Freedom of Information Law in Need of Overhaul*

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In 1822, James Madison, Fourth President of the United States of America, wrote:

'A popular government without popular information or the means of acquiring it is but a prologue to a farce or a tragedy or perhaps both. Knowledge will forever govern ignorance and a people who mean to be their own governors must arm themselves with the power which knowledge gives.'

It was on the basis of sentiments such as these that the Freedom of Information Act was enacted at the federal level in the USA in 1966. The enactment of a similar Act at the Commonwealth level in Australia came somewhat later with the passage of the Freedom of Information Act 1982.

Since its enactment, the capacity of the FOI Act to deliver on its promise of more open government has been a matter of controversy. Some recent decisions of the Administrative Appeals Tribunal might be seen as providing further evidence that the Act is in need of overhaul to facilitate greater public scrutiny and greater accountability of government.

In McKinnon and Secretary, Department of the Treasury (21 December 2004), the Administrative Appeals Tribunal decided that certain documents the subject of conclusive certificates issued under the Act by the Treasurer, Peter Costello, fell within the exemption for internal working documents (s.36) in the Act and that there existed reasonable grounds for the claim that their disclosure would be contrary to the public interest.

In McKinnon and Secretary, Department of Foreign Affairs and Trade (21 December 2004), the Tribunal decided that there existed reasonable grounds for claims of exemption made in a conclusive certificate issued by the Minister for Foreign Affairs and Trade, Mr Downer, based on the exemption in s.33 of the Act for documents whose disclosure could reasonably be expected to cause damage to Australia's international relations.

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In *McKinnon and Secretary, Department of Health and Ageing* (29 October 2004), the Tribunal accepted an argument by the respondent that a draft letter from a Minister to the Prime Minister was an internal working document within the meaning of s.36 and its confidential nature was sufficient to establish that it would be contrary to the public interest to release it.

All of these cases concerned FOI requests made by a journalist. In the first case, he sought review by the Tribunal of a decision not to grant access to certain documents concerning the impact of bracket creep on income tax revenue collections and to certain documents concerning the First Home Buyers Scheme. The second case concerned a decision not to grant access to correspondence and advice relating to the detention at Guantanamo Bay of David Hicks. The third case concerned the refusal of access to documents relating to the reforms of bulk billing arrangements under Medicare.

The first and second cases involved the issuing of conclusive certificates by the relevant Minister. The effect of the issuing of those certificates was to change the role of the Tribunal in conducting a review. In the absence of a conclusive certificate, the task of the Tribunal is to review the decision to refuse access to a document and, on the basis of the material before it, to substitute its own decision if it considers the decision was not correct. But if a conclusive certificate has been issued by the Minister, the Tribunal and the FOI applicant are faced with a ministerial veto. The Tribunal is confined to determining whether there exist reasonable grounds for the claim of exemption. It has no power to make a decision granting access to the document.

Conclusive certificates have been criticised on the basis that they undermine the object of the FOI Act. While the argument in favour of them is that the responsibility for FOI decisions on sensitive documents should rest with Ministers, the contrary argument is that these are precisely the kinds of documents at which, in the interests of public accountability, the right to access under the Act is aimed.

While few may object to a facility in the FOI Act for the issuing of conclusive certificates to protect the release of documents that may cause damage to national security or Australia's international relations or to protect the release of Cabinet
documents, a facility for the issuing of conclusive certificates to protect internal working documents is more controversial. In its 1996 report prepared jointly with the Administrative Review Council, ‘Open Government: A review of the federal Freedom of Information Act 1982’, the Australian Law Reform Commission recommended that provision for conclusive certificates in respect of internal working documents should be removed. That report has not been implemented by government.

If a Minister signs a certificate in relation to an internal working document, the Minister must set out in the certificate the public interest grounds relied upon. It is worth briefly setting out the seven grounds relied on by the Treasurer in the certificate he signed in the first case mentioned above:

1. Public servants should be able to communicate directly, freely and confidentially with their responsible Minister on matters which affect the Minister's portfolio.

2. Public servants should be able freely to do in written form what they could otherwise do orally, in circumstances where any oral communication would remain confidential.

3. The release of a document that discusses options that were not settled at the time the document was drafted and that recommends or outlines courses of action that were not ultimately taken has the potential to lead to confusion and to mislead the public.

4. The release of the material would tend to be misleading or confusing in view of its provisional nature, as it may be taken wrongly to represent a final position.

5. The release of documents that contain a different version of estimates, projections, costings and other numerical analysis that cannot be put into context because of the absence of any explanation of the variables used or assumptions relied upon has the potential to lead to confusion and to mislead the public.

6. The preparation of possible responses to questions in Parliament is a sensitive aspect of the work of Departmental officers and it is appropriate that briefing
and other material produced on a confidential basis in the preparation of
those responses remain undisclosed.

7. The release of documents that are intended for a specific audience familiar
with the technical terms and jargon used has the potential for public
misunderstanding in that the contents of the documents could be
misinterpreted.

Claims of this kind are what have been described as 'class' claims. That is to say they
do not relate to particular documents and their contents. Rather the claims are
directed to all documents of a particular class or kind.

Class claims have often been criticised by courts and tribunals. The sentiment behind
the criticism was expressed as follows by Justice Mason of the High Court in Sankey v
Whitlam (1978): 'the possibility that premature disclosure will result in want of
candour in cabinet discussions or in advice given by public servants is so slight that it
may be ignored.'

In a case with which Jack Waterford is familiar the Tribunal rejected an argument that
a document ought not to be released on the basis that in the future public servants who
might be asked to write similar documents might not be so candid or frank in the
expression of their views (Waterford and Treasurer of Commonwealth of Australia
(No. 2), 1985). The candour and frankness argument has also been rejected in other
cases.

However, in yet another group of cases, class-type claims have been accepted. In a
prominent case involving an FOI request by the then Deputy Leader of the Opposition,
John Howard, the Tribunal upheld claims that release of disputed documents would be
contrary to the public interest (Howard and Treasurer of Commonwealth of Australia,
1985). In doing so the Tribunal listed factors which it considered would be relevant
to the question whether documents should not in the public interest be released.
Those factors, which have long been criticised as going too far, suggest that
disclosures of high level communications made in the course of the development of
policy or disclosures which will inhibit frankness and candour in future
communications by public servants are not in the public interest.
The decisions of the Administrative Appeals Tribunal in the recent cases undoubtedly lend support to arguments of this kind. While the Tribunal did not accept the exemption claims as class claims but examined each particular document to see whether it fell within any of the claimed bases for exemption, the result suggests that increasing use will be made of claims of this kind to refuse access to documents.

The exemptions in the FOI Act of course represent a recognition that, in some circumstances, the public interest in access to government information needs to be outweighed by other public interests the protection of which requires that information not be disclosed. The danger is that the recent cases might cause an inappropriate shift in the balance so that the Act becomes increasingly irrelevant to the promotion of open and accountable government.

What might be done to ensure the appropriate balance is maintained?

First, steps need to be taken to implement the Australian Law Reform Commission/Administrative Review Council 'Open government' report mentioned above. In particular:

- the objects clause in the Act needs to be reformulated to explain that the purpose of the Act is to provide a right of access which will enable people to participate in the policy and decision making processes of government, open the executive government's activities to scrutiny and increase its accountability to the people;
- provision for the issuing of a conclusive certificate in respect of internal working documents should be removed;
- a statutory office of FOI Commissioner should be created (with the Ombudsman to perform the role), to provide guidance to agencies on the Act and review their compliance with it.

Senator Murray's private member's Bill, Freedom of Information Amendment (Open Government) Bill, which has been on the notice paper for many years to give effect to these recommendations, could be the vehicle for implementing them.
Secondly, attention needs to be given to updating the Act to reflect best practice in FOI law. Since the Commonwealth Act was enacted, FOI legislation has been enacted in all other States and Territories in Australia. The Commonwealth Act could be substantially improved by picking up features of the legislation in other jurisdictions. For example, the most recent of the FOI laws enacted in other jurisdictions, the Information Act of the Northern Territory (which came into force on 1 July 2003), contains a provision which codifies public interest factors relevant to non-release of documents. While it is appropriate that there be debate at the Commonwealth level on what the factors should be, their codification would help to structure the amorphous public interest test presently applying under the Commonwealth Act, thereby providing greater certainty to applicants and agencies alike. The NT Act also does not provide for the giving of conclusive certificates (called exemption certificates in the NT Act) in relation to internal working documents (called deliberative process documents in that Act).

Finally, the regime of fees and charges in the Commonwealth Act needs to be overhauled. It is a concern that statistics are showing that a significant number of FOI applicants are not proceeding with their requests after charges are notified to them (see Australian National Audit Office, Audit Report No. 57, 2003-04, 'Administration of Freedom of Information Requests'). These statistics suggest that charging may be used by some agencies as a barrier to dissuade FOI applicants from pursuing their requests.

The charging arrangements under the Act have also not kept pace with the outsourcing of the provision of IT services to agencies. If an agency's contract with its IT service provider does not make suitable provision for the retrieval of archived electronic records in response to an FOI request, it is possible under the FOI Fees and Charges Regulations that an FOI applicant is asked to pay the commercial cost to the agency under the contract of the contractor retrieving the records. The amount concerned could be significant.

Without significant overhaul, the Commonwealth FOI regime is in danger of terminal decline.