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FOI REFORM OR POLITICAL WINDOW DRESSING?

David Solomon*

The *Right to Information Act 2009* is now law in Queensland. It came into effect on 1 July 2009, a little more than 12 months after the independent review Panel that I chaired published our report. That report was, in essence, adopted by the Government. After the exposure draft of the legislation was presented, towards the end of last year, some further relatively minor changes were made, some enhancing Freedom of Information (FOI), none restricting it.

The Government is in the process of appointing the Information Commissioner and I believe will soon move to fill the two deputies' positions – the Right to Information (RTI) Commissioner and the Privacy Commissioner. The Office of the Information Commissioner was provided some time ago with additional resources so that it could research and develop documentation and provide assistance for agencies dealing with the new Act.

The Government has made it very clear to all agencies that it wants the new Act to work. There are training programs and also meetings at which the new philosophy that the reforms are based on is explained. The Premier has taken the lead, issuing a "Statement of Information Principles for the Queensland Public Service" that was circulated throughout the Public Service. It begins –

> Information is the lifeblood of democracy. To reach its full potential, a State like Queensland needs citizens who are informed and a government that is open and responsive.

Later –

> At the heart of these reforms will be a public service that conducts itself in the most open and transparent way possible, because that openness and transparency are fundamental to good government.
>
> The processes of government should operate on a presumption of disclosure, with a clear regard for the public interest in accessing government information. The Queensland public service should act promptly and in a spirit of cooperation to carry out their work based on this presumption.

And then –

> It is the Queensland Government's expectation that the Queensland public service recognises and respects that Government is the custodian of information that belongs to the community and will:
>
> - Maximise the public's access to government information by administratively releasing information where ever possible, so that recourse to the *Right to Information Act 2009* and the *Information Privacy Act 2009* is a matter of last resort.

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* *Dr David Solomon AM is the Queensland Integrity Commissioner. He was Chair of the Independent Review Panel that was appointed by the Queensland Government to review that State's Freedom of Information Act, in 2007-8. In 1992-3 he was Chair of the Electoral and Administrative Review Commission. This paper was presented at the 2009 AIAL National Administrative Law Forum, Canberra, 6 August 2009.*

and

- Act to process requests for information rapidly and fairly, rendering all possible assistance to the community in responding to their requests for information.

The changes to the information regime in Queensland that accompany the move from Freedom of Information to the Right to Information are real and substantial and, as seen above, they are accompanied by the necessary drive from the top to change the public service culture.

Similar changes, though possibly not quite as far reaching, are occurring elsewhere in Australia. The then New South Wales Premier, Nathan Rees, acting on a report by the State Ombudsman, introduced draft Bills that, after public submissions were received, went through the Parliament and were assented to in late June 2009. They won't come into effect, however, until early next year. In the meantime the NSW Government will establish the Office of the Information Commissioner. It has committed $3 million to establish it in this financial year with on-going funding of $4 million a year.

Tasmania commenced a review of its FOI law in 2008. It produced a directions paper in March 2009 and an exposure draft of its Bill is scheduled to be made public next month, with a final Bill going into Parliament in late October. Based on the exposure draft it would seem Tasmania is generally following the Queensland model, though the external reviewer will remain the Ombudsman. The Government would like the legislation passed before the end of the year or early next year.

The Commonwealth has also been active. Its legislation to establish an Office of the Information Commissioner (on much the same lines as that in Queensland) and to extensively amend the existing FOI law, were released towards the end of March. The Government hopes the legislation will be brought into Parliament in the second half of the year.

Is all this window-dressing? I think not – definitely not. Will it deliver everything journalists dream about? Certainly not and nor should it.

Let me give you two pieces of personal history that make it particularly clear to me that the reforms in Queensland are absolutely genuine and will work.

Anna Bligh became Premier in mid-September 2007. Two days later, on a Saturday, she phoned me and asked if I would like to head a Panel to review Freedom of Information in Queensland. She assured me that this was to be a genuine review. There were no restrictions on what we might consider and recommend. Two days later, she took to her first Cabinet meeting as Premier a proposal to establish an independent FOI review Panel with terms of reference that could hardly have been more extensive. They included, twice, the marvellously empowering phrase "the panel is to consider (but not limit itself to)…". I am told that this FOI proposal was actually the very first agenda item, of that her first Cabinet meeting.

When we delivered our report, the Premier took the most unusual course of inviting the Panel to address Cabinet. We spent about 45 minutes explaining what was in our report and its implications and then were quizzed by Cabinet Ministers for more than an hour. Two months later, the Premier took detailed recommendations to Cabinet on which of our recommendations should be adopted. It was a line-by-line analysis conducted by her Department and the discussion in Cabinet was spread over three successive meetings. This was a really serious and deliberate exercise that everyone knew would make major changes to FOI as it then existed.

My second story concerns a significant error that occurred in our report. I only became aware of it at a briefing that the Premier arranged for me to give to members of the Queensland delegation to the 2020 conference. She pointed out that the 141 recommendations that we detailed in our report did not include a rather significant issue that we dealt with in our executive summary.

What that summary said was

> …the Panel proposes a reduction in the 30 year rule on Cabinet material, to just 10 years. For exempt incoming ministerial briefs, parliamentary estimates briefs and question time briefs, the Panel proposes that the exemption expire after 3 years (subject to a possible extension of time on public interest grounds by the Information Commissioner)

However, if you check the footnote and go to the chapter that is indicated (as I did immediately) you find nothing about this. Somehow, the relevant section of our report was lost in the editing or printing process, along with the two relevant recommendations. The Premier said the Department had picked this up and the Government had dealt with the issue that we raised anyway.

In fact the Government did not accept our precise recommendations. It decided that a 20-year rule should replace the 30-year rule applying to material in the Queensland Archives. Further, it decided that the relevant ministerial briefs that we referred to should be able to be accessed after 10 years. More importantly perhaps, it decided that specific Cabinet documents that were sought under the RTI process, could be obtained after 10 years.

The fact that the Government decided to deal up-front with these non-recommendations demonstrates, I think, how sincere the Queensland Premier and her Government were in wanting to overhaul and improve the FOI process.

Is there any common element about the FOI reforms that are being introduced in Queensland, the Commonwealth, NSW and Tasmania that might indicate whether they represent a genuine commitment to reform? I think there is.

It is important to note that it is new political leadership, rather than media, Opposition or public pressure, that is delivering the massive changes in FOI currently occurring in Australia.

Bligh, Barnett, Rees (who was able to capitalise on the initiative of the NSW Ombudsman) and Kevin Rudd, backed by John Faulkner (who pushed for Federal Labor's pre-election commitments and then expanded on them when he took office as Cabinet Secretary) and Joe Ludwig, all committed themselves at the very beginning of their respective terms and beforehand, to making government more open and accountable than it had been under their predecessors.

FOI is only one of a number of accountability regimes that most of these new leaders have embraced. For example, at the Federal level, the Rudd Government promoted (or even introduced) changes to the 30-year (archival) rule, codes of conduct for Ministerial staff, registration of political lobbyists, restrictions on post-departure employment of senior public servants and ministers, whistle-blowing, transparency and merit based selection when appointing senior public servants, political donations and electoral reform and controls over government advertising. Tasmanian Premier Bartlett's plan to strengthen trust in democracy included reviews of whistleblower laws, registering lobbyists and codes of conduct for MPs, ministers and ministerial staff. The Queensland and NSW Premiers are also involved in implementing reforms in some or many of these areas.

The focus of this discussion, however, is FOI. There is no reason to doubt the fact that each of the leaders is committed to serious reform in this area. Of course, it is easier for them to do so than it would be for a leader who has been in government for some time and who might be more exposed to embarrassment from the FOI process. However, I am sure that would be and is a far too cynical suggestion. The fact is they are all experienced politicians who know how FOI may be used by the media, lobbyists, pressure groups or by the Opposition, to hurt a government They seem to believe that openness is a virtue, in political terms. In my view it can be made to work as an instrument of good government, not least to keep ministers and senior public servants up to the mark.

There have been politicians in the past who have been committed to FOI and wanted to advance openness and accountability in government. However, I think it is fair to say they have often been outflanked and outnumbered by those whose main concern was to avoid political embarrassment that might follow disclosure of some of the internal workings of government.

On the other hand, there have been some politicians who never hid their disapproval of this American fad, as they might have considered it to be. Let me remind you of a quote that I came across when we were working on the Queensland review. This was the verdict on FOI expressed by the then Queensland Premier, Sir Joh Bjelke-Petersen, in 1978 at a Senate committee hearing considering the first draft of the Commonwealth legislation. He claimed that FOI legislation, in principle, represented "an attempt to graft upon the governmental structure of Australia, which is modelled upon the Westminster system … ideas and concepts which are alien to that system".[1]

We have come a long way in 31 years. Alien or not, FOI has now been grafted onto the governmental structure of every country with a Westminster system, including that based in Westminster itself where, by all accounts, it is operating reasonably effectively – despite a recent hiccup in the English process that is relevant to the system improvements in which we are currently engaged in Australia. We have reached the point where changes in freedom of information are concerned not with a legislative add-on to the Westminster system but with what most of us regard as a fundamental part of it, namely the move towards more openness and hopefully better accountability.

The recent hiccup, referred to above, is a case considered by the Information Commissioner in England and then on appeal by the Information Tribunal, about the release of the minutes of two Cabinet meetings in March 2003, when the U. K. Cabinet considered the Attorney-General's legal advice concerning military action against Iraq. The Information Commissioner, and then the Information Tribunal by a two-one majority, decided that the public interest fell in favour of release of the minutes. Cabinet then decided that the Minister should override the Tribunal's decision. The Minister – the Lord Chancellor and Minister for Justice, Jack Straw – made a statement to the House of Commons and tabled an extensive statement of reasons explaining the override decision. He made the point that the actual decision of the Cabinet had been made public immediately and that the Attorney-General's advice had later been made public. He pointed out that s. 1.2 of the Ministerial Code states –

> Collective responsibility requires that ministers should be able to express their views frankly in the expectation that they can argue freely in private, while maintaining a united front when decisions have been reached. This in turn requires that the privacy of opinions expressed in Cabinet and Ministerial committees, including in correspondence, should be maintained.

He said –

> Although Cabinet minutes do not generally attribute views to individual ministers, divergence of views can still be clear and speculation over who made various comments would be inevitable if they were to be released. Their disclosure would reduce the ability of Government to act as a coherent unit. It would

> promote factionalism and encourage individual ministers to put their interests above those of the Government as a whole. Such an outcome would be detrimental to the operation of our democracy and contrary to the public interest.

In his statement to Parliament Mr Straw said –

> In summary, the decision to take military action has been examined with a fine-tooth comb; we have been held to account for it in this House and elsewhere. We have done much to meet the public interest in openness and accountability. But the duty to advance that interest further cannot supplant the public interest in maintaining the integrity of our system of government. The decision to exercise the veto has been subject to much thought and it will doubtless—and rightly so—be the object of much scrutiny. I have not taken it lightly but it is a necessary decision to protect the public interest in effective Cabinet government.[2]

One consequence of this episode has been an important change in the British FOI law – by British, I mean the FOI law that operates in England and Wales, because Scotland has its own FOI law. However, to complicate matters further, for some years there has been an inquiry into the 30-year rule that covers the release of United Kingdom archival materials, including Cabinet documents. An extensive independent review resulted in a recommendation that the period should be reduced to 15 years. However, in June this year the UK Government announced that it would instead reduce the period to 20 years – this being, of course, the period that is being widely adopted in Australia at the Commonwealth and most state levels.

Accompanying that announcement was a further decision that Cabinet documents and information relating to the Royal Family would also be made exempt altogether from the FOI Act for 20 years. In other words, the UK will follow the practice in Queensland and elsewhere of not making the release of Cabinet documents subject to a public interest test.[3] This is not to say that Cabinet materials may not be released earlier but the decision accepts there is an abiding public interest in preserving the secrecy of the internal workings of Cabinet. In Queensland and some other States, Cabinet documents will be accessible under RTI after 10 years, even though the new 20-year rule will apply generally to material in the archives.

The Tasmanian Directions Paper went much further, it recommended that the withholding period for Cabinet materials should be five years. It pointed out that this reduction from 10 years to five, was consistent with the new direction of the legislation and a 5 year exclusion period "would be appropriate and consistent with the parliamentary cycle".[4] This suggestion really tests the time limits that should be applicable to the Cabinet exemption. If implemented it would mean that, given the 5 year term of the Parliament, every incoming government would have access to the documents of its predecessor from 5 years earlier. So as well as getting its own briefing notes, an incoming government can obtain the briefing notes that were given to the previous government. I think this might be a step too far. I think it would make a significant difference to what senior public servants would be prepared to put in briefing papers for an incoming government, which would be to the detriment of the system generally and the effectiveness of the briefing that would be provided.

The present rules of the Westminster system hold that an incoming government should <u>not</u> have access to the documents of its predecessor in office. One of the responsibilities of the Department of the Premier and Cabinet/Prime Minister and Cabinet is to bundle up and put away in the archives all the Cabinet documents of the defeated government for whatever period (mostly 30 years) is prescribed. There are rare occasions when a new, (or even not so new) incoming government will want to check what the previous government may have decided or been advised. On such occasions, the head of the relevant department will contact the Leader of the Opposition for <u>permission</u> to provide a relevant document or file to the government. That may or may not be granted.

Making a change that allowed incoming governments access to the Cabinet documents of their predecessors would bring about a fundamental change. This really would be the Bjelke-Petersen worst-case scenario, the imposition of a concept quite "alien" to the Westminster system. The incoming ministers would be able to look, not just at positive Cabinet decisions (which might have been announced), but also at decisions where the former government decided not to take a particular course of action and at the submissions on which that was based, or where a submission made a proposal the Cabinet decided not to accept. I think this really is pushing FOI too far.

I think the 5-year idea (or one-term of Parliament) would only work if the public service was Americanised – that is, if the top four or five levels in each Department were all political appointments and such officers would expect to look for new jobs when a government changed from one party to another.

We have mostly avoided that kind of approach, though the relatively short periods for which agency heads and senior executive service officers are now appointed may be pushing us in that direction.

Perhaps it is just a matter of degree and there is no grand point of principle involved. If 10 years is OK, what about 8, 6 etc. However, as we lower the bar, it's my belief we really are going to have to rethink the principles and practices of our system of government.

Such radical changes would not concern me at all. I've been thinking and writing about changing our system of governance for many decades. I would commend to you a book I published in 1976 – 33 years ago - called *Elect the Governor-General!* It proposed an elected presidential style republic along American lines – and it sold 20,000 copies in just a couple of months. However, until the politicians embrace that, or give the public a chance to vote for something similar, I'm afraid we're stuck with Westminster. And that means we have to make it work properly, including using a public service that is not overtly politicised at the top.

In addition to Cabinet documents, much the same kind of argument applies to the other true exemptions under FOI or RTI, to which in my view no public interest test should apply. The Queensland Panel's final report identified about a dozen true exemptions that need to be protected.

While these are the matters that journalists and others would like to use FOI and RTI to access, the fact that they cannot get their hands on them does not mean that we have wimped out on reform. The Queensland, NSW, Commonwealth and Tasmanian reforms have taken a quantum leap in advancing freedom of information. I have not spoken about three of the most important aspects of the advances that have been made - the switch to "push" policies and pro-active disclosure by agencies; administrative release of information and making FOI and RTI the last resort; and the development of new government-wide information policies. In most jurisdictions, the burden of recommending those last changes is going to fall on Information Commissioners and others over the next year or so. But the Commonwealth is not going to wait that long, and has launched a dedicated Government Web 2.0 Taskforce, to advise it on how public sector information can be made more accessible to, and usable by, Australian citizens online. If I may quote the Secretary of the Department of Prime Minister and Cabinet, Terry Moran,

> The Taskforce will advise on how to establish a public sector culture that favours openness, on how the Government can use new web technologies to hear the views of citizens and learn from their experience and knowledge.[5]

The taskforce, of which I am a member, is due to report by the end of the year.

While I haven't discussed these other changes to FOI/RTI, I regard them as crucial and extremely important. However, I don't believe that anyone can challenge the claim that the overall package that is being implemented is both significant and substantial. I expect it will be quite some time before future reviewers, reformers or governments will be able to make progress again to anywhere near the degree that will have been achieved in 2009-2010.

Endnotes

1 Senate Standing Committee on Legal and Constitutional Affairs, *Freedom of Information*, Report on the Freedom of Information Bill 1978, and aspects of the Archives Bill 1978, Australian Government Publishing Services, Canberra, 1979, p. 34.
2 The statements were made on 24 February 2009 and can be accessed through www.justice.gov.uk.
3 See, www.justice.gov.uk/news/newsrelease160709b.htm
4 At p. 47.
5 Speech to the Institute of Public Administration Australia, Canberra, 15 July 2009.

FOI REFORM AND MAINTAINING THE MOMENTUM

Michael McKinnon*

After decades of deliberate neglect, Freedom of Information (FOI) reform is now firmly on the agenda. This is not simply political window dressing but a serious attempt to improve the operation of our information access laws in NSW, Queensland and the Commonwealth.

Underpinning this reform are questions as old as democracy itself. Does secrecy have a cost? How much does the public need know about the operations of their governments? What real damage can occur to the public interest from release of government documents?

The answer to the last question is clear – secrecy allows poor policy and corruption to flourish. The children overboard affair, the Australian Wheat Board (AWB) scandal and the weapons of mass destruction claims used to justify the invasion of Iraq, all show that secrecy is crucial if flawed reasoning and policies are to survive. Ignoring the affront to democracy of voters unable to make informed decisions because of secrecy, the work of Nobel prize winner Joseph Stiglitz, even if couched in economic terms, reveals that secrecy is a poor investment by any government.

A further example can be found with the so-called Dr Death inquiry in Queensland, in which respected lawyer Geoff Davies QC found that the Queensland Cabinet, including Peter Beattie and former health minister Gordon Nuttall, had a "culture of concealment" in which hospital waiting lists and other material were hidden.

Davies found that the conduct of the present Cabinet and its Coalition predecessor, in hiding documents relevant to the health of thousands of Queenslanders, was "inexcusable and an abuse of the Freedom of Information Act".

He also found that successive state governments had followed a practice of concealment and suppression of elective surgery waiting lists and measured quality reports. "This, in turn, encouraged a similar practice by Queensland Health staff" he said. "In my view, it is an irresistible conclusion that there is a history of a culture of concealment within and pertaining to Queensland Health."

Secretive government not only permits poor policy to flourish and flawed allocation of taxpayer resources but, logically, given the findings of Commissioner Davies, can be directly responsible for appalling and life-threatening failures by government.

The present wave of FOI reform, even if flawed, recognises not only the cost of secrecy to good government but also its negative cost to citizen support and involvement in the political process. However, those hoping to improve FOI should be aware that some politicians and senior public servants remain deeply opposed to improvement. That opposition will not diminish over time.

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* *Michael McKinnon is FOI Editor, Seven Network. This paper was presented at the 2009 AIAL National Administrative Law Forum, Canberra, 6 August 2009.*

The judiciary and the legal profession also err on the side of caution regarding government transparency on the basis of unspecified and often absurd fears of the sky falling in. The price of improved FOI, therefore, must be unrelenting vigilance and continued close engagement in reform by the media and like groups that have been instrumental in lobbying for improved transparency. Sadly, apart from a number of individuals, the legal profession, through its professional associations, has offered little to assist in the FOI reform process where its expertise has been sorely needed.

When I addressed the AIAL Forum in July 2004, I spoke with some optimism. As *The Australian's* FOI Editor, at the time, I had recently authored a submission to the Australian Labor Party (ALP) on FOI reform on behalf of News Ltd, the nation's largest media organisation employing about 2,500 journalists and publishing 145 national, metropolitan, Sunday, regional and suburban newspapers.

I also spoke with optimism, misguided in hindsight, of the prospect of FOI reform through the courts. A case that eventually found its way to the High Court, *McKinnon v Secretary, Department of Treasury* (2006) 229 ALR 187, was seen as the basis for challenging not only the issuing of conclusive certificates but also the public interest arguments used to thwart FOI applications from almost day one of the Commonwealth FOI Act's existence.

These arguments arise from the mid 1980s case of Howard re Treasurer (Re Howard and Treasurer (Cth) 3 AAR 169), in which a contention of public interest factors against disclosure included claims that the public would be confused by policy documents and that public servants would give oral advice rather than write things down if documents are released.

The case arose from FOI applications lodged in October 2002, relating to 'bracket creep' in the income tax system and possible fraud in the First Home Buyers Scheme.

At the time, I was systematically challenging the lack of compliance with the spirit of the FOI legislation. Over four or five years, I eventually lodged more than 50 appeals to the Administrative Appeals Tribunal (AAT); the majority of these were successful. Government agencies have often folded at the tribunal doorstep given the universally poor legal justification for secrecy.

I argued then, though without specific knowledge, that the Commonwealth Government was systematically and actively seeking to ignore FOI laws to protect the Howard Government's political standing. In hindsight, this view was entirely correct.

I refer to a book entitled *The Role of Departmental Secretaries* by former Public Service Commissioner and Secretary of the Department of Health and current President of the Australian Institute of Public Administration, Andrew Podger. Mr Podger writes:

> A meeting of all departmental secretaries in 2004 discussed concerns about the media campaign, led by The Australian newspaper, to challenge decisions (including the issuing of 'final certificates') to exempt documents from FOI. Discussion focused first on the definition of 'documents' and then, when the meeting was advised by Rob Cornall (Secretary of the Attorney-General's department) that the legislation implied a wide definition, discussion turned to ways of limiting the number of documents held that were not unequivocally exempt from public release. Keeping diaries was firmly discouraged, those with 'day books' or similar were advised to destroy them at the end of each week or fortnight and it was suggested that good practice was to systematically review document holdings to destroy draft papers that were no longer essential for future work. Where possible, policy documents were to be managed as cabinet papers, which were exempt. One secretary went so far as to boast that he never kept written records of conversations with the minister, but reported back to his departmental officers orally on decisions made and action to be taken. Cornall was asked to provide further legal advice on how to gain exemptions from FOI coverage.

> I expressed concern that the conversation was so one-sided. I noted the Auditor-General had frequently criticised the lack of adequate record keeping and asked Cornall to give us legal advice also on the obligations of public servants to make and to keep records. Cornall agreed that this was a sensible request. (As I recall, the subsequent advice provided was that there was no explicit obligation to create records, though the Public Service Act and the Financial Management and Accountability Act arguably implied some such obligation—for example, through the value of 'open accountability'; the Archives Act certainly constrained the destruction of records once created.) I also asked the secretary who claimed he did not keep records how he expected his staff to carry out the minister's decisions, which he had relayed orally. Surely effective management, let alone the obligation of accountability, meant someone would make a record of the decisions.
>
> A year later, when I was working in the Department of PM&C, I was intrigued by the systematic trawling of files, official and unofficial, to destroy 'surplus' copies of draft papers and other papers not essential for recording the decision-making process. There were also systematic arrangements to tie as much policy advice to cabinet papers as possible. The processes did not involve the destruction of any key documents, but were clearly aimed at limiting the risk of FOI (or parliamentary) requests for working papers being upheld.

This commitment of the bureaucracy to secrecy using extraordinarily flawed management processes is a disgrace in any democracy. Public servants ought not to protect the political interests of their long-term masters rather than accept the public's right to know but, given the continued politicisation of senior bureaucrats across the Australian public sector and uncertainties of tenure, a sentiment of secrecy will not die a willing death.

It is also extraordinary that this cynical contempt for transparency flies in the face of a judgment from a Tribunal direct to these issues.

I refer to what was, hopefully, the last conclusive certificate case to be heard by any Australian tribunal. A certificate was, effectively, a vehicle for a minister to determine that the public interest was against any release of documents, with an almost impossibly high bar set as part of the appeal process. The Howard Government issued certificates against my applications on documents about industrial relations reform, the legality of David Hick's incarceration, Reserve Bank board minutes and Treasury policy documents.

In the case, *McKinnon and Secretary, Department of Prime Minister and Cabinet* (2007) AATA1969, claims by the nation's then top public servant, Dr Shergold, that documents concerning government deliberations should not be disclosed, were rejected by the Deputy President of the Tribunal. The claim that disclosure would reveal deliberations of senior public servants, which would mean that proper records would not be created and that frank and candid advice would not be offered, were not only wrong in evidence but failed when measured under legal obligations under the Public Service Act and the department's own information management guidelines. Perhaps it is my flawed legal understanding but basically public servants would be breaking law if they failed to properly make records and, therefore, any claims of public interest against release on this basis are doomed.

Irrespective of the outcome of the present wave of FOI reforms, public servants will still attempt to remain secretive even to the extent that reforms are in fact backward steps.

While the Bligh Government, ably led by the Premier Anna Bligh, has embraced FOI reform, at the 11th hour, a significant flaw was discovered and, amazingly, fixed showing the value of a politician with a real commitment to improvement.

Under the Right to Information Bill 2009 (Qld), a little known Schedule 4 was a time bomb. Working on behalf of Australia's RTK – a peak media lobby group for freedom of speech established after the High Court case in *McKinnon* – I noted that an application for deliberative documents would be treated in a new way.

Under the old Act, a document was judged on public interest factors for and against release. However, under the Bill as it stood, any deliberative document would automatically attract a "greater weight of harm'' provision when balancing interest. Given the object of the Act itself had merely been cited as a factor favouring release when considering public interest, this change would have dramatically narrowed access. The greater weight of harm schedule was subsequently removed from the Act.

The new Act in Queensland will also ensure that question time briefs (QTBs) are never released. Last week, the Commonwealth Department of Employment released a swag of QTBs in response to one of my applications. Funnily enough, the briefs painted a universally glowing picture of government policies, making the reasons for secrecy in Queensland, about the same type of subject matter, ridiculous. In NSW, the information access reform agenda has been handed over to an Attorney General known for secrecy. Without the political authority of a Premier, or even more importantly, a Senator Faulkner, there are grave fears that the NSW reform process will falter.

