

# A few significant steps towards open government

## ALRC/ARC Discussion Paper 59: a summary and comments

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The discussion paper by the Australian Law Reform Commission and Administrative Review Council (ALRC/ARC) on Freedom of Information arguably defines an approach to the interpretation of the Commonwealth *FoI Act* that is long overdue. The ALRC/ARC perceive a number of deficiencies in the current *FoI* system and propose a comprehensive list of reforms to the Act in order that it achieve its three original stated objectives:

- 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.

The ALRC/ARC Review has pinpointed many problems with current access laws and presented many workable solutions. The concept of an independent monitor represent an interesting, and in the context of Australian *FoI* experience, the first real serious attempt to present solutions to the problems raised over the years by various editors and writers in the *FoI Review*, the NSW Ombudsman and the Canadian Information Commissioner. At the end of the day the solution of an independent monitor in preference to, rather than in addition to, an Information Commissioner is disappointing but understandable.

The Review is to be commended for some far-reaching reform suggestions. However, the Review should be urged to build on a strong base of reform contained in Discussion Paper 59. The Review needs to contemplate the concern expressed by the Canadian Information Commissioner in his 1994-1995 Annual Report:

The dreary problems and frustrations faced today by many a seeker of government information will not be swept away by mere cleverness and the ingenuity of wondrous new machines. No, the key to opening up government is not better applied science; it is somehow changing the encrusted, timorous old attitudes which see openness as a threat, not an opportunity for both citizens and governments.

The Review is now in a position to formulate a Freedom of Information Act that can set the standard for the rest of Australia. With the possible advent of *FoI* in Ireland and South Africa it would be disappointing if the Review misses the opportunity to keep Australian *FoI* at the forefront of world best practice.

### A new approach

Foremost, in attempting to address these deficiencies the Review has proposed that a new approach to the Act is required — from one of 'not disclosing information unless absolutely required, to one of disclosing unless there is

a very good reason not to'. This new approach may be viewed as simply one of pro-disclosure. In order to achieve this shift the Review suggests a number of reforms, including:

- a change in interpretation of the Act,
- changes to ensure that agency culture is pro disclosure, and
- making an independent person responsible for monitoring the government's commitment to *FoI*.

This last suggestion provides the basis for many subsequent reform proposals made by the Review, and should be viewed as one of the most, if not the most important reform proposal made by the Review.

### Interpreting the Act

The Review suggests that a more 'contextual interpretation' of the Act is needed, as the stated role of the Act — that being of public access rights to official government documents — does not indicate the source of those rights, why they are important or their broader purpose. It argues that to counteract a possible narrower application of the Act's objectives, both a preamble and an amended objects clause are desirable.

As stated by the ALRC/ARC:

#### A preamble

... The preamble should make clear that access to government information is a right. It should make clear that the *FoI Act* is intended as a legislative back up to openness in government. It should also acknowledge the privacy aspect of giving individuals a right of access to their own personal information. Several things will flow from such a preamble. First, *FoI* rights will clearly be an integral part of our system of government and will, therefore, be less vulnerable. Second, the way courts, tribunals, parliamentary committees and other decision making bodies regard citizen participation in government through better access to information will change.

**Proposal 3.1:** the *FoI Act* should include a preamble that explains that

- access by the Australian people to information held by the Commonwealth is a public right essential to the freedom of communication that is inherent in the system of representative democratic government established under the Constitution
- this right of access will enable the community to participate in its governance and to keep the government accountable
- this right will recognise that information held by government is a national resource
- the right of access to one's own personal information also serves to protect individuals' privacy
- the Act should not displace less formal procedures for access to information but should be regarded as a legislative 'last resort'.

#### Objects clause

A pro-disclosure interpretation is needed. Section 3 of the *FoI Act* states that the object of the Act is to provide a right of access to government held information. The preamble discussed in the previous paragraph will acknowledge that this right is not an end in itself but an important element in our system of government. The Review considers that this warrants the Act being interpreted in a way that favours disclosure. This does not mean that exemption provisions should not be given their full meaning. Rather, where discretion is required to be exercised, it should be exercised in a way that favours disclosure. This was clearly the intention of Parliament in 1982. Section 3(2) provides that the Act is to be interpreted so as to further the object set out in s 3(1) and that any discretions are to be exercised so as to facilitate and promote the disclosure of information . . .

This article is an amalgam of two separate documents prepared by Rick and Helen in relation to Discussion Paper 59. The first is a summary and the second is the submission made by Rick and Helen to the ALRC/ARC in response to DP 59. Both documents can be found on the *FoI* World Wide Web site at <http://www.its.newham.utas.edu.au:80/dept/comlaw/law/foi>

There appear to be two reasons why a pro-disclosure interpretation of the Act is not always taken: s 3(1) does not indicate why a right of access is important or what broader purpose it serves, and it refers expressly to the exemptions. Accordingly, it is arguable that giving effect to the exemptions is just as much an object of the Act as providing a right of access. There are two main ways to overcome these obstacles. First, the Review's proposal to include a preamble will give interpreters of the Act — agencies and review bodies — a clearer indication of the broader purpose of the Act. To ensure that they take the preamble into account, s 3 should refer to it. Second, the exemptions should not be referred to in s 3(1). They deserve to be mentioned, if only to alert applicants to the reality that the access rights provided by the Act are not absolute, but not in a way that enables s 3(2) to be rendered ineffective.

