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Freedom of Information Reform

http://www.pmc.gov.au/consultation/foi_reform/index.cfm

Submission to the Commonwealth Department of Prime Minister & Cabinet

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The Australian Privacy Foundation

The Australian Privacy Foundation is the main non-governmental organisation dedicated to protecting the privacy rights of Australians. The Foundation aims to focus public attention on emerging issues which pose a threat to the freedom and privacy of Australians. Since 1987, the Foundation has led the defence of the right of individuals to control their personal information and to be free of excessive intrusions. The Foundation uses the Australian Privacy Charter as a benchmark against which laws, regulations and privacy invasive initiatives can be assessed. For further information about the Foundation and the Charter, see www.privacy.org.au

Introduction

The APF welcomes and strongly supports the proposed reforms. In our view, FOI and privacy laws share a common objective of holding government agencies to account for the way in which they hold and use information, and the laws are broadly compatible and mutually supportive.

While there is some tension between FOI and privacy laws where information requested contains personal information about third parties, this tension is managed quite well by existing provisions in the FOI Act and the proposed reforms include some improvements in this respect.

We support the proposed creation of a new office of Information Commissioner, with separate FOI and Privacy Commissioners supporting a new Information Commissioner. This model has been shown to work well in Canada and the UK, and will give these important roles a higher profile and more potential influence, although the ultimate success of the model, as with any other, will depend on the individuals appointed.

Proposed re-location of individual access and correction rights to Privacy Act

We support in principle the proposed change so that an individual's access to information about themselves will be primarily under the Privacy Act rather than, as now, under both the Privacy and FOI Acts, but with a deference to the FOI Act provisions. In our view, the proposed change makes a 'cleaner' distinction, leaving the FOI Act to focus on its primary objective of openness and transparency, subject to limited exceptions – one of which is the protection of third party personal information. A similar arrangement has worked well in New Zealand.

However, there is a transitional problem. The FOIA currently allows complainants in access

and correction matters concerning personal information to obtain review by the AAT, and by the judicial system if necessary. The Privacy Act does not give complainants a right of appeal from determinations by the Privacy Commissioner (except in very limited circumstances). This is one of the main defects of that Act. Addressing this defect requires amendments to the Privacy Act, as the government has foreshadowed, But the content of the proposed reforms are as yet unknown, and the proposals by the ALRC in its Report 108 are very defective in relation to appeal rights, as explained in the submissions by the UNSW Cyberspace Law & Policy Centre to the DPMC Consultations on the ALRC's recommendations¹.

If the government's legislation is based on the ALRC's recommendations, then removal of individual access and correction from the FOI regime would probably be a step backwards in terms of enforceable rights. We therefore oppose the proposed re-location until the details of the government's proposals for appeals against decisions of the Privacy Commissioner are known

Information Commissioner Bill 2009 (Exposure Draft)

Functions

The provisions seem somewhat complex but we read them to have the effect that:

- the new Information Commissioner has three sets of functions in relation to FOI (s10), Privacy (s11) and additional reporting on government information handling (s 9)
- the new FOI Commissioner has the FOI functions (s10) but can also perform privacy functions
- the Privacy Commissioner keeps all existing functions under both Privacy Act and other laws (s11) but can also perform FOI functions

Obviously one would hope for a collegiate team approach by the three Information Officers (IOs) to the functions of the OIC, but it is not clear what would happen in the event of a disagreement between any two of the IOs, either in terms of performance of functions or in relation to employment and assignment of staff or consultants. We suggest that the relationships need to be made clearer.

Appointments

Given the interchangeability of functions, it is not clear why the FOIC, but not the IC or PC, is required to have legal qualifications (s17(3)), particularly as it is the PC, not the FOIC, who has quasi-judicial complaint Determination functions. The appointment as the last three Australian Privacy Commissioners of individuals without legal qualifications may have contributed to the low level of reasoned analysis in case reports on complaints resolved by the Commissioner. It may have also contributed to the almost complete absence of s51 determinations over the last 20 years.

When combined with there being only a couple of significant Federal Court decisions concerning the *Privacy Act* during that time, the combined result is that there is very little reliable guidance to the interpretation of most parts of the Act. Complainants, their advisers, and respondents, have been ill-served by successive Privacy Commissioners paying insufficient attention to the Act as a source of legal rights which require interpretation.

This problem could be addressed by a Commissioner willing to acknowledge it and make better use of appropriately qualified senior staff. But if it is considered desirable for there to be a requirement for legal qualifications for *any* of the three Commissioners, then this requirement should certainly apply to the Privacy Commissioner.

¹ See http://www.cyberlawcentre.org/ipp/publications/CLPC_sub_misc.pdf

We support the three IOs being statutory officers appointed by the Governor-General on a full time basis and for a maximum of five years (s18)). We question however whether it is desirable to allow for re-appointment (Note to s17(4)) – making the appointments non-renewable would arguably strengthen their independence. No individual, however successful, is irreplaceable and on balance we favour non-renewable term appointments.

Staff

It is not clear whether the existing staff in the Office of the Privacy Commissioner would become staff of the new OIC (s27).