The difficulty of FOI reform makes the role of the media and others, in fighting for improvement, crucial. In October 2006, after the loss in the High Court, Commonwealth Ombudsman Professor John McMillan made a typically insightful speech.

Professor McMillan argued that the "history of the *McKinnon* litigation illustrates that a conclusive certificate will be hard to overturn''.

However, he went on to note that the decision had sparked universal condemnation by the media and claims that FOI laws were broken.

"Rightly or wrongly, many people looked to the High Court to become a champion of FOI in opposition to government…(and)…the debate has had to move elsewhere.

Professor McMillan also pointed out that the *McKinnon* decision had triggered renewed interest in legislative reform of the FOI Act. Shortly after the decision, the Labor Shadow Attorney-General, Nicola Roxon, introduced a Private Members Bill to abolish conclusive certificates.

"The proposed amendment would constitute a more substantial change to the FOI Act than any decision the High Court could have given. In effect, the FOI cause will have been advanced more through a defeat in the courtroom than by a success.''

Professor McMillan cited the changes to Australian electoral laws after the High Court declined to read a 'one vote, one value' principle into the Constitution in Attorney-General (Cth); Ex rel McKinlay v Commonwealth (1975) 135 CLR 1, the *McKinlay* case. He noted that path-breaking native title legislation was enacted in Australia after the initial loss in *Milirrpum v Nabalco Pty. Ltd and the Commonwealth* (1971) 17 FLR 141, the Gove Land Rights case.

The lesson for the media and others interested in open accountable government is that real change can be won but only after organisation, the development of public support and in a climate in which politicians are continually forced to justify secrecy or offer improvement prior to and during election campaigns. FOI reform is a continuing battle.

Reforming and improving information access is a difficult job for any politician. There is little if any public credit and reform occurs in the face of entrenched opposition from at least some ministers and most of the public service.

Despite these obstacles, FOI reform is happening in Australia. The challenge for the media, lawyers and anyone supporting better access to government information will be to maintain momentum in the future. Even as new Acts are passed and new disclosure cultures embraced, meetings of public servants, political advisers and politicians will be discussing how best to stop new transparency.

REFORMING FOI – TIME FOR A NEW MODEL?

Bill Lane and Eleanor Dickens*

1. Introduction

Freedom of Information (FOI) legislation was first introduced in Australia in the 1980s, the Commonwealth FOI Act essentially being the template for the introduction of legislation in other Australian jurisdictions. Although deficiencies in FOI regimes have been the subject of a number of reform proposals,[1] the pressure for change has intensified in more recent times. Increasing Government outsourcing and corporatisation have reduced the reach of FOI in the sense that documents held by private sector entities are generally not directly accessible under FOI.[2] Governments have also generally regarded FOI as incompatible with the existence of Government business enterprises, many of which are afforded legislative immunity from FOI. As well as this, patterns of FOI usage have emerged which are arguably inconsistent with the original FOI goals of achieving open Government and enhancing the values of citizenship. For instance, whilst the framers of the Commonwealth FOI Act anticipated the need for exemptions to protect third party business interests, they may not have fully envisaged certain applications of FOI which have evolved in relation to competitive business practices, such as the use of FOI as a handy mechanism for private business entities to gain commercial information about rivals. This can be seen, for instance, in the expanding field of Government outsourcing where unsuccessful tenderers have resorted to FOI as a means of seeking access to commercial information about their business rivals.[3]

FOI regimes have also faced new challenges in the wake of increased concern about global terrorism and perceived threats to national security. As Governments modify legal systems in areas such as criminal investigation and surveillance in order to address increased national security concerns, the underlying values supporting FOI become more difficult to sustain. Increased concern for public safety means that the balance inevitably shifts from openness and transparency towards greater control of information as Governments adopt new strategies deemed necessary to deal with perceived threats of this nature.[4]

In addition to these challenges, FOI has increasingly struggled against bureaucratic inertia and even active resistance, undermining its foundational goal of enhancing transparency in Government. As a Canadian study concluded, long-term exposure by Government agencies to FOI leads to the development of 'FOI resistant cultures' in areas of public administration - represented by what are referred to as agency strategies of 'contentious issues management' - strategies which have evolved to thwart or deflect FOI requests perceived as likely to result in the exposure of information capable of reflecting badly on the agency or causing political embarrassment to a Minister.[5] The extent to which patterns of bureaucratic behaviour of this nature exist in Australia has not been the subject of any specific and systematic study, although evidence suggests that they do exist, especially where public officials are confronted with managing FOI requests involving politically sensitive issues.[6]

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Finally, the manner in which Government agencies and Ministers have been prepared to rely on the FOI 'conclusive certificate mechanism'[7] to withhold documents arguably increases the degree of cynicism about Governments' stated commitment to the goal of openness and transparency. This mechanism, which had been the subject of early calls by law reform bodies for change,[8] enabled a Minister, or some other designated public official, to sign a certificate certifying that a matter within the scope of an FOI request is embraced by a particular exemption. Once signed, a certificate established conclusively that the requested material fell within the relevant exemption. The major feature of the 'conclusive certificate mechanism' was the limited scope of review available once a certificate had been issued. The role of the reviewing body was generally confined to the question of whether reasonable grounds existed for the claim made in the certificate, rather than whether the decision to issue the certificate was based on 'reasonable grounds'. In other words, the review body was not permitted to consider whether the public interest favoured disclosure or non-disclosure of the relevant documents or even whether, in all of the relevant circumstances, it was reasonable to claim the exemption.[9] Moreover, 'reasonable grounds' was taken to mean grounds distinct from those which were 'irrational, absurd or ridiculous',[10] thus suggesting a relatively easy test to satisfy.

Disquiet over the use of the conclusive certificate mechanism came to a head with the High Court decision in *McKinnon v Secretary, Department of Treasury*[11] where a 3-2 majority (Hayne, Callinan and Heydon JJ; Gleeson CJ and Kirby J dissenting) affirmed that no balancing exercise was involved - the task being simply to decide whether there were reasonable grounds *for the claim* that disclosure would be contrary to the public interest even though there may be reasonable grounds *against the claim*.[12] (Nonetheless, the majority did emphasise that the term 'reasonable grounds' was not simply synonymous with 'not irrational, absurd or ridiculous.'[13]). In the wake of the High Court decision in *McKinnon* and as part of its stated 2007 election promise to reform the FOI process, the Commonwealth Government introduced legislation in September 2008 to abolish the power to issue conclusive certificates.[14]

Against this background, the purpose of this Paper will be to discuss the recent developments in FOI, with a particular focus on the recent developments in Queensland which have seen the establishment in many respects of a fundamentally different FOI regime.

2. The push for a new approach

2.1 Recent reform initiatives

Bearing in mind the matters outlined above, it is not surprising to have seen recent calls for a fundamentally new FOI model. Whilst some existing FOI regimes, such as that in the Northern Territory, are structurally different from the conventional 'Commonwealth FOI template', the recent reform initiatives in Queensland, New South Wales, Tasmania and the Commonwealth, point to a radical departure from the old template and the emergence of a significantly different kind of FOI regime.

In 2007, the Queensland Government commissioned an Independent Review Panel (Panel) to undertake a comprehensive review of Queensland's FOI Act. The terms of reference were deliberately framed to direct the Panel to step beyond a 'section by section' review of the existing statute in favour of exploring a completely new model. As a result, the Panel's Report - *The Right to Information - Reviewing Queensland's Freedom of Information Act*[15] (Solomon Report) was based on a fundamental re-appraisal of the core elements and concepts of the current FOI framework in the context of information management generally. In that respect, the Panel's 141 reform recommendations extended beyond the conventional architecture of FOI legislation, encompassing related areas of information privacy and

records management. Taken as a whole, the Panel's recommendations pointed towards an entirely new legislative framework, governing the overall management of Government information - a framework which the Panel summed up as a move from the conventional 'pull model' of FOI to a 'push model'.

In a formal response to the Report in August 2008, the Queensland Government accepted the majority of the Panel's recommendations and released two Draft Discussion Bills - the *Right to Information Bill 2009* and the *Information Privacy Bill 2009* designed to establish a fundamentally different type of FOI regime, interconnected with a State-based information privacy and personal information access and amendment regime. Following final adjustments to the content of the two draft Bills, the *Right to Information Act 2009* (Qld) (RTI Act) and the *Information Privacy Act 2009* (Qld) (IP Act) were passed and came into effect on 1 July 2009. The key features of the Queensland legislation are explained later, the most significant of these is a complete re-modelling of the exemption system in the context of a new public interest test and provision for the routine release of information.

In the wake of the Queensland FOI reform initiatives, the Commonwealth Government, in March 2009, released two Exposure Drafts - the *Freedom of Information Amendment (Reform) Bill 2009* and the *Information Commissioner Bill 2009*, with the stated object of building a stronger foundation for openness in Government by promoting a 'pro-disclosure culture'. These Bills have features in common with the new Queensland legislation, including in particular, a re-modelled public interest test as well as measures to ensure the increased 'routine' release of information.

In the meantime, the New South Wales (NSW) Ombudsman announced, in April 2008, a comprehensive review of the *Freedom of Information Act 1989* (NSW). A Discussion Paper issued in September 2008 was followed by the delivery of a comprehensive report to the NSW Government in February 2009 - *Opening Up Government - Review of the Freedom of Information Act 1989.*[16] The report followed the tenor of the Solomon Report, providing the NSW Government with 88 recommendations - the key elements of which included a new Act incorporating proactive disclosure, new public interest and objects clauses and the creation of an Information Commissioner. After releasing public consultation drafts,[17] the NSW Government has responded by passing the *Government Information (Public Access) Act 2009* (NSW) and the *Government Information (Information Commissioner) Act 2009* (NSW) which are expected to be proclaimed and operational in 2010.

Similar initiatives for reform have occurred in Tasmania with the release of a Directions Paper in 2009, *Strengthening Trust in Government - Everyone's Right to Know* - Review of the *Freedom of Information Act 1991* (Tas) (Directions Paper).[18] This move is a step towards a broader 10-point plan announced by the Tasmanian Government in August 2008 to 'strengthen trust in democracy and political processes in Tasmania'.[19] As with the Commonwealth and NSW recommendations, the Directions Paper follows the reform agenda of the Solomon Report, recommending in particular a reformulation of the public interest test, modelled on the RTI Act. The Paper recommends that new Tasmanian legislation include a clear statement that disclosure of information must occur unless its disclosure, on balance, would be contrary to the public interest, and a schedule which provides for a non-exhaustive list of factors which must be taken into account in assessing the public interest.

2.2 A new FOI model - key features

At the time of writing, the Queensland RTI Act and IP Acts were the only statutes in force as an operational example of the 'new FOI model'. This, together with the fact that the recent reform initiatives in other jurisdictions have substantially endorsed the Solomon Report

recommendations which underlay the Queensland legislation, means that it is appropriate to explain the key features of the 'new FOI model' by reference to the Queensland legislation.

2.3 The move from "pull" to "push"

Before considering key features of the RTI and IP Acts, it is useful to make mention of the major policy driver behind the legislative framework, having regard to its bearing on the legislative architecture and the overall structure and "tone" of the new statutes. At the centre of the RTI Act is the policy of moving from a "pull' to a "push" model in relation to the release and disclosure of Government information. Underpinning the "push model" is the assumption that freely available Government information is a cornerstone of an open and accountable democratic system - the key element being that Government should be proactively and routinely releasing information to the public, independently from the previous reactive FOI-based information access and disclosure regimes.[20] The "push model" is not new, being largely reflected, for instance, in the information access regime established under the *Official Information Act 1982* (NZ). However, the Queensland legislation, to date, represents the first operational example in Australia.

The need to move to a "push model"-based FOI regime was expressly supported by the Queensland Government in its response to the Solomon Review (Response) in the following terms:[21]

> "..It is fundamental to an open and participatory Government that information is provided as a matter of course, unless there are good reasons for not doing so. The policy framework [establishing the RTI and IP Acts] will be based on guiding information policy principles, strategies and standards that position legislative access as the 'last resort' in accessing Government information.
>
> These information policy principles, strategies and standards will embed a right to information in the administrative practices and organisational culture of the public sector, so that providing information to Queenslanders is recognised as a legitimate and core aspect of every public servant's day-to-day work."

Recognising the virtues of the "push model", the next step for the Queensland Government was to re-design and reconceptualise the old FOI legislative framework so as to give effect to the goal of the proactive release of Government information. The result has been a radically different FOI framework under the RTI and IP Acts which, at a fundamental level, is structured so as to compel FOI decision-makers to consider whether information should be disclosed solely in the context of the public interest. As the core policy driver behind the RTI Act, the "push" model is reflected throughout the legislation - on both a broader structural level and in greater detail in respect of specific provisions. Key features of the new framework are described below.

2.4 Redefining exemptions

A core reform under the RTI Act is the fundamental revision of the methodology to be adopted when determining whether access to a document can be refused (i.e. the exemption process). In this regard, the RTI Act reduces the number of 'stand alone' exemptions previously available and introduces a revised Public Interest Test which operates where a 'stand alone' exemption does not apply.

The general methodology adopted in redefining and restructuring the exemptions available under the RTI Act has been to frame the exemptions such that the key issue and basis for exemption is whether the release of the information would be contrary to the public interest. Broadly, this approach has provided that the exemption mechanism in the RTI Act consists of specific stand alone exemptions and a Public Interest Test that is to be applied to

documents falling outside the stand alone exemptions in determining whether the relevant documents should be released.

The stand alone exemptions

The stand alone exemptions in the RTI Act consist of a number of categories of documents for which Parliament has determined that disclosure would be contrary to the public interest. Generally, the stand alone exemptions are those previously found in the FOI Act which were not subject to a public interest test. The Solomon Report referred to these exemptions as the "true exemptions".[22]

In considering the exemptions contained in the previous FOI Act and whether they should be retained in a new FOI model, the Panel actually considered whether there was, in fact, a public interest in ensuring that information falling within the categories of documents covered by these exemptions was not disclosed. In working through this process, the Panel largely recommended that the majority of the pre-existing or "true exemptions" be retained and adopted in the RTI Act on the basis that disclosure of these types of information would, in fact, be contrary to the public interest.

Notably however, the Panel did recommend that the Cabinet exemption in s.36 of the previous FOI Act be retained in an amended form ensuring that it contains a purposive element (that is, a connection between the creation of a document and its submission to Cabinet).[23] In this regard, the Panel recognised that there was a public interest in protecting Cabinet information from disclosure (so as to allow for robust and frank discussion which is necessary as Cabinet is the central deliberative body of the Executive Government) but concluded that the exemption in s.36 of the previous FOI Act was too broadly worded and had been abused by successive Governments as a mechanism to prevent the disclosure of otherwise available Government information.[24] The Queensland Government accepted these recommendations and adopted a revised, narrower Cabinet-based exemption.

The Panel also recommended the establishment of a new stand alone exemption for specific Ministerial documents including "incoming Minister briefing books and Parliamentary Question Time and Estimates briefing books".[25] The basis for this was a perceived public interest in Ministers receiving full and frank advice from Departments within their portfolio area via incoming briefing books. In other words, to subject such information to potential disclosure under the RTI Act could, it was said, lead to a reluctance to document frank advice and information.[26] The Queensland Government accepted this recommendation with an exemption in the RTI Act preventing the disclosure of "incoming Minister briefing books".[27] However, the Queensland Government did not adopt the recommendation of the Panel as to the scope of this exemption with the RTI Act exemption now only covering incoming Ministers and not Parliamentary or Estimate briefing materials.

In addition to the Cabinet and incoming Minister briefing book exemptions, other exemptions prescribed under s.48 and Schedule 3 of the RTI Act include:

- Executive Council information;[28]
- Information which if disclosed would found an action for breach of confidence;[29]
- Information which is subject to legal professional privilege;[30]
- Information revealing particular Sovereign communications;[31]
- Information, the disclosure of which would be a contempt of Court or Parliament;[32]

- National or State security information;[33]
- Law enforcement or public safety information;[34]
- Investment incentive scheme information;[35] or
- Information, the disclosure of which is prohibited by an Act.[36]

Importantly, section 47 of the RTI Act expressly states that the grounds under which access to information can be refused, including under s.48 and Schedule 3 of the RTI Act, are to be construed narrowly. Although this generally has been the approach adopted under the previous legislation by the Information Commissioners and the Courts, such a requirement is now expressly stated in the RTI Act. In addition, s.44 of the RTI Act also expressly states that the RTI Act is to be administered with a "pro-disclosure" bias.

These provisions, in conjunction with the revised exemption process and reduction in the number of stand alone exemptions provides an example of how the RTI Act has been drafted to reflect the "push model" and the expectation that Government information should generally be available unless it would be contrary to the public interest.

The Public Interest Test exemption

In addition to the stand alone exemptions established under s.48 and Schedule 3 of the RTI Act, s.49 and Schedule 4 of the RTI Act establish, as a stand alone exemption, the Public Interest Test. The Public Interest Test is the most significant change to Queensland's FOI regime, establishing a uniform and express procedure for implementing the test, which prescribes specific factors which are required to be considered.

Section 49 of the RTI Act sets out the process to be adopted when applying the new Public Interest Test - which is complex, requiring the decision maker to go through a series of specified steps to ensure that regard is had to a series of factors as set out in Schedule 4, Parts 1 to 4 of the RTI Act.

In general terms, the specific steps which a decision maker must take in applying the Public Interest Test are summarised as follows:

(a) **Irrelevant considerations** - the decision maker must identify any factor that is irrelevant to deciding whether, on balance, disclosure of the information would be contrary to the public interest, including the factors set out in Schedule 4, Part 1 of the RTI Act.[37] These factors include:

- Disclosure of the information could reasonably be expected to cause embarrassment to, or loss of confidence in, the Government;
- Disclosure of the information could reasonably be expected to result in the applicant misrepresenting or misunderstanding the document;
- Disclosure of the information could reasonably be expected to result in mischievous conduct by the applicant; or
- The person who created the document containing the information was, or is, of a high seniority within the relevant agency.

(b) **Factors favouring disclosure** - The decision maker must then identify any factor favouring disclosure that is relevant to the particular information. This includes (but is not limited to) the 19 factors mentioned in Schedule 4, Part 2 of the RTI Act. Some of these factors include:

- Disclosure of the information could reasonably be expected to promote open discussion of public affairs and enhance the Government's accountability;
- Disclosure of the information could reasonably be expected to contribute to positive and informed debate on important issues or matters of serious interest;
- Disclosure of the information could reasonably be expected to inform the community of the Government's operations, including, in particular, the policies, guidelines and codes of conduct followed by the Government in its dealings with members of the community;
- Disclosure of the information could reasonably be expected to ensure effective oversight of expenditure of public funds;
- Disclosure of the information could reasonably be expected to allow or assist an inquiry into possible deficiencies in the conduct or administration of an agency or official;
- Disclosure of the information could reasonably be expected to reveal or substantiate that an agency or official has engaged in misconduct or negligent, improper or unlawful conduct;
- The information is the applicant's personal information;
- Disclosure of the information could reasonably be expected to advance the fair treatment of individuals and other entities in accordance with the law in their dealings with agencies;
- Disclosure of the information could reasonably be expected to reveal the reason for a Government decision and any background or contextual information that informed the decision;
- Disclosure of the information could reasonably be expected to contribute to the protection of the environment, or reveal environmental or health risks or measures relating to public health and safety;
- Disclosure of the information could reasonably be expected to contribute to the administration of justice generally or for a person; and
- Disclosure of the information could reasonably be expected to contribute to innovation and the facilitation of research.

(c) **Factors favouring nondisclosure** - The decision maker is then required to identify any relevant factors favouring nondisclosure. This includes (but is not limited to) the 22 factors prescribed in Schedule 4, Parts 3 of the RTI Act and the 10 factors prescribed in Schedule 4, Part 4 of the RTI Act. Examples in this regard include:

- Disclosure of the information could reasonably be expected to prejudice the private, business, professional, commercial or financial affairs of entities;

- Disclosure of the information could reasonably be expected to impede the administration of justice generally or for a person;
- Disclosure of the information could reasonably be expected to impede the protection of the environment;
- Disclosure of the information could reasonably be expected to prejudice the economy of the State;
- Disclosure of the information could reasonably be expected to prejudice trade secrets, business affairs or research of an agency or person;
- Disclosure of the information could reasonably be expected to prejudice an agency's ability to obtain confidential information;
- Disclosure of the information could reasonably be expected to prejudice the competitive commercial activities of an agency; and
- Disclosure of the information could reasonably be expected to prejudice a deliberative process of Government.

(d) Schedule 4, Part 4 of the RTI Act contains factors favouring nondisclosure in the public interest because of public interest harm in disclosure. Examples of these factors include:

- Disclosure affecting relations with other Governments;
- Disclosure of deliberative processes;
- Disclosing personal information;
- Disclosing trade secrets, business affairs or research;
- Disclosure affecting confidential communications;
- Disclosure affecting State economy; and
- Disclosure affecting financial or property interests of State or agency.

(e) **Disregard irrelevant factors** - Once all of the factors have been identified, the decision maker must disregard any irrelevant factor.[38]

(f) **Balancing the factors** - The decision maker is then required to balance the factors favouring disclosure against the factors favouring non disclosure.

(g) **Decision** - The decision maker must then decide whether, on balance, disclosure of the information would be contrary to the public interest. If after balancing the factors, it can be established that, on balance, the disclosure of the document or information would be contrary to the public interest, the decision maker can then refuse access to the information.

The Public Interest Test is therefore highly prescriptive in terms of setting out the process and specific factors that the decision-maker must have regard to in applying the test.

Collectively, the "true exemptions" in Schedule 3 of the RTI Act and the Public Interest Test prescribed under s.49 and Schedule 4 of the RTI Act have established a revised FOI exemption framework. The central component of this exemption framework being the issue of whether the disclosure of the information would be contrary to the public interest. Under this framework, some specific categories of information have been identified as being information which is not in the public interest to disclose. For information falling outside these categories, the Public Interest Test is the mechanism to apply to determine if this information should be disclosed. The use of the public interest as the central mechanism in determining the disclosure of information, at a fundamental level, has a link to the "push model" in the sense of the assumption that information should be freely available unless the disclosure of the relevant information would be contrary to the public interest.

Exempt entities - Government Owned Corporations[39]

Consistent with the push model and the requirement that as much information as possible be released to the public, the RTI Act also has exemption provisions in relation to Government commercial entities, in particular to Government Owned Corporations (GOCs).

As was the case with the revised exemption process detailed above, the scope of the exemption provided to GOCs has been dramatically narrowed under the RTI Act. Previously, GOCs were the beneficiaries of a broad exemption under s.11A of the FOI Act whereby documents created or received by a GOC when carrying on commercial activities were not subject to the FOI Act. In practice, this provided GOCs with an extremely broad exemption such that the only types of documents and information available from GOCs were those concerning employee related matters, and other non-commercial activities.

Furthermore, the nature of the exemption under s.11A of the FOI Act was such that it applied to documents, so that a document was exempt from the application of the FOI Act regardless of who had possession or control of the document. The nature of the exemption was particularly relevant to GOCs given that GOCs have extensive Government-based reporting obligations which require the provision of sensitive commercial information and documents to shareholding ministers and relevant Government Departments.

However, the RTI Act has radically changed the scope of the exemption available to GOCs and, for a number of GOCs, has dramatically increased their exposure to information access under the RTI Act. The new exemption process prescribed under the RTI Act operates on a fundamentally different basis. It provides that GOCs no longer uniformly receive the benefit of a GOC specific exemption under the RTI Act. Now only some GOCs benefit from an exemption similar to that previously provided under the FOI Act while other GOCs do not receive any specific exemption. The approach that the Government has adopted in determining whether GOCs are entitled to an exemption under the RTI Act is to consider whether the particular GOC carries out competitive commercial activities.

The approach of only providing an exemption under the RTI Act where the GOC carries out competitive commercial activities was recommended by the Panel[40] on the basis that there was a legitimate public interest in ensuring that Government businesses, including GOCs, that carried out competitive commercial activities were exempt from an FOI-based disclosure regime. In this regard, given that a particular Government entity would be competing directly with commercial service providers in carrying out particular functions, it was accepted that in order to enable the particular Government business to operate competitively in such an environment it would be necessary to provide the entity with an exemption in relation to those functions.[41]

The Government accepted the basis of this approach in identifying that only some of the current GOCs were to be provided with a GOC-based exemption. This has been reflected in

the RTI Act and provides that some GOCs (being the State-owned electricity generators) have received an exemption in respect of the majority of their functions, while other GOCs have received no specific exemption other than the standard exemptions including those contained in s.48, Schedule 3 and the Public Interest Test of the RTI Act. The Government considered that these GOCs did not operate in a competitive commercial environment and therefore were not entitled to any type of exemption from the application of the RTI Act.

Another important point of difference with the new RTI approach to GOCs is that the exemption is no longer cast in terms of applying to documents. This means that as the exemption will no longer flow with the relevant document, the benefit of the GOC specific exemption will be removed once the document leaves the relevant GOC and is, for example, provided to a Government Department.

However, the Government has expressly preserved the old 'documents-based exemption' reflected in s.11A of the previous FOI Act in respect of documents received or created by GOCs prior to 1 July 2009. This means that the RTI-based exemption regime only applies to GOC documents created or received after 1 July 2009.

The practical effect of the revision of the GOC exemption under the RTI Act is likely to mean that a greater volume of documents that were previously exempt from disclosure under the FOI Act will now be subject to the RTI Act and potentially discloseable. Again, this revision is consistent with the "push model" in the sense that the ultimate impact of the revised exemption will be an increase in the number of Government documents available to the broader public.

2.5 Offences and disciplinary action

A key component of the "push model" is the desire to effect a cultural change across the broader public sector in terms of how information is released and disclosed to the public. As explained, the revision of the exemption process is one means of facilitating such cultural change. Another is the inclusion of offence and disciplinary related provisions in the RTI Act.

Section 175 of the RTI Act establishes an offence in circumstances where a person gives a direction to an RTI decision-maker which requires the decision-maker to make a decision that the decision-maker considers should not be made under the RTI Act. This is an offence provision which attracts a fine of $10,000. The inclusion of such a provision in FOI legislation in Queensland is unique with no criminal offences previously prescribed under the FOI Act for such activities.

Section 113 of the RTI Act provides that where the Information Commissioner is of the opinion that there is sufficient evidence that an officer has committed a breach of a duty or misconduct in the administration of the RTI Act, the Information Commissioner is required to bring evidence of such a breach or misconduct to the attention of the principal officer of the agency (being the Director General or Chief Executive Officer) or, where the person in question is the principal officer, the responsible Minister of the agency. Again, the inclusion of such a provision in FOI-based legislation is unique with no similar provision previously included in the FOI Act for such activities.

The inclusion of provisions of this nature reiterates the "push model" by introducing cultural change-based mechanisms to ensure that cultural aspects of the "push model" are implemented across the public sector.

2.6 Revised functions - Information Commissioner

Under the RTI Act, the Information Commissioner has been provided with new functions and associated powers which provide the Information Commissioner with a quasi-regulatory role with respect to monitoring and enforcing the proper administration of the RTI Act.[42] In this regard, the functions of the Information Commissioner have been expanded beyond external review functions to now include a broad range of other functions, such as providing guidance on the interpretation and administration of the RTI Act, monitoring the way the Public Interest Test is applied by agencies, and monitoring, auditing and reporting on agencies compliance with the RTI Act.

Contrary to the position under the FOI Act, the Information Commissioner now has a role in terms of ensuring that the RTI Act is administered according to its proper purpose. This expanded role facilitates cultural change and again reflects the "push model", to the extent that the expanded functions of the Information Commissioner have been conferred in order to ensure that the key purposes of the RTI Act, being that as far as possible more Government information is provided to the public, is achieved in the administration of the RTI Act.

3. The new FOI Public Interest Test

Reference was made earlier to the manner in which the RTI Act establishes a new Public Interest Test exemption. As stated, this is arguably the most innovative specific feature of the new FOI model and, as such, is worth considering in more detail.

3.1 The concept of public interest and its use in FOI legislation

The concept of 'public interest' has been a central feature of FOI legislation - the term often features in FOI objects clauses and, more particularly, underlies the operation of FOI exemptions.

In a broader sense, of course, the term ‘public interest’ has been employed in various areas of law - for instance, in the law concerning breach of confidence where certain 'public interest' defences may apply. The term is also commonly used in legislation - most commonly where a statute confers a regulatory function on a body or official, stipulating that the function must be exercised, or a decision made, based on, or having regard to, the ‘public interest.’[43]

Generally speaking, the term is not used in the sense of meaning particular private or individual interests. As Tamberlin J noted in *McKinnon v Secretary, Department of Treasury,*[44] the term is generally used to signify the interests of the public, the society or the nation - in other words, to incorporate an ideal relating to the overall or greater good of society. However, rather than being one homogenous concept, the term is multi-faceted, requiring a decision-maker to evaluate and weigh various facets of the public interest.[45]

In the specific context of FOI, the manner in which the concept of 'public interest’ should operate was originally considered by the 1979 Senate Inquiry, preceding the enactment of the Commonwealth FOI Act. The Senate Inquiry Report[46] acknowledged the dangers of including the term in FOI legislation - that its amorphous and ill-defined nature meant that it was quite capable of being subject to the interpretative whim of Ministers or public officials.[47] However, drawing an analogy with the High Court decision in *Sankey v Whitlam*[48] (which involved reconciling a claim by Government for public interest immunity in response to a request for discovery of documents), the Report saw value in the term being utilised in FOI as a balancing mechanism to enable the interests associated with an FOI applicant's 'right to know' to be properly measured against competing interests against disclosure.

The term ‘public interest’ has served a specific function in FOI legislation - in particular, in relation to the operation of FOI exemptions, where it has acted as a mechanism for balancing relevant interests for and against disclosure in respect of the kind of documents to which the exemption relates. Also, in some jurisdictions, FOI legislation provides external review bodies with a 'public interest override' so that, in addition to the usual exercise of merits review, the appeal body can consider whether or not the public interest requires access to an exempt document.[49] This means that in addition to its normal 'merits review' jurisdiction, the review body enjoys a power to determine whether or not the public interest requires access to an exempt document.

Of course, not all FOI exemptions have expressly incorporated a public interest test. Where none is included, access is excluded immediately upon establishing that the request relates to the type or category of documents to which it applies - without the need to weigh public interest arguments for and against disclosure.[50] These types of exemptions are essentially ‘class exemptions' which reflect a legislative intention that the public interest in non-disclosure is paramount.

In exemptions which have expressly included a public interest there have been differences in the way in which it has been legislatively deployed.[51] Some exemptions have specified that the public interest test is a separate and additional requirement which an agency or Minister must establish to successfully invoke the exemption. This meant that it was not sufficient for an agency to establish that the requested documents are of the type to which the exemption applies – it was also necessary to establish that disclosure would be contrary to the public interest (e.g. ‘a document is exempt if its disclosure would reveal the deliberations of an agency *and would be contrary to the public interest*'). Exemptions which have contained this type of public interest test have been more closely aligned with the underlying 'right to know' philosophy because satisfaction of the document description component did not create a presumption that the documents are exempt.[52]

However, most exemptions with a public interest test have utilised it in the form of a proviso (e.g. ‘a document is exempt if its disclosure would reveal information of commercial value to another person *unless on balance its disclosure would be in the public interest*). Here, once the agency established that the requested documents were of the type to which the exemption applied, they were *prima facie* exempt, subject to the application of the public interest test. This meant that the FOI applicant had to bear an evidentiary burden to adduce relevant public interest arguments in favour of disclosure, sufficient to overcome those against, inherent in the exemption itself. As well as this, some exemptions have incorporated a test not specifically using the term 'public interest' but requiring decision-makers to determine whether disclosure would be 'unreasonable.'[53]

Finally, some exemptions have included a test which, whilst not expressed as a public interest test, requires consideration of whether disclosure of particular kinds of documents is reasonably likely to result in prejudice or 'harm' of a certain kind.

In terms of the application of the FOI public interest test, in *Director of Public Prosecutions v Smith,*[54] the Full Court of the Supreme Court of Victoria said that in the context of FOI, the term ‘public interest’ refers to *"standards of human conduct and of the functioning of Government…the interest of the public, rather than the interest of the individual or individuals."* [55] Conversely, according to the Court, it does not relate to *"that which gratifies curiosity or merely provides information or amusement."* [56]

Ultimately, the function of the public interest test in FOI exemptions was always to achieve the right balance between the 'right to know' and the protection of legitimate Government and private interests. In practical terms, the decision-maker must evaluate multiple and sometimes competing interests and, at the risk of generalisation, these can be characterised

as falling under two broadly competing heads: the desirability of individuals being able to access Government information and the need to avoid harm to recognised Government interests or third party private or commercial interests which is likely to result from disclosure. [57]

3.2 Difficulties with the original approach

The original FOI model never provided any specific guidance as to how FOI decision-makers were to deploy the public interest balancing test in exemptions and, to the extent that case law has been any guide, it has revealed different approaches.[58] Whilst it is generally accepted that public disclosure of certain kinds of information held by Government can be prejudicial to broader community and state interests or to the private or commercial interests of individuals, the difficulty lay in attempting to achieve the correct balance in particular cases, especially where decision-makers had to weigh multiple and competing interests. In one sense, the issue has been what level of specificity is required of agencies and Ministers in claims that disclosure would be contrary to the public interest. Some authorities have suggested that broad and general assertions suffice,[59] whilst other cases indicated that such claims must be based on specific evidence concerning the particular documents in question which defines the likely consequences of their disclosure. Cases of this kind rejected the idea that the public interest against disclosure was made out simply by asserting that disclosure could mislead or confuse the public or inhibit candour and frankness in the expression of views by Government officials[60] and, in fact, some Australian FOI jurisdictions legislated to make it clear that reliance on generalities of this nature would not suffice. [61]

In some exemptions, the application of the public interest test has been more controversial than in others. This was especially so in the case of the 'deliberative process documents' exemption where there have been marked differences of view in the case law. In *Re Howard and the Treasurer of the Commonwealth*,[62] (a decision published early in the life of the FOI Act (Cth.)), Davies J. listed five criteria (subsequently referred to as the '*Howard* criteria') which were intended to provide guidance in determining whether or not disclosure of documents revealing an agency's deliberative processes would be contrary to the public interest: (i) the higher the office where the deliberation occurred and the more sensitive the issues involved, means that it is more likely that the communication should not be disclosed; (ii) disclosure of communications made in the course of the development and subsequent promulgation of policy tends not to be in the public interest; (iii) disclosure which would inhibit frankness and candour in future pre-decisional communications is likely to be contrary to the public interest; (iv) disclosure, which would lead to confusion and unnecessary debate about the possibilities raised in the deliberative process, tends not to be in the public interest and (v) it is not in the public interest to disclose documents which do not fairly reveal the reasons for a decision subsequently taken, which may be unfair to a decision-maker and which may prejudice the integrity of the decision-making process.

The *Howard* criteria received qualified approval in some subsequent cases[63] but were the subject of direct criticism in others;[64] the most comprehensive critique occurring in *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs*[65] where they were bluntly described as *"ill-advised"*. [66] *Re Eccleston* rejected the idea that the level of Government involved in deliberations should, in itself, establish a presumption that disclosure would be contrary to the public interest. Moreover, the 'candour and frankness' argument was criticised as little more than a thinly disguised 'class claim' - something which was completely contrary to the very purpose of FOI. Finally, the idea that it is in the public interest not to expose the citizenry to complex ideas lest they become confused was roundly criticised as either elitist or based upon a misplaced sense of paternalism. In some FOI jurisdictions, provisions were adopted to specifically limit the relevance of the *Howard* criteria[67] but in other jurisdictions the extent of their relevance remained uncertain.[68]

Finally and from a broader perspective, the old scheme of FOI exemptions - with some incorporating a public interest test, has been criticised as excessively legalistic and inconsistent with the underlying objectives of FOI. As early as 1995, some law reform bodies pointed out that the format encouraged Government agencies to 'look for' an exemption to fit the FOI request, rather than focusing on the fact that the legislation establishes a *prima facie* right of access.[69]

3.3 The new Public Interest Test

As explained earlier, the Public Interest Test is highly prescriptive in terms of detailing how the test is to be applied and what factors are to be considered in applying it. In essence, the Public Interest Test contained in the RTI Act represents the high water mark in terms of statutorily prescribed public interest tests. Given its novel nature, the important issue now is how it will be applied and what will be the associated difficulties once the test is applied in practice.

One issue of concern is that the high degree of prescription in the Public Interest Test will have the effect of limiting an RTI decision-maker's discretion. In response to this issue, it should be noted that the factors prescribed in the Public Interest Test are not exhaustive and the decision-maker may take into account other factors that they identify as being relevant. The other mechanism to offset these concerns is the discretion afforded to the decision-maker in allocating the weighting to be awarded to each of the relevant factors in applying the Public Interest Test.

The highly prescriptive nature of the statutory directions in the RTI Act as to how the Public Interest Test is to be applied and the express listing of relevant and irrelevant factors calls to mind the two related and important grounds of judicial review concerning the exercise of discretionary powers: a failure to take account of a relevant consideration and taking account of an irrelevant consideration.[70] Of course, internal and external FOI review mechanisms are of the nature of 'merits review', as opposed to judicial review. Nonetheless, indicators from the case law concerning the manner in which these two grounds of judicial review operate provides some general insights for the task of FOI decision-makers faced with the somewhat complex task of applying the RTI Public Interest Test.

The leading Australian authority is *Minister for Aboriginal Affairs v Peko Wallsend Ltd* [71] and as the decision explains, where statutory powers or functions are concerned, the first thing is to examine the legislation. In the case of taking account of an irrelevant consideration, a certain degree of guidance is provided for FOI administrators by the provision of an express statutory list in the RTI Act of irrelevant factors. Beyond that however, the possibility of other factors, arguably irrelevant, being taken into account, is present. In that respect, as *Peko Wallsend* explains, it is necessary to identify the considerations that *were* taken into account and then determine which ones were irrelevant, having regard to the subject, matter, scope and purpose of the statute. [72]

In the case of failure to take account of a relevant consideration, the ground is made out where it is possible to show that the decision making body failed to take account of a matter which it was *bound* to consider, as opposed to something it was *entitled* to consider.[73] A major issue however, is the need to demonstrate an actual *failure* on the part of the decision maker to take account of the matter [74] and, as the *Peko Wallsend Ltd* [75] decision explains, where a statute (such as the RTI) provides an inclusive (as opposed to an exclusive) list of relevant considerations, it will be necessary to determine what, if any, additional considerations are impliedly specified by the statute, having regard to the subject matter, scope and purpose of the legislation.[76]

In this respect, many of the public interest factors listed in the RTI as relevant to consider are expressed in broad and all-encompassing terms. Accordingly, where there is evidence that the decision-maker has taken account of the relevant listed factors, it would be difficult to establish the existence of additional factors, implied by the legislation, which were not taken into account. Moreover, as the case law shows, it is not enough to simply establish that the decision-maker failed to take account of a relevant consideration - it must also be shown that the consideration was significant enough to "materially affect the decision".[77]

Finally (and importantly in the context of FOI decision-makers faced with this complex statutory task) *Peko Wallsend* made it clear that unless the statute declares otherwise, the appropriate *weight* to be given to relevant matters is for the decision maker, not the Court.[78] Accordingly, in our view the Public Interest Test will allow for a degree of flexibility to decision-makers in terms of the weighting which the decision-maker is able to allocate to specific factors in applying the test. In this regard, where judicial review becomes relevant, Courts are unlikely to go behind the decision-maker and consider the legality of weightings applied to such factors by decision-makers unless the weightings provided to specific factors appears to be manifestly unreasonable.[79]

These are issues for further consideration and are likely to be considered in the context of the RTI Act once the Act has been in operation for a time and the Public Interest Test is considered in the context of judicial review proceedings.

Endnotes

1 See in particular, Australian Law Reform Commission and Administrative Review Council *Open Government: A Review of the Federal Freedom of Information Act 1982,* Report No. 77, 1995; Administrative Review Council, *The Contracting Out of Government Services*, Report No. 42, 1998; Commonwealth Ombudsman, *Scrutinising Government: Administration of the Freedom of Information Act 1982 in Australian Government Agencies*, 2006.

2 FOI does not apply expressly and directly to the private sector although documents held by private service providers may be accessible under FOI, depending on whether specific provisions provide for that or whether the relevant FOI provisions relating to “possession” by Government agencies allow for such as finding.

3 For a good example, see *Re Wanless Wastecorp and Caboolture Shire Council* (2003) 6 QAR 242.

4 See eg. Lane, B. et al, 'Freedom of Information Implications of Information Sharing Networks for Critical Infrastructure Protection', (2008) 15 *Australian Journal of Administrative Law* 193, White, L. 'The Need for Governmental Secrecy : Why the US Government must be able to Withhold Information in the Interest of National Security', (2003) 43 *Virginia Journal of International Law* 1071.

5 See eg. Roberts, A, 'Administrative Discretion and the Access to Information Act: "Internal Law" and Open Government' (2002) 42 *Canadian Public Administration* 174. The author provides an account of what he describes as 'contentious issues management' in Government agencies in Canada.

6 See for instance NSW Ombudsman *Opening Up Government - Review of the Freedom of Information Act 1989* (Feb. 2009) at 3.6.5. See also comments made in the NSW Ombudsman's Annual Report 2001-2002 (at p.73) which raised concerns about the differential handling of FOI requests - referred to in Snell R: *“Contentious Issues Management – The Dry Rot in FOI Practice?”* (2002) FOI Review 62; *Report of the Commission of Inquiry into Bundaberg Hospital* (Queensland Health 1996) - which referred to the existence of a particular practice engaged in by senior officials within the Queensland Department of Health to thwart FOI disclosure of documents recording surgery waiting times in public hospitals by invoking the ‘Cabinet documents’ exemption after forwarding the requested documents to Cabinet with an accompanying submission.

7 For instance, under the FOI Act (Cth.), certificates issued by a Minister were possible in relation to exemptions contained within s.33 (international relations), s.33A (interstate relations), ss.34-35 (Cabinet/Executive Council documents) and s.36 (deliberative process/internal working documents).

8 See eg. Electoral and Administrative Review Commission (EARC) *Report on Freedom of Information* (1990), paras 7.300-7.323 - urging that the conclusive certificate mechanism be confined to the 'Cabinet/Executive Council' documents exemptions and furthermore, that the power to issue a certificate be confined to the State Premier. (The recommendation was not followed in the original *Freedom of Information Act 1991* (Qld.)).

9 See eg. *Re Waterford and Treasurer (No.2)* (1985) 8 ALN N47; *Australian Doctors Fund Ltd v Commonwealth* (1994) 49 FCR 478; *Neary v Treasurer of NSW* [2002] NSWADT 261; *Re Fagan and Minister for Justice and Attorney-General* (1995) 2 QAR 583 at [26]ff.).
10 *Department of Industrial Relations v Burchill* (1991) 33 FCR 122 per Davies Jenkinson and Ryan JJ., citing earlier authorities. See also *McKinnon v Secretary of Treasury* (2005) 145 FCR 70 per Jacobsen J, but note also comments by Callinan and Heydon JJ in *McKinnon v Secretary, Department of Treasury* [2006] HCA 45 at [120].
11 [2006] HCA 45.
12 *McKinnon v Secretary, Department of Treasury* [2006] HCA 45 at [131].
13 *McKinnon v Secretary, Department of Treasury* [2006] HCA 45 per Hayne J at [60].
14 This legislation was in the form of the *Freedom of Information (Removal of Conclusive Certificates and Other Measures) Bill 2008*.
15 Report by the FOI Independent Review Panel, June 2008 (State of Queensland (Department of Justice and Attorney-General) 2008).
16 Special Report to Parliament under s.31 of the *Ombudsman Act 1974* (NSW).
17 *Open Government Information Bill 2009* and *Information Commissioner Bill 2009.*
18 Department of Justice, *Strengthening Trust in Government - Everyone's Right to Know* - Review of the *Freedom of Information Act 1991* Directions Paper, 2009.
19 Foreword to the Department of Justice, *Strengthening Trust in Government - Everyone's Right to Know* - Review of the *Freedom of Information Act 1991* Directions Paper, 2009.
20 See the Solomon Report at pages 16-18.
21 The Right to Information - A Response to the Review of Queensland's Freedom of Information Act, Queensland Government at page 6.
22 See the Solomon Report, page 2.
23 See the Solomon Report at pages 106-121.
24 See the Solomon Report pages at 106-121.
25 See the Solomon Report pages at 123-128.
26 See the Solomon Report pages at 123-128.
27 See the Solomon Report pages at 123-128.
28 Section 3, Schedule 3 of the RTI Act.
29 Section 8, Schedule 3 of the RTI Act.
30 Section 7, Schedule 3 of the RTI Act.
31 Section 7, Schedule 3 of the RTI Act
32 Section 6, Schedule 3 of the RTI Act.
33 Section 9, Schedule 3 of the RTI Act.
34 Section 10, Schedule 3 of the RTI Act.
35 Section 11, Schedule 3 of the RTI Act.
36 Section 12, Schedule 3 of the RTI Act.
37 Section 49(3)(a) of the RTI Act.
38 Section 49(3) of the RTI Act.
39 For the purposes of this paper, we note that the meaning of the term Government Owned Corporation is that as it is prescribed under the *Government Owned Corporation Act 1993* (Qld) and the *Government Owned Corporation Regulation 2007* (Qld).
40 See the Solomon Report at pages 88 to 90.
41 See the Solomon Report at page 88.
42 These functions and powers are prescribed under Chapter 4 of the RTI Act.
43 See eg. *O'Sullivan v Farrer* (1978) 142 CLR 1, where a majority of the High Court (referring to *Water Conservation and Irrigation Commission (N.S.W) v Browning* (1947) 74 CLR per Dixon J at p.505) observed that the legislative use of the term 'public interest' allows for a *"discretionary value judgment to be made by reference to undefined factual matters, confined only 'in so far as the subject matter and the scope and purpose of the statutory enactments may enable…"*.
44 (2005) 145 FCR 70.
45 *McKinnon v Secretary, Department of Treasury* (2005) 145 FCR 70 at 75-6.
46 Report of the Senate Standing Committee on Constitutional and Legal Affairs, *Freedom of Information Bill 1978* (1979).
47 Report of the Senate Standing Committee on Constitutional and Legal Affairs, *Freedom of Information Bill 1978* (1979) at p.64.
48 (1978) 142 CLR 1.
49 See eg. FOI Act (Vic), s.50(4) in relation to the powers enjoyed by the Victorian Civil and Administrative Tribunal (VCAT), as explained in *Re Hulls v Victorian Casino and Gaming Authority* (1997) 11 VAR 213 at 222ff, and *Secretary to Department of Premier and Cabinet* (1999) 3 VR 331. Note also FOI Act (NSW), s.57 in relation to the power of the NSW Administrative Decisions Tribunal (NSWADT) to determine whether the grounds relied upon in determining that a documents is a restricted document are reasonable or not, as explained in *BY v Director General, Attorney General's Department* [2002] NSWADT 79.
50 For example, the exemption in FOI Act (Cth.), s.34 (protecting documents revealing the deliberations of Cabinet or the Executive Council or s.42 (protecting documents falling within the operation of legal professional privilege) and the equivalent exemptions in other FOI jurisdictions.

51 The FOI Act (Cth.) provided the original model for the manner in which public interest tests are incorporated in exemptions - for an early description, see *Re Mann and Australian Taxation Office* (1985) 7 ALD 698 at 710ff. For a more recent and comprehensive account, see *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60.
52 See the discussion in *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60.
53 For instance, FOI Act (Cth.), s.41 requires an FOI decision-maker to decide whether or not granting access to 'personal information' about another person would constitute *"unreasonable disclosure"*. However, this appears to incorporate a test of the same nature as that which exists in other exemptions which use the term 'public interest' – see *Colakovski v Australian Telecommunications Corporation* (1991) 29 FCR 429; 100 ALR 111, per Lockhart J; *Re Williams and Registrar of the Federal Court of Australia* (1985) ALD 219; (1985) 3 AAR 529, per Beaumont J, and *Re Stewart and Department of Transport* (1993) 1 QAR 227 at para 14.
54 [1991] VR 63 (Kaye, Fullarton and Ormiston JJ.)
55 *Director of Public Prosecutions v Smith*[1991] VR 63 at 75 and referred to with approval by Tamberlin J in *McKinnon v Secretary, Department of Treasury* (2005) 145 FCR 70 at 76.
56 *Director of Public Prosecutions v Smith*[1991] VR 63 at 75.
57 See *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 at 72ff. See also *McKinnon v Secretary, Department of Treasury* (2005) 145 FCR 70, per Conti J (in dissent) at 78ff.
58 Different views about the scope and application of the public interest test in relation to Government interests are discussed at length in *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60.
59 *Re Howard and Treasurer of Commonwealth of Australia* (1985) 7 ALD 626.
60 The issue arose as a matter of contention following the decision in *Re Howard and Treasurer of Commonwealth of Australia* (1985) 7 ALD 626, concerning the public interest test in the 'internal working documents exemption' in s.36 of the FOI Act (Cth.). *Re Howard* has been the subject of particular criticism and has not been uniformly followed in all other jurisdictions. See, in particular, *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60. The issue is explained again, later in relation to the operation of the 'deliberative process/internal working documents' exemption.
61 FOI Act (NSW) s 59A.
62 (1985) 7 ALD 626.
63 Such as *Re Rae and Department of Prime Minister and Cabinet* (1986) 12 ALD 589; *Re Reith and Minister for Aboriginal Affairs* (1988) 16 ALD 709 and *Re Aldred and Department of Foreign Affairs and Trade* (1990) 20 ALD 264.
64 See especially *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 at 99ff. See also *Edlund v Commissioner of Police* [2003] NSWADT 195.
65 (1993) 1 QAR 60. See also *Re Trustees of the De La Salle Brothers and Queensland Corrective Services Commission* (1996) 3 QAR 206.
66 Re Eccleston and Department of Family Services and Aboriginal and Islander Affair (1993) 1 QAR 60 at 99.
67 See eg. s59A of the FOI Act (NSW).
68 See eg. the discussion in *McKinnon v Secretary, Department of Treasury* [2005] FCAFC 142.
69 See, e.g. ALRC 77/ARC 40, 1995 at para 8.2.
70 Under systems of statutory judicial review, see ADJR Act (Cth) s.5(2)(a); JR Act 1991 (Qld) s.23(a); JR Act (Tas) ss 20(a) and (b); ADJR Act (ACT) ss 5(2)(a) and (b).
71 (1986) 162 CLR 24.
72 *Minister for Aboriginal Affairs v Peko Wallsend Ltd* 1986) 162 CLR 24 at 40-41.
73 *Sean Investments Pty Ltd v MacKellar* (1981) 38 ALR 363, per Deane J at 374
74 Aronson, M, Dyer, B and Groves, M, *Judicial Review of Administrative Action* (3rd ed, Law Book Company, 2004) p 254.
75 (1986) 162 CLR 24.
76 (1986) 162 CLR 24 at 40.
77 (1986) 162 CLR 24 at 40.
78 *Minister for Aboriginal Affairs v Peko-Wallsend Limited* (1986) 162 CLR 24 at 41. Note Mason J's comment that failure to give adequate weight to a relevant consideration may give rise to *Wednesbury* unreasonableness.
79 See for example *Telstra Corporation Ltd v the Australian Competition and Consumer Commission* [2008] FCA 1758.

THE PUBLIC/PRIVATE CONFLUENCE: ADMINISTRATIVE LAW AND COMMUNITY HOUSING: THE REGULATION OF HOUSING CO-OPERATIVES AND ASSOCIATIONS

Kathleen McEvoy and Chris Finn*

Introduction

In all of the Australian States and Territories much of the traditional provision of public housing is shared with, and increasingly devolved to, private but subsidised and regulated, community housing organisations (housing co-operatives and housing associations).[1] While these community housing providers are generally subject to tenancy legislation (such as *Residential Tenancies Acts*) in respect of tenancy arrangements,[2] receipt of state funding generally means they are also subject to regulation of their internal governance.[3] This includes the decision making processes that apply in respect of the provision of housing, such as who to accept as tenants, acceptance or termination of membership of the organisation and whether and on what grounds a tenancy may be terminated. Effectively, this internal regulation is to ensure that applicants for and recipients of housing from community housing providers have similar protections as would be expected to apply in the provision of public housing, including fair and transparent decision making, and appeal processes to monitor this, as the housing is effectively provided from public funds.[4] In South Australia, for example, a person in dispute with a community housing provider on such issues may appeal against a decision on the ground that it is unreasonable, oppressive or unjust.[5]

Two acute issues arise from this confluence of public and private regulation.

The first arises from the fact that the private community housing provider has two types of relationship with the person to whom housing services are being provided. One is as a private landlord, generally governed through residential tenancy legislation, which prescribes the rights and responsibilities of private landlords and their tenants and provides means of resolving disputes concerning them.[6] The other relationship is established through the provision of publicly established housing services by the housing provider, bringing with it the expectation of proper process in the distribution of housing resources. That relationship is governed by arrangements, separate from residential tenancies legislation,[7] which are concerned with the governance of the housing provider and its conduct as such: requiring the housing provider to behave reasonably, fairly and justly, like a public body, and often

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subjecting the housing provider, in that context, to other external scrutiny. The defining of these relationships and the distinction between the two roles of the housing provider, provides the context and background for the consideration and application of administrative law principles to housing decisions.

The second issue is the nature of that public regulation. The relevant South Australian legislation[8] indicates that public administrative law principles, including those of procedural fairness, are applicable to decisions of the housing provider, enabling them to be subject to appeal if they are "unreasonable, oppressive or unjust".[9] However, what does it mean to apply public administrative law principles to the provision of housing by a private, albeit community based and publicly funded, landlord? The central challenge is the appropriateness and capacity of administrative law principles to apply to private bodies.

This paper principally considers this second question, and essentially from the perspective of the application of South Australian legislation governing community housing.

This is a relatively new area for the application of administrative law but one of considerable significance and likely growth, especially given the shrinking of traditional public housing provision and its subsequent outsourcing to private bodies.[10] Such policy approaches are not limited to housing but extend, of course, to the provision of other services, traditionally provided publicly and now, increasingly, provided through private partnerships with government, involving significant government funding, and consequential regulation.

Community housing providers

Community housing is rental housing provided for low to moderate or special needs households, managed by community based organisations whose operations have been at least partly subsidised or resourced by government.[11] Community housing falls between public and private housing but is generally closer to the former, as it represents a partnership between government and community managed housing organisations to provide affordable and appropriate housing. This partnership is generally reflected in the requirement to establish eligibility for such housing and in the sources of funding for such housing. The ultimate source of housing funding is to be found in the Commonwealth State Housing Agreement ("CSHA").

Community Housing is typically provided by two types of organisations: housing co-operatives and housing associations.

Housing co-operatives are not for profit organisations that are fully tenant/member managed for and by people with similar housing needs and interests: these might be for single person households; people from specific cultural or linguistic backgrounds; low income families, or representing a variety of other interests. Housing Associations are generally not for profit organisations that manage housing for specific groups of people, usually those requiring specific housing assistance: for example, people with intellectual or physical disabilities; women survivors of domestic violence; young people at risk; people with mental health issues. Housing Associations are often linked with community based welfare or charitable organisations such as churches; they provide community managed housing linked to support services for the particular needs of their tenant base and are particularly focussed on high needs groups. A principal distinction between the two organisations is that the co-operative is self managed by its members, while the housing association is, at least to a degree, a commercial organisation which manages the housing provided and is specifically not tenant managed. Associations generally manage their own wait lists, segmented according to housing need and, increasingly, they are large and are professionally managed.[12]

All applicants for community housing must come within community housing eligibility criteria established pursuant to the CSHA: these comprise income, assets and needs tests. Individual community housing providers will also have their own specific criteria against which eligibility will also be tested.

In South Australia, housing co-operatives are registered[13] and incorporated[14] under the *South Australian Co-operative and Community Housing Act 1991* and are required to operate and to establish Rules and By-Laws subject to approval by the relevant regulatory authority under the Act.[15] Regulation may be for the purpose of management of risk, to enable and support funding, to promote good practice and to prevent poor practice. Restraints on governance practices, including requirements that the community housing provider makes decisions in a transparent and fair manner, and subject to external review, support all these purposes of regulation: that is, the business activities of community housing are subject to regulation to the extent that they may put at risk the social objectives and benefits of community housing.[16] Among the risks addressed by regulation are those relating to the management of tenancies: rent setting, allocations and terminations reflect key public policy objectives for governments and significant risks for tenants. These risks in tenancy management mean that both governments and tenants (consumers) have immediate interest in ensuring access to appropriate dispute resolution processes.[17]

The general objectives and characteristics of community housing are fairly consistent throughout Australia. The general aims of community housing focus on affordability of housing, which still provides tenants with choice, security of tenure and quality housing. In addition, the aims are for fair and equitable access to housing services with flexible and responsive management processes that both accord respect and respect rights, and that enable and encourage participation in tenancy and management decisions; and which work in partnership with government and communities in developing sustainable housing and related services.[18]

These objectives for community housing, and the focus on regulation, together make it clear that community housing organisations are more than merely a structure for the provision of affordable housing. In South Australia, the Act defines a "housing co-operative" as an association which is formed on the basis of the principles of co-operation, principally to provide housing accommodation to its members.[19] The principles of co-operation include open and voluntary membership; fair and democratic governance; a not for profit structure; a commitment to providing education in the principles of co-operation; and co-operation among similar associations.[20]

Public housing appeal processes

All States and Territories are required by the Commonwealth State Housing Agreement to ensure that

> Arrangements are in place for recognition of consumer rights and responsibilities, details of which are publicly available, and an identified process to action consumer complaints and review decisions. These arrangements will apply equally to State government service providers and to non-government service providers who receive funding under this Agreement.

In South Australia this requirement is legislatively recognised in respect of both State provided ("public") housing (through the South Australian Housing Trust) and community housing (provided through housing co-operatives and housing associations) by the establishment of the Housing Appeal Panel.[21]

In other Australian jurisdictions the right of an external and independent appeal process for community housing decisions is not so clear or established. Only New South Wales[22] and

Victoria[23] have formal processes to address appeals concerning community housing decisions, and in neither case are the decisions binding, but recommendatory only. There is no process in place in the ACT.[24] The only community housing decisions subject to appeal in the Northern Territory are those which come within the jurisdiction of the Residential Tenancies Tribunal. There is no external independent housing appeals process in Queensland. There is an internal review process within the Department of Housing in respect of public housing disputes; all community housing providers are required by their funding agreement to establish an internal complaints management process and members may make an application to the Supreme Court for declaratory or enforcement orders concerning rights and obligations.[25] Minimum requirements for community housing organisations apply and there is a complementary voluntary accreditation system. However, intervention by the Queensland Department of Housing in these internal processes appears to be rare and no applications to the Supreme Court appear to have been made. In Tasmania, a Housing Review Committee has been established by administrative action but with no legislative basis. It makes recommendations to the Director of Housing Tasmania but community housing is essentially regulated by individual funding agreements. In Western Australia, there are currently processes in place for a formal legislative framework for community housing; the proposal appears to be similar to that in place in Victoria. In the interim, community housing is regulated through individual funding agreements and a voluntary code of practice.

In most States and Territories[26] community housing is subject to residential tenancies legislation. This legislation is concerned with the landlord tenant relationship between the housing provider and the tenant and does not concern itself with the governance of the housing provider or its funding or regulatory relationships or requirements. Residential tenancies legislation in some jurisdictions does include specific provisions concerning community housing, but none deal with the public aspect of community housing and the issue of governance.

The most transparent and established system for external and independent review of public and community housing decisions is that in place in South Australia. The Housing Appeal Panel was placed on a legislative and determinative basis by amendments to the *South Australian Housing Trust Act 1995,* in 2007, and at the same time the Panel was given formal jurisdiction over community housing disputes.[27] The Housing Appeal Panel is empowered to consider community housing decisions where an appeal is made on the basis that a decision is "unreasonable, oppressive or unjust".[28] Decisions concerning the landlord tenant relationship are made by the Residential Tenancies Tribunal.

Section 32B of the *South Australian Housing Trust Act 1995* establishes the Panel and its general powers and jurisdiction. Section 84(a1) of the *South Australian Co-operative and Community Housing Act 1991* directs that appeals under that Act are to be made to the Panel. Section 32B(13) empowers the Presiding Member of the Panel to establish procedures for hearing appeals, and section 32D(6) provides that the Panel must provide a written statement of its decision and the reasons for it, to all parties. There is no avenue for appeal from any of the decisions of the Panel, other than that it is, of course, subject to the general principles of judicial review.

The Housing Appeal Panel sits, generally, as a Panel of three[29] and provides consensus Panel decisions with written reasons within 14 days of the decision being made (generally on the day of the hearing).[30] Hearings are in private, with both parties given notice of the hearing. Hearings rarely proceed ex parte and applications are almost never determined on the papers alone.[31] Parties may have legal or other representation at the hearing, although this is not common. Parties do not give evidence on oath and, if witnesses attend, arrangements are made concerning their role in the hearing as agreed by the parties or as seems appropriate to the particular matter: "witnesses" are commonly brought to hearings as

supporters, rather than independent witnesses. Parties put their cases to the Panel and are questioned by the Panel: cross questioning and discussion between the parties is permitted (indeed encouraged) but the Panel does not encourage or engage in cross examination. It is quite common for parties to reach a negotiated outcome.

Dispute resolution in community housing: public and private

In South Australia, community housing is subject to both public and private legislative regulation, and elsewhere in Australia, although the nature and degree of regulation varies, it is generally the case that the public and private dimensions of community housing are understood as separate.

The *Residential Tenancies Act 1995 (SA)* gives the Residential Tenancies Tribunal exclusive jurisdiction to hear and determine matters arising in relation to residential tenancies in SA.[32] The Act regulates the relationship between landlords and tenants in residential tenancies. It contains some special provisions concerning community housing organisations and housing associations.[33]

The *South Australian Co-operative and Community Housing Act 1991* (SA) regulates community housing organisations and housing associations. It is concerned with the governance of those private housing providers, which function as landlords and in so doing establish relationships through tenancy agreements with tenants, which are then subject to the *Residential Tenancies Act*.

These two Acts regulate these housing providers for different purposes and in different ways, and provide different forums for the resolution of disputes. The *Residential Tenancies Act* governs the private tenancy relationship, where both parties have externally assessed rights and obligations, rarely dependent for their enforcement on anything other than objective establishment (for example, payment of rent, provision of required notice, establishment of breach of the agreement). On the other hand, the *South Australian Co-operative and Community Housing Act 1991* essentially regulates the housing providers as corporate bodies established under that Act, including, by necessary implication, the means by which the housing provider can make housing related decisions in respect of its tenants and applicants for housing benefits. The *Residential Tenancies Act* governs the housing provider's external relations with its tenants: the *South Australian Co-operative and Community Housing Act* is about the governance of the housing provider itself.

Disputes involving community housing organisations and housing associations and their tenants can be about governance, in which case the dispute is governed by the *South Australian Co-operative and Community Housing Act*; or they can be about the landlord/tenant relationship, in which case they are governed by the *Residential Tenancies Act* and come within the jurisdiction of the Residential Tenancies Tribunal. A dispute about governance comes within the jurisdiction of the Housing Appeals Panel.

If a community housing organisation or housing association serves a notice of termination authorised by the *Residential Tenancies Act*, the tenant may dispute the notice, or the landlord may seek to enforce the notice, by obtaining an order of possession. These applications are made to the Residential Tenancies Tribunal. The Tribunal will consider if the grounds asserted in the notice are established (arrears of rent, damage etc), or if the required notice has been given, or properly served, as required under the Act, and will make an appropriate Order.

If the tenant's claim is that the decision to serve the notice is unreasonable, oppressive or unjust, then the concern is with the governance of the housing organisation, as it is required, by implication, to make decisions that are not unreasonable, oppressive or unjust by section

84(1)(ii) of the *South Australian Co-operative and Community Housing Act.* The tenant's recourse then is to appeal to the Housing Appeal Panel, pursuant to section 84 of that Act. The appeal before the Housing Appeal Panel will consider whether the decision of the housing organisation was unreasonable, oppressive or unjust, but not if the grounds are made out for the purpose of an application pursuant to the *Residential Tenancies Act.* It may be that evidence that there are such grounds, such as arrears of rent, or damage to the premises, may be relevant to the decision as to whether the decision was unreasonable, oppressive or unjust, but the Housing Appeal Panel does not make a finding that the grounds are established.

The Housing Appeal Panel does not have jurisdiction to deal with an appeal if it would be more appropriately dealt with elsewhere.[34] However, there is no other body that can consider whether the action of a housing association is unreasonable, oppressive or unjust: this is not a consideration that can be raised under the *Residential Tenancies Act 1995* before the Residential Tenancies Tribunal, which is concerned with compliance with the requirements of that Act, not specifically whether the landlord's actions are "fair".

The fundamental distinction between Housing Appeal Panel's jurisdiction and that of the Residential Tenancies Tribunal is that the Tribunal addresses external and objective tenancy issues (where the "motive" of the landlord or the means by which the landlord has acted is rarely an issue); but the Housing Appeal Panel is concerned with the governance of the housing provider, which includes consideration that the housing provider can be challenged on the ground that its decision is unreasonable, oppressive or unjust. The housing provider is a private landlord but the properties administered by the provider represent public, not merely the provider's (as landlord) own private assets and interests. It is this consideration which provides the policy underlay of the legislative right of a member or applicant for membership of a housing provider to challenge a decision of the provider on the ground that it is unreasonable, oppressive or unjust, and the implicit requirement of compliance with procedural fairness in decision making by the community housing provider. Decisions involving the distribution of public assets must be not unreasonable, oppressive or unjust, and because they represent the distribution of public benefits, they are subject to review, as are the decisions of a fully public housing provider.

It follows from these considerations that, while the Residential Tenancies Tribunal provides the forum where the private rights of the housing provider as landlord may be asserted, the Housing Appeal Panel is the venue in which the housing provider is held to the "public" duties imposed by its quasi public nature and legislative charter.

"Unreasonable, oppressive or unjust"

There is no general positive injunction imposed on community housing providers to make fair decisions. In South Australia, where the regulation is most specific and public, where a dispute arises between the community housing provider and a member, "a person or body exercising a power of adjudication in relation to the dispute must observe the rules of natural justice".[35] However, in respect of other decisions which are likely to constitute the bulk of decisions made by the community housing providers, a requirement of "fairness" is implicit, enabling members and applicants for membership to appeal against decisions on the ground that they are "unreasonable, oppressive or unjust".[36] There is, as yet, no judicial guidance as to the interpretation or application of these terms in the community housing context,[37] but the Housing Appeal Panel has had to consider their meaning and application in the majority of community housing applications it has heard. There is, however, some guidance to be found in the interpretation applied to similar terms in other statutory contexts.

Under section 140(1) of the *Conciliation and Arbitration Act 1904* (Cth), rules for election of branch or federal office holders could not be "oppressive, unreasonable or unjust". Deane J

in *Municipal Officers Association v Lancaster*,[38] commented on the interpretation of these words:

There is nothing in the context of s. 140(1)(*c*) which would justify giving an expansive construction of the requirement that the conditions, obligations or restrictions imposed by the rules of an organization upon applicants for membership or members not be "oppressive, unreasonable or unjust". Those three words are used objectively in the clause and each of them is to be given its ordinary strong meaning. Plainly, their meanings overlap and definition is liable to adulterate the strength which the words possess. To be oppressive, a condition, obligation or restriction must be burdensome, harsh and wrongful (see, for example, *Scottish Co-operative Wholesale Society v. Meyer* [1959] A.C. 324, at p. 342; *Re Jermyn Street Turkish Baths Ltd.* [1971] 1 W.L.R. 1042; *Allen v. Townsend* (1977) 31 F.L.R. 431). To be unreasonable, it must be immoderate and inappropriate. To be unjust, it must be contrary to right and justice and to ordinary standards of fair play (see, for example, *Re Kempthorne Prosser & Co.'s New Zealand Drug Co. Ltd*. [1964] NZLR 49).[39]

A similar expression has been used widely elsewhere in the industrial context to describe the protection afforded under various Industrial Relations statutes against unfair dismissal, it is "harsh, unjust or unreasonable".[40] The jurisprudence regarding this formulation is now longstanding and reasonably consistent across all Australian jurisdictions in which it is used.

The formulation itself has been described as consisting of "ordinary non-technical words which are intended to apply to an infinite variety of situations where employment is terminated".[41] While the courts have been reluctant to be too prescriptive about the components of the expression, Commissioner Connor in *Devey v Enacon Parking Pty Ltd* [42] suggested:

- "harsh" as meaning too severe, having regard to all the circumstances of the case
- "unreasonable" as meaning immoderate, excessive or extravagant
- "unjust" as meaning unfair, inequitable, undeserved or biased

Further, the test is an objective one, to be applied using the natural meaning of the words.[43]

Perhaps the most authoritative statement regarding the interpretation of the "harsh, unjust or unreasonable" test can be found in the High Court's judgment in *Byrne v Australian Airlines Ltd.*[44] McHugh and Gummow JJ considered the term "harsh, unreasonable or unjust" used in a federal award for airline employees, and expressed the opinion that:

> termination of employment may be unjust because the employee was not guilty of the misconduct on which the employer acted, may be unreasonable because it was decided on inferences which could not reasonably have been drawn from the material before the employer, and may be harsh in its consequences for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct in respect of which the employer acted.[45]

It appears clear that the general view of expressions such as "unreasonable, oppressive, or unjust" is that, in the first place, the terms are disjunctive rather than conjunctive, as indicated by "or" rather than "and", so that a decision may fall within any one of these criteria rather than within all of them;[46] and further, that such words are to be given their "ordinary strong meaning", suggesting both that the concern is with serious deficiencies, not merely formal or trivial ones, and that it is a non-technical and flexible understanding of the words that applies.

It is clear that at the heart of this and similar phrases is the notion of procedural fairness, in a flexible and non-technical sense. Applying these considerations to the expression used in the South Australian community housing legislation provides some indications of the considerations that might be applied to decision making processes in community housing in determining if they are unreasonable, oppressive or unjust.

For a decision to be "unreasonable", Deane J suggests it must be "immoderate and inappropriate",[47] Connor C adds "excessive or extravagant",[48] and McHugh and Gummow JJ contribute, "decided on inferences which could not reasonably have been drawn from the material before the employer".[49] The Housing Appeal Panel has considered decisions to be "unreasonable" where they have been made when the affected party has had no opportunity to respond to information before the decision makers,[50] but "reasonable" where the decision is on the basis that the housing provider needs the premises for specific purposes under its Constitution,[51] or where the co-operative was not prepared to transfer a property to another organisation, as losing a property could threaten the viability of the co-operative,[52] or where the applicant is in breach of conditions of tenancy.

For a decision to be "oppressive", Deane J suggests "burdensome, harsh and wrongful".[53] The Housing Appeal Panel has recognised that a decision not to renew a tenancy agreement, or to reject an application for membership with the consequential effect that a tenancy will not continue, will always have a significant and negative impact on an applicant. However, that in itself is not enough to make the decision oppressive within the meaning of the Act. If the decision is made with due regard for procedural fairness and the decision is otherwise reasonable, so there is no element of "wrongfulness", as suggested by Deane J, then it is difficult to characterise the decision as oppressive in the sense that it should be set aside.[54]

For a decision to be "unjust", Deane J suggests it must be "contrary to right and justice and to ordinary standards of fair play",[55] Connor C suggests "unfair, inequitable, undeserved or biased",[56] and McHugh and Gummow JJ propose that this would be the case if the person affected was "not guilty of the misconduct" on which the decision maker acted.[57] The Housing Appeal Panel has also focussed on substantive and serious unfairness, concerned in particular with circumstances where the applicant has been given no opportunity to respond to allegations, which may be untrue, misconceived or incorrect,[58] or based on gossip, prejudice and assertion to which the applicant has no opportunity to respond.[59] The central feature of matters where the Panel has considered a decision to be unjust is that the decision has been made in the context of a real and substantive failure to comply with the requirements of procedural fairness.

Procedural fairness and the decisions of public/private housing providers

The close knit and intimate nature of the relationships between members of housing co-operatives raises particular issues with the application of the rules of procedural fairness. There is no doubt that the doctrines of procedural fairness are applicable in this context; indeed this is specified by the South Australian statutory framework.[60] However, the application of these doctrines is, in many cases, difficult in the particular circumstances of co-operative decision making.

An initial difficulty arises because members of housing co-operatives seem often unaware of the requirements of the hearing rule. The notion that the basis upon which an adverse decision is likely to be made ought to be disclosed to the person likely to be adversely affected appears not to be well understood in many housing co-operatives.[61] There is significant provision of education and training on issues of co-operative management, including the application of the principles of procedural fairness, which is made available to co-operative members by their public sector regulatory agencies.[62] Despite the availability of

this training, there often appears to be difficulty in assimilating and applying these principles to actual decision making within the co-operative.

One possible explanation for this ignorance of, or lack of compliance with, the requirement, is that co-operative members frequently hold particular beliefs about the nature of co-operatives as organisations, which they perceive as being in conflict with procedural fairness principles. For example, co-operative members not infrequently express the view at hearings that the kind of disclosure required by the procedural fairness hearing rule is inappropriate in a co-operative setting, as inconsistent with the imperative to maintain "principles of co-operation" and "co-operative relationships" within the organisation, which is seen as mandating a preference for conflict avoidance and maintenance of "face to face" relationships between members. This desire to maintain 'good' relationships often results in a willingness to act upon confidential complaints, the details of which are not disclosed, or inadequately disclosed, to the person complained against. Another manifestation appears in the apparently quite common practice of persons being asked to leave the room while their case is discussed by the other co-operative members or while an actual verbal complaint against them is being made.[63]

Further difficulties arise in communicating the nature of a complaint to the person complained against. Quite commonly, co-operatives take it for granted that the person against whom action is contemplated is already fully aware of the nature of the allegations made against them. Typically, moves to terminate the membership of a co-operative member arise in the context of a long standing dispute between a member and the co-operative. In such circumstances, particularisation of the allegations against a member accused, for example, of the somewhat indeterminate offence of "conduct detrimental to the interests of the co-operative"[64] is not infrequently seen as redundant, and complaints of a lack of specificity are seen as disingenuous or simply a means of delaying any decisive action being taken by the co-operative. The member may be told bluntly that he/she knows perfectly well what the dispute is about (and in general terms, this is likely to be true, but this supposition is not sufficient for compliance with the rule), or the co-operative may take the view there is no point in going over the same ground again as the members "know what he/she will say".[65] Co-operatives may also avoid spelling out the chapter and verse of the allegations against a particular member due to a feeling that to do so might be perceived as harassment or bullying of that member.

Co-operatives and their members are in the unusual position of being service consumers as well as service providers. The burden on co-operative members in managing their properties and tenancies is significant, requiring a high level of trust and confidence to exist between the members, and this is generally one of the reasons why "compatibility", a sharing of values and perhaps interests, is high among the requirements for membership, enabling the co-operative to select for "group cohesion". Co-operatives' selection processes will frequently include assessments based on personal values and beliefs concerning the likelihood of an applicant getting on well with existing members and being able to contribute effectively to the successful functioning of the group. These circumstances are ripe with possibilities for the failure of procedural fairness, especially where an applicant for membership is already housed by the co-operative and then has their application for membership rejected, and consequentially their tenancy terminated. The temptation in such circumstances is to avoid raising with the applicant what may be seen as their personal shortcomings, in an environment where personal dislike may have developed as the gap in shared values, or the "lack of fit", was revealed.

When the issue of procedural fairness is raised at hearings, it is apparent that a further complication is that co-operative members often regard the application of principles of fairness as an unbalanced requirement. Co-operatives, through their representatives at hearings, express the view that the co-operative is required to comply with a set of rigid,

even pedantic, rules when dealing with another member who, in the view of the majority of members, has strikingly and repeatedly failed to afford them similar courtesies. Co-operatives in this position often point to their limited resources and to the extensive nature of their voluntary commitment to the co-operative organisation and management, and suggest that there is a limit to which "legal niceties" can realistically be applied to their processes.[66] This is a serious issue for many co-operatives (and for many housing associations where staff are often under-resourced and stressed), and its resolution requires a nuanced understanding and application of the principle that the hearing rule is indeed flexible in its content.

In summary, difficulties with the application of the hearing rule in the context of the requirement that co-operative housing providers make decisions that are not unreasonable, oppressive or unjust can be sourced to a combination of ignorance of procedural fairness principles and a belief that it is inappropriate to fully apply them in the context of co-operative decision making. Similar difficulties arise with the application of the bias rule.

The bias rule requires that decision making be undertaken by an impartial decision maker.[67] However, this abstract principle poses considerable difficulties in the context of co-operative decision making. First, the normal principles of co-operative management require that all co-operative members take an active part in the management of the co-operative's affairs, including attendance at both regular co-operative meetings and any special meetings, as well as taking an active role in the operations of the co-operative and working closely with other members. In this context, the practical result is that when a dispute between members arises, all members are likely to be involved in or at least familiar with that dispute and may well have had a say about it or been present in discussions at meetings. It is unlikely that there will be any members who are not familiar with the dispute and who have not themselves formed and, quite probably, expressed views on the rights and wrongs of the dispute. On the face of it, they are likely to have either "pre-judged" the issue to be decided or, from the point of view of any reasonable observer, to appear to have done so, and, on normal principles, they should be disqualified from involvement in the relevant decision. However, if the entire co-operative membership finds itself in this position, as is likely, it will be impossible to find an impartial decision maker within the organisation.

These difficulties are repeated when co-operatives provide "internal appeals" in relation to a challenged decision. Co-operatives are typically required by both framework legislation and by their own Rules and By-Laws to have an internal appeal mechanism which reviews decisions made prior to them being taken to any external body.[68] However, the membership of such internal review bodies is generally drawn from the co-operative itself. Inevitably, the members of the appeals committee will have been involved in the original dispute and are likely to have formed and expressed views on the matter. In addition, they will be aware of the views of other members of the review body, and of the expectations and perhaps the needs and imperatives of the co-operative as a whole. Indeed, they will usually have taken part in the decision which they are now required to review impartially. In this context at least, the well intended imposition of a requirement for internal appeal[69] seems unlikely to work effectively. Not infrequently, co-operatives ignore this requirement or observe it in the most perfunctory of fashions, in the not implausible belief that it could hardly be likely to make any difference to the outcome.[70]

Further difficulties with requirements for impartiality arise from the close knit nature of the relationships within co-operatives. These organisations are usually small in size, often with only a couple of dozen households (or even fewer) being involved. Typically, they are initially formed by a small group of like-minded friends who join together to achieve their common goal of affordable housing. Over the years those staying in the co-operative are likely to develop close friendships or, in less fortunate cases, strong enmities. Both lead to issues with the objectivity of decision making. Further complications can arise with second

generation co-operative members, who may eventually seek their own membership of the co-operative and housing within it. Decisions about housing allocation and other matters within such a context are difficult to make with any clear objectivity and impartiality.

These, then, are some of the difficulties that arise with the practical application of the principles of procedural fairness to decision making within housing co-operatives. It is not proposed that procedural fairness ought not to apply to the decisions of housing co-operatives, nor that these difficulties are incapable of resolution. Nonetheless, they do pose particular difficulties which need to be addressed with a sensitivity to the practical operation and concerns of housing co-operative organisations.

Some possible solutions

An initial and obvious proposal for a solution is better education for co-operative members and housing association managers. There is no doubt that housing co-operative members need to be more conversant with the principles of fair decision making and the requirements of the hearing rule, in particular. All housing co-operative members must appreciate that when contemplating making an adverse decision, such as membership termination, notice of the decision and the basis upon which it might be made must be disclosed to the person to be affected. The person potentially adversely affected has a clear right to know what is alleged against them, as well as to respond to those allegations prior to any decision being made. Further, the decision should be made by as impartial a decision maker and process as is possible.

However, a prescription for further and better educative efforts may well be greeted with some bemusement by the various regulatory oversight bodies. There is little doubt that a great deal of effort is already devoted to the training and support programs and other quite extensive educative activities made available to co-operatives and their members.[71] Continuing training is often stipulated as a requirement of co-operative membership and is either directly provided or overseen by the regulatory bodies.

One additional source of direct and empirical information for housing co-operatives and associations may be the written determinations of bodies such as the Housing Appeal Panel.[72] As noted above, these bodies generally sit in private and their determinations are not publicly available, although of course they are made available to the parties, who can choose to distribute the reasons and decisions. While the current practice properly preserves the privacy of the parties to a dispute, it can have a negative effect in that an important source of normative information for co-operatives and associations is not available to them. It may strike a more productive balance to maintain the privacy of actual hearings but to subsequently publish the final determinations, so that the reasonings contained therein are available to provide a useful source of guidance to co-operatives. The public sector regulatory bodies can adopt a significant role here in disseminating information concerning the outcomes of hearings, to the organisations they oversee, so that they can have a normative effect.[73]

It must be recognised that the requirements of procedural fairness are far from the only matters that housing co-operative members must grasp in order for their co-operative to function effectively. Indeed, many would argue that there are other more important requirements. An essential is that the co-operative manage its financial affairs appropriately. A typical co-operative with perhaps 12-24 properties at its disposal might therefore be managing a portfolio valued at anything between $3–$10 million of public money. A larger Housing Association with perhaps 5–100 properties will be responsible for a correspondingly larger amount of public money. The value of these properties must be maintained and appropriate maintenance and tenancy records must be kept. From time to time, old properties need to be disposed of and new ones acquired. Rents and maintenance

contributions must be collected and duly dealt with. Maintenance must be regularly scheduled and carried out. These are the roles, in the private housing market, of rental property managers, who are paid for their work, which is done in a professional environment. Most members of housing co-operatives, however, are not professional property managers, and they are at best generally available to undertake these roles on a part-time basis only. Co-operatives operate for the benefit of low paid or disadvantaged people, who often have disabilities or disadvantages keeping them from the workforce, and often these members may have little relevant education, general background or experience in business matters.

Housing co-operatives are also required to hold regular meetings, which must be properly run and accurately minuted, as legislatively required, as the co-operatives are incorporated bodies under the relevant legislation[74]. All these functions are required to be performed in an open, transparent and fully accountable fashion. All are undertaken by volunteers, often not well equipped to do so. Against this background, it is perhaps understandable that in some circumstances co-operatives may see procedural shortcuts as acceptable, particularly when dealing with someone they perceive to be the cause of a long standing aggravation. It may be that different considerations should apply in relation to housing associations, as these are generally larger, professional bodies[75] which employ people to manage their housing ventures. While it is not suggested that managers in such organisations are the equivalent to private rental property managers, unlike the members of co-operatives they are employed to undertake this work. Members of housing co-operatives do receive significantly subsidised rent in return for their role in property management.

As well as these considerations, the nature of housing co-operatives is such that they may be dominated by members who have very clearly defined views concerning the overarching social and political purposes of their co-operative, which may often be characterised as more holistic than simply the provision of housing (for example, as a women only housing organisation eschewing practices that might be identified by reference to male norms). In those circumstances a proposal that decisions are required to be addressed in a particular manner may often be resisted, with such proposals characterised as lacking understanding of the realities of the particular co-operative or of community housing in general. Accordingly, there may be a strong press within the co-operative to reject external prescriptions about how decisions within the co-operative should be made, including that of procedural fairness.

Considering these matters, effective education for housing co-operative members is likely to remain an ongoing and difficult process. However, these considerations also raise the question of whether decision-making in housing co-operatives poses special issues in terms of defining the requirements of procedural fairness. The hearing rule, at least in terms of its content, is admittedly flexible. Is there a case that the requirements of the rule ought to be applied in a more relaxed fashion to housing co-operative decision making?

Applying procedural fairness flexibly

The argument for a particularly flexible understanding of the rules of procedural fairness in the context of housing co-operative decision-making appears very strong, taking into account the particular nature of co-operative membership, the voluntary nature of administrative roles within a co-operative and the usually necessarily close knit relationships among co-operative members.

It is well established that the content of the hearing rule is flexible and varies with the nature of the circumstances.[76] For example, in *NCSC v Newscorp*[77] the investigatory and preliminary nature of inquiries undertaken by the NCSC meant that the requirements of procedural fairness were considerably curtailed. It was not necessary to disclose full information to News Corporation's lawyers at that preliminary stage, as there would be a subsequent full trial of any allegations against it prior to any possible imposition of a penalty.

Similarly, in *O'Rourke v Miller*[78] the High Court held that an opportunity for cross examination was not required in the particular circumstances of a decision to dismiss a probationary constable because, in the view of the Court, there was no significant issue as to the credibility of the witnesses in question. More generally, in *Chen Zhen Zi*[79], the Federal Court declined to lay down a general rule that procedural fairness always required an oral hearing before the determination of refugee status applications, precisely because the nature of a fair hearing is inherently flexible.

These cases reinforce the principle that procedural fairness is, of its nature, flexible. There are few decided cases closely analogous to co-operative decisions challenged in administrative review bodies, such as the Housing Appeal Panel: this reflects, perhaps, the fact that these disputes are, almost exclusively, about low cost housing for low income tenants; the disputes rarely proceed to a court. The absence of such cases in courts does not, of course, reflect the importance of the provision of secure and appropriate housing for such parties, which still deserves and requires a proper process to ensure that the rights and entitlements of the least advantaged in the community are not sidelined or ignored. However, the general principle of the flexibility of the rule is consistently asserted by the courts and is clearly applicable to the decision making environment of community housing.

Procedural fairness is often described as requiring at a minimum that a person have adequate notice that an adverse decision against them is contemplated; that they know the case against them; and that they have a reasonable opportunity to respond to any adverse allegations.[80]

In the housing co-operative decision making context, it is clear[81] that these requirements must still be met, but there is no reason why they cannot be satisfied by fairly informal processes. For example, a decision would not generally be considered unfair because of a minor failure to comply with timelines set out in co-operative Rules or By-Laws. Rather, such timelines can be regarded as representing guidelines rather than fixed rules; the substantive question is whether the person affected had an adequate opportunity to prepare a response.

In similar vein, it is not necessarily always appropriate to insist that a person must receive detailed written notice of allegations. Here, a great deal will depend upon the facts of the particular case. Where there is a longstanding dispute, the nature of that dispute will often be clear to all involved. In such a case, it may be sufficient that the person concerned be notified that his/her conduct is considered to constitute "conduct detrimental" to the interests of the organisation, and that termination of membership is contemplated unless the person can adequately defend his/her behaviour.

Further, although the right to respond to allegations is a central aspect of the hearing rule, the process involved need not be elaborate. It is essential that a person have the opportunity to contest the facts alleged, or to argue that admitted behaviours do not amount to conduct justifying termination of membership. Frequently, however, there is surprisingly little dispute as to the facts.[82]

Two examples of matters where the rules of procedural fairness were applied by the Housing Appeal Panel in South Australia in a relatively flexible manner are the following:

> In *G v S Co-operative Inc* (HAP0721) there had been no formal compliance by the Co-operative with its Rules and By-Laws in that required periods of written notice had not been provided. However the Housing Appeal Panel considered that the applicant had not been deprived of procedural fairness as he had been aware of the allegations in detail, and of the relevant dates, and the non compliance with its Rules had not deprived the applicant of any substantive rights.

In *F v T Co-operative Inc* (HAP0831) as the applicant's appeal was received outside the time period specified in its rules, the Co-operative refused to accept the appeal. The period for making the appeal, however, was over the Christmas/New year holiday period, and although even taking into account public holidays the appeal was lodged slightly out of time, the Housing Appeal Panel considered that it was appropriate there be some flexibility in the time limits under those circumstances and where there was no reason to extend the time period by a few days: here the appeal was at most 5 days late, at best, two days late – not weeks or longer. Inflexibility in imposing time limits, where the time is not greatly exceeded and time is not of the essence, is likely to be unreasonable. The Co-operative's decision to refuse to accept the appeal was overturned, but the Housing Appeal Panel considered that the hearing before it, as an independent external appeal process, cured the defect in the Co-operative's processes.

The rule against bias

Bias issues often arise in housing co-operative decision as a consequence of the close knit nature of the relationships between members, and the fact that disputes often evolve over a period of time and may involve all or many of the co-operative members. Because of these circumstances, it could be argued that the principle is simply inapplicable in this context. There is a recognised exception to the bias rule, the so called "necessity" principle, which recognises that a statutory requirement that necessary processes be carried out is not to be frustrated by the unavailability of an impartial decision maker.[83] While courts are reluctant to accede to this principle except in very clear cases, it will be applied where there is simply no alternative.[84] It might be argued that this may be the case with community housing decisions, at least at the level of primary decision-making within a co-operative. However, despite this consideration, there are circumstances in community housing where the bias rule can clearly apply. For example, where a complaint is made by one co-operative member against another, it is fair and reasonable to exclude the complainant from any actual vote which might adversely affect the other party.[85]

Consistent with the rule against bias, a co-operative should make every effort to entrust decisions to the most disinterested persons to be found within its membership, promoting a strong understanding and culture of recusal from decision making where there is a conflict of interest. It follows that it is better in terms of fairness that the membership of any internal review body within a co-operative should not be fixed. Rather, members with as little at stake as possible should be chosen on an ad hoc basis to constitute such a review body for each matter as it arises.

Alternatively, a co-operative could identify a separate appeals committee membership, with those members excluded from participation in any decisions which they might subsequently be called upon to review. This would lessen the obvious pre-judgment issues but, given the close knit nature of co-operative relationships and the fact that disputes are likely to develop over months or even years, it is not realistic to consider that the members would be able to avoid any involvement in the matter prior to an appeal being made. It might also be argued that dividing-up the co-operative in this fashion and setting up hierarchies within it, is at odds with the co-operative ethos and purpose of such organisations and assumes that co-operative decisions and actions that might cumulatively impact adversely will all be pre-identifiable.

Another possibility is to establish a review committee comprised of persons entirely outside the co-operative, in this way members of various co-operatives could provide such services

to one another. This could alleviate the bias issues associated with the review process, while maintaining a level of review which might resolve the dispute.[86]

Many co-operatives, however, see the requirement for internal review as simply too burdensome upon the resources of co-operatives. Hearing an appeal is time consuming and is likely to deepen existing divisions among those involved. Quite a high level of skill is required for the management of an appeal process, quite apart from the procedural fairness issues. The lack of these skills, coupled with the complexity of interpersonal issues and conflicts of interest, suggest that insisting on such an internal process is doomed to failure. Even with willingness to put processes in place to ensure procedural fairness, the process might fail. If there is resistance to any requirement of process, failure seems certain.

In the light of this, the final possibility is to remove the requirement for an internal appeal process prior to seeking full external merits review. This would have the advantage of simplicity, shortening the overall length of time it would take to make a decision and to exhaust all possible avenues of appeal. It might be argued that an intermediate and internal level of appeal adds little real value to the process and simply delays its final resolution. Given the reality that it seems all but impossible to remove some level of real or at least ostensible bias from co-operative decision making, this only strengthens the argument for a genuinely independent external review body, such as South Australia's Housing Appeal Panel.

However, there may be some reluctance to adopt this approach. Local resolution of disputes is recognised as a significant aspect of community housing, both to empower the members and strengthen the community of the co-operative, and to support the development of strategies and strengths for conflict management. Emphasis on local and democratic decision-making has always been a feature of community housing, taking responsibility for managing and resolving disputes and learning both to manage and learn from conflict are important elements of co-operative living. Until 2007, parties to a community housing dispute in South Australia were required to engage in mediation processes before they could access an external formal dispute resolution process; this was removed from the South Australian legislation in 2007 on the basis that mediation processes at such a late stage of the dispute and on a mandated rather than voluntary basis, were unlikely to be successful. The requirement for internal review was maintained as a central element in community co-operative living, as reflected in the "Model Rules" prescribed in South Australia. Removal of this emphasis on the value of informal and local dispute resolution might be seen as going to the heart of co-operative housing principles, but its attractiveness as a solution to a significant and difficult aspect of proper management underlines the fundamental difficulty of applying public administrative law principles to what at least one side regards as merely private arrangements; perhaps the removal of the internal appeal process would provide a valuable means to enable increased awareness of this public dimension.

Engagement of the external public sector regulator to provide a review process is also not a satisfactory way of addressing this dilemma. The regulator has its own interests and obligations to manage community housing organisations' practices. It views these both from the perspective of managing risk in the interests of the government as funder and itself as the regulator[87] and also from the perspective of its role to support and encourage independent management through advice and training. In these circumstances, the public sector regulator could not be seen as either independent or disinterested in the outcome. Neither the community housing organisation nor the applicant could be confident of an appeal process (even an internal one) managed by the regulator.

It seems that, although certain adjustments may be able to be made, decision-making in housing co-operatives will still often fall short, in terms of compliance with both the hearing rule and the bias rule. It seems difficult if not impossible to entirely alleviate those failings. It

seems the only way to ensure procedural fairness is through a genuinely independent merits review mechanism for the decisions made by these bodies, so that there can be some review and oversight of such decision-making, with some concomitant normative value for the co-operative, and the possibility of curing any procedural defects by an external and independent hearing process.

External merits review

External merits review of these decisions can also present some difficulties.

(i) Procedural fairness in the appeal hearing

In principle, any experienced appeal body ought to have no difficulty in ensuring that procedural fairness is provided for within its own external merits review hearings. However, practical and procedural difficulties are not uncommon.

Existing legislation and practices do not provide for pre-hearing conferences where the issues in dispute might be narrowed and clarified and appropriate evidence identified. In reality, arranging such pre-hearing processes is often not practical, especially if the matter is urgent and the parties are not readily available. Additionally, the Panel does not sit full time so there may be restrictions on listing matters at short notice.[88] However, without such arrangements, parties may arrive at a hearing ill prepared, relying on second and third-hand hearsay and without key documents. Even more fundamentally, parties may sometimes be at cross purposes as to the basic issues between them.[89] Nevertheless, they will expect the Appeal Panel to resolve the matter and usually in a single hearing. One benefit of the preceding internal appeal process is that it may address these issues to some extent, as in requiring a review of relevant documentation and ensuring that all the issues have been identified. This would constitute a cogent argument in favour of retaining it.

The processes of any independent appeal body must be such as to address these issues. It is not generally appropriate to require pre-hearing conferences or “pleadings” in these cases; parties are rarely represented, and any significant judicialisation of the process is not desirable. However, to conduct a fair and effective hearing, the issues must be clarified prior to the hearing so that both parties may address them, both in preparation and in the availability of witnesses and documentation. Without such preparedness an adjournment may be necessary, often adding to the tensions in the relationship, probably reducing the opportunity for a negotiated outcome, and possibly creating additional difficulties if processes elsewhere, such as in the Residential Tenancies Tribunal, are awaiting the outcome of the hearing. Managing parties’ expectations and capacities at a hearing is a significant aspect of providing them with procedural fairness; external appeal bodies need to be particularly aware of the possibilities of perceptions of bias if the process appears particularly more demanding of one party (who may be significantly less prepared) rather than the other. Despite these difficulties, an independent appeal body is required to make the correct and preferable decision and to reach that outcome by means of demonstrably fair processes, which may require processes that are sometimes not welcomed by the parties.

(ii) Jurisdictional thresholds

Independent appeal bodies may face some jurisdictional hurdles before undertaking review. One example is delineation of responsibilities between an external review body, such as the Housing Appeal Panel and another body to which an application asserting private rights may have been made, such as the Residential Tenancies Tribunal. This is discussed above and is a matter that has caused some angst amongst a number of co-operatives and associations. Not infrequently, these bodies, having lodged an application for vacant possession with the Residential Tenancies Tribunal in assertion of their rights as private

landlords, will treat the intervention of the Housing Appeal Panel on the application of the tenant/member, as an unwarranted intrusion, failing to take into account their additional quasi–public responsibilities.[90]

The other jurisdictional requirement may be in the stipulation of an internal appeal process as a pre-condition of seeking external merits review.[91] The Housing Appeal Panel has interpreted this requirement broadly, so that it is not deprived of jurisdiction by arguments that an internal appeal was procedurally flawed or by parties indefinitely precluding its jurisdiction.[92] Merits review jurisdiction is invoked even by an inadequate or flawed internal appeal process and the existence of the external independent jurisdiction provides the ultimate cure for any previous procedural failings. There is, as yet, no judicial guidance on the correctness or wisdom of this approach. The South Australian Regulations appear to suggest that an applicant may choose to appeal to the internal Appeals committee of the co-operative, or may choose to make a direct application under section 84 of the *South Australian Co-operative and Community Housing Act 1991.*[93]

(iii) Appropriate remedy

Finally, there is the question of appropriate remedy. A typical issue arising on merits review occurs where a co-operative has decided to terminate the membership of a member on the grounds of "conduct detrimental to the interests of the co-operative". In cases where the external review body agrees with that assessment, no particular issues are raised as the "correct and preferable" decision is simply to affirm the original decision of the co-operative. This resolves the dispute between the parties. However, on occasions the external review body will take the view that the decision of the Co-operative did not constitute the correct and preferable decision and may decide to substitute a different decision, namely, a decision not to terminate the membership. The practical effect of such a decision may be, however, not to resolve the dispute, but to leave it simmering or indeed to exacerbate it. The Co-operative is unlikely to consider that the member is, contrary to its previous and strongly held opinion, now a valued member of its organisation, and the reinstated co-operative member may both see their conduct as vindicated and be left with a considerable degree of resentment arising from the entire process. This is hardly a recipe for an ongoing constructive and co-operative working relationship.

One possibility is to advocate for the pragmatic reality of a "no fault" separation from the co-operative at the instance of either party. Co-operative members already enjoy that right, in that they can choose to leave the co-operative at any time. But can a co-operative rid itself of a member it no longer desires – without having to demonstrate fault on their part? This is hardly a trivial issue for a co-operative; the capacity of the members to get on together and have respect and trust for each other is significant given that they must together manage the co-operative. "Getting on together" is not only a significant social and political value of those who choose to live in co-operatives: it is a practical necessity.

This possibility poses a considerable dilemma. On the one hand, "no fault" co-operative-initiated separation places individual co-operative members at considerable risk of being deprived of their subsidised co-operative housing, without being demonstrably in breach of either their tenancy or membership agreement. Adoption of this suggestion means that a majority of a co-operative membership can, if it so chooses and with or without good reason, rid itself of members whom it finds inconvenient or difficult to deal with, or just does not like. Apart from the unfairness to the individual concerned, such an outcome is difficult to reconcile with the principles of co-operation underpinning such organisations and with the principles of fair decision making. Such a model could also be open to manipulation by dominant members of the group and susceptible to any form of discrimination, lawful or unlawful.[94] This is not an acceptable means of governing the distribution of what are ultimately public assets, merely moved to private hands for administration, and it is the

failure to recognise the public, as well as the private, dimensions of community housing that can lead to the assertion of private interests at the expense of public interests. It is to avoid such possibilities of impropriety that the regulatory and governance provisions are included in the South Australian legislation. If a co-operative is not ultimately required to have good reasons for a decision to terminate an individual's membership, then any querying of fairness in the decision making process seems quite redundant. There would be little or nothing for an external review body to review.

However, the alternative presents its own difficulties. If grounds are required for a membership termination, there will be instances where an external review body will not be satisfied that those grounds have been made out and will overturn the decision to terminate. This compels the co-operative and the estranged member, perhaps both unwillingly, back into one another's arms, presumably to resume their dispute. This outcome too is unsatisfactory.

Another possible remedy is to direct the transfer of the premises, subject to the tenancy, to some other administrative unit, generally a housing association. Indeed, this is increasingly a remedy sought by applicants unhappy with the administration of their co-operative, and often in circumstances where there is a split in the co-operative. This can be viewed as a productive "win/win" outcome: the problem is resolved, both for co-operative, in the form of ridding itself of an unco-operative or troublesome member, and for the applicant, who is not left homeless or suffering the loss of rent subsidy provided by community housing.

However, a co-operative will often resist this suggestion; losing a property means it may be weakened in terms of numbers and income, which may make the co-operative unviable both in terms of funding and in terms of administrative capacity. Further, although generally less problematical, a recipient association must be found. The most significant obstacle to this resolution, however, is in the enforcement of such a direction. In South Australia, although the decisions of the Housing Appeal Panel are determinative and supported by legislation, an order of the Panel in these terms has proved exceptionally difficult to enforce. If the co-operative does not comply with the order, enforcement is left to the regulatory body. The co-operative as an incorporated entity is the registered proprietor of the property and may be restricted in its capacity to alienate property.[95] It may be the case that the only way to require compliance with such an Order is through intervention in the co-operative's affairs by the regulatory body.[96]

However, and despite these remedial difficulties, requiring decision making conduct to comply with procedural fairness is clearly the path that must be chosen. First, this is legislatively mandated. A body such as the Housing Appeal Panel in South Australia is given a full merits review power; it can make any decision and adopt any alternative course of action that was open to the original decision making body, the co-operative or association.[97] These alternatives clearly permit a finding that grounds for the relevant decision did not exist.[98] The fact that grounds are indeed required is itself significant and denies the possibility of a "no fault" expulsion. Co-operatives are clearly required to show reasons for termination of a membership, usually either "conduct detrimental" or a breach of the rules of the co-operative, so that the member can respond effectively as part of the decision making process. A finding that one of these grounds is made out does not require a decision to terminate membership but provides a statutory basis for exercising the power to do so. Co-operatives, however, once satisfied that a ground exists, will usually move to terminate membership rather than consider a lesser alternative or give the member a second chance.[99] An independent review body is perhaps more likely to consider whether other avenues might exist.

These alternatives might include orders directed to the parties specifying particular actions each is to take: including mediation or specific orders to do with attendance at co-operative

meetings; maintenance or other matters in dispute; or to impose, for example, a period of probation with specific requirements attached. An independent body such as the Housing Appeal Panel cannot usually make orders directed to third parties, such as the public sector regulator; but it can order the actual parties to approach such a body seeking specified assistance, such as training or meeting facilitation. It is, of course, for the regulatory body to supervise the performance of the Panel's orders. Alternatively, the Appeal Panel could make orders and adjourn the matter for a period of time for further applications as necessary but generally it will be preferable for all parties, for a determinative order to be made and for the dispute - so far as the Appeal Panel is concerned – to be resolved.

Conclusion

The experience of the Housing Appeal Panel highlights some of the difficulties that arise when "public" responsibilities and "private" rights and remedies run together. Community housing organisations exist in a legal environment which is neither clearly public nor wholly private, but which is a *sui generis* hybrid of both. Hence, difficulties arise when these organisations seek to assert their "private" rights as landlords without considering their "public" responsibilities as providers of public and social housing. The confusion and lack of understanding of the double dimension of responsibility and interests is well illustrated in this area where an essential service such as housing is provided in a context that is both public (through the funding and regulation of the service provider) and private (in the relationship of the service provider and the consumer). Disentangling the public and private interests and then balancing them to ensure both are appropriately accommodated, is a particularly fraught task in the context of community housing, where disputes and difficulties in the private relationship are endemic because of the nature of both the service and the consumers, and regulation of the public relationship is essential both because of the centrality of the service to a civil and productive community and the high level of funding invested.

There is quite a high level of accountability demanded of community housing bodies, particularly housing co-operatives. They are accountable to their public sector regulators for their overall management of financial and property resources and to both regulatory bodies and appeal bodies, such as the Housing Appeal Panel, for the public aspects of their individual decisions and decision making processes. They may also be required to defend their "private" tenancy management decisions in the Residential Tenancies Tribunal. Essentially they are required, in the pursuit of their private interests as landlords, to perform the tasks of professional rental managers, and as recipients of public funding and the providers of housing pursuant to that, to make decisions in the disinterested and informed manner of a public service body. Both these roles are to be performed with the additional complication that the co-operative as service provider and landlord is also the service consumer and tenant. This complex and difficult accountability network places considerable demands upon volunteer and under resourced memberships and requires a context-sensitive, non-technical approach when reviewing the decisions they make.

The approach to fairness requirements illustrates this necessity. While it is axiomatic that the decisions made by community housing organisations in relation to memberships and tenancies must observe the principles of procedural fairness, those principles need to be understood and applied in a flexible fashion, sensitive to the practical environment in which such decisions are made. This environment of confluent public and private interests illustrates the complexity and difficulty of transferring the essentially public concept of procedural fairness to what is certainly regarded by the decision makers as a private environment and suggests that both the understanding and application of the rules of procedural fairness are still dynamic.

Endnotes

1 See documents and discussion on the website of the South Australian regulator, Community Partnerships and Growth, http://www.communityhousing.sa.gov.au/site/page.cfm (accessed 27 July 2009)
2 For example, *Residential Tenancies Act 1995 (SA)*
3 See *South Australian Co-operative and Community Housing Act 1991* generally and, in particular, *Part 7, Funding*, and sections 22 (registration); 37 (rules of natural justice to apply); and section 84 (appeals). In other States and Territories there is less extensive legislative regulation of community housing but similar requirements of governance matters are reflected in funding agreements with the community housing providers.
4 Appeal procedures in Australian States and Territories and processes in place are discussed below.
5 *South Australian Co-operative and Community Housing Act 1991* section 84, enables applications against decisions of a co-operative housing body to be made to the Housing Appeal Panel on these grounds.
6 In most States and Territories the landlord/tenant relationships in community housing is governed by Residential Tenancy legislation. In SA, NSW and the ACT this jurisdiction is conferred on a specialist tribunal; in Victoria in the general administrative tribunal VCAT; and elsewhere the jurisdiction is exercised in small claims jurisdictions.
7 Legislation in South Australia, in funding agreements elsewhere – see further discussion below.
8 *South Australian Co-operative and Community Housing Act 1991.* Elsewhere similar regulatory principles are contained in funding agreements with States or Territories, where the funding is provided subject to the Commonwealth State Housing Agreement which mandates the requirement for an appeal process to be contained in such housing funding arrangements.
9 Section 84 *South Australian Co-operative and Community Housing Act 1991*
10 See http://www.communityhousing.sa.gov.au/site/page.cfm?u=432#e626 (accessed 27 July 2009), for a Discussion Paper, *A New Vision for Community Housing for South Australia,* which outlines many of these developments and likely changes.
11 See, *A Regulatory Framework for Community Housing in Australia*, Volume 1; Risk Management, Final Report, Robyn Kennedy and Co Ltd, December 2001, National Community Housing Forum, definition adopted at page 3. Community housing does not generally include crisis housing but it does include long term supported housing and boarding and lodging arrangements.
12 For the definitions used in South Australia, see the website of the regulatory authority in South Australia, Community Partnerships and Growth, and in particular http://www.communityhousing.sa.gov.au/site/page.cfm?u=155 (accessed 27 July 2009)
13 Section 22
14 Section 23
15 Sections 6A and 7
16 Legislative regulation of community housing is strongly developed in South Australia through the *South Australian Co-operative and Community Housing Act 1991,* but (although there are some legislative provisions) in most other States and Territories regulation is largely through funding agreements.
17 See n 11 above, at pages 16–18.
18 National Community Housing Standards Manual, *The Aims of Community Housing*, 1999
19 Section 3(1) *South Australian Co-operative and Community Housing Act 1991*
20 See section 3(2) *South Australian Co-operative and Community Housing Act 1991.* Housing Associations, on the other hand, are essentially defined on the principles of service.
21 See section 32B *South Australian Housing Trust Act 1995*, and section 84(a1) *South Australian Co-operative and Community Housing Act 1991.* The HAP has operated since 1993 but was only placed on a legislative and determinative basis in 2007, at which time it was also given jurisdiction in respect of community housing disputes. Prior to this such disputes were determined by ad hoc committees of review established by the Minister as required.
22 Housing Appeals Committee established as a Ministerial Advisory Committee, which makes recommendations to the community housing provider. A voluntary accreditation system and a performance based registration system are in place in NSW.
23 Pursuant to Part VIII of the Housing Act 1983 (Vic) all community housing providers are required to establish an internal complaints procedure (section 97). If the matter is not resolved, a reference to the Registrar of Housing Agencies can be made (section 98(1)) and the Registrar may issue written directions to remedy the matter complained of. However, this is not formally enforceable.
24 Where the community housing provider is the head tenant of Housing ACT
25 *Cooperatives Act 1997* (Qld), sections 82, 83 and 86, and *Housing Act 2003* (Qld).
26 This does not appear necessarily to be the case in Queensland where community housing providers are not required to be registered in such a manner as to bring them within the relevant Queensland legislation.
27 Prior to this, the Panel had exercised delegated power from the community housing regulator to determine community housing disputes pursuant to the *South Australian Co-operative and Community Housing Act 1991*
28 Section 84(1)(ii) *South Australian Co-operative and Community Housing Act 1991.* There are also other grounds for appeal under the Act: Section 84(1)(a)(i) permits a member to appeal in relation to a dispute between themselves and another member, or with the co-operative, although no basis for the appeal is

prescribed; section 84(1)(a)(iii) enables an appeal by a member "who is the subject of any action of a prescribed kind taken by the co-operative against a member". There are no "prescribed actions" to date.

29 The Panel can sit with two members only: see section 32B(12), but this is an unusual occurrence.

30 The Panel members are not appointed on a full time basis and generally the Panel is scheduled to sit for one day per week, hearing both public and community housing appeals.

31 The only circumstances in which this occurs is where the matter is clearly outside the Panel's jurisdiction or where an urgent interim Order is required: see section 84(7) *South Australian Co-operative and Community Housing Act 1991*

32 Section 24 *Residential Tenancies Act 1995 (SA)*

33 See section 82 of the *Residential Tenancies Act 1995 (SA)*

34 See section 84(11) *South Australian Co-operative and Community Housing Act*

35 Section 37 *South Australian Co-operative and Community Housing Act 1991*

36 Section 84(1)(a)(ii) *South Australian Co-operative and Community Housing Act 1991*

37 This formulation also appears in section 41A(1)(c) of the *Strata Titles Act 1988* (SA) and in various Ombudsman statutes.

38 (1981) 54 FLR 129.

39 above n.38 at 165.

40 See eg: section 170 CE of the *Workplace Relations Act 1996* (Cth); section 84(1) of the *Industrial Relations Act 1996* (NSW); section 73 of the *Industrial Relations Act 1999* (QLD). See also section 29(1)(b)(i) of the *Industrial Relations Act 1979* (WA) which deals with employees "harshly, oppressively or unfairly dismissed*"*.

41 *Bostick (Australia) Pty Ltd v Grogevski [No 1]* (1992) 36 FCR 20.

42 unreported, IRC, NSW, Connor C, 1886 of 1995, 13 December 1995.

43 *AWU-FIME Amalgamated Union v Conagra Wool Pty Ltd* (1995) (unreported decision of the IRCA heard before Parkinson JR who gave judgment on 15/09/1994).

44 (1995) 185 CLR 410.

45 Above n 44 at 465.

46 See *Minchin and Gorman v St Jude's Child Care Centre* (19673) 40 SAIR 106 per Olsson J at 116, and further, Full Bench of the Industrial Relations Commission in *Outboard World Pty Ltd (t/as Budget Waste Control (Sydney)) v Muir* (1993) 51 IR 167.

47 Above n 38

48 Above n 42

49 Above n 45

50 *D v Z Housing Association* (HAP0872)

51 As above n 50

52 *I v Q Co-operative Inc* (HAP0927).

53 Above n 38

54 In *G v S Co-operative Inc* (HAP0721) the co-operative decided to reject an application for membership. This meant the applicant lost the tenancy. The Housing Appeal Panel considered that the decision was not unreasonable, oppressive, or unjust because the co-operative had significant and clearly explained reasons for making the decision; the applicant was aware of the concerns and had been given opportunities to respond to them and redress them; and the co-operative had proposed alternatives to the applicant to assist him.

55 Above n 38

56 Above n 42

57 Above n 45

58 In *B v Y Co-operative Inc* (HAP0819) the co-operative refused membership because its members thought the applicant was unfriendly and disengaged. He was not present when these views were discussed and was unaware of them. The applicant suffered from a form of autism which made it difficult for him to appear sociable. When the co-operative became aware of this at the hearing it determined to reconsider its decision and the applicant was accepted as a member of the co-operative. The Panel considered the original decision to be unjust.

59 See *A v X Co-operative Inc* (HAP0735), described in n. 61 below.

60 See section 37 *South Australian Co-operative and Community Housing Act 1991*

61 Numerous matters before the Housing Appeal Panel indicate this. In part it is a feature of lack of understanding of the requirements of procedural fairness, and in part both disinclination to act in what is seen as a confrontational manner, and in part lack of the professional skills required to address such issues in a constructive and disinterested manner: see for example, *A v X Co-operative Inc* (HAP0735) and *B v Y Co-operative Inc* (HAP0817). In *A,* the Co-operative was advised not to be confrontational or to ask personal questions, and so failed to make clear to an applicant for membership that it was questioning her concerning a health issue it believed might impact on her capacity to undertake functions in the co-operative; in *B,* the Co-operative was not prepared to raise with the applicant his perceived lack of friendliness, so he had no opportunity to explain his health issues prior to the decision being made. In both cases, the applicants were unaware of what was being taken into account in the decision making process. In *A*, the decision of the co-operative was reversed (there were other significant issues in this case) and the applicant's membership status was reinstated; in *B*, the co-operative conceded the deficiency and decided to reconsider the application with the applicant present.

62 The provision of education is one of the "principles of co-operation" defined in section 3(2) of the *South Australian Cooperative and Community Housing Act 1991,* and in South Australia significant training and education opportunities are provided by the regulatory authority: see http://www.communityhousing.sa.gov.au/site/page.cfm?u=405 (accessed 2 July 2009)

63 In *B v Y Co-operative Inc* (HAP 0817) and in *C v X Co-operative Inc* (HAP0011) the applicants were not members of the Co-operatives but their applications for membership were being considered. As they were not members they were required to attend meetings, but to wait outside the meeting where their membership applications were being considered, and they had no opportunity to respond to any matters discussed at the meetings concerning their applications. Both applications were successful on appeal, but in both cases the co-operative representatives told the hearing that if they had heard the applicant's responses it was likely a different decision would have been made at the meeting. Both cases were resolved by agreement with the applicants having their applications reconsidered in open meetings.

64 This expression is generally used in co-operative Rules and By-Laws as a ground for termination of membership; the Model Rules contained in Schedule 4 of the *South Australian Co-operative and Community Housing (General) Regulations 2007* specifies this as a ground for membership termination in clause 12(1)(d), and termination of membership is one of the mandatory provisions for Rules.

65 In *D v Z Housing Association* (HAP0872) the Housing Association told the Housing Appeal Panel that it considered that putting the allegations on a Notice of Termination to the tenant was sufficient notice to the tenant as they "knew what he would say if they spoke to him about it".

66 In *E v Z Housing Association* (HAP0833) the Association representatives told the Housing Appeal Panel they were too overworked to consider responding to an application for an internal review. This issue is frequently raised in hearings.

67 *Livesey New South Wales Bar Association* (1983) 151 CLR 288; *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507

68 In South Australia, the Regulations made pursuant to the *South Australian Co-operative and Community Housing Act 1991* prescribe certain "Model Rules" for Co-operatives, and set out some mandatory Rules. These include a requirement to have an appeals committee within the Co-operative (Reg 20(g) of the *South Australian Co-operative and Community Housing (General) Regulations 2007,* and in Schedule 4 of those regulations the Model Rules are set out, including Clause 13, *Appeals and conflict resolution,* which requires the Co-operative to have a By-Law constituting an Appeals Committee, and "establishing the means to assist in the resolution of conflict between members". A member aggrieved by a decision of the co-operative has a right to appeal to the Appeals committee and, in addition, has a right to appeal to the Housing Appeal Panel pursuant to section 84 of the Act. It is a requirement of the Commonwealth State Housing Agreement for an appeal or review process in place to review decisions of housing providers funded pursuant to that Agreement, so this is a general feature of housing funding agreements in all States and Territories.

69 See n.43 above

70 See *E v Z Housing Association* above n. 66 (HAP0833). In *F v T Co-operative Inc* (HAP 0831), where the Co-operative representatives told the HAP that as a small co-operative all the members had already had their say and had made up their mind so there was no point in an internal review of the decision already made by them.

71 The extensive schedule of training programs offered by the South Australian regulatory agency is available at http://www.communityhousing.sa.gov.au/site/page.cfm?u=170 (accessed 27 July 2009)

72 Section 32D *South Australian Housing Trust Act 1995*

73 In South Australia the regulatory body also (by agreement with the parties at the hearing) receives copies of the decision and reasons of the Housing Appeal Panel, and provides a regular summary of the decisions and main issues arising, which are distributed widely to all co-operatives and published on its website: see http://www.communityhousing.sa.gov.au/site/page.cfm?u=462 (accessed 27 July 2009)

74 Section 22 *South Australian Co-operative and Community Housing Act 1991*

75 Often (but not always) the corporatised arm of a charity or church, such as Anglicare or Red Shield

76 *Kioa v West* (1985) 159 CLR 550, per Mason CJ at 584 see also *Mobil Oil Australia v FCT* (1963) 113 CLR 475 Per Kitto J at 504

77 *NCSC v News Corporation* (1984) 156 CLR 296.

78 *O'Rourke v Miller* (1985) 156 CLR 342

79 *Chen Zhen Zi v MIEA* (1994) 48 FCR 591

80 See, for example, P Cane & L McDonald, *Principles of Administrative Law* (OUP 2008) at 135.

81 Pursuant to both the requirement in section 37 *South Australian Co-operative and Community Housing Act 1991,* and the general common law requirement.

82 For example, in *C v X Co-operative Inc* (HAP0011) there was no dispute on the facts that led to the decision to reject the application for membership, just the interpretation placed on them: the matter settled when the parties heard each other's concerns at the hearing, which they agreed was their first opportunity to hear each other as the applicant had been excluded from the meeting which had rejected her application.

83 *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70

84 In *F v T Co-operative Inc* (HAP0831) the respondent co-operative only had a membership of 4, excluding the applicant, and all had been involved in making the decision. In addition, the period in which the internal review panel should have been convened was over the Christmas/New Year holiday period, and the

likelihood of convening an appeal panel with external members from other co-operatives in this period, without undue delay, was very low.

85 *Stollery v Greyhound Racing Control Board* (1972) 128 CLR 509. In *A v X Co-operative Inc* (HAP0735), the issue before the co-operative in deciding the applicant's membership essentially arose from a conflict between the applicant and another co-operative member. That member excluded himself from the decision making process, but his partner was a member of the internal review process, and the member himself (who was described as "the respondent" by the co-operative's internal review) had moved the non-acceptance of the applicant's membership.

86 Even this option is not always a possible alternative: in *F v T Co-operative Inc* (HAP0831), above n.84, where no appeal panel with external members could be convened within the prescribed time period because it was over the Christmas/New Year period.

87 See *South Australian Co-operative and Community Housing Act 1991*

88 As in South Australia

89 In both *C v X Co-operative Inc (*HAP0011*)* and *B v Y Co-operative Inc* (HAP0819) when the parties heard each others' cases at the hearing they agreed on a resolution of the appeals whereby the co-operative would reconsider the application from the applicant: in both cases, clearly, these were hearings which could have been avoided, along with the stress and cost to both the applicant and the co-operatives (and the public cost) in the matter proceeding to the hearing.

90 This was most apparent in *A v X Co-operative Inc* (HAP0735). This matter involved a dispute concerning the rejection of a membership application from an applicant already housed by the co-operative, so the rejection of the application ensured the end of the tenancy. The tenant did not vacate at the end of the tenancy so the Co-operative applied to the Residential Tenancies Tribunal for vacant possession. The tenant appealed to the Housing Appeal Panel on the ground that the decision to reject the membership application (which led to the consequence of the non-renewal of the tenancy agreement) was unreasonable, oppressive or unjust. The Housing Appeal Panel took jurisdiction to address this issue and the Residential Tenancies Tribunal adjourned the hearing of the application before it. The Co-operative complained to the Housing Appeal Panel and lobbied extensively (to peak housing bodies, the Ombudsman and the Minister of Housing) to prevent the Housing Appeal Panel exercising its jurisdiction, and refused to comply with any of the Orders made by the Housing Appeal Panel. However, as the Residential Tenancies Tribunal appreciated the parallel jurisdictions, the tenant remained in occupation as the Housing Appeal Panel found that the decision concerning her application had been made without consideration of the rules of procedural fairness and was therefore unreasonable, oppressive and unjust; it reversed the decision, subject to certain conditions. This dispute has been the subject of five hearings before the Housing Appeal Panel and remains unresolved because of the failure of the respondent co-operative to appreciate the nature of the regulation that applies to it and to comply with the requirements of procedural fairness.

91 See n 23 above

92 Community housing Rules or By-Laws generally place a time limit on the convening of internal appeals, after which (in South Australia) the applicant can make a direct application to the Housing Appeal Panel: see proposed Appeals Model By-Law proposed in South Australia: http://www.communityhousing.sa.gov.au/site/page.cfm?u=184 (accessed 27 July 2099)

93 See Schedule 4, *South Australian Co-operative and Community Housing (General) Regulations 2007,* clause 13(3).

94 In *A v X Co-operative Inc* (HAP0735) a co-operative decided to refuse membership to an applicant tenant on the ground that some members believed the applicant had a "superior attitude" and held prejudicial views concerning other members of the co-operative. The applicant had also had an ongoing conflict with another member. These concerns were never put to the applicant and the Housing Appeal Panel reversed the co-operative's decisions and ordered that the application for membership be reconsidered in 6 months time. The member with whom the applicant had the conflict absented himself from the meeting at which the application for membership was reconsidered. The application was again rejected, but the co-operative, by a vote of 7/1, agreed to transfer the applicant's house subject to her tenancy, to a housing association, so that the applicant was no longer part of the co-operative but was not homeless. Subsequently, the member with whom the conflict had arisen (an office bearer) objected to this decision and at a special resolution meeting held to determine the transfer he persuaded the membership to reverse the decision, which it did, with a vote of 1/7. The outcome of this meeting was characterised at the subsequent hearing as the co-operative setting itself up as a private club with the entrants determined solely by the existing membership.

95 Section 28(1) of the *South Australian Co-operative and Community Housing Act 1991*enables a registered housing co-operative to acquire, hold, deal with and dispose of real property, but section 28(2) provides that it cannot dispose of real property without an authorisation by special resolution of the co-operative.

96 See Part 9 *South Australian Co-operative and Community Housing Act 1991,* but note that non- compliance with an order of the Housing Appeal Panel is not specifically identified as a ground for intervention in section 71(2).

97 See section 84(6)(d) *South Australian Co-operative and Community Housing Act 1991*

98 Housing providers often argue that they do not need to provide grounds for termination of a tenancy, as notice of termination of a tenancy without grounds is possible under the *Residential Tenancies Act 1995*: see section 83, and in any event the fact that a tenant has ceased to be a member of a co-operative is also a ground for termination of a tenancy agreement: section 82. This argument is put before the Housing Appeal Panel as a decision to terminate membership generally is generally consequential upon a decision

to refuse or terminate membership, and the decisions are frequently conflated. This was argued in *D v Z Housing Association* (HAP0872) where the applicant had been housed for 8 years contrary to the Association's Constitution. The parties then fell out; the Association decided to terminate the tenancy and did not give reasons. The Housing Appeal Panel considered this unreasonable and oppressive.

99 The Housing Appeal Panel has seen some examples of where co-operatives have considered alternatives. Many co-operatives are conscious of the importance of fairness and make reasonable and objective decisions: see *B v Y Co-operative Inc* (HAP0011) and *B v Y Co-operative Inc* (HAP0819) where alternatives were proposed at the hearing by the parties and acted upon, and other cases where the history of the dispute shows numerous attempts and proposals by co-operatives to accommodate the needs of members and applicants: see *F v T Co-operative Inc* (HAP0831), where numerous adjustments were made to the applicant's obligations to address her medical condition and her child care needs; and *H v R Co-operative Inc*. (HAP0722) where the Co-operative tolerated ongoing bullying, interference and harassment from the applicant and made constructive and supportive arrangements for her tenancy appreciating her behaviour was a consequence of her medical condition.

WHISTLEBLOWER PROTECTION FOR THE COMMONWEALTH PUBLIC SECTOR

Mark Dreyfus QC, MP*

The Rudd Government was elected in November 2007, having committed itself to high standards of integrity, transparency, responsiveness and accountability.

Since the election, a range of measures have been introduced to ensure high standards of accountability and integrity within government.

As part of these reforms, in July 2008, the Attorney-General, on behalf of the Cabinet Secretary, Senator the Hon. John Faulkner, asked the House of Representatives Legal and Constitutional Affairs Committee to inquire into and report on whistleblowing protections within the Australian Government public sector.

As Chair of the Committee, I oversaw the inquiry and presented the report to the House of Representatives in February 2009.

Today I want to take the opportunity to provide an overview of the recommendations made by the Committee in its report, as well as offering some observations on furthering an agenda of accountability and transparency in government.

Protection of public interest disclosures is part of an array of integrity reforms which are being undertaken by the Government. The following is an outline of some of the reforms so far:

- For the first time, integrity and governance functions have been brought together under a single minister, the Cabinet Secretary and Special Minister of State. This includes the agencies of the Commonwealth Ombudsman, Privacy Commissioner, Australian Public Service Commissioner, Inspector-General of Intelligence and Security, Auditor-General and the National Archives of Australia.

- The Government has introduced the Evidence Amendment (Journalists' Privilege) Bill 2009, which amends the professional confidential relationship provisions by inserting an objects clause. This states that the object of Division 1A is to achieve a balance between the public interest in the administration of justice, and the public interest in the media communicating facts and opinion to the public and, for that purpose, having access to sources of facts.

- The Government has introduced legislation containing the first stage of reforms to Freedom of Information, including the abolition of conclusive certificates.

- The Government released an exposure draft of the Government's Freedom of Information (FOI) reform legislation on 29 March 2009. This includes the most

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substantial overhaul of the Federal Freedom of Information regime since the Act's inception. The structural reforms in the draft legislation, including the appointment of an Information Commissioner and an FOI Commissioner, will represent a major change in FOI administration and are directed at creating a "pro-disclosure" culture.

- The Special Minister of State wrote to all agency heads in April 2009 to state that the starting point for considering FOI requests should be a presumption in favour of giving access to documents.

- The Government has strengthened the Standards of Ministerial Ethics, introduced for the first time a Ministerial Staff Code of Conduct and, on 1 July 2008, a Lobbying Code of Conduct.

- The Government has established the Public Service Ethics Advisory Service to work with all Australian Public Service agencies to enhance ethical awareness and decision making capabilities.

- The Government has introduced measures to lower disclosure levels and thus increase transparency in relation to electoral and party fundraising; these measures have yet to be passed by the Senate.

The purpose of each of these reforms is to enhance openness, accountability and transparency within the Commonwealth Government.

Openness, accountability and transparency in government are important for at least two reasons. First, the application of these principles helps to maintain confidence in our system of government – public confidence in the elected representatives, as well as public confidence in the public service. Secondly, these principles lead to better outcomes in public policy and administration.

Whistleblowing

Protecting whistleblowing - or public interest disclosures – is part of this broader public integrity framework. This framework should be a feature of any modern democracy.

The *Whistle While They Work Project* defined whistleblowing as a 'disclosure by organisation members (former or current) of illegal, immoral or illegitimate practices under the control of their employers, to persons or organisations that may be able to effect action.'

At present, the Commonwealth is the only Australian jurisdiction that does not have legislation dedicated to facilitating public interest disclosures and protecting those who make them.

The House Legal and Constitutional Affairs Committee was asked to consider and report on a preferred model for legislation to protect public interest disclosures within the Australian Government public sector.

We sought submissions from Commonwealth, State and Territory agencies, non-government organisations, relevant professional associations, media bodies, unions, academics and from whistleblowers themselves.

The Committee held 11 public hearings in Melbourne, Canberra, Sydney and Brisbane. The hearings included two roundtable discussions with public administration experts, lawyers and

academics, held on 9 September 2008, and with representatives of media related organisations, held on 27 October 2008.

The key recommendation of the Committee was that the Australian Government introduce legislation to provide whistleblower protections in the Australian Government public sector, and that it do so as a matter of priority.

Principles

As a starting point, we recommended some key principles that we felt should guide such legislation:

- It is in the public interest that accountability and integrity in public administration are promoted by identifying and addressing wrongdoing in the public sector;
- People within the public sector have a right to raise their concerns about wrongdoing within the sector without fear of reprisal;
- People have a responsibility to raise those concerns in good faith;
- Governments have a right to consider policy and administration in private; and
- Government and the public sector have a responsibility to be receptive to concerns which are raised.

Who should be covered

Limited protections against victimisation and discrimination are provided to Australian Public Service (APS) employees who report breaches of the APS Code of Conduct under current whistleblower provisions (s 16 of the Public Service Act 1999); however, only two-thirds of the 232,000 Commonwealth public sector employees are in the APS and covered by these whistleblower provisions.

Employees of agencies subject to the Commonwealth Authorities and Companies Act 1997 are presently excluded. These include organisations like the Australian Broadcasting Corporation and the Australian National University. Former employees, contractors, consultants, and the staff of Members of Parliament are also excluded.

The Committee recommended that categories of people who could make protected disclosures be expanded to include those who are currently excluded.

In addition, the Committee recommended that others who have an ‘insider's knowledge’ of official misconduct, can be deemed to be public officials for the purposes of the legislation.

Those 'others' could potentially include a volunteer or an employee of a state government entity with inside information of misconduct in the Commonwealth public sector.

What should be protected

Evidence presented to the inquiry showed strong support for the type of disclosures outlined in the terms of reference.

The Committee recommended that all of those disclosures should be protected, except for ‘official misconduct involving a significant public interest matter’, because significance or

seriousness may not be something that is immediately obvious and making a report conditional on significance or seriousness may set too high a threshold for people to be confident in coming forward.

In line with the evidence received, the Committee considered that grievances over internal staffing matters are not matters that concern the 'public interest' and should be addressed through separate mechanisms such as existing workplace personnel processes.

What protections should be available

The Committee recommended that legislation provide for protection against detrimental action (including victimisation, discrimination, discipline or an employment sanction) and immunity from civil and criminal liability.

The unfair treatment of whistleblowers is a workplace issue that should be addressed through existing industrial relations law. Some limited protections are provided in the Workplace Relations Act 1996 and, since 1 July 2009, by the Fair Work Act.

Industrial relations law could provide better protections for whistleblowers than a unique scheme. That is why the Committee has recommended that the right to make a public interest disclosure be recognised as a workplace right and infringements of that right be dealt with by the appropriate workplace authority, now the Fair Work Ombudsman.

Compensation and existing rights of whistleblowers are to remain within the types of compensation and rehabilitation provisions available to employees generally; mediation and dispute settlement would also be within the scope of provisions available to employees generally.

Where a person is not subject to the jurisdiction of the industrial courts or tribunals, such as a member of the Defence Force, the Workplace Ombudsman may still investigate and issue an evidentiary certificate that adverse action has occurred.

Conditions

The Committee considered that the main condition which should apply in determining whether a disclosure is protected is the honest and reasonable belief of the whistleblower.

Decision makers should have the discretion to protect those who materially fail to comply with the procedures for making a disclosure, where a person has nonetheless acted in good faith in the spirit of the legislation.

The proposed public interest disclosure scheme aims to minimise the disincentives for people to make disclosures. Therefore, penalties and sanctions should not apply to those who do not follow the prescribed procedure or knowingly or recklessly make false allegations. The removal of protection in these circumstances is sufficient.

The Committee considered the merits of adopting a US-style reward system for whistleblowers such as the "qui tam" provisions in the False Claims Act. On balance, the Committee concluded that such a reward system would not contribute to the objects and purposes of the legislation.

In the Committee's view, it is appropriate to provide for compensation to restore a person to the position they would have been in, if not for adverse treatment arising from making a disclosure. The legislation should not remove any existing legal rights in relation to damages.

Procedures

Research indicates that the vast majority of disclosures are made internally. Legislation should encourage the making of disclosures within agencies because of their proximity to the issues and ability to effect action.

The Committee recommended that new legislation provide avenues for making disclosures to specified external agencies, such as the Commonwealth Ombudsman and the Public Service Commissioner, for cases where people consider, on reasonable grounds, that their disclosure would not be handled appropriately within their own agency.

The success of the new legislation depends on the extent to which those within the sector have confidence in the system.

Positive obligations on agencies are an important source of confidence.

Legislation should include strong positive obligations on agencies in receiving, acting on and reporting on disclosures.

The Commonwealth Ombudsman has a reputation and appropriate skills and experience in handling investigations into serious and sensitive public interest matters and is, therefore, in the Committee's view, the most suitable agency to oversee the administration of the legislation.

The Committee recommended that the Ombudsman have new statutory responsibilities under the scheme, including monitoring the system and providing training and education and reporting to Parliament on the operation of the system.

The Committee also proposed that the Ombudsman may publish reports on matters in the public interest that are raised under this scheme.

Third party disclosures

Since the tabling of the report in Parliament in February 2009, much of the public discussion regarding these proposed reforms has centred on the role that disclosures to third parties should play in the framework and what protections should be extended to those making such disclosures.

In determining the appropriateness of protecting disclosures made to third parties, particularly the media, the primary consideration must be how such disclosures could serve the public interest. If a form of disclosure cannot promote accountability and integrity in public administration or otherwise serve the public interest, the disclosure does not warrant protection.

Enabling protection for disclosures made to the media in certain circumstances could potentially act as a safety valve, where particularly serious matters take too long to resolve inside the system and for matters that pose immediate serious harm to public health or safety.

The Committee recommended that Members of Parliament be recognised as authorised recipients of public interest disclosures. This would complement the limited protections already afforded to those who provide information to parliamentarians under the Parliamentary Privileges Act 1987 (Cth). The Standing Orders of each House should be amended to ensure that Members act responsibly in relation to the disclosures they receive.

Disclosures should be protected when they are made during the course of seeking assistance from legal advisors, professional associations and unions.

People are much more likely to make disclosures within their own agency or through other prescribed channels. However, the proposed scheme recognises that people can sometimes have good reasons to turn to third parties to seek advice or make a disclosure.
A key principle for the new public interest disclosure legislation recommended by the Committee is that government has a right to consider policy in confidence. The Committee has recommended that protection should not apply where it is established that a person has 'leaked' confidential information.

Whistleblowing is distinct from 'leaking', in which an official covertly provides information directly to the media, intending to embarrass the government. Under the Committee's proposals, unauthorised disclosures of this nature may not be eligible for protection.

Leaking breaches the trust between the public service and the executive. There may also be unintended consequences including unfairly implicating people in charges of misconduct, putting incomplete or erroneous information into the public arena and incorrectly anticipating that the government has determined that it will follow a particular course of action.

The media lacks a structured and rigorous system of investigating and assessing the risks of publishing a disclosure. It is not in the public interest that internal investigations are undermined or that workplace confidentiality is breached.

In just the last few weeks, we have seen Australian media organisations:

- Publish the details of a forged email which the journalist had not seen and which had simply been read to him over the phone.

- Break a news embargo by announcing the visit by the Deputy Prime Minister to Iraq prior to her arrival there – a mistake that could have had serious security ramifications.

- Report a high level security operation that involved the raid on 19 houses and the arrest of several people on terrorism related charges prior to the operation being completed. The early release of this report could have endangered the lives of officials involved in this operation.

The British media seems to have even more trouble identifying the public interest, as shown, for example, by the controversy which erupted in July 2009 in the UK over media organisations engaging in large scale hacking into the mobile phones of celebrities, politicians and political advisers.

A free and independent media with access to information is a critical part of a modern democracy. There are countless examples of wonderful work done by the media in exposing corruption and maladministration. But the media is not and cannot be a formal part of the official public integrity framework. We need to find a role for the media in the public interest disclosure regime, but in my view that role is likely to be a limited one.

Organisational culture

The need to build a pro-disclosure workplace culture has been missing from much of the discussion around the issue of whistleblower protection. Although this was a strong theme in evidence given to the Committee, it has attracted almost no public comment since the tabling of the report.

Whistleblower protections are needed only when systems have failed to take public interest disclosures seriously, when systems have failed to deal with public interest disclosures and when employees making disclosures have suffered repercussions resulting from the making of the disclosures.

It is clearly preferable for employees to have disclosures treated appropriately and sensitively at the time of making the disclosure, rather than having to take remedial action to return themselves to the position they were in prior to making the disclosure.

Many contributors to the inquiry noted that there is a strong culture within the public sector against those who question work practices. Organisational culture is as important as legislation in producing the desired outcome of facilitating public interest disclosures and supporting those who make them.

The Committee recognised that legislation alone is insufficient in bringing about cultural change and promoting accountability in public administration. In addition to legislation, there is an important role for leadership and education in promoting a more supportive environment in which people feel at ease in raising their doubts about workplace practices.

A critical recommendation made by the Committee was that the Commonwealth Ombudsman be given responsibility to provide assistance to agencies in implementing the public interest disclosure system. It was felt that this should occur through assistance to employees to promote awareness through educational activities and through an anonymous and confidential advice line.

Conclusion

Legislation to protect whistleblowers in the Commonwealth public sector is long overdue. I am looking forward to legislation based on the Legal and Constitutional Affairs Committee's report being introduced soon to the Parliament.

WHISTLEBLOWING – THE IMPORTANCE OF MANAGERS IN IMPLEMENTATION OF THE LEGISLATION

Helen Couper*

The report of The Standing Committee on Legal and Constitutional Affairs Inquiry into whistleblower protections within the Australian Government public sector recognises that legislation alone is not sufficient for promoting accountability and protecting whistleblowers. Mr Dreyfus QC has said "A shift in culture needs to take place to foster a more open public sector that is receptive to those who question the way things are done".

The Queensland experience supports this notion.

Following the Fitzgerald Inquiry (The Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct) of 1987-1989, Queensland became the first Australian jurisdiction to introduce legislation to protect whistleblowers. The original interim legislation was followed by the enactment of the *Whistleblowers Protection Act 1994*.

Despite this state having the oldest and most comprehensive legislation[1], employee confidence in whistleblower protection in Queensland is low[2]. Interestingly, Queensland managers have a significantly higher level of confidence than the average employee.

Generally and not surprisingly, there is higher trust in management among employees who only ever report wrongdoing internally and lower trust in management among those who report externally at any stage, including after having reported internally in the first instance.

These and other findings[3] of the Australian Research Council Linkage Project – *Whistling While They Work: Enhancing the Theory and Practice of Internal Witness Management in Public Sector Organisations*[4] highlight the importance of the role of public sector managers in the practical implementation of the whistleblower protection legislation and in shifting culture[5]. This is of particular significance in the current integrity framework in Queensland.

The *Crime and Misconduct Act 2001* (CM Act) established a framework for joint responsibility on the part of the Crime and Misconduct Commission (CMC) and public sector agencies, within which they could achieve continuous improvement in the integrity of, and reduce the incidence of misconduct in, the public sector.

The 'devolution principle' in the CM Act[6] provides that, generally speaking[7], action to prevent and deal with misconduct in an agency should generally happen within the agency itself. It recognises that achieving a misconduct resistant public sector with a strong culture of integrity cannot be achieved alone through strategies employed by an external oversight body; there must be commitment within the agencies themselves.

In the experience of the CMC, to achieve the purposes contemplated by the Act, public sector managers at all levels, particularly at the local level, must accept responsibility for the

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conduct of their staff and the practices of their workplace. It is essential that managers create a learning environment in the workplace in which people feel able to raise issues of concern. Public sector managers must own the problems and their solution, rather than see them as solely the business of an oversight body.

The CMC has embarked upon a project for the implementation of further devolution of responsibility from the CMC to the agencies and, within the agencies, to managers at the appropriate local level. An agency's whistleblower policy is an important element in the integrity framework that supports devolution.

Clearly the way in which an agency implements whistleblower protection legislation, the role of managers and an agency's culture are intertwined. An agency's internal policy must be accessible to everyone within the organisation and set the appropriate tone.

Many agencies have failed to conduct ongoing awareness sessions and education programs throughout the organisation. Often, it seems that the only people who are aware of, and possibly understand, an organisation's whistleblower regime - and the policy, procedures and process - are those in the particular business unit who have responsibility for it. It is essential that an agency ensures that everyone has a shared understanding of what the regime means in practical terms, not only for the whistleblower but also for all the stakeholders who may be affected in some way. It is too late during, or after, the event to try to ensure that all concerned develop an understanding of and trust in the process. An initial agency awareness and education campaign should be followed up, with managers regularly re-enforcing the message in their workplace.

Achieving the right approach and balance in policy and procedures is important. For example, too legalistic an approach can lead to unintended consequences. One agency has developed a formal – and often lengthy – legalistic process of whistleblower certification, resulting in a letter to the employees concerned advising of their status. In some minds, this process has created the impression that the agency's focus is not on encouraging people to come forward and in protecting them, but rather on ensuring that the agency is not sued by the subject of the public interest disclosure or otherwise adversely affected, as a result of using information provided by a person who is not, technically, a whistleblower. The 'certificate' has been seen by some to support the belief that a whistleblower is totally immune from any action, even appropriate and reasonable management action. Still others, who have raised issues of concern in good faith but who have not been deemed technically to be whistleblowers, have felt unsupported and left adrift to suffer the consequences of coming forward. Such an approach does nothing for an agency trying to develop a strong culture of integrity and continuous improvement and a workplace in which there is respect for one another and positive encouragement to raise genuine concerns. In particular, it seems that professional jealousies and perceived unwarranted and scandalous imputations on reputation need to be managed.

Agencies need to develop sound processes to deal with whistleblowers and their disclosures and managers' capability to implement the processes.

Managers must be able to recognise a public interest disclosure and understand its implications, have good decision-making skills, carry out effective performance management, be able to have difficult conversations with staff, know when and how to appropriately share information, have skills in gaining the trust of staff, be prepared to seek advice and support, promote continuous improvement, and through their actions embed a culture of integrity and accountability.

Inadequate procedures and processes and / or a manager getting it wrong can result in forests of paper destroyed, a dysfunctional workplace and agency, unnecessarily ruined

reputations, lost public confidence and years of effort to undo damage done and achieve a positive shift in culture in the workplace.

For example, in one case a manager's uninformed dismissive response: 'trust me, there is no problem' to a concern raised by a dedicated hard-working but 'difficult' officer led that officer to suspect impropriety in a decision not to prosecute a breach of legislation and to make a complaint to the CMC. The decision not to prosecute was perfectly proper but management had not been prepared to share information with the officer to explain why he need not have concerns. Managers at various levels resented the complaint and made it known, the officer suffered reprisals and lost faith and trust in the organisation to which he had dedicated a large part of his working life and ultimately left. Others within the workplace fell into two camps in their view of what had occurred.

In another agency, the manager did not recognise that a public interest disclosure was being made to him. He considered the subject of the disclosure to be one of his better officers and believed that it was unlikely that there was cause for concern. He also thought, wrongly, that natural justice required him to tell the subject about the complaint. Having been told by the manager that a complaint had been made about him, the subject and his colleagues proceeded to guess who in the workplace was the source of the complaint and to make that person's life a misery. Their victim ultimately retired medically unfit as a result of the reprisal action taken against him. Unfortunately for all concerned, they had guessed incorrectly, the victim was not the whistleblower. Needless to say, none of this did anything for the actual whistleblower's, and his supporters', level of trust in management and colleagues.

Senior management needs to set the standard and actively be seen to support whistleblowers.

One chief executive has decided that he will personally meet with every whistleblower in his agency to thank them for coming forward and assure them that he will take steps to investigate their concerns and take any appropriate action. He considers the time well spent compared with the considerable waste of time and resources that had resulted from a previous failure of management to deal appropriately with a disclosure. What had started with one employee in a small business unit being ignored when he raised some concerns - which seemed far fetched but which ultimately proved to have foundation – escalated into a number of employees over a period of years making a series of complaints – which did not have substance - including complaints to the media.

Senior management support of whistleblowers also needs to be ongoing. In one telling case, an entire large business unit within an agency became disenchanted with, and distrustful of, senior management and ultimately dysfunctional, because of a perceived failure of management to support the original whistleblower and subsequent internal witnesses, who came forward during an investigation and subsequent court proceedings. While senior management are firmly of the view that their processes are best practice, the manager of the business unit now actively discourages his staff from whistleblowing because of the serious emotional impact the particular case has had on his staff.

In another example of a situation not well handled, a whistleblower and her supporters recorded every conversation with their manager and claimed every management decision concerning them, with which they did not agree, as being a reprisal. Numerous complaints were made over a lengthy period of time and at one stage their grievances were aired publicly, an action which caused their colleagues to react very badly. It took tens of thousands of dollars and the involvement of two external agencies and an external consultant to try to resolve the situation.

These are probably extreme examples of what can occur but they are informative. There are many other more minor examples that equally demonstrate the vicious circle that can be created by an unhealthy culture, an agency's poor implementation of whistleblower legislation and managers who do not have the necessary capability to give effect to the legislation or contribute to a positive shift in an agency's culture.

Whistleblower protection or public interest disclosure legislation, in effect, seeks to treat symptoms and to some extent to cure the ills of unhealthy public sector agencies. However, the effectiveness of the treatment relies upon a strong functional immune system within the agencies. If that system is not operating effectively, symptoms might be relieved in the short term but an agency's health can only deteriorate further over time.

Endnotes

1 Brown, A.J. 2006, *Public interest disclosure legislation in Australia: towards the next generation*, Issues paper, Commonwealth Ombudsman, NSW Ombudsman and Queensland Ombudsman
2 This finding, based on results of a survey conducted in a number of 'case study public sector agencies' from various jurisdictions, is in relation to employees who believed they were covered by whistleblower protection legislation. Whistling While They Work Report 2008
3 The results confirmed the importance of organisations' internal disclosure procedures and increased their responsibility to manage reporting well on an internal basis.
4 Whistling While They Work Report 2008 and 2009 Report (released at the 2009 Australian Public Sector Anti-Corruption Conference).
5 Three Queensland integrity agencies – the Crime and Misconduct Commission, the Queensland Ombudsman and Public Service Commission – have responded to this research by developing a series of advisory resources to ensure that practical advice in regard to whistleblowing is available across the public sector.
6 Section 34
7 Subject to the principles of co-operation with the CMC and public interest and the agency's capacity

FEDERAL FOI REFORM AND MEDIA ACCESS TO GOVERNMENT INFORMATION: A TRANSPARENCY REVOLUTION OR JUST A BETTER FOOTHOLD?

Tristan Robinson*

Since the early 1980s, governments across Australia have responded to calls for new avenues of accountability through open government and citizen participation by enacting freedom of information (FOI) legislation.[1] The rationale for opening-up public access to government information is multi-dimensional: firstly, greater transparency is viewed as an essential precondition for political accountability and discouraging corruption; and secondly, access to information underlies public participation in government.[2] An accountable government and a properly informed electorate are integral components of a representative democracy.[3]

The ability of citizens to take part in and influence government decision-making is considered to be a fundamental right.[4] The significance of a strong FOI regime lies in the fact that it assists in the more meaningful and effective exercise of this right,[5] by providing citizens with the knowledge and information that make informed commentary, debate and discussion of government action possible.

However, governments have little incentive to disseminate information that conflicts with embedded Westminster notions of executive secrecy and their political interests.[6]

The media has a key role to play here in bridging the gap between the public's right to information and government's frequent disinclination towards disclosure. The sheer quantity and complexity of information produced by government means that 'much of the fact-finding and argumentation [necessary to keep the public informed] has to be conducted vicariously, the public press being the principal instrument'.[7] In this way, the media, as a 'fourth estate' of government, acts as both a conduit for information and a watchdog that defends the public interest.[8]

Although the federal FOI regime to date has proved useful to individuals seeking to access or amend their *personal* information, the media has expressed concerns regarding the effectiveness of FOI as a source for obtaining *government-controlled* information.[9] Journalists have argued that they are "unable to effectively hold governments to account given the scope of statutory [exemptions] ... for requested documents, the time taken to fulfill requests and the substantial processing costs".[10] The Australian Law Reform Commission (ALRC) has found that administrative non-compliance with requests for information acts as a major disincentive to the greater use of FOI.[11] The ALRC reported that "some agencies decide immediately not to disclose information and quickly consult the list of exemptions to find some way to justify nondisclosure".[12] This finding mirrors a broader community perception that federal FOI has failed to give a meaningful right of access to government information and (even by the government's own admission) has not achieved its broader rationale.[13]

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* *Tristan Robinson's article won the AIAL 2009 Essay Prize, when he was a final year LLB student at the University of Sydney. He is about to commence a Master of Laws at Columbia University, NY.*

Notwithstanding these criticisms, the *Freedom of Information Act* 1982 (Cth) (FOI Act) has remained substantially unchanged since its enactment.[14] It is therefore not surprising that the media's use of FOI mechanisms has remained very low, at around 10 per cent or less of all applications in 2001.[15] This compares unfavourably with other Westminster common law jurisdictions, such as New Zealand, the United Kingdom[16] and Ireland, where requests by media organisations make up a more significant 20 per cent of total requests.[17]

Further, there is evidence that some federal agencies deal differently with requests by the media and are less likely to disclosure politically sensitive information to media applicants.[18] Therefore, in its current form, federal FOI seems to offer the media little with which to deliver the openness and transparency essential to improved accountability and a more robust democracy.

The government's response: a revised approach to FOI?

In response to the continued criticism regarding the operation of the FOI Act, the then acting Attorney-General, Duncan Kerr, requested that the ALRC conduct an inquiry into the state of federal FOI, which culminated in the *Open Government Report* (ALRC 77).[19] ALRC 77 contained 106 extensive recommendations, which have never been acted upon. In March 2009, however, Cabinet Secretary Senator John Faulkner released exposure drafts of the most ambitious attempt at federal FOI reform to date: the *Freedom of Information Amendment (Reform) Bill* 2009 (Cth) (the Reform Bill) and the *Information Commissioner Bill* 2009 (Cth) (the Commissioner Bill).

Although these reform proposals represent a significant step forward in improving media access to government-controlled information, they appear to fall short of a broader 'transparency revolution'.[20] This is because the reforms engage in a fairly limited rethinking of the broader structural problems associated with the FOI Act that make it an unattractive source of information for journalists. FOI will remain premised upon the reactive dissemination of information, that is, through a request, response and appeal process. This is not well suited to journalists' needs for timely and low-cost access to information.

The reforms are centred upon improving the 'back-end' of FOI (the request and document release mechanism) and direct insufficient attention to the 'front-end' – that is the need to develop a broader whole of government framework for the management of information that is geared towards creating a *pro-disclosure* culture in government and the public service. By reconceptualising the management and flow of information away from the 'back-end', one-off document release mechanism, the media will be better able to leverage FOI to keep the public informed on matters of public interest. In turn, this will encourage the discussion, review and scrutiny of government activities that underlie public accountability and citizen participation in government.

It is important for any effort at reform to commence with and converge around the 'front-end' of FOI – at least if the government's information policy is to shift from the existing 'pull-model' (centred upon one-off release), to a 'push-model', where information is routinely and proactively published by the government without the need for formal FOI request.[21] FOI reform must be broad-based and proceed from the ground (the level of administrators) upwards in encouraging a pro-disclosure culture, in order to ensure that providing access to information becomes a core public service value. Promoting cultural change at the level of administrators needs to be the first step in the reform process because other reform initiatives – such as the creation of a strong pro-access legislative architecture for FOI – can be emasculated by an unsupportive civil service.[22] Unless there is a change in the attitude and ethos of public administrators, legislative reform will be 'something of a confidence trick',[23] promising much but delivering little in practice.

In addition, starting the reform process by re-orienting FOI towards a pro-disclosure 'push-model' will take some pressure off the 'back-end' request and release mechanism and enable it to function more effectively. This is because the broader proactive release of government information will leave FOI law to manage a 'much smaller holding of government information, representing that which is truly in contest'[24] in terms of the competing public interest for and against disclosure. Similarly, greater proactive publication will leave agencies less backed-up with routine FOI requests and better able to devote their attention to applications for more contentious information. It is this more contentious information that is likely to be of particular interest to the media.

This paper will assess the extent to which the proposed FOI reforms offer the media improved access to government-controlled information. The first part of this paper will examine the 'front-end' reform proposals (mostly contained in the Commissioner Bill), concluding that, although they give the media a solid foothold from which to pursue government-controlled information, the reforms suffer from a lack of follow-through. In particular, there is an urgent need to shore up the compliance functions of the Information Commissioner and widen the Information Publication Scheme. The second part of this paper discusses several 'back-end' flaws left over from the 1982 FOI Act that are not addressed by the proposed reforms. These are likely to continue to prevent journalists from making greater use of FOI mechanisms and need immediate attention before the final passage of the Bills.[25]

The reform proposals will be measured against ALRC 77, using several of its key recommendations as a reference point. Further, alternative reform proposals (many of which respond to concerns raised at the FOI Reform Forum attended by the author)[26] will be touched upon.

'Front-end' reform proposals

In sum, the reform proposals lay down a strong base for revitalising FOI by inserting the rationale for FOI into the objects of the FOI Act and tying this back into a revised public interest test. Nevertheless, the extent to which this will equate to improved media access to government-controlled information in practice remains unclear. In any case, the reforms leave a great deal to be done by the Freedom of Information Commissioner.

1. Recasting the statement of objects: a pro-disclosure bias

The Reform Bill successfully responds to what is perhaps the most fundamental recommendation of ALRC 77,[27] by establishing a clear legislative bias in favour of disclosure. This has been achieved by removing the reference in the objects of the FOI Act to the right of access to information being '*subject to'* the exemptions provisions of the Act.[28] Previously, this 'subject to' proviso led the courts to interpret the Act as not requiring a 'leaning' in favour of disclosure.[29] The tendency of courts to adopt a neutral stance in relation to disclosure did little to promote a right of access and provided significant leeway for administrators to refuse disclosure by asserting an exemption.[30] However, the amended objects contain a guiding 'principle of availability',[31] which is unlikely to be diluted because the new objects make no reference to any exemptions.

