federal Act. In 1989 the Victorian Parliament's Legal and Constitutional Committee conducted an inquiry into the FOI Act. Its report recommended that the Act be applied to local government agencies and all corporations established for a public purpose, that all government agencies be subject to the Act and that no application fees be introduced.²⁷ In 1993, the Act was amended to extend its application to documents in the possession of local government agencies, to introduce an application fee and to remove the \$100 ceiling on charges, to allow agencies to refuse access on the ground that a request is voluminous and to widen the exemption for Cabinet documents.²⁸ The Act is administered by the Department of Justice. Review is conducted by the Victorian AAT.

New South Wales

3.16 NSW enacted FOI legislation in 1989.²⁹ Minor amendments were made between 1989 and 1992. In 1992, a number of changes were made including a reduction in the time allowed for dealing with requests from 42 to 21 days and excluding the public interest from consideration in some exemptions.³⁰ In 1993 the Act was extended to local governments. The Act provides for appeal to the NSW Ombudsman or the District Court against decisions to refuse access. It is administered by the Premier's Department. In January 1995 the NSW Ombudsman published a Special Report on the FOI Act (NSW), calling for a number of changes.³¹ This report followed a number of unsuccessful calls by the Ombudsman for the Government to initiate a comprehensive review of the Act.

²⁴ See further at para 10. 7.

²⁵ See fn 4 in ch 1. The lack of FOI legislation in the NT is discussed at para 11.10.

²⁶ See E Kyrou *Victorian Administrative Law* Law Book Company Sydney 1985, 506.

²⁷ Victorian Legal and Constitutional Committee *Report on Freedom of Information in Victoria* AGPS Melbourne 1989.

²⁸ *Freedom of Information Amendment Act 1993* (Vic). For more details on these amendments see KRubenstein 'Freedom of Information' (1993) 1 AJAL 51.

²⁹ *Freedom of Information Act 1989* (NSW).

³⁰ *Freedom of Information (Amendment) Act 1992* (NSW).

³¹ NSW Ombudsman *Freedom of information the way ahead* NSW Ombudsman Sydney 1995.

Australian Capital Territory

3.17 The ACT's FOI Act, which is modelled closely on the federal FOI Act, was passed in 1989.³² It is administered by the Attorney-General. Review of decisions is conducted by the ACT AAT.

South Australia

3.18 South Australia enacted FOI legislation in 1991, after the failure of several Private Member's Bills in the late 1980s.³³ The FOI Act (SA) is closely modelled on the FOI Act (NSW). It is administered by the Deputy Premier and Treasurer. The South Australian Act provides for appeal to the South Australian Ombudsman or the District Court against decisions refusing access.

Tasmania

3.19 The Tasmanian FOI Act, passed in 1991, came into effect on 1 January 1993.³⁴ External review is conducted by the Ombudsman.³⁵ The Act is administered by the Department of Premier and Cabinet. A number of amendments were proposed in October 1994. The ensuing debate resulted in the Legislative Council Select Committee on FOI being asked in November 1994 to review the Act. The Committee is expected to report in 1996.

Queensland

3.20 The introduction of FOI legislation in Queensland followed extensive investigation by the Queensland Electoral and Administrative Review Commission (EARC). That inquiry arose out of a recommendation in the Report of the Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct (the Fitzgerald Report).³⁶ EARC's work involved a thorough examination of the fundamental issues relating to FOI including the scope of any legislation, the range of exemptions and appropriate review mechanisms and cost structure. In 1990 EARC recommended the introduction of FOI legislation in Queensland.³⁷ Legislation was passed in 1992.³⁸ The Act is administered by the Department of Justice and the Attorney-General. Decisions are reviewed by an Information Commissioner. In 1995 the Act was amended to broaden the exemption for Cabinet documents.³⁹ The Queensland Act is currently being reviewed by an Interdepartmental Committee.

Western Australia

3.21 In 1992 the Freedom of Information Bill (WA) was introduced. While the Bill was before Parliament, the Royal Commission into Commercial Activities of Government released its report. It recommended the enactment of FOI legislation 'as a matter of priority'. It also recommended a number of changes to the Bill. The FOI Act was subsequently enacted in 1992.⁴⁰ The FOI Act (WA) is similar in structure and content to the FOI Act (Qld). Review of decisions is conducted by an Information Commissioner.

FOI in other countries

Sweden

3.22 FOI legislation was first enacted in Sweden in 1776. Access to information is provided under the principle of publicity (the rule as to the public character of official documents) stated in the *Freedom of the Press Act*, which is part of the Constitution. All official documents are available for inspection and copying

³² *Freedom of Information Act 1989* (ACT).

³³ *Freedom of Information Act 1991* (SA).

³⁴ *Freedom of Information Act 1991* (Tas).

³⁵ id s 48.

³⁶ The Commission Brisbane 1989. The Report recommended that EARC consider and, if appropriate, make recommendations for the preparation and enactment of FOI legislation: 371.

³⁷ EARC *Report on freedom of information* EARC Brisbane 1990.

³⁸ *Freedom of Information Act 1992* (Qld).

³⁹ *FOI Amendment Act 1995* (Qld) s 3. See discussion of Cabinet documents at para 9.7.

⁴⁰ *Freedom of Information Act 1992* (WA).

subject to exemptions, such as for information relating to national security, the suppression of crime, the protection of legitimate economic interests and personal privacy provided for in the *Secrecy Act*.

United States

3.23 The US has had federal FOI legislation since 1966.⁴¹ The FOI Act (US) provides access, subject to a number of exemptions,⁴² to the records of agencies covered by the Act. An initial response to a request must be made in 10 days. The Act is used by a large number of professional organisations, often referred to as 'data brokers', to gain information for the purpose of sale. Recent administrative directives indicate a commitment on the part of the US Government to revitalising the principle of open government. In October 1993 the US Attorney-General issued a memorandum requiring agencies to apply a presumption of disclosure and instructing agencies to apply the exemptions only where there is a reasonable expectation of harm from disclosure.⁴³

Canada

3.24 The Canadian *Access to Information Act RSC 1985* came into effect in 1983. It gives citizens a right of access to government documents. Many features of the Canadian Act are the same as the Australian FOI Act, for example, requests must generally be responded to within 30 days, each government institution covered by the Act must submit an annual report on the administration of the Act and charges are imposed on applications. In the late 1980s the House of Commons Standing Committee on Justice and Legal Affairs reviewed the Act and concluded that

- the Act had too many clauses restricting access to information
- all Crown Corporations⁴⁴ should be subject to the Act and
- the collection and storage of personal information by private sector bodies should be covered by the *Privacy Act 1980-83 (Can)*.⁴⁵

The Government rejected most of the Committee's recommendations. Decisions are reviewable by an Information Commissioner who may recommend that an agency alter its decision.⁴⁶ The Information Commissioner's 1993-94 Annual Report contains 43 recommendations to improve the Canadian Act.⁴⁷ A number of the Canadian provinces also have FOI legislation, in some cases combined with privacy legislation.⁴⁸

New Zealand

3.25 New Zealand has two Acts that deal with access to information: the *Official Information Act 1982* (NZ) and the *Privacy Act 1993* (NZ). The Official Information Act provides a right of access to information held by government departments and organisations listed in the Act. Complaints are dealt with by an Information Ombudsman. The Privacy Act gives individuals a right of access to personal information held by public or private sector organisations, including Government Business Enterprises. Complaints under this Act are dealt with by a Privacy Commissioner.

Other countries

3.26 Most major European nations have enacted FOI legislation.⁴⁹ Exceptions include the United Kingdom (UK) and the Republic of Ireland.⁵⁰ A private bill providing for FOI was introduced into the UK House of

⁴¹ All US States and the District of Columbia have freedom of information legislation.

⁴² Including trade secrets, confidential commercial information obtained by the government and national defence records. Amendments in 1986 extended the exemptions available to law enforcement practices.

⁴³ Attorney-General (US) *Memorandum* 4 October 1993.

⁴⁴ Crown corporations are known as GBEs in Australia.

⁴⁵ Standing Committee on Justice and the Solicitor General *Open and shut: enhancing the right to know and the right to privacy* Canadian Government Publishing Centre Ottawa 1987.

⁴⁶ The Information Commissioner plays a role that is similar to that of an Ombudsman.

⁴⁷ Information Commissioner of Canada *Annual Report 1993-94* Information Commissioner of Canada Ottawa 1994.

⁴⁸ eg British Columbia and Ontario.

⁴⁹ The French Law on access to administrative documents came into force in December 1978.

Commons in 1993 but was rejected by the Government.⁵¹ In 1994 the Government introduced guidelines on open government.⁵² Both the UK and Ireland sent delegations to Australia in 1995 to examine this country's experience with FOI legislation.⁵³ The Review understands that legislation is currently being drafted in Ireland. In 1990 the European Union adopted the Directive on Freedom of Access to Information on the Environment.⁵⁴ Most Asian countries do not have FOI legislation, although the matter has been considered in both Hong Kong and Japan. In March 1995 Hong Kong introduced an administrative Code on Access to Information on a pilot scheme basis in nine government departments.⁵⁵ South Africa has released a draft Open Democracy Bill for discussion.

⁵⁰ The *Data Protection Act 1984* (UK) gives some rights of access to personal information.

⁵¹ Right to Know Bill 1993 (UK).

⁵² UK Government *Code of practice on access to government information*, which commenced operation on 4 April 1994.

⁵³ The Review met with both delegations.

⁵⁴ See M McDonagh 'Freedom of information developments in Europe' (1995) 58 *FOI Review* 58 for a discussion of the developments in open government in Europe, the UK and Ireland.

⁵⁵ The Government plans to extend the Code to all government agencies before the end of 1996.

4. Giving effect to the objectives of FOI

Introduction

4.1 It is important that the philosophy behind the FOI Act - open and accountable government - is fully understood, accepted and adhered to by agencies and by those who review agency decisions. This chapter discusses how this goal could be achieved.

Interpreting the Act in a way that will promote its objectives

A pro-disclosure approach

4.2 The right of access provided by the FOI Act is not absolute. In some circumstances the public interest in access to government information may be outweighed by other public interests the protection of which requires that information not be disclosed.¹ In such cases, a balance needs to be struck between the various public interests. It is important, however, that in striking that balance agencies remember that the purpose of the FOI Act is, first and foremost, to provide access to information. Section 18 of the Act provides that so long as a valid request has been made, the document sought shall be disclosed. The only legal excuse for not complying with this obligation is that the document is exempt.² The agency bears the onus of proving that a document is exempt.³ In the context of the FOI Act (NSW) the NSW Court of Appeal stated that

[p]rima facie, [a] document in its entirety must be disclosed. To withhold disclosure, it is for the agency to make out the application for an exemption. Thus the question properly is not why the information should be disclosed but why it should be exempted.⁴

Agencies should, therefore, approach a request with a presumption that the document should be disclosed. Submissions and consultations indicate that the starting point for some agencies is quite the opposite - rather more along the lines of deciding immediately that the document will not be disclosed and then scanning the exemption provisions to find a way of justifying their refusal to disclose the information.

Section 3(2)

4.3 Section 3(2) provides that the provisions of the Act are to be interpreted so as to further the object set out in s 3(1) and that any discretions are to be exercised as far as possible to facilitate and promote the disclosure of information. This indicates a clear intention on the part of Parliament that the Act be interpreted in a way that will promote disclosure. However, there is conflicting judicial opinion on whether s 3 (and equivalent State provisions) requires a 'leaning' in favour of disclosure by interpreting the exemptions restrictively. The High Court in *Victorian Public Service Board v Wright* appeared to support a pro-disclosure approach when interpreting the equivalent provision in the Victorian FOI Act.

In the light of [s 3 and s 16] it is proper to give to the relevant provisions of the [Victorian FOI] Act a construction which would further, rather than hinder, free access to information.⁵

The Victorian Supreme Court has consistently taken the approach that in light of the object clause the court should 'lean in favour of disclosure'.⁶ The Federal Court has generally tended to reject the suggestion that s 3 requires a 'leaning' in favour of disclosure when interpreting exemption provisions,⁷ although some judges have taken a narrow view of exemptions, thus favouring disclosure.⁸ Several recent State FOI cases support

¹ These interests, and the exemption provisions designed to protect them, are discussed in detail in ch 9, ch 10 and ch 11.

² s 18(2).

³ The Act states that in review proceedings the agency bears the onus of establishing that a decision was justified: s 61.

⁴ *Commissioner of Police v District Court of NSW and Perrin* (1993) 31 NSWLR 606, 625 Kirby P.

⁵ (1986) 160 CLR 145, 153. The United States Supreme Court has held that the interpretation of exemptions in the US FOI Act should lean towards a view that will maximise disclosure: *Dept of the Air Force v Rose* 425 US 352 (1975); *United States Dept of Justice v Julian* 486 US 1 (1988).

⁶ See, eg, *Accident Compensation Commission v Croom* [1991] 2 VR 322; *Sobh v Police Force of Victoria* [1994] 1 VR 41.

⁷ See, eg, *News Corporation Ltd v National Companies & Securities Commission* (1984) 1 FCR 64; *Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992) 36 FCR 111.

⁸ See, eg, *Arnold v Queensland* (1987) 6 AAR 463, 477 Wilcox J; *Attorney-General's Dept v Cockcroft* (1986) 10FCR 180, 195 Sheppard J. See P Bayne 'The objects of the Freedom of Information (FOI) Acts and their interpretation' (1995) 2 AJAL 114 for a detailed discussion of the interpretation of s 3.

the view that the principles of openness, accountability and responsibility of government - the objectives of the FOI Act - justify a presumption in favour of disclosure in relation to the interpretation of exemptions.⁹ The Review supports this approach. The exemption provisions should be interpreted against a presumption that disclosure of government information is in the public interest.¹⁰ The following paragraphs make recommendations to make it clearer that requests must be dealt with consistently with this approach.

Object clause should explain the Act's objectives

4.4 *Open and accountable government.* Section 3 states that the object of the FOI Act is 'to extend as far as possible the right of the Australian community to access to information in the possession of the [government] by ... creating a general right of access to [that] information'. It does not explain or indicate the underlying purpose of this right - to ensure open and accountable government - or its relevance for representative democracy.¹¹ This contrasts with many of the State FOI Acts.¹² It could lead a reader (including an agency) to the conclusion that the right of access provided by the Act is an end in itself and, consequently, deserving of a narrow interpretation. It certainly gives no insight into the general public interest to be served by enabling access to government documents. Object clauses can be an important interpretational tools, providing guidance on the proper interpretation of other provisions of the Act where there is vagueness or ambiguity.¹³ It is therefore important that they explain clearly the purpose and rationale of an Act. The FOI Act's object clause is equivocal in this regard and, consequently, does not provide as much assistance as it might in ensuring an interpretation that favours disclosure.

4.5 *A preamble not necessary.* DP 59 proposed that the FOI Act should include a preamble that would explain the context and purpose of the FOI Act, thereby encouraging an interpretation of the Act more conducive to disclosure.¹⁴ Many submissions support moves to improve the explanation of the objects in the Act. Some query, however, whether a preamble is the appropriate way to achieve this.¹⁵ The Review remains of the view that the broader purposes behind the right of access to government-held information provided by the Act should be clear from the Act itself. It is no longer convinced, however, that a preamble is necessary to achieve this. The necessary intimation or guidance can be provided as effectively through amending the object clause.

4.6 *Section 3 should explain the objectives of the Act.* The Review recommends that s 3 should be amended to explain clearly the underlying rationale for the Act and its significance for the proper working of representative democracy. It should include a statement to the effect that the right of access provided by the Act is a basic underpinning of Australia's constitutionally guaranteed representative democracy which enables people to participate in the policy and decision making processes of government, opens the government's activities to scrutiny, discussion, review and criticism and enhances the accountability of the Executive.

4.7 *Section 3(1)(a).* Section 3(1)(a), which merely refers to the fact that information concerning functions and documents of agencies must be published under Part II of the Act, does not contribute significantly to the understanding of the object clause. In the interest of a simplified and more focussed object clause it should be deleted.

Recommendation 1

The object clause of the FOI Act (s 3) should be amended to explain that the purpose of the Act

⁹ See *Commissioner of Police v District Court of NSW and Perrin* (1993) 31 NSWLR 606 and *Re Eccleston and Dept of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60. See ACossins *Submission 27* for a detailed analysis.

¹⁰ See discussion of the public interest in ch 8.

¹¹ The objectives of the Act are set out at para 2.2.

¹² See particularly FOI Act (Tas) s 3; FOI Act (Qld) s 4; FOI Act (WA) s 3.

¹³ The *Acts Interpretation Act 1901* (Cth) provides that in the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act must be preferred to a construction that would not: s 15AA. The clearer and more apparent the objects from the Act itself, the easier this task will be.

¹⁴ Proposal 3.1.

¹⁵ The Public Policy Assessment Society *Submission 4* suggests that material directed at interpretative guidance should be included in the object clause. The ASC *Submission 57* considers the most appropriate way of promoting pro-disclosure is through the substantive provisions of the FOI Act and education, not a preamble.

is to provide a right of access which will

- enable people to participate in the policy, accountability and decision making processes of government
- open the government's activities to scrutiny, discussion, comment and review
- increase the accountability of the Executive

and that Parliament's intention in providing that right is to underpin Australia's constitutionally guaranteed representative democracy.

Recommendation 2

Section 3(1)(a) of the FOI Act should be deleted.

No need for the object clause to refer to exemptions

4.8 The object clause contains express reference to the limitations on the general right of access imposed by exemptions 'necessary for the protection of essential public interests and the private and business affairs of persons in respect of whom information is collected and held' by government.¹⁶ This reference leaves the way open for agencies to regard the Act as being as much about withholding information as it is about providing access to it. This is not conducive to an open approach. The Review recommends that reference to the exemptions be removed from s 3(1). This will help clarify that the exemptions, like other provisions of the Act, are subject to s 3(2) and must be interpreted in a manner that will give effect to the general objectives of the Act. It will ensure that the object clause emphasises the right of access, not the exemptions, without diminishing the protection afforded the various interests identified in the Act as warranting protection. That protection is afforded by the exemption provisions themselves, not by their mention in the object clause.

Recommendation 3

The reference in the object clause to the limitations on the general right of access imposed by exceptions and exemptions should be deleted.

Government information is a national resource

4.9 The information holdings of the government are a national resource. Neither the particular Government of the day nor public officials collect or create information for their own benefit. They do so purely for public purposes. Government and officials are, in a sense, 'trustees' of that information for the Australian people.

The information which public officials, both elected and appointed, acquire or generate in office is not acquired or generated for their own benefit, but for purposes related to the legitimate discharge of their duties of office, and ultimately for the service of the public for whose benefit the institutions of government exist, and who ultimately (through one kind of impost or another) fund the institutions of government and the salaries of officials.¹⁷

It follows that government-held information should be maintained carefully and should generally be accessible to the public.¹⁸ The Review recommends that the object clause be amended to acknowledge that the information collected and created by public officials is a national resource.

¹⁶ s 3(1)(b).

¹⁷ *Re Eccleston and Dept of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60, 73.

¹⁸ Record keeping is discussed in ch 5.

Recommendation 4

The object clause should acknowledge that the information collected and created by public officials is a national resource.

Access to one's own information

4.10 ***Separate mention in object clause.*** The right of access to one's own personal information is currently subsumed in the general, public right of access to government-held information.¹⁹ Views differ on the nature of the right of access to one's own personal information. Some consider it to be part of the general right of access to government information.²⁰ Their view is that a person about whom personal information is held has been drawn, voluntarily or otherwise, into the processes of government. The existence of such documentation, its nature, the context in which it was created, its accuracy and the use to which it is put are as much issues of democratic accountability as are other kinds of information covered by the FOI Act. Others consider access to one's own personal information to be a separate right that protects an individual's privacy (and one that is closely linked to the facility to amend incorrect records). Having access to their personal information allows individuals to safeguard their personal interests, including their right to privacy, because it relates to their autonomy and desire to control others' perceptions about them.

If you can have access to information about yourself, check it, remove it in some cases and correct it when it is wrong, you have a most powerful weapon to protect your privacy. This is privacy not used as a shield, to protect another from the inquisitiveness of the applicant for government-held information. It is privacy used as a sword by which the applicant may seek to protect and assert his own personal interests from the inquisitiveness of government and others alike ... [Access to one's own personal files] is the specific concern of an individual to control the perception others have of him. It is therefore a privacy right.²¹

The privacy protection purpose served by giving people a right of access to their personal information is evidenced by the fact that such a right is also provided in the Privacy Act.²² The Review considers that the additional, privacy dimension of access to one's own personal information means this right should be stated independently of the general right of access to government-held information.

Recommendation 5

The object clause should state the right of access to personal information of the applicant separately from the general right of access to government-held information.

4.11 ***Relevant factor in any FOI request.*** There is generally a public interest in individuals having access to information about themselves. The fact that a document contains information about an individual should weigh in favour of that document being disclosed to that individual. This is acknowledged in the Queensland FOI Act which provides that if a document contains matter relating to the personal affairs of the applicant that fact is to be taken into account in determining whether it is in the public interest to grant access to the applicant and the effect that the disclosure of the matter might have.²³ The Review considers such an acknowledgment to be appropriate and desirable and recommends that the federal FOI Act should be amended to include a similar provision. It does not consider that this recommendation will clash with s 11(2) which provides that a person's right of access is not affected by their reasons for seeking the information or the agency's belief as to what those reasons are. That provision is designed to prohibit an applicant's reasons for seeking access being used by agencies to *prevent* access. It does not mean that a person's reasons, in this instance to protect his or her privacy, should not be used to support his or her request for access.

¹⁹ s 3(1)(b).

²⁰ eg Cth Ombudsman.

²¹ Justice M Kirby 'Freedom of information vs privacy' *Speech* Second symposium on law and justice in the ACT, 26 March 1977, 9, 21.

²² See Information Privacy Principles (IPPs) 6 and 7. See further at ch 5.

²³ s 6.

Recommendation 6

The FOI Act should be amended to provide that if a document contains personal information of the applicant that fact is to be taken into account in considering the effect disclosure might have and in determining whether it is in the public interest to grant access to the applicant.

A public sector that accepts and is committed to open government

Agency culture a factor in the success of FOI

4.12 The culture of an agency and the understanding and acceptance of the philosophy of FOI by individual officers can play a significant part in determining whether the Act achieves its objectives. A negative attitude, particularly on the part of senior management, can influence an agency's approach to FOI and seriously hinder the success of the Act in that agency.

Still a certain level of discomfort

4.13 There are many officers in the federal public service who have a positive attitude to FOI and work hard to administer the Act in accordance with its spirit. Despite this high level of acceptance by many individual officers there still appears to be a certain level of discomfort within the bureaucracy with the concept of open government. Some observers consider it may well take a generational change before there is a good working relationship with the FOI Act in the public sector generally.

If can fairly be said that much has been achieved in 12 years by government and bureaucrats in adapting to the new concepts and culture that FOI brought with it. Some areas of controversy still remain, and the balance between providing information and maintaining some secrecy is yet to be struck. As time goes by and a larger number of public servants grow up with FOI, the capacity of the public sector to live and work with FOI will increase.²⁴

Others have a less optimistic view of the progress made to date.

It is my sad conclusion ... that with few exceptions the agencies of government have taken the Act as a guide to where they should dig their trenches and build their ramparts.²⁵

Whatever the extent of the problem, it is clear that the Act is not yet accepted universally throughout the bureaucracy as an integral part of the way democracy in Australia operates. The continuing resistance may relate to the increasingly direct accountability of public servants and their resultant loss of anonymity.²⁶ In 1994 the Public Service Act Review Group noted the strengthened accountability framework in the public service and the changed expectations of the community towards public sector practice and performance in recent years.

Public administration is an increasingly complex business and governments and the community are demanding the highest standards of performance, integrity and accountability from public servants. The culture of the [Australian Public Service] has been changing and will continue to do so as it adjusts to this changing environment.²⁷

The ambiguities and perceived divided loyalties that can sometimes arise as a result of being responsible to both the Minister and to the Australian community can result in ambivalence towards FOI on the part of many public servants. So too can the fact that the FOI Act superimposed a right of access to government-held information on an established culture of secrecy which was, and still is, supported by broad legislative prohibitions on individual officers disclosing information. Not enough has been done to reconcile the new culture of openness, represented by the FOI Act, and the old 'secrecy regime'. The remainder of this chapter discusses steps that could be taken to help to change the attitude of agencies and individual officers to the release of government information and thereby achieve greater openness.

²⁴ J Cain 'Some reflections on FOI's early years' (1995) 58 *FOI Review* 54, 58.

²⁵ M Paterson *Submission 94*.

²⁶ See further discussion of this at para 10.13. See P Bayne *Freedom of information* The Law Book Company 1984, 16-18 for a discussion of the impact of FOI legislation on the orthodox doctrine of the Westminster system that public servants are as far as possible personally anonymous. See also Senate Standing Committee 1979 Report para 4.44.

²⁷ Public Service Act Review Group *Report* AGPS Canberra 1994, vii.

A better understanding of the philosophy of the Act

4.14 Amending the object clause to provide greater insight into the purpose of providing a general right of access to government information will not, of itself, overcome any remaining culture of secrecy. It must be combined with the education of all officers so that they are aware of the purpose of and philosophy behind the FOI Act.²⁸ The better their understanding of the purpose of the legislation, the more likely they will be to process requests consistently with its spirit.

While it may be helpful to express in the FOI Act Parliament's intentions for the manner in which the Act is to be interpreted and applied, it will be more important to bring these intentions to the notice of persons at the 'coal face' who are responsible for making FOI decisions and to induce them to act accordingly.²⁹

Increasing awareness in agency employees as to the democratic underpinnings of FOI and the fact that they (ie, agency employees) are a critical link between the people and their government should highlight and emphasise their role vis-a-vis the FOI Act and vis-a-vis the public generally.³⁰

In Chapter 6, the Review recommends the appointment of an FOI Commissioner to oversee the administration of the FOI Act. The Commissioner's role will include promoting understanding of the Act and its objectives throughout the public sector. This work will help to improve the culture in agencies where staff may currently have an unsatisfactory attitude to FOI and promote a fundamental change in the way public servants are permitted and expected to deal with information held by the government. In the words of the Canadian Information Commissioner

the key to opening up government is ... somehow changing the encrusted, timorous old attitudes which see openness as a threat, not an opportunity for both citizens and governments.³¹

The Commissioner's work in this area should also convey the message that the privacy of officers and of members of the public can be protected within a culture of openness.

More 'authorised officers'

4.15 The FOI Act provides that a decision on an FOI request may be made by the Minister, the principal officer of the agency or by an officer acting within the scope of authority exercisable by him in accordance with arrangements approved by the responsible Minister or the principal officer of an agency.³² It appears that in many agencies, very few officers are 'authorised' to handle FOI requests. In those agencies, all FOI requests must be channelled through a few officers. The Review considers that FOI decision making should not be confined to a select few within an agency. Increasing the number of authorised officers would help promote greater openness and would demonstrate that the release of government information is an integral part of operations, not a specialised and rarefied procedure separate from the normal business of the agency. It would also help to avoid delays in request handling. Agencies that have offices in each State and Territory and in regional areas should ensure that at each of these local levels adequate numbers of officers are authorised to release documents.

Recommendation 7

Agencies should review their current arrangements to ensure that they have sufficient officers authorised under s 23 of the FOI Act to make FOI decisions.

FOI and performance agreements

4.16 The Review considers that the cultural changes that will result from improved appreciation of the philosophy and purpose of the FOI Act would be more likely to occur if senior officers were given tangible

²⁸ State Records (SA) *Submission 92* attributes South Australia's highest per capita use of a State FOI Act and highest ratio of access granted (88%) to a concerted state-wide emphasis on the need to change to a culture of access to government information.

²⁹ Dept of Defence *Submission 76*.

³⁰ Advanced Administrative Law Class 1994-95 University of Wollongong *IP Submission 33*.

³¹ Information Commissioner of Canada *Annual Report 1994-95* Information Commissioner of Canada Ottawa 1995, 4.

³² s 23.

incentives to pay greater attention to, and to improve, an agency's FOI practices and performance. Linking good public information, communication and FOI practices to performance appraisal would be likely to influence the attitude towards information access of the officers whose attitudes often influence those of the entire staff of an agency - the senior officers. The Review recommends that performance agreements of all senior officers³³ should be required to impose a responsibility to ensure the efficient and effective handling of access to government-held information, including FOI requests, in the agency. Commitment to good information management and FOI practices should also be expressed in an agency's corporate plan. One submission suggests that the FOI Act should provide for the removal from FOI duties of public servants who 'through apathy, incompetence or corruption implement FOI in a less than excellent manner'.³⁴ Poor behaviour by a particular officer is a matter for the head of an agency and, if necessary, internal discipline. The Review does not consider this to be a matter that ought be dealt with in the FOI Act.

Recommendation 8

Performance agreements of all senior officers should be required to impose a responsibility to ensure efficient and effective practices and performance in respect of access to government-held information, including FOI requests.

Greater disclosure outside the FOI Act – s 14

Informal release of information wherever possible

4.17 The FOI Act prescribes when information *must* be disclosed. It does not prescribe when information is *permitted* to be disclosed. Agencies retain a discretion to disclose information at any time.³⁵ This is expressly acknowledged in the Act. Section 14 states that the Act is not intended to prevent or discourage agencies from disclosing information (including exempt information) where they can properly do so. This is a clear exhortation to agencies to be as open as possible and not to regard the requirements of the FOI Act as expressing the full extent of their responsibility to be open. Greater openness can work to the benefit of both agencies and potential FOI applicants. Often, the voluntary release of information by an agency will allay a person's concerns and avoid the need for them to seek information under the FOI Act.³⁶

Failure to heed s 14

4.18 Although s 14 is vitally important to achieving the openness that was intended by those who introduced the FOI Act, it appears that agencies often forget it. They view the FOI Act as the sole means of releasing information rather than as a restriction on their ability to refuse to release information. There appear to be many instances of agencies regarding requests for information as FOI requests when there is no reason to do so. The ATO's submission contains a stark example. The 'greater proportion' of requests for information lodged with the ATO relate to personal information, for example, copies of tax returns, group certificates and notices of assessment and are provided within 30 days with no deletions.³⁷ Even though a great many of those requests are not FOI requests, they are treated as such by the ATO. The ATO notes that

[p]rior to the introduction of the FOI Act the ATO was providing these documents in accordance with its own internal administrative arrangements. The provision of these documents does not add anything to the objective of the FOI Act of opening up the business of government nor are they records which an individual would require to be amended.³⁸

³³ All SES officers and Senior Officers Grades A to C.

³⁴ L Stirling *Submission 3*.

³⁵ Subject to any restrictions imposed by other legislation. See discussion of secrecy provisions at para 4.22.

³⁶ An example can be found in the context of staff promotions. Some departments do not make available to potential Promotion Appeal Committee (PAC) appellants relevant parts of comparative statements contained in selection committee reports. Yet when people see this material in the course of PAC proceedings, they often withdraw their appeals. Both the agency and the individual would benefit from this information being provided quickly and informally. The Public Service Act Review Group recommended that guidelines on the keeping of and access to personnel records issued by the Public Service Commission be reviewed to express more firmly the view that this information should be given to potential PAC appellants and that departments should reflect this approach in their personnel policies and practices. The Group noted that this policy would eliminate the need for staff to lodge formal applications under the FOI Act: Public Service Act Review Group *Report* AGPS Canberra 1994, 86.

³⁷ The only document for which a charge is levied is the tax return - \$30 application fee and \$10 per return.

³⁸ *Submission 17*.

It suggests that requests of this nature either be withdrawn from the provisions of the FOI Act or at least that it not be necessary to report them for the purpose of compiling annual FOI statistics as there is a significant resource cost associated with the recording and reporting. There is no indication in the ATO's submission that it deals with these requests under the FOI Act for any reason other than that the FOI Act exists. The Review sees no reason why such straightforward transfers of information need have anything to do with the FOI Act.³⁹

Recommendation - agencies to review current practices

4.19 Wherever possible, agencies should release information quickly and informally.

Ideally, the FOI legislation should be a last resort mechanism to gain adequate information about a government decision or action.⁴⁰

The Review considers that agencies could deal with many requests for information much less formally than they do currently and in a way that, in the long run, would be less administratively burdensome for them. There may be scope, for example, for commonly requested categories of information to be released as a matter of course, either without request or upon oral request. The Review recommends that each agency should carefully review the types of requests it receives to determine whether there are categories of documents that could be released without the need for a request under the FOI Act. If an agency determines that there is scope to deal with certain requests outside the FOI Act it should make this clear to potential applicants (who will nevertheless remain able to make a formal FOI request if they so wish). Agencies may wish to develop guidelines for their staff on how requests that are not FOI requests are to be handled.⁴¹ If employees receive clear guidance as to what they can and cannot properly disclose outside the FOI Act, they will be more inclined to take an open approach.

Recommendation 9

Agencies should regularly examine the types of requests for information they receive to determine whether there are particular categories that could be dealt with independently of the FOI act. If there are, this should be made clear to potential applicants and staff.

s 91 - impact on individual officers

4.20 ***Release of non-exempt documents outside the FOI Act.*** Section 91 of the FOI Act provides that where a document is disclosed and access was required by the Act, no action for defamation, breach of confidence or infringement of copyright can be taken against an officer who gave, or authorised the giving of, the access. It does not provide protection to officers who disclose information outside the Act. This may discourage officers from disclosing information outside the FOI Act. In an attempt to address what could be regarded as a disincentive to officers adopting the open approach advocated by the Review, DP 59 proposed that the protection afforded by s 91 should be available whenever officers disclose information, whether pursuant to the FOI Act or not, provided the disclosure was not malicious or reckless.⁴² A number of submissions support the proposal.⁴³ The ASC questions the introduction of a 'subjective test' and doubts whether it would achieve a substantive philosophical change.⁴⁴ The Review remains of the view that the indemnity afforded by s 91 should be extended in the interest of encouraging disclosure of information outside the Act. The protection should, however, be restricted to officers authorised to release information

³⁹ The Review agrees with the ATO that there is little merit in collecting statistics on such requests. If they were not dealt with by the ATO as FOI Act requests, however, statistics on them would not have to be provided. Statistics are discussed at para 6.9.

⁴⁰ Cth Ombudsman *Annual Report 1994-95* AGPS Canberra 1995, 35.

⁴¹ The Review notes that the *Guidelines on the keeping of and access to personnel records* issued by the Public Service Commission encourage agencies to deal informally with requests for personnel records. They refer to s 14 of the Act and suggest that the guidelines be used 'in preference to the formal and expensive processes of the FOI Act' unless a request is clearly an FOI request. They advise that where access is not likely to be given under the guidelines staff should be advised, as a matter of course, of their rights under the FOI Act: Public Service Commission, *Commonwealth Managers Toolbox* July 1995. s 15A of the FOI Act provides that where there are established procedures in an agency by which employees can obtain access to their personnel records, an employee, past or present, must not use the FOI Act until they have tried those procedures and failed to obtain the information.

⁴² Proposal 3.3.

⁴³ eg Law Institute of Victoria *Submission 90*; Litigation Law Practice Committee, Law Society of NSW *Submission 91*; Australia Post *Submission 44*; H Sheridan & R Snell *Submission 58*.

⁴⁴ *Submission 57*.

under s 23 of the FOI Act. The Review recommends that s 91 be amended to provide to authorised officers protection in respect of the release of a document other than under the FOI Act where the document would not have been exempt had it been requested under the FOI Act.

Recommendation 10

Section 91 of the FOI Act should be amended to extend the indemnity against action for defamation, breach of confidence or infringement of copyright to an authorised officer who releases a document other than under the FOI Act provided the document would not have been exempt had it been requested under the FOI Act.

4.21 Release of non-sensitive exempt documents. Section 91 does not protect officers who release non-sensitive exempt information because release of such information is not 'required'.⁴⁵ Recommendation 10 will not provide protection in this situation because it deals with disclosure of documents that are not exempt. The Queensland Information Commissioner suggests that s 91 could be amended to provide protection for releases that were either 'required or permitted'.⁴⁶ The Review considers that this may provide too wide a protection, given that 'permitted' would cover all information, including sensitive exempt information. The Review considers that s 91 should, in the interest of encouraging disclosure of non-sensitive exempt documents, be amended to provide protection in respect of a release under the FOI Act of an exempt document pursuant to a bona fide exercise of discretion not to claim the exemption. In the interest of removing any barriers to the release independently of the FOI Act of information that can be released under the Act, the Review considers that s 91 should also provide protection in respect of the release of a document outside the FOI Act where the release, had it been made under the FOI Act, would have been a bona fide exercise of discretion not to claim an applicable exemption.

Recommendation 11

Section 91 of the FOI Act should be amended to extend the indemnity against action for defamation, breach of confidence or infringement of copyright to an authorised officer who

- i. releases an exempt document under the FOI Act pursuant to a bona fide exercise of discretion not to claim the exemption or
- ii. releases a document other than under the FOI Act and the release, had it been made under the FOI Act, would have been a bona fide exercise of discretion not to claim an applicable exemption.

Secrecy provisions - a deterrent to openness

The 'new open' and the 'old closed' regimes have not been reconciled

4.22 A major hindrance to achieving the open government promoted by the FOI Act is the continued existence of what is often referred to as the 'secrecy regime'. This regime, which had its origins in the belief that it was in the public interest to keep the workings of government secret, prohibits the disclosure of information obtained in the course of an official's duty, often regardless of the nature of the information or the effect its disclosure might have.⁴⁷ The continuation of this regime alongside the FOI Act sends mixed messages to officers about what information they are authorised to disclose.

[T]he individual official ... is often enough caught between the present commitment both of modern legislation and of the common law to open government and the enduring demands of illiberal official secrecy regimes.⁴⁸

⁴⁵ The discretion to disclose exempt documents is discussed at para 8.3.

⁴⁶ As is the case in the FOI Act (Qld) s 102: *Submission 37*.

⁴⁷ For a comprehensive discussion of the various phases in Australia's laws governing information management and official secrecy see P Finn *Official information Integrity in government project: Interim Report 1* Australian National University Canberra 1991.

⁴⁸ id 94-95.

The passage of the Privacy Act five years after the FOI Act contributed to this confusion. For those who prefer the traditional closed culture to the new openness, it appeared to provide further justification for a secretive approach. However, this misinterprets the nature of privacy protection. A culture of secrecy undermines privacy protection. It prevents people getting access to their own personal information and amending inaccurate records. It permits poor recordkeeping. It protects government officials from being accountable for intruding on an individual's privacy. Secrecy can be as detrimental to privacy as it is to open government. It is, therefore, as much in the interests of privacy as it is in the interests of open government to confine confidentiality to those situations where it is necessary, and not to allow it to nurture or perpetuate a culture of secrecy.

Broad prohibitions on disclosure

4.23 There has been limited recognition in the laws relating to the disclosure of government information of the movement towards greater responsibility for individual officers. For example, regulation 35 of the Public Service Regulations provides that except in the course of official duty, no employee shall disclose information concerning public business or any matter of which he or she has knowledge officially without the express authority of the Secretary. It does not identify types of information which could, on public interest grounds, be said to warrant secrecy protection but casts a blanket prohibition over all disclosure. It does not matter, for example, that the information is already available to the public or would be required under the FOI Act to be made available. To make matters worse, officers are liable to criminal penalties for breaching this requirement by virtue of s 70 of the *Crimes Act 1914* (Cth) (Crimes Act). There are also numerous 'specific' secrecy provisions throughout federal legislation. While the FOI Act provides that a person is not guilty of a criminal offence by reason only of giving access to non-exempt information under the FOI Act, there is no such protection for officers who release the same information outside the Act.⁴⁹

Relevant work in this area

4.24 **Review of secrecy provisions.** The mismatch between the openness promoted by the FOI Act and the myriad secrecy provisions in federal legislation has long been recognised. In 1976 the Prime Minister, Mr Malcolm Fraser, asked his Ministers to review the secrecy provisions in legislation for which they were responsible in readiness for the introduction of FOI legislation.⁵⁰ When the FOI Act was debated in the Senate in 1981, the Government undertook

to complete a review of all the existing secrecy provisions within three years from the date on which the freedom of information legislation comes into force with a view to repealing or amending those provisions which are inconsistent with the basic object of freedom of information legislation.⁵¹

In 1983 the Government decided to undertake a comprehensive review of secrecy provisions.⁵² In the following years a number of inquiries took place which dealt with issues relevant to that review.⁵³

4.25 **Gibbs Committee.** The Government's review was overtaken by the Review of Commonwealth Criminal Law, chaired by Sir Harry Gibbs (the Gibbs Committee), which commenced in 1987 and finished in December 1991.⁵⁴ Part V of its final report dealt with disclosure of official information. The Committee recommended that the present catch-all provisions of s 70 and 79(3) of the Crimes Act be repealed and replaced with provisions under which the application of penal sanctions to unauthorised disclosure of official information is limited to specific categories of information no more widely stated than is required for the effective functioning of government.⁵⁵ It recommended that those categories include information relating to intelligence and security services, defence, foreign relations, information obtained in confidence from other

⁴⁹ s 92.

⁵⁰ *Commonwealth Record* 20-26 September 1976, 740. In 1976 and 1978 Departments reviewed the secrecy provisions for which they were responsible. In November 1980 an Interdepartmental Committee was established to review secrecy provisions in s 70 and 79 of the Crimes Act.

⁵¹ *Hansard* (Sen) 29 May 1981, 2389.

⁵² Attorney-General's Dept *FOI Annual Report 1982-83* AGPS Canberra 105.

⁵³ eg Human Rights Commission *Review of Crimes Act 1914 and other crimes legislation of the Commonwealth* AGPS Canberra 1983; ALRC Report No 22 *Privacy* (ALRC 22) AGPS Canberra 1983; Royal Commission on Australia's Security and Intelligence Agencies *Report on the Australian Security Intelligence Organisation* AGPS Canberra 1985; Senate Standing Committee on Regulations and Ordinances *Report on the Committee's scrutiny of certain Health Insurance Regulations disallowed by the effluxion of time* The Committee Canberra 1986; Parliamentary Joint Select Committee on an Australia Card *Report* AGPS Canberra 1986.

⁵⁴ Attorney-General's Dept *Review of Commonwealth Criminal Law Final Report* AGPS Canberra 1991.

⁵⁵ Recommendation 35.1.

governments or international organisations but not information supplied in confidence, Cabinet documents, information affecting personal privacy, information the disclosure of which could damage Commonwealth/State relations or information causing damage to the economy.⁵⁶

4.26 *Government's response to the Gibbs Committee.* In October 1993 the Attorney-General's Department prepared a response to the Gibbs Committee's recommendations on the disclosure of official information.⁵⁷ That response acknowledged that the current situation is inconsistent with the spirit of the FOI Act and out of step with the needs of modern government.⁵⁸ It made a number of proposals aimed at limiting the application of criminal sanctions to the disclosure of information which falls within specified categories, with explicit reference to the potential damage to the public interest which disclosure may cause. It also focused on establishing systems by which individual officers will receive clear guidance on what information they are authorised to disclose. The Attorney-General's Department is currently preparing legislation to implement the recommendations of the Gibbs Committee and the Commission of Inquiry into ASIS.⁵⁹ The Government recently announced in principle support for the development of legislation to protect whistleblowers.⁶⁰

4.27 *In Confidence.* In June 1995 the House of Representatives Standing Committee on Legal and Constitutional Affairs published *In Confidence*, a report on the protection of confidential personal and commercial information held by the Commonwealth.⁶¹ The Committee concluded that current protection is inadequate. In contrast to the Gibbs Committee, it recommended that the protection of confidential personal and commercial information should be the subject of general offence provisions located in the Crimes Act.⁶² The information subject to those prohibitions would be defined in various other pieces of legislation.⁶³ It also recommended that the power to disclose confidential third party information held by a Commonwealth agency should be given only to a limited number of clearly identified senior executive service officers and that agencies should be required to provide, within 14 days of the disclosure, reasons to the Privacy Commissioner for an authorised disclosure of personal information.⁶⁴ Many of the Committee's recommendations exceed what the Review considers to be necessary to protect the privacy of individuals. The last mentioned recommendation, for example, would require notification to the Privacy Commissioner of every release under the FOI Act of information that contained the name of a public servant. The Report seems to the Review to promote a culture of secrecy within agencies, rather than a culture in which the need to protect genuinely sensitive third party information is recognised and respected.

Review's recommendation

4.28 It is clear that to obtain the full benefits of the FOI Act and the other developments in administrative law and public sector administration designed to bring about more open government, the inconsistencies between the 'old' and 'new' regimes must be removed. Individual officers, including those not authorised under the FOI Act,⁶⁵ should not be subject to any disciplinary or criminal offence for disclosing information which would normally be given to any member of the public seeking that information. This issue, on which much work has already been carried out, should be addressed as a matter of urgency. The Review recommends that the government implement the recommendations of the Gibbs Committee as soon as possible. In addition, it should re-commence a thorough review of all 'specific' federal secrecy provisions for the purpose of ensuring the removal of any barriers to the fulfilment of the objectives of the FOI Act.⁶⁶ Secrecy provisions should contain standards of protection no broader than those provided in the FOI Act.⁶⁷ In Chapter 6 the Review recommends the appointment of an FOI Commissioner whose role will be to

⁵⁶ Attorney-General's Dept *Review of Commonwealth Criminal Law Final Report* AGPS Canberra 1991, 367.

⁵⁷ Attorney-General's Dept *The protection of official information* October 1993.

⁵⁸ id 7.

⁵⁹ Commission of Inquiry into ASIS *Report on the Australian Secret Intelligence Service* AGPS Canberra 1995 (the Samuels Inquiry).

⁶⁰ *Hansard* (H of R) 26 October 1995, 3072. This legislation is a response to the Gibbs Committee, the Senate Select Committee on Public Interest Whistleblowing *In the public interest* The Committee Canberra 1994 and the Samuels Inquiry.

⁶¹ AGPS Canberra.

⁶² Recommendation 29.

⁶³ Recommendation 30.

⁶⁴ Recommendations 4 and 5 respectively.

⁶⁵ See para 4.15.

⁶⁶ See discussion of s 38 of the FOI Act, which makes exempt documents the disclosure of which is prohibited by another federal Act, at para 11.2. Also note that the WA Information Commissioner recently recommended that secrecy provisions in WA legislation be repealed and replaced with a statutory framework containing principles for collection, use and distribution of data by agencies: HSheridan 'Western Australia: a brief look at the first 18 months' (1995) 57 *FOI Review* 38.

⁶⁷ This reflects the approach taken in the Senate Standing Committee 1979 Report: see para 21.1-21.12.

monitor and enhance the disclosure of government information. The Review considers the Commissioner would be ideally positioned to carry out, or assist the conduct of, such a review.

Recommendation 12

The recommendations of the Gibbs Committee should be implemented as soon as possible.

Recommendation 13

A thorough review of all federal legislative provisions that prohibit disclosure by public servants of government held information should be conducted as soon as possible to ensure that they do not prevent the disclosure of information that would not be exempt under the FOI Act.

5. FOI, archives and privacy

Introduction

5.1 The FOI, Archives and Privacy Acts are the principal federal statutes relating to information access in the public sector.¹ They are interconnected and, in some instances, overlap. They all depend on good recordkeeping practices. This chapter examines the interrelationship between these three Acts and makes recommendations to ensure that the interaction between them is dealt with in a co-ordinated and consistent way.

FOI, Archives and Privacy Acts all deal with government records

FOI Act

5.2 The FOI Act provides a legislative basis for obtaining access to government held information, including the applicant's personal information. It also provides for the amendment of personal information² and measures to prevent the unreasonable disclosure of one person's personal information to a third party.³

Archives Act

5.3 The Archives Act was developed in conjunction with the FOI Act. It establishes the Australian Archives and sets out comprehensive arrangements for conserving and preserving the archival resources of the Commonwealth. It establishes a right of access to Commonwealth records that are more than 30 years old.⁴ The mechanism for making documents available under the Archives Act differs from the access provisions under the FOI Act.⁵ The exemptions in the Archives Act are less restrictive than those in the FOI Act because the documents sought under the former Act are older and generally less sensitive. The role of the Australian Archives includes encouraging and facilitating the use of archives, developing policy and advice for government agencies on the management, preservation and disposal of records and creating and maintaining information systems about the structure of government and the Commonwealth's record series.⁶

Privacy Act

5.4 The Privacy Act protects the privacy of personal information in the government sector.⁷ It sets out rules called Information Privacy Principles (IPPs) which regulate the collection, storage, security, access, correction, use and disclosure of personal information. There are IPPs covering access to and amendment of personal information and third party disclosure.⁸ The Privacy Act is administered by the Privacy Commissioner.

DP 59 proposal - a single Act

5.5 DP 59 proposed that in the light of the close links between these Acts, and in the interest of consistent administration, the FOI, Privacy and Archives Acts should, in the medium to long term, be consolidated into a single Act.⁹ This consolidation would address the overlap between the Privacy and FOI Acts and bring together the major provisions dealing with access to government-held information and records management, which is fundamental to the protection of privacy, the success of FOI and to the preservation of archives. A

¹ Other federal legislation might touch on these issues, for example, in the form of secrecy provisions.

² Pt V.

³ s 41.

⁴ s 56 of the Archives Act provides for the release of particular documents that are less than thirty years old in special circumstances, for example, where a person of academic significance seeks special access to documents for the purpose of his or her work. It also provides for the Prime Minister to grant accelerated access (ie public access to documents that are less than 30 years old) in special circumstances.

⁵ Under the Archives Act, documents are 'cleared' for public use in advance of any request. This happens (in theory at least) when documents become 30 years old. After being 'cleared', documents are then 'ready and waiting' for users before a request is made. Under the FOI Act, the question of release and the assessment whether a document falls within an exempt category arises only after a request is received. An additional difference is that access under the Archives Act is free.

⁶ See Australian Archives *Strategic directions* Australian Archives Canberra 1994.

⁷ It extends to the private sector in respect of tax file numbers and credit reporting.

⁸ IPPs 6, 7 & 11. The Privacy Act does not prevent the disclosure of third party information if disclosure is required by the FOI Act: IPP 11 1(d).

⁹ Proposal 12.1.

number of submissions support the proposal for a single Act.¹⁰ The ACT Attorney-General's Department considers

[t]here are strong arguments in favour of the adoption of a concept of total records management, and the articulation of that concept in a single piece of legislation.¹¹

State Records, South Australia advises that

South Australia has found strong common links between freedom of information, privacy, records management and archives and believes, in its experience, that it would be worthwhile for the Commonwealth to explore this issue further.¹²

Some see merit in the proposal in principle but express concerns about the difficulties of implementing it.¹³ However, many submissions oppose the suggestion on the ground that the combined Act would be unwieldy and contain several different schemes with differing objectives and procedures, that the considerable cost of redrafting the Acts, retraining staff and re-educating the public cannot be justified and that a co-ordinated government records policy can be achieved without a single Act.¹⁴ The Australian Bankers' Association is concerned that the proposal would result in the private sector being regulated under what is predominantly a public sector Act.

[W]hilst there may be merit in rationalising the [three Acts] into one piece of legislation insofar as those Acts relate to the information policy of the government and government entities, those aspects of the Privacy Act which relate to the private sector should be dealt with in separate legislation. The inclusion of private sector provisions in legislation which essentially relates to the public sector is inappropriate as it does not focus attention on the significant differences between the two sectors.¹⁵

No recommendation for a single Act

5.6 The Review accepts many of the concerns expressed in submissions and consultations and acknowledges that, despite their many common aspects, each Act has a distinct purpose that is understood by the bureaucracy and, to some degree, by the community. These different aspects would need to be replicated in a single Act, for example, access procedures from both the FOI and Archives Acts would need to be preserved. There is insufficient benefit in the proposal to outweigh the disadvantage in disturbing the current legislative framework at this stage. In addition the proposal to extend privacy regulation to the private sector¹⁶ detracts from the appeal of a single Act. The Review no longer considers that the FOI, Privacy and Archives Acts should be combined in a single Act. Nevertheless, it remains strongly of the view that the connections between these Acts must be clearly understood and appreciated by those subject to them and by those who oversee their administration. The Acts should be amended, where necessary, to ensure that together they provide a cohesive and consistent package of legislation on government records. The remainder of this chapter discusses several such amendments.

Archives and FOI

Closing the 'access gap'

5.7 The FOI Act only provides access to documents created after 1977.¹⁷ The Archives Act provides access to documents that are more than 30 years old.¹⁸ Documents created less than 30 years ago but before 1977 are, therefore, not generally accessible under either Act. DP 59 proposed that this 'access gap' should be closed by amending the FOI Act to extend to all documents that are less than 30 years old.¹⁹ A number of

¹⁰ eg Litigation Law Practice Committee, Law Society of NSW *Submission 91*; A Conway-Jones *Submission 18*.

¹¹ *IP Submission 38*. See also its submission to the DP: *Submission 77*.

¹² *Submission 31*.

¹³ eg Australia Post *Submission 44*; Dept of Prime Minister and Cabinet *Submission 82*; ATO *Submission 17*; Telstra *Submission 45*; Privacy Commissioner *DP Submission 81*.

¹⁴ See, eg, Australian Archives *Submission 69*; C Hurley *Submission 8*; Cth Ombudsman *Submission 53*; ASC *Submission 57*; Privacy Committee (NSW) *Submission 88*; Dept of Employment, Education and Training *Submission 60*; H Sheridan & R Snell *Submission 58*. *Submission 26*.

¹⁵ See ch 15.

¹⁷ Unless the document contains the applicant's personal information or information relating to his or her business, commercial or financial affairs: s 12(2).

¹⁸ Subject to the accelerated access provision referred to in fn 4.

¹⁹ Proposal 4.4.

submissions support this proposal.²⁰ Several GBEs express concern about having to retrieve documents that were created before 1977.²¹ Telstra suggests that, in the case of GBEs subject to the Corporations Law, the FOI Act should 'only apply for the period of time in which it is required by other law to maintain business books and records.'²² The Review considers that the proposal would not require an agency to retain documents for longer than would otherwise be legally required. The FOI Act provides access to documents that are in the possession of agencies. If a GBE no longer has a document that is requested under the FOI Act, it simply will not be able to disclose the document. Provided it has complied with any relevant law regarding retention of records, no breach of any law will have occurred. The restriction of FOI access to documents created after 1977 arose from concern about the additional resources that would be required if the Act applied to older documents.²³ Some parts of the public sector expected an unmanageable flood of requests in response to the passage of the Act even without retrospective access. This did not eventuate. The Senate Standing Committee recommended in 1979 that retrospective access should be phased in by subsequent amendment to the Act as it became administratively possible.²⁴ The Review does not consider that extending the Act to documents in the 'access gap' will have undue resource implications. Any individual requests that would substantially divert the resources of the agency could be refused under s 24.²⁵ Even though the documents created in this period were not prepared with public access in mind, sufficient time has passed for them to be seen in their proper historic perspective. The Review recommends that the FOI Act should be amended to make documents that are less than 30 years old accessible under the FOI Act.

Recommendation 14

The FOI Act should be amended so that it applies to documents that are less than 30 years old, regardless of when they were created.

Good recordkeeping is important for FOI, archives and privacy

5.8 A 'record' is recorded information created, received or maintained by an organisation in the transaction of business or the conduct of affairs and kept as evidence of such activity.²⁶ While not all documents in the possession of an agency are records in this technical sense, most of the documents sought under the FOI Act will be. Good recordkeeping and records management are therefore important to the success of the FOI Act.²⁷ Without them, the right of access provided by the Act is unenforceable in practice. Agencies will be unable to locate records efficiently (if at all) and records that ought be retained may be destroyed.

Whereas once the challenge was to gain access to information held by government, it has now become ensuring that government stores the information comprehensively and comprehensibly.²⁸

Good recordkeeping practices are also vital to privacy protection. Ineffective records management and storage can result in inadvertent and improper disclosure of personal information. In South Australia the Office of State Records contains an FOI/Privacy Unit in recognition of the connection between records management, FOI and privacy.²⁹

One of the major concerns in South Australia was the ineffectiveness of records and information management within Government and the implications this had not only for Freedom of Information and Privacy but also for the effectiveness of public administration.³⁰

²⁰ eg The Public Policy Assessment Society *Submission 4*; PIAC *Submission 34*; Australian Consumers' Association *Submission 55*; ASC *Submission 57*; H Sheridan & R Snell *Submission 58*; Litigation Law Practice Committee, Law Society of NSW *Submission 91*.

²¹ Telstra *Submission 45*; Australia Post *Submission 44*.

²² *Submission 45*.

²³ See Senate Standing Committee 1979 Report ch 14.

²⁴ Senate Standing Committee 1979 Report recommendation 14.19.

²⁵ See discussion of s 24 at para 7.14.

²⁶ See Archives Authority of NSW *Records and recordkeeping: introducing new concepts* Records Management Office Sydney 1994 for discussion of definition of 'record' and an explanation of the strong links between records, recordkeeping and accountability.

²⁷ See Archives Authority of NSW *Records and recordkeeping: introducing new concepts* Records Management Office Sydney 1994 for an explanation of each of these terms. In short, record management is a subset of recordkeeping.

²⁸ D McGann *Submission 96*.

²⁹ State Records' primary function is to provide effective records management and archives administration. The FOI/Privacy Unit monitors the use of the FOI Act (SA): *Submission 92*.

³⁰ State Records (SA) *Submission 31*.

The Archives Act deals mainly with records that have a continuing value and are older than 30 years. The Australian Archives has an interest, however, in such records being well maintained throughout their entire life. One function of the Australian Archives is to promote the keeping of current records in an efficient and economical manner and in a manner that will facilitate their use as part of the archival resources of the Commonwealth.³¹

Recordkeeping standards

5.9 Currently, there is no statutory regulation of recordkeeping in the federal public sector, except in respect of archives. Nor are there comprehensive best practice standards or guidelines.³² A consequence of this is that there is no uniformity in recordkeeping practices across the public sector. Until recently, the Australian Archives does not appear to have taken an active role in providing guidance for agencies as to their recordkeeping obligations and responsibilities.

Creating records

5.10 A fundamental aspect of recordkeeping is the creation of records that will adequately document the activities of the organisation. Failure to create such records reduces an organisation's accountability. There is currently no general obligation on federal public servants to create adequate records. Nor is there a general requirement to document decisions.³³ The Public Service Act Review Group recommended that the new public service legislation should require Department heads to ensure that proper standards are maintained at all times in the creation, management, maintenance and retention of Commonwealth records.³⁴ Such a requirement would not, however, provide a Commonwealth-wide standard because not all Commonwealth agencies are subject to the *Public Service Act 1922* (Cth) (Public Service Act).³⁵ The Australian Archives is currently preparing a documentation standard for record creation in the Australian Public Service. This project is intended to improve the value of records to government and the community by establishing standards for documenting government decision-making and promoting effective recordkeeping. The Review understands that the Australian Archives is not planning to incorporate standards for the management of records once they are created. Such guidance will be left to the records management standards developed by Standards Australia.³⁶

Review's recommendations

5.11 ***The Archives Act should be reviewed.*** In light of the fundamental importance of good recordkeeping practices to effective public administration and to the fulfilment of the objectives of the FOI Act, the Review considers that they should be given a higher priority and greater legislative prominence. The Australian Archives is the logical organisation to be given statutory responsibility for setting and promoting recordkeeping standards, monitoring the recordkeeping practices of federal agencies and monitoring the changing nature of information technology and its consequences for government recordkeeping. The Archives Act currently provides a limited role for the Australian Archives in this area but it does not reflect the massive changes that have occurred in practices and technology since the Act was passed in 1983. The

³¹ Archives Act s 5(2)(c).

³² Guidelines on specific categories of records have been issued by various agencies, eg, the Australian Archives and the Dept of Finance have each published guidelines on electronic records: Australian Archives *Managing electronic records* and *Keeping electronic records - policy for electronic recordkeeping in the Commonwealth government* Australian Archives Canberra 1995; Information Exchange Steering Committee's Electronic Data Management Sub-Committee *Improving electronic data management* AGPS Canberra 1995. The Public Service Commission has issued guidelines on keeping and providing access to personnel records: see Commonwealth Managers Toolbox July 1995. In 1993 the Dept of Transport prepared a document for its own staff entitled *Documenting the business of the Department on file*. The Australian Archives is currently developing a documentation standard for the creation of records - see further at para 5.10.

³³ Statements of reasons for a decision may be required by the legislation under which the decision is made. A statement may also be required under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 13 or the AAT Act s 37. The Cth Ombudsman's Annual Report 1994-95 cites a reduction in the recording of important information and advice as a concern arising from the 'information revolution': AGPS Canberra 1995, 34.

³⁴ Report of the Public Service Act Review Group AGPS Canberra 1994, p 116.

³⁵ The ALRC, eg, is not subject to the Public Service Act.

³⁶ On 1 May 1995 Standards Australia released for public comment a draft Australian standard on records management: Standards Australia *Draft Australian Standard Records Management DR95194-95199* 1 May 1995. Australian Archives has been involved in the preparation of these standards.

Review considers it is time the Archives Act was reviewed and recommends accordingly.³⁷ In the meantime, however, the Review recommends that the Archives Act should be amended in several ways.

5.12 *Obligation to create records.* The Archives Act should impose an obligation on the chief executive officer of an agency to ensure the creation of such records as are necessary to document adequately government functions, policies, decisions, procedures and transactions and to ensure that records in the agency's custody are maintained in good order and condition.³⁸ The DP 59 proposal that such an obligation be imposed on officers received general support in submissions.³⁹ Several submissions suggest that education and good administrative practices are more important than any legal requirement.⁴⁰ The Review agrees that education and training will be important to give effect to such a requirement but considers that a clear statement of obligation would provide a solid foundation for the establishment and promotion of good recordkeeping practices. The obligation would best be imposed on chief executive officers, not officers directly. This is more in keeping with current management practices in the public service.

5.13 *Archives to issue and monitor standards.* The Archives Act should authorise the Director-General of Archives to issue recordkeeping standards, to audit records and recordkeeping practices and to report to the Minister if he or she considers an agency's practices are inadequate. Giving the Director-General statutory authority not only to issue standards but to monitor their use would signify the Government's commitment to improving the standard of recordkeeping in the Commonwealth public sector and send a clear message to the public service about the importance of good recordkeeping for public administration. The Review notes that South Australia has drafted a Bill which provides a mechanism for records management standards to be set and monitored.⁴¹ DP 59 proposed that agencies' recordkeeping practices be monitored by the FOI Commissioner as part of his or her oversight of the administration of the FOI Act.⁴² This notion received support in submissions.⁴³ The Review now considers, however, that while the FOI Commissioner may, in the course of auditing agencies' FOI practices, have regard to their recordkeeping practices and may consult with the Director-General of Archives about them, prime responsibility for monitoring agencies' recordkeeping practices should lie with the Australian Archives. While documents that are not records will not strictly be subject to the recordkeeping standards issued by Archives, the Review considers that agencies should aim to meet those standards in respect of all documents in their possession.

Recommendation 15

The Archives Act should be reviewed. In the interim, it should be amended to

- require the chief executive officer of an agency to ensure the creation of such records as are necessary to document adequately government functions, policies, decisions, procedures and transactions and to ensure that records in the possession of the agency are appropriately maintained and accessible
- authorise the Director General of Archives to issue recordkeeping standards, to audit records and recordkeeping practices and to report to the Minister on inadequate practices.

³⁷ The Act has never been reviewed.

³⁸ Standards relating to the use of e-mail are becoming particularly important given its increasing use as a common form of communication within agencies. See Records Management Office, Archives Authority of NSW *Documenting the future* Sydney 1995, 41. The Canadian Information Commissioner has recommended that the *National Archives of Canada Act 1985* (Can) should include express provisions for the retention of computer communications, including E-mail, once the information has been created: '[t]he need to keep, at least for a time, all messages on these systems stems directly from the notion of open and accountable government. To give the official who created or received a message unfettered choice about its destruction would clearly jeopardise accountability.' *Annual Report 1993-94* Information Commissioner of Canada Ottawa 1994, 9.

³⁹ Proposal 4.17. See, eg, H Sheridan & R Snell *Submission 58*; State Records (SA) *Submission 92*; Australian Consumers' Association *Submission 55*; PIAC *Submission 34*. The Australian Archives *Submission 69* agrees with the need and utility of such a requirement but suggests that it might be more appropriately located contained in the Public Service Act. The difficulty with the Public Service Act is that it does not have a sufficiently broad coverage.

⁴⁰ ASC *Submission 57*. See also Law Institute of Victoria *Submission 90*.

⁴¹ State Records Bill 1995 (SA).

⁴² Proposal 4.18.

⁴³ eg Australian Consumers' Association *Submission 55*; ASC *Submission 57*; H Sheridan & R Snell *Submission 58*; State Records (SA) *Submission 92*.

Privacy and FOI

Several connections

5.14 The linkages and interrelationship between the FOI Act and the Privacy Act are significant. The most obvious is that disclosing an individual's personal information to another person has the potential to invade the former's privacy. The exemption in the FOI Act designed to avoid unreasonable invasions of privacy (s 41) is discussed in Chapter 10.⁴⁴ The other significant connection between the two Acts is access to, and amendment of, one's own personal information. This is discussed in the following paragraphs.

Overlap in respect of access and amendment

5.15 Both the FOI Act and the Privacy Act give individuals a right of access to their own personal information and a right to amend or annotate that information if it is incorrect, incomplete, out of date or misleading.⁴⁵ As the great majority of FOI requests seek access to the applicant's own information the overlap is, in terms of volume, significant. The rights provided by the Privacy Act are found in IPPs 6 and 7. IPP 6 provides that an individual is entitled to have access to a record that contains his or her personal information. IPP 7 requires record-keepers to ensure that records that contain personal information are accurate and, having regard to the purpose for which the information was collected, relevant, up to date, complete and not misleading. To date, the Privacy Commissioner has taken the view that where the FOI Act provides an effective mechanism for obtaining access to and amendment of personal information, complaints about access and amendment should be referred for investigation under the FOI Act.⁴⁶ He has not issued guidelines in respect of either IPP, having taken the view that the FOI memoranda issued by the Attorney-General's Department provide adequate guidance on access and amendment.

Should this overlap be removed?

5.16 During the course of this review the question has arisen whether this overlap is satisfactory. Because DP 59 proposed that the FOI, Archives and Privacy Acts should be combined, it did not address the issue whether, if the FOI and Privacy Acts remain separate, the overlap between the FOI and Privacy Acts in respect of access to, and amendment of, personal information ought be addressed. The following paragraphs discuss several options that were canvassed either before DP 59 or since the Review decided not to proceed with the proposal for a single Act.

Remove access and amendment of personal information from the FOI Act

5.17 IP 12 asked whether the duplication between the two Acts should be removed by repealing the relevant provisions of the FOI Act.⁴⁷ A number of submissions favour this approach.⁴⁸ They regard access to and amendment of one's own personal information as primarily privacy issues which were only provided for in the FOI Act because the Privacy Act did not exist in 1982. They consider that these matters should be dealt with solely under the Privacy Act. Access and amendment, whether in the private or public sector, would then fall within the domain of the Privacy Commissioner.⁴⁹ Consistent interpretation of principles would be assured and a complainant would not have to complain both to the AAT and to the Privacy Commissioner in order to gain the benefit of the Privacy Commissioner's full range of remedies.⁵⁰ Other submissions consider that access to and amendment of personal information are as much matters of government accountability and

⁴⁴ See para 10.2.

⁴⁵ Differences between the amendment provisions of the FOI Act and IPP 7 are discussed in detail in ch 12.

⁴⁶ The Privacy Act provides that the Privacy Commissioner may decide not to investigate a complaint if he is satisfied that the act or practice (i) is the subject of an application under another Cth enactment and the subject-matter of the complaint has been or is being dealt with adequately under that enactment or (ii) could be made the subject of an application under another Cth enactment for a more appropriate remedy: s 41(1)(e), (f).
⁴⁷ Issue 88.

⁴⁸ See, eg, N Waters *IPSubmission* 88; Dept of Social Security *IPSubmission* 39; ATO *IPSubmission* 41; ASC *IPSubmission* 82.

⁴⁹ See ch 15 for discussion of privacy protection in the private sector. This approach has been adopted in New Zealand. When the *Privacy Act 1993* (NZ) was enacted the *Official Information Act 1982* (NZ) was amended so that requests for access to and amendment of personal information could not be made under it: s 24(2).

⁵⁰ The Privacy Commissioner has power to make a determination for compensation which the AAT does not have under the FOI Act. See discussion at para 5.23.

openness as of privacy and should, therefore, remain within the FOI Act.⁵¹ They point out that many requests for the applicant's own personal information also seek other information. To have 'mixed' requests dealt with under two Acts, or for agencies to have to classify those requests according to specified criteria in order to determine under which Act they should be processed, would be unnecessarily complicated and confusing. Additional practical disadvantages of this approach are that the procedural and exemption provisions of the FOI Act would have to be reproduced in the Privacy Act and the Privacy Commissioner's resources would be diverted to complaints about access and amendment to the possible detriment of the other IPPs. The Review is not convinced that the arguments in favour of changing the current arrangements so that access to and amendment of one's own personal information could be dealt with only under the Privacy Act outweigh the disadvantages. It acknowledges that if the Privacy Act is extended to the private sector,⁵² access and amendment decisions will be reviewed by different bodies depending on which sector the decision-maker is in. It does not consider this to be inappropriate given the additional democratic accountability factors that are relevant in the public sector.

Remove amendment only

5.18 A modified rationalisation would see the transfer of Part V of the FOI Act (the amendment provisions) to the Privacy Act. Part V was originally included in the FOI Act in the absence of privacy legislation.⁵³ In 1987 the Senate Standing Committee on Legal and Constitutional Affairs recommended that the amendment provisions be transferred from the FOI Act to comprehensive privacy legislation 'should the latter be enacted'.⁵⁴ This did not happen when the Privacy Act was passed in 1988. Although this option is favoured by some,⁵⁵ the Review does not consider it worthwhile or in the interest of user friendly legislation to alter the current arrangements in such a way that access to personal information would be dealt with under one Act and amendment under another. Given that in many cases a request for access will precede a request for amendment, it seems undesirable to separate the two procedures. This is not to say that the amendment provisions in the FOI Act could not be improved, in several instances by making them more closely reflect IPP 7. They are discussed in detail in Chapter 12.

Combine the FOI and Privacy Acts

5.19 Several Canadian provinces have combined information access and privacy legislation.⁵⁶ The Review considers that, given that the Commonwealth already has separate privacy and freedom of information legislation, to combine the FOI Act and the Privacy Act would involve considerable time and resources for little practical benefit. This option suffers the same disadvantages (although to a lesser degree) as the proposal to combine the FOI, Archives and Privacy Acts into a single Act.⁵⁷

Several proposals to enhance the current arrangements

5.20 The Review does not consider the overlap between the Acts gives rise to any difficulties that justify a major change in legislative arrangements. Nevertheless, it does propose several adjustments to ensure that the administration of access to and amendment of personal information in the public sector remains satisfactory.

Guidelines

5.21 In Chapter 6, the Review recommends the appointment of an FOI Commissioner who will be responsible for issuing guidelines to assist agencies to administer the FOI Act. Given the privacy dimension of access to and amendment of personal information, it is important that the Privacy Commissioner has the

⁵¹ See, eg, Cth Ombudsman *IP Submission* 68; Dept of Veterans' Affairs *IP Submission* 93; Australian Consumers' Association *IP Submission* 98. The Cth Ombudsman has advised the Review that many FOI requests are mixed requests.

⁵² See ch 15.

⁵³ The Senate Standing Committee 1979 Report recommended that FOI legislation should include a limited right to seek correction of personal information: para 24.18. Pt V was included in the Act as a consequence of an amendment when the FOI Bill 1981 was debated in the Senate: *Hansard* (Sen) 8 April 1981, 1239; 29 May 1981, 2364.

⁵⁴ *Report on the operation and administration of freedom of information legislation* the AGPS Canberra 1987 para 15.7.

⁵⁵ eg G Greenleaf *Submission* 99.

⁵⁶ British Columbia and Ontario.

⁵⁷ See para 5.6.

opportunity to contribute to the development of policy in this area.⁵⁸ The Review recommends that the FOI Commissioner should be required to consult with the Privacy Commissioner before issuing guidelines on access to and amendment of one's own personal information.⁵⁹ It was suggested to the Review that such guidelines should be issued jointly by the FOI Commissioner and the Privacy Commissioner and only after public consultation.⁶⁰ The Review does not, however, consider that joint guidelines would be workable or effective. At the end of the day, a single person must have responsibility for their issue. The FOI Commissioner may wish to undertake public consultations before issuing those guidelines, in addition to consulting with the Privacy Commissioner.

Recommendation 16

The FOI Act should require the FOI Commissioner to consult with the Privacy Commissioner before issuing guidelines on access to, and amendment of, individuals' own personal information.

FOI decisions to be reviewed by the AAT only

5.22 Current potential for inconsistent interpretation. The Privacy Commissioner may not always agree with an agency's decision to refuse to release or to amend the applicant's personal information. In such a case, the potential exists for the Privacy Commissioner to find that in refusing the applicant's request the agency breached IPP 6 or 7.⁶¹ The Privacy Commissioner could reach that conclusion independently of any determination by the AAT as to the correctness or otherwise of the agency's decision.⁶² The Review considers that it is unsatisfactory that both the AAT and the Privacy Commissioner are able to determine the correctness of a decision made under the FOI Act. This situation has the potential to create confusion and uncertainty for agencies and to encourage 'forum shopping' by applicants. Not everyone agrees that it is unsatisfactory. Graham Greenleaf, for example, asks

[w]hat is wrong with the Privacy Commissioner deciding an agency's decision was wrong? - that seems to be a partial definition of the Commissioner's job. The main problem to date is that complainants have been denied the option of 'forum shopping', not that they have exercised it.⁶³

5.23 Correctness of FOI decision on access and amendment to be determined by the AAT. The Review considers that the AAT should be the sole determinative reviewer of decisions made under the FOI Act. The Privacy Commissioner should not be able to make a determination on the correctness or otherwise of an agency's decision about access and amendment made under the FOI Act. Accordingly, the Review recommends that the Privacy Act should be amended to provide that the Privacy Commissioner cannot find that an agency has breached IPP 6 or 7 in respect of a decision made under the FOI Act, unless that decision has been found on external review by the AAT or the Federal Court to be incorrect. This would not prevent the Privacy Commissioner from exercising his or her power to award compensation for any loss or damage that flowed from an agency decision that the AAT had found to be incorrect.⁶⁴ The recommended amendment would eliminate the potential for any differences in interpretation of the FOI Act between the Privacy Commissioner and the AAT to cause confusion for agencies or applicants. It would establish the FOI Act as the 'dominant' Act in respect of access to and amendment of personal information in the public sector, effectively confirming the Privacy Commissioner's current practice of leaving complaints about access and amendment to be dealt with under the mechanisms provided by the FOI Act. The precise relationship between the Acts, and between those who determine the policy and handle complaints for each, would be apparent from the legislation itself. The Privacy Commissioner has indicated in discussions with the Review that he does not oppose this recommendation.

⁵⁸ The Privacy Commissioner currently engages in discussion with the Attorney-General's Dept on an informal basis regarding the Dept's memos on access and amendment of personal information.

⁵⁹ It also recommends that the FOI Commissioner should be required to consult the Privacy Commissioner in respect of guidelines on s 41: see para 10.9.

⁶⁰ G Greenleaf *Submission 99*; Privacy Commissioner in consultations.

⁶¹ This might happen, for example, if the Privacy Commissioner formed the view that the document was not exempt under the FOI Act and that the agency was, therefore, neither required nor authorised to refuse access.

⁶² This is unlikely to happen under the policy and practice of the current Privacy Commissioner.

⁶³ G Greenleaf *Submission 99*. See also G Greenleaf 'New ALRC-ARC options endanger privacy' (1995) 2(7) *PLPR* 121.

⁶⁴ Nor would it prevent the Privacy Commissioner from commenting on an agency's access and amendment practices in the course of auditing its record management practices

Recommendation 17

The Privacy Act should be amended to provide that the Privacy Commissioner cannot find that an agency has breached IPP 6 or 7 in respect of a decision made under the FOI Act, unless that decision has been found on external review by the AAT or the Federal Court to be incorrect.

6. An FOI Commissioner

Introduction

6.1 A number of the problems identified by the Review point to the need for more effective administration of the FOI Act. This chapter discusses the benefits of having an independent person overseeing the administration of the FOI Act and actively contributing to its improvement. It recommends the creation of a new statutory office of FOI Commissioner.

DP 59 proposal - an independent monitor

An independent person to oversee the administration of the Act

6.2 In passing the FOI Act, the Parliament provided a statutory right of access to government-held information. It did not, however, establish a program management regime to oversee the implementation of what is a complex set of obligations. This contrasts with other comparable Commonwealth-wide legislation for which dedicated program managers and advocates have been provided.¹ There is no person or organisation who has general responsibility for overseeing the administration of the FOI Act. Nor is there any authority which monitors the way agencies administer the Act, identifies and addresses difficult or problematic issues and provides assistance and advice to the public on FOI. Although the Act is overseen to some extent by the Attorney-General's Department and the Ombudsman, the mechanisms provided are fragmented and the Attorney-General's Department is not sufficiently independent of the Executive.² The Review considers that many of the shortcomings in the current operation and effectiveness of the Act can be attributed to this lack of a constant, independent monitor of and advocate for FOI. The need for adequate monitoring of the FOI Act was noted by Justice Michael Kirby as early as 1983.

It is vital that someone or some agency ... should be closely monitoring the experience under the FOI Act ... Otherwise, the preventative value of legislation of this character would be lost, in a concentration of effort on simply responding to individual claims. We should aggregate experience and draw lessons from it. For example, a persistently recalcitrant government agency ... continuously reversed on appeal, should have its attitude drawn to political and public attention so that they can be corrected, to bring even the most obdurate official into line with the new policy.³

DP 59 proposed that there should be an independent person to oversee the administration of the Act. The role proposed for this person included promoting the FOI Act, issuing guidelines on how to apply the Act, training agencies and monitoring and reporting on agencies' administration of and compliance with the Act.⁴

Response to the proposal

6.3 Many submissions agree that there is a need for independent oversight of the administration of the Act and support the appointment of an independent person to perform this role.⁵

Independent examination of agencies' activities is important and should be undertaken by a separate authority.⁶

The independent monitor's role should ... [include] providing critical comment on policy and agency culture.⁷

Other submissions are not convinced that a new position is necessary.⁸ They point out that some of the roles envisaged for the independent person are already being performed by other bodies and are concerned that a new position would merely add another layer of bureaucracy.

¹ eg the Privacy Act, the *Audit Act 1901* (Cth) and the Public Service Act.

² See further at para 6.29.

³ Justice M Kirby 'Information and freedom' The Housden Lecture, Melbourne 6 September 1983, 11.

⁴ See DP 59 para 3.11-3.23.

⁵ eg AAT *Submission 20*; Qld Information Commissioner *Submission 37*; Sydney Futures Exchange *Submission 40*; Dept of Prime Minister and Cabinet *Submission 82*; Dept of Immigration and Ethnic Affairs *Submission 87*; Legal Aid Commission of Victoria *Submission 86*; Treasury *Submission 80*; PIAC *Submission 34*; D Murphy *Submission 43*; Cth Ombudsman *Submission 53*.

⁶ AAT *Submission 20*.

⁷ ASC *Submission 57*.

The proposed promotional, training and guideline responsibilities are likely to elevate the role of the independent monitor potentially creating another bureaucratic and expensive 'empire'.⁹

They consider that agencies should be given more time to embrace the Act.

A new statutory position: FOI Commissioner

6.4 The Review remains of the view that the appointment of an independent person to monitor and promote the FOI Act and its philosophy is the most effective means of improving the administration of the Act. The existence of such a person would lift the profile of FOI, both within agencies and in the community and would assist applicants to use the Act. It would give agencies the incentive to accord FOI the higher priority required to ensure its effective and efficient administration.¹⁰ Vesting all the proposed functions in a single office will create the 'critical mass' required to ensure a public profile for FOI and greater effectiveness of the Act. The Review considers that no existing person or organisation could take on the role proposed for this independent person.¹¹ Consequently, it recommends that a new statutory office of FOI Commissioner should be created. At present there are approximately eight professional staff in the Attorney-General's Department with responsibility for FOI policy, overseeing the administration of the legislation and conducting FOI training. Because the FOI Commissioner will have broader functions than those of the Information Access Unit within the Attorney-General's Department, he or she will require a slightly larger number of staff. Since some of these staff may be transferred from the Information Access Unit, the increase in resources required to staff the FOI Commissioner's Office will be relatively modest. The net establishment cost of this recommendation may be further reduced if the FOI Commissioner were located in the same premises as an existing statutory authority.¹² On-going costs might also be contained if the corporate support for the office were 'contracted out' to another agency. The overall improvement in the administration of the FOI Act flowing from the work of the FOI Commissioner would, in the longer term, produce savings for agencies by reducing staff time in processing requests and reducing the need and cost of external review by the AAT (because of improved original decision making).

Recommendation 18

A statutory office of FOI Commissioner should be created.

The FOI Commissioner's role

6.5 Most of the specific functions the Review proposes for the FOI Commissioner fall into two broad categories. First, the Commissioner will, on the basis of regular audits, monitor agencies' compliance with, and administration of, the Act. Second, he or she will promote the Act and provide advice and assistance to agencies and members of the public. Additional functions will include providing legislative policy advice and participation in broader information policy. Each proposed function is discussed below.

Monitoring agencies' administration of the Act

Focussed, independent and constant oversight

6.6 The Review considers that monitoring by the FOI Commissioner will result in improved FOI administration. Agencies will be encouraged to pay more attention to the way they implement the Act. The Commissioner will develop a good understanding of each agency's situation and the type of requests it receives. He or she will therefore be able to compare agencies' FOI practices with a view to ascertaining, developing and promoting best practice and achieving greater consistency in FOI administration.

⁸ eg Australia Post *Submission 44*; Dept of Employment, Education and Training *Submission 60*; Law Institute of Victoria *Submission 90*; ATSIIC *Submission 75*; Dept of Administrative Services *Submission 83*; Dept of Finance *Submission 25*.

⁹ Law Institute of Victoria *Submission 90*.

¹⁰ Agencies that need to change their practices and attitudes will be more likely to do so if they know their performance is going to be evaluated, monitored and reported publicly.

¹¹ The reasons for this are explained at para 6.29.

¹² See discussion at para 6.30.

Government-wide quality control will become possible. The following paragraphs discuss several aspects of monitoring - auditing, reporting and collecting statistics.

Agency audits

6.7 The FOI Commissioner should conduct audits of agencies to ensure that their practices and administration are adequate, just as the Privacy Commissioner conducts audits under the Privacy Act.¹³ To perform this role the Commissioner should be given power to demand the production of documents. Audits will enable the Commissioner to examine an agency's FOI practices closely, to identify systemic problems and to appreciate the variety in FOI requests received across government agencies. The FOI Commissioner may decide to conduct an audit if a complaint suggests the possibility of unsatisfactory FOI practices in a particular agency. Alternatively, an agency may ask the FOI Commissioner to conduct an audit to help it assess its FOI practices and to identify deficiencies. If deficient procedures are found, the FOI Commissioner should consult with and advise the agency on how to improve them. Failure to address an identified problem may result in adverse comment in the Commissioner's annual report.¹⁴

Annual report

6.8 Reporting is an important part of monitoring. Accordingly, the FOI Commissioner should be responsible for preparing an annual report to Parliament on the operation and administration of the FOI Act. The Commissioner's report should highlight poor FOI administration and any regular or persistent failure to comply with the Act or failure to respond suitably to an audit. The Attorney-General's Department's annual FOI report is a compilation of information provided voluntarily by agencies rather than the result of independent audit or consideration of agencies' FOI practice. It does not provide sufficient material to enable a comparison of agency performance on FOI or to enable an assessment to be made of what constitutes best practice. This is partly due to the fact that the Department has no authority to compel agencies to provide requested information.¹⁵ The Commissioner will not be confined to the annual report as a means of drawing attention to poor practices. He or she should be able to take other appropriate steps to exert pressure on an agency to improve its practices, for example, by briefing the relevant Minister. The current requirement on each agency to provide information on its FOI experience in its annual report should continue.

Statistics

6.9 Collecting statistics is a logical part of the role of monitoring and therefore should be done by the FOI Commissioner. Statistics collected by the Attorney-General's Department provide inadequate assistance in evaluating agencies' performance. They do not, for example, distinguish between requests for the applicant's personal information and other requests. Nor do they reveal which exemptions are claimed and how frequently. Not all agencies comply with the Department's requests for statistics. Many submissions consider that FOI statistics should be improved.¹⁶ The Review agrees. The FOI Commissioner should ensure that the quality of statistics is improved. The Commissioner should be given the power to require agencies to provide statistics on their FOI administration. The Review acknowledges the possible resource implications of any new reporting requirements and suggests that the FOI Commissioner bear this in mind when determining what statistics should be collected.¹⁷

Promoting the objectives of the Act and providing advice and assistance

A resource for agencies and the public

6.10 Currently there is no person independent of the government from whom members of the public who want to gain access to government-held information can seek advice about the Act. Nor is there an

¹³ Privacy Act s 27(1)(h).

¹⁴ See para 6.8.

¹⁵ See para 6.9.

¹⁶ eg Cth Ombudsman *IP Submission* 68; R Snell *IP Submission* 31; Dept of Veterans' Affairs *IP Submission* 93. Separating personal requests from other requests was seen as particularly important: eg A Ardagh *IP Submission* 87.

¹⁷ The ATO queries the value of collecting statistics on straightforward personal information requests, for example, copies of tax returns, group certificates: *Submission* 17. If such requests were handled without resort to the FOI Act, as the Review urges in ch 4, they would no longer be FOI statistics.

independent person to whom an agency can turn for assistance in communicating or dealing with an applicant. The absence of such a person contributes to the difficulties sometimes experienced by agencies and applicants. The FOI Commissioner will be a resource for both applicants and agencies. For applicants, current or potential, the FOI Commissioner will be a source of independent information about processes and options. For agencies, the Commissioner will be a source of assistance in administering the Act. The following paragraphs discuss various aspects of the FOI Commissioner's advice and assistance role.

Publicising the Act

6.11 The degree to which people use the FOI Act to seek information from the government depends largely on their awareness of the Act and of how to use it. A number of submissions consider that the Act is not adequately publicised.¹⁸ The Act is silent on the issue of responsibility for publicising the FOI Act and educating the public. Although the government initially encouraged agencies to publicise the operation of the Act, in 1985 it directed agencies to suspend further promotional activities.¹⁹ The FOI Commissioner should be responsible for ensuring that people know about the Act and how to use it. The FOI Commissioner should liaise with the Privacy Commissioner in respect of any promotion involving personal privacy. Australia's 1400 public libraries should be used as public access points for information about the operation and administration of the Act, particularly given their capacity for electronic information delivery. Information in plain language about how to use the FOI Act should be available at all government departments and agencies and at public libraries. In publicising the Act account should be taken of access and equity issues, for example, the need for people from non-English speaking backgrounds to be aware of the existence of the Act.²⁰

Guidance on how to interpret and administer the Act

6.12 ***Attorney-General's Department memos.*** The Information Access Unit within the Attorney-General's Department issues memos to assist agencies to interpret and apply the Act.²¹ These memos have no legal status. They are available to the public for the cost of photocopying if applicants happen to find out about them. Their existence is not publicised.²² They are rarely if ever cited by agencies in argument before the AAT and it seems that, until recently, AAT members did not have copies of them. This is surprising given that these memos often guide agencies in their decision making and require valuable resources to produce. The current memos are sometimes complex and legalistic and, it has been suggested, appropriate only as communications between legal officers. In part, this reflects the complexity of the Act, or at least the complexity of its interpretation.

6.13 ***Guidelines for both parties.*** Guidelines could assist both agencies and applicants to understand, interpret and administer the Act. It would make sense for the person who oversees the administration of the Act to prepare guidelines. Accordingly, the Review recommends that the FOI Commissioner take over from the Attorney-General's Department the task of issuing guidelines. The Commissioner's close involvement with both agencies and members of the public will give him or her a good appreciation of areas in which guidance is needed. The guidelines should provide information that will help agencies apply the Act and information about relevant AAT and Federal Court decisions. They must be comprehensible to non-lawyers as many FOI officers and most potential applicants are not legally qualified. The FOI Commissioner might also consider developing a manual for use by both applicants and agencies.²³ A copy of the relevant guidelines should be given to an applicant, along with a statement of reasons, if an exemption is claimed.

6.14 ***Status of FOI Commissioner's guidelines.*** The guidelines issued by the FOI Commissioner need to be flexible. Accordingly, they should be administrative guidelines, not delegated legislation.²⁴ They will not be

¹⁸ eg Australian Consumers' Association *IP Submission* 98; Confidential *IP Submission* 99; NSW Council for Civil Liberties *IP Submission* 11; R Snell *IP Submission* 31.

¹⁹ This was one of a number of directions aimed at containing the cost of administering the Act: see FOI Memo 77. The Attorney-General's Dept produces a pamphlet *Freedom of Information Act* which is available from all government agencies and departments. The most recent re-issue was in February 1995. Previous versions have been issued in languages other than English.

²⁰ This may be particularly important in respect of migrants from non-democratic countries who may feel uncomfortable challenging the bureaucracy. The Government's Access and Equity Strategy should be taken into account: see Office of Multicultural Affairs *IP Submission* 70.

²¹ Memos issued during the course of a year are reproduced in the Dept's FOI Annual Report.

²² Some agencies identify the memos in their s 9 statements. These statements are discussed at para 7.7.

²³ The NSW Ombudsman prepared a loose-leaf FOI Users' Manual in 1994.

²⁴ This view is supported by the AAT: *Submission* 20.

subject to the Legislative Instruments Bill 1994 as they will not determine the law or alter the content of the law.²⁵ It will be important to ensure that the greatest possible benefit is gained from what will be a valuable resource. The FOI Act should require both agencies and the AAT to take into account the guidelines issued by the Commissioner. While this will not make them binding, it will clearly establish them as 'relevant considerations'. Failure to take them into account will therefore be reviewable under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

Educating and training agencies

6.15 It is important that all staff, particularly senior staff whose attitudes have a significant influence on agency culture, have a good understanding of the Act, its purpose and its democratic significance. Agencies are, and should remain, responsible for ensuring that their staff are adequately trained in FOI. Some agencies have developed internal training programs designed to fit their particular needs. Staff turnover and decentralisation of FOI Act functions (if this happens) should be monitored from a training perspective. Middle and senior level management programs should include FOI training, which should be considered to be as important as financial management and human resources training.²⁶ An agency's FOI procedures should be easily accessible to every member of staff. Staff training is also provided by the Attorney-General's Department.²⁷ The Review considers that the FOI Commissioner should provide FOI training for agencies, with a particular emphasis on promoting an understanding and acceptance of the Act and its objects.²⁸ PIAC suggests that training on how to use the FOI Act should also be provided for community organisations.²⁹ The Review would encourage the FOI Commissioner to provide information on how to use the Act to community groups and any interested members of the public, for example journalists.

Information, advice and facilitation

6.16 A '**circuit breaker**'. FOI requests can deteriorate into adversarial disputes. Once this happens, the likelihood of an outcome satisfactory to both parties is small. In many of these instances, the early involvement of an independent third party, at the request of either party, could aid communication between the parties and act as a 'circuit breaker'.³⁰ The WA Information Commissioner considers that many problems are 'headed off and resolved' at an early stage when agencies and applicants seek advice from her office.³¹ This results in fewer requests for external review. Independent clarification of the facts and options may be all that is needed to prevent a misunderstanding deteriorating into a dispute. In DP 59 the Review described this information and advice role as 'facilitation'.

6.17 **DP comments.** DP 59 proposed that the FOI Commissioner ought be able to facilitate the handling of FOI requests in an informal and non-binding way.³² Submissions are divided on this issue. Some consider facilitation to be unnecessary.³³ Others support the FOI Commissioner having a facilitative role.³⁴

Generally speaking, I favour the concept of a facilitator. I have seen many cases where there has been a lack of trust exhibited by an applicant for access toward an FOI administrator who was attempting to negotiate to narrow, so as to

²⁵ The Bill sets out a comprehensive regime governing drafting standards and procedures for the making, publication and scrutiny of delegated legislation. The regime includes an electronic register of delegated legislation and Parliamentary scrutiny of legislative instruments: Legislative Instruments Bill 1994 Explanatory Memorandum (Sen).

²⁶ Some, eg, the Senior Executive Management Program, already do. Several submissions on IP 12 indicated that an FOI training module or program (perhaps including a video that could be used at induction seminars) that agencies could use in-house would be beneficial: eg ASC *IP Submission 82*; Dept of Immigration and Ethnic Affairs *IP Submission 84*.

²⁷ The Dept provides introductory seminars on how to administer the Act. It also provides advanced level training and holds forums at which departments and agencies have an opportunity to discuss relevant issues and experiences.

²⁸ See also para 4.14. Until the FOI Commissioner becomes fully established, it would be sensible for him or her to liaise with the Dept so that full advantage could be taken of its expertise in this area.

²⁹ *Submission 34*. The Attorney-General's Dept has in the past conducted training sessions for specialised groups of possible users, eg, journalists, on how to use the Act.

³⁰ eg an applicant who is suspicious of an agency's attempts to narrow the terms of the request may be prepared to accept an explanation by the FOI Commissioner of the legitimate need to focus requests as much as possible.

³¹ The Advice and Awareness sub-program within the office of the WA Information Commissioner provides assistance to members of the public and agencies and encourages liaison between the agency and the applicant.

³² See para 3.16; proposal 3.6.

³³ eg The Public Policy Assessment Society *Submission 4*; Law Institute of Victoria *Submission 90*; ATO *Submission 17*; Dept of Employment, Education and Training *Submission 60*.

³⁴ eg PIAC *Submission 34*; Cth Ombudsman *Submission 53*; Australian Consumers' Association *Submission 55*; Attorney-General's Dept (ACT) *Submission 77*; Dept of Veterans' Affairs *Submission 24*.

make more manageable, the terms of an FOI access application: the participation of an 'honest broker' may resolve an impasse to the benefit of all parties.³⁵

Some support a facilitation role but consider it to be incompatible with a monitoring role.³⁶

6.18 *Helping to improve communications between the parties.* The Review considers that the FOI Commissioner should be a resource to be used by the applicant, the agency or a third party. This may be particularly helpful for agencies that do not receive many FOI requests.³⁷ The Commissioner should be able to provide advice to any party at any stage of a request, including at internal review.

The monitor could ... be a source of advice and guidance to agency staff and FOI applicants alike - in a manner similar to the role performed by the Privacy Commissioner in relation to the Privacy Act.³⁸

The FOI Commissioner will not, however, be an advocate for applicants.³⁹ Nor will he or she be a mediator between the parties. The FOI Commissioner will be a means of improving communications between the parties.

A pro-active role by the monitor may avoid the need for an applicant to go to appeal or just give up.⁴⁰

Where an agency delays processing a request and the applicant seeks the advice of the FOI Commissioner as to what steps are available, the Commissioner may, in addition to providing information to the applicant, be able to persuade the agency to finalise the request (perhaps by reminding the agency of his or her auditing and reporting powers). The ability of the Commissioner to be an effective 'circuit breaker' will depend on his or her ability to react quickly (within a few days) to a request for assistance. The degree to which the FOI Commissioner is prepared to assist in a particular instance should be left to the discretion the Commissioner. The FOI Commissioner will need to make clear, particularly to applicants, the extent on his or her powers, most importantly that they do not include formal investigation of specific cases or determinative review of decisions.

No investigative powers

6.19 The FOI Commissioner will not need formal investigative (as opposed to audit) powers to perform the role envisaged by the Review.⁴¹ Investigation powers are required by persons responsible for forming a view as to the correctness of specific actions or decisions. The FOI Commissioner will not have such responsibility and so does not need such powers. The FOI Commissioner may nevertheless be able to help resolve individual complaints by persuasion.⁴² Alternatively, the Commissioner may initiate an audit of an agency's FOI practices if he or she considers that a complaint - or series of complaints - indicate deficient FOI practices in that agency. Threat of an audit may well encourage an agency to take note of the Commissioner's view of a particular decision - either its substance or the way it was reached. Responsibility for the decision will, however, remain with the agency. If an applicant wants a particular decision investigated more fully than can be done by the FOI Commissioner without formal investigative powers, he or she will be able to make a complaint to the Ombudsman. If an applicant wants a decision overturned, review by the AAT will remain the appropriate course. The Review is confident that there will be fewer complaints about agencies' FOI practices and decisions once the FOI Commissioner is established and the administration of the Act improves. It is also certain that many of the complaints that might still arise will be resolved informally by the FOI Commissioner without the need for a full investigation by the Ombudsman or an appeal to the AAT.

³⁵ Qld Information Commissioner *Submission 37*.

³⁶ Telstra *Submission 45*. See also ASC *Submission 57*; AAT *Submission 20*.

³⁷ If an agency does not receive many FOI requests, it is possible that its officers may have a lesser understanding and working knowledge of the Act than officers in agencies that receive numerous requests. One submission suggests that inexperience within agencies in dealing with requests results in more cases going to internal review and appeal: D Murphy *Submission 43*.

³⁸ Dept of Defence *Submission 76*.

³⁹ The Ombudsman used to have such a role but it was removed in 1991 after the Senate Standing Committee 1987 Report recommended that the special role of the Ombudsman as counsel before the AAT in FOI matters was not needed: para 17.20-17.24.

⁴⁰ D Murphy *Submission 43*.

⁴¹ Separate from whatever powers he or she might need in order to conduct random audits: see para 6.7.

⁴² Conducting audits, training agencies, issuing guidelines, providing advice to applicants and agencies, monitoring closely the kind of decisions being appealed to the AAT and their outcomes will give the FOI Commissioner a good understanding of agency practices and of problem areas and sufficient authority to influence agencies' FOI practices, in particular instances as well as at a general level.

No determinative review powers

6.20 The FOI Commissioner should not have power to conduct determinative review of an agency's FOI decision. Rather, the AAT should remain the sole determinative reviewer of FOI decisions, as it is with many other discretionary decisions. A number of submissions urged the Review to adopt the review system that operates in Queensland and Western Australia in which determinative review is carried out by an Information Commissioner. The Queensland Information Commissioner, for example, says his

experience so far has convinced me that the Information Commissioner model (with adequate resourcing) is the most efficacious model for dispute resolution in FOI cases.⁴³

Submissions' support for the Queensland and Western Australian Information Commissioner model seems to stem largely from dissatisfaction with the AAT. Some submissions claim that the AAT has not responded effectively to defects in agencies' FOI practices. Reference has been made to the AAT's inability to require production before the hearing of documents that are claimed to be exempt, its formality and expense and the quality of some of its decisions. Submissions also refer to the success of the Information Commissioners in Western Australia and Queensland. There are several reasons, however, why the Review does not recommend that the FOI Commissioner replace the AAT as determinative reviewer of FOI decisions. First, determinative powers are not compatible with the role proposed for the Commissioner. It is not usual for an institution responsible for formulating guidelines on the administration of legislation to have individual case dispute resolution powers.⁴⁴ Providing advice and assistance to both parties and, perhaps, facilitating a request could give rise to a conflict of interest and a perception of a lack of independence if the FOI Commissioner were to have determinative powers. Second, there is no need to create another merits review mechanism. The existence of the AAT makes the consideration of review mechanisms at the federal level different from that in Queensland and Western Australia, neither of which jurisdiction has an administrative appeals tribunal. Third, the Review is confident that the AAT can adjust its current practices where necessary in order to provide effective review of FOI decisions. These reasons are discussed in greater detail in Chapter 13.

Legislative policy advice

6.21 The Attorney-General's Department, as the Department of the Minister who administers the FOI Act, is responsible for providing the government with policy advice on FOI and has carriage of legislative amendments. The FOI Commissioner should be able to give advice to the government on problems that arise, how they might best be addressed (by legislative amendment or otherwise), the likely impact of proposed amendments to the FOI Act and provisions in other federal legislation that relate to the disclosure of information. He or she should, as a matter of practice, be consulted on all legislative changes to the Act before they are put before Parliament.⁴⁵ Proposed amendments to other legislation that will have the effect of restricting the application of the FOI Act should also have to be discussed with the FOI Commissioner before proceeding. Consultation with the FOI Commissioner should counteract any perceived bias in the policy advice provided by the Department arising from its role as provider of legal advice to the government.

Recommendation 19

The functions of the FOI Commissioner should include

- auditing agencies' FOI performance
- preparing an annual report on FOI
- collecting statistics on FOI requests and decisions
- publicising the Act in the community
- issuing guidelines on how to administer the Act

⁴³ Qld Information Commissioner *Submission 37*. See also H Sheridan & R Snell *Submission 58*; CthOmbudsman *Submission 53*. Many submissions that prefer a Commissioner with determinative review powers support the Review's recommendation for an FOI Commissioner without determinative review powers in preference to the current situation.

⁴⁴ See, eg, Dept of Finance and the Public Service Commission. The Privacy Commissioner is somewhat of an exception in this regard.

⁴⁵ The relationship between the Attorney-General's Dept and the FOI Commissioner on policy development should be similar to that between the ASC and the Business Law Division of the Attorney-General's Dept or that between the Discrimination Commissioners and the Human Rights Branch of the Attorney-General's Dept.

- providing FOI training to agencies
- providing information, advice and assistance in respect of FOI requests
 - at any stage of an FOI request
 - at the request of the applicant, the agency or a third party
- providing legislative policy advice on the FOI Act.

Recommendation 20

The FOI Commissioner should be given power to require agencies to provide statistics on their FOI administration.

Recommendation 21

If an agency claims that a document is exempt it should be required to give to the applicant a copy of the relevant guidelines in addition to its statement of reasons.

Recommendation 22

The FOI Act should require both agencies and the AAT to take into account the guidelines issued by the FOI Commissioner.

Recommendation 23

Information in plain language about how to use the FOI Act should be available at all government departments and agencies and at public libraries.

Interaction between the FOI Commissioner and the Ombudsman and the AAT

6.22 In monitoring and reporting on the administration of the FOI Act and in developing and revising guidelines, the FOI Commissioner will need to have regard to the FOI work of both the AAT and the Ombudsman and to have regular consultations with those organisations. The FOI Commissioner should keep a close eye on the type of decisions being taken to the AAT, the AAT's determinations on those reviews and investigations undertaken by the Ombudsman.⁴⁶ The work of the AAT and the Ombudsman may expose systemic problems which the Commissioner can seek to rectify by way of guidelines, training or reporting. The Ombudsman should draw to the attention of the FOI Commissioner any systemic problems identified in the course of investigating an FOI complaint. FOI statistics from the AAT and the Ombudsman will help the FOI Commissioner monitor agencies' performance. It can be expected that the Ombudsman and the FOI Commissioner will make mutually acceptable arrangements as to when applicants who approach the office of one should be referred to the other's office.

Role for FOI Commissioner in broader information policy

Looking beyond the FOI Act

6.23 The administration and operation of the FOI Act is only one aspect of what might loosely be referred to as 'information policy' - the way the government manages, provides access to, publishes and charges for its information, and how this might be affected by changes in technology. The Review considers that it would be valuable for the FOI Commissioner to take an active interest in information policy.

Greater release of information outside the FOI Act

6.24 **Release on request.** One issue the FOI Commissioner could become involved in is promoting the release of information outside the Act, both on request and automatically. Chapter 4 explains the Review's view that wherever possible, information should be released to individuals who seek it without the need for a

⁴⁶

Investigations by the Ombudsman into matters unrelated to the FOI Act can often give rise to information access issues.

request under the FOI Act.⁴⁷ The Commissioner would be well placed to identify agencies that insist on people seeking access to information under the FOI Act in circumstances where common sense and the spirit of the Act suggest that the information could be provided more informally. He or she could then set about encouraging a change in practice, perhaps by issuing guidelines on the circumstances in which agencies generally ought to provide access outside the FOI Act.

6.25 **General release.** Improved technology will enhance the ability of agencies to make a greater amount of information than is currently published in hard copy routinely available to the public, for example on the Internet. The National Library of Australia highlights the need for a national information infrastructure so the government can take advantage of electronic technology to achieve FOI objectives.⁴⁸ The FOI Commissioner could play an important role in promoting the development of such infrastructure and encouraging agencies to use it, thereby reducing the need for people to use the FOI Act to gain access to information.

Recommendation 24

The FOI Commissioner should encourage agencies to make full use of advances in information technology to provide better access, for example, on-line access, to government information.

The cost of information that is not accessible under the FOI Act

6.26 Documents that are available for purchase cannot be obtained under the FOI Act.⁴⁹ The price of such documents will, therefore, affect the achievement of the objectives of the FOI Act. Overpricing of government information could make it inaccessible, despite the existence of the FOI Act, with serious consequences for both the government and the public. It is clearly important not only to address concerns about the fees and charges regime under the Act but also to address the potential for agency pricing policies to remove much information from the scope of the FOI Act, thus substantially reducing the Act's impact.⁵⁰ The Review considers that there will be an important role for the FOI Commissioner in monitoring agency practices regarding the sale of documents, including the prices charged, and in discouraging the sale of information to the public at a price that would restrict the public availability of information in a way that is inconsistent with the spirit and philosophy of the FOI Act.⁵¹

Recommendation 25

The FOI Commissioner should monitor the practices of agencies regarding the sale of documents with a view to ensuring that their pricing policies do not impose unreasonable barriers to the accessibility of government information.

Co-ordination of government information policy and practice

6.27 There is no single person responsible for co-ordinating the government's information policy. This is not surprising given the huge range of issues relating to information. It is important, however, that to the greatest extent possible the 'regulators' in the field of government information take a co-ordinated and consistent approach to government information practices including publishing, pricing, storage, usage and management, particularly in respect of electronic information. The privatisation of government information collection and creation also gives rise to questions of adequate accessibility of government information.⁵² In July 1995 the

⁴⁷ See para 4.17.

⁴⁸ *IP Submission 23.*

⁴⁹ s 12(1)(c).

⁵⁰ Fees and charges are discussed in ch 14.

⁵¹ The Review notes that in 1994 the Canadian Information Commissioner recommended that the *Access to Information Act RSC 1985* (Can) should be amended to ensure that only information that is reasonably priced and reasonably accessible to the public is excluded from the Act's coverage. He suggested several guiding principles for determining whether a price is reasonable, including that fees should not be set to recover the costs of collecting, compiling or processing information as these costs have already been paid by the taxpayer and that there should be no exclusive or restricted licensing arrangements for the sale or dissemination of government information: *Annual Report 1993-94* Information Commissioner of Canada Ottawa 1994, 12.

⁵² In the US a huge industry exists to package and sell congressional documents (transcripts, legislation). The Speaker of the House of Representatives, Newt Gingrich, has suggested that all this information should be available for free on the Internet saying this would 'change the balance of power in America' in favour of ordinary citizens, rather than Washington lobbyists: *New Scientist* 25 February 1995, 45. The contracting out of government services is discussed at para 15.8.

Government established an Office of Government Information Technology, under the direction of the Chief Government Information Officer (CGIO). The functions of the office are to ensure a whole-of-government approach to the use of information technology and telecommunications, to provide leadership to agencies in realising the potential of technology in improving client services delivery and to develop a blueprint for the more efficient and effective use of technology across the public sector.⁵³ The Review considers it is important that there be a mechanism whereby those who may in the course of their work come across problems and issues in the field of information policy can raise them with others in that field with a view to formulating an appropriate response and, where necessary, alerting the government to the need for administrative or legislative change.

[Issues arising from the information revolution] deserve early attention by all involved in public administration. The willy-nilly adoption of new information technologies or practices must be preceded by a full appreciation of the context in which they will be used and of the actual benefits that will accrue to the consumers of agencies' services.⁵⁴

The Review recommends that there should be a standing arrangement for consultation between the FOI Commissioner, the Director-General of Archives, the CGIO, the General Manager of the AGPS, the Privacy Commissioner and the Ombudsman.

Recommendation 26

There should be a standing arrangement for consultation between the FOI Commissioner, the Director-General of Archives, the Chief Government Information Officer, the head of the AGPS, the Privacy Commissioner and the Ombudsman.

Review of FOI Commissioner's role after five years

6.28 The FOI Commissioner would be expected to establish some performance indicators by which to measure his or her performance of the statutory function. The Review considers that in addition the need for, and the role of, the FOI Commissioner should be reviewed formally and independently five years after the position is created. The review should examine whether the Commissioner has performed the role envisaged and whether the office remains useful. Agencies, applicants, the AAT, the Ombudsman and the Privacy Commissioner should be encouraged to participate in the review and to consider and comment on whether the FOI Commissioner has resulted in improved FOI administration. The five year review should be conducted by the Administrative Review Council.

Recommendation 27

The need for, and the role of, the FOI Commissioner should be reviewed by the Administrative Review Council after five years.

No existing organisation could perform the role proposed for the FOI Commissioner

6.29 DP 59 raised the possibility of an existing body taking on the role proposed for the FOI Commissioner. Options canvassed included the Attorney-General's Department, a parliamentary committee, the Ombudsman, the Australian Archives, the AAT, the Privacy Commissioner and the Chief Government Information Officer.⁵⁵ At public hearings on 4 July 1995 the Auditor-General was suggested as another possible option. The Review does not consider any of these options to be suitable.

- Attorney-General's Department. The Review acknowledges that some of the functions proposed for the independent person are currently being performed by the Attorney-General's Department. Some submissions consider that the Department could provide adequate monitoring.⁵⁶ The Review disagrees.

⁵³ The Office is within the Finance portfolio.

⁵⁴ Cth Ombudsman *Annual Report 1994-95* AGPS Canberra 1995, 34.

⁵⁵ See DP 59 para 3.25.

⁵⁶ Dept of Veterans' Affairs *Submission 24*; Law Institute of Victoria *Submission 90*.

The Department is not sufficiently independent of the government and agencies subject to the Act to be an effective and influential monitor. The need for independence was noted in submissions.

[I]t is essential that this monitor should be independent from the executive government, since ... on occasions, it will be necessary for criticism to be levelled at the executive government regarding matters such as administration of the FOI Act, amendments to the FOI Act, and resourcing for the administration of the FOI Act.⁵⁷

The Department's ability to criticise agencies' FOI practices would be constrained by the fact that many agencies are clients of its Legal Practice. This may place it in a position of conflict of interest and would certainly affect public perception of its impartiality.⁵⁸

- *Ombudsman.* A number of organisations consider that the Ombudsman could, with expanded powers and resources, perform the role proposed for the FOI Commissioner. In their view the Ombudsman has the necessary independence, FOI experience and established profile and reputation in the community and has already moved towards a broader approach of facilitating agency compliance. They say the proposed role would complement the Ombudsman's duties under s 57 of the FOI Act.⁵⁹ The Ombudsman considers that the role would effectively build on her existing role. The majority of the Review disagrees. The role proposed for the FOI Commissioner is different from that of the Ombudsman in several respects, the most significant of which is that the former does not involve individual complaint resolution. This aspect of the Ombudsman's work could reduce the effectiveness of the proposed advice and assistance role because of a perceived conflict of interests. In addition, the Ombudsman's role makes it important that he or she not become involved in policy development. The Ombudsman should be independent of the policy making process and able to criticise defective policy. The Ombudsman, like the Auditor-General, has broad systemic responsibility for maintaining the integrity of government. This requires arms length scrutiny which would be compromised significantly if the Ombudsman had responsibility for administering particular legislation other than his or her own. The impact and effectiveness of the proposed role will be greatest if it is carried out by a separate, statutory body rather than being absorbed into the role of an existing statutory position such as that of Ombudsman.
- *Parliamentary Committee.* A parliamentary committee would be unable to provide the constant monitoring envisaged by the Review and may be perceived to be subject to party political pressure and thus not sufficiently independent.⁶⁰
- *Australian Archives.* The Australian Archives' submission expressly opposes any suggestion that it be given this role.⁶¹ The Review notes that while the Director-General of Archives holds a statutory office, the Australian Archives is not an independent statutory authority. Consequently, it does not have sufficient administrative or financial independence to carry out the role of FOI Commissioner.
- *AAT.* The AAT's role as determinative reviewer of FOI decisions is not compatible with the policy, training and promotional functions proposed for the FOI Commissioner.⁶²
- *Privacy Commissioner.* The Privacy Commissioner's role could be expanded to include that of the proposed FOI Commissioner, resulting in a single position of Information and Privacy Commissioner - possibly with two deputies, one for privacy and one for FOI. A combined position operates in several Canadian provinces.⁶³ This approach is attractive in so far as it would require a single individual to resolve any tensions between FOI and privacy. In Canada over recent years there has been considerable discussion of the merits of a combined position. In 1992 the Canadian government

⁵⁷ Qld Information Commissioner *Submission 37*. See also Treasury *Submission 80*; Sydney Futures Exchange *Submission 40*.

⁵⁸ The commercial imperatives of the Legal Practice may limit the resources the Dept can allocate to FOI policy.

⁵⁹ See Qld Information Commissioner *Submission 37*; The Public Policy Assessment Society *Submission 4*; PIAC *Submission 34*; Telstra *Submission 45*; Federation of Community Legal Centres *Submission 79*.

⁶⁰ This view is supported by the Dept of Prime Minister and Cabinet *Submission 82*.

⁶¹ This contrasts with several submissions that consider Archives could perform the FOI Commissioner role: A Conway-Jones *Submission 18*; Country Women's Association *Submission 64*.

⁶² The AAT *Submission 20* does not consider that the AAT should be given the role proposed for the FOI Commissioner.

⁶³ British Columbia, Ontario and Quebec.

proposed combining the offices of the Information Commissioner and the Privacy Commissioner.⁶⁴ It considered this would

encourage a balancing of interests between the two objectives of privacy and access to information. This balancing becomes increasingly necessary as Canada moves away from a single-interest approach in a wide range of policy and program areas.⁶⁵

The Canadian Information Commissioner favours a combined position.⁶⁶ While appreciating the potential benefits of this approach, particularly in light of the significant overlap between the two Acts,⁶⁷ the Review is not convinced at this stage that a single Commissioner would be the best option given the differences between the powers proposed for the FOI Commissioner and those the Privacy Commissioner currently enjoys⁶⁸ and the fact that the Privacy Act may be extended to apply in the private sector as well as the public.⁶⁹ There is a need to ensure that the principles of openness and privacy each have a clearly identifiable and unambiguous advocate. The balance between FOI and privacy can sometimes be a fine one and it may be difficult for an individual not to develop, or be perceived to have developed, a stronger allegiance to one over the other which could lead to accusations of bias in favour of either openness or privacy. It is particularly important that the benefits of openness, not only for public accountability but for creativity and commercial exploitation, not be diminished by an overemphasis on privacy. Given the tendency to date for agencies to favour secretiveness over openness and the fact that the overwhelming majority of FOI requests are for applicants' personal information, there is a risk that FOI would become the 'poor cousin' if the Privacy Commissioner were given responsibility for the role of FOI Commissioner. Accordingly, the Review does not consider that at this stage extending the role of the Privacy Commissioner is the preferable option. The Privacy Commissioner agrees.⁷⁰

- *Chief Government Information Officer.* While the work of the CGIO on realising the potential of information technology relates to issues that are relevant to FOI, for example identifying areas in which government information technology standards are necessary, the nature of the position is quite different from that proposed for the FOI Commissioner. The CGIO is not charged with responsibility for any aspect of government information policy in a substantive sense. Nor is it concerned to monitor the performance of departments and agencies in meeting demands from the public in seeking access to official information.
- *Auditor-General.* the Auditor-General would have the same difficulties as those identified in respect of the Ombudsman.

Location of the FOI Commissioner

6.30 The Review is of the view that the FOI Commissioner should be established as a separate statutory position. In the normal course of events, the Commissioner would establish his or her own office. This would be appropriate and effective. The Review is conscious however that the resource implications of such a course of action should be scrutinised carefully. Given the significant connections between the FOI Act and the Privacy Act, and the need under the Review's recommendations for close liaison between the FOI Commissioner and the Privacy Commissioner and between the FOI Commissioner and the Ombudsman, there may be advantages in locating the offices of the FOI Commissioner, the Privacy Commissioner and the Ombudsman at the same premises.⁷¹ This would be convenient for consumers as well as having potential resource benefits. Consumer convenience could also be improved if the three officers were prepared to distribute each other's guidelines and other material, where appropriate. There would be potential for additional financial savings if these three officers were able to come to an agreement regarding the sharing of

⁶⁴ The Privacy Act states that the Information Commissioner may be appointed as Privacy Commissioner: s 55.

⁶⁵ See Information Commissioner of Canada *Annual Report 1991-92* Information Commissioner of Canada Ottawa 1992, 21.

⁶⁶ id 19.

⁶⁷ See ch 5.

⁶⁸ The Privacy Commissioner can investigate individual complaints and make determinations on the merits. If the Privacy Commissioner's role were to be modified at some time in the future to be more like that of the FOI Commissioner, without determinative powers, the question of a single officer may warrant further consideration.

⁶⁹ See para 15.22.

⁷⁰ Privacy Commissioner *DP Submission 81*.

⁷¹ The Privacy Commissioner is a member of the Human Rights and Equal Opportunity Commission. This arrangement is currently under review by the Attorney-General's Dept, the Dept of Finance and the Human Right and Equal Opportunity Commission.

corporate support and secretariat services.⁷² The Review suggests that the government give consideration to locating the FOI Commissioner, the Privacy Commissioner and the Ombudsman at the same address.

⁷²

The Review notes that in Canada the FOI Commissioner and the Privacy Commissioner are co-located and share corporate and administrative services.

7. Using the FOI Act

Introduction

7.1 It is important that the procedural requirements in the FOI Act do not detract from the valuable access rights created by it. This chapter considers issues relating to the way the FOI Act operates in practice including what is accessible, making requests and processing requests.¹

What is accessible under the FOI Act

'Documents'

7.2 Despite its title, the FOI Act provides access to documents, not information. 'Document' is, however, defined broadly. It includes any record of information and any article on which information has been stored or recorded, either mechanically or electronically.² It was suggested to the Review that, as currently defined, 'document' may not include data because in strict technical terminology 'data' is not 'information'.³ The Review considers that data should be accessible under the Act. An applicant should not be denied access to data merely because the agency has not yet processed it into information. The Review recommends that the definition of document should be amended to clarify that it includes data.

Recommendation 28

The definition of document should be amended to clarify that it includes data.

Recorded information

7.3 The FOI Act does not apply to unrecorded information, such as oral advice. In DP 59 the Review asked whether people should be able to demand access to such information under the Act.⁴ Most submissions oppose this suggestion. They claim that it would be unreasonable to expect agencies to create new documents containing information that has not previously been recorded in order to satisfy an FOI request.⁵ The Review agrees. Such an obligation could impose a significant resource burden on the agency. In addition, documents created from memory may be unreliable, particularly if a long time has passed between the relevant events and the document's creation, and the process may be open to manipulation. The Review considers that the FOI Act should continue to provide access to recorded information only. This will not prevent agencies providing access outside the FOI Act to previously unrecorded information if they wish to.⁶ It does, however, highlight the importance of agencies creating adequate records.⁷

Documents 'in the possession of' an agency

7.4 The FOI Act provides access to documents in the possession of an agency, whether or not they were created in that agency.⁸ In determining whether a document is in the possession of an agency, relevant considerations are the purposes for which it was created, the capacity in which it is handled by officials and, most particularly, whether the agency is in a position to exercise control over it.⁹ Even if documents are not

¹ This chapter deals with issues concerning requests for access only. Requests for amendment are dealt with in ch 12.

² s 4(1).

³ Data is the raw or unprocessed inputs. It becomes information only after it has been processed by an information system or database.

⁴ IP 12 issue 27.

⁵ eg The Public Policy Assessment Society *IP Submission 3*; Health Insurance Commission *IP Submission 51*; Dept of Veterans' Affairs *IP Submission 93*; Law Society of NSW *IP Submission 105*.

⁶ See discussion of s 14 at para 4.21.

⁷ Record keeping, including the creation of records, is discussed at para 5.9-5.10.

⁸ s 15; s 4. This includes documents provided to agencies by private sector bodies for regulatory or other purposes. Note that s 13 provides that documents in certain institutions are deemed not to be in their possession for the purposes of FOI, eg, documents in the Australian War Memorial collection and library material in the National Library. s 7(2A) provides that an agency is exempt from the operation of the Act in relation to a document that originated with or has been received from ASIS, ASIO, the Inspector-General of Intelligence and Security, Office of National Assessments, Defence Intelligence Organisation or the Defence Signals Directorate of the Dept of Defence.

⁹ See *Re Mann and Capital Territory Health Commission* (1983) 5 ALN N368; *Re Wertheim and Dept of Health* (1984) 7 ALD 121. See also new Memo 19 para 3.15. Thus personal documents in an officer's desk drawers will not be in the possession of the agency for the purposes of FOI but any document created by the officer as part of his or her duties will be wherever it is located.

in the physical possession of an agency they will be subject to an FOI request made to that agency if it has a right to immediate physical possession.¹⁰ It was suggested to the Review that documents that are accessible to an agency on public access electronic networks such as the Internet are in its possession and therefore accessible under the FOI Act. The Review does not consider that information is in the possession of an agency merely because the agency may access that information via a link to another agency's computer system or the Internet.¹¹ To suggest that it is would be like arguing that every book in a public library is in the possession of a person with borrowing rights. If an agency has downloaded information from a computer network, that information is clearly in its possession for the purpose of the FOI Act. Until it is downloaded, however, it remains merely accessible to the agency, not in its possession.

Making an FOI application

Assistance from agencies

7.5 The success of the FOI Act depends in large part on the ability and willingness of agencies to assist and consult with applicants.

The focus should be on providing the right information. There needs to be a cultural shift, appropriately supported by the requirements of the Act, that encourages the public and the administrative agencies to co-operate in defining the appropriate information required and then identifying and providing that information.¹²

The Act requires agencies to assist applicants in certain circumstances.¹³ In practice, however, many agencies still do not seem to have an adequate commitment to these obligations. The Review does not propose to prescribe further what assistance must be given but considers that the FOI Commissioner should encourage agencies to do more than the bare statutory minimum. If agencies take care to find out exactly what information an applicant requires they may ultimately save resources and avoid disputes.

No standard application form

7.6 Although FOI applications must be written and comply with certain basic criteria outlined in the Act,¹⁴ there is no prescribed application form. The Review considers that this should not change. This view is supported in submissions.¹⁵ A prescribed form would create an unnecessary impediment to access. Agencies may choose to develop a standard application form suited to their particular information base and records management system but it should not be a prerequisite for a valid request.

Identifying what information exists

7.7 Sections 8 and 9. An applicant who lacks information about what documents an agency holds and who is unfamiliar with its operations may have difficulty identifying the specific documents relevant to his or her request.

In many cases ... an applicant may not be aware of the nature of the agency's record holdings, and, as a result, a request will be expressed in wider terms than is necessary to meet the applicant's needs.¹⁶

Currently, there is little scope for an applicant to determine independently what files or documents exist. Sections 8 and 9 of the Act are designed to provide the public with guidance about the information held by government departments but it appears that the information disclosed in accordance with them is not easily accessible and is rarely used. Section 8 requires agencies to publish certain information in their annual

¹⁰ This is known as constructive possession. See new FOI Memo 19 para 3.16 and M Campbell 'FOI access to electronic records' in S Yorke (ed) *Playing for Keeps* Australian Archives Canberra 1995, 188, 190. If an agency contracts out its electronic information management requirements, the terms of the contract should ensure that the agency retains control over the information.

¹¹ This view is supported in submissions. See, eg, Australia Post *Submission 44*; Australian Consumers' Association *Submission 55*; Dept of Defence *Submission 76*; Dept of Employment, Education and Training *Submission 60*; Litigation Law Practice Committee, Law Society of NSW *Submission 91*.

¹² Dept of Finance *IP Submission 72*.

¹³ Agencies are obliged to assist agencies to make valid applications, to determine whether a document with deletions would be acceptable and to narrow requests: s 15(3), s 22(1), s 24(6).

¹⁴ s 15(2). Among other things, the application must specify an address in Australia to which notices under the Act can be sent and must be accompanied by the \$30 application fee.

¹⁵ eg Dept of Housing and Regional Development *IP Submission 76*; Telecom *IP Submission 94*; Dept of Defence *IP Submission 102*.

¹⁶ New FOI Memo 19 para 6.6.

reports including a statement of the categories of documents that are maintained in the possession of the agency. Section 9 requires agencies to have certain documents such as manuals containing rules or guidelines available for inspection and purchase and to deposit with the regional offices of Australian Archives an annually updated list of that material.¹⁷ The availability of this information needs to be better publicised. DP 59 proposed that s 9 indexes should be available for inspection at all AGPS shops, public libraries and at branches of the relevant agency instead of at the Australian Archives.¹⁸ This proposal is supported by a number of agencies including the National Library and the Australian Archives.¹⁹ Some agencies consider the proposal will be time consuming and resource intensive and will thus place an undue burden on them.²⁰ The Review is not convinced by these arguments. Agencies are already required to prepare an index of s 9 material. The only change under the proposal will be the location of the information. The FOI Commissioner should co-ordinate the distribution of the material to AGPS shops and public libraries to ensure this requirement does not become an unacceptable burden for agencies. The Review considers that the increased availability of s 9 indexes will improve applicants' understanding of agency decision-making processes and may of itself reduce the number of FOI requests.

Recommendation 29

Agencies should no longer be required to deposit a list of their decision making documents with the Australian Archives. These lists should instead be available for inspection at all AGPS shops, public libraries and branches of the relevant agency.

7.8 Monitoring compliance with sections 8 and 9. Compliance with sections 8 and 9 is patchy.²¹ If the provisions are to be of any real benefit, they must be taken seriously by agencies. If compliance with these sections was closely monitored departments would have a greater incentive to ensure that the information is current and comprehensive. DP 59 proposed that this monitoring role should be carried out by the FOI Commissioner as part of his or her general responsibility for ensuring that agencies comply with the requirements of the FOI Act.²² There is strong support for the proposal in submissions.²³ The Review considers that this monitoring will provide the level of compliance necessary if s 8 and 9 are to be of any real benefit to applicants.

Recommendation 30

Compliance with obligations under sections 8 and 9 should be overseen by the FOI Commissioner.

7.9 Information about departmental files. On 14 November 1994, in response to a motion by Senator Harradine, the Senate ordered all federal departments to table in Parliament an indexed list of departmental file titles created since January 1994.²⁴ While the motivation behind this order - to help people identify what information government holds so they can exercise their rights under the FOI Act - is understandable, it is doubtful that the enormous volume of lists deposited at Parliament House will be of practical use. The Review considers that information about departmental files would be more useful if it was made available on-line, for example, at AGPS shops, public libraries and departmental branches. This would make the information accessible to a wider audience and would be in keeping with the national and international trend towards providing electronic guides to government information resources. An example of this trend is the World Wide Web Server recently established by the National Library. The Server is intended to be a starting point for locating Australian government information on the Internet. It hosts the Commonwealth Government Internet Homepage and provides pointers to all other electronically published government

¹⁷ These offices are Information Access Offices for the purposes of the FOI Act s 28: Government Gazette No G47, 29 November 1983.

¹⁸ Proposal 4.5.

¹⁹ *Submission 63*; *Submission 69*. See also Australian Consumers' Association *Submission 55*; Dept of Administrative Services *Submission 83*.

²⁰ eg Dept of Defence *Submission 76*; Australia Post *Submission 44*.

²¹ See, eg, Attorney General's Dept *FOI Annual Report 1993-94* AGPS Canberra 1994, 34 and Senate Legal and Constitutional Legislation Committee *Scrutiny of Annual Reports No 1 1995* Senate Printing Unit Canberra 1995, 28.

²² Proposal 4.6.

²³ eg Telstra *Submission 45*; PIAC *Submission 34*; Australian Consumers' Association *Submission 55*; ASC *Submission 57*; Dept of Defence *Submission 76*.

²⁴ Senate Notice Paper No 131, 7 December 1994. Individual case related files are exempt from the order and titles can be edited to remove personal information.

information.²⁵ In order for greater availability of information about files to be of assistance to citizens, file titles will have to be meaningful and self-explanatory. Agencies should bear this in mind when naming new files.²⁶

Processing FOI requests

Time limits

7.10 *Standard request.* For the past nine years, the time limit for processing FOI requests has been 30 days.²⁷ It has been suggested that recent advances in information technology and records management mean that it should now be easier for agencies to identify and retrieve information and that, consequently, the time limit for processing a request should be reduced. The Review agrees that it is reasonable to expect agencies to take advantage of technological developments to improve their FOI administration. However, it considers that it would be premature to reduce the 30 day period immediately because some agencies do not yet have the facilities to store all documents electronically. Instead, it recommends that in three years the time limit should be reduced to 14 days.²⁸ In the meantime, the FOI Commissioner should ensure that agencies are aware of the planned reduction and adapt and improve their practices in readiness for it.

Recommendation 31

In three years the time limit for processing FOI requests should be reduced to 14 days.

7.11 *Requests requiring consultation.* Where an agency is required to consult with third parties before deciding whether to grant access to a document, the 30 day time limit is extended by a further 30 days.²⁹ There may be special circumstances in which even this 60 day period is too short, for example, where consultation is required with people or organisations located overseas. DP 59 proposed that agencies should be able to seek approval from the FOI Commissioner to extend beyond the extra 30 days the time limit for complying with a request that requires consultation.³⁰ Some submissions express reservations about the proposal, generally on the basis that such a power would sit oddly with an FOI Commissioner who will not have determinative powers.³¹ Several submissions consider extensions should simply be negotiated by the agency and the applicant as the need arises.³² The Review no longer considers it appropriate for the FOI Commissioner to have a formal role in this process, however, he or she should be available to provide advice or assistance to either party on this issue.

7.12 *Penalties for failing to meet deadlines.* Processing delays are one of the most common problems FOI applicants experience.³³ DP 59 asked whether agencies should be penalised for failing to process FOI requests within the statutory time limit.³⁴ An example of a possible penalty is losing the right to collect charges. Those who support the proposal consider the threat of penalties would give agencies a strong

²⁵ A similar service has recently been set up in the United States. The Government Information Locator Service identifies public information resources throughout the Federal Government, describes the information available in those resources and provides assistance in obtaining the information: see Bulletin 95-01 from the Office of Management and Budget within the Executive Office of the President, Washington DC. Note also that the National Library of Australia and the National Library of New Zealand are developing a national document and information service designed to allow users to locate information in library databases throughout the world.

²⁶ The Personal Information Digest which the Privacy Commissioner is required to keep could serve as a model for sensitive information indexing and storage. See G Greenleaf 'Inside the filing cabinet' (1994/1995) 1(10) *PLPR* 200, 199.

²⁷ The original 60 day time limit was reduced to 45 days in 1984. In 1986 the time limit was reduced to 30 days: *Freedom of Information Amendment Act 1983* (Cth) s 10(d).

²⁸ In the United States, agencies have 15 days to make an initial decision.

²⁹ s 15(6). Consultation obligations arise under s 26A, s 27 and s 27A.

³⁰ Proposal 4.7. It should be noted that the Canadian Information Commissioner has such a discretion: *Access to Information Act RSC 1985* (Can) s 9(1)(b). The Commissioner can also extend the time limit if the request is for a large number of records or necessitates a search through a large number of records and meeting the original time limit would unreasonably interfere with the operations of the government institution: s 9(1)(a). The Information and Privacy Commissioner in British Columbia can also approve extensions: *Freedom of Information and Protection of Privacy Act 1992* (British Columbia) s 10(1).

³¹ Telstra Submission 45; ASC Submission 57.

³² eg Australian Consumers' Association Submission 55; Law Institute of Victoria Submission 90; State Records (SA) Submission 92.

³³ In her 1994-1995 *Annual Report*, the Cth Ombudsman states that the most common complaint about the handling of FOI requests is delay: AGPS Canberra 1995, 36. The Canadian Information Commissioner has also commented on 'the problem of chronic delays': *Annual Report 1993-94* Information Commissioner of Canada Ottawa 1994, 15.

³⁴ Issue 4.9.

incentive to be more timely.³⁵ Agencies, on the other hand, claim that deadlines are only broken out of necessity and that penalties would therefore do little to increase the speed with which requests are processed.³⁶

The threat of a penalty will not lead agencies all of a sudden to answer all FOI requests within the statutory time limits. If agencies do not always satisfy this requirement it is because of a valid reason such as current workloads.³⁷

The Review does not consider it necessary to introduce penalties for breaching the FOI processing time limit. In many cases, an agency will be able to negotiate an extension with the applicant to the satisfaction of both parties. The Review encourages this practice. In addition, the FOI Commissioner will be able to bring considerable pressure to bear, both in individual cases and at a systemic level, on an agency that delays requests. Furthermore, breaching the statutory limit amounts to a deemed refusal of access for the purposes of an application for review by the AAT.³⁸

Transfer of requests

7.13 Section 16 of the Act makes provision for the transfer of FOI requests between agencies in various circumstances, including where the document is not in the possession of the agency to which the request was directed but is known to be in the possession of another agency.³⁹ The section is technical and complex. The Review considers that the detail in s 16 is necessary to ensure that agencies only transfer requests where it is in the best interests of the applicant, that is, where another agency is genuinely in a better position to deal with the request. Nevertheless, the Review considers that there is scope for s 16 to be re-written more clearly.⁴⁰

Refusing to process a request

7.14 **Section 24.** Section 24 allows agencies to refuse to process an FOI request on the ground that the work involved would substantially and unreasonably divert the resources of the agency from its other operations.⁴¹ This ability to refuse a request without even beginning to process it is a powerful one and should only be used as a last resort after the agency has made every attempt to assist the applicant to narrow his or her request. The consultation requirement in the Act makes this clear.⁴² In addition, agencies should not be able to use s 24 just because their information management systems are poorly organised and documents take an unusually long time to identify and retrieve.⁴³ It is hoped that improved training of agencies and the ability of the FOI Commissioner to report adversely on agencies that do not administer the Act properly will safeguard against possible misuse of this section. In the equivalent provision in the WA FOI Act, the obligation to assist applicants is stated in the first subsection.⁴⁴ The Review considers that this places greater emphasis on negotiation than does the federal Act. The proposal in DP 59 that s 24 be re-drafted to emphasise the importance of agencies consulting with applicants about their requests received strong support in submissions.⁴⁵ The Review considers that, although relatively minor, such an amendment would have a valuable symbolic and educative effect and recommends that the provision be amended accordingly. DP 59 also proposed that an agency should be required to consult with the FOI Commissioner before claiming s 24 in order to ensure that it had fulfilled its obligation to consult with the applicant before rejecting the request.⁴⁶ While the proposal has support in the community sector,⁴⁷ agencies consider that consultation with

³⁵ eg D Bowd *Submission 16*; PIAC *Submission 34*; Cyclists' Rights Action Group *Submission 5*; Federation of Community Legal Centres *Submission 79*.

³⁶ eg Dept of Veterans' Affairs *Submission 24*; Dept of Finance *Submission 25*; Dept of Employment, Education and Training *Submission 60*; Dept of Defence *Submission 76*; Treasury *Submission 80*.

³⁷ ATO *Submission 17*.

³⁸ s 56(1).

³⁹ s 16(1)(a). Note that s 8 of the *Access to Information Act RSC 1985* (Can) provides that the head of a government agency can transfer an FOI request if he or she considers that another agency has a greater interest in the record. An agency has a 'greater interest' in a record if (i) the record was originally produced in or for the agency or (ii) in the case of a record not originally produced in or for a government agency, the government agency was the first to receive the record.

⁴⁰ This suggestion is supported by Telstra *Submission 45*. OPC will be re-drafting the Act in plain language: see para 1.8.

⁴¹ s 24(1)(a). Subsection (1)(b) enables a Minister to refuse a request if it would substantially and unreasonably interfere with the performance of his or her functions.

⁴² s 24(6).

⁴³ See para 5.13 for a discussion of appropriate record keeping standards.

⁴⁴ s 20.

⁴⁵ Proposal 4.11. eg PIAC *Submission 34*; Australian Consumers' Association *Submission 55*; H Sheridan & R Snell *Submission 58*; Federation of Community Legal Centres *Submission 79*; Dept of Immigration and Ethnic Affairs *Submission 87*.

⁴⁶ Proposal 4.12.

the Commissioner in these circumstances should not be mandatory and that existing review rights are adequate to protect applicants.⁴⁸

Applicants have review rights to challenge agencies' reliance on this section. An additional consultation requirement may lead to further delay and bureaucratic procedure.⁴⁹

The Review considers that agencies should be free to seek the advice or assistance of the FOI Commissioner before refusing a request under s 24 but that this consultation should not be compulsory. The Commissioner will have a primarily facilitative role. It would be inappropriate, therefore, to require agencies to consult him or her before refusing a request. The Commissioner's guidelines should provide assistance on determining when the preconditions for claiming s 24 are satisfied and emphasise the 'last resort' nature of the provision.

Recommendation 32

Section 24 of the FOI Act should be re-drafted to emphasise the importance of agencies consulting with applicants about their requests.

7.15 '*Substantially and unreasonably divert the resources*'. Decisions on s 24 indicate that the resources to be taken into account when determining whether a request will amount to a substantial and unreasonable diversion of resources in a large department are those of the relevant line area not the resources of the entire agency.⁵⁰ This interpretation has been criticised.⁵¹ The Review acknowledges that a degree of uncertainty surrounds the phrase but considers that due to the wide range of circumstances in which it may arise, legislative amendment to define what constitutes a 'substantial diversion of resources' would be neither appropriate nor helpful. The FOI Commissioner's guidelines should, however, provide assistance on how the phrase is to be interpreted.

7.16 *Section 24(5)*. Under s 24(5), agencies are entitled to refuse an FOI request without having identified any of the relevant documents if it is apparent from the nature of the documents described in the request that they are exempt.⁵² DP 59 proposed that this provision be repealed because it is contrary to the principle that exemption of a document should be determined according to the harm that would flow from its disclosure.⁵³ Harm cannot be determined properly if documents are assessed as a group. This proposal is opposed by a number of agencies that consider s 24(5) to be a useful means of preserving resources and expediting the processing of requests.⁵⁴ While the Review acknowledges that the repeal of s 24(5) may increase the time and money that agencies will expend on certain requests, it considers this potential inconvenience to be outweighed by the importance of ensuring that each document covered by a request is assessed on its individual merits.

Recommendation 33

Section 24(5) of the FOI Act should be repealed.

⁴⁷ eg PIAC *Submission 34*; Australian Consumers' Association *Submission 55*; Federation of Community Legal Centres *Submission 79*.

⁴⁸ eg Dept of Employment, Education and Training *Submission 60*; Telstra *Submission 45*; Australia Post *Submission 44*; Dept of Administrative Services *Submission 83*; Dept of Immigration and Ethnic Affairs *Submission 87*.

⁴⁹ ASC *Submission 57*.

⁵⁰ See, eg, the decision of the AAT in *Re SRB and SRC v the Dept of Health, Housing, Local Government and Community Services* (1994) 33 ALD 171.

⁵¹ eg by the Attorney-General's Dept: '... the Tribunal does not seem to have given careful consideration to the possibility of making resources available from other resources of Health without causing a substantial diversion of resources from other priorities.' D324. See also new FOI Memo 19 para 8.1-8.6.

⁵² To refuse the request validly in these circumstances, it must also be apparent from the nature of the documents requested that no obligation would arise under s 22 to grant access to an edited copy of any of the documents or it must be apparent from consultation with the applicant that they would not wish to have access to an edited copy of any of the documents: s 24(5)(a), (b).

⁵³ Proposal 4.13.

⁵⁴ eg Australia Post *Submission 44*; Telstra *Submission 45*; ASC *Submission 57*; Dept of Defence *Submission 76*; Dept of Administrative Services *Submission 83*; Dept of Human Services and Health *Submission 97*.

7.17 Section 24 and the application fee. The Review considers that if an agency invokes s 24 it should remit the application fee once it is apparent that the applicant does not intend to challenge the s 24 decision. An applicant should only pay for documents he or she receives.⁵⁵

Recommendation 34

If an agency refuses under s 24 of the FOI Act to process a request it should remit the application fee once it is clear the applicant does not intend to challenge the s 24 decision.

7.18 Vexatious applications. DP 59 proposed that the Act be amended to allow an agency to reject a request on the basis that it is vexatious.⁵⁶ This proposal was intended to cover situations that are not caught by s 24 such as repeated requests for information that the applicant has been advised is for sale or for information to which access has previously been refused. The proposal has a high level of support among agencies.⁵⁷ A number of submissions express doubt, however, about the need for such a provision and concern about the potential for decision-makers to abuse it.⁵⁸

In the twelve years of operation of the Act, few requests could properly be classified as vexatious.⁵⁹

The Review now considers that the potential for agencies to invoke such a provision to avoid requests merely because they regard them as nuisances outweighs any advantages there may be in such a provision. 'Vexatious' is a vague concept and is likely to result in unpredictable implementation. In addition, a certain number of difficult, time-consuming applications that some may describe as vexatious are an inevitable part of any information access regime. The Review does, however, acknowledge that the Act does not currently provide agencies with a mechanism for dealing with repeated requests for documents to which access has already been refused. It recommends that a provision be introduced to allow an agency to refuse a request that seeks access to documents to which the applicant has been refused access before if there are no reasonable grounds for the request being made again.⁶⁰

Recommendation 35

The FOI Act should be amended to provide that an agency may refuse to process a repeat request for material to which the applicant has already been refused access, provided there are no reasonable grounds for the request being made again.

Statements of reasons

7.19 Section 26 of the Act requires agencies to provide applicants with a statement of reasons where access is refused, either in whole or part. The requirement is designed to

- give an applicant the real reasons for a decision, as opposed to a mere rationale for a decision reached on other, undisclosed grounds
- enable the applicant to make an informed decision about whether to apply for review⁶¹ and
- discipline decision-makers by obliging them to provide the real reasons for a decision.⁶²

⁵⁵ See recommendation 88.

⁵⁶ Proposal 4.14.

⁵⁷ eg Dept of Finance *Submission 25*; Australia Post *Submission 44*; Telstra *Submission 45*; ASC *Submission 57*; Dept of Employment, Education and Training *Submission 60*; Dept of Defence *Submission 76*; Dept of Administrative Services *Submission 83*; Dept of Immigration and Ethnic Affairs *Submission 87*.

⁵⁸ eg D Bowd *Submission 16*; Cth Ombudsman *Submission 53*; Australian Consumers' Association *Submission 55*.

⁵⁹ H Sheridan & R Snell *Submission 58*.

⁶⁰ There is a similar provision in the FOI Act (Vic): s 24A. An example of a reasonable ground for a repeat request may be a bona fide belief that the documents in question are no longer exempt.

⁶¹ Ansett Transport Industries (Operations) Pty Ltd v Wraith (1983) 49 ALR 500, 507.

⁶² Our Town FM Pty Ltd v Australian Broadcasting Tribunal (1987) 16 FCR 465, 486.

These purposes are not always served in practice. Submissions indicate that statements are often of a poor standard.⁶³ For example, agencies sometimes merely refer to an exemption provision without providing an explanation of how the provision applies to the document.⁶⁴ The Review acknowledges that a statement may be time consuming to produce if a number of documents are withheld but considers for two reasons that the resources expended on preparing a comprehensive statement of reasons are well spent. First, the more comprehensive the reasons for an agency's decision, the more likely an applicant is to accept it. Second, if an agency has effectively to justify an exemption claim it will be less likely to make such a claim unnecessarily. DP 59 proposed that the quality of statements of reasons should be monitored by the FOI Commissioner and that agencies that consistently fail to provide adequate reasons for decisions should be named in the Commissioner's annual report.⁶⁵ A number of submissions support the proposal.⁶⁶ Those that oppose it consider that naming agencies in the annual report will not produce better quality statements. The Review disagrees. Improved education of agencies by the FOI Commissioner about the importance of comprehensive statements, combined with the Commissioner's auditing and reporting role, should lead to improved statements of reasons. The Review also notes the importance of the AAT ensuring that agencies provide adequate statements of reasons.⁶⁷

Recommendation 36

The FOI Commissioner should monitor the quality of agencies' statements of reasons and name agencies that have performed poorly in this respect in the FOI annual report.

Use of FOI in litigation

7.20 A number of submissions raise concerns about the use of the FOI Act as an adjunct or alternative to discovery in legal proceedings.⁶⁸ Documents may be easier to obtain under the Act because, unlike discovery, there is no need to show that a document is relevant to the litigation. Some agencies consider that having access to information under the FOI Act gives the other party an unfair advantage and that the agency effectively subsidises the cost of that party's discovery. The Review does not consider it necessary or appropriate to restrict use of the FOI Act in this way.⁶⁹ To prohibit the use of the Act as a supplement to discovery would require a departure from the fundamental principle that an applicant's right of access is not affected by his or her motives.⁷⁰ Furthermore, if litigants find the FOI Act a cheaper and more expeditious means of obtaining information than discovery there seems no reason, either in terms of litigation principles or the FOI Act,⁷¹ to prevent them using it.

⁶³ eg Cth Ombudsman *IP Submission 68*; Advanced Administrative Law Class 1994-95 University of Wollongong *IP Submission 33*; Dept of Housing and Regional Development *IP Submission 76*.

⁶⁴ The Cth Ombudsman has recently criticised the practice of claiming a number of exemptions without specifying in the statement which sections relate to which document: *Annual Report 1994-95* AGPS Canberra 1995, 38.

⁶⁵ Proposal 4.15. Note recommendation 8.39 that agencies should list in their statement of reasons the factors considered in applying a public interest test.

⁶⁶ *PIAC Submission 34*; *Telstra Submission 45*; *Australian Consumers' Association Submission 55*; *ASC Submission 57*; *H Sheridan & R Snell Submission 58*.

⁶⁷ Under s 62 of the FOI Act, the AAT may declare that a statement of reasons is inadequate. If this happens the agency must provide additional particulars.

⁶⁸ eg Dept of Foreign Affairs and Trade *IP Submission 67*; *ASC IP Submission 82*; *TPC IP Submission 29*; Dept of Defence *IP Submission 102*; Dept of Family and Community Services (SA) *Submission 28*; *Australia Post Submission 44*; *Telstra Submission 45*. Discovery is a process whereby parties to an action disclose to each other all documents in their possession relating to matters in question in the action.

⁶⁹ The Review notes that the Senate Standing Committee 1987 Report also took this view: see para 64.

⁷⁰ s 11(2).

⁷¹ It should be noted that the Review recommends the retention of an unqualified exemption for documents that attract legal professional privilege: see para 10.27.

8. Exemptions - general principles

Introduction

8.1 The public interest in the general availability of government information will in some cases be outweighed by the public interest in protecting information from disclosure. The purpose of the exemption provisions is to balance the objective of providing access to government information against legitimate claims for protection. This chapter discusses the general principles governing the interpretation and application of the exemptions and makes several recommendations to improve agency practices in this regard.

The philosophy and interpretation of exemption provisions

A right of access

8.2 The starting point for an agency dealing with an FOI request should be that the applicant has a right to obtain the requested material. DP 59 proposed that, to remind agencies of the subsidiary nature of the exemptions, a statement should be added to the beginning of Part IV of the Act (which contains the exemption provisions) to the effect that consideration of an FOI request must commence from the position that, on the face of it, the applicant has a right to obtain the requested information.¹ A number of submissions support the proposal.² While still supporting the aim of this proposal, the Review no longer considers it necessary. The Review's recommendation to remove reference to the exemptions from the object clause will provide sufficient reinforcement of what is already clear from the Act but not always acknowledged - that, *prima facie*, the applicant has a right to obtain a requested document.³ Once that is clarified, the approach of agencies is chiefly a matter of education and attitude.⁴ An additional statement in Part IV would be superfluous.

Discretion not to claim an exemption

8.3 **Section 18(2) discretion.** Agencies are not obliged to withhold exempt documents. Section 18(2) gives them a discretion to release a document even if it technically falls within an exemption. In most cases, to release an exempt document would not be appropriate because the very fact that it is exempt indicates that there is a good reason not to disclose it. However, there will sometimes be situations in which no adverse consequences would flow from a document's release, despite the fact that it falls within the bounds of an exemption provision. In these situations, agencies should exercise their discretion to release exempt documents.⁵ It is important that agencies understand and exercise this discretion as it is a means by which they can give practical effect to the spirit of the FOI Act. The FOI Commissioner should make it a priority to educate agencies about the existence and importance of this discretion.

8.4 **No need for non-waivable exemptions.** In DP 59 the Review proposed that agencies should not be able to waive the exemptions in s 37(1)(c) (public safety), s 41 (personal information) and s 43 (business affairs). The concern behind the proposal was to provide maximum protection for the third party interests protected by these provisions.⁶ The proposal received support in a number of submissions.⁷ Some, however, oppose it. They consider it is unnecessary and contrary to the spirit of the Act and a pro-disclosure policy.⁸ The Review has reconsidered this issue. It now considers that to make any exemptions non-waivable is both unnecessary and undesirable. If an agency determines that a document falls within any of these three exemptions, it will be aware that its disclosure would have an adverse consequence and would not, therefore, be likely even to

¹ Proposal 5.1.

² eg PIAC *Submission 34*; H Sheridan & R Snell *Submission 58*.

³ See recommendation 3.

⁴ See para 4.12.

⁵ The Review recommends that s 91 be amended to provide indemnity for officers who release documents pursuant to a bona fide exercise of that discretion: see recommendation 11.

⁶ Proposal 5.3.

⁷ eg ATO *Submission 17*; Australia Post *Submission 44*; Avcare *Submission 73*; ATSIC *Submission 75*. The Aboriginal and Torres Strait Islander Social Justice Commissioner *Submission 98* considers that there should also be a non-waivable exemption for documents the release of which would disclose confidential indigenous cultural information. See further at para 10.34.

⁸ eg Dept of Veterans' Affairs *Submission 24*; Cth Ombudsman *Submission 53*; ASC *Submission 57*; Dept of Prime Minister and Cabinet *Submission 82*.

contemplate exercising its discretion to release exempt documents.⁹ There is, therefore, no need to legislate to restrict the exercise of that discretion. Making these exemptions non-waivable would not only have little practical effect, it would also have the potential to create confusion and may even encourage agencies to apply these exemptions more broadly than they otherwise would. This could have a flow on effect to other exemptions and an adverse effect on the interpretation and application of exemptions generally.

8.5 *No AAT discretion to disclose exempt documents.* The FOI Act expressly prohibits the AAT from ordering the disclosure of a document that it has found to be exempt.¹⁰ This contrasts with the situation in Victoria where the AAT can grant access to an exempt document if it is of the opinion that the public interest requires it.¹¹ No other Australian FOI Act enables the external determinative review body to order the disclosure of exempt documents.¹² It has been suggested that the federal FOI Act should be amended to reflect the Victorian FOI Act in this respect.¹³ The Review does not consider that this would be appropriate. Most exemptions incorporate public interest considerations, either expressly or implicitly. To give the AAT a discretion to release exempt documents in the public interest would effectively allow it to override the balancing process inherent in the exemptions and thereby reduce the protection the Review considers warranted. In those few situations in which a document is technically exempt but its disclosure would not have an adverse consequence, it is sufficient to exhort agencies not to claim the exemption.¹⁴

A single, general exemption provision?

8.6 The existing exemption provisions generally fall into two broad categories: those related to the responsibilities and operations of government (such as the exemptions for national security and Cabinet documents) and those that protect third party information (such as the exemptions for personal information and business affairs). The Review does not consider it appropriate to replace the current specific exemptions with a single, general exemption for documents the disclosure of which would be contrary to the public interest.¹⁵ A general exemption of that kind would be uncertain and vulnerable to idiosyncratic decision making. Nor does the Review consider there are interests beyond those currently covered by the exemption provisions that need the protection of a specific exemption.¹⁶ Rather, the protection currently afforded is in some cases unnecessary or too wide and runs counter to the objectives of the Act.¹⁷

Section 32

8.7 Section 32 provides that each exemption provision is to be given its full meaning, unrestricted by the fact that another exemption may apply. It was suggested to the Review that s 32 should be repealed because it may encourage agencies to give an overly broad interpretation to the exemption provisions. The Review considers the repeal of s 32 to be unnecessary in light of the proposed amendments of the object clause.¹⁸

Marking documents as potentially exempt at time of creation

8.8 It has been suggested that the FOI regime may be more efficient if documents that are considered potentially exempt when they are created are so marked at that time.¹⁹ It can be argued that the author of a document is in the best position to know if anything in it is likely to be exempt. It is possible, however, that such a system would lead to a rigid, mechanical approach to FOI that is not conducive to improving government accountability. The status of documents can change dramatically over time. What may, for example, be highly confidential information when a document is created may not be by the time an FOI

⁹ The consultation requirements in respect of s 41 (see discussion at para 10.15) and s 43 are an additional safeguard to ensure that the views of third parties are taken into account by the agency in determining whether the information is exempt. Officers who decided to release information they had determined was exempt under one of these three exemptions would not receive the protection of s 91 because such release would not be a bona fide exercise of their discretion to release exempt documents: see para 4.21.

¹⁰ s 58(2).

¹¹ FOI Act (Vic) s 50(4). This provision does not apply in regard to Cabinet documents, Bureau of Criminal Intelligence documents or documents exempt on personal privacy grounds.

¹² The NSW Ombudsman can *recommend* that an exempt document be released if it would, on balance, be in the public interest: FOI Act (NSW) s 52(6)(a).

¹³ A Cossins *Submission 27*.

¹⁴ See para 8.3.

¹⁵ This possibility was raised in IP 12 at issue 29 and overwhelmingly rejected in submissions.

¹⁶ See also discussion of recommended review of secrecy provisions at para 4.28.

¹⁷ See ch 9-11 for discussion of specific exemptions.

¹⁸ See ch 4.

¹⁹ eg D Murphy *Submission 43*.

request is made. Consequently, the Review considers that the status of a document should continue to be evaluated at the time it is requested, not at the time it is created. Marking documents as 'potentially exempt' may adversely affect the later assessment of the document. Any markings placed on a document at the time it is created, for example a 'confidential' stamp, should not be considered determinative as to the status of the document for FOI purposes.

Exemptions in a schedule to the Act

8.9 In the NSW, WA and SA FOI Acts the exemption provisions are located in a schedule. Some argue that this has an important symbolic effect, sending a message to agencies that the purpose of the Act is to provide access and that the exemptions are a subsidiary consideration.²⁰ Others consider that such a change would be of little benefit to applicants or agencies.²¹ The Review considers that moving the exemptions in the federal FOI Act to a schedule would be a purely cosmetic amendment that would not achieve anything that could not be accomplished by the proposed clarification of their philosophy and interpretation.

Causation tests

8.10 ***'Would or could reasonably be expected to'***. A number of exemptions currently require an agency to determine whether a specified harm 'would or could reasonably be expected to' result from disclosure.²² The decision-maker must have real and substantial grounds for the expectation that harm will occur.²³ This test has sometimes been wrongly applied.²⁴ It has been suggested that the phrase should be clarified. The Review is not convinced that legislative amendment is necessary. Improved education of decision-makers and external review bodies and the availability of comprehensive guidelines on the application of exemptions should be sufficient to resolve any difficulties there may be in understanding and applying this phrase.

8.11 ***'Substantial adverse effect'***. Several provisions require decision-makers to determine that disclosure will have a 'substantial adverse effect' before the exemption can be claimed.²⁵ The word 'substantial' has been variously interpreted as indicating that the consequences of disclosure must be severe, of some gravity and not insubstantial or nominal.²⁶ The Review considers that the phrase does not require legislative amendment. Once again the key to the correct application of the phrase is improved agency education. If decision-makers are conscientious about giving effect to the FOI Commissioner's guidelines on this test then a consistent best practice should emerge.

Public interest test

The availability of government information should be determined by the public interest

8.12 What most distinguishes the approach to disclosure of government information in the FOI Act from approaches taken prior to its enactment is its focus on the public interest.

[N]otions of the public interest constitute the basic rationale for the enactment of, as well as the unifying thread running through the provisions of, the FOI Act.²⁷

Before the FOI Act, the disclosure of government-held information outside legal proceedings was entirely at the discretion of the government. This focus on the public interest as the key determinant of disclosure of government information is evidenced by the incorporation of a public interest test in most exemption

²⁰ eg N Waters *IP Submission* 88; Cth Ombudsman *IP Submission* 68; Attorney-General's Dept (ACT) *IP Submission* 38; Treasury *IP Submission* 37.

²¹ eg ASC *IP Submission* 82; Australian Customs Service *IP Submission* 92; Law Society of NSW *IP Submission* 105.

²² eg s 33, s 33A, s 37, s 40, s 44.

²³ See *Attorney-General's Dept v Cockcroft* (1986) 10 FCR 180; *Searle Australia Pty Ltd v PIAC and Dept of Community Services and Health* (1992) 108 ALR 163; *George v Rocket* (1990) 170 CLR 104.

²⁴ eg in *Searle Australia Pty Ltd v PIAC and Dept of Community Services and Health* (1992) 108 ALR 163 the full bench of the Federal Court found that the AAT had not applied the correct test in determining whether certain consequences could reasonably be expected to result from disclosure. The Court pointed out that it was not the reasonableness of the claim for exemption that was in issue but the reasonableness of expecting a particular consequence from disclosure.

²⁵ s 39, s 40(1)(c), (d) & (e), s 44(1)(a).

²⁶ See, eg, *Harris v Australian Broadcasting Corporation* (1983) 50 ALR 551; *Re Dyrenfurth and Dept of Social Security* (1987) 12 ALD 577; *Re 'B' and Medical Board of the ACT* (1994) 33 ALD 295; *Asic v Australian Federal Police* (1986) 11 ALN N194; *Re Russell Island Development Association and Dept of Primary Industries and Energy* (1994) 33 ALD 683.

²⁷ *Re Eccleston and Dept of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60, 74.

provisions. In others exemption provisions the public interest component is implicit.²⁸ Public interest tests allow all considerations relevant to a particular request to be balanced. They are therefore an important and necessary feature of the Act, even though it can at times be difficult to perform this balancing exercise.

Definition of 'public interest'

8.13 The public interest is an amorphous concept which is not defined in the FOI Act or any other statute. The determination of public interest is essentially non-justiciable and depends on the application of a subjective rather than an ascertainable criterion.²⁹ The origins of the public interest test also create uncertainty.³⁰ The public interest has been described as something that is of serious concern or benefit to the public not merely of individual interest.³¹ It has also been held that public interest does not mean 'of interest to the public' but 'in the interest of the public'.³² This lack of definition can mean the public interest is difficult for agencies, applicants and the AAT to ascertain. Despite this, the Review does not consider that any attempt should be made to define the public interest in the FOI Act. The public interest will change over time and according to the circumstances of each situation. It would be impossible to define the public interest yet allow the necessary flexibility.

Assistance for agencies - FOI Commissioner's guidelines

8.14 Although a statutory definition of the public interest is not appropriate, guidelines issued by the FOI Commissioner would be helpful. These guidelines should provide assistance on how to apply a public interest test³³ and on what factors should or should not be taken into account in weighing the public interest. Just as what constitutes the public interest will change over time, so too may the relevant factors. For this reason, the Review considers that administrative guidelines issued pursuant to the Act are generally preferable to legislative guidelines.³⁴ Many submissions support the issue of guidelines in this area³⁵ although a number of agencies express concern about the need to ensure that the guidelines do not take on the status of rules or become inflexible.³⁶ Factors that might be listed as relevant to the public interest might be:

- the general public interest in government information being accessible
- whether the document would disclose the reasons for a decision
- whether disclosure would contribute to debate on a matter of public interest
- whether disclosure would enhance scrutiny of government decision making processes and thereby improve accountability and participation.³⁷

The guidelines should encourage agencies to invite an applicant to nominate any public interest factors in favour of disclosure that he or she believes are relevant. Factors that might be listed as irrelevant to the public interest might be:

²⁸ eg s 34, s 42, s 45, s 46.

²⁹ *R v Trade Practices Tribunal; ex parte Tasmanian Breweries Ltd* (1971) 123 CLR 361.

³⁰ Public interest immunity, also known as Crown privilege or public interest privilege, is a test used in common law to determine whether official documents can be used by a court. It has been argued that the interpretation of the public interest in FOI legislation has become inappropriately imbued with notions used in this test. See, eg, *Re Eccleston and Dept of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60; A Cossins *Submission* 27.

³¹ See, eg, *British Steel Corporation v Granada Television Ltd* (1980) 3 WLR 780; *Sinclair v Mining Warden at Maryborough* (1975) 132 CLR 473; *Re Eccleston and Dept of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60. See also Attorney-General's Dept's training material on the public interest in FOI.

³² *Johansen v City Mutual Life Assurance Society Ltd* (1905) 2 CLR 186.

³³ This will vary depending on the exemption. eg, in s 36 an agency must assess whether disclosure of a deliberative document would be contrary to the public interest; in s 40 an agency must balance certain factors against the public interest in disclosure.

³⁴ In contrast, several submissions consider that the guidelines should be contained in the Act: eg, *The Public Policy Assessment Society Submission* 4; *Australian Privacy Charter Council Submission* 59.

³⁵ *NSW Bar Association Submission* 15; *AAT Submission* 20; *PIAC Submission* 34; *Telstra Submission* 45; *HSheridan & R Snell Submission* 58; *Dept of Employment, Education and Training Submission* 60; *Dept of Immigration and Ethnic Affairs Submission* 87; *Litigation Law Practice Committee, Law Society of NSW Submission* 91.

³⁶ eg *ATO Submission* 17; *Dept of Prime Minister and Cabinet Submission* 82.

³⁷ This list is supported by a number of submissions, eg, *NSW Bar Association Submission* 15; *Australia Post Submission* 44; *Australian Consumers' Association Submission* 55.

- the seniority of the person who is involved in preparing the document or who is the subject of the document
- that disclosure would confuse the public or that there is a possibility that the public might not readily understand any tentative quality of the information
- that disclosure would cause a loss of confidence in the government
- that disclosure may cause the applicant to misinterpret or misunderstand the information contained in the document because of an omission from the document or for any other reason.³⁸

Recommendation 37

The FOI Commissioner should issue guidelines on how to apply a public interest test. The guidelines should list factors that are relevant and factors that are irrelevant when weighing the public interest.

Embarrassment to government

8.15 The NSW FOI Act provides that for the purpose of determining whether release of a document would be contrary to the public interest it is irrelevant that the disclosure may cause embarrassment to the government.³⁹ The Review considers that a legislative prohibition is warranted in this instance and that the federal FOI Act should contain a similar provision. Potential (or actual) embarrassment is not a valid criterion against which to balance the public interest in disclosure of information. This should be made clear to decision-makers in the legislation.

Recommendation 38

The FOI Act should be amended to provide that, for the purpose of determining whether release of a document would be contrary to the public interest, it is irrelevant that the disclosure may cause embarrassment to the government.

Statements of reasons should list the public interest factors considered

8.16 DP 59 proposed that where an agency claims an exemption that incorporates a public interest test, it should be required to list in its statement of reasons all the factors it took into account in applying the test.⁴⁰ Many submissions support the proposal.⁴¹ Those who oppose it consider it to be unnecessarily prescriptive. They consider that statements of reasons should be left to develop in accordance with the guidelines as a matter of best practice.⁴² The Review remains of the view that statements of reasons should be required to list the public interest factors taken into account in claiming an exemption. This will help the applicant to assess whether the agency applied the test properly and, therefore, whether review of the decision is warranted. It should also help the AAT to assess the agency's application of the test. It is essential to ensure that applicants have a clear understanding of an agency's reasons for a decision. This can only happen if the public interest test is demystified. Imposing a statutory obligation to account for the public interest factors considered should also improve the quality of decision making because agencies will be forced to scrutinise their reasoning thoroughly. The Review recommends that s 26(1)(a) be amended accordingly.

³⁸ This list of factors also has considerable support in submissions, eg, NSW Bar Association *Submission 15*; Australia Post *Submission 44*; Australian Consumers' Association *Submission 55*.

³⁹ s 59A(a). The provision also states that it is irrelevant whether disclosure would cause a loss of confidence in the government or cause the applicant to misinterpret or misunderstand the information contained in the document because of an omission from the document or for any other reason.

⁴⁰ Proposal 5.8. Note that there is already a statutory obligation to state the public interest ground on which access was refused under the exemption for internal working documents: s 36(7).

⁴¹ eg PIAC *Submission 34*; D Murphy *Submission 43*; Australian Consumers' Association *Submission 55*; Dept of Employment, Education and Training *Submission 60*; Dept of Immigration and Ethnic Affairs *Submission 87*.

⁴² eg The Public Policy Assessment Society *Submission 4*; ASC *Submission 57*.

Recommendation 39

Section 26(1)(a) of the FOI Act should be amended to require an agency to include in its statement of reasons, where relevant, the factors it took into account in applying the public interest test.

Conclusive certificates

A limited role for conclusive certificates

8.17 A conclusive certificate issued by the Minister responsible for an agency makes the document that is the subject of the certificate exempt for as long as the certificate remains in force. As the word 'conclusive' indicates, the AAT cannot revoke such a certificate.⁴³ A conclusive certificate is therefore a 'ministerial veto'. The original justification for conclusive certificates was that the ultimate responsibility for decisions on particularly sensitive matters should lie with the relevant Minister.⁴⁴ It can be argued that highly sensitive information, release of which would not harm the public interest but which would precipitate a public accountability debate, is exactly the sort of material to which the FOI Act is designed to give access because it involves responsibility at the very highest levels of government. Conclusive certificates have been criticised in the Parliament by members of the Opposition on the basis that they undermine the objects of FOI legislation.⁴⁵ Currently, there is provision for conclusive certificates in s 33, 33A, 34, 35, 36. The Review recommends that the certificate provisions be removed from s 33A (Commonwealth/State relations).⁴⁶ The ALRC also recommends that there should be no conclusive certificate for s 36 (deliberative process documents).⁴⁷ While appreciating the concerns about the potential for conclusive certificates to reduce the effectiveness of the Act, the Review considers that they are justified in respect of s 33 (national security and defence) and 34 (Cabinet documents).

Duration of conclusive certificates

8.18 DP 59 proposed that conclusive certificates be limited to a maximum duration of two years (by way of regulations made under s 36A) as recommended by the 1987 Senate Standing Committee.⁴⁸ After two years have expired, a fresh FOI request could be made (and a fresh conclusive certificate issued). In 1991 amendments designed to introduce a five year time limit on certificates were disallowed by the Senate on the basis that five years was too long a period.⁴⁹ A number of submissions support the proposed two year limitation.⁵⁰ Those that oppose it are divided. Some consider that conclusive certificates should remain unlimited;⁵¹ others consider they should expire in less than two years or should be abolished altogether.⁵² The ALRC remains of the view that it is unreasonable for a conclusive certificate to remain in force indefinitely. If a Minister is required to reassess the relevant document every couple of years, he or she will be forced to take account of changed circumstances that may mean that a conclusive certificate is no longer necessary. Consequently, the ALRC recommends that regulations should be made under s 36A prescribing two years as the maximum duration of conclusive certificates. The ARC does not support this recommendation. It considers that certificates issued under s 33 and s 34 should remain unlimited because of the especially sensitive nature of the material falling within those exemptions. It considers, however, that s 36 certificates should specify a period of duration not exceeding five years.⁵³

⁴³ See further at para 8.19.

⁴⁴ See, eg, Senate Standing Committee 1979 Report para 5.10; Senate Standing Committee 1987 Report para 9.7. See also M Campbell 'Conclusive certificates under the Freedom of Information Act 1982' *Paper Administrative Law National Practitioners' Forum* Sydney 30-31 October 1991.

⁴⁵ eg *Hansard* (Sen) 29 May 1981, 2378; *Hansard* (Sen) 7 October 1983, 1310-13, 1317.

⁴⁶ See recommendation 45. The Review recommends that s 35 be repealed: see recommendation 50.

⁴⁷ See recommendation 53A. The ARC favours retaining a limited conclusive certificate for s 36: see recommendation 53B.

⁴⁸ Proposal 5.9. See Senate Standing Committee 1987 Report para 9.21.

⁴⁹ *Hansard* (Sen) 24 March 1992, 946.

⁵⁰ eg PIAC *Submission* 34; Australian Consumers' Association *Submission* 55; H Sheridan & R Snell *Submission* 58; State Records (SA) *Submission* 92.

⁵¹ eg Dept of Defence *Submission* 76; Treasury *Submission* 80.

⁵² eg Litigation Law Practice Committee, Law Society of NSW *Submission* 91; Attorney-General's Dept (ACT) *Submission* 77.

⁵³ See discussion at para 9.20.

Recommendation 40A (ALRC)

Regulations should be made under s 36A of the FOI Act prescribing two years as the maximum duration of conclusive certificates.

Recommendation 40B (ARC)

Conclusive certificates issued under s 33 and s 34 should remain unlimited in duration. Certificates issued under s 36 should be limited to a maximum of five years.⁵⁴

Review of issue of conclusive certificates

8.19 The AAT can review the issue of a conclusive certificate and express a view on whether there are reasonable grounds for the exemption claim.⁵⁵ It can recommend, but not order, the revocation of a certificate. If a Minister chooses not to revoke a conclusive certificate on a recommendation of the AAT, he or she must advise Parliament by tabling a notice in both Houses and then reading it in the House in which he or she sits.⁵⁶ This obligation imposes a considerable and sufficient discipline on Ministers. Consequently, the Review does not consider it necessary to alter the review arrangements for conclusive certificates.

Monitoring the use of conclusive certificates

8.20 The Review understands that it is not uncommon for agencies to issue a conclusive certificate after an applicant has lodged an appeal with the AAT. The Review considers this practice to be an abuse of the certificate provisions. If a document truly warrants a conclusive certificate, a certificate should be issued at the time the decision is made to refuse access. DP 59 suggested that, rather than impose a prohibition on the late issue of conclusive certificates, the FOI Commissioner should educate agencies not to engage in this practice and comment adversely in the FOI annual report on those who do.⁵⁷ It also suggested that the annual report should also include information on the number of conclusive certificates issued by each Minister and note any failure of a Minister to revoke a certificate on the recommendation of the AAT.⁵⁸ Several submissions consider that adverse comment in the FOI Commissioner's annual report will not achieve anything more than the Minister's Parliamentary statement.⁵⁹ The Review considers that monitoring by the FOI Commissioner would be a valuable supplement to the Minister's obligation to advise Parliament of his or her decision and will provide agencies with further incentive to improve their practices in this area. The Review is supported in this view by a number of submissions.⁶⁰

Recommendation 41

The FOI Commissioner should monitor the use of conclusive certificates and include in his or her annual FOI report details about their use and any failure of a Minister to revoke a certificate despite a finding by the AAT that there are no reasonable grounds for the exemption claim.

Information as to the existence of a document

Where a particular document is requested

8.21 *Neither confirm nor deny.* Section 25 allows agencies to neither confirm nor deny the existence of a document where information as to the existence or non-existence of that document would, if included in another document, make the latter-mentioned document exempt under s 33 (national security), s 33A

⁵⁴ See para 9.18 for further discussion of conclusive certificates issued under s 36.

⁵⁵ s 58.

⁵⁶ s 58A.

⁵⁷ para 5.24.

⁵⁸ Proposal 5.10.

⁵⁹ eg Australia Post *Submission 44*; Dept of Prime Minister and Cabinet *Submission 82*.

⁶⁰ eg PIAC *Submission 34*; ASC *Submission 57*; Australian Consumers' Association *Submission 55*.

(Commonwealth/State relations) or s 37(1) (law enforcement).⁶¹ The provision is designed to allow agencies to withhold information about the existence (or non-existence) of a document where that information is itself exempt. For example, the fact that there is no document about Australia's nuclear weapons capabilities may be considered worth protecting under s 25 if knowledge of that fact would enable an applicant to undermine national security.⁶² A decision to give a s 25 response is reviewable.⁶³ Section 25 is especially problematic for applicants because it appears to perpetuate the kind of secretive, conspiratorial agency culture that the FOI Act is intended to break down. DP 59 asked whether there is a problem with the 'neither confirm nor deny' response provided for by s 25.⁶⁴ A number of submissions consider that s 25 is contrary to the spirit of the Act and should be repealed.⁶⁵ Others consider it a necessary provision.⁶⁶

8.22 *Review's position.* The Review is concerned that s 25 can be used to 'bamboozle' applicants with legalistic jargon. Nevertheless it considers that, unfortunately, the provision is necessary where information about the existence (or non-existence) of a document needs to be withheld. However, reliance on s 25 will only be justified in rare situations. The Review considers that a s 25 response is not justified in respect of documents relating to Commonwealth/State relations. The Review cannot envisage any circumstances in which releasing information about the existence or non-existence of a document would cause damage to domestic inter-government relations. It considers that the FOI Commissioner should educate agencies about the correct use of s 25 and monitor their practices to ensure that agencies do not exploit it or claim it when it is the contents of a document, rather than its existence that warrants protection. Agencies may choose to seek the advice of the FOI Commissioner as to whether it would be proper to use s 25 in a particular instance.

Recommendation 42

The FOI Act should be amended so that a 'neither confirm nor deny' response under s 25 is not available in respect of documents information about the existence or non-existence of which would be exempt under s 33A (Commonwealth/State relations).

Recommendation 43

The FOI Commissioner should educate agencies about the correct use of s 25 and monitor their practices to ensure that agencies do not claim it when it is the contents of a document, rather than its existence, that warrant protection.

Where the document is not specifically requested

8.23 *Section 26(2).* Section 25 may not be of any use to an agency that seeks to withhold information about the existence of a document in a situation where that document was not specified in the request.⁶⁷ For example, if a person asks for his or her personal file and the file contains a law enforcement warrant, to claim an exemption under s 37 may, depending on the agency involved, immediately alert the applicant to the exact nature of the exempt document. For example, an agency such as Telstra would normally have only one type of law enforcement document, (a telephone interception warrant). It appears that often in these cases agencies simply pretend that the document does not exist. They invoke a 'statutory lie' under s 26(2). This section provides that a statement of reasons for refusing a request is not required to contain any matter of such a nature that its inclusion in a document of an agency would cause that document to be exempt. In the example given above, the agency's statement of reasons need not include information about the warrant

⁶¹ Note that under s 35 of the FOI Act (Qld) and s 31 of the FOI Act (WA) the 'neither confirm nor deny' response can also be given in respect of Cabinet and Executive Council documents.

⁶² eg by surmising that Australia does not have nuclear weapons capabilities.

⁶³ s 25(2)(b).

⁶⁴ Issue 5.11.

⁶⁵ eg NSW Bar Association *Submission 15*; Australian Consumers' Association *Submission 55*.

⁶⁶ eg Australia Post *Submission 44*; Telstra *Submission 45*; ASC *Submission 57*.

⁶⁷ Note the record exclusion provisions in the US FOI Act are designed to be used for a similar purpose. The provisions provide that whenever a request is made for documents relating to a criminal investigation and there is reason to believe that the subject of the investigation is not aware of its pendency and that disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of the section: 5USCA 552(c)(1). The Act contains similar provisions to protect the identity of informants in the criminal justice system and classified records maintained by the FBI on foreign intelligence and international terrorism.

because if that information was included in another of the agency's documents, that document would be exempt (under s 37(1)(a)).

8.24 **Concerns about the 'statutory lie'.** If a statutory lie is used, the applicant never knows that the document exists and, consequently, cannot appeal against the decision to refuse access. DP 59 asked whether there are problems with s 26(2) being used in this manner.⁶⁸ A number of submissions consider that it is problematic and contrary to the spirit of the FOI Act.⁶⁹ The Review agrees that there are dangers associated with allowing agencies to pretend a document does not exist. The provision is open to abuse because the 'lie' is not, and cannot be, subject to review. However, there are limited occasions when the use s 26(2) for statutory lie purposes is justified. As part of his or her educative role, the FOI Commissioner should make clear to agencies the limited circumstances in which it is appropriate to use s 26(2) for these purposes. Agencies should also consult with the FOI Commissioner before using s 26(2). Such consultation will rely on the good faith of agencies as the Commissioner will have no way of knowing of the relevant document's existence unless advised by the agency. Several submissions support a consultative role for the FOI Commissioner in regard to s 26(2).⁷⁰ If nothing else, it will have a beneficial educative effect and help to safeguard against misapplication of the provision.

National uniform exemption provisions

8.25 While there are many similarities between the exemption provisions in the State and federal FOI Acts, they are not uniform. From the point of view of applicants, it would be preferable if the exemptions in all FOI Acts throughout Australia were consistent. They would then not have to understand two sets of exemptions when they seek access to documents in the possession of State and Commonwealth agencies. Achieving uniform exemptions would require intensive consultation between State and federal governments. The Review considers this would be a worthwhile enhancement of FOI in Australia and suggests that the Standing Committee of Attorneys-General should pursue this matter.

⁶⁸ Issue 5.12.

⁶⁹ eg NSW Bar Association *Submission 15*; Australian Consumers' Association *Submission 55*.

⁷⁰ The Public Policy Assessment Society *Submission 4*; A Conway-Jones *Submission 18*; Telstra *Submission 45*.

9. Specific exemptions - responsibilities and operations of government

Introduction

9.1 This chapter examines and makes recommendations in respect of the specific exemptions in the FOI Act designed to protect the responsibilities and operations of government.

National security and defence - s 33

Scope of the exemption

9.2 Section 33 serves three purposes. It protects the security and defence of Australia,¹ the international relations of the Commonwealth and information communicated in confidence by a foreign government or an international organisation.² Section 33(2) enables the Minister to issue a conclusive certificate in respect of documents subject to this exemption.³ The Review considers that, due to the special sensitivity of security and international relations material, this is one of the few exemptions for which the availability of a conclusive certificate is justified.⁴

Section 33 and the public interest

9.3 **Security and intergovernment material.** Section 33 is not subject to a public interest test. The Review considers this is appropriate except in respect of information communicated in confidence by an international organisation.⁵ Information about national security and defence warrants unqualified protection. The federal government can only function effectively in the international political arena if it is able to give an absolute guarantee that information received in confidence from other governments will remain confidential. The overriding public interest is in the maintenance of national security and the effective continuation of Australia's international relations. In addition, the Australian government has a legal responsibility to its international partners to protect certain material. Accordingly, the Review does not consider that a public interest test should be introduced into s 33(1)(a).

9.4 **Information communicated in confidence by an international organisation.** DP 59 proposed that s 33(1)(b) be redrafted so that the exemption for information provided by international organisations is subject to a public interest test.⁶ There was considerable opposition to this proposal at the Canberra agency forum on the basis that organisations such as the World Health Organisation and the Organisation for Economic Co-operation and Development (OECD) may be unwilling to continue to provide information to the Commonwealth unless they could be given a guarantee of confidentiality. Several submissions express the same concern.⁷ The Department of Prime Minister and Cabinet, for example, claims that in some circumstances international organisations deal with information of a similar sensitivity to that of foreign governments.⁸ Other submissions support the proposal on the basis that it is important to balance the need to protect this information against the public interest in access.⁹ The Review does not consider that information from international organisations warrants the absolute protection afforded to information from foreign governments. In some cases it may be in the public interest to release confidential material received from international organisations, for example, information relating to public health. If the information is extremely sensitive and its release would jeopardise Australia's relations with a non-government organisation (NGO) it

¹ The expression 'security of the Commonwealth' is defined in s 4(5) to include matters relating to the detection, prevention, or suppression of activities (whether within or outside Australia) subversive of, or hostile to the interests of the Commonwealth or an ally, the security of any communications system or cryptographic system used for the defence of the Commonwealth or an ally, or the conduct of the international relations of the Commonwealth.

² s 33(1).

³ This is analogous to the position in the US where documents can be kept secret by Executive order in the interest of national defence or policy: 5 USCA 552 6(C)(b)(1).

⁴ See discussion of conclusive certificates at para 8.17.

⁵ See para 9.4.

⁶ Proposal 6.1.

⁷ eg, Australia Post *Submission 44*; The Public Policy Assessment Society *Submission 4*; Dept of Defence *Submission 76*; Law Institute of Victoria *Submission 90*.

⁸ *Submission 82*. For example information communicated by the Director-General of the International Atomic Energy Agency.

⁹ eg ASC *Submission 57*; PIAC *Submission 34*; Cth Ombudsman *Submission 53*.

is unlikely the public interest in disclosure would outweigh the public interest in keeping the information confidential. This 'weighing up' process should, however, be allowed to take place on a case by case basis. In addition, the Minister will still be able to issue a conclusive certificate for a document conveyed in confidence by an NGO if he or she considers that it requires absolute protection from disclosure. The Review recommends that the exemption for information received from international organisations should be subject to a public interest test.¹⁰ Section 33(1)(b) will need to be redrafted to distinguish between the two types of international information.¹¹

Recommendation 44

Section 33(1)(b) of the FOI Act should be subdivided and the exemption for information communicated in confidence by an international organisation made subject to a public interest test.

A combined intergovernment relations exemption?

9.5 Section 33 originally contained a subsection exempting documents the disclosure of which could reasonably be expected to cause damage to relations between the Commonwealth and any State or the Northern Territory.¹² In 1983 this subsection was converted into a separate exemption for documents affecting relations with the States, s 33A.¹³ This was done because the Government wanted to introduce a public interest test into the exemption for domestic intergovernment relations to enable the Commonwealth to release information that it was in the public interest to release despite the fact that it had been designated confidential by a State.¹⁴ The Review considered whether, in order to rationalise the exemption provisions, all exemptions for intergovernment information, international and domestic, should be once again combined into a single provision.¹⁵ In light of its conclusion that the exemption for confidential international intergovernment information should not be subject to a public interest test, the Review does not consider there would be any benefit in recombining the provisions. In addition, from both a policy and an administrative perspective it is preferable to leave s 33(1)(a)(iii) and s 33A as separate exemptions because they involve different sensitivities and political considerations.

Intergovernment relations (domestic) - s 33A

9.6 Documents are exempt under s 33A if their disclosure would, or could reasonably be expected to, damage relations between the Commonwealth and a State or would divulge information communicated in confidence by a State to the Commonwealth. The exemption contains a balancing public interest test.¹⁶ In DP 59 the Review proposed that this test should remain but that provision for the Minister to issue a conclusive certificate should be removed.¹⁷ The Department of Prime Minister and Cabinet, which has a central role in managing relations between the Commonwealth and the States, agrees that a conclusive certificate is unnecessary for this exemption.

¹⁰ This may overcome the unsatisfactory outcome of decisions such as *Commonwealth v Hittich* (1994) 53 FCR 152 in which it was held that a World Health Organisation newsletter was exempt from disclosure under s 33(1)(b) merely because it could be classified as a document communicated in confidence on behalf of an international organisation, despite the fact that it could be regarded as being in the public domain: '... s 33(1) does not provide any basis for a public interest criterion extending beyond the terms of the section. Either a document is within the section, in which case it is an exempt document, or it is not.' The introduction of a public interest test in s 33(1)(b) should mean that a document will not be able to be validly withheld if it has already been made public.

¹¹ If the Review's recommendation is adopted, consideration might be given to dividing s 33(1)(b) into two exemptions to avoid any possible confusion from having one part of an exemption subject to a public interest test but not the other.

¹² s 33(1)(a)(iv). The original s 33(1)(b) also exempted documents the disclosure of which would divulge information communicated in confidence to the Commonwealth by the government of a State or the Northern Territory.

¹³ *Freedom of Information Amendment Act 1983* (Cth) s 17. This amendment implemented recommendation 17.11 of the Senate Standing Committee 1979 Report. See para 9.6 for a discussion of s 33A.

¹⁴ 'Since the FOI Act was enacted, at least one State has made a practice of designating most of its communication in writing with the Commonwealth as confidential, presumably to bring all of those documents within the scope of the Commonwealth/State exemption. It was never intended that the exemption would operate in that way. The addition of the overriding public interest test will ensure that documents will not be withheld where they ought to be released.' *Hansard* (Sen) 2 June 1983, 1181.

¹⁵ IP 12 issue 56.

¹⁶ s 33A(5).

¹⁷ Proposal 6.2.

We accept that documents dealing with relations with the States will not have the same sensitivity as documents concerned with international relations ... We are not aware that requests for access to these documents have caused particular difficulties in practice or called for the issue of conclusive certificates under the existing s 33A.¹⁸

Those who oppose the removal of provision for conclusive certificates for s 33A documents believe it will simply lead to unnecessary expense as the proposal will inevitably increase the number of applications for review of decisions that documents are exempt under s 33A.¹⁹ Their view implies that all applications for review will fail because agencies always consider all the public interest factors in disclosure. The Review sees no reason why agencies' decisions under s 33A should not be subject to review in the normal manner. It does not consider that a conclusive certificate is warranted for documents relating to domestic intergovernmental relations. The requirement under s 26A to consult with a State before releasing a document which could be exempt under s 33A will ensure that agencies apply the exemption in full knowledge of the arguments in favour of non-disclosure.²⁰

Recommendation 45

Provision for a conclusive certificate in s 33A of the FOI Act should be removed.

Cabinet documents - s 34

Scope of exemption

9.7 Section 34(1) exempts documents that have been submitted to Cabinet or that a Minister proposes to submit to Cabinet, official records of Cabinet and documents the release of which would involve the disclosure of any deliberation or decision of Cabinet.²¹ The exemption does not apply to Cabinet documents that contain purely factual material unless release of that material would involve disclosure of any unpublished deliberation or decision of Cabinet.²² A conclusive certificate is available under s 34(2). The Review considers this should continue. Given the fundamental role of Cabinet in the Westminster system of government it is appropriate that the ultimate responsibility for exemption of Cabinet documents lies with Ministers.²³

Class exemption

9.8 Section 34 is a class exemption: if a document falls within one of the categories of Cabinet material described in s 34 it qualifies for exemption regardless of whether there is public interest in its release. Agencies need not consider what harm, if any, is expected to flow from disclosure of the particular documents. The harm is inherent in breaching the confidentiality of Cabinet deliberations.²⁴ This exemption has always been controversial because it seems to contradict the principle of open government. Cabinet is the 'peak body' for government decision making yet its deliberations are secret. The Review considers that Cabinet documents warrant a class exemption. It is not in the public interest to expose Cabinet documents to the balancing process contained in most other exemptions or to risk undermining the process of collective Cabinet decision making. To breach the 'Cabinet oyster' would be to alter our system of government fundamentally.²⁵ Amending the FOI Act is not the appropriate way to effect such a radical change. As with all FOI exemptions, agencies have a discretion not to claim s 34.²⁶ The Attorney-General's Department has,

¹⁸ Submission 82. See also Australian Consumers' Association Submission 55; PIAC Submission 34; HSherridan & R Snell Submission 58.
¹⁹ eg Treasury Submission 80.

²⁰ s 26A provides that where arrangements have been entered into between the Commonwealth and a State with regard to consultation and it appears that a document that is the subject of a request contains State information and the State may reasonably wish to contend that the document is exempt under s 33A, a decision to grant access to the document shall not be made by the agency unless consultation has taken place between the Commonwealth and the State.

²¹ s 34(1)(c) also exempts documents that are copies of, or contain extracts from, documents submitted to Cabinet or official records of Cabinet.
²² s 34(1A).

²³ See para 8.17 for a discussion of conclusive certificates.

²⁴ See Dept of Prime Minister and Cabinet *Cabinet Handbook* 4th ed AGPS Canberra 1994, 5, 6. See also *Commonwealth v Northern Land Council* (1993) 176 CLR 604, 615: '[I]t has never been doubted that it is in the public interest that the deliberations of Cabinet should remain confidential in order that the members of Cabinet may exchange differing views and at the same time maintain the principle of collective responsibility for any decision which may be made.'

²⁵ See *Re Anderson and Dept of Special Minister of State No 2* (1986) 11 ALN N239 in which the Tribunal stated that s 34 provides the mechanism to preserve the long-established principle of responsible government that Cabinet deliberations are secret.

²⁶ s 18(2).

however, always advised agencies to claim the Cabinet exemption when applicable or to consult the FOI Coordinator in the Department of Prime Minister and Cabinet if they wish to waive s 34.²⁷ The Review agrees that the Department of Prime Minister and Cabinet may be in the best position to assess whether disclosure of a particular Cabinet document would be likely to harm the Cabinet system.²⁸ Agencies should therefore continue to consult the Department of Prime Minister and Cabinet before releasing a Cabinet document. The Department should not, however, insist on agencies claiming s 34 if it is clear that no harm to the Cabinet system would flow from the disclosure of a particular document.

Documents brought into existence for the purpose of consideration by Cabinet

9.9 Section 34(1)(a) provides that a document is exempt if it has been submitted to Cabinet for its consideration or is proposed by a Minister to be so submitted, being a document that was brought into existence for the purpose of submission for consideration by Cabinet. Despite the apparently clear wording to the contrary, documents that have been submitted to Cabinet but that were not created for that purpose have been held to be exempt.²⁹ The Review considers that this is an incorrect interpretation of the legislation.³⁰ DP 59 proposed that s 34(1)(a) be amended to make absolutely clear that the exemption only applies to documents prepared for Cabinet.³¹ The proposal was intended to ensure that agencies cannot abuse the exemption by attaching documents to Cabinet submissions merely to avoid disclosure under the FOI Act.³² The Department of Prime Minister and Cabinet supports the proposal.

The intention of the proposal is certainly consistent with the original understanding of the purposes of the words in s 34(1)(a).³³

A number of other submissions also favour the proposal on the basis that as much government information as possible should be available.³⁴ It is difficult to see how disclosure of documents that have not been brought into existence for the purpose of consideration by Cabinet could be detrimental to the Cabinet process.

The convention of collective ministerial responsibility is undermined only by disclosure of documents which reveal Ministers' individual views or votes expressed in Cabinet. Documents not prepared for the purpose of submission to Cabinet do not, by definition, disclose such opinions.³⁵

The Review recommends that s 34(1)(a) be amended to ensure that it only exempts documents created for the purpose of submission to Cabinet.³⁶

Recommendation 46

Section 34(1)(a) of the FOI Act should be re-drafted to make abundantly clear that it applies only to documents that have been brought into existence for the purpose of submission for consideration by Cabinet.

²⁷ FOI Memo 34 para 3. New FOI Memo 19 provides that agencies should also consult with the FOI Coordinator of the Dept of Prime Minister and Cabinet about transfers of requests (under s 16) involving Cabinet documents.

²⁸ The Secretary to Cabinet has a particular responsibility to ensure the confidentiality of current and past Cabinet records and as a consequence has expertise in judging the sensitivity of such documents.

²⁹ *Re Fewster and Dept of the Prime Minister and Cabinet* (No 2) (1987) 13 ALD 139; *Re Porter and the Dept of Community Services and Health* (1988) 14 ALD 403; *Re Reith and Minister of State for Aboriginal Affairs* (1988) 16 ALD 709; *Re Aldred and Dept of Foreign Affairs and Trade* (1990) 20 ALD 264 cf *Re Anderson and Dept of Special Minister of State* (No 2) (1986) 11 ALN N239. See also revised FOI Memo 34 para 7.

³⁰ See also DC Pearce (ed) *Australian Administrative Law* Butterworths 1995, 2220.

³¹ Proposal 6.4.

³² This practice is referred to in A Cossins 'Paving the way for less open government in Victoria: amendments to the Cabinet documents exemption' (1993) 45 *FOI Review* 27.

³³ *Submission* 82.

³⁴ eg NSW Bar Association *Submission* 15; PIAC *Submission* 34; H Sheridan & R Snell *Submission* 58.

³⁵ DC Pearce (ed) *Australian Administrative Law* Butterworths 1995, 2220. See also *Whitlam v Australian Consolidated Press* (1985) 73 FLR 414; *Commonwealth v Northern Land Council* (1993) 176 CLR 604.

³⁶ Note that, in contrast to the Review's recommendations, recent amendments to the Qld Cabinet exemption have broadened the provision. The *Freedom of Information Amendment Act 1995* (Qld) s 3 provides that 'submit' matter to Cabinet includes bring the matter to Cabinet irrespective of the purpose of submitting the matter to Cabinet, the nature of the matter or the way in which Cabinet deals with the matter. This amendment has been heavily criticised by community groups such as the Council of Civil Liberties: *The Australian* 24 March 1995, 4.

Section 34(1)(d)

9.10 **Decisions that have already been published.** Section 34(1)(d) provides that a document the release of which would involve the disclosure of any deliberation or decision of the Cabinet is exempt. The Review considers that the exemption should not apply to a document that discloses a Cabinet decision that has already been officially published and recommends that s 34(1)(d) be amended accordingly. The exemption should continue to apply to documents that disclose the *deliberations* of Cabinet whether or not the decision to which those deliberations relate has been officially published.

9.11 **'Officially published' should be defined.** The phrase 'officially published' is not defined in the Act. This could give rise to uncertainty about when s 34(1)(d) applies. The Review understands the phrase to mean made publicly available through official channels, including Ministerial press release. Leaked information or oral statements would not constitute official publication. DP 59 proposed that the phrase 'officially published' be defined in the Act to avoid confusion and disputes.³⁷ A number of submissions support the proposal.³⁸ The Review recommends that 'officially published' be defined in the Act to make s 34 easier for both applicants and agencies to understand.³⁹

Recommendation 47

Section 34(1)(d) of the FOI Act should be amended to make it clear that it does not apply to a document that discloses a decision of the Cabinet if that decision has already been officially published.

Recommendation 48

The term 'officially published' should be defined in the FOI Act.

Time limit

9.12 In most State FOI Acts, the Cabinet exemption only applies to documents that are less than 10 years old.⁴⁰ This restriction on the exemption provides a balance between ensuring the integrity of the Cabinet process and providing access to government information. DP 59 proposed that s 34 be amended to impose a 20 year time limit on the exemption for Cabinet documents.⁴¹ A 20 year limit was chosen because it represents roughly a generation of Ministers. Submissions are evenly divided on this issue. A number of submissions consider that 20 years is too long and that a 10 year limit would be sufficient.⁴² The Department of Prime Minister considers that the current arrangements should continue whereby Cabinet documents are exempt under the FOI Act but become accessible after 30 years under the Archives Act.⁴³ The Review considers that there is no need for s 34 to protect documents for more than 20 years. Cabinet documents that are more than 20 years old may, nevertheless, be withheld if they fall within one of the other exemptions in the FOI Act.

Recommendation 49

Section 34 of the FOI Act should be amended so that Cabinet documents are only exempt for 20 years after the date on which they were created.

Cabinet notebooks

9.13 Cabinet notebooks contain the notes taken by the Secretary to the Cabinet and other Cabinet officers at meetings of the Cabinet. These notes function as 'memory joggers' to aid the drafting of the Cabinet

³⁷ Proposal 6.5.

³⁸ eg Australian Consumers' Association *Submission 55*; Qld Information Commissioner *Submission 37*.

³⁹ The phrase also appears in s 35(1)(d) and s 47(1)(b).

⁴⁰ FOI Act (Vic) s 28; FOI Act (Tas) s 24; FOI Act (NSW) Sch 1 cl 1(2)(b); FOI Act (WA) Sch 1 cl 1(4).

⁴¹ Proposal 6.6.

⁴² eg Australian Consumers' Association *Submission 55*; H Sheridan & R Snell *Submission 58*.

⁴³ *Submission 82*.

minute'.⁴⁴ They do not form part of the official record. In 1994, Cabinet notebooks were excluded from the coverage of the FOI Act.⁴⁵ At the same time, they were made accessible under the Archives Act 50 years after the year in which they came into existence.⁴⁶ The only way a person can now gain access to a Cabinet notebook in the 50 years after it was created is by court ordered discovery.⁴⁷ A number of commentators consider that the amendment was unnecessary given that Cabinet notebooks would be adequately protected by s 34(1)(d) and the conclusive certificate provisions.⁴⁸ The Review considers the exclusion of notebooks from the Act to be an acceptable means of protecting the integrity of Cabinet deliberations. Notebooks are an incomplete record of Cabinet and include the notetaker's record of individual Minister's comments which, if made publicly accessible, may undermine the process of collective Cabinet decision making.⁴⁹ The Cabinet notebook exclusion should, therefore, be retained. Consideration should, however, be given to amending the Archives Act so that Cabinet notebooks become available under that legislation at the same time as other Cabinet material, that is, 30 years.⁵⁰

Executive Council documents - s 35

9.14 Section 35 exempts Executive Council documents. These documents include statutory appointments, commissions, regulations, proclamations and approvals of treaties.⁵¹ The exemption does not cover purely factual information that has been considered by the Council unless its disclosure would involve the disclosure of any deliberation or advice of the Council that has not been officially published.⁵² DP 59 proposed that s 35 should be repealed on the basis that Executive Council documents that warrant exemption can be withheld under other provisions such as s 33(1)(a)(iii) (international relations) and s 41 (personal information).⁵³ The majority of submissions on this issue support the proposal.⁵⁴ The Department of Prime Minister and Cabinet is, however, opposed to the repeal of s 35 despite acknowledging that Executive Council documents are generally not sensitive and that other exemptions could apply to the few that are.⁵⁵ In consultations on DP 59 the Department of Prime Minister and Cabinet suggested that Executive Council documents should not be available until they have been considered by the Council. The Review is of the opinion that requests for draft Executive Council documents would be rare and that, even if one was made, genuinely sensitive material would be protected by one of the other specific exemptions. Section 35 should be repealed.⁵⁶

Recommendation 50

Section 35 of the FOI Act should be repealed.

⁴⁴ *Hansard* (H of R) 16 December 1992, 3892.

⁴⁵ *Prime Minister and Cabinet (Miscellaneous Provisions) Act* 1994 (Cth) s 12.

⁴⁶ id s 3-6. Generally documents fall within the open access period under the Archives Act 30 years after they were created. That period was considered to be inadequate in the case of Cabinet notebooks because 'some former ministers may still be alive': *Hansard* (H of R) 3 March 1994, 1714.

⁴⁷ However, the judgment of the High Court in *Commonwealth v Northern Land Council* (1993) 176 CLR 604, reversing a decision of the Federal Court (1991) 30 FCR 1, makes it extremely unlikely that an external review body could order the disclosure of a Cabinet notebook under the FOI Act.

⁴⁸ eg A Cossins 'Uranium mining, Cabinet notebooks and redundant amendments to the Commonwealth FOI Act' (1994) 52 *FOI Review* 42; DC Pearce (ed) *Australian Administrative Law* Butterworths 1995, 2227.

⁴⁹ '... confidentiality has been urged in order to support collective responsibility by keeping secret the stand taken by individual Ministers on particular matters so that the Cabinet may present a united front to the public in what it does.': *Commonwealth v Northern Land Council* (1993) 176 CLR 604, 628.

⁵⁰ The Dept of Prime Minister and Cabinet *Submission* 82 considers that this suggestion is premature but it is supported by D Murphy *Submission* 43.

⁵¹ Dept of Prime Minister and Cabinet *Federal Executive Council Handbook* AGPS Canberra 1983.

⁵² s 35(1A). See discussion of 'officially published' at para 9.11.

⁵³ Proposal 6.7. A large proportion of the Executive Council's work relates to appointments. Information such as individual curriculum vitae may be protected by s 41.

⁵⁴ eg PIAC *Submission* 34; Qld Information Commissioner *Submission* 37; Australian Consumers' Association *Submission* 55; H Sheridan & R Snell *Submission* 58.

⁵⁵ The Department states that the material supporting Executive Council determination of a matter is not argumentative; it offers essentially factual advice and recommends a decision: *Submission* 82.

⁵⁶ The oath or affirmation that is taken by each member of the Executive Council on his or her appointment includes an undertaking that he or she will not directly or indirectly reveal matters which are debated in Council. The Review considers that disclosure of Executive Council documents under the FOI Act would not constitute a breach of that oath.

Internal working documents - s 36

Deliberative processes

9.15 Section 36 exempts documents that would disclose matter in the nature of advice, opinion or recommendation prepared for the purposes of the deliberative processes of an agency or Minister if disclosure would be contrary to the public interest.⁵⁷

The [provision] recognises that within the wide class of documents defined in [s 36(1)(a)] there will be many that can be made public without harm to the public interest ...⁵⁸

Section 36 has been heavily criticised by applicants and commentators as being a catch-all provision. It was suggested to the Review that it should be narrowed to apply only to deliberative material associated with policy formulation.⁵⁹ The AAT has consistently rejected that suggestion,⁶⁰ holding instead that s 36 covers all the 'thinking processes' of an agency involved in its functions.⁶¹ DP 59 asked whether s 36 should be narrowed in some way.⁶² Submissions are evenly divided on this issue. Agencies generally oppose restricting s 36 to policy documents on the basis that it would often be difficult to distinguish such material from other deliberative documents. They claim the public interest test provides sufficient safeguard against s 36 being claimed for innocuous material.⁶³ Other submissions consider that narrowing the exemption would be desirable.⁶⁴ The Review considers that confining s 36 to policy documents, or indeed to any one type of deliberative process document, would make the provision difficult to administer without necessarily improving the level of access to government information. Accordingly, it does not recommend any legislative narrowing of the exemption. It is, however, important that agencies only claim s 36 in respect of documents prepared for the agency's deliberative processes. The Review considers that the title of the exemption - 'internal working documents' - gives a misleading impression of the width of s 36 and recommends that it be changed to 'documents revealing deliberative processes'.⁶⁵

Recommendation 51

Section 36 of the FOI Act should be retitled 'Documents revealing deliberative processes'.

Section 36 and the public interest

9.16 The public interest component of s 36 is controversial and has been much litigated.⁶⁶ In the early decision of *Re Howard and the Treasurer*,⁶⁷ the AAT listed five factors that mitigate against disclosure of deliberative process documents. These included that disclosure that will inhibit frankness and candour in future pre-decision communications is likely to be contrary to the public interest. For a number of years these considerations were treated as though they were statutory factors to be taken into account when determining when disclosure would not be in the public interest.⁶⁸ The approach in *Howard* has been questioned in a

⁵⁷ s 36(1). This may include documents that would disclose communications between Ministers and departmental advisers, communications between officers and records of discussions.

⁵⁸ Freedom of Information Bill (Cth) 1981 Explanatory Memorandum (Sen) para 124.

⁵⁹ eg R Snell IP *Submission 31*.

⁶⁰ eg *Re James and the Australian National University* (1984) 6 ALD 687; *Kavvadias v Commonwealth Ombudsman* (No 1) (1984) 6 ALD 47; *Re Murtagh and Commissioner of Taxation* (1984) 6 ALD 112.

⁶¹ The leading case on this point is *Waterford and Dept of the Treasury* (No 2) (1984) 5 ALD 588. See also *Re Eccelston and Dept of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 on the equivalent provision in the FOI Act (Qld). Issue 6.10.

⁶² eg *ASC Submission 57*; *Dept of Defence Submission 76*; *Merit Protection and Review Agency Submission 47*; *Dept of Immigration and Ethnic Affairs Submission 87*.

⁶³ eg *PIAC Submission 34*; *Australian Consumers' Association Submission 55*; *H Sheridan & R Snell Submission 58*; *NSW Bar Association Submission 15*.

⁶⁴ There is a high level of support for a name change of this sort in submissions. eg *PIAC Submission 34*; *Australia Post Submission 44*; *Australian Consumers' Association Submission 55*; *Dept of Immigration and Ethnic Affairs Submission 87*; *Dept of Defence Submission 76*. Only *ATO Submission 17* opposes the proposal.

⁶⁵ In a number of cases pre-dating the FOI Act the courts made it clear that the public interest in disclosure should always be considered when deciding whether to withhold deliberative process documents: *Sankey v Whitlam* (1978) 142 CLR 1; *Commonwealth v John Fairfax and Sons Ltd* (1980) 147 CLR 39, 52; *Harris v Australian Broadcasting Corporation* (1983) 50 ALR 551; *Re Burns and the Australian National University* (1984) 6 ALD 193; *Commonwealth v Northern Land Council* (1993) 176 CLR 604. (1985) 7 ALD 626.

⁶⁶ eg *Re Reith and Minister of State for Aboriginal Affairs* (1988) 16 ALD 709; *Re Aldred and Dept of Foreign Affairs and Trade* (1990) 20 ALD 264. Note that the equivalent provision in the FOI Act (Tas) states that disclosure of an internal working document is not contrary to

number of decisions.⁶⁹ For example, the AAT has since rejected the possible inhibition of candour and frankness as a consideration weighing against disclosure unless concrete evidence to support this effect can be adduced.⁷⁰ The Review agrees with the view expressed in the Senate Standing Committee 1979 Report that although the prospect of disclosure may cause individuals to be less candid and frank, the real issue is whether the efficiency and output of the agency's deliberative processes will be affected by release.⁷¹ The FOI Commissioner's guidelines on the public interest test should emphasise the need for flexibility when ascertaining the public interest in all circumstances, including in s 36.

Exceptions to the exemption

9.17 Section 36 contains a number of exceptions designed to limit the exemption to documents that contain genuinely sensitive deliberative material. It does not cover:

- documents required to be available for inspection and purchase under s 9 that are used for the purpose of making decisions or recommendations, for example, guidelines on persons' entitlements under income support legislation⁷²
- purely factual material⁷³
- reports of scientific or technical experts, whether employed within an agency or not, including reports expressing the opinions of such experts on scientific or technical matters⁷⁴
- reports of a prescribed body or organisation within an agency⁷⁵ or
- the record of, or final statement of the reasons for, a final decision in the exercise of a power or an adjudicative function.⁷⁶

As well as excluding factual material, the equivalent provisions in the NSW, Qld, SA and WA FOI Acts exclude purely statistical information.⁷⁷ DP 59 proposed that s 36 be amended to exclude this type of material.⁷⁸ A number of submissions support the proposal.⁷⁹ The Review acknowledges that it could be argued that statistics are simply a type of factual information, however, it considers that the availability of such material should be put beyond doubt by specifically excluding it from the exemption.

Recommendation 52

Section 36 of the FOI Act should be amended to exclude purely statistical information.

the public interest merely because of (a) the seniority of the person who created, annotated or considered the information or (b) the possibility that the public may not readily understand any tentative or optional quality of the information: s 27(4).

⁶⁹ eg in *Re Rae and Dept of Prime Minister and Cabinet* (1986) 12 ALD 589 it was held that the *Howard* factors are 'not intended to be used as determinative guidelines for the classification of information.' The *Howard* factors were also criticised in the Senate Standing Committee 1987 Report para 11.7-13.

⁷⁰ See *Re Fewster and Dept of Prime Minister and Cabinet* (No 2) (1987) 13 ALD 139; *Re Kamminga and the Australian National University* (1992) 26 ALD 585; *Re Cleary and Dept of the Treasury* (1993) 31 ALD 214. This approach has also been adopted in some States. See, eg, *Re Eccleston and Dept of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60.

⁷¹ Para 19.11.

⁷² s 36(2).

⁷³ s 36(5). Where factual material can be severed from an otherwise exempt document it should be released: *Harris v Australian Broadcasting Corporation* (1983) 50 ALR 551; *Kavvadias v Commonwealth Ombudsman* (No 2) (1984) 2 FCR 64. Note that in *Harris* it was also held that the involvement of opinion in the process of deducing the existence of facts did not alter the essential purely factual nature of the material.

⁷⁴ s 36(6)(a). This exemption has been interpreted narrowly. In *Harris v Australian Broadcasting Corporation* (1983) 50 ALR 551, eg, it was held that it is confined to reports of experts in the mechanical arts and applied sciences. See also *Re James and the Australian National University* (1984) 6ALD 687.

⁷⁵ s 36(6)(b).

⁷⁶ s 36(6)(c). Note that the equivalent provision in the *Freedom of Information and Protection of Privacy Act 1992* (British Columbia) also lists documents that are not covered by the exemption. The list includes factual material, public opinion polls, statistical surveys, economic forecasts, environmental impact statements and reports of internal task forces: s 13.

⁷⁷ FOI Act (NSW) Sch 1 cl 2 (2)(a)(ii); FOI Act (Qld) s 41(2)(b); FOI Act (SA) Sch 1, cl 9(2)(b); FOI Act (WA) Sch 1, cl 6(3).

⁷⁸ Proposal 6.11.

⁷⁹ eg PIAC *Submission 34*; Qld Information Commissioner *Submission 37*.

Conclusive certificates

9.18 **DP proposal.** DP 59 proposed that provision for a conclusive certificate in respect of s 36 be removed.⁸⁰ The majority of submissions commenting on this proposal support it.⁸¹ Several oppose it.⁸²

9.19 **ALRC position.** The ALRC considers that it is inappropriate that a Minister is able to issue a conclusive certificate in respect of deliberative process documents. Decisions to withhold documents revealing deliberative processes, which are in the majority of cases the decisions of officials, should always be reviewable. Absence of a conclusive certificate provision will not reduce the capacity of agencies to exempt deliberative process documents if disclosure would be contrary to the public interest, for example, because of legitimate questions of timing. It will, however, mean that an agency's assessment of the balance between ensuring government efficiency and the public interest in disclosure of the particular information will be open to external scrutiny. The abolition of conclusive certificates, together with the FOI Commissioner's guidelines on applying a public interest test, will make it easier to ensure that the correct balance is achieved.

9.20 **ARC position.** The ARC takes a different view. It considers that a conclusive certificate will sometimes be warranted in respect of deliberative process documents, particularly material associated with the Cabinet process such as draft Cabinet submissions⁸³ and letters accompanying co-ordination comments. Given the breadth of s 36, however, the ARC considers that a Minister should be subject to special conditions when issuing a conclusive certificate under s 36; conditions that should not apply in respect of certificates issued under s 33 and 34. Ministers should be required to provide the applicant with detailed reasons for issuing a certificate under s 36. The Minister should also be obliged to specify the duration of the certificate, up to a maximum of five years, and give reasons for choosing the specified time. In addition, the Minister should have a statutory obligation to advise the FOI Commissioner whenever a s 36 conclusive certificate is issued. The combination of these requirements should mean that conclusive certificates will only be issued where the Minister is confident that the document genuinely warrants conclusive, non-reviewable exemption.

Recommendation 53A (ALRC)

Provision for a conclusive certificate in respect of s 36 of the FOI Act should be removed.

Recommendation 53B (ARC)

The FOI Act should be amended to provide that when a Minister issues a conclusive certificate under s 36 he or she must

- provide the applicant with detailed reasons for issuing the certificate
- specify the duration of the certificate, up to a maximum of five years, and give reasons for choosing that period
- advise the FOI Commissioner that the certificate has been issued.

Law enforcement and public safety - s 37

Scope of the exemption

9.21 Section 37 exempts documents the disclosure of which would prejudice investigations, public safety⁸⁴ or the fair trial of a person, or reveal the identity or existence of a confidential source of information.⁸⁵ The

⁸⁰ Proposal 6.9.

⁸¹ eg Qld Information Commissioner *Submission 37*; Australian Consumers' Association *Submission 55*; HSheridan & R Snell *Submission 58*; The Public Policy Assessment Society *Submission 4*; PIAC *Submission 34*.

⁸² eg Australia Post *Submission 44*; Treasury *Submission 80*; Dept of Prime Minister and Cabinet *Submission 82*.

⁸³ Draft Cabinet submissions that have not been approved by a Minister cannot be withheld under s 34(1)(a). They can only be withheld under s 34(1)(d) if the final version of the submission has been considered by Cabinet.

⁸⁴ s 37(1)(c) and 37(2)(c). DP 59 proposed that s 37(1)(c) should be a non-waivable exemption: proposal 6.13. The Review no longer considers that there should be non-waivable exemptions: see para XR. FOI Memo 82 states that decision-makers should adopt a conservative approach in deciding whether to release a document that may endanger public safety. If agencies take the recommended approach it is unlikely they would ever waive s 37(1)(c). Moreover there need only be a real possibility of harm: *Dept of Health v Jephcott* (1985) 8 FCR 85.

⁸⁵ s 37(1)(b). Under s 37(2A) a person is a confidential source if they are participating in a witness protection programme. A person will also be considered a confidential source where he or she has supplied information on the understanding (express or implied) that his or her identity

Review is aware of concerns that s 37(1)(a), which exempts documents the disclosure of which would prejudice the conduct of an investigation of a breach of the law, may be used by agencies to justify withholding documents that relate to completed investigations that are unlikely to be prejudiced. To prevent this, the Review proposed in DP 59 that s 37(1)(a) should be amended so it would only be available where disclosure of the document would prejudice a current investigation.⁸⁶ Agencies have expressed concern that from a practical point of view it will often be difficult to determine whether an investigation is 'current' given that investigations may be reopened on receipt of additional information.⁸⁷ The AAT has interpreted the provision as not applying to completed investigations.⁸⁸ It has also acknowledged that in some situations it may be difficult to say that an investigation has in fact come to an end. It may suddenly and unforeseeably be revived and should, therefore, be regarded as dormant rather than completed.⁸⁹ The Review supports the AAT's approach and no longer considers that s 37(1)(a) requires amendment. Determining whether disclosure of a document would prejudice an investigation is a matter of common sense: it would be difficult to argue that a closed investigation could be prejudiced but easier to demonstrate that a dormant investigation may be compromised by the release of documents. The FOI Commissioner's guidelines should highlight the need to establish prejudice before relying on this ground of exemption and explain that it will be very difficult to claim where an investigation has been completed. The guidelines should provide assistance on when an apparently completed investigation may be considered dormant and therefore possibly susceptible to prejudice from the disclosure of information.

Security of places of lawful detention

9.22 Under the Review's recommendation to amend s 40(1)(d), it will no longer be possible to withhold plans of prisons and detention centres under that provision.⁹⁰ The Review considers that s 37 should be expanded to make exempt documents the disclosure of which would prejudice the security of a place of lawful detention.⁹¹

Recommendation 54

Section 37 of the FOI Act should be expanded to cover documents the disclosure of which would prejudice the security of a place of lawful detention.

Section 37 and the public interest

9.23 The use of the word 'reasonably' in s 37 implies an obligation to consider the public interest when deciding whether the exemption applies. DP 59 proposed that, with the exception of the exemption for documents the disclosure of which would endanger the safety of any person, s 37 should be subject to an express public interest test.⁹² Most agencies oppose the suggestion because they consider that the current provision works well.⁹³ For example, the Department of Administrative Services considers the integrity of its fraud investigations would be compromised if interviewees could not be assured of the confidentiality of their comments.⁹⁴ The Review considers that an express public interest test should be introduced into s 37 in regard to particular kinds of law enforcement documents only. A similar approach is used in the equivalent

will remain secret. This protection has been held to extend to 'dob-in' letters: *Re Sinclair and Secretary, Dept of Social Security* (1985) 9 ALN N127. See also *Re Letts and Director-General of Social Security* (1984) 6 ALN N176; *Re Said and Commissioner, Australian Federal Police* (1984) 6 ALN N14; *Dept of Health v Jephcott* (1985) 8 FCR 85.

⁸⁶ Proposal 6.14.

⁸⁷ eg *ASC Submission 57*; *ATO Submission 17*.

⁸⁸ *Edelsten and Australian Federal Police* (1985) 9 ALN N65; *Re S and Commissioner of Taxation* (unreported) AAT 9 July 1992, D296A.

⁸⁹ *Re Edelsten and Australian Federal Police* (1985) 9 ALN N65.

⁹⁰ See para 9.26.

⁹¹ There are similar provisions in the *Access to Information Act RSC 1985* (Can) s 16(1)(d) and the *Freedom of Information and Protection of Privacy Act 1992* (British Columbia) s 15(1)(i). The law enforcement exemptions in a number of State FOI Acts exempt documents the disclosure of which would endanger the security of a building, structure or vehicle: FOI Act (NSW) Sch 1 cl 4(1)(g); FOI Act (Qld) s 42(1)(g); FOI Act (SA) Sch 1 cl 4(1)(g). This recommendation supersedes proposal 6.15 in DP 59 that s 37 be amended to include documents the disclosure of which would endanger the security of government buildings. Such a general provision is no longer considered necessary given that s 39 will protect the plans of the Mint: see para 9.24.

⁹² Proposal 6.12.

⁹³ eg *Australia Post Submission 44*; *ASC Submission 57*; *Dept of Prime Minister and Cabinet Submission 82*.

⁹⁴ *Submission 83*.

provision in all State FOI Acts.⁹⁵ In NSW, for example, the following documents do not fall within the law enforcement exemption if their disclosure would, on balance, be in the public interest:

- a document revealing that the scope of a law enforcement investigation has exceeded the limits imposed by law
- a document containing a general outline of the structure of a programme adopted by an agency for dealing with any contravention or possible contravention of the law
- a report on the degree of success achieved in any programme adopted by an agency for dealing with any contravention or possible contravention of the law
- a report prepared in the course of a routine law enforcement inspection or investigation by an agency the functions of which include that of enforcing the law (other than the criminal law)
- a report on a law enforcement investigation that has already been disclosed to the person or body the subject of the investigation.⁹⁶

The Review considers that this provides an appropriate balance without risking prejudice to law enforcement operations or public safety and recommends that s 37 should be amended to include a public interest test in respect of those categories of information.

Recommendation 55

Section 37 of the FOI Act should be amended to provide that specified documents (those described in FOI Act (NSW) Sch 1 cl 4(2)) are not exempt if their disclosure would, on balance, be in the public interest.

Financial or property interests of the Commonwealth - s 39

9.24 A document is exempt if its disclosure would have a substantial adverse effect on the financial or property interests of the Commonwealth or an agency. The exemption is subject to a public interest test.⁹⁷ Section 39 has only been litigated once, in regard to the property interests of the Commonwealth.⁹⁸ DP 59 proposed that s 39 be repealed on the basis that financial and property interests of the Commonwealth could be adequately protected by s 43, amended so as to apply to the competitive commercial activities of agencies,⁹⁹ or by s 40(1)(d) (operations of an agency).¹⁰⁰ In light of its recommendation to narrow the scope of s 40(1)(d),¹⁰¹ the Review considers s 39 should be retained. This will allow agencies to withhold sensitive non-competitive financial information such as economic models, the plans of the Mint and documents relating to Australian Estate Management.¹⁰²

⁹⁵ FOI Act (NSW) Sch 1 cl 4; FOI Act (Qld) s 42; FOI Act (SA) Sch 1 cl 4; FOI Act (Tas) s 28; FOI Act (Vic) s 31; FOI Act (WA) Sch 1 cl 5.

⁹⁶ FOI Act (NSW) Sch 1 cl 4(2).

⁹⁷ s 39(2).

⁹⁸ In *Connolly and Dept of Finance* (1994) 34 ALD 655 the AAT held that disclosure of documents about arrangements for the sale of the Commonwealth's uranium stockpile was not in the public interest due to the volatility of the market. The Tribunal acknowledged the prima facie right of the public to know in general terms how the Government was planning to realise public assets but found that the preponderant public interest was in the stability of the market price for public and privately owned uranium.

⁹⁹ See recommendation 68.

¹⁰⁰ Proposal 6.17. Submissions on this issue are fairly evenly divided. Community groups such as PIAC *Submission 34* and the Australian Consumers' Association *Submission 55* support the repeal of s 39 whereas government agencies believe it should be retained because the other FOI exemptions do not provide sufficient protection for financial information of the Cth: eg Australia Post *Submission 44*; Telstra *Submission 45*.

¹⁰¹ See recommendation 56.

¹⁰² See Dept of Administrative Services *Submission 83*.

Operations of an agency - s 40

Scope of the exemption

9.25 Section 40(1) exempts documents the disclosure of which would, or could reasonably be expected to, prejudice tests or audits¹⁰³ or have a substantial adverse effect on the management or assessment of personnel,¹⁰⁴ the proper and efficient conduct of the operations of an agency or the conduct of industrial relations unless, on balance, disclosure would be in the public interest.¹⁰⁵

Section 40(1)(d)

9.26 Section 40(1)(d) exempts documents the disclosure of which would have a substantial adverse effect on the proper and efficient conduct of the operations of an agency unless disclosure would be in the public interest.¹⁰⁶ Several other Australian jurisdictions have an equivalent exemption.¹⁰⁷ Like s 36, s 40(1)(d) is often criticised for being too broad and providing agencies with a 'back-stop' exemption when no other provision applies.¹⁰⁸ DP 59 asked whether s 40(1)(d) should be retained.¹⁰⁹ Submissions from government agencies support its retention on the basis that it protects material the disclosure of which would severely compromise their ability to carry out their core functions and which is not exempt under any other provision.¹¹⁰ The Review considers that s 40(1)(d) is unnecessarily broad and, consequently, open to excessive use. It considers that the only kind of documents that warrant exemption under s 40(1)(d) and that are not covered by another exemption are those that prejudice the conduct of an internal or administrative investigation. Once an investigation is completed it can no longer be prejudiced so the exemption will not apply. The Review recommends that s 40(1)(d) should be narrowed accordingly.

Recommendation 56

Section 40(1)(d) of the FOI Act should be redrafted to exempt documents the disclosure of which would prejudice the conduct of an internal or administrative investigation.

Industrial relations

9.27 Section 40(1)(e) exempts documents the disclosure of which would have a substantial adverse effect on the conduct of industrial relations by or on behalf of the Commonwealth or an agency.¹¹¹ Most State FOI Acts have a similar exemption.¹¹² The threat of industrial action by officers who do not wish to have information (such as their names) released is the principal reason the exemption is claimed. DP 59 proposed that the exemption be repealed.¹¹³ A number of submissions oppose the proposal.¹¹⁴ Others support it.¹¹⁵ The ATO claims that the exemption is necessary to prevent the disruption to its industrial relations that would

¹⁰³ See *Re Barrell and Australian Broadcasting Corp* (1985) 7 ALN N129; *Aspic v Australian Federal Police* (1986) 11 ALN N184.

¹⁰⁴ This exemption has been claimed in several cases to justify the removal of officers' names from documents to which access was granted: *Re Murtagh and Commissioner of Taxation* (1984) 6 ALD 112; *Re Z and Australian Taxation Office* (1991) 6 ALD 673; *Wilson and Australian Postal Corporation* (unreported) AAT 11 July 1994. Embarrassment to officers arising from disclosure is, however, insufficient to constitute a substantial adverse effect: *Harris v Australian Broadcasting Corp* (1983) 50ALR 551. See discussion at para 10.13 about the disclosure of personal information of public servants.

¹⁰⁵ s 40(2).

¹⁰⁶ 'Substantial adverse effect' has been interpreted as meaning the effect is serious or significant: *Harris v Australian Broadcasting Corp* (1983) 5 ALD 545; *Re Heaney and Public Service Board* (1984) 6ALD 310. In *Re Thiess and Dept of Aviation* (1986) 9 ALD 454 the AAT stated that the words 'substantial adverse effect' in s 40(1)(d) and (e) connote an adverse effect sufficiently serious or significant to cause concern to a properly informed, reasonable person. In *Re Dyki and the Commissioner for Taxation* (1990) 12 AAR 544 the AAT held that the onus of establishing a substantial adverse effect is a heavy one.

¹⁰⁷ FOI Act (ACT) s 40(1)(d); FOI Act (NSW) Sch 1 cl 16(iv); FOI Act (SA) Sch 1 cl 16(iv).

¹⁰⁸ eg Senate Standing Committee 1987 Report para 12.45; NSW Bar Association *Submission 15*.

¹⁰⁹ Issue 6.18.

¹¹⁰ eg Cth Ombudsman *Submission 53*; Dept of Veterans' Affairs *Submission 24*; Dept of Defence *Submission 76*; Australia Post *Submission 44*; ASC *Submission 57*; Merit Protection and Review Agency *Submission 47*; Dept of Immigration and Ethnic Affairs *Submission 87*; TPC *Submission 42*; Dept of Administrative Services *Submission 83*.

¹¹¹ 'Industrial relations' has been interpreted as meaning relationships between employers and employees: *Re McCarthy and Australian Telecommunications Commission* (1987) 13 ALD 1, 7.

¹¹² FOI Act (ACT) s 40(1)(e); FOI Act (NSW) Sch 1 cl 16(v); FOI Act (Qld) s 40(d); FOI Act (SA) Sch 1 cl 16 (v); FOI Act (WA) Sch 1 cl 11(1)(d).

¹¹³ Proposal 6.19.

¹¹⁴ eg ATO *Submission 17*; Australia Post *Submission 44*; Telstra *Submission 45*.

¹¹⁵ eg PIAC *Submission 34*; Australian Consumers' Association *Submission 55*; H Sheridan & R Snell *Submission 58*.

inevitably occur if junior officers felt they were being harassed as a result of their names being released pursuant to FOI requests.¹¹⁶ The Review considers that this concern is insufficient reason to retain s 40(1)(e). Information the disclosure of which would endanger the physical safety of an officer can be withheld under s 37(1)(c). It is not appropriate that the effect of disclosure of information on industrial relations determines what information is disclosed, particularly when other exemptions will adequately protect the sort of information that may give rise to industrial concerns. Accordingly, the Review recommends that s 40(1)(e) be repealed.

Recommendation 57

Section 40(1)(e) of the FOI Act should be repealed.

Documents affecting the national economy - s 44

9.28 Documents are exempt under s 44 if their disclosure would have a substantial adverse effect on the ability of the government to manage the economy or may result in an undue disturbance of the ordinary course of business in the community.¹¹⁷ The provision applies to documents that include sensitive financial information such as exchange rates, interest rates and taxes.¹¹⁸ This exemption is rarely used.¹¹⁹ There are no court or AAT decisions concerning it. In each case in which the exemption has been claimed, the relevant documents have been found on appeal to be exempt under another provision and s 44 has not been considered. DP 59 proposed that s 44 should be repealed on the basis that documents falling within it that warrant exemption could be withheld under other provisions such as s 36 (deliberative process documents) and s 43 (business affairs).¹²⁰ A number of submissions support the proposal to repeal s 44¹²¹ while two agencies oppose it.¹²² The Review considers that the exemption is superfluous and should be repealed.

Recommendation 58

Section 44 of the FOI Act should be repealed.

¹¹⁶ *Submission 17.*

¹¹⁷ The Senate Standing Committee 1979 Report states that s 44 is a difficult exemption because 'political action which bears no direct relationship to economic affairs can have an effect on the economy': para 26.2.

¹¹⁸ s 44(2).

¹¹⁹ eg in *Re Waterford and the Treasurer of the Commonwealth* (1985) 5 FCR 76 the AAT held that a conclusive certificate issued under s 36(3) in respect of a document containing forward estimates of budget receipts had been validly issued. See also *Re Arnold Mann and the Australian Taxation Office* (1985) 7 ALD 698.

¹²⁰ Proposal 6.21.

¹²¹ eg *PIAC Submission 34*; *Australian Consumers' Association Submission 55*; *H Sheridan & R Snell Submission 58*.

¹²² *Treasury Submission 80*; *Australia Post Submission 44*.

10. Specific exemptions - third party information

Introduction

10.1 This chapter discusses exemptions designed to protect the interests of third parties. These exemptions protect information provided to the government by third parties as well as information about third parties in records created by the government. Although some of the exemptions, such as s 42 and s 43, also protect the effective operations of government, their main purpose is to safeguard the interests of third parties that deal with government agencies.

Personal privacy - s 41

The interface between FOI and privacy

10.2 When an FOI request includes a document that contains the personal information of someone other than the applicant, the unavoidable tension between the right of access provided by the FOI Act and the need to protect personal privacy becomes apparent. Resolving this tension can be difficult.

[H]andling requests where the applicant demands access to information about someone else can be one of the more frustrating and time-consuming aspects of responding to FOI requests.¹

Section 41, which appears to be one of the most frequently claimed exemptions,² is designed to guide agencies in this task. It states that

a document is an exempt document if its disclosure under this Act would involve the unreasonable disclosure of personal information about any person (including a deceased person).

Definition of personal information

10.3 'Personal information' is defined in the FOI Act as information about an individual whose identity is apparent from the information concerned or whose identity 'can reasonably be ascertained' from that information.³ This definition corresponds with that in the Privacy Act.⁴ It encompasses more information than did the pre-1991 term 'personal affairs'⁵ and has been interpreted widely.⁶ In the FOI context this can be problematic because it raises the prospect of a great deal of information being exempt under s 41. It is therefore important that s 41 achieves an appropriate balance between protecting personal privacy and providing access to government-held information.

Privacy Act IPP 11

10.4 The Privacy Act also provides protection for third party privacy. IPP 11 prohibits the disclosure of an individual's personal information to another person except in a number of specified circumstances, including where the individual consents to the disclosure or the disclosure is reasonably necessary for the enforcement of the criminal law or for the protection of public revenue.⁷ Breach of IPP 11 constitutes an interference with

¹ Dept of Family and Community Services (SA) *Submission* 28.

² Although there are no federal statistics, the equivalent exemption in the FOI Act (WA) is the most claimed exemption: WA Information Commissioner *Annual Report 1993-94* WA Information Commissioner Perth 1994, 31.

³ s 4(1).

⁴ s 6. The definition does not make clear by whom the person's identity must be 'reasonably ascertained' - the community at large, a significant section of the community or those who know the person or circumstances well - in order for information to be 'personal information'. For a thorough discussion of the definition of 'personal information' see R Fraser 'Freedom of information and privacy: some recent developments and issues' (1994) 54 *FOI Review* 74 and P Bayne 'The concepts of 'information relating to personal affairs' and 'personal information' (1994) 1 *AJAL* 226.

⁵ All States except WA have retained 'personal affairs'. One of the reasons for moving to 'personal information' was to ensure that work related information, eg, work performance information, which did not constitute 'personal affairs', would be covered by the amendment provisions of Pt V of the FOI Act. Another seems to have been to make the FOI and Privacy Acts uniform in this respect.

⁶ See, eg, *Re Tadeusz Slezankiewicz and AOTC (No 2)* (unreported) AAT 1 July 1992 D296 (information in workshop records that dealt with the manner in which jobs had been done and did not refer to the applicant by name); *Re Jackson and Department of Social Security* (unreported) AAT 6 November 1991 D286 (a series of ticks on a form in the boxes next to questions about a person's private life). In *Re Russell Island Development Association and Department of Primary Industries and Energy* (1994) 33ALD 683 the AAT left open the question whether information that discloses that a person held a particular view, or made representations about an issue, at a particular time is personal information.

⁷ 1(b), (e). IPP 11 is reproduced in full at Appendix E.

an individual's privacy.⁸ Given that the Privacy Act is the principal legislation dealing with personal privacy, s 41 should be guided by the Privacy Act.

DP 59 proposal

10.5 ***Personal information to be generally exempt.*** DP 59 proposed that s 41 should be amended to reflect more closely the form of IPP 11 by providing that personal information is exempt unless it falls within specified exceptions. The proposed exceptions, which differed from those in IPP 11, included where the person consents to the disclosure, where disclosure would reveal specified information about a public servant and where disclosure would, on balance, be in the public interest.⁹ This proposal reflected the approach taken in the WA FOI Act.¹⁰ A number of submissions support the proposal,¹¹ although some do so with reservations, principally about the limited protection provided for the personal information of public servants. Other submissions prefer the current wording of s 41 and consider the proposal to be an over-reaction to the difficulties that can be experienced with s 41.¹²

10.6 ***Review no longer favours this approach.*** The Review no longer considers that s 41 should be reworded as proposed in DP 59. There should be no presumption that personal information is exempt, particularly given the width of the definition of 'personal information'. It would not be in keeping with the general philosophy of the FOI Act - that information should be disclosed unless harm will result from disclosure - to provide a general exemption for personal information, even with a range of exceptions.¹³ To do so would run the risk that personal information would be withheld merely because it did not fall within one of the exceptions prescribed in the Act.

s 41 should be clarified

10.7 While not favouring a presumption that personal information is exempt, the Review nevertheless considers that s 41 should be amended to make clearer the relationship between FOI and privacy. As a starting point, s 41 should provide that information the disclosure of which would constitute a breach of IPP 11 is exempt. However, in the FOI context there is an additional dimension which is not reflected in the exceptions to IPP 11 - the public interest. In the current s 41 the word 'unreasonable' incorporates a public interest test.¹⁴ Whether disclosure is 'unreasonable' depends whether the public interest factors that favour disclosure outweigh the privacy interests of the third party. To reflect this, an agency should be required to consider whether, in respect of a particular document, disclosure would be in the public interest notwithstanding that disclosure would breach IPP 11. If at some time in the future IPP 11 was amended to incorporate a public interest exception, this additional factor would no longer be necessary.¹⁵ The Review recommends that s 41 be re-worded to provide that a document is exempt if it contains personal information, the disclosure of that information would constitute a breach of IPP 11 and disclosure would not, on balance, be in the public interest.¹⁶ As well as helping to clarify the relationship between FOI and privacy, this recommendation will identify clearly the various elements of s 41 that are currently bound up in the phrase 'unreasonable disclosure of personal information'.

⁸ Privacy Act s 13.

⁹ Proposal 6.22.

¹⁰ Sch 1 cl 3; FOI Regulations 1993 reg 9.

¹¹ eg H Sheridan & R Snell *Submission 58*; State Records (SA) *Submission 92*.

¹² eg The Public Policy Assessment Society *Submission 4*; ASC *Submission 57*; Dept of Employment, Education and Training *Submission 60*; Dept of Immigration and Ethnic Affairs *Submission 87*.

¹³ Comments by Heerey J in *Colakovski v AOTC* (1991) 100 ALR 111, 123 seem to infer that personal information should only be released under the FOI Act if there is a positive public interest favouring disclosure. This would impose a barrier on obtaining access to personal information held by the government that does not apply to other sorts of government-held information.

¹⁴ See *Colakovski v AOTC* (1991) 100 ALR 111.

¹⁵ The Review notes that comments adopted by the Human Rights Committee indicate that 'arbitrary interference' in Article 17 of ICCPR means interference that is not reasonable in the particular circumstances: International Human Rights Instruments *Compilation of general comments and general recommendations adopted by Human Rights Treaty Bodies* 29 July 1994, 22 (HRI/GEN/1/Rev.1).

¹⁶ In deciding for the purpose of s 41 whether disclosure would constitute a breach of IPP 11, the exception in IPP 11 1(d) for disclosure required or authorised by or under law should be ignored in so far as it relates to release of information under the FOI Act. This will avoid any circularity that may otherwise arise from having a direct reference to IPP 11 in s 41.

Recommendation 59

Section 41 of the FOI Act should be redrafted to provide that a document is exempt if

- (i) it contains personal information
- (ii) its disclosure would constitute a breach of IPP 11 of the Privacy Act and
- (iii) its disclosure would not, on balance, be in the public interest.

No legislative prescription as to what is exempt under s 41

10.8 Agencies will still have to weigh up various factors on a case-by-case basis to determine whether a document falls within s 41. The Review considered whether the Act should go further and prescribe circumstances in which personal information is or is not exempt. This has been done in other jurisdictions and could possibly make this exemption easier for agencies to use.¹⁷ The Review considers that such an approach would not provide sufficient flexibility. Variations in the circumstances of a particular case could not be taken into account, which may result in information being incorrectly classified.

Guidelines

10.9 The FOI Commissioner should, however, issue guidelines to assist agencies determine whether information is exempt under s 41.¹⁸ The Review envisages that those guidelines would incorporate guidelines issued by the Privacy Commissioner on IPP 11.¹⁹ The FOI Act should require the FOI Commissioner to consult the Privacy Commissioner when developing guidelines on s 41.²⁰ The two Commissioners should liaise closely about relevant developments in this area and the guidelines should be reviewed whenever necessary. If the two Commissioners came to a view that the Act itself, rather than the guidelines, should provide that certain documents are or are not exempt under s 41, they should recommend to the government that the Act be amended accordingly. The Review has no doubt that agencies are competent, particularly with the aid of guidelines, to determine whether information falls within s 41. To provide for someone other than the agency, for example, the Privacy Commissioner, to determine this question in respect of all FOI requests that include third party personal information would be unnecessary, costly and time consuming.²¹

Recommendation 60

The FOI Act should require the FOI Commissioner to consult the Privacy Commissioner before issuing guidelines on the interpretation and application of s 41.

Where the applicant has a special relationship with the third party

10.10 **Currently not relevant.** Disclosure of information under the FOI Act is effectively disclosure to the 'whole world' because the Act imposes no restrictions on the use of information released pursuant to an FOI request. As a consequence, the determination of whether a document is exempt is not influenced by the identity of the particular applicant. In the context of s 41, the Federal Court has interpreted 'unreasonable' on the basis of disclosure to anyone who may make a request, not on the basis of disclosure to the particular applicant.²² In some situations, however, there may be a special relationship between the applicant and the

¹⁷ eg in British Columbia the *Freedom of Information and Protection of Privacy Act* 1992 lists circumstances in which disclosure is presumed to be an 'unreasonable invasion of a third party's personal privacy'. These include where the personal information relates to a medical history or evaluation or eligibility for income assistance or social service benefits or indicates the third party's racial or ethnic origin, sexual orientation or religious or political beliefs or associations: s 22(3)(a), (c), (h). It also lists circumstances in which disclosure is not an 'unreasonable invasion of a third party's personal privacy', including where the information is about the person's position or remuneration as an officer or employee of a public body or expenses incurred by the person while travelling at the expense of a public body: s 22(4)(e), (h).

¹⁸ The FOI Commissioner's guidelines will be administrative only: see discussion at para 6.14.

¹⁹ The Review understands that the Privacy Commissioner plans to issue guidelines on IPP 11 in the near future.

²⁰ The Review also recommends that the FOI Commissioner should be required to consult the Privacy Commissioner in respect of guidelines on access to and amendment of personal information: see recommendation 16.

²¹ DP 59 sought comment on a suggestion made to the Review that agencies are not capable of assessing the public interest in the context of s 41: issue 6.24. Submissions overwhelmingly reject the suggestion: see, eg, Cth Ombudsman *Submission* 53; Dept of Immigration and Ethnic Affairs *Submission* 87; Dept of Veterans' Affairs *Submission* 24.

²² See, eg, *Colakovski v AOTC* (1991) 100 ALR 111; *Searle Australia Pty Ltd v PIAC and Dept of Community Services and Health* 108 ALR 163, 179. The AAT has also interpreted 'unreasonable' on the basis of disclosure to the general public: eg *Green and AOTC* (unreported) AAT 21 August 1992 D298.

third party which, as a practical matter, is a relevant consideration in determining whether the particular applicant should have access to the information. Examples of such relationships include those between a parent and his or her child, between a husband and wife and between a disabled person and his or her carer. There are two ways in which a special relationship could be reflected in the exemptions. First, by permitting the disclosure of exempt documents to the person in the special relationship, subject to conditions. Second, by permitting special relationships to be taken into account in applying the exemption.

10.11 ***Disclosure subject to conditions.*** In 1987 the Senate Standing Committee on Legal and Constitutional Affairs recommended that the AAT and the courts should be able to release documents that would otherwise be exempt under s 41 or s 43(1)(c)(i) subject to undertakings by the applicant as to how the documents will be used.²³ The Review does not support this recommendation. It would be difficult, particularly for the AAT, to enforce such conditions and, in any case, enforcement action would come too late. Any damage the conditions were designed to guard against would already have been done. In addition, if it was considered appropriate to allow the AAT and the courts to release documents subject to conditions, it would be logical also to allow agencies to do so. The difficulty of enforcing conditions imposed by an agency would be even greater than in respect of the AAT and the courts.

10.12 ***Relevant consideration in applying s 41.*** The Review considers that amending the Act to permit an agency to take into account a special relationship between the applicant and the third party when determining whether the public interest in disclosure outweighs any interference with the third party's personal privacy is a preferable option. Such an amendment would not mean that the existence of a special relationship would automatically preclude the document from being exempt. It will merely be a relevant factor in determining whether the information should be withheld. There will be circumstances, for example a situation involving domestic violence, where the special relationship will contribute to the conclusion that disclosure is not, on balance, in the public interest.²⁴ The important thing is that the relationship will be a factor that can properly be taken into account. By 'special relationship' the Review means a close relationship, generally a family relationship. It does not mean any situation in which the requested information is of special significance to the applicant, as opposed to the general public. The FOI Commissioner's guidelines should explain this and provide examples. The guidelines should also make clear, however, that in weighing the public interest in the applicant being given access to the information, the decision maker should take into account the fact that there is nothing in the legislation to prevent a successful applicant from distributing the information more widely.

Recommendation 61

Section 41 of the FOI Act should be amended to provide that in weighing the public interest in disclosure an agency may have regard to any special relationship between the applicant and the third party.

Public servants' personal information

10.13 ***DP 59 proposed limited exemption.*** It is open to agencies to determine that names and other personal information of public servants that relates to the carrying out of their duties are exempt under s 41. If abused, this can defeat one of the objects of the Act - to open the bureaucracy to scrutiny - and thereby bring the Act into disrepute. In an attempt to narrow the availability of s 41 in respect of public servants, DP 59 proposed that details of an officer's name, position in the agency, qualifications relevant to that position, job description and anything done by the person in the course of performing the job should not be exempt.²⁵ The Merit Protection and Review Agency is concerned that the phrase 'anything done by the person in the course of performing the job' would make accessible all information obtained in the course of an investigation, for example an investigation into a case of sexual harassment in the public service, so long as it concerned public servants in the course of their jobs.²⁶ The Department of Immigration and Ethnic Affairs advises that

²³ para 13.13-13.21; 14.28. The AAT cannot order the release of exempt documents: FOI Act s 58(2). See further at para 8.5.

²⁴ The Dept of Family and Community Services (SA) points out the potential complexities of requests by parents for access to information about their children and stresses the need for children to be consulted regarding the disclosure of information about them if they are sufficiently mature: *Submission 28*.

²⁵ See proposal 6.22.

²⁶ *Submission 47*. See also Australia Post *Submission 44*; ASC *Submission 57*.

public servants and public sector contractors are sometimes harassed and intimidated as a consequence of their employment.²⁷

10.14 Review's view. Individuals do not forfeit all right to privacy when they become employees of the government. It is clear, however, that in light of the objectives of the FOI Act, public servants are entitled to less privacy protection than other citizens in relation to their official duties. The Act cannot serve its purpose if it is administered in a way that maintains the traditional anonymity of public servants.²⁸ This is recognised by the Privacy Commissioner.

The disclosure of personal information of public servants as it relates to the performance of their duties for the government does not unduly threaten personal privacy and reflects the democratic objectives of FOI ... However, there would be situations which would warrant non-disclosure, for example, there could in some situations be reasonable security or other concerns which would justify non-disclosure of an officer's identity.²⁹

The Review acknowledges that there may be circumstances in which disclosure of public servants' personal information would constitute an interference with privacy that is not outweighed by any public interest in disclosure, for example, where an officer has been harassed. These instances will, however, be exceptions to the general principle that personal information about public servants that relates to the performance of their public duties, for example, information that identifies an officer as the person responsible for an action performed in the course of his or her duties and information about the position, functions or remuneration of an officer, should be accessible. The guidelines to be issued by the FOI Commissioner should make this clear and should indicate the limited circumstances in which exemption may be justified.³⁰ If this arrangement proves unsatisfactory, consideration should be given to specifying in the FOI Act itself categories of personal information of public servants that are not exempt under s 41.³¹

Consultation with third parties

10.15 Section 27A. Under the FOI Act an agency must consult with a third party before releasing his or her personal information if the agency determines that the person might reasonably wish to contend that the information is exempt and it is 'reasonably practicable' to consult.³² To assist agencies to determine when a person might reasonably wish to contend that the document is exempt, s 27A(1A) lists factors to which the agency must have regard.³³ Consultation can be time consuming and delay the processing of an FOI request. It is important, therefore, that it is only done when really necessary.³⁴ It is also important that wherever possible consultation in respect of a portion of an FOI request does not delay the entire request.³⁵

10.16 Reducing unnecessary consultation. The Review suggests two steps agencies could take to avoid the delay of unnecessary consultation. First, applicants seeking third party personal information should be advised, either before they make a request or shortly after, that the third party's consent would expedite their request. If the third party is known to the applicant and is happy for the applicant to receive the information, the applicant may be able to provide the necessary consent much more quickly than the agency will be able

²⁷ eg some interpreters contracted by the Dept request that their names not be recorded, or not be disclosed, because they fear ramifications from being connected with unfavourable decisions within their ethnic communities: *Submission 87*.

²⁸ In *Commissioner of Police v District Court of NSW and Perrin* (1993) 31 NSWLR 606 Kirby P stated that the FOI Act was not intended to protect the 'traditional anonymity' of public servants. He held that the name of an officer doing no more than the apparent duties of that person could not properly be classified as information concerning the 'personal affairs' of that person.

²⁹ Privacy Commissioner *DP Submission 81*.

³⁰ New FOI Memo 94, issued by the Attorney-General's Dept after consultation with the Privacy Commissioner, deals to a certain extent with these issues.

³¹ The Review notes that British Columbia's *Freedom of Information and Protection of Privacy Act 1992* provides that disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff: s 22(4)(e).

³² s 27A.

³³ These include the extent to which the personal information is well known and whether the person to whom the personal information relates is known to be associated with the matters dealt with in the document.

³⁴ In 1994 the Dept of Human Services and Health wrote to the ALRC seeking approval to release minutes of a meeting held 18 years ago at which the Commissioner responsible for the ALRC's project on Human Tissue Transplants was present in his official capacity. The minutes refer to comments made by the Commissioner about the ALRC's report which was published in 1977. While this consultation was undertaken under s 135 of the *National Health Act 1953* (Cth), rather than for the purpose of an FOI request, it nevertheless indicates the extremes to which the need for consultation with third parties can be taken.

³⁵ The Ombudsman's latest annual report notes an instance of an agency holding up an entire request because of consultation with third parties on only a few relevant documents: *Annual Report 1994-95* AGPS Canberra 1995, 37.

to obtain it.³⁶ Second, if it is not clear from the nature or circumstances of the request whether the applicant really wants the third party personal information covered by the request, agencies should make as much effort as possible to ascertain from the applicant whether he or she is interested in obtaining that information before starting to consult. In doing so, the agency should reveal as much information as possible (without infringing s 41) to enable the applicant to determine whether he or she is interested in obtaining the third party information. If the applicant is not interested in the third party personal information, the agency will be able to delete the personal information, avoid consulting the third party and comply with the request more quickly - to the benefit of both the applicant and the agency. This approach should be an integral part of the way agencies deal with FOI requests that include third party personal information. The guidelines to be issued by the FOI Commissioner should make this clear.³⁷ Agencies might like to consult the FOI Commissioner about whether consultation is necessary or practicable in a particular instance.³⁸

Recommendation 62

The guidelines on consultation should provide that

- (i) agencies should, where suitable, advise the applicant that the consent of the third party would expedite their request for third party personal information
- (ii) if it is not clear from the nature or circumstances of the request whether the applicant really wants the third party personal information covered by the request, agencies should make as much effort as possible to ascertain from the applicant whether he or she is interested in obtaining that information before starting to consult.

10.17 ***Revealing the applicant's identity to the third party.*** There is a question whether the identity of the applicant should be revealed to the third party by the agency during consultation. There is nothing in the FOI Act to prevent an agency identifying the applicant to the third party. IPP 11 would, however, have to be borne in mind. Some consider that, as the applicant will not be restricted in how he or she uses the information if the request is successful, the identity of the applicant is irrelevant and to disclose it to the third party may give the third party a false expectation that the information will go no further than the applicant.³⁹ On the other hand, it could be considered that the identity of the applicant is relevant to the third party's consideration of whether they consider the document to be exempt. If the third party does not know who is seeking the information, they may object to release of the information when, if they knew who the applicant was, they would not object.⁴⁰ The Review considers that agencies should be able to exercise discretion in this matter. It will, however, generally be desirable to give the applicant an opportunity to comment before his or her identity is disclosed to the third party and also to remind the third party that if the information is disclosed the applicant will not be prevented from distributing it as he or she sees fit.

Joint personal information

10.18 Information that is personal information of both the applicant and another person is commonly referred to as joint personal information. Requests for this information are problematic if the third party does not want the applicant to have access to the information. They involve both privacy aspects of FOI - the applicant's right to gain access to information that is about him or her and the need to protect the privacy of the third party. It has been held by the ACT AAT that the fact that the information involves personal information of the applicant is a relevant factor in applying s 41 to joint personal information.⁴¹ The Review has recommended that the fact that a document contains personal information of the applicant should be taken into account in determining whether it is in the public interest to grant access to the applicant.⁴² This will enable an applicant to argue that the public interest in him or her getting access to his or her personal

³⁶ This will not be an option in all cases but in respect of requests made to some agencies, eg, the Dept of Immigration and Ethnic Affairs, it often will be.

³⁷ The guidelines should also stress the need for the agency to be careful that in ascertaining whether an applicant wants access to the third party information it does not disclose information that would itself be exempt under s 41.

³⁸ Submissions generally support the Review's proposal in DP 59 that agencies should be able to seek the advice of the FOI Commissioner on whether consultation is necessary or practicable in a particular instance: proposal 6.26.

³⁹ New Memo 94 states that the name of the FOI applicant should not be disclosed during consultation: para 12, Attachment A.

⁴⁰ The decision whether a document is exempt remains the agency's regardless of the view of the third party but those views will, undoubtedly, have some influence on the agency's decision.

⁴¹ eg *Re Carter and Dept of Health* (unreported) ACT AAT 23 January 1995. See also *Munday and Commissioner for Housing* (unreported) ACT AAT 28 March 1995.

⁴² See recommendation 6.

information outweighs the potential interference with the other person's privacy and that the joint personal information is not, therefore, exempt. The outcome of such an argument will of course depend on the circumstances of the particular case.

'Dob ins'

10.19 **A difficult area.** 'Dob in' is the description commonly used by agencies to refer to information that alleges that a person is involved in some form of wrongdoing.⁴³ Individuals the subject of 'dob ins' often use the FOI Act to seek the identity of the informer and, if they have not already been advised of it, the exact nature of the allegation. Consultations and submissions indicate that this can be a very difficult aspect of FOI administration, for both agencies and applicants. The Review received a number of submissions expressing concern about the use of 'dob ins' including the failure of agencies to advise the subject immediately a 'dob in' is received and provide an opportunity to respond, the preparedness of agencies to act on anonymous 'dob ins' and the failure of agencies to ensure that 'dob ins' are not merely vindictive fabrications.⁴⁴ Agencies have been known to claim s 37(1)(b) (existence or identity of a confidential source of information), s 40(1)(d) (substantial adverse effect on the proper conduct of the operations of an agency), s 45 (breach of confidence) and s 41 to avoid disclosing the identity or contents of 'dob ins'. Whether the information qualifies for exemption will depend on the circumstances of the particular case. It may be very important in some situations that the identity of the informer not be disclosed.⁴⁵ Disclosure of the allegation itself would be less likely to be unreasonable than disclosure of the identity of the informer, particularly as the substance of the 'dob in' will presumably contain personal information of the applicant if the applicant is the person who has been 'dobbed in'.

10.20 **Need for great care.** The Review acknowledges that 'dob ins' are part of a continuum of situations that ranges from police informers, to citizens' responses to police appeals for information about breaches of the law, to whistleblowers. There is currently no government-wide protocol for how agencies should deal with these situations. While the Review makes no recommendations about the application of exemptions to 'dob ins', it does urge agencies to be very careful about what they do with them and give serious consideration to discarding them if they do not propose to investigate them or if the allegations have been investigated and found to be unsubstantiated. Agencies should be particularly careful when dealing with anonymous allegations. Where the identity of the 'informer' is known to the agency, the agency should ensure that he or she appreciates the seriousness of making a false allegation.⁴⁶ Agencies should, as a general rule, immediately advise the person who is the subject of an allegation of the substance of the allegation and invite him or her to respond.⁴⁷ The Review understands that this is standard practice in some State agencies.⁴⁸

Indirect disclosure of personal information: s 41(3)

10.21 If an agency considers that disclosure directly to an applicant of information about the applicant which was prepared by a 'qualified person' such as a medical practitioner, psychiatrist or social worker would be detrimental to the applicant's physical or mental health, it may release the information to the applicant via a person who carries on the same occupation as the qualified person who prepared the information.⁴⁹ This provision is supposed to ensure that people receive 'disturbing' personal information in a supportive environment. It appears to the Review, however, that the provision does not necessarily guarantee this and is open to abuse by agencies. The NSW Privacy Committee considers there are very few cases where disclosure could harm a person and suggests that the provision should be carefully limited.⁵⁰ The Review

⁴³ eg that the person is engaged in conduct that would disentitle them to the government benefit he or she is currently receiving.

⁴⁴ eg G Hayes *Submission 23*; G Vandenberg *Submission 12*; N Boonyasilp *Submission 2*.

⁴⁵ The Dept of Family and Community Services (SA) *Submission 28* cites as an example the identity of a person who makes a child abuse notification. Apart from the fact that the disclosure of that information is prohibited by another law, confidentiality is a strong weapon in a child protection program.

⁴⁶ One submission suggests that when an individual wishes to give information to a Dept he or she should be required to sign an affidavit on oath and should be advised that if the information is false (and vindictive) he or she is liable to prosecution: N Boonyasilp *Submission 2*.

⁴⁷ There may be some cases, for example where secrecy is necessary in order to investigate the allegation further, in which this would not be possible.

⁴⁸ The Review also notes that the British Columbia *Freedom of Information and Protection of Privacy Act 1992* provides that an agency must, on refusing to disclose personal information supplied in confidence about an applicant, give the applicant a summary of the information unless the summary cannot be prepared without disclosing the identity of the person who supplied the information: s 22(5). The agency may allow the third party to prepare the summary: s 22(6).

⁴⁹ s 41(3). 'Qualified person' also includes psychologist and marriage guidance counsellor: see s 41(8).

⁵⁰ *IP Submission 16. The Report of the Inquiry into the Use of Pituitary Derived Hormones in Australia and Creutzfeldt-Jakob Disease* accuses the Dept of Health of undermining the spirit of FOI legislation by insisting that information be made available only through a medical

agrees that it will be extremely rare that the disclosure of information to an applicant will result in injury to the applicant. If, however, an agency does reasonably apprehend that disclosure of information about the applicant will result in serious, imminent injury to the applicant, it should be obliged to disclose the information in a way that will minimise the foreseen risk. This may or may not involve disclosure via the applicant's medical practitioner. Given that the purpose of the obligation is to prevent apprehended injury, the Review sees no reason why it should be limited to situations in which the relevant information is of a type currently specified in s 41(3). It should arise in respect of any information about the applicant.⁵¹

Recommendation 63

Section 41(3) of the FOI Act should be amended to provide that if an agency reasonably apprehends that the applicant, upon receiving a document requested under the FOI Act which includes information about the applicant, is likely to cause serious injury to himself or herself, the agency must disclose the information in a way that minimises that risk.

Section 41(4)

10.22 If an agency releases a medical or psychiatric report to an applicant it must, if reasonably practicable, advise the person who prepared the report that it has been released to the applicant.⁵² The Department of Veterans' Affairs advises that this requirement is resource intensive and queries the need for it, particularly in respect of reports that were commissioned in such a way that the doctor understood that access might later be given to the subject of the report.⁵³ The Review does not consider that there is any need for s 41(4) and recommends that it be repealed.⁵⁴

Recommendation 64

Section 41(4) of the FOI Act should be repealed.

Disclosure in accordance with the FOI Act should not breach the Privacy Act

10.23 '**Required or authorised**'. The prohibition in IPP 11 against release of third party personal information contains an exception for disclosure of personal information that was 'required or authorised' by or under law.⁵⁵ Consequently, release of personal information pursuant to an FOI request is unlikely to breach IPP 11. Even if the Privacy Commissioner considered that the information in question was exempt, and thus not 'required' to be disclosed, its disclosure would probably be considered to be 'authorised'. However, the meaning of 'authorised' in this context is not clear. On one view, any release of information pursuant to a request made under the FOI Act is an 'authorised' release of information. On another view, the FOI Act does not 'authorise' the release of information because s 14 of the Act makes it quite clear that nothing in the Act prevents the release quite apart from the Act of information that can be properly released⁵⁶

10.24 **Clarification**. The potential for an agency to be found by the Privacy Commissioner to have breached IPP 11 in respect of information disclosed pursuant to the Act and in accordance with the consultation requirements of the Act is probably small. Nonetheless the Review considers that in the interest of certainty

practitioner. While the release of information in question was actually made under the *National Health Act* 1953 (Cth) s 135A and not the FOI Act, the Report expressed the view that s 41(3) of the FOI Act is intended to provide for release through a medical practitioner only in the case of severe mental illness: AGPS Canberra 1994, 703.

⁵¹ eg an agency may fear that disclosure to an applicant of the results of a staff survey about his or her performance is likely to cause the applicant to injure himself or herself. The agency should be obliged to disclose that information in a way that reduces the likelihood of injury even though it is not information that is currently covered by s 41(3).

⁵² s 41(4).

⁵³ *IP Submission 24*.

⁵⁴ If disclosure of the report to the applicant would be likely to endanger the life or physical safety of any person, including the person who wrote the report, the document would be exempt under s 37(1)(c). If the report contained personal information of the author which the agency considered the author may wish to claim is exempt, the agency would be required under s 27A to consult the author before making a decision to release the document.

⁵⁵ 1(d).

⁵⁶ ie the Act does not establish what information can be released but rather what information can be withheld.

this issue should be clarified.⁵⁷ It recommends that the Privacy Act should be amended to provide that a release of personal information under the FOI Act constitutes a release that was 'required or authorised by law' for the purpose of IPP 11(d) provided the consultation requirements in the FOI Act were complied with. This will eliminate any possible confusion about the meaning of IPP 11 1(d) in so far as it relates to a release of information under the FOI Act. If an agency releases information pursuant to an FOI request without having regard to the provisions of the Act relating to consultation it would be open to the Privacy Commissioner to find that the agency had breached IPP 11 and to make a declaration, including that the complainant is entitled to compensation for any loss or damage suffered by reason of the information being released.⁵⁸

Recommendation 65

The Privacy Act should be amended to provide that a release of personal information under the FOI Act is deemed to be disclosure that was 'required or authorised by law' for the purposes of IPP 11 1(d), provided the consultation requirements in the FOI Act were complied with.

Legal professional privilege - s 42

The exemption should be self-contained

10.25 **Proposal in DP 59.** Section 42(1) exempts from disclosure any document that would attract legal professional privilege in legal proceedings.⁵⁹ The phrase 'legal professional privilege' is not defined in the Act. Accordingly, the provision operates by reference to the general law under which a document is privileged if it was created for the sole purpose of seeking or providing legal advice or for the sole purpose of use in legal proceedings.⁶⁰ The privilege is the client's and can be waived expressly or by implication. DP 59 proposed that s 42 should be redrafted to reflect the client legal professional privilege provisions in the *Evidence Act 1995* (Cth) (Evidence Act).⁶¹ These provisions mirror the common law of legal professional privilege with one significant variation: the privilege applies where the document was prepared for the dominant, rather than the sole, purpose of seeking or providing legal advice or use in legal proceedings.⁶² The proposal has considerable support in submissions.⁶³

10.26 **Review's position.** The Review no longer considers that the Evidence Act formulation of legal professional privilege should be imported into the FOI Act. Replacing the sole purpose test with the dominant purpose test would broaden the exemption unacceptably and enable agencies to withhold documents that contain policy advice as well as legal advice.⁶⁴ Nevertheless, the Review considers that s 42(1) should contain an explanation of the common law of legal professional privilege. This would effectively make the exemption self-contained and thus easier for applicants and agencies to understand. The sole purpose test ensures that s 42 cannot be used to exempt advice the Commonwealth receives from lawyers it engages or employs that is not solely legal advice, for example, advice that contains policy advice.⁶⁵ A document that contains policy advice as well as legal advice may of course be exempt under another exemption, for example s 36 (deliberative process documents). The Review considers that the Act

⁵⁷ The Dept of Immigration and Ethnic Affairs *IP Submission 84* expressed concern to the Review about the potential for an agency that acted in accordance with the FOI Act to be found to be in breach of the Privacy Act.

⁵⁸ Privacy Act s 52.

⁵⁹ Guidelines and manuals on decision making that are publicly available under s 9 are not exempt: s 42(2).

⁶⁰ *Grant v Downs* (1976) 135 CLR 674; *Baker v Campbell* (1983) 49 ALR 385.

⁶¹ Proposal 6.27.

⁶² s 117-119.

⁶³ eg Minter Ellison *Submission 22*; Public Service Commission *Submission 32*; PIAC *Submission 34*; Telstra *Submission 45*; Australian Consumers' Association *Submission 55*; ASC *Submission 57*; Dept of Employment, Education and Training *Submission 60*; Dept of Prime Minister and Cabinet *Submission 82*.

⁶⁴ The Evidence Act formulation of legal professional privilege only applies to material adduced in court. The sole purpose test still applies in the context of discovery.

⁶⁵ In *Re Proudfoot and Human Rights and Equal Opportunity Commission* (1992) 28 ALD 734 the AAT held that legal advice given by a qualified lawyer employed by the government can be privileged provided the lawyer holds a current practising certificate, is acting in his or her capacity as professional legal adviser and the advice is confidential. Note that the *Judiciary Act 1903* (Cth) s 55G provides that lawyers employed by the Attorney-General's Dept are entitled to practise as solicitors or barristers whether or not they hold practising certificates.

should also make clear that if the client has waived legal professional privilege at common law s 42 will not apply.⁶⁶

Recommendation 66

Section 42(1) of the FOI Act should be redrafted to provide that a document is exempt if it was created for the sole purpose of

- (i) seeking or providing legal advice or
- (ii) use in legal proceedings.

Recommendation 67

The FOI Act should be amended to make it clear that s 42 does not apply if the client has waived legal professional privilege at common law.

Section 42 and the public interest

10.27 In *Waterford v Department of the Treasury* the Federal Court held that a public interest test could not be implied into s 42 by reference to the object clause.⁶⁷ DP 59 proposed that s 42 should be made subject to an express public interest test because there may be circumstances, albeit limited, where the public interest in disclosure would outweigh any harm that would flow from releasing a privileged document.⁶⁸ Several submissions support the proposal.⁶⁹ Those who oppose it consider that introducing a public interest test would erode the privilege unacceptably. Minter Ellison, for example, considers there are compelling policy reasons for legal professional privilege to remain absolute, the chief one being the need for certainty.⁷⁰ The Review has reconsidered its position on this issue and no longer considers that s 42 should be subject to a public interest test. safeguarding legal professional privilege is inherently in the public interest.

Although the public interest in having all relevant evidence available is, to an extent, defeated by [legal professional] privilege, there is no occasion for the courts to undertake a balancing of public interests: the balance is already struck by the allowing of the privilege.⁷¹

The FOI Commissioner's guidelines should encourage agencies not to claim the privilege for the Commonwealth's own documents without considering whether in the particular case it could waive the privilege and release the document without any harm resulting. Where the privilege belongs to a third party, an agency should not waive the exemption unless the third party has previously waived the privilege or advised the agency that it is happy for the document to be released pursuant to the FOI request.

Business affairs - s 43

Scope of the exemption

10.28 **Current provision.** Section 43 exempts from disclosure trade secrets⁷² and information with a commercial value that could be destroyed or diminished by disclosure.⁷³ It also exempts information that concerns a person, organisation or undertaking in respect of business, professional, commercial or financial affairs if release either would, or could reasonably be expected to, have an unreasonable adverse affect on

⁶⁶ See *Re Dwyer and Dept of Finance* (1985) 8 ALD 474 and *Re Maher and Attorney-General's Dept* (1986) 13 ALD 98 cf *Re Colonial Mutual Life Assurance Society Ltd and Dept of Resources and Energy* (1987) 12 ALD 251.

⁶⁷ (1985) 7 ALD 93. See also *Re Dwyer and Dept of Finance* (1985) 8 ALD 474.

⁶⁸ Proposal 6.27. The High Court has held that in the context of the general law it would be contrary to the public interest to allow legal professional privilege to be used to protect communications made to further a deliberate abuse of statutory power: *Attorney-General v Kearney* (1985) 61 ALR 55.

⁶⁹ eg Public Service Commission *Submission 32*; H Sheridan & R Snell *Submission 58*; PIAC *Submission 34*.

⁷⁰ *Submission 22*. The proposal is also opposed by Dept of Family and Community Services (SA) *Submission 28*; Australia Post *Submission 44*; Telstra *Submission 45*; ASC *Submission 57*; Dept of Employment, Education and Training *Submission 60*; Dept of Prime Minister and Cabinet *Submission 82*; Dept of Immigration and Ethnic Affairs *Submission 87*; Law Institute of Victoria *Submission 90*.

⁷¹ *Carter v Managing Partner, Northmore Hale Davy and Leake* (1995) 129 ALR 593, 596.

⁷² s 43(1)(a). 'Trade secret' is not defined in the Act and is, therefore, given its common law meaning. Trade secrets need not be technical in nature. Whether information is a trade secret is to be determined on the facts in each case: *Searle Australia Pty Ltd v PIAC* (1992) 36 FLR 111.

⁷³ s 43(1)(b).

business or could reasonably be expected to prejudice the future supply of information to the Commonwealth.⁷⁴ The purpose of s 43 is

to protect, within reasonable limits, the interests of third parties dealing with an agency or undertaking and supplying information to it in the course of that dealing.⁷⁵

Before releasing a document that contains business information, an agency must, where reasonably practicable, consult the person or organisation involved.⁷⁶

10.29 DP 59 proposal. DP 59 proposed that the subsections applying to trade secrets and information with commercial value should be repealed as such information would be exempt under the limb relating to adverse effects on business.⁷⁷ Some submissions support the proposal⁷⁸ but it is strongly opposed by agencies and business.⁷⁹ They claim that providing express protection for this material provides certainty that would not exist if agencies had to argue that it fell within the broader limb. The Review accepts this argument. An express exemption for trade secrets is necessary to ensure certainty of protection for third parties' intellectual property rights.⁸⁰ Section 43(1)(b) is necessary to ensure that agencies are able to withhold information that is unrelated to business or professional affairs but that, nevertheless, has a commercial value that would be diminished or destroyed by disclosure. An example would be a document lodged with the government containing valuable research results.⁸¹

Competitive commercial activities of agencies

10.30 Section 43 has been held not to exempt documents that relate to the commercial activities of federal agencies, despite the apparently clear wording of s 43(3).⁸² As a result, Schedule 2 Part II was introduced to protect certain agencies' documents that contain information about their competitive commercial activities.⁸³ Some of the agencies in Schedule 2 Part II are GBEs.⁸⁴ DP 59 proposed that s 43 be amended to put beyond doubt its application to the competitive commercial activities of agencies.⁸⁵ Submissions generally support the proposal on the basis that it will promote effective competition.⁸⁶ The Review recommends that s 43 be amended as proposed. It is preferable that the competitive commercial activities of agencies be protected by s 43 than by means of a schedule to the Act.⁸⁷

Recommendation 68

Section 43 of the FOI Act should be amended to make clear that it applies to documents that contain information about the competitive commercial activities of agencies.

Section 43 and the public interest

10.31 While the use of the term 'unreasonably' in s 43(1)(c)(i) imports a public interest test into that subsection,⁸⁸ there is no obligation on agencies to have regard to the public interest in the other parts of s 43. The Review considered whether the whole of s 43 should be made subject to an express public interest test and, if so, whether there should be any distinction between documents relating to the government's

⁷⁴ s 43(1)(c).

⁷⁵ *Harris v Australian Broadcasting Corporation* (1983) 50 ALR 551, 565.

⁷⁶ s 27.

⁷⁷ Proposal 6.28.

⁷⁸ eg The Public Policy Assessment Society *Submission 4*; PIAC *Submission 34*; Australian Consumers' Association *Submission 55*.

⁷⁹ eg Qld Chamber of Commerce & Industry *Submission 6*; Australia Post *Submission 44*; Avcare *Submission 73*; Treasury *Submission 80*; TPC *Submission 42*.

⁸⁰ If these rights are not protected under the FOI Act, the Commonwealth may have a constitutional obligation to compensate owners for that loss: Constitution s 51(xxxi).

⁸¹ See further in TPC *Submission 42*.

⁸² *Harris v ABC* (1983) 50 ALR 551. s 43(3) states that a reference to an undertaking in the exemption includes an undertaking carried on by the Cth, a State or a local government authority.

⁸³ Agencies listed in Sch 2 Pt II in relation to documents in respect of their competitive commercial activities include the Attorney-General's Dept, the Australian Government Solicitor and the Health Insurance Commission. Sch 2 Pt II is discussed further at para 11.14.

⁸⁴ eg Telstra, Australian Postal Corporation. GBEs are discussed in detail in ch 16.

⁸⁵ Proposal 6.29.

⁸⁶ eg Dept of Administrative Services *Submission 83*; Avcare *Submission 73*; Dept of Finance *Submission 25*.

⁸⁷ See para 11.14.

⁸⁸ *Searle Australia Pty Ltd v PIAC* (1992) 108 ALR 163, 178.

commercial activities and those of third parties.⁸⁹ Most State FOI Acts have a public interest test for all elements of the equivalent exemption.⁹⁰ A number of submissions oppose the introduction of a public interest test. They claim that it may jeopardise the flow of vital commercial information to the government and enable businesses to gain an unfair advantage over their competitors.⁹¹ The Review no longer considers that s 43(1)(a), s 43(1)(b) or s 43(1)(c)(ii) should be subject to a public interest test. These exemptions protect valuable commercial information that in many cases the Commonwealth has obtained free of charge and in the public interest. It is essential to ensure that this information continues to be available to the government and that its value is not compromised by that availability.⁹² Accordingly, the Review does not propose any change to s 43 in regard to the public interest. The FOI Commissioner's guidelines should, however, emphasise the importance of decision-makers assessing each document on its merits to determine whether it warrants exemption.

Material obtained in confidence - s 45

The exemption should continue to reflect the general law

10.32 Section 45 exempts documents the disclosure of which would found an action by a person other than the Commonwealth for breach of confidence. The provision operates by reference to the complex principles of law and equity that deal with breach of confidence. It is generally accepted that three elements must exist for a duty of confidence to arise: the information must have been supplied in a relationship of confidentiality, it must be of a confidential character (that is, not common or public knowledge) and the supplier of the information must have some interest in maintaining its confidentiality.⁹³ The complexity of the law in this area, can make s 45 difficult for agencies to apply.⁹⁴ DP 59 proposed that s 45 should be redrafted to make it self-contained so that it would be easier for applicants to understand and for agencies to apply.⁹⁵ This would effectively involve codifying the law of confidence for the purpose of the FOI Act. A number of submissions consider that codification would be beneficial because of the uncertainty and complexity of the common law.⁹⁶ On the other hand, some agencies consider that codifying the law of confidence for the purpose of s 45 would be counter-productive. They claim that the exemption should be left to develop in line with the common law rather than becoming a separate, potentially inconsistent regime.⁹⁷ The Review no longer considers that s 45 should be redrafted. The exemption should have the same scope as the common law. The FOI Commissioner's guidelines should give decision-makers detailed assistance on interpreting the law of confidence and applying s 45.

Section 45 and the public interest

10.33 DP 59 proposed that s 45 should be made subject to a public interest test.⁹⁸ A number of submissions support the proposal.⁹⁹ There is concern among agencies, however, that introducing a public interest test in s 45 will jeopardise the flow of confidential information to the government.¹⁰⁰ The Review has reconsidered its position and no longer considers that s 45 should be made subject to a public interest test. Protection of genuine confidences is inherently in the public interest. It is important, however, that the exemption is only used to withhold information that genuinely falls within it. Much information that is described as confidential is not confidential in the sense that its disclosure would found an action for breach of

⁸⁹ DP 59 proposal 6.30; issue 6.31.

⁹⁰ FOI Act (Qld) s 45(1); FOI Act (Tas) s 31, 32; FOI Act (Vic) s 34; FOI Act (WA) Sch 1, cl 4. The equivalent provision in the *Access to Information Act RSC 1985* (Can) contains a public interest over-ride where information relates to public health, public safety or protection of the environment: s 20(6).

⁹¹ eg *Treasury Submission 80*; *Australian Bankers' Association Submission 26*.

⁹² If there is a need to provide access to particular commercial information, for example because of public health implications, this would be better addressed by way of specific legislation requiring disclosure of that information by the private sector body than by narrowing the exemption in s 43.

⁹³ See *Corrs, Pavey, Whiting and Byrne v Collector of Customs* (1987) 13 ALD 254; *Smith, Kline and French Laboratories (Aust) Ltd v Secretary, Dept of Community Services and Health* (1991) 28 FCR 291.

⁹⁴ See, eg, *Dept of Immigration and Ethnic Affairs IP Submission 84*; *Treasury IP Submission 37*.

⁹⁵ Proposal 6.32.

⁹⁶ *AAT Submission 20*; *Public Service Commission Submission 32*; *Australian Consumers' Association Submission 55*; *H Sheridan & R Snell Submission 58*; *Dept of Prime Minister and Cabinet Submission 82*; *Telstra Submission 45*.

⁹⁷ *ASC Submission 57*; *Avcare Submission 73*; *Dept of Immigration and Ethnic Affairs Submission 87*; *State Records (SA) Submission 92*; *Qld Information Commissioner Submission 37*; *Aboriginal and Torres Strait Islander Social Justice Commissioner Submission 98*.

⁹⁸ Proposal 6.32.

⁹⁹ eg *PIAC Submission 34*; *H Sheridan & R Snell Submission 58*; *Australian Consumers' Association Submission 55*.

¹⁰⁰ eg *Dept of Prime Minister and Cabinet Submission 82*; *Dept of Immigration and Ethnic Affairs Submission 87*; *Dept of Human Services and Health Submission 97*.

confidence. Agencies must appreciate the various elements that go to establishing an obligation of confidence. It is essential, therefore, that the FOI Commissioner's guidelines provide decision-makers with detailed assistance on when a duty of confidence arises so as to avoid misapplication of s 45.

Confidential indigenous information

10.34 The Aboriginal and Torres Strait Islander Social Justice Commissioner considers that there should be a separate, non-waivable exemption for documents the release of which would disclose sensitive Aboriginal and Torres Strait Islander cultural information. He also suggests that the determination of whether sacred information is confidential should be made by an expert because many non-indigenous people are ignorant of its significance and complexity.

What to a non-indigenous bureaucrat seems reasonable disclosure may in effect result in harm to the person who is responsible for or connected to the knowledge included in the document in question.¹⁰¹

The Department of Prime Minister and Cabinet also expresses concern about the need to protect secret indigenous information and suggests that consideration should be given to developing an exemption referable to the special nature of confidentiality among indigenous people.¹⁰² The Review agrees that assessment of sacred indigenous information may involve unique considerations. However, it does not consider that a special exemption for confidential indigenous information is necessary because the general law of confidence encompasses such communications.¹⁰³ Nevertheless, the Review supports the Aboriginal and Torres Strait Islander Social Justice Commissioner's suggestion that decision-makers be required to consult an expert on indigenous information to determine whether its release would found an action for breach of confidence before deciding whether s 45 applies. This expert could be someone accredited by the indigenous community who liaises with the FOI Commissioner. Experts on indigenous cultural information should also be consulted by the Commissioner when developing guidelines on this exemption.

Electoral rolls and related documents - s 47A

10.35 Section 47A exempts electoral rolls and related documents from disclosure under the FOI Act.¹⁰⁴ It was inserted in 1992 in an attempt to prevent the end-use restrictions on roll data imposed by the *Commonwealth Electoral Act 1918* (Cth) (the Electoral Act) being undermined by such data being available under the FOI Act.¹⁰⁵ The end-use provisions prohibit the use of computerised roll information provided to parliamentarians and certain other groups other than for purposes related to enrolment and other prescribed purposes.¹⁰⁶ They do not apply to non-computerised roll data. DP 59 proposed that s 47A should be repealed because it does not achieve its intended purpose and is an unnecessary restriction on access to information. Current technology enables the electoral roll, which is publicly available in printed form under the Electoral Act, to be scanned and the data rearranged (for purposes such as direct marketing) anyway.¹⁰⁷ A number of submissions support the proposal.¹⁰⁸ Others consider that repeal should be delayed until other steps are taken to protect electors' privacy. The Australian Electoral Commission, for example, suggests that s 47A should be retained until the Electoral Act is amended to introduce end-use restrictions on roll data in all its forms.¹⁰⁹ The Review remains of the view that s 47A should be repealed and recommends accordingly.

¹⁰¹ Submission 98.

¹⁰² Submission 82. The unique nature of Aboriginal tribal secrets was acknowledged in the Senate Standing Committee 1979 Report para 25.14.
¹⁰³ eg in *Foster v Mountford* (1976) 14 ALR 71 the Supreme Court of the Northern Territory held that the law of confidence was available to protect oral Aboriginal tribal secrets. In that case the Court granted an interlocutory injunction to prevent the publication of a book containing detailed information about secret indigenous cultural and religious ceremonies, release of which would have caused serious social damage.

¹⁰⁴ The exemption includes electoral rolls and prints, microfiches, tapes or disks of an electoral roll, documents used in preparing an electoral roll and documents derived from an electoral roll. It does not apply to individuals who seek access to records about themselves: s 47A (3)-(5).

¹⁰⁵ *Electoral and Referendum Amendment Act 1992* (Cth). See Explanatory Memorandum (Sen) para 12. See also evidence of the Australian Electoral Commission to the House of Representatives Standing Committee on Legal and Constitutional Affairs, Inquiry into the protection of confidential personal and commercial information: 21 October 1992, 4-7.

¹⁰⁶ Electoral Act s 91, s 91A, s 91B. See *Hansard* (H of R) 16 December 1992, 3866.

¹⁰⁷ Proposal 6.34.

¹⁰⁸ eg Australian Consumers' Association Submission 55; H Sheridan & R Snell Submission 58; PIAC Submission 34.

¹⁰⁹ Submission 14. See also Privacy Commissioner DP Submission 81; Privacy Committee of NSW Submission 88. In its *In Confidence* report the House of Representative Standing Committee on Legal and Constitutional Affairs recommends that the Privacy Commissioner consider the issue of limiting access to electoral rolls or limiting the purposes for which information obtained from the roll may be used as part of a review of access to public register information: recommendation 34.

Recommendation 69

Section 47A of the FOI Act should be repealed.

11. Other exemptions and exclusions

Introduction

11.1 This chapter gives an overview of and makes recommendations for the reform of the FOI exemptions not dealt with in Chapter 9 or 10. It also deals with a number of miscellaneous exclusions from the Act.

Secrecy provisions - s 38

Scope of the provision

11.2 Section 38 provides that a document is exempt if its disclosure is prohibited by a secrecy provision in another Act *and* either that provision is listed in Schedule 3 of the FOI Act or the other Act expressly applies s 38 to the document. The exemption does not apply if the document contains personal information about the applicant.¹ An officer who makes a *bona fide* release under the FOI Act cannot be prosecuted for breach of a secrecy provision in another Act.²

Repeal of the exemption

11.3 DP 59 proposed that s 38 should be repealed after a three year 'acclimatisation' period on the basis that the FOI Act should be the primary legislation for determining when government information may be withheld from disclosure under the Act.³ Under the proposal, an agency would only be permitted to withhold a document that was requested under the FOI Act, and the disclosure of which is prohibited by another Act, if it fell within one of the other exemptions in the FOI Act. Many agencies are concerned that information currently protected by s 38 would not be exempt under any other FOI exemption.⁴ For example, the ATO considers that s 38 is essential to ensure effective protection of the large amount of confidential personal and business information it holds. It argues that if people are not confident that their information will be kept confidential they may be reluctant to provide it, thus compromising collections and prejudicing government revenue.⁵ The Review is not convinced by this argument. Taxpayer information is provided pursuant to statutory obligations, not voluntarily. In addition, taxpayer information is adequately protected under the exemptions for personal and business information.⁶ In most, if not all, cases the FOI exemptions cover government-held information currently protected by a secrecy provision. Just to take two examples:

- Section 40F(2) of the *Designs Act 1906* (Cth) provides that a person must not disclose information about the subject matter of an application for registration of a design if the Registrar of Designs has made an order that such disclosure would be contrary to the interests of the defence of the Commonwealth. Documents subject to such an order would be exempt under s 33 of the FOI Act (national security and defence exemption).
- Section 150(2)(b) of the *Child Support (Assessment) Act 1989* (Cth) provides that officers of the Department of Social Security must not disclose personal information obtained in the course of duties to any person other than the person whom it is about. Documents falling within this prohibition would be exempt under s 41 of the FOI Act (personal information exemption).

In any case, the Review considers that the exemption provisions in the FOI Act represent the full extent of information that should not be disclosed to members of the public. Secrecy provisions that prohibit the disclosure of information that would not fall within the exemption provisions are too broad.⁷ The Review considers that repealing s 38 will promote a more pro-disclosure culture in agencies. It also notes that the Department of Social Security considers that the 1994 amendments to the *Social Security Act 1991* (Cth) that

¹ s 38(2). See also *Re Coulthard and Secretary, Dept of Social Security* (1995) 56 *FOI Review* 27.

² *Actors' Equity v Australian Broadcasting Tribunal* (1984) 6 ALD 68.

³ Proposal 6.16.

⁴ eg Dept of Prime Minister and Cabinet *Submission* 82; ATSIIC *Submission* 75. The Merit Protection and Review Agency *Submission* 47 considers that a distinction should be made between secrecy provisions in existence prior to the enactment of the FOI Act and those created afterwards. It argues that in the case of the latter, Parliament intends the secrecy provision to override the FOI Act.

⁵ *Submission* 17.

⁶ s 41, s 43.

⁷ eg Public Service Regulations reg 35. See para 4.XR on the need for a review of secrecy provisions in federal legislation.

removed s 38 as an exemption for FOI applications to the Department have had no adverse effect on the Department's operations.⁸ If s 38 is not repealed, it should at least be amended so that Schedule 3 becomes a definitive list of all secrecy provisions to which the FOI Act is subject.⁹

Recommendation 70

Section 38 of the FOI Act should be repealed.

Documents relating to research - s 43A

11.4 Section 43A(1) exempts documents that contain information about research that is being, or is to be, undertaken by an officer of an agency specified in Schedule 4 where disclosure of the information before completion of the research would be likely unreasonably to expose the agency or officer to disadvantage.¹⁰ The exemption does not apply to documents that relate only to completed research.¹¹ The exemption was added to the Act in 1991 although the relevant second reading speech gives no reason for its inclusion.¹² The Review considers that s 43A should be repealed. Sections 43 (business affairs) and s 39 (financial interests of the Commonwealth) will ensure that agencies do not suffer financial disadvantage from premature release of research documents. If the only concern is to prevent damage to reputation and career by protecting the researcher's priority of publication, agencies may be able to defer access under s 21(1)(c) until the research is published.¹³

Recommendation 71

Section 43A of the FOI Act should be repealed.

Contempt of Parliament or court; Royal Commission orders - s 46

11.5 A document the disclosure of which would be in contempt of court or contrary to any order or direction of a Royal Commission¹⁴ or which would infringe parliamentary privilege is exempt under s 46. The exemption operates by reference to the general law of contempt.¹⁵ An equivalent exemption exists in several State and Territory FOI Acts.¹⁶ In commenting on the need for the s 46 exemption in the original FOI Bill the Senate Standing Committee observed that

Parliament and the courts have unique functions, and have traditionally had powers to regulate their own proceedings that have been regarded as a necessary incident to their functions. The Bill, which is designed to open to public scrutiny the operations of the Executive, should not unnecessarily interfere with the other organs of the State with consequences that cannot at the outset be entirely foreseen.¹⁷

⁸ IP Submission 39.

⁹ This would entail repeal of s 38(1)(b)(ii). The Senate Standing Committee 1979 Report (para 21.12) and 1987 Report (para 12.32) recommend that Sch 3 be exhaustive. The Qld Law Reform Commission Report No 46 *The Freedom of Information Act 1992: review of secrecy provision exemption* QLRC Brisbane 1994 recommends that the information protected by the majority of secrecy provisions should no longer be automatically exempt under the FOI Act as it is caught by other exemptions anyway. The recent report of the NSW Ombudsman *Freedom of Information: the way ahead* NSW Ombudsman Sydney 1995 is also critical of secrecy provision exemptions. The Canadian Information Commissioner has recommended that the secrecy provisions exemption in the *Access to Information Act RSC 1985* (Can) be repealed to end the practice of 'skirting the law by placing more and more statutes ... under the section': *Annual Report 1993-94* Information Commissioner of Canada Ottawa 1994, 41.

¹⁰ The CSIRO and the Australian National University are the only agencies listed in Sch 4. The term 'disadvantage' is not defined in s 43A and there are no AAT or court decisions on the provision.

¹¹ s 43A(2).

¹² *Freedom of Information Amendment Act 1991* (Cth) s 31. *Hansard* (Sen) 14 August 1991, 302.

¹³ s 21(1)(c) allows an agency to defer access if the premature release of the document would be contrary to the public interest.

¹⁴ Or other body having power to take evidence on oath: s 46(b).

¹⁵ The question under s 46(a) is whether public disclosure would constitute contempt: *Re Marjorie Cecil Altman and Family Court of Australia* (1992) 15 AAR 236. In *John Allan Witham v John William Holloway* (1995) 69 ALJR 847 the High Court held that all contempt cases (civil or criminal) would now have to be proved beyond a reasonable doubt. Note that in its report on the law of contempt the ALRC recommended that the common law of contempt be replaced by a statutory regime: ALRC Report No 35 *Contempt* ALRC Sydney 1987.

¹⁶ FOI Act (ACT) s 46; FOI Act (NSW) Sch 1 cl 17; FOI Act (Qld) s 50; FOI Act (WA) Sch 1 cl 12.

¹⁷ 1979 Report para 23.12.

The Review agrees with this view and does not see any need to change the exemption. Royal Commissioners should, however, be made aware of the need to limit orders that place restrictions on the dissemination of documents to the period in which the document is likely to be genuinely sensitive.

Companies and securities legislation - s 47

11.6 Section 47 exempts certain documents prepared in accordance with companies and securities legislation, such as documents prepared by a State for the Ministerial Council for Companies and Securities and documents the disclosure of which would reveal the deliberations or decisions of the Ministerial Council.¹⁸ DP 59 proposed that the exemption be repealed on the basis that Ministerial Council documents can be protected under other exemptions, such as that for Commonwealth/State relations (s 33A).¹⁹ The proposal is supported by all submissions that commented on this issue including that from the ASC.²⁰ The Review recommends that s 47 be repealed.

Recommendation 72

Section 47 of the FOI Act should be repealed.

Documents of courts, tribunals and the Official Secretary to the Governor-General - s 5, 6 and 6A

11.7 Sections 5, 6 and 6A bring documents of courts, certain tribunals²¹ and the Official Secretary to the Governor-General within the scope of the FOI Act if they relate to matters of an administrative nature. Other documents of these bodies are not subject to the operation of the Act. The Review considers that it is appropriate that judicial documents are excluded from the Act.

There is obviously very good reason for governments not imposing requirements which would interfere with the independence of the judiciary and the proper administration of justice.²²

The Review also considers it appropriate that documents that relate to the Governor-General's Executive prerogative are not subject to the FOI Act but that administrative documents held by the Governor-General's office are. While this will allow requests to be made for information that relates to the personal affairs of the Governor-General and his or her family, as well as to official affairs, the Review considers that the exemption provisions, particularly s 41, achieve an appropriate balance between protecting the privacy rights of the Governor-General and his or her family and allowing an adequate level of accountability for the use of public resources. No amendment of s 5, 6 and 6A is recommended.

Parliamentary departments

11.8 The parliamentary departments are currently excluded from the coverage of the FOI Act.²³ In 1979 the Senate Standing Committee expressed the view that the 'parliamentary departments should be encouraged to act as if the legislation were applicable to them'.²⁴ DP 59 proposed that the parliamentary departments should be brought within the scope of the FOI Act on the basis that documents that warrant protection would be adequately protected by the exemption provisions, for example s 46 (parliamentary privilege).²⁵ A number of submissions, including that of the Clerk of the Senate, support the proposal.²⁶ The Department of the Senate has, in any case, always acted as though it were subject to the FOI Act, releasing documents unless they

¹⁸ The exemption protects documents arising out of the National Companies and Securities Commission, although it no longer exists, if they are in the possession of a Minister or an agency: s 47(2). The Ministerial Council for Companies and Securities is now known as the Ministerial Council for Corporations. Its principal function continues to be the consideration of legislative proposals relating to the national companies and securities scheme.

¹⁹ Proposal 6.33.

²⁰ *Submission 57*.

²¹ The Australian Industrial Relations Commission, Industrial Registrar and Deputy Registrars and the Coal Industry Tribunal: s 6(a), Sch 1.

²² Senate Standing Committee 1979 Report para 12.29.

²³ They are not prescribed authorities as defined in s 4.

²⁴ Senate Standing Committee 1979 Report para 12.32.

²⁵ Proposal 6.35.

²⁶ eg H Evans *IP Submission 8*; PIAC *Submission 34*; Australian Consumers' Association *Submission 55*; Federation of Community Legal Centres *Submission 79*.

would have fallen within an exemption. In contrast the Department of Parliamentary Reporting Staff considers that it should remain outside the Act because it does not have a public policy role or provide services to the public. It claims that extending the FOI Act to the parliamentary departments could expose them to lengthy and costly legal challenges in respect of material they would claim to be exempt under s 46.²⁷ The Department of the Parliamentary Librarian also opposes extending the Act to the parliamentary departments for similar reasons.²⁸ The Review is not persuaded by these arguments. It remains convinced, particularly in light of the experience of the Department of the Senate, that there is no justification for the parliamentary departments to be excluded from the Act and that being subject to the Act will not cause any greater inconvenience for them than is caused to other agencies subject to the Act. Accordingly, it recommends that the parliamentary departments be made subject to the FOI Act.

Recommendation 73

The parliamentary departments should be made subject to the FOI Act.

Territories

Terms of reference

11.9 The Review's terms of reference require it to consider whether the basic purposes and principles of freedom of information legislation in Australia, including the external territories, have been satisfied and whether they require modification.²⁹

Northern Territory

11.10 The Northern Territory Parliament has not passed FOI legislation. This makes the Northern Territory the only Australian jurisdiction without its own FOI legislation. Residents of the Territory can seek access under the federal FOI Act to documents in the possession of Commonwealth agencies but there is no legislative right of access to documents held by Northern Territory agencies.³⁰ The Department of the Chief Minister has indicated to the Review that the Northern Territory has no plans to introduce FOI legislation. The Aboriginal and Torres Strait Islander Social Justice Commissioner considers that the federal FOI Act should be amended to apply to the Northern Territory.

The Northern Territory Government must ... act to address its bureaucratic culture which presently endorses the denial of indigenous people's rights. I note that the principles underpinning the FOI Act should guide such reform and provide the Government with useful indicators of the level of accountability currently demanded of government departments by the community.³¹

The Review considers that it would be premature to recommend the extension of the federal FOI Act to the Northern Territory given its political and economic independence.³² However, it strongly urges the Northern Territory Government to take immediate steps to introduce FOI legislation. If FOI legislation is not passed in the near future, further consideration should be given to extending the Commonwealth's FOI Act to the Territory in order to safeguard the democratic rights of its residents.

External Territories

11.11 ***Norfolk Island.*** Norfolk Island has been a self-governing territory of Australia since 1979. The Commonwealth has devolved most of its legislative powers in respect of the Island to the Norfolk Island

²⁷ Submission 36.

²⁸ Submission 61. The Dept of the House of Representatives and the Joint House Dept did not made submissions.

²⁹ The Coral Sea Islands Territory, the Territory of Ashmore and Cartier Islands, the Heard Island and McDonald Islands Territory and the Australian Antarctic Territory are administered by the Minister for Environment, Sport and Territories. The Minister is subject to the federal FOI Act. As these territories do not have their own administrations, the issue of whether the Act should be extended does not arise.

³⁰ The NT Legislative Assembly and Executive Council are specifically excluded from the definition of prescribed authority in s 4 of the FOI Act.

³¹ Submission 98.

³² The Northern Territory has been a self-governing territory since 1978. Through the enactment of the *Northern Territory (Self-Government) Act 1978* (Cth) the Cth devolved most of its legislative powers in respect of the Territory to the Northern Territory government.

Legislative Assembly.³³ The Assembly has not passed FOI legislation. Residents of Norfolk Island can seek access to documents in the possession of Commonwealth agencies under the federal FOI Act but there is no legislative right of access to documents in the possession of the Norfolk Island Government, Administration, Legislative Assembly or Administrator.³⁴ In 1991 the House of Representatives Standing Committee on Legal and Constitutional Affairs identified inadequate appeal avenues as the main shortcoming of administrative law on Norfolk Island.³⁵ The introduction of FOI legislation would not remedy this problem. The Review understands that the Norfolk Island Government is taking steps to introduce FOI legislation tailored to the specific needs of its small administration. The Review supports this approach and considers that the legislation should be expedited to promote accountability on the Island. If FOI legislation is not passed by the Norfolk Island Government in the near future, further consideration should be given to extending the Commonwealth's FOI Act to the Island.

11.12 *Christmas Island and Cocos (Keeling) Islands.* Christmas Island, an Australian Territory since 1958,³⁶ is administered by an Administrator on behalf of the Commonwealth. The Administrator is subject to the federal FOI Act.³⁷ The Christmas Island Shire Council is subject to the Western Australian FOI Act.³⁸ The Cocos (Keeling) Islands became a Territory of Australia in 1955.³⁹ The Islands are administered on behalf of the Commonwealth. The Administrator is advised by the Cocos (Keeling) Islands Shire Council which has a wide range of local government powers and functions. As with Christmas Island, the Administrator is subject to the federal FOI Act and the Council is subject to the Western Australian FOI Act. The Review has not received any evidence that would indicate that these arrangements are not satisfactory. Accordingly, it makes no proposals in respect of FOI arrangements for Christmas Island or the Cocos (Keeling) Islands.

Schedule 2

Part I

11.13 Agencies listed in Part I of Schedule 2 are excluded entirely from the operation of the FOI Act. The Review considers that agencies should only be excluded from the coverage of the Act in exceptional circumstances. DP 59 proposed that Part I be repealed on the basis that the exemptions provide sufficient protection for documents in the possession of any agency.⁴⁰ Many submissions support the proposal.⁴¹ However, the intelligence agencies listed in Part I strongly oppose it. They claim that agency exclusions are necessary to ensure the maintenance of intelligence liaison arrangements and to protect information about capabilities.⁴² The Review has reconsidered its position on this issue. Intelligence agencies' internal processes and methods are scrutinised by the Inspector-General of Intelligence and Security (who is directly accountable to the Prime Minister) and by the Parliamentary Committee on ASIO. In view of the fact that if they were subject to the Act the vast majority of their documents would be exempt, the Review considers these accountability mechanisms to be adequate. Accordingly, the Review recommends that the intelligence agencies should remain in Part I.⁴³ Many of the other agencies in Part I are GBEs.⁴⁴ GBEs are discussed in Chapter 16. The Review recommends that all other agencies currently listed in Part I should be required to demonstrate to the Attorney-General that they warrant being excluded from the operation of the FOI Act.⁴⁵ If they do not do this within 12 months they should be removed from Schedule 2.

³³ *Norfolk Island Act 1979* (Cth).

³⁴ The Legislative Assembly of Norfolk Island is specifically excluded from the definition of 'prescribed authority' in s 4 of the FOI Act.

³⁵ *Islands in the sun. The legal regimes of Australia's external territories and the Jervis Bay Territory* AGPS Canberra 1991.

³⁶ *Christmas Island Act 1958* (Cth).

³⁷ The office of Administrator was established under the Administration Ordinance 1968 (Cth) made under the *Christmas Island Act 1958* (Cth). It is a prescribed authority for the purposes of the FOI Act.

³⁸ The laws of WA apply to Christmas Island under the *Territories Reform Act 1992* (Cth). The Council has full shire status under the *Local Government Act 1960* (WA) and is thus subject to the FOI Act (WA).

³⁹ *Cocos (Keeling) Islands Act 1955* (Cth).

⁴⁰ Proposal 6.36.

⁴¹ eg PIAC *Submission 34*; Australian Consumers' Association *Submission 55*; H Sheridan & R Snell *Submission 58*.

⁴² Office of National Assessments *Submission 21*; Inspector-General of Intelligence and Security *Submission 33*; ASIS *Submission 78*.

⁴³ ASIS, ASIO, Inspector-General of Intelligence and Security; Office of National Assessments.

⁴⁴ Australian Industry Development Corporation, Australian National Railways Commission, Commonwealth Bank, Housing Loans Insurance Corporation, Pipeline Authority.

⁴⁵ Aboriginal Land Councils and Land Trusts, Auditor-General, National Debt Commission, National Labour Consultative Council.

Recommendation 74

The intelligence agencies should remain in Schedule 2 Part I. All other agencies currently listed (other than GBEs) should be required to demonstrate to the Attorney-General that they warrant being excluded from the operation of the Act. If they do not do this within 12 months, they should be removed from Schedule 2 Part I.

Part II

11.14 Part II of Schedule 2 exempts certain agencies in respect of specified types of documents. Most Part II exemptions are for documents that relate to the competitive commercial activities of the agency. These agencies will no longer need to be included in Part II if s 43 is amended to make it clear that documents concerning the competitive commercial activities of agencies are exempt from the FOI Act.⁴⁶ DP 59 proposed that Part II be repealed on the ground that the various other types of documents protected by Part II would be protected adequately by the substantive exemption provisions.⁴⁷ For example, documents relating to activities of the Defence Intelligence Organisation and the Defence Signals Directorate that warrant protection would be exempt under s 33. A number of submissions support the proposal.⁴⁸ Others support it provided s 43 is amended as recommended.⁴⁹ On the other hand, several of the agencies listed in Part II consider they should remain in Schedule 2 Part II as the documents exempted by it would not be protected by any of the FOI exemptions.⁵⁰ The Review recommends that the agencies, including GBEs, exempt under Part II in respect of documents relating to their competitive commercial activities should be removed from the Schedule if s 43 is amended, as recommended, to apply to documents that relate to agencies' competitive commercial activities.⁵¹ All other agencies currently listed in Part II should be required to demonstrate that the type of documents specified in Part II could not be withheld under any exemption provision and that it would not be in the public interest to release those documents. If they are not able to do this within 12 months those documents should be removed from Schedule 2 Part II.⁵²

Recommendation 75

If s 43 of the FOI Act is amended as recommended by the Review, the exemptions in Schedule 2 Part II for documents relating to competitive commercial activities of agencies should be repealed. All other agencies listed in Schedule 2 Part II should be required to demonstrate to the Attorney-General that the documents specified warrant exclusion from the operation of the Act. If they do not do this within 12 months, those documents should be removed from Schedule 2 Part II.

Part III

11.15 A body corporate established by or under an Act specified in Part III of Schedule 2 is exempt from the operation of the FOI Act in respect of its competitive commercial activities. DP 59 proposed that Part III be repealed on the basis that it will be redundant if s 43 is amended to make it clear that it applies to the competitive commercial activities of government organisations.⁵³ Most submissions support the proposal.⁵⁴

⁴⁶ See recommendation 68. The Law and Justice Legislation Amendment Bill (No 2) 1995 cl 32 and 33 provides for the Dept of Administrative Services and the Indigenous Land Corporation to be added to Sch 2 PtII in respect of documents that relate to their competitive commercial activities.

⁴⁷ Proposal 6.37.

⁴⁸ eg PIAC *Submission 34*; Australian Consumers' Association *Submission 55*; Litigation Law Practice Committee, Law Society of NSW *Submission 91*.

⁴⁹ eg Australia Post *Submission 44*; ASC *Submission 57*.

⁵⁰ eg Australian Broadcasting Corporation *Submission 85*; Export Finance and Insurance Corporation *Submission 50*.

⁵¹ See recommendation 43. With regard to GBEs, see also para 16.14. In respect of Telstra, see para 16.16.

⁵² These agencies are: Australian Broadcasting Corporation in relation to its program material; Australian Trade Commission in relation to documents concerning overseas development projects; Dept of Defence in relation to documents concerning activities of the Defence Intelligence Organisation and the Defence Signals Directorate; Treasury in relation to documents concerning the Australian Loan Council; Export Finance and Insurance Corporation in relation to documents concerning anything done by it under Part 4 or 5 of its enabling legislation; Federal Airports Corporation in relation to documents concerning determinations of aeronautical charges; National Health and Medical Research Council in relation to documents in the possession of members of the Council who are not officers or employees; Reserve Bank in relation to documents in respect of its banking operations and exchange control matters; Special Broadcasting Service Corporation in relation to program material.

⁵³ Proposal 6.38.

The Review has not changed its view on this issue and considers that Part III should be repealed provided s 43 is amended as recommended by the Review.

Recommendation 76

Schedule 2 Part III should be repealed provided s 43 of the FOI Act is amended, as recommended by the Review, to apply to documents that relate to agencies' competitive commercial activities.

12. Amendment and annotation of personal information

Introduction

12.1 The FOI Act gives an individual a right to seek amendment or annotation of a record containing their own personal information.¹ This provides a means of ensuring that personal information held by government, on which decisions may be based, is correct. There are a number of deficiencies in the current amendment and annotation provisions. This chapter contains recommendations to address them.

The importance of amendment and annotation of personal information

12.2 The government collects personal information that may be used for many purposes including determination of entitlements under federal legislation and assessment of taxation liability. It is in the interests of both the government and the individuals concerned that this information is correct. A right of access to their own personal information enables individuals to find out what information the government holds about them. But access rights alone may be inadequate to ensure that inaccurate information is corrected.

The right to compel amendment of personal records is a necessary adjunct to the right of access.²

Agencies may correct errors voluntarily without the need to resort to the FOI Act. However, a legislative mechanism by which personal information can be corrected is essential if privacy protection and government accountability are to be assured.

Overlap between the FOI and Privacy Acts

12.3 The Privacy Act also deals with the correction of personal information. IPP 7 requires agencies to take reasonable steps to ensure that personal information records are correct, relevant, up to date, complete and not misleading. For the reasons discussed in Chapter 5 the Review does not consider that this overlap gives rise to any difficulties that warrant removing from the FOI Act provision for amendment or annotation.³ Nevertheless it does consider that these provisions could be improved.

Current FOI Act provisions for amendment or annotation

Seeking amendment

12.4 A person may seek to have a document that contains their personal information amended.⁴ The current grounds for amendment under the FOI Act are that the information is incomplete, incorrect, out of date or misleading.⁵ If the agency is satisfied that the document is deficient in one of these ways, it may amend the document. The agency can do this in one of two ways. It may alter the document to make the information accurate⁶ or it may add to the document a note that specifies the respects in which the agency is satisfied that the personal information is deficient.⁷ If an agency is not satisfied that a ground for amendment exists, it must give the applicant an opportunity to add to the document a statement that sets out his or her concerns.⁸

Seeking annotation

12.5 Instead of seeking amendment of a document that contains inaccurate personal information, a person may apply for an annotation of the document.⁹ In this situation, the applicant provides a statement about the information contained in the document. Provided the statement is not irrelevant, defamatory or unnecessarily

¹ Pt V.
² ALRC 22 para 1278.
³ See para 5.18.
⁴ s 48(c).
⁵ s 48(a).
⁶ s 50(2)(a), (3).
⁷ s 50(2)(b).
⁸ s 51.
⁹ s 48(d).

voluminous, the agency must annotate the document by adding the applicant's statement to it.¹⁰ This process involves no concession by the agency that there is any deficiency in the document.

Review of decisions

12.6 A person can apply for review of a decision concerning an application for either amendment or annotation.¹¹

Access as a prerequisite to amendment

Lawful access to document

12.7 A person seeking amendment or annotation of personal information under the FOI Act must have been given access to the document through lawful means.¹² By contrast, the obligation imposed on agencies by IPP 7 is not dependent on the person seeking the change having access to the document. In DP 59 the Review proposed that the word 'lawfully' be deleted from s 48.¹³ It also asked whether any difficulties arise from the fact that under the FOI Act a person must have access to a document before he or she can seek to have it amended whereas under the Privacy Act access is not required.¹⁴

Responses to DP 59

12.8 Many submissions agree that the right to seek amendment or annotation should not be restricted by a requirement that access to the document has been provided lawfully.

The question of how an applicant has gained access to a document is irrelevant to the determination of whether that information ought to be amended.¹⁵

Some also consider that the prerequisite for access is unnecessary.

It is accepted that the FOI Act is about information obtained or obtainable under that Act but, in respect of the amendment of records, what is important surely is the accuracy of the records. If information is incorrect then regardless of how an applicant came to know of it, the information remains incorrect and should be corrected.¹⁶

Other submissions consider that it is better practice for applicants to have a copy of the document before seeking amendment and that the copy of the document should have been obtained lawfully.¹⁷

Review's position

12.9 ***Access should not be a prerequisite.*** Access as a prerequisite to seeking amendment or annotation under the FOI Act arises from the fact that amendment rights were first introduced in the FOI Act which deals primarily with access and were regarded as complementary to the right of access. It has been presumed that the only way an individual would know that information was incomplete, incorrect, out of date or misleading would be if they had access to the document. In most cases this will be so. There is no reason, however, why amendment or annotation rights in the FOI Act should not be independent of access rights as they are in the Privacy Act. There may be situations in which a person is legitimately denied access to a document because it is exempt but they are sufficiently aware of the contents of the document to know or suspect that it contains false information. The Review considers that the right to seek amendment or annotation of personal information should not be dependent upon the applicant having access to the

¹⁰ s 51A, s 51B.

¹¹ A person may apply for internal review: s 54(1)(g), (h). If dissatisfied after internal review, he or she may apply for review by the AAT: s 55(1)(g), (h).

¹² s 48. Pt V originally provided only for amendment of documents obtained under the FOI Act. In 1988 s 48 was amended following a recommendation in the Senate Standing Committee 1987 Report (para 15.62) that amendment should be available under the FOI Act in respect of all lawfully obtained documents, not just those obtained under the FOI Act.

¹³ Proposal 8.1.

¹⁴ Issue 8.2.

¹⁵ H Sheridan & R Snell *Submission 58*. See also The Public Policy Assessment Society *Submission 4*; AConway-Jones *Submission 18*; Public Service Commission *Submission 32*; PIAC *Submission 34*.

¹⁶ Attorney-General's Dept (ACT) *Submission 77*. See also Australian Consumers' Association *Submission 55*; H Sheridan & R Snell *Submission 58*.

¹⁷ Australia Post *Submission 44*; ASC *Submission 57*; State Records (SA) *Submission 92*.

document and recommends that the prerequisite of access should be removed from Part V of the FOI Act. If this recommendation is not implemented, the word 'lawfully' should be removed from s 48. Any unlawful activity involved in the applicant obtaining the document should be dealt with independently of the amendment request, not by restricting amendment rights.

12.10 **Privacy Act s 35.** The Privacy Act s 35 provides that where a person has been denied access to a document under the FOI Act (and cannot, therefore, seek amendment under the FOI Act) and that person has requested the agency to amend the document and the agency has refused, the person may make a complaint to the Privacy Commissioner.¹⁸ If the Review's recommendation that the FOI Act be amended to remove the need to have access to the document before seeking amendment or annotation is implemented, s 35 of the Privacy Act will no longer be necessary. The Review recommends that it be repealed.

Recommendation 77

The words 'to which access has been lawfully provided to the person, whether under this Act or otherwise' should be deleted from s 48 of the FOI Act.

Recommendation 78

If Recommendation 77 is implemented, s 35 of the Privacy Act should be repealed.

Relevance as a ground for seeking amendment or annotation

DP 59 proposal and response

12.11 Relevance is not a ground for amendment or annotation under the FOI Act. In contrast, IPP 7 requires a record keeper to take reasonable steps to ensure that records are relevant, with regard to the purpose for which the information is collected or is to be used. DP 59 proposed that the grounds upon which amendment or annotation can be sought under the FOI Act should be expanded to include that the information is not relevant, having regard to the purpose for which it was collected or is to be used.¹⁹ Many submissions support the proposal.²⁰ The Privacy Commissioner claims it will more closely align the provisions of the FOI Act with the corresponding provisions in the Privacy Act.²¹ Others express concern. The Department of Immigration and Ethnic Affairs, for example, considers that relevance is better left for determination by the Privacy Commissioner.

The issue of relevance is addressed in the Privacy Act. ... [T]his avenue provides adequate opportunity for members of the public to address their concerns about the relevance of personal information held by agencies in a workable and flexible manner. We see no need to further complicate Part V of the FOI Act by including such a provision.²²

The ASC notes that the issue remains as to what constitutes a 'relevant' record and who should determine this.²³ The Public Policy Assessment Society expresses concern about the burden that determining relevance might place on agencies.²⁴

Review's recommendation

12.12 Including relevance as a ground for amendment or annotation under the FOI ACT would not impose on agencies any greater responsibility than they already have under the Privacy Act. It would merely ensure that the right of amendment under the FOI Act matches the standards in the Privacy Act. This is particularly important given that under the Review's recommendations amendment of records containing personal

¹⁸ Under s 35 the Privacy Commissioner can examine a document that is exempt under the FOI Act, recommend that the agency amend the document and, if it does not, direct the agency to annotate the document. To date the Privacy Commissioner has not been called on to exercise this power: Privacy Commissioner *DP Submission 81*.

¹⁹ Proposal 8.3.

²⁰ eg A Conway-Jones *Submission 18*; Public Service Commission *Submission 32*; Australia Post *Submission 44*; Australian Consumers' Association *Submission 55*; H Sheridan & R Snell *Submission 58*.

²¹ Privacy Commissioner *DP Submission 81*.

²² *Submission 87*.

²³ *Submission 57*.

²⁴ *Submission 4*.

information in the public sector will effectively be governed by the FOI Act rather than the Privacy Act.²⁵ The Review recommends that the grounds for amendment and annotation of personal records under the FOI Act be expanded to include that the information is not relevant, having regard to the purpose for which the information was collected or is to be used. The Privacy Commissioner's guidelines on IPPs 1-3 will assist agencies to determine whether information is relevant.²⁶

Recommendation 79

Section 48 of the FOI Act should be amended to provide that amendment or annotation of personal information may be sought on the ground that, having regard to the purpose for which the information was collected or is to be used, it is not relevant.

An obligation to amend

DP 59 proposal and response

12.13 An agency currently has a discretion not to amend a document even if it is satisfied that a ground for amendment exists.²⁷ DP 59 proposed that if, on an application for amendment, an agency considers that the document is deficient in one of the ways prescribed in the Act, the agency should be *required* to amend the document. Many submissions agree that an agency should be obliged to amend a document in this situation.²⁸ Others foresee practical problems, particularly with respect to electronically stored records.

At first sight this proposal seems eminently reasonable, but members with data processing and records experience have drawn attention to the facts that (a) some records, particularly electronically stored records and information kept on data bases ... are difficult to amend; and (b) in the case of old data (kept for example, under statutory retention rules), the fact that personal information may be incomplete, out of date, misleading or even incorrect may be of little or no consequence. It would under these circumstances often be pointless and a waste of public money to force an agency to amend the record.²⁹

Review's position

12.14 It seems that concern about this proposal relates more to the issue of what steps the agency must take to amend the document rather than to the question of whether the agency should be obliged to acknowledge that the document is deficient. It is important to remember that agencies have a discretion as to how to effect an amendment. They can alter the document or add a note to it.³⁰ This gives agencies the flexibility to take into account a range of relevant factors, including the nature of the document, how it is stored, whether it is in current use and whether the document was created outside the agency, in determining how it will amend a document it concedes is deficient. The Review's main concern is to ensure that if an agency is satisfied that a document the subject of a request is deficient it acknowledges this clearly.³¹ Exactly how the agency then amends the document is a matter for the agency. The Review recommends that s 50(1) of the FOI Act be amended to provide that if an agency is satisfied that the record of personal information to which the request relates is incorrect, incomplete, out of date, not relevant or misleading it must acknowledge this and take such steps as are, in the circumstances, reasonable to amend the record. What is reasonable will vary depending on, for example, whether the record is electronic or in hard copy or is a current or old record.

²⁵ See recommendation 17.

²⁶ Privacy Commissioner *Plain English guidelines to Information Privacy Principles 1-3. Advice to agencies about collecting personal information* Privacy Commissioner Sydney 1994.

²⁷ s 50(1).

²⁸ eg A Conway-Jones *Submission 18*; Dept of Family and Community Services (SA) *Submission 28*; Public Service Commission *Submission 32*; PIAC *Submission 34*; Australia Post *Submission 44*; Australian Consumers' Association *Submission 55*; H Sheridan & R Snell *Submission 58*; Country Women's Association of NSW *Submission 64*; Privacy Commissioner *DP Submission 81*; Dept of Administrative Services *Submission 83*; State Records (SA) *Submission 92*.

²⁹ The Public Policy Assessment Society *Submission 4*. See also D McGann *Submission 96*.

³⁰ See para 12.4.

³¹ This will then clearly distinguish the situation from that under s 51(1)(b) where the agency does not consider that the document is deficient and has only to annotate the document by attaching to it a statement provided by the applicant.

Recommendation 80

Section 50(1) of the FOI Act should be amended to provide that if, on an application for amendment of a document containing personal information, an agency considers that the information is incorrect or, having regard to the purpose for which the information was collected or is to be used, out of date, incomplete, not relevant or misleading, it must acknowledge this clearly and take steps that are, in the circumstances, reasonable to amend the document.

Amendment by deletion

Deletion of personal information under the FOI Act

12.15 The FOI Act does not specifically provide for documents to be amended by deleting information.³² Nor is there any express prohibition against deleting material.³³ However, s 50(3) provides that when making an amendment by altering the document an agency must ensure, 'to the extent that it is practicable to do so', that the amendment does not obliterate the existing text of the record. The wording of s 50(3) implies that deletion is possible under the FOI Act. This was certainly the approach adopted by the AAT in its recent decision of *Sime and Minister for Immigration and Ethnic Affairs* (*Sime* decision).³⁴ Deputy President McDonald found that the only practicable course in that case was to amend the document by deleting both the offending paragraph and the annotation that had been added to the document by the agency following the application for amendment. In contrast to the FOI Act, IPP 7 provides expressly for amendment of personal information by deletion.

DP 59 proposals and submissions

12.16 DP 59 proposed that the FOI Act should make express provision for deletion.³⁵ Many submissions support deletion as an amendment option.³⁶ However, some agencies have reservations about deleting information.³⁷ Their concerns relate to the possibility that deletion will compromise the historical integrity of the record. Some consider that a deletion facility will result in attempts to rewrite history.

While we acknowledge there are good arguments for and against introduction of a provision to enable removal of information from a record, our overall view is that no such provision should be made, even though, in some cases, the information is judged to be especially odious or offensive. A provision for removal of information, even if the information is only set aside in another location, would open up considerable scope for rewriting of records for improper purposes. For example, compensation claimants might seek to remove medical opinions that do not support their claim from the claim file containing the evidence on which determinations are made.³⁸

DP 59 also proposed that deleted material should be kept on a separate, securely-held file for later reference should it become necessary to determine whether a decision made on the basis of the incorrect (and since deleted) material on a file was justified.³⁹ One submissions suggests it would be preferable to leave the information as part of the record but with an annotation about its status as deleted material.⁴⁰ Others are not convinced there is a need to retain deleted material at all.⁴¹ The Privacy Commissioner points out that in addition to the fact that IPP 7 expressly provides for material to be 'completely expunged', the OECD's

³² The AAT has taken different views on this issue: see *Re Wiseman and Dept of Communications* (1984) 12 ALD 707, 710; *Re Cox and Dept of Defence* (1990) 20 ALD 199 cf *Re Jackson and Dept of Social Security* (unreported) AAT 6 November 1991.

³³ By comparison, the Tasmanian and Victorian FOI Acts prohibit the deletion of information and the destruction of a document without the permission of the archives authority: FOI Act (Tas) s 46; FOI Act (Vic) s 49. The federal Archives Act prohibits destruction, damage and alteration of a record unless done 'as required by any law': s 24.

³⁴ (1995) 21 AAR 369.

³⁵ Proposal 8.5.

³⁶ The Public Policy Assessment Society *Submission 4*; A Conway-Jones *Submission 18*; Public Service Commission *Submission 32*; PIAC *Submission 34*; Australia Post *Submission 44*; Australian Consumers' Association *Submission 55*; H Sheridan & R Snell *Submission 58*; Country Women's Association of NSW *Submission 64*; Dept of Administrative Services *Submission 83*; State Records (SA) *Submission 92*.

³⁷ Dept of Veterans' Affairs *Submission 24*; Merit Protection and Review Agency *Submission 47*; ASC *Submission 57*; Australian Archives *Submission 69*; Dept of Defence *Submission 76*; Attorney-General's Dept (ACT) *Submission 77*; Dept of Immigration and Ethnic Affairs *Submission 87*.

³⁸ Dept of Defence *Submission 76*.

³⁹ Proposal 8.5.

⁴⁰ Attorney-General's Dept (ACT) *Submission 77*.

⁴¹ Federation of Community Legal Centres *Submission 79*; Privacy Commissioner *DP Submission 81*.

Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data provide for amendment by erasure. Keeping information about an individual that is not correct, current, relevant or is misleading has potential privacy implications.

I appreciate that there are some circumstances which merit keeping material for later reference, but by the same token there are some specialised circumstances where individuals would feel concerned that incorrect information is still kept on record about them.⁴²

Review's position

12.17 Although not expressly provided for in the FOI Act, it seems clear from the limitation imposed by s 50(3) that a document could be amended by deleting information from it.⁴³ Deletion is merely one way in which a document may be altered to make the information complete, correct, up to date, relevant and not misleading. There is, therefore, no need to amend the FOI Act to make express provision for deletion. The Review considers that the circumstances in which deletion is the only practicable option will be rare. It acknowledges, however, that there will be situations in which supplementing the existing text of a document with additional text or adding a note to it will not be sufficient to correct the record and deletion of the offending text may be the only means of ensuring the record is correct. Section 50(3) makes clear that deletion is a 'last resort'. In deciding how to amend a document and whether deletion of text is appropriate, an agency will need to consider whether the document is part of the history of the file or is necessary background to subsequent records and actions. The FOI Commissioner should give guidance on when it may be appropriate to delete information. The Review no longer considers that deleted material should be retained on a separate file. If it is of such a nature that it warrants deletion, it should be completely expunged from the record.

Recommendation 81

The FOI Commissioner should issue guidelines on when it might be appropriate to amend a document by deleting information.

Review of decisions to amend or annotate

The limitation imposed by s 55(6)

12.18 When reviewing an agency's decision in respect of an application for amendment, the AAT is restricted in what it can require an agency to do. Section 55(6) provides that the AAT cannot require amendment of a document if it is satisfied that the document is a record of a decision made under an enactment or if the decision involves a determination of a question that the applicant is, or has been, entitled to have determined by a court or tribunal. Section 55(6)(c) prevents the AAT overturning an agency's decision to refuse to amend a document if the document relates to an opinion unless the opinion was based on a mistake of fact or the author of the opinion was biased, unqualified to form the opinion or acted improperly in conducting the factual inquiries that led to the formation of the opinion.⁴⁴ These restrictions were imposed as a result of recommendations in the Senate Standing Committee 1987 Report.⁴⁵ The Senate Standing Committee was concerned to avoid the amendment provisions being used to 're-litigate' before the AAT disputes that had been dealt with by other tribunals or courts or to overturn opinions merely because it could be shown that another person would have formed a different opinion.

Response to DP 59

12.19 In DP 59 the Review expressed the view that, for the same reasons given by the Senate Standing Committee, it is reasonable to restrict the AAT's ability to order an agency to amend certain documents. It was concerned, however, that the restriction imposed by s 55(6)(c) may have been interpreted too strictly and

⁴² Privacy Commissioner *DP Submission 81*.

⁴³ Particularly in light of the *Sime* decision: see para 12.15.

⁴⁴ The provision has been applied strictly by the AAT: see, eg, *Re Russell Ian Close and the Australian National University* (1993) 31 ALD 597.

⁴⁵ Para 15.9-15.47. s 55(6) was inserted in 1991.

asked whether it is a fair and reasonable limitation on the AAT's review powers. Some submissions consider that the constraints imposed by this provision are unnecessary and should be removed.

Subsection 55(6)(c) ... does nothing to promote the objects of the Act. ... [It] brings into play competing interests and the consideration of some extraneous factors, such as the apparent standing of the opinion-maker, which could possibly influence the Administrative Appeals Tribunal but are irrelevant to the question of the quality of personal information. ... s 55(6)(c) places an excessive and unreasonable burden of proof on applicants, especially those unrepresented, in a way that hinders the privacy object of the Act.⁴⁶

However, many submissions consider that some limitation on amendment of opinions is necessary and consider that s 55(6)(c) is fair and reasonable.⁴⁷

If an original document is altered, then this can be seen as an attempt to rewrite history. The agency is forced to make an evaluative assessment on what was written in the past. This type of evaluative assessment can go far back in the past and to have to substitute judgements made then with judgements made now, by different people, may in effect only serve to replace one version or interpretation with another.⁴⁸

Some support a redrafting of the section to make it more comprehensible.⁴⁹

Review's position

12.20 The Review remains of the view that there are some documents that the AAT should not be able to order an agency to amend. Accordingly, s 55(6) should remain. Nevertheless, it appears from submissions that the section is not as clear as it might be. Section 55(6)(c) in particular seems to cause confusion. One submission considers that s 55(6)(b) does not make it clear when the AAT may amend one of its own decisions.⁵⁰ The Review recommends that s 55(6) should be redrafted to address these concerns and to clarify which documents it covers. The Department of Veterans' Affairs suggests that agencies too should be restricted, in terms similar to s 55(6), in their ability to amend certain documents. The Department is concerned that without such restriction agencies will, in light of the Review's earlier recommendation, be forced to alter documents that it is inappropriate to alter, for example, medical opinions that were sound at the time they were made. The Review does not consider that this will happen. If an agency is not convinced that a document is deficient, it will have no obligation to amend it, let alone amend it by actually altering the document. Accordingly, it sees no need to alter the status quo.

Recommendation 82

Section 55(6) of the FOI Act, which places restrictions on the AAT's ability to require a record to be amended, should be redrafted so that its meaning is clearer.

Rejecting amendment applications on resource grounds

DP 59 proposal and response

12.21 DP 59 proposed that s 24, which allows an agency to refuse to process a request for access to information on the ground that the work involved in processing the request would substantially and unreasonably divert the resources of the agency from its other operations, should also apply to requests for amendment of personal information.⁵¹ A number of submissions support the proposal.⁵² One submission considers that such a provision might provide a solution to the difficulties experienced in respect of old data and some electronically stored information where the practical difficulties of effecting an amendment would

⁴⁶ R Close IP *Submission 42*. See also E Bleicher IP *Submission 96*.

⁴⁷ The Public Policy Assessment Society *Submission 4*; Dept of Veterans' Affairs *Submission 24*; Public Service Commission *Submission 32*; Australia Post *Submission 44*; Merit Protection and Review Agency *Submission 47*; ASC *Submission 57*.

⁴⁸ Australian National University *Submission 49*.

⁴⁹ Merit Protection and Review Agency *Submission 47*; Australian National University *Submission 49*; Australian Consumers' Association *Submission 55*; H Sheridan & R Snell *Submission 58*.

⁵⁰ Dept of Veterans' Affairs *Submission 24*.

⁵¹ Proposal 8.7. See discussion of s 24 at para 7.14.

⁵² A Conway-Jones *Submission 18*; Public Service Commission *Submission 32*; Australia Post *Submission 44*; ASC *Submission 57*.

be a waste of public money.⁵³ Other submissions disagree with the proposal on the ground that agencies have a responsibility to ensure that accurate records are kept.⁵⁴

What must be of prime concern is the integrity of information held and used by agencies. It is a very odd position if an agency could refuse to correct information because of an alleged difficulty in doing so. It is appreciated that the circumstances in which it is anticipated that an agency could do this are seen to be very limited but to be able to do it at all, frankly, seems odd. If the information is current information being used by an agency in its dealings with the applicant then it is very hard to see how rejection could ever be appropriate.⁵⁵

Review's position

12.22 When seeking amendment, the applicant must specify which documents are sought to be amended, the manner in which it is claimed that the information is incomplete, incorrect, out of date or misleading, and his or her reasons for claiming that this is so. While an agency has a duty to consider an application for amendment, the Review considers that the onus of satisfying the agency that there are grounds for amendment rests largely on the applicant. The agency may make inquiries and take action to satisfy itself about those grounds, but it should only be required to do whatever is reasonable in the circumstances. If an applicant seeks review of a decision refusing to amend a document the agency must be able to justify its decision. It does not have to prove that its record is accurate. The Review considers it unlikely, therefore, that a request for amendment will have the potential to substantially and unreasonably divert the resources of the agency from its other operations. Accordingly, the Review sees no need for s 24 to be extended to apply to the amendment or annotation provisions. Most concerns about resources seem to relate to the steps an agency takes *after* it has decided that the information is deficient. The Review's recommendation that an agency should be obliged to take only such steps as are, in the circumstances, reasonable, will allow the agency to take into account resource implications in determining how to effect an amendment.

⁵³ The Public Policy Assessment Society *Submission 4*.

⁵⁴ PIAC *Submission 34*; Australian Consumers' Association *Submission 55*; HSheridan & R Snell *Submission 58*; State Records (SA) *Submission 92*.

⁵⁵ Attorney-General's Dept (ACT) *Submission 77*.

13. Review mechanisms

Introduction

13.1 It is expected that the recommendations in this Report will lead to improved agency decision making and so reduce the need for applicants to seek review. Nevertheless, it cannot be assumed that original decision-makers will always make the preferable decision. An effective system for merits review of decisions is fundamental to the successful operation of the FOI Act.¹ Currently, a person who is dissatisfied with a decision made in respect of an FOI application may apply for internal review of that decision by the agency that made it. If after that the applicant is still not satisfied with the decision, he or she may apply for external review by the AAT. The Ombudsman also undertakes a form of external merits review while investigating complaints about government administration but can only make recommendations to the agency regarding its decision. The Review has examined these review mechanisms, considered alternatives and concluded that no fundamental change is necessary. However, it considers that the current mechanisms could be made more effective. This chapter makes recommendations to improve the existing review system for FOI decisions.

The ARC's Better Decisions report

13.2 The ARC has recently completed a review of merits review tribunals. Its report, *Better Decisions: review of Commonwealth Merits Review Tribunals (Better Decisions)*, states that

the overall objective of the merits review system is to ensure that administrative decisions of government are correct and preferable.²

This objective incorporates fairness, accessibility, timeliness and informality of decision making. The ARC's review focussed on the five main Commonwealth merits review tribunals, one of which is the AAT.³ It made recommendations to assist applicants in using the review process, to enhance the independence of review tribunals and to ensure that review tribunal decisions are used by agencies to improve decision making generally.⁴ In examining the system for merits review of FOI decisions, the Review has borne in mind the objectives identified by the ARC in *Better Decisions*.

Internal review

Current regime

13.3 Internal review of an FOI decision is undertaken by someone other than the original decision-maker, usually a more senior officer.⁵ A fee of \$40 is payable.⁶ Internal review is a prerequisite for seeking external review by the AAT unless the original decision was made by the responsible Minister or the principal officer of the agency concerned.⁷ No time limit is prescribed for completion of an internal review but if the applicant has not been informed of a result within 30 days, he or she may apply to the AAT for review of the original decision.⁸ In the 1994-95 financial year 354 requests were made for internal review. This represents 4% of agency decisions to refuse access or to grant only partial access. During the same period 293 decisions were

¹ Merits review involves the reconsideration afresh of the factual, legal and policy aspects of the decision. A new decision is made, either affirming or varying the original decision or setting it aside and substituting another decision. Persons or bodies consulted about an FOI request and who have an interest in the decision may have review rights as well as the applicant: s 54.

² ARC Report No 39 *Better decisions: review of Commonwealth merits review tribunals* AGPS Canberra 1995, 11.

³ The other tribunals are the Veterans' Review Board (VRB), the Social Security Appeals Tribunal (SSAT), the Immigration Review Tribunal (IRT) and the Refugee Review Tribunal (RRT).

⁴ *Better Decisions* ch 1-7, recommendations 1-86. The ARC also considered the overall structure of the merits review tribunals system and recommended that the various specialist review tribunals and the AAT should be united in a new, single body to be called the Administrative Review Tribunal: ch 8 recommendations 87-102.

⁵ s 54(1). Internal review is available in respect of decisions regarding applications for access, amendment of personal information, remission of fees or the imposition of charges. The right to seek internal review also applies to third parties where the processing of an FOI application has involved consultations with them and they object to the release of the documents concerned: s 54(1C), (1D) and (1E).

⁶ FOI (Fees and Charges) Regulations reg 5(b). The Review recommends that this fee be abolished: see recommendation 92.

⁷ In which case internal review is not available: s 54(1). Internal review is also not a prerequisite for third parties seeking AAT review where they have been involved in consultations in the processing of an FOI application: s 58F, 59 and 59A.

⁸ s 55(3).

made following internal review. Of these, approximately 68% affirmed the original decision while 32% resulted in some concession to the applicant, generally access with deletion.

DP proposal and submissions

13.4 DP 59 proposed that internal review of FOI decisions should continue to be available but should not be a prerequisite to external review.⁹ Submissions from the public and community groups support the proposal.¹⁰ For example, PIAC considers that removing internal review as a prerequisite would

assist in improving the original decision making process within the agency to ensure that judgments are made within the terms of the legislation. Agencies would know that potentially they would be immediately accountable to external review ... Such a course would also benefit applicants in that costs and delay could be minimised if the issue appeared to be one that was so contentious it was heading for an external review in any case.¹¹

A number of agencies oppose the proposal. They consider internal review to be a necessary part of the review process.¹² Reasons cited include

- review at a more senior level in individual cases allows for monitoring of the quality of primary decisions as well as the correction of individual decisions¹³
- internal review provides cost effective review, thereby reducing reliance on more expensive external review¹⁴
- agencies should have the opportunity to consider new arguments put forward by the applicant.¹⁵

Review's position

13.5 ***Response to agency submissions.*** The objections to the proposal cited in submissions go more to the potential benefits of internal review than the issue of whether internal review should be a prerequisite to external review. Systemic monitoring of agency performance should take place regardless of the level of internal review of decisions. Removing internal review as a prerequisite to AAT review will not prevent its use: applicants will retain the option to apply for internal review. The Review agrees that internal review enables agencies to consider new arguments put by the applicant, however, agencies may do this at any time. An agency's opportunity to listen to the views of the applicant will not be restricted if internal review is no longer a prerequisite to external review.

13.6 ***Recommendation.*** The Review considers that internal review can have advantages for both applicants and agencies.

For applicants, internal review has the potential to be a relatively quick and easily accessible form of merits review. ... For agencies, internal review can be a useful quality-control mechanism, particularly as it gives them an early opportunity to identify and correct systemic problems with their own decision-making processes.¹⁶

Because of this, the Review has no doubt that internal review will continue to be the preferred first review option for many applicants, even if it is not a prerequisite to AAT review. However, internal review can act as a barrier to external review in those cases where resolution is unlikely unless a decision is made independently of the agency. This was noted by the ARC in *Better Decisions*.

⁹ Proposal 9.1. It also proposed that there be no fee for internal review: proposal 9.2. See para 14.22 for a discussion of the fee for internal review.

¹⁰ eg N Boonyasilp *Submission 2*; The Public Policy Assessment Society *Submission 4*; Cyclists' Rights Action Group *Submission 34*; H Sheridan & R Snell *Submission 58*; Confidential *Submission 62*; Federation of Community Legal Centres *Submission 79*.

¹¹ *Submission 34*.

¹² Dept of Finance *Submission 25*; Dept of Family and Community Services (SA) *Submission 28*; Telstra *Submission 75*; Dept of Defence *Submission 76*; Treasury *Submission 80*; Dept of Prime Minister and Cabinet *Submission 82*; Dept of Immigration and Ethnic Affairs *Submission 87*.

¹³ Dept of Finance *Submission 25*; Dept of Defence *Submission 76*; Dept of Immigration and Ethnic Affairs *Submission 87*.

¹⁴ Dept of Finance *Submission 25*; Telstra *Submission 45*; ASC *Submission 57*; Dept of Defence *Submission 76*.

¹⁵ Dept of Prime Minister and Cabinet *Submission 82*.

¹⁶ *Better Decisions* para 6.49.

Because internal review is undertaken by officers of the same agency who made the original decision, it is viewed by some applicants merely as a barrier to the effective final resolution of their case, introducing delays (and, in some cases, additional cost) without delivering a truly impartial and objective reconsideration of their case.¹⁷

The Review is not convinced that the right to seek AAT review should be fettered by a requirement to seek internal review first. It considers that it is unlikely that an application for review of an FOI decision would reach the AAT without the original decision being reconsidered within the agency by an officer other than the person who made the decision. The AAT preliminary conference system requires an agency to reconsider the merits of its own decision during the pre-hearing phase even if it has not conducted a formal internal review. If an applicant prefers to apply to the AAT for review of an agency's decision rather than to seek internal review, that option should be available from the outset. Accordingly, the Review recommends that internal review not be a prerequisite to AAT review.

Recommendation 83

Internal review should not be a prerequisite to AAT review of an FOI decision.

AAT review

Nature of AAT review

13.7 The AAT has jurisdiction over a wide range of administrative decisions.¹⁸ The AAT's FOI jurisdiction derives from the FOI Act¹⁹ and the AAT Act.²⁰ In conducting its reviews the AAT holds preliminary conferences with the parties to seek to resolve or narrow matters in dispute before scheduling the matter for hearing. It conducts mediation in some cases. A case management system helps to ensure that proceedings are conducted as expeditiously as possible. Review is generally effected through hearings rather than on the papers. In FOI reviews the AAT may affirm, vary or set aside a decision and substitute its own unless a conclusive certificate has been issued, in which case it can only make a recommendation.²¹ A party has a statutory right to appeal against an AAT decision to the Federal Court on a question of law.²² Applications to the AAT attract a \$300 fee.²³

Different views on effectiveness of the AAT as a reviewer of FOI decisions

13.8 The AAT is currently the only external review body with determinative power undertaking merits review of FOI decisions. All submissions agree that there should only be one independent review body with power to making binding determinations following merits review.

Conflicting approaches to the resolution of similar problems should not be given the opportunity to develop, as this causes immense confusion for primary administrators.²⁴

PIAC notes that more than one determinative reviewer would also allow applicants to 'forum shop', seeking determination by the body they perceived would give them the better result.²⁵ Views differ, however, on the effectiveness of the AAT as a reviewer of FOI decisions and whether a different body should undertake this. Criticisms have been made about the cost of AAT review, the length of time taken to finalise reviews, the formality of AAT proceedings and the quality of AAT decisions.²⁶ After examining mechanisms for review of FOI decisions which operate in other jurisdictions the Review proposed in DP 59 that the AAT remain the

¹⁷ Para 6.50. See also para 6.43.

¹⁸ As at 30 June 1995 the AAT's jurisdiction was contained in 274 statutes: AAT *Annual Report 1994-95* AGPS 1995, 5.

¹⁹ s 55, s 58, s 58F, s 59, s 59A.

²⁰ s 25(1), s 40, s 43.

²¹ See discussion at para 8.19.

²² AAT Act s 44. This is a form of judicial review: as with other forms of judicial review the courts supervise the lawfulness of those decisions but generally do not substitute new decisions for those found to be unlawful.

²³ AAT Regulations reg 19. The AAT fee is discussed further at para 14.27.

²⁴ Qld Information Commissioner *Submission 37*.

²⁵ *Submission 34*.

²⁶ eg Dept of Social Security *IP Submission 39*; Cth Ombudsman *IP Submission 68*; Australian Consumers' Association *IP Submission 98*; Telecom *IP Submission 94*; Qld Information Commissioner *Submission 37*. See also Attorney-General's Dept *FOI Annual Report 1992-93* AGPS Canberra 1993, 21-22; Attorney-General's Dept *FOI Annual Report 1993-94* AGPS Canberra 1994, 22-23.

determinative reviewer of federal FOI decisions.²⁷ Some submissions express a preference for the less adversarial and more flexible style of review offered by the Information Commissioner review model which operates in Queensland and Western Australia. They consider that a specialist review body would provide superior determinative external review of FOI decisions.

[T]he AAT has had a poor track record as the sole determinative external review body for FOI decisions. The AAT has demonstrated a determination to do better but this appears to be a fairly late reaction to long term criticisms. ... The new procedural changes at the AAT have improved the handling of FOI cases. Nevertheless its institutional history ranks it as a distant third place as a determinative external review body in comparison to State Ombudsman and first and foremost in comparison to the Information Commissioner model used in Queensland, Western Australia and Canada.²⁸

On the other hand, many submissions support the retention of the AAT as the sole determinative review body for FOI decisions provided some improvements are made to its procedures.²⁹

We are in favour of maintaining the AAT as the only external review body (prior to the Federal Court) however this is predicated on the need to address a number of problems with AAT review, including cost, delays, formality and quality of decisions.³⁰

Review's position

13.9 AAT should remain the sole determinative reviewer of FOI decisions. The Review agrees with submissions that there should only be one external review body with determinative powers in respect of FOI decisions. It considers that the AAT should remain that body. Factors taken into account by the Review in reaching this conclusion are set out below. The Review then makes several recommendations about specific aspects of AAT review.

13.10 Workload does not justify expense of new tribunal. When the FOI Act was enacted in 1982 the Commonwealth already had in place a system for merits review of administrative decisions.³¹ It was and remains appropriate that review of FOI decisions be carried out by the AAT. Establishing a new tribunal would involve substantial cost for which there is no justification when review can properly be conducted by the AAT. While specialist tribunals have been established in several high volume jurisdictions,³² the number of FOI applications is insufficient to warrant the creation of a specialist tribunal for review of FOI decisions.³³ Further, the size of the AAT and the range of its functions allows for organisational flexibility which in turn enables it to cater for unexpected increases in the number of review applications in particular jurisdictions.³⁴

13.11 Improvements to AAT review. The Review acknowledges that there is room for improvement in the way the AAT conducts review of decisions, however, it considers that the Tribunal has the necessary flexibility within the current legislative framework to effect these improvements. In practice, the handling of applications has tended to follow a rigid pattern culminating in a formal hearing. Many of the changes recommended by the ARC in *Better Decisions* are designed to maximise the AAT's flexibility and to make it more user friendly and its proceedings more informal. In particular, *Better Decisions* encourages review tribunals to use whatever methods and processes best serve their objectives, including techniques associated

²⁷ Proposal 9.4.

²⁸ H Sheridan & R Snell *Submission 58*. See also Australian Consumers' Association *Submission 55*; Qld Information Commissioner *Submission 37*.

²⁹ eg The Public Policy Assessment Society *Submission 4*; NSW Bar Association *Submission 15*; ATO *Submission 17*; A Conway-Jones *Submission 18*; Dept of Finance *Submission 25*; D Murphy *Submission 43*; Australia Post *Submission 44*; Telstra *Submission 45*; LGunawan *Submission 51*; ASC *Submission 57*; Dept of Defence *Submission 76*; Privacy Commissioner *DP Submission 81*; Dept of Immigration and Ethnic Affairs *Submission 87*.

³⁰ PIAC *Submission 34*.

³¹ By comparison, neither Qld nor WA (both of which adopted the Information Commissioner model) has a generalist administrative review tribunal such as the AAT that could have been given jurisdiction to review FOI decisions.

³² The numbers of applications dealt with by the specialist tribunals each year confirm their high volume status. In the 1994-95 financial year the number of applications received by the SSAT, the RRT and the IRT were 9443, 3158 and 2174, respectively. In the period 11 June 1994 to 9 June 1995 the VRB received 8162 applications: 1994-95 *Annual Reports* of the SSAT, the RRT, the IRT and the VRB.

³³ Between 1 July 1990 and 30 June 94 the AAT reviewed fewer than 70 FOI decisions per year: Attorney General's Dept *FOI Annual Report 1994-95* AGPS Canberra 1995, 23. In the 1994-95 financial year the AAT received 113 applications for review of FOI decisions which formed less than 2% of the total number of applications for review in the AAT's General and Veterans' Division: *AAT Annual Report 1994-95* AGPS Canberra 1995, 112.

³⁴ This could be an advantage over a specialist review body where resource constraints may have greater impact. See, eg, Qld Information Commissioner 1994/95 *Annual Report* para 2.3.

with an active investigative approach and, where appropriate, resolving an application 'on the papers' rather than through oral hearings.³⁵ The AAT has already responded to criticisms of its performance, aired during the ARC's review of merits review tribunals and this review, by introducing new procedures for handling applications for review of FOI decisions.³⁶ These include

- allocating case managers to receive and stream applications for review of FOI decisions
- designation by the President of full time members in each State who will have carriage of all FOI matters in that State from the time they are allocated by the case manager until they are resolved
- disseminating information about FOI through a weekly bulletin which covers changes in legislation, case law and practice.

The AAT has informed the Review that it is considering further possible changes in the way it handles FOI reviews, for example, conducting the review through a series of meetings rather than a formal hearing. Although many submissions consider that it is too soon to tell whether the procedural changes already introduced by the AAT have improved its handling of FOI matters,³⁷ others are more positive.³⁸ The AAT considers that the changes have generally met with approval but that it is too early to assess their full impact.³⁹ The Review is confident that the changes will improve the AAT's performance in FOI matters. It also expects that the guidelines issued by the FOI Commissioner will be a valuable interpretative resource for the AAT as well as agencies and will enhance consistent decision making.⁴⁰

13.12 *Specialist FOI knowledge.* The Review considers that specialist knowledge can be acquired by a generalist review body such as the AAT. The AAT has been reviewing FOI decisions since 1982 and has built up considerable FOI expertise. It has recently designated an FOI Resource Member to provide intellectual leadership, advice and guidance to members on FOI matters.⁴¹ It has also held a training workshop for AAT members with special responsibility for, or interest in, FOI.⁴² Under its new procedures, designated FOI members will handle FOI applications. This will enhance both the AAT's FOI expertise and consistent decision making. The varied backgrounds of the AAT's members can be an advantage.

[E]fficiencies could flow from having an AAT Tax member review Australian Taxation Office FOI applications at the AAT. The issues involved in the documents are generally similar to the issues the AAT Tax member encounters in other matters before the Tribunal.⁴³

The capacity of the AAT to convene a three Member Tribunal with appropriate combinations of expertise is also an asset.

Recommendation 84

The AAT should remain the sole external determinative reviewer of FOI decisions.

Production of documents claimed to be exempt

13.13 *Current situation.* When an agency fulfils its obligation under s 37 of the AAT Act to lodge with the AAT all relevant documents regarding an FOI decision, it is not required to lodge a document that it claims to be exempt.⁴⁴ However, the AAT is able under s 64 of the FOI Act to require production of such a document for inspection by the AAT, but only for the purpose of deciding whether the document is an exempt document.⁴⁵ This has generally been taken to mean that the AAT cannot order production of these

³⁵ *Better Decisions* para 3.33-3.46, 3.133-3.137. Also see recommendations 5, 6 and 19.

³⁶ The new procedures were introduced on 1 December 1994.

³⁷ See, eg, The Public Policy Assessment Society *Submission 4*; NSW Bar Association *Submission 15*; PIAC *Submission 34*; Australian Consumers' Association *Submission 55*; ASC *Submission 87*.

³⁸ J Vandenberg *Submission 12*; A Conway-Jones *Submission 18*; PIAC *Submission 34*; H Sheridan & RSnell *Submission 58*.

³⁹ AAT *Submission 20*.

⁴⁰ See para 6.13.

⁴¹ AAT *Annual Report 1994-95* AGPS Canberra 1995, 24.

⁴² id 36.

⁴³ ATO *Submission 17*.

⁴⁴ s 64(1).

⁴⁵ The power is more limited where the document is covered by a conclusive certificate.

documents before the hearing. This reduces the potential for settling a dispute before the hearing because the AAT does not have access to the documents the subject of the dispute (unless the agency provides them to the AAT voluntarily prior to the hearing).

13.14 Review's position. DP 59 proposed that s 64 should be amended to clarify that the AAT is able, at any time after an application for review is lodged, to require production of documents claimed to be exempt.⁴⁶ All submissions on the proposal support it, although several are concerned to ensure that the confidentiality of the documents is preserved when they are in the AAT's possession.⁴⁷ Submissions, including that from the AAT, note that allowing the AAT to require production of these documents would result in more informed discussion at preliminary conferences and lead to a more speedy resolution, possibly removing the need for a hearing.⁴⁸

It would be of great assistance to the AAT if it could have access to the documents claimed to be exempt at the very earliest point in proceedings after the application for review is filed. A consequence of early filing would be that the AAT would, at a much earlier time, be able to form its own view as to the substance of any claims for exemption. This would also assist in settling those matters which are amenable to settlement at a much earlier stage.⁴⁹

The Review agrees that if the AAT were able, before a hearing, to require production of documents claimed to be exempt it would be more able to resolve matters early. The Review recommends that s 64 be amended to make it clear that the AAT may require a document that is claimed to be exempt to be produced to it at any time after the date by which the agency is required to have lodged the documents with the AAT pursuant to s 37 of the AAT Act.

Recommendation 85

Section 64 of the FOI Act should be amended to make it clear that the AAT can, at any time after the date by which an agency must have complied with s 37 of the AAT Act, require production to the AAT of documents claimed by the agency to be exempt.

Disclosure by AAT of documents that are claimed to be exempt

13.15 Access by applicant's legal representative to documents claimed to be exempt. When documents that are claimed to be exempt are provided to the AAT in response to an order under s 64(1), access to them is restricted to members and staff of the AAT. It is not clear whether the restrictions on further disclosure apply if the AAT obtains the documents other than pursuant to order under s 64, for example, if the agency voluntarily gives the documents to the AAT for inspection. In particular, there have been differing views on whether the AAT can allow an applicant's legal representative access to such documents.⁵⁰ The Federal Court recently held, in *Day v Collector of Customs* (Day decision),⁵¹ that the restrictions in s 64 on further disclosure do not apply if the AAT has obtained the documents other than through an order under s 64(1) and that in these circumstances the AAT has a discretion to allow an applicant's legal representative access to the documents, subject to undertakings about further disclosure.⁵²

13.16 Review's position. Early in the pre-hearing phase, many agencies voluntarily provide the AAT with the documents they claim to be exempt so as to assist the AAT to narrow the issues and possibly resolve the dispute.⁵³ The Day decision could have the effect of making agencies less prepared to provide documents to the AAT voluntarily.⁵⁴ More importantly, it potentially disadvantages unrepresented applicants and it may make them feel that they should be legally represented in FOI matters. This would have the unfortunate effect of increasing the legalistic and adversarial nature of AAT proceedings which would, despite the views expressed in the Day decision, be contrary to the trend towards greater flexibility in the AAT. In the

⁴⁶ Proposal 9.6.

⁴⁷ Australia Post *Submission 44*; Telstra *Submission 45*.

⁴⁸ eg Dept of Finance *Submission 25*; Dept of Family and Community Services (SA) *Submission 28*.

⁴⁹ AAT *Submission 20*.

⁵⁰ The AAT has taken different views on providing such access: see, eg, *Re Witheford and Dept of Foreign Affairs* (1993) 5 ALD 534 cf *Re Carver and Dept of Prime Minister and Cabinet* (1987) 12 ALD 447.

⁵¹ (1995) 130 ALR 106.

⁵² This discretion arises under the AAT Act s 39 and the FOI Act s 63(1).

⁵³ There is nothing to prevent the agency from also providing the applicant's legal representative with a copy of the exempt document.

⁵⁴ Australia Post *Submission 44* raises this concern.

Review's view, the AAT should not have a discretion to provide the applicant's legal representative or any other person with access to the documents claimed to be exempt. The AAT should be obliged to protect from further disclosure documents that are claimed to be exempt and which are in its possession, whether or not they have been produced under a s 64 order. The FOI Act should be amended accordingly.

Recommendation 86

The FOI Act should be amended to prohibit the AAT from disclosing to any person, including the applicant's legal representative, documents that are claimed to be exempt, whether they were provided to the AAT under s 64 or not.

Cost of AAT review

13.17 The Review considers that several reforms should be made to alleviate the cost of AAT review for applicants. These are discussed in Chapter 14.⁵⁵

Investigation by the Ombudsman

Current role in FOI

13.18 An applicant can complain to the Ombudsman about an agency's handling of an FOI request.⁵⁶ There is no fee for making a complaint which may be made as an alternative to, or preliminary to, AAT review. The Ombudsman may decline to investigate a matter until an applicant has sought internal review of the decision.⁵⁷ The Ombudsman generally does not commence or continue an investigation if the applicant applies to the AAT for review of a decision.⁵⁸ In appropriate cases, the Ombudsman may refer an applicant directly to the AAT. Investigations by the Ombudsman may reveal deficiencies in an agency's handling of the case under investigation or systemic deficiencies in the way in which that agency generally handles FOI requests. The current Ombudsman takes a conciliatory approach when investigating complaints about FOI. The Ombudsman has no power to set aside a decision and substitute another decision but may make recommendations to the particular agency concerned or to the responsible Minister and, if necessary, may report to Parliament. During the 1994-95 financial year the Ombudsman received 221 complaints about the handling of FOI requests by agencies, around 30% more than the previous year.⁵⁹

Background to Ombudsman's role in FOI

13.19 The Ombudsman's current role in FOI has evolved since the Senate Standing Committee 1979 Report. That Committee envisaged a far greater role for the Ombudsman in FOI administration, including acting as counsel before the AAT on behalf of applicants and 'a number of useful advisory and critical functions in relation to the general operation of the freedom of information legislation.'⁶⁰ These functions effectively constituted a role of monitor and rapporteur in respect of the operation and administration of the FOI Act. The Act was amended in 1983 to incorporate the Committee's recommendations.⁶¹ However, resource constraints within the Ombudsman's office in the mid 1980s meant that these extra functions were unable to be performed.⁶² In practice, the Ombudsman's involvement was confined to investigating individual complaints against agencies. The Senate Standing Committee 1987 Report considered whether Ombudsman review should be made a compulsory first tier of external review prior to AAT review. It rejected this approach, noting that in doing so it was rejecting the creation of a fully-fledged information commissioner.⁶³ The Committee considered that the Ombudsman should have no special role or powers with respect to FOI. It recommended that the special role of the Ombudsman as advocate before the AAT and as monitor and

⁵⁵ See para 14.28.

⁵⁶ The Ombudsman's power to investigate complaints is discretionary. She may also conduct an investigation relating to a matter of FOI administration of her own motion: Ombudsman Act s 5(1), s 6(1).

⁵⁷ Ombudsman Act s 6(1A).

⁵⁸ FOI Act s 57(2); Ombudsman Act s 6(2).

⁵⁹ Cth Ombudsman *Annual Report 1994-95* AGPS Canberra 1995, 35.

⁶⁰ Senate Standing Committee 1979 Report para 29.2.

⁶¹ Pt VA was inserted by the *Freedom of Information Amendment Act 1983* (Cth).

⁶² See Commonwealth & Defence Force Ombudsman *Annual Report 1983-84* AGPS Canberra 1985, 7.

⁶³ Senate Standing Committee 1987 Report para 17.6.

rapporteur should be removed and that provision for designation of a Deputy Ombudsman for FOI matters be repealed.⁶⁴ The Act was amended in 1991 to give effect to these recommendations. Section 51 was inserted in the FOI Act to alert applicants to their right to make a complaint to the Ombudsman.⁶⁵

No changes recommended to Ombudsman's powers

13.20 ***Submissions.*** A number of submissions favour increasing the Ombudsman's role and powers in respect of FOI. Some consider the Ombudsman should have determinative powers; others consider the Ombudsman should take on the role of the FOI Commissioner.⁶⁶ However, many consider that there should be no change to the Ombudsman's role⁶⁷ and some strongly oppose any suggestion that the Ombudsman should be given determinative review powers.⁶⁸

13.21 ***Review's support for Ombudsman's current role.*** The Review notes that in other jurisdictions the Ombudsman has determinative powers.⁶⁹ However, in view of the Review's recommendation that the AAT should continue as the sole merits reviewer of FOI decisions there is no need for the Ombudsman to be given determinative review powers. Although the role currently performed by the Ombudsman in FOI administration overall is a relatively small one⁷⁰ the Ombudsman makes a valuable contribution to FOI administration and can assist agencies to reach the correct and preferable decision in individual cases. The Ombudsman provides applicants with the option of a free, informal review and is particularly effective when delays occur in the processing of an FOI application.⁷¹ Ombudsman investigation has also been valuable in bringing to light systemic problems in FOI administration. The Ombudsman's investigation in 1994 of a complaint about Telecom disclosed several aspects of defective FOI administration which are being addressed as a result of the Ombudsman's intervention.⁷² Acceptance of the Ombudsman's recommendations can lead to improvement in FOI administration.

13.22 ***FOI Commissioner may have an impact on the Ombudsman's role in FOI.*** While the Review supports retention of the Ombudsman's current role in FOI administration it acknowledges that there may be changes to that role in light of its recommendation to establish an FOI Commissioner. The existence of the FOI Commissioner, whose job it is to provide assistance to applicants and agencies, will probably reduce the number of queries to the Ombudsman. The FOI Commissioner will be able to solve queries that otherwise may have ended up as a complaint to the Ombudsman. The Ombudsman will remain as an individual case investigator and reviewer. The Ombudsman and the FOI Commissioner should liaise closely.⁷³

13.23 ***No fee for complaint to the Ombudsman.*** In its submission to DP 59 the Treasury suggested that Ombudsman review should be made subject to a fee.⁷⁴ The Review disagrees. The services of the Ombudsman should remain free. Given that the Ombudsman only has recommendatory powers, a complaint to the Ombudsman can provide only limited assistance to an applicant. Most complaints to the Ombudsman about FOI are about agency delay. The public should not have to pay a fee to have potential maladministration by government agencies investigated. The cost of the Ombudsman's investigation is properly borne by government. The option of Ombudsman investigation and review is a valuable right that should not be fettered by the imposition of a fee.

⁶⁴ id para 17.7, 17.20-17.35.

⁶⁵ Pt VA was repealed by the Freedom of Information Amendment Act 1991 (Cth).

⁶⁶ PIAC *Submission 34*; Australian Consumers' Association *Submission 55*.

⁶⁷ The Public Policy Assessment Society *Submission 4*; Dept of Finance *Submission 25*; PIAC *Submission 34*; Australia Post *Submission 44*; Telstra *Submission 45*; LGunawan *Submission 51*; Treasury *Submission 80*.

⁶⁸ Dept of Finance *Submission 25*; ASC *Submission 57*.

⁶⁹ eg, the SA Ombudsman, the Tas Ombudsman and the NZ Ombudsman. The NZ Ombudsman does not have determinative power but his or her recommendations become binding on an agency after 21 days unless, before that day, the Governor-General, by Order in Council, otherwise directs: *Official Information Act 1982* (NZ) s 32.

⁷⁰ According to the Attorney-General's Dept 1994-95 FOI *Annual Report*, Ombudsman complaints were made in regard to just .77% of the total number of FOI requests made during the year: AGPS Canberra 1995 para 4.7. However, statistics in recent Ombudsman Annual Reports show that more applicants are seeking the Ombudsman's assistance each year.

⁷¹ Cth Ombudsman *Annual Report 1993-94* AGPS Canberra 1994, 19; *Annual Report 1994-95* AGPS Canberra 1995, 35.

⁷² Cth Ombudsman *Freedom of information Investigation of a complaint by Graham Schorer concerning actions by Telecom in 1994* November 1994 (the COT cases investigation).

⁷³ See para 6.22.

⁷⁴ *Submission 80*.

14. The cost of seeking access to information under the FOI Act

Introduction

14.1 The cost of obtaining information under the FOI Act is one of the most controversial aspects of the legislation. This chapter gives an overview of the FOI fees and charges regime. It discusses the problems with the current system and recommends improvements to make it easier for applicants to understand and for agencies to apply.

Fees and charges and the objects of the FOI Act

14.2 The costs regime should not be inconsistent with the objects of the Act.¹ It is counterproductive for the Act to encourage involvement in government but effectively disqualify citizens from participating by imposing prohibitive charges. The cost to agencies of administering the Act must be viewed in the context of the legislation's role in furthering democratic accountability.

[A]ny examination of the issue [of cost] should go beyond short-term expediency and include consideration of the crucial long-term issues concerning the nature of a true liberal democracy.²

[T]oo much emphasis has been placed upon economic factors (such as cost recovery) at the expense of admittedly unquantifiable social (and political) benefits derived from the right of access to documents conferred by the FOI Act.³

When assessing the cost of providing information under the Act it is important to remember the benefits that flow from the openness fostered by the Act, many of which are intangible and unquantifiable.

[\$20 million is] a bargain for such an essential tool of public accountability. The law pays for itself in more professional, ethical and careful behaviour on the part of public officials who must now conduct public business in the open.⁴

A strict application of the user-pays principle would almost certainly guarantee that the Act would fail in its objectives.⁵ Yet it can be argued that totally free access may place an unreasonable financial and administrative burden on agencies. In the Review's view, applicants should make some contribution to the cost of providing government-held information but that contribution should not be so high that it deters people from seeking information. The fees and charges regime should reflect the fact that the FOI Act is primarily about improving government accountability and the public's participation in decision making processes, not about generating revenue or ensuring cost recovery.

Current fees and charges regime

Overview

14.3 An FOI applicant must pay a \$30 application fee.⁶ He or she may seek remission of that fee.⁷ An agency may impose charges to meet the cost of processing the request and for various services such as photocopying and transcribing. Before an FOI request is processed the agency must give the applicant an estimate of the charges it intends to impose.⁸ The applicant may then seek the reduction or waiver of those charges.⁹ A decision to refuse to reduce or waive charges is reviewable.¹⁰

¹ See ch 4 on the objects of the Act and agency culture.

² L Dalton 'FOI - the irony of the information age' (1994) 68 *Law Institute Journal* 848, 850.

³ Senate Standing Committee 1987 Report para 19.5.

⁴ Information Commissioner of Canada *Annual Report 1993-94* Information Commissioner of Canada Ottawa 1994, 11.

⁵ In *Re Hesse and Shire of Mundaring* (unreported) WA Information Commissioner 17 May 1994 the WA Information Commissioner stated that user pays is contrary to the principle in the legislation that access should be provided at the lowest reasonable cost.

⁶ s 15(2)(e); FOI (Fees and Charges) Regulations reg 5(a).

⁷ See para 14.24.

⁸ s 29(1).

⁹ s 29(5). See discussion at para 14.25.

¹⁰ The Act provides for internal review (s 54(1)(d), (e)) and review by the AAT (s 55(1)(d), (e)). See ch 13 on review mechanisms.

Rationale behind the regime

14.4 The FOI charging regime was originally intended to be a means of seeking a contribution from users of the Act to the cost of administering it. A move towards a more user-pays approach occurred in 1986 with the introduction of an application fee and a separate charge for decision making time.¹¹ This has not, however, led to anything close to full cost recovery. For example in 1994-95 the cost of providing information under FOI was estimated by agencies to be \$10 383 956. Only 3.7% of this amount was recovered by way of fees and charges.¹²

Criticisms of the current system

14.5 The current FOI fees and charges regime is the subject of considerable criticism by both applicants and agencies. Applicants complain that costs are high and are not related to whether they receive any information. They pay even if all the documents they request are withheld on the basis that they are exempt. Fees and charges can, therefore, be a considerable deterrent.

[Fees and charges] are imposed as a crude rationing device to inhibit demand, and hence to reduce the level of publicly funded resources which must be devoted to administration of the FOI Act.¹³

It appears that some agencies abuse the estimate system, making exaggerated estimates to deter applicants from proceeding with requests. In addition, some agencies give the waiver provisions an overly technical interpretation. Some agencies consider the current regime to be so complicated, time consuming and expensive to administer that they do not bother imposing charges for providing access to documents under the FOI Act.

Applicant's personal information

Current fees and charges

14.6 A request for the applicant's own personal information must be accompanied by the standard \$30 application fee. The hourly processing charges are, however, limited to a maximum of two hours.¹⁴ Applicants in receipt of a prescribed benefit or any other form of income support are entitled to relief from fees and charges in regard to requests for documents concerning decisions about their benefits.¹⁵

DP 59 and submissions

14.7 In most cases an individual has no choice as to whether or how the government collects information about him or her, or how that information is stored. Access enables the applicant to protect his or her privacy and contributes to the accuracy of government records thereby enhancing accountability. For these reasons, DP 59 proposed that access to an applicant's personal information should be free.¹⁶ The majority of submissions, particularly those from individuals and community groups, support this proposal: some because they consider that fees and charges are inconsistent with the underlying philosophy of FOI; others because it is already common practice in some agencies not to charge for access to personal information.¹⁷ In contrast, a

¹¹ The package of amendments was designed to 'reduce administrative costs and increase revenues': *Hansard* (H of R) 19 August 1986, 272. See A Ardagh 'The walls of secrecy are going up again' (1987) 12 *Legal Service Bulletin* 21 for a critique of the amendments.

¹² Attorney-General's Dept *FOI Annual Report 1994-95* AGPS Canberra 1995, 16. The total yearly cost figures are compiled from information provided by agencies on staff years spent on FOI matters and estimates of non-staff costs directly attributable to FOI, such as photocopying. Costs vary greatly between agencies. In 1993-94, eg, the Dept of Veterans' Affairs incurred an average cost of \$88 for processing the 10 729 requests it received but the Australian Broadcasting Corporation processed 17 requests at an average cost of \$76 704. This divergence can be attributed to the differing nature and size of requests, applicants' willingness to narrow requests and the experience the agency has in dealing with FOI requests (more sophisticated methods mean more efficient processing).

¹³ Qld Information Commissioner *Submission* 37.

¹⁴ FOI (Fees and Charges) Regulations reg 4 Sch 1 Pt I item 2A. Since this limitation on charges was introduced in 1991, the number of requests for personal information does not appear to have increased significantly. See para 14.11 for a discussion of the charges that can be levied in respect of a request for non-personal information.

¹⁵ eg those receiving benefits under the *Social Security Act 1991* (Cth). See FOI (Fees and Charges) Regulations reg 6.

¹⁶ Proposal 7.1.

¹⁷ D Bowd *Submission* 16; A Conway-Jones *Submission* 18; PIAC *Submission* 34; D Murphy *Submission* 43; The Public Policy Assessment Society *Submission* 4; Federation of Community Legal Centres *Submission* 79; Attorney General's Dept (ACT) *Submission* 77; Dept of Prime Minister and Cabinet *Submission* 82.

number of agencies favour the imposition of a nominal fee to deter frivolous applications.¹⁸ The Western Australian Information Commissioner considers that the sheer number of requests for personal information can place considerable demands on agencies' resources and that they should be permitted to levy a reasonable photocopying charge.¹⁹

Review's position

14.8 The Review remains of the view that access to one's own personal information should generally be free. Citizens should be able, subject to the FOI exemptions, to obtain access to information about them that is held by the government without financial barriers. In addition, it should be noted that there is no provision under the Privacy Act for a record keeper to impose a charge for providing access to personal information. There may be some scope for permitting agencies to charge for photocopying of documents containing personal information (other than those relating to income support) where the applicant has previously been provided with the same information free of charge.

Recommendation 87

Access to an applicant's personal information should be free.

Information other than the applicant's personal information

Structure of discussion

14.9 The following paragraphs set out the reforms to the fees and charges regime (for information other than the applicant's personal information) proposed in DP 59 and outline the responses in submissions. The Review then recommends a new regime which involves significant changes to the way agencies are entitled to charge for FOI access.

Application fee

14.10 Any application fee, even a nominal amount, may deter people from using the Act, particularly given that it must be paid 'up front' at the time of application.²⁰ The Review does not consider the current \$30 fee to be so high as to constitute an unreasonable deterrent. However, DP 59 asked whether the \$30 application fee should entitle an applicant to a prescribed amount of search and retrieval time, in other words, whether the agency should be prevented from charging for the first few hours of search and retrieval time.²¹ The majority of submissions on this point consider that agencies should be able to charge for all search and retrieval time on the basis that as the application fee is a filing fee it should not entitle the applicant to any services.²² The Department of Prime Minister and Cabinet is concerned that building search and retrieval charges into the application fee would increase unreasonably the level of subsidy provided to FOI applicants by taxpayers.²³ Other submissions support the proposal because they consider it would encourage people to use the Act and minimise the deterrent effect of the application fee.²⁴

Charges

14.11 **Processing time.** Agencies have a general discretion not to levy charges.²⁵ Any charges that are imposed must be determined in accordance with the FOI (Fees and Charges) Regulations. Search and retrieval time can be charged at \$15 an hour.²⁶ Decision making time can be charged at \$20 per hour.²⁷ DP

¹⁸ eg Dept of Immigration and Ethnic Affairs *Submission 87*; Dept of Finance *Submission 25*. See also Australia Post *Submission 44*; ASC *Submission 57*.

¹⁹ WA Information Commissioner *FOI Annual Report 1993-94* WA Information Commissioner Perth 1994, 34.

²⁰ The fee may be remitted but not waived. See para 14.24 for a discussion of the issues surrounding remission of fees.

²¹ Issue 7.3.

²² Australia Post *Submission 44*; ATSIIC *Submission 75*; Dept of Finance *Submission 25*; Dept of Veterans' Affairs *Submission 24*; ASC *Submission 57*.

²³ *Submission 82*.

²⁴ eg PIAC *Submission 34*. See also Cth Ombudsman *Submission 53* and Australian Consumers' Association *Submission 55* who consider that the application fee should include 40 pages of photocopying.

²⁵ s 29(2).

²⁶ FOI (Fees and Charges) Regulations reg 4, Sch 1 Pt 1 item 2.

59 asked whether agencies should continue to be able to charge for decision making time.²⁸ Most agencies consider that they should. The TPC, for example, states that as decision making makes up a considerable proportion of the time spent processing an FOI request, agencies should be able to charge for it.²⁹ A number of submissions oppose the charge for decision making time on the basis that it is open to abuse by agencies that want to discourage applicants.³⁰

14.12 **Other charges.** Agencies can charge \$6.25 for each half hour of time spent supervising the inspection of documents and \$4.40 for each page of transcript.³¹ Photocopying may be charged at 10¢ per page.³² These charges are easier to quantify than those for processing because they do not depend on the decision-maker's methods or the agency's information management practices.³³ DP 59 proposed that these charges should remain the same except for photocopying which should be charged at reasonable commercial rates.³⁴ Submissions are evenly divided on this issue. Those that oppose commercial photocopying rates for FOI requests express concern that this may result in a substantial rise in rates if 'commercial rates' was intended by the Review to include a profit margin.³⁵

Different charges depending on the nature of the request?

14.13 Under the current regime, fees and charges are the same no matter who asks for the information or why. However, there is an argument that while the motive of an applicant is irrelevant to whether he or she should be granted access to a document, it may be reasonable to take it into account when charging for that access.³⁶ DP59 asked whether, for requests other than the applicant's personal information, there should be a different system of fees and charges depending on the nature of the documents requested or the purpose for which they are sought.³⁷ Submissions generally oppose a 'multiple track' fees and charges regime. Agencies consider that it would be complex to administer and confusing for applicants.³⁸ The Review agrees. It would be difficult to determine which categories of request should be singled out for higher charges and, in many cases, to determine the applicant's motive.³⁹

A new fees and charges regime for information other than personal information of the applicant

A new regime

14.14 The Review considers that agencies should continue to be able to impose charges for FOI access to documents other than the applicant's personal information. Although charging for access to information undoubtedly reduces its accessibility, some form of contribution from applicants is appropriate. The current fees and charges regime is, however, too complicated and penalises applicants for agencies' inefficient information management practices. The Review recommends a new approach.

²⁷ id item 5. Decision making time is defined to include examining the document, consulting, making a copy of the document with deletions and notifying the applicant of an interim or final decision.

²⁸ Issue 7.4.

²⁹ *Submission 42*.

³⁰ eg A Conway-Jones *Submission 18*; Cth Ombudsman *Submission 53*.

³¹ FOI (Fees and Charges) Regulations reg 4, Sch 1 Pt II item 1, item 7.

³² id item 2.

³³ There is also a series of charges that are required to be fixed at an amount not exceeding the actual costs incurred: producing a document by the use of a computer or other like equipment; arrangements made for an applicant to hear a recording or view a videotape; producing a copy of a film or videotape: FOI (Fees and Charges) Regulations reg 4, Sch 1 Pt II items 4-6. The applicant must meet the cost of postage where the documents are mailed rather than collected: FOI (Fees and Charges) Regulations reg 4, Sch 1 Pt II item 8.

³⁴ Proposal 7.5.

³⁵ eg The Public Policy Assessment Society *Submission 4*; H Sheridan & R Snell *Submission 58*. The Review did not envisage a profit margin: see para 14.18.

³⁶ The US FOI Act distinguishes between different requests for the purposes of imposing charges. eg, when documents are requested for commercial use agencies can charge for search time, decision making time and copying whereas a journalist can only be charged for copying: 5 USCA 552(a)(4)(A)(ii)(I), (II).

³⁷ Issue 7.2.

³⁸ See, eg, Australia Post *Submission 44*; Telstra *Submission 45*.

³⁹ See Cth Ombudsman *Submission 53*: 'In many cases it will be difficult or impossible to ascertain an applicant's motives, or to distinguish between 'worthy' motives of policy relevance ... or 'unworthy' motives of commercial or academic purposes.'

Charge according to the documents released

14.15 The Review considers that charges should only be levied in respect of documents that are released. This contrasts with the current system in which charges bear no relationship to whether the applicant actually receives any information. Some agencies may consider this approach to be unfair because they will only be able to charge for documents disclosed to the applicant even if they have processed many more.⁴⁰ The Review does not consider this to be a concern that outweighs the greater fairness to applicants. This approach may even encourage agencies to release more documents than they would currently. Agencies should retain a discretion about whether to impose any charges. If an agency decides to impose a charge, it should still be obliged to provide the applicant with an estimate of those charges before processing the request. If an applicant makes a general request, rather than a request for specific documents, he or she may have no idea how many documents will be covered by it and, without an estimate, may have no idea how much the request is likely to cost.

Fixed scale

14.16 ***FOI Commissioner to determine scale.*** The charge that agencies may impose in respect of documents released should be determined in accordance with a scale fixed by the FOI Commissioner. The scale should be set on the basis of a realistic assessment of the average number of hours a competent administrator in an agency with efficient record management systems would spend on search and retrieval. It should not take into account decision making time. The scale should fix a charge for a specific numbers of pages rather than for each individual page. For example

1 -	20 folios	\$30
21 -	50 folios	\$45
51 -	80 folios	\$60. ⁴¹

The scale should be effected either by way of regulations or a legislative instrument so as to be subject to parliamentary scrutiny.⁴² A standard fee scale would provide greater certainty and protect applicants against agencies with inefficient information management systems. In setting the fee scale the FOI Commissioner should have regard to various factors such as what information technology and record management systems an agency could reasonably be expected to be using.⁴³ The Commissioner should liaise closely with the Chief Government Information Officer when determining the scale of charges and should review the scale annually. Under the recommended regime, an applicant will still be able to apply to have the charges waived.⁴⁴

14.17 ***Application fee.*** The Review considers that the \$30 application fee should continue. The \$30 should, however, be treated as credit in respect of any charges levied on the release of information. For example, under the current regime, an applicant who incurs \$70 in charges will pay a total of \$100 for the request. Under the recommended scheme, the \$30 application fee would be offset against the charge of \$70 and the applicant would only have to pay \$40 more on receipt of the documents.

14.18 ***Photocopying.*** Applicants should continue to pay for the cost of photocopying the documents provided. This should be in addition to the scale costs. This is appropriate because photocopying is not part of request processing but is a direct service provision, the cost of which can fairly be charged to the applicant. The FOI Commissioner should determine an FOI photocopying charge for the federal public

⁴⁰ They may think this particularly if the applicant has refused to cooperate in negotiations with the agency to narrow the request.

⁴¹ The model recommended by the Review is similar to, although not based on, the US FOI fees and charges system. Each US federal government agency is required to promulgate regulations specifying a schedule of fees for processing FOI requests and establishing procedures and guidelines for determining when such fees should be waived or reduced. The schedule must conform with guidelines formulated by the Director of the Office of Management and Budget (after public consultation) which provide for a uniform schedule of fees for all agencies: 5 USCA 552(a)(4)(A)(i).

⁴² There is a possibility that a fee scale of this nature may be characterised by Treasury as a tax and will consequently have to be implemented by way of separate legislation.

⁴³ Note FOI Act (Vic) s 22 that lists principles that must be taken account by agencies when calculating charges in accordance with the regulations, eg, an agency cannot charge for the additional search and retrieval time required to locate a misplaced document or for decision making time.

⁴⁴ See para 14.25.

sector, to be reviewed annually. That charge should be based on reasonable cost recovery. It should not contain a profit margin.

14.19 **Transcripts.** The charge for transcripts should remain at the current rate unless the FOI Commissioner determines that it is inadequate in terms of reasonable cost recovery.⁴⁵ Advances in information technology may mean it is now easier and cheaper to provide such material than it was when the fee was originally determined.

14.20 **Inspection.** There should no longer be a charge for supervising the inspection of documents. Inspection is intended to ensure that documents are not removed or altered. An officer should be capable of carrying out such supervision while continuing his or her normal work routine in the same room as the applicant. Supervising access to information is an incidental function of accountable government rather than a clear cut cost incurred as a result of the provision of a particular service such as photocopying. Accordingly, it should be a cost borne by the government.

Recommendation 88

Agencies should only be able to impose charges in respect of documents that are released. Charges should be assessed in accordance with a fixed scale that has been determined on the basis of a realistic assessment of what information technology and record management systems an agency could reasonably be expected to be using. The scale should be developed by the FOI Commissioner in consultation with the Chief Government Information Officer and reviewed annually.

Recommendation 89

The \$30 application fee should remain and be used as credit towards any charges imposed.

Recommendation 90

The FOI Commissioner should set photocopying and transcribing charges.

Recommendation 91

The regulation that prescribes a charge for supervising inspection of documents should be repealed.

Alternative modifications to current regime

14.21 If the Review's recommendation for a new method of charging based on the number of documents disclosed is not implemented, the Review recommends the following modifications to the existing fees and charges regime.

- Agencies should not be able to charge for the first three hours of search and retrieval time. This should minimise the deterrent effect of the charges regime, particularly if agencies ensure that their information management practices are efficient so that documents take a minimum of time to identify and locate.
- Decision making time should not be charged to the applicant. Decision making is an integral part of the functions of government and in no other area of government is a charge made for the time taken to do it. The Review agrees with Anne Ardagh's view that

⁴⁵ FOI transcripts are written reproductions of documents that are recorded as sound or in shorthand.

[a]n open-ended, decision-making fee constitutes a further and even greater deterrent effect than an application fee, especially on those seeking policy-type documents.⁴⁶

- The FOI Commissioner should set photocopying and transcribing charges.⁴⁷
- The regulation prescribing a charge for supervising inspection of documents should be repealed.⁴⁸

Fee for internal review

DP 59 and submissions

14.22 Requests for internal review must be accompanied by a \$40 fee.⁴⁹ DP 59 proposed that there should be no fee for internal review.⁵⁰ It also proposed that internal review no longer be a prerequisite to external review.⁵¹ Many submissions, principally those from individuals and community groups, agree that internal review should be free.⁵² Government agencies generally consider there should be a fee to deter frivolous applications for internal review.⁵³ However, many suggest that the fee should be refunded if the internal review is favourable to the applicant.⁵⁴

Review's position

14.23 Internal review is an integral part of an agency's decision making process. While the Review acknowledges that the senior officer time involved in internal review may be expensive, this should be an incentive to improve the standard of initial decision making, rather than a reason to charge for review. Improved administration of the Act should, in any case, reduce the need for internal review. The Review considers that an applicant for internal review should not be required to pay a fee.⁵⁵

Recommendation 92

The \$40 fee for internal review should be abolished.

Remission of fees and waiver or reduction of charges

Discretion to remit fees

14.24 An applicant may apply to have the application fee remitted on any ground. Section 30A(1) lists two examples of grounds on which a fee can be remitted: financial hardship of the applicant and that giving access is in the general public interest or in the interest of a substantial section of the public.⁵⁶ These examples have caused confusion about how s 30A should be interpreted. In particular, agencies have had difficulty determining what the second ground actually means.⁵⁷ The Review considers that this confusion could be avoided and attention re-focussed on the general nature of the discretion if s30A did not cite any examples. Instead, the FOI Commissioner's guidelines should provide guidance on factors relevant to the exercise of this discretion.⁵⁸ These factors should include that payment of the fee has caused the applicant

⁴⁶ A Ardagh 'The walls of secrecy are going up again' (1987) 12 *Legal Service Bulletin* 23.

⁴⁷ See para 14.18-14.19.

⁴⁸ See para 14.19.

⁴⁹ s 54(1); FOI (Fees and Charges) Regulations, reg 5(b).

⁵⁰ Proposal 9.2.

⁵¹ Proposal 9.1. See discussion at para 13.3.

⁵² eg Cyclists' Rights Action Group *Submission 5*; PIAC *Submission 34*; H Sheridan & R Snell *Submission 58*; Federation of Community Legal Centres *Submission 79*.

⁵³ eg ATO *Submission 17*; TPC *Submission 42*; Treasury *Submission 80*; Dept of Prime Minister and Cabinet *Submission 82*.

⁵⁴ eg Dept of Veterans' Affairs *Submission 24*; Australia Post *Submission 44*; Telstra *Submission 45*; Dept of Immigration and Ethnic Affairs *Submission 87*. The Attorney-General's Dept currently advises agencies that the fee for internal review should be remitted where the only issue on review is the decision not to remit the initial internal review fee: FOI Memo 29 para 103. Note also that the ASC *Submission 57* is in favour of free internal review.

⁵⁵ This recommendation is consistent with the approach of the ARC in *Better Decisions*: recommendation 75.

⁵⁶ Note that these grounds are also listed in the *Freedom of Information and Protection of Privacy Act 1992* (British Columbia) s 75(5).

⁵⁷ Agencies tend to focus on the public interest in remission rather than the public interest in giving access: FOI Memo 29 para 87.

⁵⁸ Agencies should make clear to applicants the financial implications of applying to the AAT for review of a decision not to remit an application fee. Commonsense suggests it is pointless to spend \$300 to try to save \$30.

financial hardship or that release of the document would have a benefit to the community rather than, or in addition to, a benefit to the applicant.

Recommendation 93

Section 30A(1)(b)(i) and (ii) of the FOI Act should be repealed so as to clarify that agencies have a general discretion to remit fees.

Discretion to waive or reduce charges

14.25 Under s 29(4), an applicant can apply to have charges reduced or waived on any ground including financial hardship to the applicant or the public interest in access. They should continue to be able to do so under the new regime. The provision should, however, be clarified in the same way as s30A. Section 29(4) should continue to confer a general discretion on agencies to waive or reduce charges.

Recommendation 94

Section 29(5) of the FOI Act should be repealed so as to clarify that agencies have a general discretion to waive or reduce charges.

Automatic waiver for particular groups

14.26 IP 12 asked whether some groups, such as Members of Parliament or the media, whose actions could arguably be regarded as inherently in the public interest, should attract an automatic waiver.⁵⁹ Although there was some support for an automatic waiver for Members of Parliament seeking information in the performance of their duties,⁶⁰ the Review does not favour an automatic waiver. Members of Parliament can seek a waiver and each request will be dealt with on its merits. The availability of waiver on public interest grounds is sufficient to ensure that the democratic objects of the Act are advanced.⁶¹

AAT review

Cost of AAT review

14.27 An application to the AAT for review of an FOI decision must be accompanied by a \$300 filing fee.⁶² As the AAT filing fee applies across all jurisdictions, any recommendation about reducing it would be outside the scope of this review.⁶³ The applicant may also incur other costs in seeking AAT review, for example, the cost of legal representation. Given that agencies are usually represented by counsel, applicants can feel intimidated into seeking legal representation, at considerable expense. While agencies incur costs in appearing before the AAT, it is within their power to minimise those costs as much as possible. The fact that FOI applicants will incur the costs of an AAT hearing highlights the importance of AAT procedures being as flexible and efficient as possible.⁶⁴ Proceedings before the AAT should be conducted in a way that does not make appellants feel the need to be legally represented.⁶⁵ Agencies should not spend public resources on unnecessary legal representation.

⁵⁹ Para 9.11.

⁶⁰ eg R Snell *IP Submission 31*; A Kenos *IP Submission 71*.

⁶¹ The Attorney-General's Dept advises agencies that Members of Parliament should receive remissions as a matter of course in some circumstances, eg, when the information requested would normally be provided to the Member in accordance with the Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters: FOI Memo 29 para 97.

⁶² This is the standard filing fee for AAT review and is prescribed in the AAT Regulations reg 19(1), (2). It is payable unless the decision to be reviewed relates to a document that concerns a decision specified in Sch 3 of the AAT Regulations (eg a decision under certain sections of the *National Health Act 1953* (Cth) or a decision reviewable under the *Superannuation Act 1976* (Cth) s 154) or the fee is waived under reg 19(6) on the ground of financial hardship.

⁶³ But see discussion of refunding fee at para 14.28.

⁶⁴ See ch 13.

⁶⁵ See the discussion of the decision in *Day v Collector of Customs* (1995) 130 ALR 106 at para 13.XR.

Powers to refund AAT application fee and recommend payment of costs

14.28 The AAT may refund the \$300 filing fee if proceedings have 'terminated in a manner favourable to the applicant'.⁶⁶ In addition, the AAT has a discretion to recommend to the Attorney-General that an FOI applicant's costs be paid by the Commonwealth where the applicant is successful or substantially successful.⁶⁷ This provision is rarely used.⁶⁸ The Review considers that it should be employed more widely and that its existence should be publicised by the FOI Commissioner. The Review also considers that the circumstances in which a costs order may be made by the AAT should be broadened to include several situations where the applicant is not 'successful or substantially successful'. The first is where an agency issues a conclusive certificate after the applicant lodges an application for review by the AAT. Issuing a conclusive certificate at this late stage is unfair to the applicant as he or she may not have sought review if the document had originally been subject to a conclusive certificate.⁶⁹ The proposal to this effect in DP 59 received considerable support.⁷⁰ The Review recommends that the Act be so amended. The second situation is where an agency claims an additional ground of exemption after an appeal is lodged with the AAT and the original ground is dismissed. The Cyclists' Rights Action Group suggests that the FOI Act should be amended to allow the AAT to recommend to the Attorney-General that appeal costs be paid by the Commonwealth in this situation.⁷¹ The Review agrees and recommends that the Act be amended accordingly.⁷² It has been suggested that this will cause agencies to claim every possible exemption at the initial decision making stage to avoid the possibility of an adverse costs order. The Review does not consider that this risk outweighs the benefit that will flow to applicants from the broadened costs provision. However, the FOI Commissioner should monitor agency practices to ensure that agencies are not taking a 'drift net' approach to the exemptions.

Recommendation 95

The FOI Commissioner should publicise the existence of s 66 of the FOI Act which empowers the AAT to recommend to the Attorney-General that an applicant's costs be paid by the Commonwealth where he or she is successful or substantially successful.

Recommendation 96

The FOI Act should be amended to allow the AtAT to recommend to the Attorney-General that the costs incurred by the applicant in applying for review to the AAT be paid by the Commonwealth where

- an agency issues a conclusive certificate after the application for review is filed in the AAT or
- the agency claims an additional ground of exemption after the application for review is filed with the AAT and the original ground for exemption is dismissed.

⁶⁶ AAT Regulations reg 19(7)(b).

⁶⁷ FOI Act s 66(1), (2). The AAT has held that for the purposes of s 66, an applicant's success should be evaluated on a qualitative as well as quantitative basis: *Re Hittich and Dept of Health* (1994) 36 ALD 498.

⁶⁸ The Review understands that only nine such recommendations have been made, all but one of which were acted on.

⁶⁹ See para 8.17 for a discussion of conclusive certificates.

⁷⁰ Proposal 9.7. See, eg, Cth Ombudsman *Submission 53*; Australian Consumers' Association *Submission 55*; Dept of Prime Minister and Cabinet *Submission 82*. Note that the AAT suggests that any agency that files a conclusive certificate at this stage should also pay a \$300 AAT filing fee: *Submission 20*.

⁷¹ *Submission 5*.

⁷² This is consistent with recommendation 12 of ALRC Report No 75 *Costs shifting - who pays for litigation* ALRC Sydney 1995 which states that in proceedings before the AAT each party should bear his or her own costs subject to the provisions of particular legislation.

15. Private sector

Introduction

15.1 In the public sector the FOI Act seeks to promote open government and democratic accountability by providing a right of access to government-held information. The extent to which the public should have a general right of access to information held by private sector bodies is less clear. Little has been written on the subject and to date there has been no real consideration given to extending FOI principles to the private sector. The Review's terms of reference ask it to consider whether the FOI Act should be extended to cover private sector bodies. This chapter outlines the Review's examination of this issue. It concludes that as a general rule the FOI Act should not apply to private sector bodies. However, there may be situations involving private sector bodies contracting with government or receiving government funding where public information access rights are relevant. The Review recommends that the privacy protection afforded by the FOI Act should be extended to the private sector, but not by means of the FOI Act.

Current access to private sector documents

15.2 A member of the public has no general legal right of access to documents in the possession of a private sector body.¹ Access to such documents is provided at the discretion of that body unless access is sought through the discovery process or there is an obligation to disclose information to government under the various federal, State and local government regulations applying to private sector bodies. Market forces and good customer relations may encourage a private sector body to provide information or copies of documents voluntarily to members of the public on request but access is unlikely to be given unless it is in the interests of that body. In some sectors access to an individual's personal information is provided for by industry codes of practice.² Compliance with those codes is voluntary. The Privacy Act, which provides a right of access to and amendment of one's own personal information, does not apply to the private sector generally but does apply to the credit reporting industry.³

Views on extending the FOI Act to the private sector

DP proposals

15.3 In DP 59 the Review expressed the view that the democratic objectives of FOI have little relevance to private sector bodies as those bodies do not 'govern' and, therefore, are not accountable to the public in the same way as public sector bodies. It proposed that the FOI Act should not be extended to the private sector.⁴ The Review suggested that if, in a particular area, there is a need for greater disclosure of particular information held by the private sector, the relevant legislation should be amended or new legislation introduced to require that industry to disclose the information to the relevant regulator (from whom members of the public could then seek the information). It considered that separate community 'right to know' legislation,⁵ which would require information to be made public automatically through, for example, public registers (rather than available only in response to a request) may be justified in certain circumstances.⁶ DP 59 also proposed that the Privacy Act should be extended to the private sector so as to provide the same privacy protection afforded by the FOI Act in the public sector.⁷ The Review's view on privacy protection in the private sector is discussed at paragraph 15.22. The first part of this chapter deals with the non-privacy aspects of the FOI Act.

¹ It may be possible under the federal or a State FOI Act to obtain access to documents that originated from a private sector body and are in the possession of government.

² eg the Banking Code of Practice; the Insurance Reference Service Code of Conduct.

³ Pt IIIA provides a right of access to and correction of one's own credit information held by a credit reporting agency or credit provider.

⁴ Proposal 11.1.

⁵ Community 'right to know' refers to the public's right to specified information, eg, about pollution or chemical hazards.

⁶ Proposals 11.2, 11.3.

⁷ Proposal 11.5.

Response to DP 59

15.4 Many submissions agree with the view expressed in DP 59 that the FOI Act should not be extended to the private sector.⁸

[T]he principal objective of FOI ... is the enhancement of open and accountable government by providing greater incentives to act in accord with the public interest. The "democratic objective" of FOI is inappropriate when attention turns to private sector businesses, which are not, and should not, be burdened with expectations that all their activities should be in the public interest.⁹

Those submissions also agree that any deficiencies in current disclosure requirements should be addressed by amending or introducing appropriate legislation to require disclosure of specified information to the regulator.¹⁰ Other submissions disagree with the proposal not to extend the FOI Act.¹¹ They point out that the effect of privatisation and 'contracting out' may be to remove from the coverage of FOI legislation information that should be publicly accessible.

FOI should be extended to the private sector for the very same reasons that it is necessary in the public sector. With more GBEs being privatised and 'self-regulation' being introduced in the private sector it is even more important that the public and shareholders are able to find out what is going on inside these companies and not have to accept simply what the directors choose to tell them.¹²

Some submissions favour the extension of the FOI Act to private sector bodies contracted to perform functions formerly carried out by a government agency or in receipt of government funding.¹³ The Review's support for the concept of community 'right to know' legislation received a mixed response. Some submissions consider that the Review's proposals do not go far enough and urge the Review to make more specific recommendations on this matter.¹⁴ PIAC nominates the chemical industry as one area in which community 'right to know' legislation is warranted.¹⁵ Others consider community 'right to know' legislation to be an undue interference with the private sector and see no need for it.¹⁶

The Review's view on general extension

No general extension of the FOI Act

15.5 The Review remains of the view that the democratic accountability and openness required of the public sector under the FOI Act should not be required of the private sector. As a general rule, private sector bodies do not exercise the executive power of government¹⁷ and do not have a duty to act in the interest of the whole community. Private sector bodies should not be under an obligation to disclose to any member of the public any document in their possession. This does not mean that private sector bodies are not accountable to the public at all. Private sector bodies are already subject to a wide range of federal, State and local government regulations that affect their management, policies, operations and products. These regulations cover such matters as health and safety, environmental protection, company and financial management, fair trade practices and consumer protection. They have been imposed in response to a demonstrated need for accountability. In addition, some industries have voluntarily adopted disclosure policies to enhance

⁸ eg Australian Institute of Company Directors *Submission 89*; Business Council of Australia *Submission 93*; Treasury *Submission 80*; Qld Chamber of Commerce & Industry *Submission 6*; Australian Corporate Lawyers' Association *Submission 13*; A Conway-Jones *Submission 18*; PIAC *Submission 34*; Australian Finance Conference *Submission 39*; D Murphy *Submission 43*; Telstra *Submission 45*; Victorian Employers' Chamber of Commerce and Industry *Submission 54*; State Chamber of Commerce (NSW) *Submission 56*; KPMG *Submission 67*; Avcare *Submission 73*; Royal NSW Canine Council *Submission 74*; Dept of Prime Minister and Cabinet *Submission 82*; The Public Policy Assessment Society *Submission 4*.

⁹ Treasury *Submission 80*.

¹⁰ eg Australian Institute of Company Directors *Submission 89*; The Public Policy Assessment Society *Submission 4*; Qld Chamber of Commerce & Industry *Submission 6*; A Conway-Jones *Submission 18*; PIAC *Submission 34*; Treasury *Submission 80*.

¹¹ eg B Hewitt *Submission 7*; D Bowd *Submission 16*; H Sheridan & R Snell *Submission 58*.

¹² D Bowd *Submission 16*.

¹³ eg Qld Nurses' Union *Submission 9*; Dept of Employment, Education and Training *Submission 60*; CthOmbudsman *Submission 53*; Australian Consumers' Association *Submission 55*; Health Consumers' Network (Qld) *Submission 66*; Consumers' Health Advocacy *Submission 71*.

¹⁴ PIAC *Submission 34*; Consumers' Health Advocacy *Submission 71*.

¹⁵ PIAC *Submission 34*.

¹⁶ Qld Chamber of Commerce & Industry *Submission 6*; Australian Corporate Lawyers' Association *Submission 13*.

¹⁷ Some private sector bodies may do so when contracted to provide services to the public on behalf of the government: see para 15.12.

consumer access to information.¹⁸ In the Review's view strong justification would be needed to subject private sector bodies to the additional resource burden and potential threats to commercial operations that could result from a general extension of the FOI Act. The Review does not consider that such justification exists. Accordingly, it recommends that the FOI Act not be extended to the private sector.

Any need for greater disclosure should be addressed directly

15.6 *Specific disclosure requirements.* If the reporting or disclosure requirements for particular information in a particular industry are deficient, those requirements should be improved. In most cases, a deficiency will be remedied by requiring disclosure of specified information to the relevant regulator. If the information disclosed to the regulator is not published, people will be able to seek it from the regulator under the FOI Act. The Review has not sought to identify any areas in which disclosure of information by the private sector is deficient. If deficiencies are identified, however, they should be addressed directly through specific disclosure requirements rather than through an extension of the FOI Act which would make accessible all documents in the possession of private sector bodies, not just the documents that contain the information that it has been determined should be made accessible.

15.7 *Community 'right to know' legislation.* In some situations there may be justification for specific legislation requiring release of particular information direct to the public on request or through public registers in recognition of the community's 'right to know' about that information. The FOI Act is an inadequate mechanism for addressing this situation.

FOI is an inappropriate vehicle for community right to know because the FOI processes are generally regarded as cumbersome, and would not facilitate the free dissemination of information sufficient to satisfy the community's right to know. In direct contrast to FOI laws and processes, legislation for a community right to know should make access to ... information easy, relevant and quick, and the information prepared in a manner that is readily comprehensible.¹⁹

In addition, some people consider that the exemptions in the FOI Act mean that information that the community has a particular interest in accessing may be withheld and that the public accessibility of this information would be better addressed by specific legislation.²⁰ While the Review has not been able in this review to do sufficient research to identify and recommend particular community 'right to know' legislation, it is clear that industrial waste and chemical hazards are areas in which a number of individuals and organisations consider disclosure of information needs to be improved and that a legislative scheme for community 'right to know' is necessary.²¹ The Review considers that further investigation of the adequacy of current information disclosure requirements in the chemicals area is warranted.

Recommendation 97

The FOI Act should not be extended to apply generally to private sector bodies.

Recommendation 98

If there is a need for greater disclosure of particular information in a particular area of the private sector, the legislation regulating that industry should be amended, or new legislation introduced, to require greater disclosure of that information. Depending on the identified need, disclosure might be to the relevant regulator, to the public on request or, in appropriate cases, to the public at large by means of public register or other automatic disclosure mechanisms.

¹⁸ eg the Australian Chemical Industry Association Code of Practice on Right to Know applies to companies that have agreed to join the industry's Responsible Care self-regulatory scheme: *Responsible Care: A Public Commitment*, Australian Chemical Industry Council, 1989.

¹⁹ J Fuller *Chemicals, communication and the community. Recognising a right to know in the chemical world* PIAC Sydney 1995, 19.

²⁰ Information provided to the regulating agency by private sector companies may be exempt from disclosure under the FOI Act on the basis that the information was provided in confidence (s 45) or would adversely affect business affairs (s 43).

²¹ See, eg, Australian Consumers' Association *Submission 55*. See also N Gunningham & A Cornwall *Toxics and the community: legislating the right to know* Australian Centre for Environmental Law, Australian National University 1994; J Fuller *Chemicals, communication and the community. Recognising a right to know in the chemical world* PIAC Sydney 1995.

Private sector bodies contracting with government

Trend towards government contracting out for service provision

15.8 Government is under increasing pressure to become more effective and efficient in performing its functions. This has led to changes allowing agencies greater flexibility in methods of service delivery. These include increased reliance on competitive tendering and contracting between government agencies and between government and the private sector. Government contracting is a broad term which covers contracting for the provision of goods and services to government as well as the provision of services to the public on behalf of government.

Contracting for provision of goods and services to government

15.9 The government enters many contracts with private sector bodies for the provision of goods and services to the government.²² In most of these situations, the agency will have a clear incentive to ensure that the contract requires the private contractor to give it sufficient information to enable it to ascertain whether the contract is being fulfilled. In the hands of the agency, that information will be subject to the FOI Act. In these situations there is no need either to subject the private sector body to the FOI Act or to make any special arrangements to ensure that the contract includes adequate obligations on the private sector body to provide information to the agency. The following paragraphs do not therefore deal with these situations. In other situations involving contracting for the provision of services to government, for example a contract for a private sector body to collect information for the government, there may be a need to do more than rely on the agency to ensure that the information collected is as accessible to the public as it would have been had the government collected the information itself. In these situations, the comments and recommendations in the following paragraphs in respect of contracts to provide services to the public on behalf of government may be applicable.

Accountability implications of government contracting

15.10 The trend towards government contracting with private sector bodies to provide services to the community raises significant regulatory and accountability issues. These issues are currently being investigated as part of a broad inquiry by the Industry Commission into competitive tendering and government contracting.²³ The risk of loss of accountability as a result of government contracting has not gone unnoticed.

What appears to be happening is that administrative law is being pushed out of the public sphere by re-labelling public activities. ... This re-labelling is done by the expedient of using the mechanism of contract to fulfil public purposes. The rhetoric of contract, in particular "freedom of contract", is then employed to insulate the government from scrutiny. When this freedom is combined with the use of contract for the ordering and control of public resources, the synthesis becomes dangerous.²⁴

This review is concerned only with the accountability that can be provided by information access rights. It is necessary to consider what, if anything, should be done to prevent loss of accountability because information relating to the provision of a service is in the possession of a private sector body and not a government agency. This issue needs to be addressed to ensure that all information necessary for government accountability purposes is available to the public.

DP 59 proposal and response

15.11 DP 59 proposed that FOI rights should not be reduced as a result of the contracting out of government functions.²⁵ Many submissions acknowledge the need to retain information access rights in respect of

²² eg stationery, computer equipment or information technology services.

²³ Industry Commission *Competitive Tendering and Contracting by Public Sector Agencies* Draft Report 24 October 1995 Pt B1.

²⁴ N Seddon *Government contracts: Federal, State and Local* Federation Press Sydney 1995, 15. See also J Alford & D O'Neill (eds) *The contract State public management and the Kennett Government* Centre for Applied Social Research, Deakin University 1994, 128; J Boston (ed) *The State under contract* Bridget William Books Ltd New Zealand 1995, 38; P Bayne 'Recent developments in administrative law' *Paper AIC Administrative Law Conference* Sydney 28-29 August 1995.

²⁵ Proposal 11.4. DP 59 referred to 'outsourcing of government functions'. The Review considers 'government contracting' to be a more useful term in the context of this review.

government functions being performed in the private sector.²⁶ Some consider this can be taken care of under the contractual arrangements between the private sector body and the agency.²⁷ Others consider that would be unsatisfactory. They would prefer the FOI Act to be extended to apply to the private sector body in respect of documents that relate to the performance of the function.²⁸

The FOI Act should be extended to include documents relating to an action of an organisation which is done on behalf of a government department. Only documents which are about the outsourced activity are covered by the FOI Act, and the Act operates automatically without any need for specific arrangements with the outsourced agency.²⁹

An example of this approach is the recent extension of the FOI Act to private sector 'eligible case managers' contracted to provide case management services for unemployed persons on behalf of the Commonwealth.³⁰

Review's position

15.12 *Public affected by contracting out of service provision.* Where an agency contracts with a private sector body to provide services to the public on behalf of government, public information access considerations arise because it is the public, not the contracting agency, that is the ultimate recipient of the service. It is in this situation that the traditional distinction between the public and private sectors becomes blurred. So long as the service is provided in an acceptable manner, the fact that it is provided by a private sector body rather than a government agency is likely to be of little consequence to the public. However, if any problems occur in relation to the provision of the service, it is members of the public who will be affected and whose ability to seek redress may be reduced by the fact that they are not party to the contract. It is in this situation that adequate access to information about the performance of the contract needs to be guaranteed. Contracting with private sector bodies for the provision of services directly to the public on behalf of government poses a potential threat to the government accountability and openness provided by the FOI Act. It should not be possible to avoid that accountability and openness by contracting with the private sector for the provision of services.

15.13 *Preserving public information access rights.* Responsibility for ensuring the preservation of the public's information access rights in an appropriate manner should rest with the contracting agency.

[W]hile the government as contractor plays a role identical to the powerful 'private' contractors, the performance of the role is an exercise of public power, and there is a public interest in its regulation.³¹

An agency should bear in mind the cost of preserving these rights when considering whether to contract out the provision of a particular service. There are a number of ways in which provision can be made for documents that relate to the contracted service to be accessible. Given the range of situations in which services may be contracted it is not possible for the Review to specify with certainty which of these approaches will be the most appropriate in a particular situation. Nevertheless, the Review expresses a preliminary view on when it may be appropriate to use each approach.

- ***Making the private sector body subject to the FOI Act.*** In some situations it may be appropriate to extend the FOI Act to apply to the private sector body in respect of documents that relate to the provision of the service.³² An advantage of this approach is that there would be no need for agencies to make contractual provision for information access rights. A disadvantage is that it would require regular amendment of the FOI Act. The Review considers that this approach should be taken wherever a legislative scheme is established under which private sector bodies will be contracted to provide services to the public on behalf of the government.

²⁶ A Conway-Jones *Submission 18*; PIAC *Submission 34*; Australian Finance Conference *Submission 39*; The Public Policy Assessment Society *Submission 4*; Privacy Commissioner *DP Submission 81*; Australian Institute of Company Directors *Submission 89*; Business Council of Australia *Submission 93*.

²⁷ See, eg, Dept of Administrative Services *Submission 83*.

²⁸ Cth Ombudsman *Submission 53*; Australian Consumers' Association *Submission 55*; Federation of Community Legal Centres *Submission 79*.

²⁹ Cth Ombudsman *Submission 53*.

³⁰ See *Employment Services Act 1994* (Cth) and FOI Act 6B. 'Eligible case manager' is defined in the FOI Act s 4(1). The Dept of Employment, Education and Training *Submission 60* reports that the case manager contractors do not appear to consider onerous the extension of the FOI Act to their activities.

³¹ P Bayne 'Recent developments in administrative law' *Paper AIC Administrative Law Conference Sydney 28-29 August 1995*, 4.

³² This could be done by amending the definition of 'agency', as was done in the case of eligible case managers providing services under the *Employment Services Act 1994* (Cth), or 'prescribed authority'.

- **Deeming documents to be in the possession of the contracting agency.** Where the service is not provided pursuant to a legislative scheme of the kind described above, the FOI Act could provide that documents held by a private sector body that relate to services provided by that body under a government contract are deemed to be in the possession of the contracting agency.³³ The operation of this provision could be triggered by statutory instrument applying the provision to the particular contract.³⁴ At the time of entering the contract agencies would consider whether this provision should be applied.³⁵ One advantage of this approach is that rights under the FOI Act, and, therefore, public accountability regarding provision of the service, would be preserved. The agency would not have to incorporate information access rights in individual contracts. Another advantage is that the seeker of information would not be disadvantaged by not being a party to the contract.
- **Incorporating information access rights in individual contracts.** Rights of access could be incorporated into the terms of the contract between the agency and the private sector body requiring the body to disclose specified information either to the agency or, on request, to the users of the service. If information is disclosed to the agency, it will be subject to the FOI Act.³⁶ This approach has several possible disadvantages. First, it leaves the preservation of public information access rights to the contracting parties. Second, the individual member of the public who may seek to exercise the 'right' provided by the contract is not a party to that contract and will have no recourse if the terms of the contract are breached. Nevertheless, this approach may be the only appropriate means of providing relevant information access rights in some situations, for example, one-off or short term contracts.

In cases other than where there is a statutory scheme for the contracting out of services, the ALRC does not express a preference for either of the second or third approaches described above. It considers that the agency should be left to decide the most appropriate way to provide relevant information access rights. The ARC takes the view that if there is no statutory scheme, agencies should lean in favour of preserving information access rights by deeming documents that relate to the provision of the service to be in the possession of the contracting agency. Only where this is not appropriate, for example because of the nature of the contract, should information access rights be left to the terms of the contract between the agency and the private sector body. The ARC is also concerned that even if the FOI Act applies to a private sector body, the scope for claiming that documents are exempt, particularly under s 43, will be greater than if the service was still being provided by the government. It considers that if documents that relate to the provision of a service to the public wofunded private sector bodies. In most cases such bodies should be subject to the general approach the Review recommends for the private sector - that specific disclosure requirements should be legislated for where necessary.³⁷ For example, the legislation that provides for particular kinds of private sector bodies to be funded could impose, as a condition of funding, requirements to provide particular information. Depending on the particular service, disclosure may be required to the funding agency or to the users of the service and their representatives or possibly even to the general public. An example of this approach is the ALRC's recommendation in its review of aged care and child care legislation that as a condition of funding, the relevant legislation should require government funded aged care and child care services to provide information on specified matters directly to consumers.³⁸

15.15 FOI Commissioner to issue guidelines to assist agencies. The FOI Commissioner could play a useful role in developing guidelines to assist agencies to determine what is necessary to ensure that appropriate information access arrangements are made in a particular contracting out or funding situation.³⁹ If it is determined that contractual provision is the most suitable alternative in a particular instance, the FOI Commissioner should suggest appropriate clauses. The FOI Commissioner should monitor the contracting out of government services and functions, and the funding of private sector bodies to perform services on behalf of government, and report on whether, in all of these situations, satisfactory arrangements are being

³³ An alternative might be to define such documents as documents of an agency: see FOI Act s 4.

³⁴ The statutory provision would establish the right to access. As a practical matter, processing of an application for access could be handled either by the contracting agency or by the private sector body holding the documents.

³⁵ There may also need to be a provision in the contract requiring the private sector body to hand over documents at the agency's request.

³⁶ eg Qld Nurses' Union *Submission* 9; Australian Consumers' Association *Submission* 55; Health Consumers' Network *Submission* 66.

³⁷ See para 15.6.

³⁸ ALRC Report No 70 *Interim Child care for kids* ALRC Sydney 1994 recommendation 27; ALRC Report No 72 *The coming of age* ALRC Sydney 1995 recommendation 46.

³⁹ The Privacy Commissioner has issued guidelines on the privacy implications of outsourcing information technology and other functions. Those guidelines include suitable clauses for preserving privacy rights in most outsourcing contracts: *Outsourcing and privacy* Human Rights and Equal Opportunity Commission Sydney 1994.

made with respect to the accessibility of relevant information. The ARC considers that the FOI Commissioner should also monitor the use of the business affairs exemption (s 43) in respect of documents held by private sector bodies that are subject to the FOI Act to ensure that documents that would not have been exempt when the service was performed by an agency do not become so merely because the service is now performed by a private sector body.

Recommendation 99

If an agency contracts with a private sector body to provide a service or perform a function on behalf of the government, the agency should ensure that suitable arrangements are made for the provision of public information access rights.

Recommendation 100

Where a statutory scheme provides for private sector bodies to be contracted to provide services or functions to the public on behalf of the government, information access rights should generally be provided by applying the FOI Act to those private sector bodies, but only in respect of documents that relate to the provision of those services or functions.

Recommendation 101A (ALRC)

Where there is no statutory scheme, the contracting agency should determine the most suitable way to provide relevant information access rights, bearing in mind the guidelines issued by the FOI Commissioner.

Recommendation 101B (ARC)

Where there is no statutory scheme, the contracting agency should generally preserve information access rights by ensuring that documents in the possession of the private sector body are deemed to be in the possession of the contracting agency.

Recommendation 102

The FOI Commissioner should provide guidance to agencies on what arrangements are advisable in a particular contracting out or funding situation. The Commissioner should also monitor the contracting out of government services and functions, and the funding of private sector bodies to provide services to the public, and report on whether in all of these situations satisfactory arrangements are being made with respect to the accessibility of relevant information.

Information privacy protection in the private sector

Introduction

15.16 The objectives of the FOI Act include providing for access to personal information and amendment of records containing personal information. Although the Review considers that as a general rule the FOI Act should not apply to the private sector, there remains the issue of whether the privacy protection provided by the FOI Act should be provided in the private sector by means other than the FOI Act.

Current information privacy protection in the private sector

15.17 There is currently no comprehensive information privacy protection applying to the private sector in Australia. What protection exists is piecemeal and provided by a mixture of legislation, administrative guidelines and voluntary codes of practice. The Privacy Act, which protects information privacy in the federal public sector through the application of the IPPs,⁴⁰ applies to the private sector only in respect of tax

⁴⁰ See ch 5.

file numbers⁴¹ and credit reporting.⁴² In recent years some private sector industries have developed, or are considering developing, codes of practice that incorporate information privacy protection.⁴³ Others have introduced an industry Ombudsman or another body whose functions include addressing privacy concerns.⁴⁴

DP 59 proposals and response

15.18 DP 59 proposed that information privacy should be protected in the private sector and that this should be achieved by extending the Privacy Act to the private sector.⁴⁵ It also proposed that the Privacy Act should be extended to cover any part of the public sector not currently subject to the Act.⁴⁶ Many submissions agree with the proposal to extend the scope of the Privacy Act,⁴⁷ some with reservations about how the extension should be implemented.⁴⁸ Others do not support the proposal.⁴⁹ They consider that it is unnecessary,⁵⁰ that it would be an undue interference with and burden on the private sector,⁵¹ that insufficient evidence was provided in DP 59 as to the need for privacy regulation in the private sector⁵² and that privacy concerns within the private sector are presently, or could be, adequately dealt with by self regulation.⁵³

Increasing focus on protecting information privacy within Australia

15.19 A comprehensive national approach to protecting privacy was first canvassed in Australia by the ALRC in 1983.⁵⁴ Since then various government inquiries and public initiatives have demonstrated that many Australians are concerned to have their privacy protected. On 5 December 1994, the Australian Privacy Charter Council,⁵⁵ released a Charter which sets out 18 general privacy principles that are intended to act as benchmarks against which the practices of business and government, and the adequacy of legislation and codes, may be measured.⁵⁶ Surveys conducted by the Privacy Commissioner between 1990 and 1994 show that many people are concerned about privacy and want control over their personal information and legislated safeguards.⁵⁷

While accepting that there are benefits to their personal information being collected, Australians do not feel that they have enough control over the information handling process. Around ninety percent want to know when their personal information is being collected, what use it will be put to, and whether it will be transferred to anyone else. They also want the right to check and correct the information held about them.⁵⁸

The House of Representatives Standing Committee on Legal and Constitutional Affairs recently examined the scope of privacy protection in Australia and recommended that the protection provided by the IPPs

⁴¹ Privacy Act s 17, s 18.

⁴² Pt IIIA which came into effect in February 1992, subjects the credit reporting industry to the IPPs and is supplemented by a legally binding code of conduct.

⁴³ eg the Australian Direct Marketing Association has voluntary guidelines that incorporate some privacy protection for consumers, the Insurance Reference Service has a Code of Conduct and a Code of Practice has been proposed for the life insurance industry. The TPC has recently issued a Guide to Codes of Conduct to assist industry self-regulation.

⁴⁴ eg the Telecommunications Industry Ombudsman, the Australian Banking Industry Ombudsman, the Superannuation Complaints Tribunal and the General Insurance Claims Review Panel. A Telecommunications Privacy Advisory Committee has also been established within AUSTEL to develop appropriate industry standards for the protection of privacy.

⁴⁵ Proposal 11.5.

⁴⁶ Proposal 11.6.

⁴⁷ `The Public Policy Assessment Society *Submission 4*; J Sperling *Submission 10*; A Conway-Jones *Submission 18*; D Murphy *Submission 43*; Confidential *Submission 46*; Australian Consumers' Association *Submission 55*; H Sheridan & R Snell *Submission 58*; Federation of Community Legal Centres *Submission 79*; Privacy Commissioner *DP Submission 81*; Legal Aid Commission of Victoria *Submission 86*; Australian Institute of Company Directors *Submission 89*.

⁴⁸ PIAC *Submission 34*; National Pituitary Hormones Advisory Council *Submission 48*.

⁴⁹ Qld Chamber of Commerce & Industry *Submission 6*; Australian Corporate Lawyers Association *Submission 13*; Australian Bankers' Association *Submission 26*; Australian Finance Conference *Submission 39*; Victorian Employers' Chamber of Commerce & Industry *Submission 54*; State Chamber of Commerce (NSW) *Submission 56*.

⁵⁰ Australian Corporate Lawyers Association *Submission 13*.

⁵¹ Qld Chamber of Commerce & Industry *Submission 6*; Australian Corporate Lawyers Association *Submission 13*; State Chamber of Commerce (NSW) *Submission 56*.

⁵² Victorian Employers' Chamber of Commerce & Industry *Submission 54*.

⁵³ Australian Bankers' Association *Submission 26*; Victorian Employers' Chamber of Commerce & Industry *Submission 54*; Business Council of Australia *Submission 93*.

⁵⁴ ALRC 22 especially para 1092, 1392-1395.

⁵⁵ Whose membership is drawn from a cross section of professional, academic and business experts in privacy.

⁵⁶ Australian Privacy Charter Council *The Australian Privacy Charter* December 1994.

⁵⁷ Privacy Commissioner *Community Attitudes to Privacy* Information Paper Number 3 HREOC 1995.

⁵⁸ id Foreword.

should be extended to all confidential third party information by way of a national privacy code.⁵⁹ There are two main factors prompting reform in this area: technological change and international developments.

Impact of technological advances on information privacy

15.20 The advances in telecommunications and computer technologies in recent years has markedly increased the potential for the collection, storage and manipulation of data. These advances are not limited by any state or national boundaries and affect the public and private sectors alike. They are rapid and continuing and offer Australia many opportunities. They may also pose a threat to personal privacy. This is of concern to many people.⁶⁰ Some are particularly concerned about the privacy implications of the impending introduction of smart cards, credit sized plastic cards with a built-in memory to store and manipulate information.⁶¹ In embracing technological advances Australia must acknowledge and address the implications for personal information privacy and at the very least put in place minimum safeguards for privacy protection.

International obligations and directions

15.21 Australia is a party to the International Covenant on Civil and Political Rights (ICCPR) and a member of the OECD. Article 17 of the ICCPR prohibits the arbitrary or unlawful interference with a person's privacy. In 1980 the OECD issued guidelines that apply to personal data whether in the public or private sectors. The guidelines set minimum standards for the protection of privacy and individual liberties.⁶² More recently, the European Union issued a Directive which applies to both public and private sectors. It imposes a uniform minimum standard of privacy protection in the European Union and directs member countries to amend their laws to comply with the Directive.⁶³ This Directive has important implications for Australia as it prohibits the transfer of personal data from the European Union to countries that do not have adequate data protection laws.⁶⁴

Review supports comprehensive information privacy protection

15.22 The Review remains of the view that information privacy should be protected in the private sector as well as in the public sector. The Privacy Commissioner favours a consistent national legislative framework for information privacy protection⁶⁵ as does the House of Representatives Standing Committee on Legal and Constitutional Affairs.⁶⁶ The Government recently announced that it will 'develop an effective, comprehensive scheme to protect individual privacy which does not impose unnecessary burdens on business and the community.'⁶⁷ The Attorney-General's Department has commenced consultations for the purpose of ascertaining the most effective scheme. The Review recommends that a comprehensive, national scheme for

⁵⁹ *In Confidence* para 10.1.1-10.8.1.

⁶⁰ See, eg, National Information Services Council, Office of the Chief Scientist, Dept of the Prime Minister and Cabinet *Agenda Papers from the first meeting of the Council* 10 August 1995 AGPS Canberra 1995, 83; H Raiche 'Clearer vision needed for privacy on the infobahn' (1995) 2 *PLPR* 21; Telecommunications Industry Ombudsman 'Privacy protection - a major challenge in telecommunications' (1995) 2 *PLPR* 46.

⁶¹ See, eg, Privacy Commissioner *Sixth Annual Report on the Operation of the Privacy Act* AGPS Canberra 1994, 93; M Walters 'Smart cards and privacy' (1994) 1 *PLPR* 143; C Connolly 'Smart cards and personal privacy implications' (1995) 2 *PLPR* 61; E Moody 'Banks agree smart cards hold privacy challenges' *The Australian* 2 September 1995, 62.

⁶² The OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data cover such matters as the collection of information relating to an identifiable individual; quality of data collected; purpose of data collection; limitation on the use of data; security safeguards for data; openness about development and practices and policies with respect to personal data; access and correction rights and accountability for compliance with the Guidelines. They also cover movements of personal data across national borders. The OECD recommended that member countries take into account in their domestic legislation the principles concerning the protection of privacy and individual liberties set out in the OECD Guidelines. The Privacy Act goes part of the way to implementing Australia's commitment to the OECD Guidelines: see preamble to the Privacy Act.

⁶³ The objectives of the Directive include the protection of information privacy by member states and the prevention of restrictions on the free flow of personal information between member states.

⁶⁴ More countries are enacting information privacy legislation to comply with standards set by international bodies and bodies established for regional economic cooperation. The following countries have privacy or data protection laws that extend to both public and private sectors including Austria (1978), Belgium (1992), Denmark (1978), Finland (1987), France (1978), Germany (1977), Greenland (1979), Hong Kong (1995), Hungary (1992), Iceland (1981), Ireland (1988), Israel (1981), Luxembourg (1979), The Netherlands (1988), New Zealand (1993), Norway (1978), Portugal (1991), Slovenia (1990), Spain (1992), Sweden (1973), Switzerland (1992) and the United Kingdom (1984).

⁶⁵ Privacy Commissioner *Community Attitudes to Privacy* Information Paper Number 3 Human Rights and Equal Opportunity Commission August 1995 Foreword.

⁶⁶ *In Confidence* recommendation 38.

⁶⁷ Prime Minister 'Innovate Australia Information Technology and Telecommunications' *Speech* 6 December 1995 11-12; Attorney-General & Justice Minister 'Government moves to protect privacy' *Joint news release* 10 December 1995.

information privacy protection be introduced in Australia.⁶⁸ Any GBE or government agency not currently subject to the Privacy Act should be brought within that scheme.⁶⁹

Achieving a comprehensive, national privacy scheme

15.23 Review supports extension of Privacy Act. In DP 59 the Review noted that the IPPs in the Privacy Act provide a comprehensive set of standards for the collection, handling and disclosure of personal information and proposed that the Privacy Act be extended to the private sector. It proposed, however, that the Act only be enforceable in a particular industry if and when the Privacy Commissioner issues a code for that industry.⁷⁰ A number of submissions support this proposal.⁷¹ Others prefer the approach taken in New Zealand. The *Privacy Act 1993* (NZ) applies to both public and private sectors⁷² and makes provision for the development of codes of practice which may cover particular industries, agencies, professions or particular information activities.⁷³ The Act, which came into effect on 1 July 1993, will become fully enforceable in all sectors three years after that date, whether or not a code of practice has been issued in a particular industry. The Review remains of the view that the Privacy Act provides a sound basis for national privacy protection legislation in Australia, although modification may be necessary if it is applied to the private sector. The Review also remains of the view that enforceable codes of practice can provide the flexibility needed in a privacy regime that must apply to a wide range of sectors and industries. Further consultation and research would be needed to determine the precise changes that would have to be made to the Privacy Act, including possible exemptions and exceptions that would be needed and what fees, if any, should be levied for providing access to and amendment of personal information in the private sector.

15.24 State and Territory governments. A comprehensive, national privacy scheme will require privacy protection in the State and Territory public sectors as well as in the private sector. The House of Representatives Standing Committee on Legal and Constitutional Affairs recommended that the proposal for a national privacy code be placed on the agenda for the earliest possible meeting of the Council of Australian Governments.⁷⁴ The Review supports a cooperative approach between the Commonwealth and the States and Territories. A national scheme for the protection of information privacy is a matter that clearly falls within the responsibility of the various Attorneys-General. Accordingly, it would be appropriate that it be placed on the agenda for discussion at the earliest possible meeting of the Standing Committee of Attorneys-General.

15.25 Access to health and medical records. The Review received a number of submissions that claim there is an urgent need for legislation to enable patients to gain access to their health and medical records in the private sector.⁷⁵ The Government recently expressed support for a right of access to such records.⁷⁶ The Review considers that access to health and medical records in the private sector could be dealt with in the context of a comprehensive national privacy regime. The importance of this issue points to the need for a national regime to be implemented quickly.

⁶⁸ The Review considers that the external affairs power (Constitution s 51(xxix)), which enables the federal government to legislate to give effect to international obligations, would provide the Constitutional power necessary to enable the federal Government to implement a national legislative scheme for information privacy protection. The relevant international obligation is Article 17 of the ICCPR.

⁶⁹ GBEs are discussed further in ch 16.

⁷⁰ Proposals 11.5 and 11.7.

⁷¹ A Conway-Jones *Submission 18*; Sydney Futures Exchange *Submission 40*; Confidential *Submission 46*; Australian Consumers' Association *Submission 55*; H Sheridan & R Snell *Submission 58*.

⁷² With some exceptions, eg, for the news media and Members of Parliament.

⁷³ If a code is issued, it has legislative force. The only code issued to date is the Health Information Privacy Code 1994 which applies specific rules to agencies in the health sector. The code was first released as a draft and was modified in light of experience prior to implementation as a final code in June 1994.

⁷⁴ *In Confidence* recommendation 39.

⁷⁵ See, eg, PIAC *Submission 34*; National Pituitary Hormones Advisory Council *Submission 48*; Health Consumers' Network (Qld) *Submission 66*; Consumers' Health Advocacy *Submission 71*; Federation of Community Legal Centres *Submission 79*.

⁷⁶ Minister for Human Services and Health & Minister for Justice 'Consumer health rights boosted' *News Release* 13 December 1995. The news release indicates that the Government is awaiting the outcome of the appeal to the High Court (heard on 21 November 1995) against the decision of the NSW Court of Appeal in *Breen v Williams* (1994) 35 NSWLR 522 which will help it to determine whether legislation is necessary 'to enshrine this patient right'.

Recommendation 103

A comprehensive, national legislative scheme should be introduced to provide information privacy protection in all sectors, including the private sector and those parts of the federal public sector that are not currently subject to the Privacy Act.

Recommendation 104

The Attorney-General should raise the need for national information privacy protection at a meeting of the Standing Committee of Attorneys-General at the earliest possible opportunity.

16. GBEs

Introduction

16.1 In recent years governments have attempted to improve the efficiency and accountability of the public sector. Commercialisation of government agencies and of services has led to the restructuring and creation of internal business units within agencies.¹ It has also resulted in some functions being carried out by distinct, independent corporate structures called government business enterprises (GBEs).² The term GBE covers a wide range of entities. Typically, a GBE is wholly or partly government owned and undertakes commercial activities. In addition to these commercial activities, a GBE's functions may include regulatory and policy functions and Community Service Obligations (CSOs).³ The creation of GBEs and the reduction of the government's direct control over their day to day operations is intended to improve the efficiency with which goods and services are provided. Many GBEs conduct their functions in competition with wholly private entities. The Review's terms of reference ask whether the FOI Act should apply to GBEs.

Personal and non-personal information

16.2 In Chapter 15 the Review recommends that a comprehensive national scheme for the protection of information privacy should be introduced and that this scheme should apply to any part of the federal public sector not currently subject to the Privacy Act.⁴ The national scheme will provide individuals with access and amendment rights in respect of their personal information held by any GBE, thus satisfying the privacy objective of the FOI Act. This chapter focuses on non-personal information in the possession of GBEs and whether the FOI Act should provide a right of access to that information.

Defining GBEs for administrative law purposes

16.3 The ARC recently inquired into the applicability of federal administrative law to GBEs.⁵ It identified several characteristics that it considers should be used to determine what constitutes a GBE for the purpose of federal administrative law

- the government controls the body
- the body is principally engaged in commercial activities and
- the body has a legal personality separate from the government.

The ARC considered government control to be the most important characteristic that distinguishes a GBE from a privately-owned business enterprise and the chief factor calling for public accountability. Government control will be established if the government has an ownership interest in the body of at least 50%. In the case of a body corporate, the government has a controlling interest if it is able to

- control (whether directly or through its ownership interest in other bodies) the composition of the board of directors
- cast (or control the casting of) more than one half of the maximum number of votes that might be cast at a general meeting of the body or

¹ eg AGPS and DASFLEET within the Dept of Administrative Services.

² GBE is only one term used to describe such government enterprise entities. Other terms include Government (or State) Owned Enterprises, State Owned Corporations and Public (or Government) Trading Enterprises.

³ Community Service Obligations (CSOs) are obligations imposed by the government on some government-owned commercial bodies to supply essential services such as water, power and communications at less than the cost of producing them so as to ensure universal access. The fulfilment of a CSO typically requires a body to provide a service that would not be provided, or that would only be provided at a high cost to consumers, if market conditions prevailed. Examples of Commonwealth GBEs with CSOs are Telstra, which has a 'universal service obligation' under the *Telecommunications Act 1991* (Cth) s 288 to provide standard telephone services in Australia and Australia Post, which has an obligation under the *Australian Postal Corporation Act 1989* (Cth) s 27 to supply a letter service.

⁴ See ch 15 recommendation 103.

⁵ ARC Report No 38 *Government business enterprises and Commonwealth administrative law* (ARC 38) ARC Canberra 1995. The Report considered the AAT Act, the Ombudsman Act, the Archives Act and the *Administrative Decisions (Judicial Review) Act 1977* (Cth). No detailed consideration was given to the FOI Act or the Privacy Act in view of this review.

- control more than one half of the issued share capital of the body.⁶

The ARC concluded that if the government does not have a controlling interest in the enterprise, it should not be subject to the Commonwealth's administrative law statutes.⁷ The Review has adopted these criteria for the purpose of considering the question of whether the FOI Act should apply to GBEs.

Accountability of GBEs

The policy of competitive neutrality

16.4 The Government has adopted a national competition policy that supports an open, integrated domestic market for goods and services and that embraces competitive neutrality between GBEs and private businesses. The Competition Principles Agreement entered into by the Commonwealth, the States and the Territories in April 1995 states that 'government businesses should not enjoy any net competitive advantage simply as a result of their public sector ownership'.⁸

GBEs are subject to private sector and government accountability mechanisms

16.5 GBEs are subject to a wide range of accountability measures that also apply to private sector organisations.⁹ Some GBEs operate in markets that are supervised by regulatory bodies.¹⁰ In addition, GBEs are subject to the Accountability and Ministerial Oversight Arrangements for Commonwealth GBEs which enable government to oversee the operations of GBEs.¹¹ Under these Arrangements GBEs are required to present to the responsible Minister detailed corporate plans that include financial targets and business strategies for the next three to five years. They must also provide confidential six monthly reports on progress against, and any changes to, the corporate plan. Many of the provisions of the Arrangements have been adopted in proposed legislation which will replace the *Audit Act 1901*.¹²

Accountability through federal administrative law statutes

16.6 As discussed in Chapter 2, over the last 20 years government accountability has evolved beyond the traditional Westminster system of ministerial responsibility to Parliament to a wider view of accountability embracing the values of openness, fairness and participation and involving individual clients of government agencies and external review bodies. This is reflected in the Commonwealth administrative law statutes. With the loosening of government control of GBEs and their greater resemblance to private sector bodies than to government agencies, there is a question whether GBEs should be subject to the accountability framework of the Commonwealth's administrative law statutes in addition to whatever private sector accountability mechanisms apply. As the Independent Committee of Inquiry into Competition Policy in Australia noted

developments of this kind strike at the heart of traditional differences between public and private organisations, and raise new and challenging questions for policy makers. For example, recent reports have questioned whether more commercially-oriented government operations should continue to enjoy various Crown immunities, or continue to be subject to administrative, judicial and ombudsman review and freedom of information requirements.¹³

The ARC's recent inquiry accepted that administrative law should not apply in the case of commercial activities undertaken in a market where there is real competition because

⁶ ARC 38, 9.

⁷ ARC 38, 7.

⁸ cl 3(1).

⁹ eg the Corporations Law and trade practices legislation.

¹⁰ eg the ASC, AUSTEL and the Australian Competition and Consumer Commission.

¹¹ See Dept of Finance *Accountability and Ministerial Oversight Arrangements for Commonwealth GBEs* July 1993.

¹² Commonwealth Authorities and Companies Bill 1994 (Cth); Financial Management and Accountability Bill 1994 (Cth); Auditor-General Bill 1994 (Cth).

¹³ Independent Committee of Inquiry into Competition Policy in Australia *National competition policy* (Hilmer Report) AGPS Canberra 1993, 295-296.

in this context, the objectives of the administrative law package are inappropriate, or they can be achieved as effectively by other more suitable mechanisms.¹⁴

Current application of the FOI Act to GBEs

16.7 There is currently no general rule or policy governing the application of the FOI Act to GBEs. Some GBEs are not subject to the Act because they do not fall within the definition of 'prescribed authority'.¹⁵ Some GBEs are prescribed authorities but are entirely exempt from the coverage of the Act by virtue of being included in Schedule 2 Part I.¹⁶ Others are exempt in respect of particular documents, generally documents that relate to their competitive commercial activities.¹⁷

DP 59 proposal and response

16.8 DP 59 proposed that GBEs should be subject to the FOI Act.¹⁸ Documents relating to a GBE's competitive commercial activities would be exempt under s 43. Some submissions consider that the objectives of the FOI Act are unnecessary, irrelevant or limited in their application to the commercial operations of GBEs principally because FOI obligations are perceived as impediments to commercial competitiveness.¹⁹ They point to the potential for a GBE's competitors to use the FOI Act to the detriment of the GBE.²⁰ One submission doubts that the diversity in the functions of GBEs and their varying operating environments are amenable to a universal FOI regime.²¹ Submissions in favour of applying the FOI Act to GBEs focus on the public ownership of GBEs and their use of public funds.²² One suggests that GBEs have a public interest responsibility that is not shared by their competitors.²³ While these submissions argue that the FOI Act should apply to GBEs, many acknowledge the need to protect from disclosure documents that relate to a GBE's competitive commercial activities.²⁴

The Review's position

Efficient management of public assets

16.9 The government retains ultimate responsibility for the use of public assets and the performance of public functions. When a GBE is created, the government delegates the management of public assets, or functions that were previously performed by a government agency, to others who are charged with responsibility for operating the enterprise efficiently and profitably. The government also authorises those managers to set priorities and objectives by reference to competitive market conditions, subject only to any specific public or community interest requirements set out in legislation governing the GBE. Efficient management of public assets or public functions by reference to competitive market requirements is itself in the public interest. The Review recognises that there is an issue in these circumstances as to what access to documents in the possession of GBEs is in the public interest. The Review notes the Government's measures to increase the efficiency of its business enterprises, including the policy of competitive neutrality. Whether a completely level playing field is achievable when GBEs are involved is, however, debatable. Because of their emphasis on commercial efficiency and their separate legal personality GBEs cannot be equated with traditional government agencies. However, at the end of the day GBEs are not private sector bodies although they may resemble them in many respects.

¹⁴ ARC 38, xi.

¹⁵ s 4(1). Generally, companies incorporated under the Corporations Law are not 'prescribed authorities' and there is no general provision applying the Act to corporatised GBEs. Qantas Airways Limited is specifically excluded: s 4(1)(b).

¹⁶ These include the Australian Industry Development Corporation, the Australian National Railways Commission, the Commonwealth Bank of Australia, the Housing Loans Insurance Corporation and the Pipeline Authority. Sch 2 Pt I is discussed at para 11.13.

¹⁷ Sch 2 Pt II. These include the Australian Postal Corporation, the Export Finance and Insurance Corporation, the Federal Airports Corporation and Telstra. See also Sch 2 Pt III.

¹⁸ Proposal 10.1.

¹⁹ See, eg, Confidential *Submission 38*; Federal Airports Corporation *Submission 41*; Treasury *Submission 80*; Dept of Prime Minister and Cabinet *Submission 82*; Business Council of Australia *Submission 93*; The Public Policy Assessment Society *Submission 4*.

²⁰ See, eg, Federal Airports Corporation *Submission 41*; Treasury *Submission 80*.

²¹ Confidential *Submission 38*.

²² See, eg, Legal Aid Commission of Victoria *Submission 86*; Federation of Community Legal Centres *Submission 79*; State Records (SA) *Submission 92*.

²³ State Records (SA) *Submission 92*.

²⁴ See, eg, Australian Consumers' Association *Submission 55*; State Chamber of Commerce (NSW) *Submission 56*; Avcare *Submission 73*; Legal Aid Commission of Victoria *Submission 86*.

GBEs and democratic accountability

16.10 GBEs are subject to a wide range of accountability mechanisms. Because GBEs are given more autonomy in their management and operations than are government agencies, they are also subject to special accountability arrangements.²⁵ The accountability provided by most of these mechanisms differs from the type of accountability that can be achieved through the FOI Act. The FOI Act enhances democratic accountability by allowing public examination of government policy and decision making and increasing participation in that decision making. The Review does not consider that these principles necessarily become irrelevant as a consequence of the creation of a GBE. There are questions about the degree and type of accountability that should be required and the best way to achieve it.

Relevant factors

16.11 ***The extent to which a GBE is engaged in commercial activities in a competitive market.*** Some GBEs operate in highly competitive markets competing on an equal basis with private sector bodies.²⁶ Others may carry out commercial activities in a market where there is less competition because there are fewer private providers of the relevant goods or services.²⁷ Using these distinctions GBEs can be placed along a continuum. At one end are those most of whose activities are undertaken in a non competitive situation (notwithstanding that some of their activities may be conducted in a highly competitive market) and at the other end are those whose commercial activities are carried out predominantly in a highly competitive market.

16.12 ***GBEs with multiple functions.*** Some GBEs have multiple functions. In addition to their commercial activities they also have regulatory functions, CSOs or are responsible for implementing government policy. In some cases a GBE may have responsibility for regulating aspects of the industry within which it operates. The potential conflict of interest involved in this situation often leads to a decision that these functions should be performed by separate bodies.²⁸ The Review notes that the Joint Committee of Public Accounts has recently recommended a review of commercialised government entities with multiple functions to identify clearly and separate these discrete functions.²⁹ The Review considers that clear delineation of the various functions and separation, where possible, would assist in determining the extent to which the accountability provided through the FOI Act remains relevant.

GBEs that operate predominantly in a competitive market

16.13 ***Not subject to the Act.*** Generally, GBEs should be subject to the FOI Act.³⁰ However, the greater the extent to which a GBE's commercial activities are carried out in a competitive market, the less the justification for applying the FOI Act. Once a GBE becomes engaged predominantly in such activities, market forces combined with whatever regulatory mechanisms apply to the private sector generally or to the particular industry in which the GBE operates will provide more appropriate accountability.³¹ To subject those GBEs to the FOI Act may put at risk the benefits the government is seeking in creating GBEs - increased efficiency and competitiveness. The Review recommends that GBEs that are engaged predominantly in commercial activities in a competitive market should not be subject to the FOI Act. They should, if necessary, be excluded from the definition of prescribed authority.

16.14 ***One ARC member disagrees.*** The Ombudsman disagrees. In her view the question goes beyond a test of the operation of the marketplace (assuming it is competitive). Other considerations related to CSOs, the public interest, statutory powers and management of public assets require that the principles of transparency and accountability should apply to GBEs allowing for exemptions for commercial and competitive

²⁵ See para 16.5.

²⁶ eg Australian Defence Industries.

²⁷ eg Australian Postal Corporation.

²⁸ eg before the creation of AUSTEL as independent regulator of the telecommunications industry in 1989, Telecom Australia had regulatory functions relating to the telecommunications industry. Another example of such restructuring is the division of the former Civil Aviation Authority into the Civil Aviation Safety Authority and Airservices Australia.

²⁹ Parliament of the Commonwealth of Australia Joint Committee of Public Accounts, Report No 336 *Public business in the public interest* AGPS Canberra 1995 recommendations 4, 5, 11, 12, 14.

³⁰ See para 16.15.

³¹ The Review considers this to be the case even if the GBE also has some regulatory function or CSOs.

documents to be claimed under the FOI Act. The Ombudsman considers that all GBEs should be subject to the FOI Act.

GBEs that do not operate predominantly in a competitive market

16.15 Fully subject to the FOI Act. The Review considers that GBEs that are not predominantly engaged in competitive commercial activities should be subject to the FOI Act. A number of GBEs currently subject to the Act are exempt under Schedule 2 Part II in respect of documents that relate to their competitive commercial activities. The Review considers that those documents will be adequately protected by s 43, the business affairs exemption.³² It does not consider that they need to be exempt by means of Schedule 2 Part II. This means that when an FOI request is received, a GBE will have to consider the exemption provisions in relation to each document rather than relying on a 'blanket' exemption for documents that relate to their competitive commercial activities.

16.16 No recompense for the cost of complying with the FOI Act. In DP 59 the Review acknowledged that providing access to documents involves administration costs. It asked whether GBEs, particularly those that are self-funding, should be compensated for the cost of complying with the FOI Act.³³ Some submissions consider that self-supporting GBEs cannot afford the diversion of resources and costs associated with administering the FOI Act and its resultant burden on their competitiveness.³⁴ In view of the Review's recommendation that GBEs that are predominantly involved in competitive commercial activities should not be subject to the Act, GBEs to which the FOI Act will apply are likely to have a mix of regulatory and commercial functions, or be subject to CSOs that justify the application of the FOI Act. Alternatively, they may operate in a less competitive, even monopolistic, market and gain some advantage by virtue of their public sector ownership. In these cases there is an accountability obligation that is not extinguished by the fact that the entity is a GBE performing those functions rather than a government agency. The cost of performing those functions would be included as part of the budget for operating the GBE. The cost of complying with the FOI Act is merely part of that cost and should be borne by the GBE. The Review considers therefore that GBEs that are subject to the FOI Act should not be compensated for the cost of complying with the Act.

Telstra Corporation Limited

16.17 Telstra is subject to the FOI Act.³⁵ Documents in respect of its activities conducted on a commercial basis in competition with non-government bodies are exempt from the operation of the Act by virtue of Schedule 2 Part II. Since the creation of AUSTEL, Telstra has no regulatory functions. It does, however, have CSOs. In particular, it has an obligation to provide a reasonably accessible standard telephone service to all people in Australia.³⁶ The ALRC and the ARC have differing views on whether the FOI Act should continue to apply to Telstra. The ALRC does not consider that Telstra should be treated differently from other GBEs. It considers that Telstra operates predominantly in a competitive market and ought not, therefore, be subject to the FOI Act. Some members of the ARC consider that Telstra is not yet sufficiently engaged in competitive commercial activities to warrant exclusion from the FOI Act.³⁷ Other ARC members consider that even if Telstra is operating predominantly in a competitive market it should retain its current status under the FOI Act, including its current Schedule 2 Part II exemption for documents that relate to its competitive commercial activities. Factors taken into consideration by these members in reaching this view include Telstra's CSOs and their view that Telstra has a strong position in the telecommunications market,³⁸ that telecommunications have a fundamental public importance and that it is possible that future industry regulators may provide equivalent or enhanced public accountability of, and privacy protection within, the telecommunications industry. The ARC considers that it is likely that as the telecommunications industry

³² See para 10.28.

³³ Issue 10.2.

³⁴ See, eg, National Rail Corporation Ltd *Submission 1*; Confidential *Submission 38*; Federal Airports Corporation *Submission 41*; D Murphy *Submission 43*; Australia Post *Submission 44*; Dept of Defence *Submission 76*; State Records (SA) *Submission 92*.

³⁵ It has been declared by regulation to be a 'prescribed authority' for the purposes of the Act. As a company incorporated under the Corporations Law it would not otherwise be subject to the FOI Act.

³⁶ *Telecommunications Act 1991* (Cth) s 288, s 290.

³⁷ eg while consumers in the more populated regions of Australia have a choice of telecommunications carriers, consumers in remoter parts of the country do not.

³⁸ Some members consider that Telstra's government ownership influences consumer choice and advantages Telstra notwithstanding that most of its services are carried out in a highly competitive market.

moves towards complete deregulation in 1997 mechanisms sufficient to maintain the necessary public accountability of Telstra and justify Telstra's complete exemption from the FOI Act will be put in place. Accordingly, it considers that Telstra's status under the FOI Act should remain under review.

Recommendation 105

GBEs that are engaged predominantly in commercial activities in a competitive market should not be subject to the FOI Act. If they are currently subject to the Act, they should be excluded from the definition of 'prescribed authority'.³⁹ Other GBEs should be subject to the Act. They should not be given a general exemption in respect of documents that relate to their competitive commercial activities, that is, they should not be placed in Schedule 2 Part II.

Recommendation 106A (ALRC)

Telstra, like other GBEs that are engaged predominantly in commercial activities in a competitive market, should not be subject to the FOI Act.

Recommendation 106B (ARC)

Telstra should retain its current status under the FOI Act until such time as alternative satisfactory disclosure requirements applying to the entire telecommunications industry are put in place.

³⁹ The Cth Ombudsman dissents: see para 16.14.

Appendix A: Participants

ALRC

Members

Alan Rose AO, *President*
Sue Tongue, *Deputy President* (to 5 October 1995)
Chris Sidoti (to 11 August 1995)
Michael Ryland

Officers

Margaret Ryan, *Principal Law Reform Officer*
Frith Way, *Law Reform Officer*
Bridie Healy, *Project Assistant*
Louise Mitchell, *Research Assistant* (February to September 1995)
Joanna Longley, *Librarian*
Emma Joneshart, *Library Assistant*
Oleg Ziskin, *Information Technology*
Anna Hayduk, *Typesetting*

ARC

Members

Dr Susan Kenny, *President* (to 30-September 1995)
Professor Marcia Neave, *President* (from 1 October 1995; appointed to Council 27 June 1995)
Justice Jane Mathews (*ex-officio* member)
Philippa Smith (*ex-officio* member)
Alan Rose AO (*ex-officio* member)
Chris Coneybeare (to 30 September 1994)
George Haddad (to 16 October 1995)
Stuart Hamilton AO (to 30 September 1995)
Dr Allan Hawke
Dr Ian Lowe (from 3 October 1995)
Sheila O'Sullivan
Tim Pallas
Clare Petre (to 11 May 1995)
Alan Robertson SC
Ann Sherry (from 3 October 1995)
Stephen Skehill
Greg Wood (from 1 October 1994)

The ARC thanks Gabrielle Mackey the ARC project officer responsible for this project. The ARC also thanks Philippa Lynch, John Atwood, Charles Beltz, Marguerite Saw and the support staff in the ARC Secretariat.

Consultants

Jeremy Allanson, Barrister
Peter Bayne, Faculty of Law, Australian National University
John Cain, former Premier of Victoria
Madeline Campbell, Principal Counsel, Attorney-General's Department
John Griffiths, Barrister
Craig Johnston/Bill McManus, Public Interest Advocacy Centre

Dominic McGann, Executive Director, Dept of Justice & Attorney-General (Qld)
Kim Rubenstein, Law School, University of Melbourne
Keith Steele, Partner, Freehill Hollingdale & Page
Martin Souter, Assistant Director, Business Council of Australia
Jack Waterford, Editor, Canberra Times

Appendix B: Abbreviations

AAR	Administrative Appeals Reports
AAT	Administrative Appeals Tribunal (Cth)
AAT Act	<i>Administrative Appeals Tribunal Act 1975</i> (Cth)
ACOSS	Australian Council of Social Services
ACTU	Australian Council of Trade Unions
AGPS	Australian Government Publishing Service
AIAL	Australian Institute of Administrative Law
AJAL	Australian Journal of Administrative Law
ALD	Administrative Law Decisions
ALJ	Australian Law Journal
ALJR	Australian Law Journal Reports
ALN	Australian Administrative Law Service (Notes)
ALR	Australian Law Reports
ALRC	Australian Law Reform Commission
ALRC 22	ALRC Report No 22 <i>Privacy</i> AGPS Canberra 1983
ARC	Administrative Review Council
ARC 38	ARC Report No 38 Government business enterprises and Commonwealth administrative law ARC Canberra 1995
Archives Act	<i>Archives Act 1983</i> (Cth)
ASC	Australian Securities Commission
ASIO	Australian Security Intelligence Organisation
ASIS	Australian Secret Intelligence Service
ASX	Australian Stock Exchange
ATO	Australian Taxation Office
ATSIC	Aboriginal and Torres Strait Islander Commission
AUSTEL	Australian Telecommunications Authority
<i>Better decisions</i>	ARC Report No 39 <i>Better decisions: review of Commonwealth merits review tribunals</i> AGPS Canberra 1995
CGIO	Chief Government Information Officer
CLR	Commonwealth Law Reports
Crimes Act	<i>Crimes Act 1914</i> (Cth)
CSOs	Community Service Obligations
Dept	Department
DP 59	ALRC and ARC Discussion Paper 59 <i>Freedom of information</i> ALRC Sydney 1995
FCR	Federal Court Reports
FLR	Federal Law Reports
FOI Act	<i>Freedom of Information Act 1982</i> (Cth)
FOI Memo	Attorney General's Department FOI Memorandum
GBE	Government Business Enterprise
ICCPR	International Covenant on Civil and Political Rights
IPPs	Information Privacy Principles
IP 12	ALRC and ARC Issues Paper 12 <i>Freedom of information</i> ALRC Sydney 1994
NSWLR	New South Wales Law Reports
OECD	Organisation for Economic Cooperation and Development
Ombudsman Act	<i>Ombudsman Act 1976</i> (Cth)
OPC	Office of Parliamentary Counsel
PIAC	Public Interest Advocacy Centre
PLPR	Privacy Law & Policy Reporter
Privacy Act	<i>Privacy Act 1988</i> (Cth)
Public Service Act	<i>Public Service Act 1922</i> (Cth)
QAR	Queensland Administrative Reports

Senate Standing Committee	Senate Standing Committee on Legal and Constitutional Affairs
Senate Standing Committee 1979 Report	Senate Standing Committee on Constitutional and Legal Affairs <i>Freedom of Information. Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978, and aspects of the Archives Bill 1978</i> AGPS Canberra 1979
Senate Standing Committee 1987 Report	Senate Standing Committee on Legal and Constitutional Affairs <i>Freedom of Information Act 1982. Report on the operation and administration of the freedom of information legislation</i> AGPS Canberra 1987
Telstra	Telstra Corporation Limited
TPC	Trade Practices Commission
USCA	United States Code Annotated
VR	Victorian Reports
WLR	Weekly Law Reports

Note: Numbers preceded by 'D' appearing after case citations refer to the Attorney-General's Department's series of FOI decision summaries.

Appendix C: List of submissions

Submissions to Issues Paper 12

Submission number

Administrative Appeals Tribunal (Cth)	48
Advanced Administrative Law Class 1994-95, University of Wollongong	33
Dr A Ardagh, Charles Sturt University	87
M Arrighi	95
Attorney-General's Department (ACT)	38
Australian Archives	73
Australian Broadcasting Corporation	36
Australian Chamber of Commerce and Industry	118
Australian Consumers' Association	98
Australian Customs Service (Part confidential)	92
Australian Electoral Commission	86
Australian Finance Conference	35
Australian Gas Light Company	53
Australian Institute of Company Directors	116
Australian Maritime Safety Authority	110
Australian Medical Association	19
Australian Medical Association, Queensland Branch	108
Australian National Rail	119
Australian National University	69
Australian Pharmaceutical Manufacturers Association Inc	112
Australian Securities Commission	82
Australian Sports Commission	63
Australian Stock Exchange	30
Australian Taxation Office	41
Avcare Limited	85
R Barnett	25
E Bleicher	96
Business Council of Australia	28
BZW Australia	40
Hon J Cain	27
J Candido	22
Clayton UTZ (Brisbane)	66
Clayton UTZ (Sydney)	56
R Close	42
Commonwealth Bank	59
Commonwealth Ombudsman	68
Confidential	49
Confidential	50
Confidential	52
Confidential	55
Confidential	61
Confidential	77
Confidential	99
Confidential	104, 107
Consumers' Health Forum	101
A Conway-Jones	14
A Cossins, University of NSW	45
C S I R O	91
I Cunliffe	83
Cyclists' Rights Action Group	21
Department of Administrative Services	109
Department of Defence	102
Department of the Environment, Sport and Territories	64

Department of Finance	72
Department of Foreign Affairs and Trade	67
Department of Housing and Regional Development	76
Department of Human Services and Health	90
Department of Immigration and Ethnic Affairs	84
Department of Primary Industries and Energy	62
Department of Prime Minister and Cabinet	117
Department of Social Security	39
Department of Veterans' Affairs	93
Hon S Baker, Deputy Premier and Treasurer (SA)	75
M Donovan	12
S Ellis	54
Endometriosis Association (Vic) Inc	97
H Evans, Clerk of the Australian Senate	8
S Fist	1
GIO Australia	24
Prof J Goldring, University of Wollongong	32
Assoc Prof G Greenleaf, University of NSW	89
L Gunawan	60
Halisa International	47
Health Insurance Commission	51
B Hewitt	9, 34
Institute of Chartered Accountants in Australia /Australian Society of Certified Practising Accountants	74
Insurance Council of Australia	106
J Karpinski	121
K Kendell	103
Dr AT Kenos	71
Law Institute of Victoria	80
Law Institute of Victoria - Administrative Law Section	115
Law Society of NSW	15, 105
Merit Protection and Review Agency	79
D Moulis	4
D Murphy	120
National Children's & Youth Law Centre	44
National Council for Adoption	10
National Library of Australia	23
NSW Council for Civil Liberties Inc	11
Office of Multicultural Affairs	70
Office of National Assessments	113
Older Women's Network	20
Optus Communications	43
M Paterson	18
Privacy Commissioner	81
Privacy Committee (NSW)	16
A Proudfoot	5
Public Interest Advocacy Centre	114
Public Policy Assessment Society Inc	3
Public Service Commission	57
Queensland Chamber of Commerce and Industry	65
Queensland Nurses' Union	58
Royal NSW Canine Council Limited	78
JA Salmon	6, 13
AE Sandell	7
LM Scott	2
Shell Company of Australia Limited	46
R Snell, University of Tasmania	31
State Chamber of Commerce (NSW)	111

L Stirling	26
Telstra Corporation Limited	94
G Terrill	17
Trade Practices Commission	29
Treasury	37
Victorian Employers' Chamber of Commerce and Industry	100
N Waters	88

Submissions to Discussion Paper 59

Submission number

Aboriginal and Torres Strait Islander Commission	75
Aboriginal and Torres Strait Islander Social Justice Commissioner	98
Administrative Appeals Tribunal (Cth)	20
Advisory Council on Australian Archives	100
Attorney-General's Department (ACT)	77
Australia Post	44
Australian Archives	69
Australian Bankers' Association	26
Australian Broadcasting Corporation	85
Australian Consumers' Association	55
Australian Corporate Lawyers Association	13
Australian Electoral Commission	14
Australian Finance Conference	39
Australian Institute of Company Directors	89
Australian National University	49
Australian Privacy Charter Council	59
Australian Securities Commission	57
Australian Security Intelligence Organisation	78
Australian Taxation Office	17
Avcare Limited	73
R Barnett	35
N Boonyasilp	2
D Bowd	16
Business Council of Australia	93
P Carrol	68
Commonwealth Ombudsman	53
Confidential	38
Confidential	46
Confidential	62
Confidential	70
Confidential	95
Consumers' Health Advocacy	71
A Conway-Jones	18
A Cossins, University of NSW	27
Country Women's Association of NSW	64
Cyclists' Rights Action Group	5
G Dean	52
Department of Administrative Services	83
Department of Defence	76
Department of Employment, Education and Training	60
Department of Family and Community Services (SA)	28
Department of Finance	25
Department of Human Services and Health	97
Department of Immigration and Ethnic Affairs	87
Department of Parliamentary Library	61
Department of the Parliamentary Reporting Staff	36
Department of Prime Minister and Cabinet	82

Department of Veterans' Affairs	24
E.D.B. Health Conciliation	30
Export Finance and Insurance Corporation	50
Federal Airports Corporation	41
Federation of Community Legal Centres	79
PA Gardiner	84
Assoc Prof G Greenleaf, University of NSW	99
L Gunawan	51
Halisa International	19
G Hayes	23
Health Consumers Network (QLD)	66
B Hewitt	7
C Hurley	8
Information Commissioner - QLD	37
Inspector-General of Intelligence and Security	33
K P M G	67
Law Institute of Victoria	90
Litigation Law Practice Committee, Law Society of NSW	91
Legal Aid Commission of Victoria	86
D McGann	96
J McGinty MLA (WA)	65
Merit Protection and Review Agency	47
Minter Ellison (Sydney)	22
D Murphy	43
National Library of Australia	63
National Pituitary Hormones Advisory Council	48
National Rail Corporation Limited	1
NSW Bar Association	15
Office of National Assessments	21
L Finch (Part confidential)	29
M Paterson	94
Privacy Commissioner	81
Privacy Committee (NSW)	88
Public Interest Advocacy Centre	34
Public Policy Assessment Society Inc	4
Public Service Commission	32
Queensland Chamber of Commerce & Industry	6
Queensland Nurses' Union	9
Royal NSW Canine Council Limited	74
H Sheridan & R Snell	58
S Soldatow	72
J Sperling	10
State Chamber of Commerce (NSW)	56
State Records (SA)	31, 92
L Stirling	3
Sydney Futures Exchange Limited	40
Telstra Corporation Limited	45
Treasury	80
Trade Practices Commission	42
Trust Company of Australia Limited	11
JG Vandenberg	12
Victorian Employers' Chamber of Commerce and Industry	54

Appendix D: List of recommendations

Chapter 4 - Giving effect to the objectives of FOI

1. The object clause of the FOI Act (s 3) should be amended to explain that the purpose of the Act is to provide a right of access which will

- enable people to participate in the policy, accountability and decision making processes of government
- open the government's activities to scrutiny, discussion, comment and review
- increase the accountability of the Executive

and that Parliament's intention in providing that right is to underpin Australia's constitutionally guaranteed representative democracy.

2. Section 3(1)(a) of the FOI Act should be deleted.

3. The reference in the object clause to the limitations on the general right of access imposed by exceptions and exemptions should be deleted.

4. The object clause should acknowledge that the information collected and created by public officials is a national resource.

5. The object clause should state the right of access to personal information of the applicant separately from the general right of access to government-held information.

6. The FOI Act should be amended to provide that if a document contains personal information of the applicant that fact is to be taken into account in considering the effect disclosure might have and in determining whether it is in the public interest to grant access to the applicant.

7. Agencies should review their current arrangements to ensure that they have sufficient officers authorised under s 23 of the FOI Act to make FOI decisions.

8. Performance agreements of all senior officers should be required to impose a responsibility to ensure efficient and effective practices and performance in respect of access to government-held information, including FOI requests.

9. Agencies should regularly examine the types of requests for information they receive to determine whether there are particular categories that could be dealt with independently of the FOI Act. If there are, this should be made clear to potential applicants and to staff.

10. Section 91 of the FOI Act should be amended to extend the indemnity against action for defamation, breach of confidence or infringement of copyright to an authorised officer who releases a document other than under the FOI Act provided the document would not have been exempt had it been requested under the FOI Act.

11. Section 91 of the FOI Act should be amended to extend the indemnity against action for defamation, breach of confidence or infringement of copyright to an authorised officer who

- (i) releases an exempt document under the FOI Act pursuant to a bona fide exercise of discretion not to claim the exemption or
- (ii) releases a document other than under the FOI Act and the release, had it been made under the FOI Act, would have been a bona fide exercise of discretion not to claim an applicable exemption.

12. The recommendations of the Gibbs Committee should be implemented as soon as possible.

13. A thorough review of all federal legislative provisions that prohibit disclosure by public servants of government-held information should be conducted as soon as possible to ensure that they do not prevent the disclosure of information that would not be exempt under the FOI Act.

Chapter 5 - FOI, archives and privacy

14. The FOI Act should be amended so that it applies to documents that are less than 30 years old, regardless of when they were created.

15. The Archives Act should be reviewed. In the interim, it should be amended to

- require the chief executive officer of an agency to ensure the creation of such records as are necessary to document adequately government functions, policies, decisions, procedures and transactions and to ensure that records in the possession of the agency are appropriately maintained and accessible
- authorise the Director General of Archives to issue recordkeeping standards, to audit records and recordkeeping practices and to report to the Minister on inadequate practices.

16. The FOI Act should require the FOI Commissioner to consult with the Privacy Commissioner before issuing guidelines on access to, and amendment of, individuals' own personal information.

17. The Privacy Act should be amended to provide that the Privacy Commissioner cannot find that an agency has breached IPP 6 or 7 in respect of a decision made under the FOI Act, unless that decision has been found on external review by the AAT or the Federal Court to be incorrect.

Chapter 6 - An FOI Commissioner

18. A statutory office of FOI Commissioner should be created.

19. The functions of the FOI Commissioner should include

- auditing agencies' FOI performance
- preparing an annual report on FOI
- collecting statistics on FOI requests and decisions
- publicising the Act in the community
- issuing guidelines on how to administer the Act
- providing FOI training to agencies
- providing information, advice and assistance in respect of FOI requests
 - at any stage of an FOI request
 - at the request of the applicant, the agency or a third party
- providing legislative policy advice on the FOI Act.

20. The FOI Commissioner should be given power to require agencies to provide statistics on their FOI administration.

21. If an agency claims that a document is exempt it should be required to give to the applicant a copy of the relevant guidelines in addition to its statement of reasons.

22. The FOI Act should require both agencies and the AAT to take into account the guidelines issued by the FOI Commissioner.
23. Information in plain language about how to use the FOI Act should be available at all government departments and agencies and at public libraries.
24. The FOI Commissioner should encourage agencies to make full use of advances in information technology to provide better access, for example, on-line access, to government information.
25. The FOI Commissioner should monitor the practices of agencies regarding the sale of documents with a view to ensuring that their pricing policies do not impose unreasonable barriers to the accessibility of government information.
26. There should be a standing arrangement for consultation between the FOI Commissioner, the Director-General of Archives, the Chief Government Information Officer, the head of the AGPS, the Privacy Commissioner and the Ombudsman.
27. The need for, and the role of, the FOI Commissioner should be reviewed by the Administrative Review Council after five years.

Chapter 7 - Using the FOI Act

28. The definition of document should be amended to clarify that it includes data.
29. Agencies should no longer be required to deposit a list of their decision making documents with the Australian Archives. These lists should instead be available for inspection at all AGPS shops, public libraries and branches of the relevant agency.
30. Compliance with obligations under sections 8 and 9 should be overseen by the FOI Commissioner.
31. In three years the time limit for processing FOI requests should be reduced to 14 days.
32. Section 24 of the FOI Act should be re-drafted to emphasise the importance of agencies consulting with applicants about their requests.
33. Section 24(5) of the FOI Act should be repealed.
34. If an agency refuses under s 24 of the FOI Act to process a request it should remit the application fee once it is clear the applicant does not intend to challenge the s 24 decision.
35. The FOI Act should be amended to provide that an agency may refuse to process a repeat request for material to which the applicant has already been refused access, provided there are no reasonable grounds for the request being made again.
36. The FOI Commissioner should monitor the quality of agencies' statements of reasons and name agencies that have performed poorly in this respect in the FOI annual report.

Chapter 8 - Exemptions - general principles

37. The FOI Commissioner should issue guidelines on how to apply a public interest test. The guidelines should list factors that are relevant and factors that are irrelevant when weighing the public interest.
38. The FOI Act should be amended to provide that, for the purpose of determining whether release of a document would be contrary to the public interest, it is irrelevant that the disclosure may cause embarrassment to the government.
39. Section 26(1)(a) of the FOI Act should be amended to require an agency to include in its statement of reasons, where relevant, the factors it took into account in applying the public interest test.

40A. (ALRC)

Regulations should be made under s 36A of the FOI Act prescribing two years as the maximum duration of conclusive certificates.

40B. (ARC)

Conclusive certificates issued under s 33 and s 34 should remain unlimited in duration. Certificates issued under s 36 should be limited to a maximum of five years.

41. The FOI Commissioner should monitor the use of conclusive certificates and include in his or her annual FOI report details about their use and any failure of a Minister to revoke a certificate despite a finding by the AAT that there are no reasonable grounds for the exemption claim.

42. The FOI Act should be amended so that a 'neither confirm nor deny' response under s 25 is not available in respect of documents information about the existence or non-existence of which would be exempt under s 33A (Commonwealth/State relations).

43. The FOI Commissioner should educate agencies about the correct use of s 25 and monitor their practices to ensure that agencies do not claim it when it is the contents of a document, rather than its existence, that warrant protection.

Chapter 9 - Specific exemptions - responsibilities and operations of government

44. Section 33(1)(b) of the FOI Act should be subdivided and the exemption for information communicated in confidence by an international organisation made subject to a public interest test.

45. Provision for a conclusive certificate in s 33A of the FOI Act should be removed.

46. Section 34(1)(a) of the FOI Act should be re-drafted to make abundantly clear that it applies only to documents that have been brought into existence for the purpose of submission for consideration by Cabinet.

47. Section 34(1)(d) of the FOI Act should be amended to make it clear that it does not apply to a document that discloses a decision of the Cabinet if that decision has already been officially published.

48. The term 'officially published' should be defined in the FOI Act.

49. Section 34 of the FOI Act should be amended so that Cabinet documents are only exempt for 20 years after the date on which they were created.

50. Section 35 of the FOI Act should be repealed.

51. Section 36 of the FOI Act should be retitled 'Documents revealing deliberative processes'.

52. Section 36 of the FOI Act should be amended to exclude purely statistical information.

53A. (ALRC)

Provision for a conclusive certificate in respect of s 36 of the FOI Act should be removed.

53B. (ARC)

The FOI Act should be amended to provide that when a Minister issues a conclusive certificate under s 36 he or she must

- provide the applicant with detailed reasons for issuing the certificate
- specify the duration of the certificate, up to a maximum of five years, and give reasons for choosing that period
- advise the FOI Commissioner that the certificate has been issued.

54. Section 37 of the FOI Act should be expanded to cover documents the disclosure of which would prejudice the security of a place of lawful detention.

55. Section 37 of the FOI Act should be amended to provide that specified documents (those described in FOI Act (NSW) Sch 1 cl 4(2)) are not exempt if their disclosure would, on balance, be in the public interest.

56. Section 40(1)(d) of the FOI Act should be redrafted to exempt documents the disclosure of which would prejudice the conduct of an internal or administrative investigation.

57. Section 40(1)(e) of the FOI Act should be repealed.

58. Section 44 of the FOI Act should be repealed.

Chapter 10 - Specific exemptions - third party information

59. Section 41 of the FOI Act should be redrafted to provide that a document is exempt if

- (i) it contains personal information
- (ii) its disclosure would constitute a breach of IPP 11 of the Privacy Act and
- (iii) its disclosure would not, on balance, be in the public interest.

60. The FOI Act should require the FOI Commissioner to consult the Privacy Commissioner before issuing guidelines on the interpretation and application of s 41.

61. Section 41 of the FOI Act should be amended to provide that in weighing the public interest in disclosure an agency may have regard to any special relationship between the applicant and the third party.

62. The guidelines on consultation should provide that

- (i) agencies should, where suitable, advise the applicant that the consent of the third party would expedite their request for third party personal information
- (ii) if it is not clear from the nature or circumstances of the request whether the applicant really wants the third party personal information covered by the request, agencies should make as much effort as possible to ascertain from the applicant whether he or she is interested in obtaining that information before starting to consult.

63. Section 41(3) of the FOI Act should be amended to provide that if an agency reasonably apprehends that the applicant, upon receiving a document requested under the FOI Act which includes information about the applicant, is likely to cause serious injury to himself or herself, the agency must disclose the information in a way that minimises that risk.

64. Section 41(4) of the FOI Act should be repealed.

65. The Privacy Act should be amended to provide that a release of personal information under the FOI Act is deemed to be disclosure that was 'required or authorised by law' for the purposes of IPP 11 1(d), provided the consultation requirements in the FOI Act were complied with.

66. Section 42(1) of the FOI Act should be redrafted to provide that a document is exempt if it was created for the sole purpose of

- (i) seeking or providing legal advice or
- (ii) use in legal proceedings.

67. The FOI Act should be amended to make it clear that s 42 does not apply if the client has waived legal professional privilege at common law.

68. Section 43 of the FOI Act should be amended to make clear that it applies to documents that contain information about the competitive commercial activities of agencies.

69. Section 47A of the FOI Act should be repealed.

Chapter 11 - Other exemptions and exclusions

70. Section 38 of the FOI Act should be repealed.

71. Section 43A of the FOI Act should be repealed.

72. Section 47 of the FOI Act should be repealed.

73. The parliamentary departments should be made subject to the FOI Act.

74. The intelligence agencies should remain in Schedule 2 Part I. All other agencies currently listed (other than GBEs) should be required to demonstrate to the Attorney-General that they warrant being excluded from the operation of the Act. If they do not do this within 12 months, they should be removed from Schedule 2 Part I.

75. If s 43 of the FOI Act is amended as recommended by the Review, the exemptions in Schedule 2 Part II for documents relating to competitive commercial activities of agencies should be repealed. All other agencies listed in Schedule 2 Part II should be required to demonstrate to the Attorney-General that the documents specified warrant exclusion from the operation of the Act. If they do not do this within 12 months, those documents should be removed from Schedule 2 Part II.

76. Schedule 2 Part III should be repealed provided s 43 of the FOI Act is amended, as recommended by the Review, to apply to documents that relate to agencies' competitive commercial activities.

Chapter 12 - Amendment and annotation of personal information

77. The words 'to which access has been lawfully provided to the person, whether under this Act or otherwise' should be deleted from s 48 of the FOI Act.

78. If Recommendation 77 is implemented, s 35 of the Privacy Act should be repealed.

79. Section 48 of the FOI Act should be amended to provide that amendment or annotation of personal information may be sought on the ground that, having regard to the purpose for which the information was collected or is to be used, it is not relevant.

80. Section 50(1) of the FOI Act should be amended to provide that if, on an application for amendment of a document containing personal information, an agency considers that the information is incorrect or, having regard to the purpose for which the information was collected or is to be used, out of date, incomplete, not relevant or misleading, it must acknowledge this clearly and take steps that are, in the circumstances, reasonable to amend the document.

81. The FOI Commissioner should issue guidelines on when it might be appropriate to amend a document by deleting information.

82. Section 55(6) of the FOI Act, which places restrictions on the AAT's ability to require a record to be amended, should be redrafted so that its meaning is clearer.

Chapter 13 - Review mechanisms

83. Internal review should not be a prerequisite to AAT review of an FOI decision.

84. The AAT should remain the sole external determinative reviewer of FOI decisions.

85. Section 64 of the FOI Act should be amended to make it clear that the AAT can, at any time after the date by which an agency must have complied with s 37 of the AAT Act, require production to the AAT of documents claimed by the agency to be exempt.

86. The FOI Act should be amended to prohibit the AAT from disclosing to any person, including the applicant's legal representative, documents that are claimed to be exempt, whether they were provided to the AAT under s 64 or not.

Chapter 14 - The cost of seeking access to information under the FOI Act

87. Access to an applicant's personal information should be free.

88. Agencies should only be able to impose charges in respect of documents that are released. Charges should be assessed in accordance with a fixed scale that has been determined on the basis of a realistic assessment of what information technology and record management systems an agency could reasonably be expected to be using. The scale should be developed by the FOI Commissioner in consultation with the Chief Government Information Officer and reviewed annually.

89. The \$30 application fee should remain and be used as credit towards any charges imposed.

90. The FOI Commissioner should set photocopying and transcribing charges.

91. The regulation that prescribes a charge for supervising inspection of documents should be repealed.

92. The \$40 fee for internal review should be abolished.

93. Section 30A(1)(b)(i) and (ii) of the FOI Act should be repealed so as to clarify that agencies have a general discretion to remit fees.

94. Section 29(5) of the FOI Act should be repealed so as to clarify that agencies have a general discretion to waive or reduce charges.

95. The FOI Commissioner should publicise the existence of s 66 of the FOI Act which empowers the AAT to recommend to the Attorney-General that an applicant's costs be paid by the Commonwealth where he or she is successful or substantially successful.

96. The FOI Act should be amended to allow the AAT to recommend to the Attorney-General that the costs incurred by the applicant in applying for review to the AAT be paid by the Commonwealth where

- an agency issues a conclusive certificate after the application for review is filed in the AAT or
- the agency claims an additional ground of exemption after the application for review is filed with the AAT and the original ground for exemption is dismissed.

Chapter 15 - Private sector

97. The FOI Act should not be extended to apply generally to private sector bodies.

98. If there is a need for greater disclosure of particular information in a particular area of the private sector, the legislation regulating that industry should be amended, or new legislation introduced, to require greater disclosure of that information. Depending on the identified need, disclosure might be to the relevant

regulator, to the public on request or, in appropriate cases, to the public at large by means of public register or other automatic disclosure mechanisms.

99. If an agency contracts with a private sector body to provide a service or perform a function on behalf of the government, the agency should ensure that suitable arrangements are made for the provision of public information access rights.

100. Where a statutory scheme provides for private sector bodies to be contracted to provide services or functions to the public on behalf of the government, information access rights should generally be provided by applying the FOI Act to those private sector bodies, but only in respect of documents that relate to the provision of those services or functions.

101A. (ALRC)

Where there is no statutory scheme, the contracting agency should determine the most suitable way to provide relevant information access rights, bearing in mind the guidelines issued by the FOI Commissioner.

101B. (ARC)

Where there is no statutory scheme, the contracting agency should generally preserve information access rights by ensuring that documents in the possession of the private sector body are deemed to be in the possession of the contracting agency.

102. The FOI Commissioner should provide guidance to agencies on what arrangements are advisable in a particular contracting out or funding situation. The Commissioner should also monitor the contracting out of government services and functions, and the funding of private sector bodies to provide services to the public, and report on whether in all of these situations satisfactory arrangements are being made with respect to the accessibility of relevant information.

103. A comprehensive, national legislative scheme should be introduced to provide information privacy protection in all sectors, including the private sector and those parts of the federal public sector that are not currently subject to the Privacy Act.

104. The Attorney-General should raise the need for national information privacy protection at a meeting of the Standing Committee of Attorneys-General at the earliest possible opportunity.

Chapter 16 - GBEs

105. GBEs that are engaged predominantly in commercial activities in a competitive market should not be subject to the FOI Act. If they are currently subject to the Act, they should be excluded from the definition of 'prescribed authority'. Other GBEs should be subject to the Act. They should not be given a general exemption in respect of documents that relate to their competitive commercial activities, that is, they should not be placed in Schedule 2 Part II.

106A. (ALRC)

Telstra, like other GBEs that are engaged predominantly in commercial activities in a competitive market, should not be subject to the FOI Act.

106B. (ARC)

Telstra should retain its current status under the FOI Act until such time as alternative satisfactory disclosure requirements applying to the entire telecommunications industry are put in place.

Appendix E: Information Privacy Principle 11

1. A record-keeper who has possession or control of a record that contains personal information shall not disclose the information to a person, body or agency (other than the individual concerned) unless:

- (a) the individual concerned is reasonably likely to have been aware, or made aware under Principle 2, that information of that kind is usually passed to that person, body or agency;
- (b) the individual concerned has consented to the disclosure;
- (c) the record-keeper believes on reasonable grounds that the disclosure is necessary to prevent or lessen a serious and imminent threat to the life or health of the individual concerned or of another person;
- (d) the disclosure is required or authorised by or under law; or
- (e) the disclosure is reasonably necessary for the enforcement of the criminal law or of a law imposing a pecuniary penalty, or for the protection of the public revenue.

2. Where personal information is disclosed for the purposes of enforcement of the criminal law or of a law imposing a pecuniary penalty, or for the purpose of the protection of the public revenue, the record-keeper shall include in the record containing that information a note of the disclosure.

3. A person, body or agency to whom personal information is disclosed under clause 1 of this Principle shall not use or disclose the information for a purpose other than the purposes for which the information was given to the person, body or agency.

Table of legislation

Federal

Acts Interpretation Act 1901	4.4
Administrative Appeals Tribunal Act 1975	2.8, 5.10, 13.7, 13.1313.14, 13.15, 16.3
Administrative Appeals Tribunal Regulations	13.7, 14.28
Administrative Decisions (Judicial Review) Act 1977	2.8, 5.10, 6.14, 16.3
Archives Act 1983	1.9, 5.1, 5.3, 5.5, 5.6, 5.7, 5.8, 5.11, 5.12, 5.13, 5.16, 5.19, 9.12, 9.13, 12.15, 16.3
Audit Act 1901	6.2, 16.5
Australian Postal Corporation Act 1989	16.1
Child Support (Assessment) Act 1989	11.3
Christmas Island Act 1958	11.12
Cocos (Keeling) Islands Act 1955	11.12
Commonwealth and Referendum Amendment Act 1992	10.35
Commonwealth Electoral Act 1918	10.35
Constitution	2.3, 2.4, 10.29, 15.22
Corporations Law	5.7, 11.6, 16.5, 16.7, 16.16
Crimes Act 1914	4.23, 4.25, 4.27
Designs Act 1906	11.3
Employment Services Act 1994	15.11, 15.13
Evidence Act 1995	10.25, 10.26
Freedom of Information Act 1982	
Part V	5.18, ch 12
Part VA	13.19
s 3	4.3-10
s 4	3.10, 7.2, 7.4, 10.3, 11.10, 11.11, 15.13, 16.7
s 5, 6 and 6A	11.7
s 6B	15.11
s 8	7.6-8
s 9	7.6-8
s 10	3.9
s 11	4.11, 7.20
s 14	4.17-19
s 15	7.4, 7.5, 7.6, 7.11, 14.3
s 16	7.13
s 17	3.9
s 18	4.2, 8.3
s 19	3.10
s 21	11.4
s 22	7.5
s 23	4.15
s 24	3.10, 7.5, 7.14-17, 12.21-2
s 25	8.21-2
s 26	7.19, .8.16, 8.23-4, 9.8
s 26A	7.11
s 27	7.11, 10.28
s 27A	3.11, 7.11, 10.15
s 29	14.3, 14.11, 14.25
s 30A	14.24
s 32	3.9, 8.7
s 33	8.1, 8.17, 8.18, 8.21, 9.2-5, 9.14, 11.3, 11.14
s 33A	8.10, 8.17, 8.21, 9.5, 9.6, 11.6
s 34	8.12, 8.17, 8.18, 9.7-13, 9.20
s 35	8.17, 9.14
s 36	8.14, 8.18, 9.15-20, 9.28

s 36A	8.18
s 37	5.10, 8.4, 8.10, 8.2, 9.21-3, 10.19
s 38	11.2-3
s 39	8.11, 9.24, 11.4, 9.22
s 40	8.10, 8.11, 8.14, 9.22, 9.24, 9.25-7, 10.19
s 41	8.4, 9.14, 10.2-24, 11.3, 11.7
s 42	10.25-7
s 43	8.4, 10.11, 10.28-31, 11.3, 11.4, 11.14, 11.15, 15.7, 15.13, 15.15, 16.15
s 43A	11.4
s 44	8.10, 8.11, 9.28
s 45	8.12, 10.19, 10.32-4, 15.7
s 46	8.12, 11.5, 11.8
s 47	11.6
s 47A	10.35
s 48	12.4, 12.5, 12.7-12
s 50	12.4, 12.13-17
s 51	12.4
s 51A and 51B	12.5
s 54	12.6, 13.1, 13.3, 14.22
s 55	12.6, 12.18-20, 13.3
s 56	7.12
s 57	13.18
s 58	8.5, 8.19
s 58A	8.19
s 58F	13.3
s 59	13.3
s 59A	3.11, 13.3
s 61	4.2
s 62	7.19
s 64	13.13-16
s 66	14.28
s 91	4.20-1, 8.4
s 92	4.23
Sch 2	11.13-15, 16.7, 16.15, 16.17
Sch 3	11.3
Sch 4	11.4
Freedom of Information Amendment Act 1983	3.9, 3.10, 7.10, 9.5, 13.18
Freedom of Information Amendment Act 1991	3.13, 11.4, 13.18
Freedom of Information (Fees and Charges) Regulations	
reg 4	14.6, 14.11, 14.12
reg 5	13.3
reg 6	3.10, 14.6
Freedom of Information Regulations	
reg 19	14.27, 14.28
Sch 3	14.27
Judiciary Act 1903	10.26
National Health Act 1953	10.15, 10.21, 14.27
Norfolk Island Act 1979	11.11
Northern Territory (Self-Government) Act 1978	11.10
Ombudsman Act 1976	2.8, 13.18, 16.3
Prime Minister and Cabinet (Miscellaneous Provisions) Act 1994	9.13
Privacy Act 1988	1.9, 3.11, 5.1, 5.4, 5.5, 5.14, 5.15, 5.16, 5.17, 5.18, 5.19, 5.23, 6.7, 6.29, 6.30, 10.3, 10.4, 10.24, 12.3, 12.10, 12.11, 12.12, 15.2, 15.3, 15.17, 15.18, 15.23, 16.2, 16.3
Public Service Act 1922	5.10, 5.12, 6.2
Social Security Act 1991	11.3, 14.6
Superannuation Act 1976	14.27

Telecommunications Act 1991	16.1, 16.17
Territories Reform Act 1992	11.12

Australian Capital Territory

Freedom of Information Act 1989	1.2, 3.17, 9.26, 9.27, 11.5
---------------------------------	-----------------------------

New South Wales

Freedom of Information Act 1989	1.2, 3.16, 8.5, 8.9, 8.15, 9.12, 9.17, 9.22, 9.23, 9.26, 9.27
Freedom of Information Amendment Act 1992	3.16

Northern Territory

Northern Territory (Self-Government) Act 1978	11.10
---	-------

Queensland

Freedom of Information Act 1992	1.2, 3.20, 8.21, 9.15, 9.17, 9.22, 9.23, 9.27, 10.31, 11.3
Freedom of Information Amendment Act 1995	3.20, 9.9

South Australia

Freedom of Information Act 1991	1.2, 3.18
Freedom of Information Act 1992	5.8, 8.9, 9.17, 9.23, 9.26, 9.27

Tasmania

Freedom of Information Act 1991	1.2, 3.19, 9.12, 9.16, 9.23, 10.31, 12.15
---------------------------------	---

Victoria

Freedom of Information Act 1982	1.2, 3.15, 7.18, 8.5, 9.12, 9.23, 10.31, 12.15, 14.16
Freedom of Information Amendment Act 1993	3.15

Western Australia

Freedom of Information Act 1992	1.2, 3.21, 7.14, 8.9, 8.21, 9.12, 9.17, 9.23, 9.27, 10.2, 10.5, 10.31, 11.12
Local Government Act 1960	11.12

Overseas legislation

Access to Information Act 1982 (Can)	3.24
Access to Information Act RSC 1985 (Can)	3.24, 6.26, 7.11, 7.13, 9.22, 10.31, 11.3
Data Protection Act 1984 (UK)	3.26
Freedom of Information Act 1966 (US)	3.2, 3.23, 8.23, 9.2, 14.13, 14.16
Freedom of Information and Protection of Privacy Act 1992 (British Columbia)	7.11, 9.17, 9.22, 10.8 10.14, 10.20, 14.24
Freedom of the Press Act (Sweden)	3.22
National Archives of Canada Act 1985 (Can)	5.12
Official Information Act 1982 (NZ)	3.25, 5.17
Privacy Act 1980-83 (Can)	3.24
Privacy Act 1993 (NZ)	3.25, 5.17, 15.23
Secrecy Act (Sweden)	3.22

Table of cases

Accident Compensation Commission v Croom [1991] 2 VR 322	4.3
Actors' Equity v Australian Broadcasting Tribunal (1984) 6 ALD 68	11.2
Ansett Transport Industries (Operations) Pty Ltd v Wraith (1983) 49 ALR 500	7.19
Arnold v Queensland (1987) 6 AAR 463	4.3
Asic v Australian Federal Police (1986) 11 ALN N194	8.11, 9.25
Attorney-General's Dept v Cockcroft (1986) 10 FCR 180	4.3, 8.10
Attorney-General (NSW); Ex rel McKellar v Commonwealth (1977) 139 CLR 527	2.4
Attorney-General (NSW); Ex rel McKinlay v Commonwealth (1975) 135 CLR 1	2.4
Attorney-General v Kearney (1985) 61 ALR 55	10.27
Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106	2.4
Baker v Campbell (1983) 49 ALR 385	10.25
Breen v Williams (1994) 35 NSWLR 522	15.25
British Steel Corporation v Granada Television Ltd (1980) 3 WLR 780	8.13
Carter v Managing Partner, Northmore Hale Davy and Leake (1995) 129 ALR 593	10.27
Cleary and Dept of the Treasury (1993) 31 ALD 214	2.3, 2.4
Colakovski v AOTC (1991) 100 ALR 111	10.6, 10.7, 10.10
Commissioner of Police v District Court of NSW and Perrin (1993) 31 NSWLR 606	4.2, 10.14
Commonwealth v Hittich (1994) 53 FCR 152	9.4
Commonwealth v John Fairfax and Sons Ltd (1980) 147 CLR 39	9.16
Commonwealth v Northern Land Council (1993) 176 CLR 604	9.8, 9.9, 9.13, 9.16
Connolly and Dept of Finance (1994) 34 ALD 655	9.24
Corrs, Pavey, Whiting and Byrne v Collector of Customs (1987) 13 ALD 254	10.32
Day v Collector of Customs (1995) 130 ALR 106	13.15, 13.16, 14.27
Dept of Health v Jephcott (1985) 8 FCR 85	9.21
Dept of the Air Force v Rose 425 US 352 (1975)	4.3
Edelsten and Australian Federal Police (1985) 9 ALN N65	9.21
Foster v Mountford (1976) 14 ALR 71	10.34
George v Rocket (1990) 170 CLR 104	8.10
Grant v Downs (1976) 135 CLR 674	10.25
Green and AOTC (unreported) AAT 21 August 1992	10.10
Harris v Australian Broadcasting Corporation (1983) 50 ALR 551	8.11, 9.16, 9.17, 9.25 9.26, 10.28, 10.30
Johansen v City Mutual Life Assurance Society Ltd (1905) 2 CLR 186	8.13
John Allan Witham v John William Holloway (1995) 69 ALJR 847	11.5
Kavvadias v Commonwealth Ombudsman (No 1) (1984) 6 ALD 47	9.15, 9.17
Munday and Commissioner for Housing (unreported) ACT AAT, 28 March 1995	10.18
Nationwide News Pty Ltd v Wills (1992) 177 CLR 1	2.4
News Corporation Ltd v National Companies & Securities Commission (1984) 1 FCR 64	4.3
Our Town FM Pty Ltd v Australian Broadcasting Tribunal (1987) 16 FCR 465	7.19
R v Trade Practices Tribunal; ex parte Tasmanian Breweries Ltd (1971) 123 CLR 361	8.13
Re Aldred and Dept of Foreign Affairs and Trade (1990) 20 ALD 264	9.9, 9.16
Re Anderson and Dept of Special Minister of State (No 2) (1986) 11 ALN N239	9.8, 9.9
Re Arnold Mann and the Australian Taxation Office (1985) 7 ALD 698	9.28
Re 'B' and Medical Board of the ACT (1994) 33 ALD 295	8.11
Re Barrell and Australian Broadcasting Corp (1985) 7 ALN N129	9.25
Re Burns and the Australian National University (1984) 6 ALD 193	9.16
Re Carter and Dept of Health (unreported) ACT AAT 23 January 1995	10.18
Re Carver and Dept of Prime Minister and Cabinet (1987) 12 ALD 447	13.15
Re Cleary and Dept of the Treasury (1993) 31 ALD 214	9.16
Re Colonial Mutual Life Assurance Society Ltd and Dept of Resources and Energy (1987) 12 ALD 251	10.26
Re Coulthard and Secretary, Dept of Social Security (1995) 56 FOI Review 27	11.2
Re Cox and Dept of Defence (1990) 20 ALD 199	12.15
Re Dwyer and Dept of Finance (1985) 8 ALD 474	10.27
Re Dyki and the Commissioner for Taxation (1990) 12 AAR 544	9.26

Re Dyrenfurth and Dept of Social Security (1987) 12 ALD 577	8.11
Re Eccleston and Dept of Family Services and Aboriginal and Islander Affairs (1993) 1 QAR 60	2.3, 4.9, 8.12, 8.13, 9.15, 9.16
Re Fewster and Dept of Prime Minister and Cabinet (No 2) (1987) 13 ALD 139	9.9, 9.16
Re Heaney and Public Service Board (1984) 6 ALD 310	9.26
Re Hesse and Shire of Mundaring, 17 May 1994	14.2
Re Hittich and Dept of Health (1994) 36 ALD 498	14.28
Re Howard and the Treasurer (1985) 7 ALD 626	9.16
Re Jackson and Dept of Social Security (unreported) AAT 6 November 1991	10.3, 12.15
Re James and the Australian National University (1984) 6 ALD 687	9.15, 9.17
Re Kamminga and the Australian National University (1992) 26 ALD 585	9.16
Re Letts and Director-General of Social Security (1984) 6 ALN N176	9.21
Re McCarthy and Australian Telecommunications Commission (1987) 13 ALD 1	9.27
Re Maher and Attorney-General's Dept (1986) 13 ALD 98	10.26
Re Mann and Capital Territory Health Commission (1983) 5 ALN N368	7.4
Re Marjorie Cecil Altman and Family Court of Australia (1992) 15 AAR 236	11.5
Re Murtagh and Commissioner of Taxation (1984) 6 ALD 112	9.15, 9.25
Re Porter and the Dept of Community Services and Health (1988) 14 ALD 403	9.9
Re Proudfoot and Human Rights and Equal Opportunity Commission (1992) 28 ALD 734	10.26
Re Rae and Dept of Prime Minister and Cabinet (1986) 12 ALD 589	9.16
Re Reith and Minister of State for Aboriginal Affairs (1988) 16 ALD 709	9.9, 9.16
Re Russell Ian Close and the Australian National University (1993) 31 ALD 597	12.18
Re Russell Island Development Association and Dept of Primary Industries and Energy (1994) 33 ALD 683	8.11, 10.3
Re S and Commissioner of Taxation (unreported) AAT 9 July 1992	9.21
Re Said and Commissioner, Australian Federal Police (1984) 6 ALN N14	9.21
Re Sinclair and Secretary, Dept of Social Security (1985) 9 ALN N127	9.21
Re SRB and SRC v the Dept of Health, Housing, Local Government and Community Services (1994) 33 ALD 171	7.15
Re Tadeusz Slezankiewicz and AOTC (No 2) (unreported) AAT 1 July 1992	10.3
Re Waterford and the Treasurer of the Commonwealth (1985) 5 FCR 76	9.28
Re Wertheim and Dept of Health (1984) 7 ALD 121	7.4
Re Wiseman and Dept of Communications (1984) 12 ALD 707	12.15
Re Witheford and Dept of Foreign Affairs (1993) 5 ALD 534	13.15
Re Z and Australian Taxation Office (1991) 6 ALD 673	9.25
Sankey v Whitlam (1978) 142 CLR 1	9.16
Searle Australia Pty Ltd v Public Interest Advocacy Centre (1992) 36 FCR 111	4.3, 10.28
Searle Australia Pty Ltd v Public Interest Advocacy Centre and Dept of Community Services and Health (1992) 108 ALR 163	8.10, 10.10
Sinclair v Mining Warden at Maryborough (1975) 132 CLR 473	8.13
Sime and Minister for Immigration and Ethnic Affairs (1995) 21 AAR 369	12.15, 12.17
Smith, Kline and French Laboratories (Aust) Ltd v Secretary, Dept of Community Services and Health (1991) 28 FCR 291	10.32
Sobh v Police Force of Victoria [1944] 1 VR 41	4.3
Theophanous v Herald & Weekly Times Ltd (1994) 182 CLR 104	2.4
United States Dept of Justice v Julian 486 US 1 (1988)	4.3
Victorian Public Service Board v Wright (1986) 160 CLR 145	4.3
Waterford and Dept of the Treasury (No 2) (1984) 5 ALD 588	9.15
Waterford and Dept of the Treasury (1985) 7 ALD 93	10.27
Whitlam v Australian Consolidated Press (1985) 73 FLR 414	9.9
Wilson and Australian Postal Corporation (unreported) AAT 11 July 1994	9.25

Select bibliography

ADMINISTRATIVE APPEALS TRIBUNAL

_____ *Annual Report 1994-95* AGPS Canberra 1995

ADMINISTRATIVE REVIEW COUNCIL

_____ *Report No 38 Government business enterprises and Commonwealth administrative law* ARC Canberra 1995

_____ *Report No 39 Better decisions: review of Commonwealth merits review tribunals* AGPS Canberra 1995

ALFORD J & O'NEILL D (EDS)

_____ *The contract State public management and the Kennett Government* Centre for Applied Social Research, Deakin University Melbourne 1994

ALLARS M

_____ *The Report of the Inquiry into the Use of Pituitary Derived Hormones in Australia and Creutzfeldt-Jakob Disease* AGPS Canberra 1994

ARCHIVES AUTHORITY OF NEW SOUTH WALES

_____ *Documenting the future* Records Management Office Sydney 1995

_____ *Records and recordkeeping: introducing new concepts* Records Management Office Sydney 1994

ARDAGH A

_____ 'The walls of secrecy are going up again' (1987) 12 *Legal Services Bulletin* 21

AUSTRALIA. ATTORNEY-GENERAL & JUSTICE MINISTER

_____ 'Government moves to protect privacy' *Joint news release* 10 December 1995

AUSTRALIA. ATTORNEY-GENERAL'S DEPARTMENT

_____ *FOI Annual Report 1982-83* AGPS Canberra 1983

_____ *FOI Annual Report 1992-93* AGPS Canberra 1993

_____ *FOI Annual Report 1993-94* AGPS Canberra 1994

_____ *FOI Annual Report 1994-95* AGPS Canberra 1995

_____ *Proposed Freedom of Information legislation: report of Inter-Departmental Committee* AGPS Canberra 1974

_____ *Review of Commonwealth Criminal Law Final Report* AGPS Canberra 1991

_____ *The protection of official information* October 1993

AUSTRALIA. DEPARTMENT OF FINANCE

_____ *Accountability and Ministerial Oversight arrangements for Commonwealth GBEs* July 1993

AUSTRALIA. DEPARTMENT OF FINANCE. INFORMATION EXCHANGE STEERING COMMITTEE'S ELECTRONIC DATA MANAGEMENT SUB-COMMITTEE

_____ *Improving electronic data management* AGPS Canberra 1995

AUSTRALIA. DEPARTMENT OF PRIME MINISTER AND CABINET

_____ *Cabinet Handbook* 4th ed AGPS Canberra 1994

_____ *Federal Executive Council Handbook* AGPS Canberra 1983

AUSTRALIA. DEPARTMENT OF PRIME MINISTER AND CABINET. NATIONAL INFORMATION SERVICES COUNCIL

_____ *Agenda Papers from the first meeting of the Council* 10 August 1995 AGPS Canberra 1995

AUSTRALIA. DEPARTMENT OF TRANSPORT

_____ *Documenting the business of the Department on file* 1993

AUSTRALIA. HUMAN RIGHTS COMMISSION

_____ *Review of Crimes Act 1914 and other crimes legislation of the Commonwealth* AGPS Canberra 1983

AUSTRALIA. INTERDEPARTMENTAL COMMITTEE ON PROPOSED FREEDOM OF INFORMATION LEGISLATION

_____ *Policy proposals for Freedom of information legislation: report of Interdepartmental Committee* Parliamentary Paper 400/1976 Canberra 1977

AUSTRALIA. MINISTER FOR HUMAN SERVICES AND HEALTH & MINISTER FOR JUSTICE

_____ 'Consumer health rights boosted' *News release* 13 December 1995

AUSTRALIA. PARLIAMENT. HOUSE OF REPRESENTATIVES STANDING COMMITTEE FOR LONG TERM STRATEGIES

_____ *Australia as an information society: grasping new paradigms* AGPS Canberra 1991

AUSTRALIA. PARLIAMENT. HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

_____ *In confidence* AGPS Canberra 1995

_____ *Islands in the sun The legal regimes of Australia's external territories and the Jervis Bay Territory* AGPS Canberra 1991

AUSTRALIA. PARLIAMENT. JOINT COMMITTEE OF PUBLIC ACCOUNTS

_____ *Report 336 Public business in the public interest: An Inquiry into Commercialisation in the Commonwealth Public Sector* AGPS Canberra 1995

AUSTRALIA. PARLIAMENT. SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

_____ *Scrutiny of Annual Reports No 1* 1995 Senate Canberra 1995

AUSTRALIA. PARLIAMENT. SENATE SELECT COMMITTEE ON PUBLIC INTEREST WHISTLEBLOWING

_____ *In the public interest* The Committee Canberra 1994

AUSTRALIA. PARLIAMENT. SENATE STANDING COMMITTEE ON CONSTITUTIONAL AND LEGAL AFFAIRS

_____ *Freedom of Information. Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978, and aspects of the Archives Bill 1978* AGPS Canberra 1979

AUSTRALIA. PARLIAMENT. SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

_____ *Freedom of Information Act 1982. Report on the operation and administration of the Freedom of Information legislation* AGPS Canberra 1987

AUSTRALIA. PARLIAMENT. SENATE STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

_____ *Report on the Committee's scrutiny of certain Health Insurance regulations disallowed by the effluxion of time* The Committee Canberra 1986

AUSTRALIA. PARLIAMENTARY JOINT COMMITTEE ON AN AUSTRALIA CARD

_____ *Report* AGPS Canberra 1986

AUSTRALIA. PRIME MINISTER

_____ *Innovate Australia. Information technology and communications* 6 December 1995

_____ 'Innovate Australia Information Technology and Telecommunications' *Speech* 6 December 1995

AUSTRALIA. PRIVACY COMMISSIONER

- _____ *Community Attitudes to Privacy* Information Paper Number Three AGPS Canberra 1995
- _____ *Outsourcing and privacy* Human Rights and Equal Opportunity Commission Sydney 1994
- _____ *Personal Information Digest 1991* AGPS Canberra 1992
- _____ *Plain English guidelines to Information Privacy Principles 1-3. Advice to agencies about collecting personal information* Privacy Commissioner Sydney 1994
- _____ *Sixth Annual Report on the Operation of the Privacy Act* AGPS Canberra 1994

AUSTRALIA. PUBLIC SERVICE ACT REVIEW GROUP

- _____ *Report* AGPS Canberra 1994

AUSTRALIA. PUBLIC SERVICE COMMISSION

- _____ *Guidelines on the keeping of and access to personnel records*
- _____ *Commonwealth Managers Toolbox* July 1995

AUSTRALIAN ARCHIVES

- _____ *Managing electronic records and Keeping electronic records -- policy for electronic recordkeeping in the Commonwealth government* *Australian Archives* Canberra 1995
- _____ *Strategic directions* Australian Archives Canberra 1994

AUSTRALIAN CHEMICAL INDUSTRY COUNCIL

- _____ *Responsible Care: A Public Commitment* Australian Chemical Industry Council 1989

AUSTRALIAN LAW REFORM COMMISSION

- _____ *Report No 22 Privacy* AGPS Canberra 1983
- _____ *Report No 35 Contempt* ALRC Sydney 1987
- _____ *Report No 70 Interim Child care for kids* ALRC Sydney 1994
- _____ *Report No 72 The coming of age* ALRC Sydney 1995
- _____ *Report No 75 Costs shifting -- who pays for litigation* ALRC Sydney 1995

AUSTRALIAN PRIVACY CHARTER COUNCIL

- _____ *The Australian Privacy Charter* December 1994

BAYNE P

- _____ *Freedom of information* Law Book Company Sydney 1984
- _____ 'The concepts of 'information relating to personal affairs' and 'personal information' (1994) 1 *Australian Journal of Administrative Law* 226
- _____ 'The FOI laws - instructive comparisons and contrasts' *Paper* Australian Institute of Administrative Law Conference Brisbane July 1994
- _____ 'The objects of the Freedom of Information (FOI) Acts and their interpretation' (1995) 2 *Australian Journal of Administrative Law* 114
- _____ 'Recent developments in administrative law' *Paper* AIC Administrative Law Conference Sydney 28-29 August 1995

BAYNE P & RUBENSTEIN K

- _____ 'Freedom of information and democracy: a return to the basics?' (1994) 1 *Australian Journal of Administrative Law* 107

BENNET J

- _____ 'Open Government' *Paper* National Convention of Councils for Civil Liberty 29 September 1973.

BOSTON J (ED)

- _____ *The State under contract* Bridget William Books Ltd Wellington 1995

CAIN J

_____ 'Some reflections on FOI's early years' (1995) 58 *FOI Review* 54

CAMERON C

_____ 'Official Secrecy, open government and making democracy democratic' *Paper* South Australian Institute of Personnel Management 17 September 1972

CAMPBELL E

_____ 'Public Access to government documents' (1967) 41 *Australian Law Journal* 73

CAMPBELL M

_____ 'Conclusive certificates under the Freedom of Information Act 1982' *Paper* Administrative law Practitioners' Forum Sydney 30-31 October 1991

_____ 'FOI access to electronic records' in YORKE S (ed) *Playing for keeps* Australian Archives Canberra 1995, 188

CANADA. STANDING COMMITTEE ON JUSTICE AND THE SOLICITOR GENERAL

_____ *Open and shut: enhancing the right to know and the right to privacy* Canadian Government Publishing Centre Ottawa 1987

CANBERRA TIMES

_____ *Editorial* 9 October 1967

_____ *Editorial* 1 September 1970

COMMISSION OF INQUIRY INTO ASIS

_____ *Report on the Secret Intelligence Service* AGPS Canberra 1995

COMMONWEALTH OMBUDSMAN

_____ *Annual Report 1993-94* AGPS Canberra 1994

_____ *Annual Report 1994-95* AGPS Canberra 1995

_____ *Freedom of information Investigation of a complaint by Graham Schorer concerning actions by Telecom in 1994* Commonwealth Ombudsman 1994

COMMONWEALTH OMBUDSMAN & DEFENCE FORCE OMBUDSMAN

_____ *Annual Reports 1983-84* AGPS Canberra 1985

CONNOLLY C

_____ 'Smart cards and personal privacy implications' (1995) 2 *Privacy Law and Policy Reporter* 61

COSSINS A

_____ 'Paving the way for less open government in Victoria: amendments to the Cabinet documents exemption' (1993) 45 *FOI Review* 27

_____ 'Uranium mining, Cabinet notebooks and redundant amendments to the Commonwealth FOI Act' (1994) 52 *FOI Review* 42

DALTON L

_____ 'FOI -- the irony of the information age' (1994) 68 *Law Institute Journal* 848

FINN P

_____ *Official information Integrity in government project: Interim Report 1* Australian National University Canberra 1991

FRASER R

_____ 'Freedom of information and privacy: some recent developments and issues' (1994) 54 *FOI Review* 74

FULLER J

_____ *Chemicals, communication and the community. Recognising a right to know in the chemical world* Public Interest Advocacy Centre Sydney 1995

GREENLEAF G

_____ 'Inside the filing cabinet' (1994/1995) 1 *Privacy Law and Policy Reporter* 200

_____ 'New ALRC-ARC options endanger privacy' (1995) 2 *Privacy Law and Policy Reporter* 121

GUNNINGHAM N & CORNWALL A

_____ *Toxics and the community: legislating the right to know* Australian Centre for Environmental Law, Australian National University Canberra 1994

HARRISON K & COSSINS A

_____ *Documents, dossiers & the inside dope* Allen and Unwin Sydney 1993

IMMIGRATION REVIEW TRIBUNAL

_____ *Annual Report 1994-95* AGPS Canberra 1995

INDEPENDENT COMMITTEE OF INQUIRY INTO COMPETITION POLICY IN AUSTRALIA

_____ *National competition policy* AGPS Canberra 1993

INDUSTRY COMMISSION

_____ *Competitive Tendering and Contracting by Public Sector Agencies* Draft Report Industry Commission Canberra 24 October 1995

INFORMATION COMMISSIONER OF CANADA

_____ *Annual Report 1991-92* Information Commissioner of Canada Ottawa 1992

_____ *Annual Report 1993-94* Information Commissioner of Canada Ottawa 1994

_____ *Annual Report 1994-95* Information Commissioner of Canada Ottawa 1995

KIRBY MD

_____ 'Freedom of information vs privacy' *Speech* Second symposium on law and justice in the ACT 26 March 1977

_____ 'Information and freedom' The Housden Lecture Melbourne 6 September 1983

_____ 'Summing up: FOI in Australia - First term report' *Speech* Seminar on access to government information Australian National University 27-29 May 1983

KYROU E

_____ *Victorian Administrative Law* Law Book Company Sydney 1985

MCDONAGH M

_____ 'Freedom of information developments in Europe' (1995) 58 *FOI Review* 58

MOODY E

_____ 'Banks agree smart cards hold privacy challenges' *The Australian* 2 September 1995

NEW SOUTH WALES. OMBUDSMAN

_____ *Freedom of Information the way ahead* NSW Ombudsman Sydney 1995

OECD

_____ *Guidelines on the Protection of Privacy and Transborder flows of Personal Data* 1980

PEARCE DC (ED)

_____ *Australian Administrative Law* Butterworths 1995

QUEENSLAND. COMMISSION OF INQUIRY INTO POSSIBLE ILLEGAL ACTIVITIES AND ASSOCIATED POLICE MISCONDUCT

_____ *Report of the Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct* Brisbane 1989

QUEENSLAND. ELECTORAL AND ADMINISTRATIVE REVIEW COMMISSION

_____ *Report on freedom of information* The Commission Brisbane 1990

QUEENSLAND INFORMATION COMMISSIONER

_____ *1994/95 Annual Report* Government Printer Brisbane 1995

QUEENSLAND LAW REFORM COMMISSION

_____ *Report No 46 The Freedom of Information Act 1992: review of secrecy provision exemption*
Queensland Law Reform Commission Brisbane 1994

RAICHE H

_____ 'Clearer vision needed for privacy on the infobahn' (1995) 2 *Privacy Law and Policy Reporter*
21

REFUGEE REVIEW TRIBUNAL

_____ *Annual Report 1994-95* AGPS Canberra 1995

RILEY T

_____ 'Accountability of government: an international perspective' (1987) 11 *FOI Review* 54

ROYAL COMMISSION ON AUSTRALIAN GOVERNMENT ADMINISTRATION

_____ *Report* AGPS Canberra 1976

ROYAL COMMISSION ON AUSTRALIA'S SECURITY AND INTELLIGENCE AGENCIES

_____ *Report on the Australian Security Intelligence Organisation* AGPS Canberra 1985

RUBENSTEIN K

_____ 'Freedom of Information' (1993) 1 *Australian Journal of Administrative Law* 51

SEDDON N

_____ *Government contracts: Federal, State and Local* Federation Press Sydney 1995

SHERIDAN

_____ 'Western Australia: a brief look at the first 18 months' (1995) 57 *FOI Review* 38

SNELL R

_____ 'Hitting the wall: does Freedom of Information have staying power?' *Paper* Australian Institute
of Administrative Law Conference Brisbane 1994

_____ *The effect of freedom: is FOI a benefit or a threat to record management practices?* National
Convention of the Records Management Association of Australia September 1993

SOCIAL SECURITY APPEALS TRIBUNAL

_____ *Annual Report 1994-95* AGPS Canberra 1995

SPIGELMAN J

_____ *Secrecy: political censorship in Australia* Angus & Robertson Sydney 1972

STANDARDS AUSTRALIA

_____ *Draft Australian Standard Records Management DR 95194-95199* 1 May 1995

TELECOMMUNICATIONS INDUSTRY OMBUDSMAN

_____ 'Privacy protection - a major challenge in telecommunications' (1995) 2 *Privacy Law and Policy Reporter* 46

TSAKNIS L

_____ 'Commonwealth secrecy provisions: time for reform' (1994) 18 *Criminal Law Journal* 254

UNITED NATIONS

_____ *Compilation of general comments and general recommendations adopted by Human Rights Treaty Bodies* 29 July 1994 (HRI/GEN/1/Rev 1)

VETERANS' REVIEW BOARD

_____ *Annual Report 1994-95* AGPS Canberra 1995

VICTORIA. PARLIAMENT. VICTORIAN LEGAL AND CONSTITUTIONAL COMMITTEE

_____ *Report on Freedom of Information in Victoria* Government Printer Melbourne 1989

VILANTI P

_____ 'Comment' (1994) 50 *FOI Review* 1

WESTERN AUSTRALIAN INFORMATION COMMISSIONER

_____ *FOI Annual Report 1993-94* WA Information Commissioner Perth 1994

WALTERS M

_____ 'Smart cards and privacy' (1994) 1 *Privacy Law and Policy Reporter* 143

Index

AAT	6.13, 6.22, 6.29
disclosure of documents by	8.5, 10.11, 13.15-16
FOI Commissioner's guidelines	6.14
jurisdiction	13.7
production of documents for inspection by	13.13-14
AAT review	3.9, 3.13, 7.12, 13.7-17
decision not to amend	12.6, 12.18-20
determinative reviewer	5.22-3, 6.20, 13.8-12
cost	14.27-8
issue of conclusive certificates	8.19
Aboriginal cultural information	10.34
Access	ch 2-3, 7.2-4
Archives Act	5.3
documents claimed to be exempt	13.15-16
documents less than 30 years old	5.7
prerequisite to amendment or annotation	12.7-10
refused	7.14-19
statutory right	2.7, 4.2
'Access gap' (archives and FOI)	5.7
Accountability and openness	2.2-3, 2.7, 2.8, 2.11, 4.4-7, 4.12-13
Accuracy of personal information	2.5, 5.15-21, ch 12
Administration of FOI Act	ch 6, 13.19
Administrative guidelines, <i>see</i> FOI Commissioner's guidelines	
Advice about Act, <i>see</i> Information, advice and assistance	
Age of documents	5.7
Agency culture	4.12-16, 6.15
AGPS	2.6, 6.27
AGPS shops	7.7, 7.9
Amendment of personal information	2.5, 5.15-21, ch 12
relevance as a ground for	12.11-12
Amendments made to FOI Act	3.8-13, 7.10, 9.5, 13.19
policy advice	6.4, 6.21
Amendments to Privacy Act (proposed)	10.23-4, 12.10
Annotation of personal information	2.5, 5.15-21, ch 12
Annual FOI report	6.8, 7.19, 8.20
Application fees	3.10, 14.3, 14.10, 14.17
AAT filing fee	14.27-8
internal review	14.22-3
Ombudsman review	13.23
personal information	14.6
reduction of	14.25
remission of	7.17, 14.24
Application	7.5-9
seeking amendment or annotation	12.4-6
vexatious	7.18
<i>see also</i> Processing requests	
Assistance <i>see</i> Information, advice and assistance	
Attitudes (public sector)	4.12-14
Attorney-General's Department	6.2, 6.4, 6.29
annual FOI report	6.8
memos	6.12-13
statistics	6.9
training by	6.15
Auditor-General	6.29, 11.13
Audits (FOI Commissioner)	6.7, 6.19

Australia Post	16.1, 16.7
Australian Archives	5.3, 5.8, 6.29, 7.7
Director-General of	5.13, 6.27
Review's recommendations	5.11, 5.13
standards	5.10, 5.11, 5.13
'Authorised' disclosure (IPP 11)	10.23-4, 10.27
'Authorised officers'	4.15
indemnity	4.20-1, 11.2
<i>Better Decisions: review of Commonwealth Merits Tribunals</i>	13.2, 13.11
Breach of confidence	
indemnity for	4.20-1
exemption	10.3-4
Business activities of agencies	9.24, 10.30, 11.14-15, ch 16
Business affairs exemption	8.4, 10.28-31
GBEs	16.15
Cabinet documents	9.7-13
conclusive certificates	8.17
Cabinet notebooks	9.13
Cabinet processes	9.20
Canada	3.24, 5.19, 6.26, 6.29, 7.11, 7.12, 9.17, 10.31, 13.8
Causation tests	8.10-11
Charges	3.10, 3.13, 6.26, ch 14
<i>see also</i> application fees; costs	
Chief Government Information Officer	6.27, 6.29
Christmas Island	11.12
Cocos (Keeling) Islands	11.12
Codes of practice (private sector)	15.17
Commercial activities of agencies	9.24, 10.30, 11.14-15, ch 16
<i>see also</i> Business affairs exemption	
Commonwealth financial or property interests	9.24
Commonwealth/State relations exemption	3.9, 8.21-2, 9.5-6
Communication between parties	6.16-18
Community 'right to know' legislation	15.3, 15.4, 15.7
Community Service Obligations (CSOs)	16.1, 16.14, 16.16
Telstra	16.17
Companies and securities legislation exemption	11.6
Complaints received and handled	13.3, 13.10, 13.18
Computers (information technology)	6.27, 15.20
<i>see also</i> Electronic records	
Conclusive certificates	3.3, 3.9, 8.17-20
AAT costs discretion	14.28
internal working documents	9.18-20
Consultation	6.21-2, 6.27
with applicants	7.5, 7.14
confidential indigenous information	10.34
with third parties	10.15-17
time limit	7.11
Contempt	11.5
Contracting with government ('contracting out')	15.8-15
Copyright infringement indemnity	4.20-1
Costs	3.6, 6.4, 14.5
AAT review	14.27-8
GBEs	16.16
information not accessible under FOI Act	6.26
<i>see also</i> Fees and charges; Resources	

Courts	6.13
contempt	11.5
disclosure subject to conditions	10.11
documents of	11.7
use of FOI in litigation	7.20
Creating records	5.10, 5.12, 7.9
for consideration by Cabinet	9.9
marking as potentially exempt	8.8
Credit reporting	15.17
Crown privilege	8.13
Data	7.2
Deadlines <i>see</i> time limits	
Decision making time	14.21
Defamation indemnity	4.20-1
Defence (national security) exemption	8.17, 8.21-2, 9.2-5, 11.3
Definitions	
documents	7.2-4
documents in the possession of	7.4
GBEs	16.3
legal professional privilege	10.25-6
officially published	9.10-11
personal information	10.3
prescribed authority	ch 16
public interest	8.13
Delays	2.11, 4.15, 13.23
consultations with third parties	10.15-16
penalties	7.12
<i>see also</i> Time limits	
Deliberative processes	9.15-17
Democracy and government information	ch 2
Detention centre plans	9.22
Determinative review powers	5.22-3, 6.20, 13.8-12, 13.20-1
Disclosure	10.10
by AAT	13.15-16
outside FOI Act	4.17-21, 6.24-6
private sector documents	15.5-7
subject to conditions	10.11
<i>see also</i> Access; Exemptions and exclusions; Public interest; Secrecy	
Time limits	
Discretion	
to amend personal record	12.13-14
to disclose exempt documents	8.3-5
'Dob ins'	10.19-20
Document	
existence of	8.21-4
possession of	7.4, 7.13, 15.13
Domestic intergovernment relations	3.9, 8.21-2, 9.5-6
Draft legislation	1.7-8
Education and training	4.14, 5.12, 6.15, 13.12
Electoral rolls and related documents	10.35
Electronic information	2.6, 6.25, 7.9
amendment of	12.13-14, 12.21-2
'documents'	7.2
e-mail	5.12

time limits	7.10
Embarrassment to government	8.15
European Union	3.26, 15.21
Executive Council documents	9.14
Exemptions and exclusions	3.3, 3.9, 4.2, ch 8-11, 16
additional grounds for claimed	14.28
Archives Act	5.3
disclosure by AAT	13.15-16
national uniform exemption provisions	8.25
non-waivable exemptions	8.4
production required for AAT inspection	13.13-14
reference in object clause	4.8
release of non-sensitive	4.21
single exemption provision	8.6, 8.25
External review	13.7-23
prerequisite	13.3-6
<i>see also</i> AAT; Ombudsman	
External Territories	11.11-12
Facilitation	6.16-18
Fees and charges	3.10, 3.13, 6.26, ch 14
<i>see also</i> application fees; costs	
Files, identifying	7.7-9
Filing fee (AAT)	14.27-8
Financial hardship	14.24-5
Financial interests of Commonwealth	9.24
FOI Commissioner	ch 6
scale of charges to be fixed by	14.16
compliance with sections 8 and 9	7.7-8
consultation with before refusing to process request	7.14
determinative review power	6.20, 13.8
functions	6.5-29
guidelines	
amendment by deletion	12.17
on consultation	10.16
contracting out or funding situations	15.15
fee remission	14.24
legal professional privilege	10.27
material obtained in confidence	10.33
personal information	5.21, 10.9, 10.16
public interest test, application of	8.14
public servants' personal information	10.14
impact on Ombudsman's role	13.22
location of	6.4, 6.30
powers of	6.7, 6.19-20
Foreign relations (national security and defence)	8.17, 8.21-2, 9.2-5, 11.3
'Forum shopping'	5.22
Freedom of expression	2.4-5
GBEs (government business enterprises)	ch 16
regulatory functions of	6.12, 6.16
General exemption provision	8.6, 8.25
Gibbs Committee	4.25-6
Government contracting ('contracting out')	15.8-15
Government funded bodies	15.14
Government information policy	6.27
Governor-General, Official Secretary to	11.7

Health records	10.21-2, 15.25
High Court 'free speech cases'	2.4
Historical background	ch 3
Hong Kong	3.26
House of Representatives Standing Committee on Legal and Constitutional Affairs	4.27, 15.19, 15.22, 15.24
<i>In Confidence</i>	4.27, 15.19, 15.22, 15.24
Indemnity of authorised officers	4.20-1, 11.2
Independent oversight	ch 6
Indexes of existing information	7.7-9
Indigenous information (confidential)	10.34
Industrial relations	9.27
Information, advice and assistance	6.10-18, 7.14
for applicants	6.13, 7.5
staff training	4.14, 6.15, 13.12
<i>see also</i> FOI Commissioner's guidelines	
Information Commissioner	
review model	13.8
of Canada	3.24, 4.14, 5.12, 6.26, 6.29, 7.11, 7.12, 11.3, 14.2
Queensland	1.6, 3.20, 4.21, 6.20, 13.8, 13.10
Western Australia	1.6, 3.21, 4.28, 6.16, 6.20, 10.2, 13.8, 13.10, 14.2, 14.7
Information policy	6.23-27
Information Privacy Principles (IPPs)	5.4, 5.15, 5.22-3, 12.7, 12.11, 12.15, 12.16
breach of	5.22-3, 10.4-7, 10.17, 10.23-4
private sector application	15.17, 15.19, 15.23
Information technology	6.27, 15.20
<i>see also</i> electronic records	
Informers ('dob ins')	10.19-20
Inspection charges	14.20, 14.21
Intelligence agencies	11.13, 11.14
Interdepartmental Committees	3.2-4
Intergovernment material, <i>see</i> Commonwealth/State relations; National security and defence	
Internal review	13.3-6, 14.22-3
Internal working documents	9.15-20
International Covenant on Civil and Political Rights	2.5, 15.21
International obligations and directions	2.5, 15.21
International organisations	9.4
International relations (national security and defence)	9.2-5, 8.17, 8.21-2, 11.3
Internet	2.6, 7.4, 7.9
Interpretation of Act	2.2-5, 4.2-11, 9.9
exemption provisions	8.2-11
neither confirm nor deny	8.21-2
substantial adverse effect	8.11
substantially and unreasonably divert the resources	7.15
unreasonable/unreasonably	10.10
<i>see also</i> Definitions; FOI Commissioner's guidelines	
Investigations, prejudicing	9.21, 9.23
internal or administrative	9.26
Investigative powers	6.19
IPPs, <i>see</i> Information Privacy Principles	
Ireland	3.26
Joint personal information	10.18
Judicial documents	11.7
Judicial review	6.14

Law enforcement and public safety exemption	8.4, 8.21-2, 9.21-3
Legal proceedings, use of FOI in	7.20
Legal professional privilege	10.25-7
Legislative policy advice	6.4, 6.21
Libraries	2.6, 6.11, 7.7, 7.9
Litigation, use of FOI in	7.20
Medical records	10.21-2, 15.25
Members of Parliament	14.26
Mental health, disclosure detrimental to	10.21-2
Merits review tribunals	13.2, 13.10
documents	11.7
<i>see also</i> AAT	
Monitoring	6.6-9
conclusive certificates	8.20
identifying what exists	7.7-9
pricing of government information	6.26
statements of reasons	7.19
National economy	9.28
National Library	7.9
National resource	4.9
National security and defence	8.17, 8.21-2, 9.2-5, 11.3
Negotiation <i>see</i> Consultation	
'Neither confirm nor deny'	8.21-2
New South Wales	3.16
exemption provisions	4.2, 8.9
embarrassment to government	8.15
law enforcement exemption	9.23
statistical material	9.17
New Zealand	3.25, 5.17, 13.21
Non-government organisations (NGOs)	9.3
Norfolk Island	11.11
Northern Territory	9.5-6, 11.10
Object clause	4.4-10
Objectives of FOI Act	2.2, 2.7, 2.8, 4.4-11
fees and charges	14.2
promoting	6.10-20
OECD	12.16, 15.21
Office of Government Information Technology	6.27
Office of Parliamentary Counsel (OPC)	1.7-8
Official Secretary to Governor-General	11.7
'Officially published' Cabinet decisions	9.10-11
Ombudsman	6.22, 6.29, 6.30
industry	15.17
investigation by	13.18-23
On-line information <i>see</i> Electronic information	
Openness of government <i>see</i> Accountability and openness	
Operations of agency	9.25-7
commercial activities	9.24, 10.30, 11.14-15, ch 16
contracting out	15.8-15
Outsourcing (contracting out)	15.8-15
Parliament, contempt of	11.5
Parliamentary departments	11.8

Penalties for delays	7.12
Performance agreements	4.16
Personal information	2.3, 3.11, 3.13, 11.3
correction of	2.5, 5.15-21, ch 12
definition of	10.3
deletion of	12.15-17
fees and charges	3.10, 14.6-8
GBEs	16.2
indirect disclosure of	10.21-2
international obligations and directions	2.5, 15.21
non-waivable exemption	8.4
not subject to fees or charges	3.10
outside FOI Act	4.18
public servants'	10.13-4
recordkeeping	5.8, 12.11
requests made	2.10
right of access	4.10-11
<i>see also</i> Privacy protection	
Personal privacy	10.2-24
Photocopying charges	14.3, 14.12, 14.18, 14.21
Policy advice	6.4, 6.21, 6.23-27
Possession of documents	7.4, 7.13
contracting out	5.13
Pre-decision communications	9.16
Preamble	4.5
'Prescribed authority'	ch 16
Price of government information	6.26
Prison plans	9.22
Privacy Act	3.11, 5.4, 10.3-4
amendment of personal records	12.7, 12.10
consolidation with FOI Act	5.19
consolidation with FOI and Archives Acts	5.5-6
extension to private sector	15.2, 15.3, 15.17-25
FOI disclosure not in breach	10.23-4
New Zealand	3.25
overlap in respect of access and amendment	5.15-21
relevance of information	12.11-12
Privacy Commissioner	5.4, 5.15, 5.17, 6.29, 15.15
co-location with FOI Commissioner	6.30
complaints about denied FOI access	12.10
consultative arrangements	5.21, 6.27, 10.9
review of FOI decisions	5.22-3
Privacy protection	4.10, 5.4, 5.14-23
deletion of information	12.15-17
private sector information	15.16-25
recordkeeping	5.8
secrecy	4.22
third party information	10.2-24
Private sector	ch 15
Privatisation	6.27, 15.4
Processing requests	2.9, 7.10-19
Processing time	14.11, 14.12, 14.16, 14.21
personal information	14.6, 14.8
Production of documents claimed to be exempt	13.13-14
Promotion and publicity	6.10-20, 6.24-5, 7.7
Property interests of Commonwealth	9.24
Protection (legal) of officers	4.20-1, 11.2

Psychiatric reports	10.21-2
Public interest	3.9, 4.2, 4.22, 8.12-16
AAT discretion to disclose exempt documents	8.5
business affairs exemption	10.31
Cabinet documents exemption	9.8
intergovernment relations exemption	9.4-6
internal working documents exemption	9.15-16, 9.19
law enforcement and public safety exemption	9.23
legal professional privilege exemption	10.27
material obtained in confidence exemption	10.33
national security and defence exemption	9.3-5
operations of agency exemption	9.26
personal information	4.11, 10.7
public servants' personal information	10.14
remission of fees	14.24
statements of reasons should list	8.16
Public libraries	2.6, 6.11, 7.7, 7.9
Public safety exemption	8.4, 9.21-3
Publicity and promotion	6.10-20, 6.24-5, 7.7
Purchased documents	6.26
'qualified person', information prepared by	10.21-2
Queensland	3.20
business affairs exemption	10.31
Cabinet exemption	9.9
disclosure of personal information	4.11
objectives	4.4
review	6.20, 13.8, 13.10
statistical material	9.17
Recorded information	7.3
Recordkeeping	2.8, 5.8-13
file titles	7.9
personal information	5.8, 12.11-12
Refund of AAT application fee	14.28
Refusal to process request	7.12, 7.14-19, 12.21-2
Remission of fees	14.24
Representative democracy	2.3-4
Requests	2.9-11, 4.19
facilitation of handling	6.16-17
internal review	13.3
processing	7.10-19
refusal to process	7.12, 7.14-15, 12.21-2
'Required or authorised' disclosure (IPP 11)	10.23-4
Research documents	11.4
Resources	4.15-16, 4.18, 6.4
educating and training	4.14, 5.12, 6.15, 13.12
Ombudsman's office	13.19
refusal to process request on grounds related to	7.14-15, 12.21-2
workloads	13.3, 13.10, 13.18
Review of Commonwealth Criminal Law	4.25-6
Review of decisions	3.9, 3.11, 3.13, 7.12, ch 13
to amend or annotate (AAT)	12.6, 12.18-20
fees and charges	3.10, 14.3
FOI Commissioner	6.19-20
issue of conclusive certificates (AAT)	8.19
by Privacy Commissioner	5.22-3

status of FOI Commissioner's guidelines	6.14
'Right to know' legislation	15.3, 15.4, 15.7
Sale of documents	6.26
Schedule 2 agencies	11.13-15
Schedules, exemption provisions in	8.9
Secrecy	4.13-14, 4.22-8
provisions in other Acts	11.2-3
Section 8 statements	7.7-8
Section 9 material	7.7-9, 10.25
Security of places of lawful detention	9.22
Senate Standing Committee on Constitutional and Legal Affairs	
1979 report	3.6, 9.16, 11.8
1987 report	3.12, 8.18, 10.11, 12.18, 13.19
Social worker reports	10.21-2
South Africa	3.26
South Australia	3.18, 5.5
exemption provisions	8.9
Ombudsman	13.21
statistical material	9.17
Staff training	4.14, 5.12, 6.15, 13.12
State/Commonwealth relations	3.9, 8.21-2, 9.5-6
Statements of reasons	7.19, 8.16, 9.20
Statistical information	9.17
Statistics	4.18, 6.9
'Statutory lie'	8.23-4
'Substantial adverse effect'	8.11
'Substantially and unreasonably divert the resources'	7.15
Sweden	3.22
Tasmania	3.19
business affairs exemption	10.31
deletion of information	12.15
internal working documents	9.16
objectives	4.4
Ombudsman	13.21
Tax file numbers	15.17
Telstra Corporation Limited	16.1, 16.7, 16.17
Territories	3.17, 11.9-12
Third party information	3.11, 4.27, 5.4, 8.4, ch 10
Time limits	3.9, 7.10-12
Cabinet exemption	9.12
conclusive certificates	8.18
internal working documents	9.20
internal review	13.3
removal of agencies from Schedule 2	11.13, 11.14
<i>see also</i> Delays	
Trade secrets	10.28-31
Training	4.14, 5.12, 6.15, 13.12
Transcribing charges	14.12, 14.17, 14.19, 14.21
Transfer of requests	7.13
Tribunals	13.2, 13.10
documents of	11.7
<i>see also</i> AAT	
Uniform exemption provisions	8.6, 8.25
United Kingdom	3.26

United States	3.2-3, 3.23, 6.27, 7.9, 8.23, 9.2, 14.16
'Unreasonable'/'unreasonably'	10.10, 10.31
'Unreasonably divert the resources'	7.15
Unrecorded information	7.3
User-pays principle	14.2, 14.4
Vexatious application	7.18
Victoria	3.15
business affairs	10.31
deletion of information	12.15
review body's disclosure of exempt documents	8.5
vexatious applications	7.18
Waiver of charges	14.25-6
Waiver of exemptions	8.4
Western Australia	3.21, 11.12
advice and facilitation program	6.16
business affairs	10.31
exemption provisions	8.9
objectives	4.4
personal privacy exemption	10.2, 10.5
review	6.20, 13.8, 13.10
statistical material	9.17
Withholding documents <i>see</i> Exemptions and exclusions	