Advisory Committees

The new Information Advisory Committee (IAC) will advise the IC on all of his/her functions, including privacy functions (s30). It is not clear what the relationship will be between this Committee and the Privacy Advisory Committee (PAC) established under the Privacy Act. We note that the IAC will comprise exclusively public servants, whereas the PAC has a range of members from different backgrounds representing different interests. We submit that the IAC should have at least some consumer/citizen members, and that it should perhaps be limited to advising on FOI functions, if the PAC is to continue. Alternatively, a broad based Advisory Committee could advise all three IOs on all information functions, or there could be a specialized FOI advisory committee and a general advisory committee for the IC's s9 reporting functions. On balance, we support there being both a PAC and an IAC, with perhaps overlap of scope in relation to access and correction of public sector personal information

Annual Reports

We note that the IC must include 'privacy matters' in his/her Annual Report (s33). 'Privacy matters' are defined in s35, but appear to overlap with the matters that the Privacy Commissioner is required to include in his/her Annual Report under s97 of the Privacy Act 1988. Duplication will not matter, but we seek clarification of the relationship between these two requirements.

In relation to the Privacy Commissioner there also needs to be a requirement for the Commissioner to publish summaries of mediated cases according to objective and published standards (as submitted in detail to the ALRC by the UNSW Cyberspace Law & Policy Centre – see footnote 1). This argument is now even stronger, given that access and correction complaints will be dealt with under the Privacy Act. While implementing this recommendation could await the proposed Privacy Act amendments, it could equally be included in the current IC Bill.

Resources

It is essential that the Office of the Information Commissioner (OIC) be adequately resourced, particularly in the first few years when a major effort will be required to change an entrenched culture of secrecy in many agencies.

In particular, the Privacy Commissioner will need sufficient staff resources to deal with complaints about access and correction, which will be a new workload, given that there has been no equivalent role under the existing FOI Act.

FOI Amendment (Reform) Bill 2009 – Exposure Draft

We generally strongly support all aspects of the proposed reforms, particularly the pro-active publication scheme, the reduction and simplification of exemptions with a single, simpler public interest test, and significant improvements in the complaints review scheme, and extension to contractors.

We have a few specific comments, based in part on our experience and potential future role as an applicant for non-personal information under the FOI Act:

Publication of submissions

The proactive publication scheme could usefully include a ‘default’ presumption of publication of submissions to all government inquiries, reviews and consultations. While practice has improved significantly in recent years, too many agencies still ‘forget’ to give notice of a default publication policy when soliciting submissions, and then claim that the difficulty or cost of subsequently consulting submitters prevents them from publishing them. The default position should be that anyone making a submission to government should assume that it will be made public – if they have reasonable grounds for requesting confidentiality then they should be required to make such a request, and agencies should be instructed to grant such requests only when there is a convincing case, and to the extent that it is necessary; i.e. as much of a submission as possible should be published, rather than it being ‘all or nothing’. An appropriate alternative in many cases would be publication of the submission but with identifying particulars suppressed – the public would then still be able to assess the ‘weight’ of submissions, while still protecting the identity of the submitter where this is justified.

Exemptions

Cabinet documents

While the proposed exemption for cabinet documents is much more limited than currently, it still allows withholding of documents ‘*proposed* by a Minister to be submitted [to the Cabinet]’ (s34) (our emphasis). This is in our view open to abuse, and we cannot see why the simple ‘dominant purpose of submission for consideration by the Cabinet’ would not suffice as a single, simple test for this exemption.

We understand that under the UK Act, some cabinet documents can be released, with a public interest test applying, and urge the government to complete its reforms by at least matching this precedent, which appears not to be causing major problems in the UK.

Schedule 2 Exemptions

Apart from the substantive exemptions in Part IV of the FOI Act 1982, there are numerous exemptions from that Act for particular agencies or documents by virtue of section 7 and Schedule 2. The ALRC recommended in its Report 77 ‘Open Government’ that most of the agencies listed in Schedule 2 be required to demonstrate, within 12 months, that they warrant an exclusion, and otherwise be removed from Schedule 2 (Recommendations 74 & 75). It is very disappointing that the current Bill does not respond to this recommendation. We submit that the Bill should give effect to this recommendation.

AML/CTF Act Suspicious Matter reports

We take this opportunity to call for an amendment to the exemption from FOI access rights for 'suspicious matter' reports under the AML/CTF Act 2006. As we have repeatedly pointed out in submissions on AML/CTF legislation, this 'blanket' exemption (contained in Schedule 2, Part II of the FOI Act 1982) is indefensible, resulting in a secret 'blacklist' of unsubstantiated allegations against individuals by employees of reporting entities. These employees, who are required to submit reports on the basis of very subjective criteria, and are prohibited by law from 'tipping off' the individuals concerned, are in most cases not qualified to make such allegations, which could potentially have serious adverse implications for individuals. We agree that an exemption is justified in relation to any report about an individual who is the subject of a current investigation by any of the AUSTRAC partner agencies, but there must be a threshold point after which individuals are able to establish, through an FOI request, if there have been any 'suspicious matter' reports held about them, but not acted on by any agency. To prevent this, as the exemption in Schedule 2 currently does, is to deny individuals the opportunity to challenge adverse information about themselves – a denial of natural justice.

Resources

We repeat our submission that the Office of the Information Commissioner (OIC) must be adequately resourced, particularly in the first few years when a major effort will be required to change an entrenched culture of secrecy in many agencies.

Specific questions about this submission should be directed to APF Board member Nigel Waters

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Please note that postal correspondence takes some time due to re-direction – our preferred mode of communication is by email, which should be answered without undue delay.