**Proposal 3.2:** s.3 should be reworded as follows:

- (1) The objects of this Act are
  - (a) to make available to the public information about the operations of departments and public authorities and, in particular, to ensure that rules and practices affecting members of the public in their dealings with departments and public authorities are readily available to persons affected by them
  - (b) to give the Australian community a right of access to information held by the Commonwealth
  - (c) to give individuals a right of access to personal information about themselves held by the Commonwealth and a right to bring about the amendment of that information if it is incomplete, incorrect, out of date, irrelevant or misleading.
- (2) The rights of access given by this Act are limited by specified exceptions and exemptions necessary for the protection of essential public interests and the private and competitive commercial activities of persons in respect of whom information is collected and held by departments and public authorities.
- (3) The provisions of this Act shall be interpreted so as to further the object set out in subsection (1) and the purposes set out in the preamble and any discretion conferred by this Act (for example, in interpreting the exemption provisions) shall be exercised as far as possible so as to facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of information.

### Comments

A pro disclosure approach to Fol is vital. The puzzle has always been why a learning approach to interpretation of Fol legislation has not been embraced by the Federal Court and the Victorian AAT.<sup>1</sup> Recent developments in the Supreme Courts of Victoria and New South Wales and the adoption of pro disclosure practices by the NSW Ombudsman herald the hope of a fundamental change.

It is hard for most agencies to completely escape the charge that, in handling Fol requests for non-personal information, the primary operating guideline is determining the minimal level of disclosure which the Agency is willing to tolerate. Access regimes at both Commonwealth and State level seem to be played like a game of snakes and ladders where most of the applicant's ladders have been removed from the game.

### Agency culture

The Review received considerable evidence that the culture of an agency is a significant factor in the success or otherwise of Fol. It has been recognised that not all agencies have an accepting and co-operative attitude towards Fol, and that in some, a negative culture exists. The Review suggests several factors that may give rise to such an approach;

- the absence of any statement in the Act of its democratic objectives. (It is perceived by the Review that awareness in agency employees as to the democratic

underpinning's of Fol will be increased through the reformulated objects clause in the Act.)

- uncertainty arising from a change in lines of accountability and the protection provided by s.91.

**Limited protection of s.91.** Section 91 of the *Fol 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. This effectively means that officers who disclose information pursuant to an Fol request where no exemption applies receive protection that officers who either exercise a discretion not to claim an available exemption or disclose information outside the Act do not receive. This has two consequences. First, it may discourage officers from disclosing information without treating the request as a formal Fol request.<sup>2</sup> This would be contrary to the preferred approach of general openness without automatic resort to the *Fol Act*. Second, it encourages officers to claim available exemptions without considering whether they are absolutely necessary to prevent some harm in the particular situation.

In view of the limited protection of s.91 the Review has proposed that the protection afforded by this section should be broadened.

The Review considers that a change in attitude from one of withholding information, unless forced by the *Fol Act* to disclose it, to one of disclosing information unless there is a very good reason not to will be most likely to occur if there is a rebuttable presumption that disclosure is appropriate. The release of information consistent with the spirit and terms of the *Fol Act* should be an authorised release of information. Section 91 should be amended to provide this. Officers should receive protection from defamation, breach of confidence and copyright actions whenever they disclose information, whether pursuant to the *Fol Act* or not, provided disclosure is not malicious or reckless. The Act should effectively provide 'authorisation to disclose' rather than protection from the consequences of disclosure.

### Comments

Agency culture is the key to most administrative law reform. In the area of Fol it is critical. The recent decision of the NSW Supreme Court in *Botany Council v The Ombudsman* (CA 40422/95, unreported) illustrates how ineffectual most of the operating guidelines for Fol are if an agency decides to prevent access.<sup>3</sup> Any workshop that includes officers from a range of agencies (State and Federal) quickly reveals the variance in approach to the same set of facts.

Over a period of time, frequent users, such as journalists, seem to use Fol only as a means of last resort. Previous encounters have generally proved to be frustrating experiences. Discussion Paper 59 acknowledges the problem that people may be deterred if they lack confidence in the outcome of a request. The principle cause of this 'battle fatigue' is the impact of negative agency culture. The Review quotes one of the authors' submissions to the Fol Issues Paper released in 1994;

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 Fol to scrutinise policy decisions has been one of frustration, delay and haphazard provision of information. [p.10]

### An independent person to oversee the administration of the Act

The Review considered that a number of shortcomings evident in both administration of and compliance with the Act could be attributed to the fact that agency request handling is not systematically reviewed. At present a review is only carried out once an application for an appeal or review of a decision has been lodged. In effect, the Review considers that: