

# **Submission to FOI Review by Dr Hawke**

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## **1. Introduction**

While I welcome this review of the Act, and recognize its limited timeframe and terms of reference, it is evident that there is a need for a comprehensive review of the Act, which is outside the scope of this review: similar to the reviews in Queensland and NSW by Dr Solomon and the NSW Ombudsman respectively, of their FOI Acts. The most recent wide-ranging review of the Act was by the ALRC in 1995, which made many excellent recommendations as yet not implemented. However, much has changed since 1995.

This Review should recommend a further review of the Commonwealth Act. The wide range of issues raised in the submissions to this review which have been published to date, demonstrate the extent of concerns by agencies and the public about the Act and its effectiveness. After several sets of amendments, it has become cumbersome in its drafting, structure and numbering. It needs to be rewritten in plain English and renumbered – the numbering is difficult for the public and for practitioners to remember, especially the conditional exemptions and the external review provisions.

However there is a pressing need to address at least some of the perceived and actual problems with the administration of the Act even before such a review, lest the Act is thrown out with the bathwater. In Ireland, the perception by senior managers and Ministers that their FOI Act caused problems, was a prime impetus behind the much-criticised changes in their 2003 amendments, including dramatic increases in fees which resulted in greatly reduced usage of the Act. I would recommend the Review prioritise some essential “fixes” to be done immediately, and commence a comprehensive review of the Act to address the larger issues.

In this submission, I have attempted to address most of the specific questions posed by the Review, but have grouped my responses by topic. I have focused on areas which need to be addressed to ensure the effective and efficient operation of the Act to better achieve its objectives. If time permitted, there are many other aspects I would have liked to address, but many other submissions have already been made which have addressed them.

I would be happy to provide further information or am available for discussion if that would assist the Review.

## **2. Information Publication Schemes**

The IPS increased somewhat the range of material required to be published, and most agencies have responded very positively, with quite a few going beyond the minimum required. Proactive publication has increased, as has the attention of agencies to making information on their websites more accessible. The OAIC guidance and support has been essential in achieving this. There remain a few problem areas, most of which are addressed in the submission of the OAIC. I would support their recommendations, particularly in the following areas:

## **2.1 Disclosure Log**

Simultaneous publication in the Disclosure Log at the same time as giving access to an applicant, has had a negative impact on the use of the Act by journalists. While there are a number of solutions, including a mandatory minimum period before publication, at least one option is the NSW model which recognizes the value of the exclusive use of the information by refunding the charges if published earlier than 3 days after the applicant is given access.

A website with the Disclosure Logs of all agencies, perhaps [foi.gov.au](http://foi.gov.au), with strong search capability and enhanced by keyword tagging, would facilitate better use of the large volumes of material released, but not yet being utilized to their full value.

## **2.2 Copyright of 3rd parties**

In my view, this issue has not been given sufficient consideration in the past. In NSW, amendments recently were made to the GIPA Act, recognizing that the open access provisions of the Act did not override the rights of external (3<sup>rd</sup> party) copyright owners. I support the recommendations of the OAIC on this matter.

## **2.3 Accessibility Standards**

The requirement to publish released documents in the Disclosure Log has highlighted problems with legacy document formats (including paper – we are a long way from the “paperless” office!) and the software usually used to redact sensitive information. For security and ease of redacting, most agencies would work with documents in Acrobat PDF format, which cannot always be made to be accessible as per the Standards (notably when it is created from scanned images of documents). To make all published documents accessible would be a significant workload for agencies. I support the recommendations of the OAIC on this matter.

## **3. Administrative Access**

I have always been a strong supporter of administrative access schemes, and have designed and implemented them in many agencies in several jurisdictions. In my opinion, they work best for relatively straightforward requests, for example, an individual’s personal file, or for a single report on a topic. Schemes are most successful when full access can be given, and when the work involved is of a manageable size. The OAIC’s recommendation to require people to attempt administrative access before making formal requests (similar to the current s15A for personnel records) is worthy of consideration, although there are some agencies for whom it will not work as well as others.

For personal information, access schemes should make it as easy and affordable as possible to obtain access to one’s own personal information. Because of the need to check identity and so on, there would still need to be some paperwork. Whether this is an FOI scheme, or an Administrative Access scheme, or another statutory access mechanism does not matter as long as the applicant is given a high quality, affordable means of access.

FOI has a system of appeal rights, so that where any of the requested information has to be refused, I would recommend it being handled under the FOI Act to maximize the applicant's rights of review. In some cases, FOI is the only option, due to its legislative protections – for example, access to health records of the deceased in Queensland Health has to be handled under FOI (RTIA and IPA) rather than Admin Access. Where applications involve third party information, FOI is preferred as it has specific provisions for third party consultation and appeals. For straightforward first-party requests for access, however, administrative access is usually adequate and this should be encouraged.

For non-personal information, publication on websites of catalogues and indexes of available information, or even full-text versions of certain documents, would be the best means. However in light of the enormous volume of information being produced by agencies, it would be impractical and wasteful to attempt to put all records of an agency online.

However, FOI Officers need a clear statement of support from the top to encourage them to release information both under FOI and outside FOI. In cases where the applicant is an Opposition MP, a journalist, or a client in conflict with the agency, senior managers are usually reluctant to release information even under FOI. I strongly support Rick Snell's call for a statement of support from the Prime Minister, accompanied by similar statements from agency heads. I have found during FOI training courses that having a senior executive open the course with an endorsement of openness, or even a video containing same, makes a big difference to those who are hostile, as well as those who are timid.

One aspect of increasing release outside FOI is monitoring the workload. Some agencies have resisted release outside FOI as it reduces their FOI statistics, with a risk of the dedicated FOI resources being reduced accordingly. One solution to this is to track the outside-FOI releases as well as the FOI requests, although (in the case of the former) without the additional detailed statistics required.

#### **4. "Information" vs "Documents"**

There has been a lot of debate about whether the act should cover access to "information" or "documents", as at present. There are definitely some advantages for the public in allowing the more free-form option to ask questions, similar to the UK and New Zealand models. However, this approach can be more difficult and time-consuming for the public servants to locate answers: dialogue between the applicant and agency to frame the request is essential. However there needs to be some controls in terms of time expended per inquiry or it could become too burdensome for under-resourced agencies.

For many years, most agencies have been (correctly, in my view) interpreting information in electronic form as falling within the meaning of the term "document" and have facilitated access to electronically stored information, and provided it where possible in digital form. Many already provide access to

datasets and it would not be a big step to clarify that this is already possible without amending the Act.

A change to allow access to “information”, including of course information not in a recorded form, would require a number of changes in approach within agencies. In effect, applicants could simply ask a series of questions of agencies, requiring creation or compiling of responses. Much of this would have to be done by people with a detailed knowledge of the subject matter, rather than by centrally located FOI Officers with knowledge of FOI rather than specific topic areas. FOI Officers could still co-ordinate, but they could not easily compile such responses. It is akin to the requirement under s.13 of the AD(JR) Act on providing statements of reasons (which, by the way, is a heavily under-promoted and under-utilised accountability mechanism). In summary, I consider this would have advantages for applicants, but would have significant resource implications for agencies.

One approach is perhaps re-conceive the role of FOI co-ordinators as gatekeepers / information specialists, similar to reference librarians, who are familiar with the varied databases and information resources in their agency and who research the answers to the public’s questions. This would not work for many personal requests (“I want to see my entire file”) but would for some non-personal requests. Resources (time, human and information resources) and skills are key challenges.

#### **4.1 Back-up Tapes and Servers**

Whichever approach is taken, “documents” or “information”, I would recommend excluding back up tapes and servers from the definition of “record /information”, as has been done in Queensland and NSW. Searches through back-up tapes is very costly and time-consuming, and rarely produces much of value compared to the time required. Such requests have often come from applicants with a history of dispute with the agency, and they are disinclined to exclude anything from the scope of their requests. Provisions for vexatious requests (see below) may assist, but this is a fairly straight-forward change to reduce a growing problem area. The exception is where an agency has lost or tampered with a document, as set out in the example from Queensland below.

From the Queensland RTI Act:

***29 Application not for backup system documents***

*(1) An access application, however expressed, for a document does not require an agency or Minister to search for the document from a backup system.*

*(2) However, subsection (1) does not prevent an agency or Minister searching for a document from a backup system if the agency or Minister considers the search appropriate.*

*Note—*

*While a search for a document from a backup system is not generally required before refusing access on the ground that the document is*

*nonexistent or unlocatable, a search is required in the particular circumstances mentioned in section 52(2).*

*52 (2) Before an agency or Minister may be satisfied under subsection (1)(a) that a prescribed document does not exist, a search for the document from a backup system is required, but only if the agency or Minister considers the document has been kept in, and is retrievable from, the backup system.*

*(3) Subject to subsection (2), a search for a document from a backup system is not required before the document is nonexistent or unlocatable for section 47(3)(e).*

*(4) In this section—*

*prescribed document means a document that—*

*(a) is a document required to be kept under the Public Records Act 2002; and*

*(b) is not a document that the agency or Minister could lawfully have disposed of under the Public Records Act 2002.*

## **4.2 Records management issues**

Since its inception, FOI has highlighted problems in other areas of administration, particularly records management. There are significant deficiencies in many agencies in terms of their electronic records. There are poor standards in areas such as email, despite what is now over 15 years of its use: disconnected topics in a single email thread; very high levels of repetition, resulting in multiple records meeting search criteria (eg: to assess size of request for “substantial and unreasonable” workload purposes or for charges estimates) and yet with a high level of duplication, which is wasteful for the agency and the applicant. Version control and the proliferation of drafts is another problem area leading to high levels of near-duplicates and inflation of charges estimates.

Records management has traditionally had a very low profile, lower levels of classification of its staff, and is rarely given any kind of priority. Although most agencies would claim to have full electronic records management, the reality does not match. In addition, there always will be large volumes of records in other formats, mostly paper-based, which will always need a degree of manual searching and which do not warrant conversion to digital formats. Accurate estimation and reliable searching is a challenge for almost all agencies, based on complaints and reviews on the basis of sufficiency of search.

Adequate resourcing and giving some priority to records management would increase the efficiency and effectiveness of FOI for both the public and agencies.

## **5. Procedures**

### **5.1 Requirements of a formal FOI request**

For requests for personal information, evidence of the applicant's identity should be a threshold requirement before the request is considered valid. Without proof of identity, an agency would risk privacy breaches in detailed discussion with an applicant about the scope of their application, if their identity had not yet been verified ("Do you want the records from your psychiatrist or your gynaecologist?"). The Queensland Information Privacy Act provides an example of such provisions.

The Act should also make clear that request is not valid (ie: the clock is not yet ticking) until the terms of the request are clear. While I consider this interpretation is correct as per s.15(2)(b), the practical refusal provisions in s24AA(1)(b) appear to suggest otherwise. Clarification of a request with an applicant does not need to be mandatory, but it is very desirable. When done well, by an officer with some knowledge of the topic/records, it produces a better result – less costly for the applicant, less work for the agency.

## **5.2 Timeframes and Extensions of Time**

The timeframes should be calculated using business days, rather than calendar days. This change has been made in the NSW and Queensland reviews of their Acts. Consideration may need to be given to the impact of the Electronic Transactions Act, which currently means that an email received on Christmas Day could be up to 9 days old by the time it is opened after an agency's Christmas shut down period.

For extensions of the timeframes, there should be no need to advise OAIC of extensions agreed with applicants under s15AA. For the current s.15AB extensions on the grounds of complex or voluminous requests, there should be an automatic extension if specified criteria are met, eg: number of pages/hours/ third parties. The OAIC should not need to be involved. There does not seem to have been a lot of benefit in the use s.15AC extensions, other than where an application for review has been lodged. These changes would reduce the workload for the overburdened OAIC and also the paperwork for agencies, freeing up resources for more timely handling of requests and reviews.

## **5.3 Fees and Charges**

There is no perfect model, and there never will be universal agreement on this topic. Investment in open government and accessible information is an integral part of our democratic system. A pure costs approach is not appropriate.

One could make comparisons with government expenditure on media / PR activities, which would demonstrate that the costs of FOI are far less. FOI is a legal right and there is a statutory duty to perform many aspects of the Act, and yet under-resourcing of FOI has been chronic over the years in many agencies. Much of the media / PR function is discretionary and yet usually its resources are not only adequate, but increase regularly.

Very little evaluative research has been undertaken in Australia on the impact of FOI at all, or on the impact of the 2010 reforms. Quantitative accounts of increased numbers and costs is more easily obtained, but is only a part of the picture. The benefits of FOI have been for the public and for the agencies. Oft-cited benefits for public administration include pressure to review and keep current and accurate the policies and practices of agencies; improved quality of administrative decision-making; and some improvements in records management. These are indirect benefits, not specified as the objectives of the FOI Act, and yet they occur in virtually all jurisdictions following implementation of an FOI Act. Expenditure on FOI can be seen as an investment in improving government efficiency and effectiveness, as well as fulfilling a legislative mandate.

However, a balance has to be found between user-pays and disrupting the work of agencies from their other purposes.

### **Application Fees**

The predicted outcome of abolishing fees for FOI requests has been realized, with clear increases in the numbers of requests for most agencies. There has been extensive debate about the costs and benefits of application fees, and many submissions to this review address that issue. The current Commonwealth model means, in effect, that a small (taking less than 5 hours) request is free; the problems have occurred where applicants have lodged multiple simultaneous requests, each one being small, but the aggregate being a significant workload. The current model could be maintained and be effective, if provisions were amended to allow aggregation of requests from a single applicant, or a group of applicants acting in concert, and to assess them as if a single request, both for charging and refusal (“substantial and unreasonable diversion of resources”) purposes.

A possible variation of this would be the Queensland approach to charging. The first five hours work is free; however once the work exceeds five hours, the total amount is chargeable. The present Commonwealth model means that search time is chargeable, and may only be an hour or two; and if decision making time is only an hour or two above the 5 free hours, the total cost is uneconomical to recover, and generally waived. The model suggested by the OAIC has some merit, although like all charging models, it runs a risk of being burdensome for agencies to track and charge time accurately.

### **5.4 Third Party Consultation (Ss. 26A- 27A)**

There are a number of problems with the third party consultation provisions, and I agree with the recommendations of the submission by the OAIC to this review. Agencies should also be encouraged to consider consulting applicants to re-scope their request to delete third party material in some situations (this is obviously not relevant where it is a dispute between the parties). However on occasions, a simple phone call to the applicant can remove the need to consult any third parties.

Confidential information is an area to which the third party provisions should be extended. Most confidential information may be covered by personal privacy or by commercial information, but there would be some situations where it is not (for example, an informant providing allegations of wrong doing about another person, or a confidential submission to a government inquiry). Although this could be argued to be an issue of personal privacy, I think it is more accurately seen as relating to a confidential transaction and the provider should be consulted as a third party.

The Queensland third party consultation provision (s.37 in the RTI Act) is a possible model, not requiring the decision maker to link the third party to a specific exemption:

***37 Disclosure of concern to third party***

*(1) An agency or Minister may give access to a document that contains information the disclosure of which may reasonably be expected to be of concern to a government, agency or person (the relevant third party) only if the agency or Minister has taken the steps that are reasonably practicable—*

*(a) to obtain the views of the relevant third party about whether—*

*(i) the document is a document to which this Act does not apply; or*

*(ii) the information is exempt information or contrary to public interest information; and*

*(b) to inform the relevant third party that if access is given to the document because of an access application, access may also be given to the document under a disclosure log.*

The previous form of this provision in the Queensland FOI Act applied a threshold of whether disclosure could reasonably be expected to be of “substantial concern” rather than merely “concern”, as in the present form. I would recommend retaining the term “substantial concern” as it allows the decision maker to decide consultation is not warranted.

**Personal Information of Deceased Persons**

In relation to section 27A, Consultation – Documents Affecting Personal Privacy, I would recommend altering the term “person’s legal personal representative” to “representative” or “eligible family member”, as for example in Queensland’s RTI and IP Acts. Many deceased persons would not have a legal personal representative, and there are issues involving payment for costs incurred in consultation with solicitors acting in this role.

s.37 RTI Act:

*(2) If disclosure of information may reasonably be expected to be of concern to a person but for the fact that the person is deceased, subsection (1) applies as if the person's representative were a relevant third party.*

...

*(5) In this section—*

*representative, in relation to a deceased person, means the deceased person's eligible family member, or, if 2 or more persons qualify as the deceased person's eligible family member, 1 of those persons.*

Schedule 6 Dictionary:

*eligible family member—*

*1 eligible family member, of a deceased person, means—*

*(a) a spouse of the deceased person; or*

*(b) if a spouse is not reasonably available—an adult child of the deceased person; or*

*(c) if a spouse or adult child is not reasonably available—a parent of the deceased person; or*

*(d) if a spouse, adult child or parent is not reasonably available—an adult sibling of the deceased person; or*

*(e) if a spouse, adult child, parent or adult sibling is not reasonably available and the deceased person was not an Aboriginal person or Torres Strait Islander—the next nearest adult relative of the deceased person who is reasonably available; or*

*(f) if a spouse, adult child, parent or adult sibling is not reasonably available and the deceased person was an Aboriginal person or Torres Strait Islander—a person who is an appropriate person according to the tradition or custom of the Aboriginal or Torres Strait Islander community to which the deceased person belonged and who is reasonably available.*

*2 A person described in item 1 is not reasonably available if—*

*(a) a person of that description does not exist or is deceased; or*

*(b) a person of that description can not be reasonably contacted; or*

*(c) a person of that description is unable or unwilling to act as the eligible family member of the deceased person for the purposes of this Act.*

## **6. Grounds of Refusal**

### **6.1 Repeat Requests**

Requests which have already been dealt with (in whole or in part) by the agency, have caused difficulties for some agencies, particularly the large client-service agencies. The Commonwealth Act does not currently provide for a refusal on this basis. A possible model is available in the NSW GIPA Act, in section 60(1)(b) or the Queensland RTI Act in section 43. Similarly, a provision to refuse repeat applications for amendment should be considered, whether or not the amendment provisions remain in FOI or the Privacy Act.

### **6.2 Vexatious Requests**

Although such a situation is rare for most agencies, there has always been a need for some defence against abuses of the Act. I agree with the recommendation in the submission of the OAIC that agencies be given the power to refuse to deal with a request on the ground that a request is vexatious. The criteria could be very similar to those already in the Act in section 89L(1). The refusal would of

course be subject to review by the OAIIC. This would be in addition to the power of the OAIIC to declare an applicant vexatious based on their conduct in a series of requests or to a number of different agencies.

### **6.3 Previous unpaid charges**

Where applicants agree to pay charges but lose interest or fail to pay final charges, agencies are left with few options, as it is usually uneconomical to pursue such matters as debts. The Irish FOI Act includes a provision in s.10(1)(f) in which monies due from previous FOI applications have to be paid before processing of a subsequent application is undertaken:

*“10(1) A head .... may refuse to grant the request if ...  
(f) a fee or deposit payable under section 47 in respect of the request concerned or in respect of a previous request by the same requester has not been paid.”*

### **6.4 Substantial and unreasonable diversion of resources**

I support the recommendation of the OAIIC for placing an upper limit on request size at 40 hours. This model is largely based on UK where it is expressed as a cap based on maximum cost (£450 for local or £600 for central agencies) and is also based on some case law from the NSW ADT. This provision needs to allow an agency to aggregate similar requests from one requester or several requesters acting in concert, or it will defeat the purpose of the limit.

### **6.5 Alternative access available**

Another ground of refusal which could be expanded is where an alternative means of access is available, including court-ordered access/subpoenas. From anecdotal evidence, many of the large requests encountered by agencies arise in the context of prospective enforcement activity or court action. For many of these litigants, high charges are no deterrent as they are well-resourced, and the FOI rate of charges is dramatically lower than the costs of para-legals and lawyers. Both Queensland and NSW have attempted to deal with this issue, and the submission of the OAIIC also addresses this.

### **6.6 Neither confirm nor deny provision (s.25)**

This refusal provision should be applicable to any of the grounds of exemption, rather than being limited to sections 33, 37 and 45A. The UK Act allows the application of this provision across the board. Historically in Australia it has been limited to a few provisions, but in practice, it is needed for many others. It has been extended in the Queensland RTI Act to cover additional exemptions /public interest considerations.

I would argue that it is necessary in particular for the personal information exemption, for example to deal with a request for records concerning the psychiatric or sexually transmitted diseases history of another person, where even to admit their existence by using an exemption would breach the privacy of

the record-subject. I have known other examples involving the cabinet, breach of confidence and business affairs exemptions.

## **7. Exemptions**

### **7.1 Cabinet / Deliberative Process**

The 2010 amendments to section 34 expanded it from its original form to include: “(c) it was brought into existence for the dominant purpose of briefing a Minister on a document to which paragraph (a) applies”. While this was also done in the amendments made to several of the state FOI Acts some years ago, it increases substantially the amount of material now covered by this absolute exemption and goes beyond its purpose of protecting Cabinet confidentiality. With any increase to the scope of protection under the Cabinet exemption, there is a risk of following the retrograde Queensland provision in its former FOI Act, where the mere presence of a document in the Cabinet room was sufficient to give it absolute protection.

Cabinet documents should be exempt for a maximum period of only 10 years, in keeping with legislation overseas and in Australia (eg: NSW, Victoria, WA, Tasmania, NT). The exceptions in s.34(6) and 47C(2)(b) should be expanded to include: “purely factual or statistical material”. The NT Information Act also applies the 10 year limit to the exemption for deliberative process, and there seems no reason this could not also apply in the Commonwealth. Within 10 years, most issues have entered the public domain or lost most of their heat.

The Commonwealth case law has been somewhat stunted by the past use of the (now abolished) conclusive certificate power, such that many cases were argued without the documents themselves (and any alleged harm) being considered by the Tribunal or court. In jurisdictions such as Queensland which never had conclusive certificates, the case law has found more forcefully against the application of the Howard factors, most extensively argued in the famous Eccleston decision of the Queensland OIC. With the abolition of the certificates, and with time, decisions of the OAIC and the AAT will give better guidance as to those relatively few situations where candour and frankness can be genuinely argued. In light of public servants’ standards of ethical conduct, these situations should be fairly limited.

The Review should consider recommending a more vigorous program for publication of some Cabinet material within a much shorter timeframe after decisions are made –months, not years. The New Zealand model is often quoted as one which we should follow, and while there are some differences in the political landscape, the concept is a worthy one to pursue. Cabinet decision making is at the heart of an accountable government, which is one of the main aims of FOI. When the Cabinet exemption is applied in a restrictive manner, or the terms of the exemption distorted as they were in Queensland between the mid 1990s and the present reforms (which still did not remedy all of its defects), there is an enormous loss of openness and accountability from that one source alone, even where other aspects of the Act are working well.

## 7.2 Law Enforcement

The threshold of harm for the application of S.37(1)(c) -“endanger the life or physical safety of any person” - is very high, and based on case law from several jurisdictions, has little likelihood of success. The situations causing most concern amongst agencies are closer to the risk of stalking / harassment rather than a threat to life or physical safety. Many of the (relatively rare) situations which cannot otherwise be protected consist of the names of public officials dealing with clients who may be mentally ill or aggrieved with an agency’s staff. The staff names would not usually qualify for exemption under s.47F and their information would not usually be regarded as obtained in confidence.

An amendment which was made in Queensland, Ireland, and NSW, addresses this. The additional ground of exemption in the Queensland RTI Act Schedule 3 Clause 10 (1)(d) is:

*“A document is an exempt document if it contains matter the disclosure of which could reasonably be expected: .....to result in a person being subjected to a serious act of harassment or intimidation”.*

In the NSW GIPA Act, the form of the public interest consideration relating to this is:

*s.14 Table Note 3*

*“(f) expose a person to a risk of harm or of serious harassment or serious intimidation;”*

## 7.3 Personal Information

### 7.3.1 Personal Information – Definition

The term “personal information” should be defined to specifically exclude certain aspects relating to public officials. A good example is in the Irish FOI Act (based on the Canadian Privacy Act s.3):

*s. 2 "personal information" means information about an identifiable individual that:*

*(a) would, in the ordinary course of events, be known only to the individual or members of the family, or friends, of the individual, or*

*(b) is held by a public body on the understanding that it would be treated by it as confidential,*

*and, without prejudice to the generality of the foregoing, includes [list of specified types of information] ....*

***but does not include:*** *[my emphasis]*

*(1) in a case where the individual holds or held office as a director, or occupies or occupied a position as a member of the staff, of a public body, the name of the individual or information relating to the office or position or its functions or the terms upon and subject to which the individual holds or held that office or occupies or occupied that position or anything written*

*or recorded in any form by the individual in the course of and for the purpose of the performance of the functions aforesaid,*  
*(II) in a case where the individual is or was providing a service for a public body under a contract for services with the body, the name of the individual or information relating to the service or the terms of the contract or anything written or recorded in any form by the individual in the course of and for the purposes of the provision of the service, or*  
*(III) the views or opinions of the individual in relation to a public body, the staff of a public body or the business or the performance of the functions of a public body;*

Australian examples can be seen in the WA Act (Schedule 1 Clause 3(3) ):

*“(3) Matter is not exempt matter under subclause (1) merely because its disclosure would reveal, in relation to a person who is or has been an officer of an agency, prescribed details relating to —*

*(a) the person;*  
*(b) the person’s position or functions as an officer; or*  
*(c) things done by the person in the course of performing functions as an officer.*

*(4) Matter is not exempt matter under subclause (1) merely because its disclosure would reveal, in relation to a person who performs, or has performed, services for an agency under a contract for services, prescribed details relating to —*

*(a) the person;*  
*(b) the contract; or*  
*(c) things done by the person in performing services under the contract.”*

This is also addressed in the NSW GIPA Act :

*“(3) Personal information does not include any of the following:*  
*(c) information about an individual (comprising the individual’s name and non-personal contact details) that reveals nothing more than the fact that the person was engaged in the exercise of public functions”.*

If an exclusion for basic aspects of public servants’ information is not incorporated, it will lead to excessive third party consultation, exemption of fairly trivial information, and reduction in accountability. Public servants must have appropriate rights of privacy, but where accountability outweighs that, as in most disclosures under FOI where they are simply performing their public function, deciding and signing off on documents about other topics, they should not be able to remain anonymous.

### **7.3.2 Personal Information – Applicant’s reasons**

To assist decision makers in assessing the test of “unreasonableness” or public interest in the s47F exemption, it may be necessary in guidelines (or by amendment) to make clear that the prohibition on taking the applicant’s reasons into account in section 11(2) does not prevent the decision maker taking into account for section 47F(2) any relationship between the applicant and the third party or factors which may be set out in the applicant’s reasons for seeking

access. The decision of the Victorian Court of Appeal in *Marke*<sup>1</sup> has been followed in NSW, Queensland and South Australia, and is in keeping with the approach taken in many AAT decisions. This interpretation generally has the effect of facilitating access to particular applicant which would otherwise be denied.

The NSW GIPA Act s.55 provides an example of a legislative amendment to clarify this:

***Consideration of personal factors of application***

*(1) In determining whether there is an overriding public interest against disclosure of information in response to an access application, an agency is entitled to take the following factors (the "personal factors of the application") into account as provided by this section:*

- (a) the applicant's identity and relationship with any other person,*
- (b) the applicant's motives for making the access application,*
- (c) any other factors particular to the applicant.*

*(2) The personal factors of the application can also be taken into account as factors in favour of providing the applicant with access to the information.*

*(3) The personal factors of the application can be taken into account as factors against providing access if (and only to the extent that) those factors are relevant to the agency's consideration of whether the disclosure of the information concerned could reasonably be expected to have any of the effects referred to in clauses 2-5 (but not clause 1, 6 or 7) of the Table to section 14.*

### **7.3.3 Children's personal information**

Consideration could also be given to a provision similar to that enacted in the Queensland RTI and IP Acts to protect the rights of children as applicants and as third parties [sections below from the RTI Act]:

***25 Making access applications for children***

*(1) Without limiting the ability of persons to make applications for children, an access application may be made for a child by the child's parent.*

*Notes—*

*1 Section 190 clarifies the powers of those acting for others.*

*2 For an application made for a child, the child (and not the parent) is the applicant—see schedule 6, definition applicant. This may be particularly relevant for section 66 (Applicant under financial hardship).*

*(2) In this section—*

*child means an individual who is under 18 years.*

*parent—*

*1 Parent, of a child, is any of the following persons—*

- (a) the child's mother;*
- (b) the child's father;*
- (c) a person who exercises parental responsibility for the child, including a person who is granted guardianship of the child under the Child Protection Act 1999 or who otherwise exercises parental*

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<sup>1</sup> *Victoria Police v Marke* [2008] VSCA 218

*responsibility for the child under a decision or order of a federal court or a court of a State.*

*2 However, a person standing in the place of a parent of a child on a temporary basis is not a parent of the child.*

*3 A parent of an Aboriginal child includes a person who, under Aboriginal tradition, is regarded as a parent of the child.*

*4 A parent of a Torres Strait Islander child includes a person who, under Island custom, is regarded as a parent of the child.*

### **50 Contrary to child's best interests**

*(1) If an access application is made to an agency or Minister for a document, the agency or Minister must decide to give access to the document unless disclosure would, on balance, be contrary to the public interest.*

*(2) Despite schedule 3, section 12(2) and schedule 4, part 2, item 8, in relation to an application by or for a child for access to a document, the Parliament considers it would, on balance, be contrary to the public interest to give access to the document to the extent it comprises personal information of the child if the disclosure of the information would not be in the child's best interests.*

*(3) In considering whether disclosure of the information would not be in the best interests of the child, the agency or Minister must, unless the access application was made for the child, have regard to whether the child has the capacity to—*

*(a) understand the information and the context in which it was recorded; and*

*(b) make a mature judgment as to what might be in his or her best interests.*

*(4) However, despite an agency or Minister being able, under section 47(3)(c), to refuse access to all or part of a document, the agency or Minister may decide to give access.*

*(5) In this section—  
child means an individual who is under 18 years.*

### **7.3.4 Personal Information – Access via qualified person**

Section 47F(5) should be amended to allow access to be given to an appropriate qualified person, not necessarily only to a person qualified in the discipline of the document concerned. By way of illustration: it would usually be more appropriate, and convenient, for a patient to have access to their medical information through a nurse, who could explain information created by medical and other health practitioners. Medical practitioner resources are scarce and expensive and not necessary to provide access in every situation (although for some information, such as mental health information, a psychiatrist may be the most appropriate person).

The Queensland RTI and IP Acts have provisions to allow for this:

### **51 Contrary to applicant's best interests—healthcare information**

*(1) If an access application is made to an agency or Minister for a document, the agency or Minister must decide to give access to the document unless disclosure would, on balance, be contrary to the public interest.*

*(2) Despite schedule 3, section 12(2) and schedule 4, part 2, item 7, the Parliament considers it would, on balance, be contrary to the public interest to give access to a document to the extent it comprises relevant healthcare information of the applicant if the disclosure of the information might be prejudicial to the physical or mental health or wellbeing of the applicant.*

*healthcare professional means a person who carries on, and is entitled to carry on, an occupation involving the provision of care for a person's physical or mental health or wellbeing, including, for example—*

- (a) a doctor, including a psychiatrist; or*
- (b) a psychologist; or*
- (c) a social worker; or*
- (d) a registered nurse.*

#### **7.4 Secrecy exemption**

The ALRC recommendations regarding Secrecy provisions should be implemented.

#### **7.5 Public Interest test**

It is a bit early to assess to what extent (if any) the 2010 reforms have changed the level of openness, although there is anecdotal information to suggest positive improvements. Virtually all of the conditional exemptions were already subject to a public interest test in the former Act, and those which were over-used (deliberative process and operations of agencies) I suspect are still over-used. Some which have traditionally remained as absolute, such as legal professional privilege and breach of confidence, rely on the common law exceptions which go part-way towards a kind of public interest test.

As more case law emerges from decisions of the OAIC and AAT, agencies will gain confidence in applying the public interest test appropriately. This has been the trend elsewhere – until an approach fostering greater openness is clearly supported by the review bodies, some agencies will take a conservative view.

### **8. Review system**

#### **8.1 Internal Review**

I would support the reintroduction of internal review as mandatory before an applicant is permitted to seek external review. Internal review has many advantages for the applicant and the agency. For the applicant it offers a free, and usually quick, opportunity for reconsideration of the matter. Many internal reviews vary the original decision, so it is not merely a rubber stamp. For agencies, it also offers an opportunity for quality control and enhancing

openness, as the more senior person undertaking the review can influence more junior decision makers to release more on future occasions.

Mandatory internal review was abolished in Queensland and NSW, as it was in the Commonwealth. Unsurprisingly in all three jurisdictions, it led to an increase in external reviews to the OIC, and the consequent delays at that level. Obliging applicants to seek internal review first would almost certainly reduce the volume of external reviews and the resources required to resolve them.

## **8.2 Role of OAIC**

The OAIC has been performing many roles in the context of the Act, and doing so extremely well, and I applaud the introduction of this model of review (and its role in other areas, such as education and awareness, information policy etc).

However, in its review role, the OAIC has suffered from a predictable flood of external review requests, like its counterparts in almost every other jurisdiction which has used the IC model (Queensland, WA, UK and Ireland to name a few). In part the answer lies in adequate resourcing. But another aspect to consider is that it is currently virtually duplicating the role of the AAT.

I would recommend the OAIC's decisions be appealable to the AAT (or perhaps the Federal Court) only on points of law. This would be parallel to the situation in Queensland, which is regarded as a best-practice jurisdiction in its external review case law. Part of the success of the Queensland model is, in my view, due to the fact that agencies take its decisions more seriously as they are binding, and final, except for appeal on points of law. This model would give greater authority to the OAIC and its decisions and therefore more consistency in interpretation of the Act. The OAIC has all the advantages of a specialist tribunal in developing a consistent body of caselaw. While certain members of the AAT have developed tremendous expertise in FOI, over its history it has had some markedly inconsistent approaches, interpretations and decisions, which makes it harder for practitioners to be confident in their own decision-making.

I would recommend that appeals from the OAIC on a point of law should be heard by the AAT, rather than the Federal Court as the costs and formalities of the Federal Court are greater than those of the AAT.

## **8.3 Powers of OAIC**

I support the recommendations of the OAIC in their submission that the office be given additional powers. Most important of these would be the power to delegate decision making within the office, and the power to remit a matter to an agency for their action. These would greatly facilitate the handling of cases and ameliorate the current backlog.

## **9. Offence Provisions**

### **9. Protections and Offence provisions**

Over the 30 years I have been involved in FOI, I have noticed an increase in the influence and power of Ministerial staff members in the processing of FOI requests from the media, other MPs and certain key interest groups. While keeping the Minister's office informed is quite appropriate, the level of involvement often goes significantly beyond that. I know of many cases where pressure was brought to bear to "lose" documents, or refuse documents on spurious grounds, knowing that the appeal period would "buy" enough time for the heat to have gone out of the issue.

The NSW Ombudsman review of FOI and the Solomon Review in Queensland recognized the importance of protecting the FOI decision makers from inappropriate influence from senior staff or Ministerial staff. The offence provisions which were introduced into the GIPA and RTI Acts demonstrate the need for a deterrent. The Queensland OIC has also recently issued a protocol on reporting to Directors-General and Ministers on FOI matters which is a useful guide.

Consideration should be given to enacting offence provisions similar to those in the Queensland RTI Act and the NSW GIPA Act, which protect decision makers from undue influence being brought to bear by senior officers and others such as Ministerial staff [Sections below quoted from NSW GIPA Act]:

***116 Offence of acting unlawfully***

*An officer of an agency must not make a reviewable decision in relation to an access application that the officer knows to be contrary to the requirements of this Act.*

***117 Offence of directing unlawful action***

*A person (the "offender") must not:*

*(a) direct an officer of an agency who is required to make a decision in relation to an access application to make a reviewable decision that the offender knows is not a decision permitted or required to be made by this Act, or*

*(b) direct a person who is an officer of an agency involved in an access application to act in a manner that the offender knows is otherwise contrary to the requirements of this Act.*

*Maximum penalty: 100 penalty units.*

***118 Offence of improperly influencing decision on access application***

*A person (the "offender") who influences the making of a decision by an officer of an agency for the purpose of causing the officer to make a reviewable decision that the offender knows is not the decision permitted or required to be made by this Act is guilty of an offence.*

*Maximum penalty: 100 penalty units.*

***120 Offence of concealing or destroying government information***

*A person who destroys, conceals or alters any record of government information for the purpose of preventing the disclosure of the information as authorised or required by or under this Act is guilty of an offence.  
Maximum penalty: 100 penalty units.*

## **10. Cultural change**

Organisational culture and the level of openness has always been variable across agencies; at the risk of a generalization which cannot be supported with other than anecdotal evidence, more client-focussed agencies have a more positive and open approach than the central policy agencies.

One could write a thesis on how to achieve culture change. An obvious first step would be a clear statement of support from the top – I endorse Rick Snell’s recommendation of a statement from the Prime Minister and all Ministers. Ministers’ offices need to refrain from inappropriate attempts to influence decisions (for this, both sanctions and protocols such as that recently proposed by the Queensland OIC are needed). Strong leadership by Ministers and agency heads is essential – many junior and middle-level public servants are quite open, but sometimes when decisions need to be cleared through or made by more senior officers, some of the openness dissipates.

In his submission to the Review, Mr Thomler describes meeting many public servants unaware or with misconceptions of their role in FOI. While training was provided by the OAIC to the FOI decision makers of many agencies, there is an enormous need to embed FOI awareness training in areas such as: induction training for all new staff; in courses on policy development and report /submission writing; and in HR practices, as a few examples.

Even more importantly, senior managers are often a barrier to the changes being made: training the junior staff to change the culture is not feasible without senior level support and understanding of the impact and results of such changes. I was closely involved in implementation of FOI (both initially and a reformed Act) in jurisdictions such as the Commonwealth, in NSW, Queensland, the UK and Ireland. The greatest success in achieving some cultural change occurred when senior staff were forced to attend at least briefing sessions, if not more detailed training (which should have been essential as these senior staff were often internal reviewers).

I would be happy to expand on any aspect of my submission or to assist the Review in any way.

**Note about the author:**

I have been working in the field of FOI since late 1981. Initially I was involved in the implementation of FOI in the Commonwealth government, then in NSW, Queensland, and the Northern Territory. I have also worked on implementing FOI in Ireland, the United Kingdom, Cayman Islands and China. Since leaving the public service in 1993 I have been an FOI practitioner, consultant and trainer in several jurisdictions in Australia and overseas. I have also been involved in the reform processes in Queensland, NSW and the Commonwealth over the past few years, in making submissions, and conducting training for staff. In that time I have trained literally thousands of staff in FOI, mostly conducting intensive one and two-day courses for decision-makers. I have also made thousands of decisions as a delegate in several agencies.

I have been the Director of Information Consultants Pty Ltd since 1998. I was appointed an Honorary Senior Research Fellow with the Constitution Unit at University College London in 2003. In 2006 I co-authored a book on "FOI: Balancing the Public Interest" (2nd edition, published by UCL London). Through my website I have assisted hundreds of members of the public in seeking information from government, and have myself been an FOI applicant over many years. I like to think that my experience as both an applicant and an agency decision-maker has given me a balanced perspective in assessing FOI matters.