For the first time, the objects also explicitly refer to the democratic rationale underpinning FOI:

> 'The Parliament intends, by these objects, to promote Australia's representative democracy by ...:
>
> (a) increasing public participation in Government processes, with a view to promoting better--informed decision-making;
>
> (b) increasing scrutiny, discussion, comment and review of the Government's activities'.[32]

This leaves little doubt that the courts should now adopt a pro-disclosure interpretation and marks a crucial first step in opening-up access to government-controlled information. A pro-disclosure interpretation will support a presumption that the disclosure of government documents is generally in the public interest. It will also reduce the number of situations in which administrators can justifiably claim that information is exempt.[33] The objects clause also recognises that 'information held by the Government is to be managed for public purposes and is a national resource'.[34] This is the basis of a more open attitude and alleviates an 'us versus them' mentality on the part of administrators towards the release of information.[35]

Further, the objects acknowledge the dual nature of FOI (that is, proactive publication at the 'front-end' and document disclosure at the 'back-end'), flagging the important front-end objective of 'requiring agencies to publish ... information'.[36]

2. The Office of the Information Commissioner

Although the Commissioner Bill offers an inkling of an attempt to open-up access to information, the Government has yet to particularise how the functions undertaken by the Commissioner will help give effect to the objects of the Act. The Bill's core proposal – the creation of an independent statutory officer and 'champion of FOI'[37] – marks a very significant step towards promoting more open government and implements ALRC Recommendation 18.[38] Nevertheless, to be effective, the Commissioner will need to play a central role in monitoring closely the administration of FOI and in driving cultural change.

However, the Bill seems to leave the Commissioner with a great deal of work to do to underwrite administrative compliance. This may be a cause for concern, especially since, if the Commissioner fails in this task, the re-casting of the objects clause may be a largely hollow exercise.

Whilst it is difficult to assess the impact of the Commissioner Bill without a fuller picture of the supporting detail, some of the 'freedom of information functions'[39] set out in the Bill that will be crucial for the Commissioner to promote compliance with the FOI Act, include:

- 'providing awareness and understanding of the ... Act'[40]; however, the Commissioner should go beyond merely promoting understanding and encourage the development of a pro-access attitude to information disclosure.[41] Senator Faulkner has flagged the creation of a culture of disclosure as an important policy objective,[42] yet this does not find clear expression in the Commissioner Bill.

- 'providing advice, assistance and training to any person or agency'[43]: the relatively complex wording and tests to be applied for certain exemption provisions in the FOI Act suggest that the training of administrators by the Commissioner is crucial.

- 'collecting information and statistics from agencies and Ministers about freedom of information matters'[44]: the Commissioner should go further than simply collecting and publishing this data in annual reports and should conduct detailed audits of agency records relating to FOI applications, as recommended by ALRC 77.[45] The results of these audits should be provided to the Parliamentary Committee through annual agency report cards.[46] Instituting this as an indicator of agency performance will make agencies more accountable and help to promote FOI compliance.[47]

It is conceded that it is necessary for the powers of a statutory office like the Information Commissioner to be stated in general terms, so as to allow the Commissioner discretion to do as he/she sees fit to carry out his/her functions. However, in providing this degree of flexibility, there is a danger that, should the Commissioner fail to elicit good information

management practices from the start, it will be difficult to encourage administrative compliance further down the line. This is because the Commissioner seems to have little power to impose sanctions or to offer incentives to agencies to promote the proper administration of FOI.

Although the Commissioner has been given substantial authority to investigate and review agency compliance,[48] this has not been backed-up by penalty provisions to be applied where an agency is found to have contravened the FOI Act – the most the Commissioner can do is table a written report to the responsible Minister.[49] This compares unfavourably with the draft *Open Government Information Bill* 2009 (NSW) (the OGI Bill), which creates new offences for knowingly contravening FOI legislation.[50] Importantly, the Reform Bill also makes no provision for complaints to be made to the Commissioner about an agency's failure to comply with the requirements of the Information Publication Scheme (IPS). Since administrative compliance is a key sticking point to increasing the media's use of FOI, stronger punitive provisions should be contained in the Commissioner Bill to bolster the monitoring and investigative powers of the Commissioner.[51]

Further, it will be crucial for the Office of the Information Commissioner to be adequately resourced and employ sufficient staff to properly carry out its functions,[52] especially since a lack of funding and governmental support has weakened FOI monitoring in the past.[53]

3. The Information Publication Scheme (IPS)

The IPS provides a good framework for the managed disclosure of information, but it fails to go further and mandate a broader whole of government system for the management of information.

The bulk of the information that agencies are required to publish under the IPS replicates the current s 8-9 of the FOI Act. However, the Reform Bill adds two new publication requirements: agencies will be required to publish on the internet 'information ... that is routinely provided to the Parliament'[54] and 'information in documents to which the agency routinely gives access in response to requests'.[55] Providing direct access to this kind of information recognises that 'beyond the public interest is the applicant's right to know what information ... government holds, each FOI application is a vehicle for promoting the wider public interest in the enforcement of open government'.[56]

Nevertheless, these two additions to the FOI Act's publication requirements may be of little significance to journalists, since information routinely released by agencies is unlikely to be of the contentious or ground-breaking sort that is of interest to journalists.[57]

The Commissioner can issue guidelines requiring other classes of information to be published[58] – however, the decision of whether to issue such guidelines is at the discretion of the Commissioner and it is not mandatory to do so,[59] as is the case under the equivalent UK provision.[60] It is unclear why the issuing of guidelines is only discretionary (even if it is likely that the Commissioner *will* do so). This provision should be stiffened-up to ensure that agencies are not left to make up their own rules and develop inconsistent approaches to publishing information.

If the Commissioner Bill were to make it mandatory for agencies to proactively release a wider range of information, the ambit of the FOI request and release mechanism would be narrowed and left to deal with only the most sensitive government-held information. Proactive release would make more information *directly* and *immediately* available to the media and reduce the formal, one-off release mechanism to an option of last resort.[61]

The ability for FOI to act as a tool for investigative journalism would be improved if the IPS were reconceptualised as a comprehensive electronic record and document management system, within which all successful FOI requests are published and logged in a searchable FOI database.[62] There is no hint of this in the Reform Bill, whereas the NSW OGI Bill requires agencies to create and maintain an electronic reading room[63] that provides web-based access to previously released documents. This has become standard practice in the United States, where agencies publish on their websites recently disclosed information and news material that journalists would have previously had to make a formal FOI request to obtain.[64] To encourage the media to invest in and make use of FOI, the online publication of information provided to requestors should be delayed 24 hours (enabling the requestor to maintain an informational advantage for a 24 hour news cycle).[65] This rewards the requestor for the time and effort involved in making an FOI request, without compromising the benefits of subsequently making this information available more broadly.

A document management and publication system of this kind can also help the 'back-end' of FOI to function more efficiently, by providing journalists with better information and more specific detail with which to frame an FOI request.[66] A more precise request is less likely to be resisted by administrators and will be easier to process in a shorter time frame and at less cost.[67] Better document management can also help turn FOI 'inside-out': rather than agencies holding the balance of power (in that they are responsible for making the search and determining whether disclosure is appropriate), documents can be classified in advance (subject to audit by the Commissioner) and journalists can conduct a preliminary search themselves.

"Back-end' reform proposals

The bulk of the proposed reforms are centred upon improving the 'back-end' of FOI (the request and release mechanism), rather than directly focusing upon changing the public sector culture of passive resistance towards disclosure and promoting a philosophy of open government.[68] Although some 'back-end' proposals are likely to make government-controlled information more accessible to the media, the Bills do not address several obstacles to media access to information left over from the FOI Act.

1. Rationalising the exemption provisions

Although the reference to exemptions in the objects of the Act has been removed, the Reform Bill does not do much to cut-down the broad categories of documents able to be exempt from disclosure. Only two of the rarely used exemptions are abolished (Executive Council documents[69] and documents prepared in accordance with companies and securities legislation)[70], all other 16 exemptions remain in one form or another.

The exemption for Cabinet documents has traditionally been the most problematic for journalists, because it has the effect of 'placing beyond the reach the very documents that would be of the greatest utility in scrutinising governments and keeping them accountable'.[71] This previously absolute exemption (justified on the grounds of upholding the Westminster 'Cabinet oyster')[72] will now contain a qualification – Cabinet documents will need to pass a further test and will only be exempt where they are brought into existence for the *dominant purpose* of submission for consideration by Cabinet.[73] This gives effect to Recommendation 46 and acknowledges that disclosing documents not brought into existence for the purpose of consideration by Cabinet are not necessarily detrimental to the Cabinet process.[74] Importantly, agencies will no longer be able to abuse this exemption and avoid disclosure simply by attaching these documents to Cabinet submissions.[75]

The addition of a dominant purpose test will improve access to some government information, at least compared with the undiscriminating 'class classification'[76] that currently

operates to protect Cabinet documents from disclosure.[77] The proposed amendments move closer towards the approach taken to exemptions under New Zealand's *Official Information Act*,[78] which are worded in 'consequential terms'.[79] It would be more consistent with providing a right of access to information for documents under the FOI Act to (in parity with the *Official Information Act)* only be withheld where disclosure would have an adverse effect upon the operation of government.[80]

It is not mandatory to assert an exemption - just because a document can be classified as falling within the bounds of an exemption does not mean that it must be withheld. Nevertheless, some administrators have tended to automatically refuse access if a ground of exemption is technically available.[81] This underscores the need for training and the promotion of a pro-disclosure culture at the 'front-end'. Senator Faulkner has advised government secretaries and agency heads that the proper operation of a Westminster system of government does not require *all* information falling within an exemption to be withheld.[82] Rather, the 'starting point for considering FOI requests should be a presumption in favour ... of access'.[83] It remains to be seen whether this will make agencies less prone to withhold information beyond what is legitimately within the scope of the exemptions.[84]

A long-standing barrier to accessing government information, which is continued by the Reform Bill, is to leave the parliamentary departments outside the scope of FOI (notwithstanding Recommendation 73 to the contrary). This means journalists cannot use FOI mechanisms to access information concerning payments made to individual Members of Parliament or Senators and how these sums have been acquired or spent.[85] Parliamentary departments are included in the coverage of UK FOI, and the Canadian Information Commissioner has made a recommendation to this effect on the basis that:

> the public 'expect[s] all publically funded bodies to be publically accountable under access to information legislation. Therefore, it is recommended that the administrative records of the Senate, the House of Commons, the Library of Parliament ... be covered by the Act, subject to provisions protecting Parliamentary privileges'.[86]

This rationale applies with equal force in Australia. Notwithstanding this and the ALRC's view that 'there is no justification for the parliamentary departments to be excluded from the [FOI] Act and ... being subject to the Act will not cause any greater inconvenience for them than is caused to other agencies'[87], the Reform Bill has not addressed this issue.

2. A unified 'public interest' test

A significant pro-disclosure feature that will benefit media access to government information is the new over-arching public interest test,[88] which is accompanied by a list of factors for and against disclosure.[89] In line with Recommendation 37,[90] this test is weighted in favour of disclosure:

> 'the agency or Minister *must* give access to the document ... unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest' [emphasis added].[91]

The new public interest test prevents administrators from making 'class' claims to exempt documents in that it requires decision-makers to examine the content and context of each individual document in balancing the interests for and against disclosure.[92] The provision also clarifies that the onus is on the respondent agency to establish that the public interest lies in nondisclosure.[93] This gives substance to the notion that the public has access to government information *as of right.* The Reform Bill thus makes the public interest the central consideration in the determination of an FOI application.

The listing of factors in favour of, and irrelevant to, the public interest in disclosure in ss 11B(2)-(3) will open-up access to information by helping decision-makers to easily identify the relevant public interest factors that need to be balanced. Importantly, the amendments tie the public interest test back to the objects of the Act. Agencies and Ministers must now take explicit account of whether a decision to withhold information would 'promote the objects of the Act'[94] and 'inform debate on a matter of public importance'.[95] This bodes well for an improved access regime, since the promotion of open governance is now a *direct* factor to be considered in processing an FOI application.

The amendments are aimed at framing the public interest test upon these more principled grounds and eliminating the more spurious public interest arguments for non-disclosure. Under s 11B(4), many of the arguments criticised by Hayne J in *McKinnon v Secretary, Department of Treasury*[96] (the so-called *Howard* factors justifying non-disclosure)[97] are explicitly stated to be irrelevant considerations in determining whether disclosure would be contrary to the public interest. These include: that access could cause embarrassment to the Commonwealth,[98] or could result in confusion and unnecessary debate.[99] Interestingly, one of the *Howard* factors has been noticeably omitted from the list of irrelevant factors – that disclosure would inhibit the 'frankness and candour' of communication between government and the public service. This seems to leave open the possibility that decision-makers will be able to continue to block access to documents by asserting that 'frankness and candour' supports non-disclosure on public interests grounds.

If the need to protect the free flow of honest advice between government and bureaucrats is still a factor relevant to the public interest in non-disclosure, this should be made explicit (rather than leaving the Act silent on the issue). At the FOI Reform Forum, attended by the author, it was suggested that this could be done by redrafting s 11B to take into account those factors set out by Tamberlin J in *Haneef and Department of Immigration and Citizenship* as favouring non-disclosure.[100]

A potential concern with the universality of the public interest test (that is, its application to all conditional exemptions) arises where the Reform Bill grafts the public interest test onto an 'unreasonableness' test. This occurs in the case of the personal privacy conditional exemption[101] and the business affairs conditional exemption.[102] This creates the problem of administrators having to apply a two-stage or double-barrelled test for disclosure decisions (in that they must consider both the broad public interest factors in s 11B and the specific unreasonableness of disclosure). The Reform Bill offers no clear demarcation between what considerations inform each test, nor any guidance upon how they are to be applied jointly. The ALRC has noted that 'it can be difficult to perform ... [the] balancing exercise' required by the public interest test,[103] supplementing this with a second, 'unreasonableness' test is likely to complicate this exercise even further.

3. Review of FOI decisions

The Reform Bill adds a further tier (on top of the AAT) to the external merits review system, allowing the Commissioner to conduct independent merits review of decisions by agencies and Ministers to refuse requests for access to documents.[104] This introduces an independent body of review for primary FOI decisions, yet the amendments retain internal review as a prerequisite for external review by the Commissioner or AAT.[105] The government's position is that internal review is inexpensive, efficient and benefits the applicant (with over 50% of primary decisions being varied in some way in favour of the applicant).[106]

However, this rationale does not explain why applicants should not have the *option* of bypassing internal review and proceeding directly to external review[107] (as recommended by ALRC 77 and proposed in the NSW OGI Bill).[108] If internal review is principally for the benefit of the applicant, there is force in the argument that applicants should be allowed to waive

this step in the review process. It seems desirable that there should be a degree of flexibility to take into account the particular circumstances of the applicant.[109] For example, if an applicant has had a hostile or adversarial experience in dealing with an agency to date, they are unlikely to gain much from internal review.[110] Proceeding to internal review in this scenario may simply lead to further delay in the progress of an application, which journalists are at pains to avoid.

Further, if agencies are made immediately accountable to external review, the quality of their initial decisions may improve and they are likely to pay greater attention to their compliance with the FOI Act.[111]

4. Cost and time barriers to access

The high costs and the long time frames that apply in obtaining decisions regarding access are major barriers to the media's effective use of FOI mechanisms. Most journalists seek information whose immediate value is extremely time-sensitive and delays in processing an FOI request can substantially erode the utility of the requested information.[112] Others, such as investigative journalists, are less subject to time constraints, and have found FOI to be a 'valuable ... tool for obtaining raw information to contribute to an investigation by creating leads or paper trails'.[113]

Nevertheless, FOI in its current form may rarely be an independent generator of public interest stories or political scandals.[114] Many journalists have found it easier to source government-held information from informal leaks than through formal FOI applications.[115]

Further, if FOI mechanisms are to be useful to journalists, the cost of providing information must be reduced. Even relatively well-resourced media organisations can struggle to meet the processing fees imposed by agencies.[116] The difficulty in quantifying the cost of processing requests has provided scope for agencies to impose high charges to deter applicants from pursuing their requests.[117] In 2007-08, the average charge per application increased by approximately 18 per cent from 2005-06, despite a decrease of 30 per cent in the total number of applications.[118] In this way, the right of access 'is being truncated by the requirement to pay'.[119]

The Reform Bill responds to this concern by abolishing all application fees and providing free processing time (1 hour for all applicants and 5 hours for journalists).[120] However, this does not address the root cause of the high cost of FOI – the scheduling of fees based on decision-making and processing time.[121] There has been no indication that the government will alter the FOI fee structure by implementing Recommendation 88 and charging on the basis of documents actually released.[122] This represents a backwards step from the proposal in the 2003 Bill to only levy charges in respect of documents released.[123] In contrast to the NSW OGI Bill, the Reform Bill does not provide a discount on fees for journalists requesting information that is of special public interest.[124]

As acknowledged in a 1997 Canadian Green Paper, *timely* access is critical to the media's use of FOI.[125] In this way, 'access delayed may be access denied'.[126] Non-compliance with the statutory prescribed time limits for processing applications has been a persistent problem for FOI and curbs its attractiveness as a source for obtaining government-held information. In 2005-06, 25 per cent of applications to federal agencies for non-personal information took 90 days to process, three times longer than the statutory time limit of 30 days.[127]

The Reform Bill seeks to improve agency compliance with processing times by mandating that an agency waives its right to levy charges if its response to an application is out of time.[128] Nevertheless, the built-in time delay of 30 days is still substantial and the Recommendation to reduce processing time limits to 14 or 21 days has not been acted

upon.[129] Rather, the Reform Bill contains new provisions for extensions of time to be made.[130] It is interesting to note that no public dividend has stemmed from the significant improvements in information technology and the digital management of information since the inception of federal FOI in 1982 – the time limit for locating documents and processing requests remains unchanged.

The Reform Bill also contains no provision to fast-track FOI, by allowing applicants to make 'urgent' requests, where decision-making is expedited.[131] This procedure would be particularly appealing to journalists operating under time pressures and is available in the United States and New Zealand.[132] Therefore, the Reform Bill does little to reduce the time and cost barriers to using FOI. It is likely to continue to be difficult under the amended Act for journalists to obtain information whilst it remains current and relevant.

It seems antithetical to improving the efficiency of the 'back-end' request and release mechanism to continue to charge for the time spent in locating and processing documents – since this provides no incentive for agencies to enhance their document management systems.[133] A substantial proportion of the costs associated with the administration of FOI laws are caused by a weakness in document and records management.[134] Therefore, a better document management system would minimise the cost and inconvenience of document search and retrieval, in addition to delivering significant operational efficiencies to government.[135]

5. Reverse FOI: third party costs and delay

A related, but largely unexplored issue is the potential for delay that arises from the interplay between the public interest test and the reverse FOI procedures available to third parties.[136] The FOI Act provides a right for third parties to be consulted if documents relating to their affairs are the subject of an FOI request, and to submit a response detailing the projected effect of release upon their affairs.[137] Since the revised public interest test will apply to all conditional exemptions, third parties affected by an FOI request will now have to address public interest issues in addition to the issue of the effect of release.[138] This means that responses submitted by third parties will be more complex, possibly adding time and expense to processing of requests. The Reform Bill has not followed the suggestions made in other jurisdictions that a time limit should be put on third party responses to minimise processing delays.[139]

Conclusion

The proposed federal FOI reforms make a significant step forward in improving media access to government-controlled information. The recasting of the objects of the FOI Act and the fuller development of the public interest test (the addition of factors for and against disclosure) provide the media with a better foothold from which to pursue high-level government information. If enacted, the reforms will give content to the right of access by permitting greater disclosure of documents held by federal agencies that relate to the affairs of government and private businesses.

However, although the media has a stronger, pro-disclosure starting point from which to make requests for access, many of the 'back-end' barriers to access remain. The amendments to the exemption provisions have been mostly 'tinkering around the edges' and these still provide a substantial bulwark to the greater release of information. Importantly, the major deterrents to the media's use of FOI – the high charges for access and the delays in the processing of requests – have not been adequately addressed in line with the ALRC's recommendations. Therefore, preliminary analysis of the proposed reforms suggests that they are likely to stop short of a broader 'transparency revolution' in providing access to information.

In order for the FOI regime to work effectively there needs to be greater follow-through on the 'front-end' reform proposals. More work needs to be done to make a wider range of information directly and immediately available so as to narrow the ambit of the 'back-end' request and release mechanism, making it an option of last resort. Specifically, the reform proposals in their current form are scant on detail as to how they will produce a pervasive culture of access and disclosure within government and the public service. This means a great deal will turn on the success of the Commissioner in this regard. However, the ability of the Commissioner to effect change is doubtful because the Commissioner Bill lacks strong compliance provisions. The Commissioner should be given broader powers to take whatever steps are necessary to underwrite compliance and promote widespread changes in public service attitudes away from the tradition of secrecy.

Further, the strong framework laid down by the IPS should be followed by a wider, whole of government information management system. Once this is achieved, the 'back-end' request and release mechanism will be able to function more effectively, alleviating some of the time and cost pressures in accessing information.

It is important for government to appreciate that improved FOI and the development of a whole of government information management system hold the potential to deliver benefits to the public sphere. FOI provides the government with a significant opportunity to leverage information access and dissemination to consult and develop policy and make closer connections with citizens.[140] Increasing openness through better information flows can advance policy and raise the quality of public administration.[141]

If FOI reform is conceived of in this light, as part of an element in a broadly-cast information policy, it will be easier to achieve acceptance of FOI and its resource costs. As such, the media's role should extend beyond that of simply end-users of FOI – journalists must continue to educate themselves and the community they serve about the importance of attaining this revised approach to FOI.

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1 *Freedom of Information Act* 1982 (Cth); *Freedom of Information Ac*t 1989 (NSW); *Freedom of Information Act* 1982 (Vic); *Freedom of Information Act* 1992 (Qld); *Freedom of Information Act* 1992 (WA); *Freedom of Information Act* 1991 (Tas); *Freedom of Information Act* 1991 (SA); *Freedom of Information Act* 1989 (ACT).

2 This rationale was articulated by the Senate Standing Committee on Constitutional and Legal Affairs, *Report on the Freedom of Information Bill 1978 and Aspects of the Archives Bill 1978* (Canberra: Australian Government Publishing Service, 1979).

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5 NSW Ombudsman, above n4, at 86.

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10 Ibid.

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12 ALRC/ARC, above n11, quoted in Rick Snell & Peter Sebina 'Information Flows: the real art of Information Management and Freedom of Information' (2007) 35(1) *Archives and Manuscripts* 55, at 59.

13 Senator John Faulkner, *Letter to Secretaries of Federal Agencies* (Canberra: Department of Prime Minister & Cabinet, 30 April 2009a), at 1.

14 There have been a few recent attempts at reform put forward by Senator Andrew Murray, including the *Freedom of Information (Open Government) Bill 2001* (Cth) and the *Freedom of Information Amendment (Open Government) Bill 2003* (Cth).

15 Paula Walker 'The Western Australian FoI experience 1996 -1998 – any lessons for reform?' (1999) 79 *FOI Review* 7. Nigel Waters, *Print Media Use of Freedom of Information Laws in Australia* (Australian Centre for Investigative Journalism, 1999).

16 Stephen Lamble draws this conclusion, although he does not specify the number of media requests versus public requests for these two jurisdictions. Stephen Lamble 'Media use of FoI surveyed: New Zealand puts Australia and Canada to shame' (2004) 109 *FOI Review* 5, at 8.

17 J MacDonald and C H Jones, *The Law of Freedom of Information* (London: Oxford University Press, 2003), at [9.10].
18 Moira Paterson, *Freedom of Information and Privacy in Australia: government and information access in the modern state* (Sydney: LexisNexis Butterworths, 2005), at 499.
19 ALRC/ARC, above n11.
20 Yoram Rabin & Roy Peled 'Between FOI Law and FOI Culture: The Israeli Experience' (2005) 1(2) *Open Government: a journal on Freedom of Information* 1, at 39.
21 Ibid.
22 Maeve McDonagh 'FOI in Ireland and Europe: Progress and Regression' (2001) 29 *International Journal of Legal Information* 256, at 264.
23 Patrick Birkinshaw, *Freedom of Information: The Law, the Practice and the Ideal* (London: Weidenfeld and Nicholson, 1988), at 238.
24 FOI Independent Review Panel, *The Right to Information: Reviewing Queensland's Freedom of Information Act* (June 2008), at 17.
25 The Government has indicated that it intends to introduce both Bills in the forthcoming winter sitting period for Federal Parliament (ending 22 June, 2009). Department of Prime Minister & Cabinet (PM&C), FOI Reform Public Forum, Canberra, 7 May 2009.
26 Ibid.
27 ALRC 77, above n11, Recommendation 3.
28 See the FOI Act, above n1, s 3.
29 *News Corporation Ltd v National Companies and Securities Commission* (1984) 57 ALR 550, at 559 (Bowen CJ & Fisher J); *Kavvadias v Commonwealth Ombudsman (No 1)* (1984) 1 FCR 80; *Austin v Deputy Secretary, Attorney-General's Department* (1986) 67 ALR 585. P Bayne & K Rubenstein 'The Objects of the Freedom of Information (FOI) Acts and their Interpretation' (1995) 2 *Australian Journal of Administrative Law* 114, at 116.
30 Moira Paterson (2005), above n18, at 42.
31 See the New Zealand Committee on Official Information (Danks Committee), *Towards Open Government* (Government Printer, Wellington: 1980), at 20 .
32 *Freedom of Information Amendment (Reform) Bill 2009* (Cth), ss 3(2)(a)-(b).
33 Rhys Stubbs 'Freedom of Information and Democracy in Australia and Beyond' (2008) 43(4) *Australian Journal of Political Science* 667, at 675. Compare *Commissioner of Police v District Court of NSW* (1993) 3 NSWLR 606 at 639 (Kirby P).
34 Reform Bill, above n31, s 3(3).
35 Rick Snell, *Administrative Compliance and Freedom of Information in Three Jurisdictions: Australia, Canada and New Zealand,* Paper presented at the Freedom of Information - One Year On Conference (23 April 1999, Dublin), at 1: <http://www.ucc.ie/law/foi/conference/snell99.html> (accessed 10 April 2009).
36 Reform Bill, above n31, s 3(1)(a).
37 Senator John Faulkner, *Panel Discussion: Australia's Right to Know Freedom of Speech Conference* (Speech Transcript, 24 March 2009), at 1.
38 *Information Commissioner Bill (2009)* Cth, s 4.
39 Id, s 10.
40 Id, s 10(a).
41 Jack Herman 'Reform FoI' (2004) 16(4) *Australian Press Council News,* November, 1, at 5.
42 Senator John Faulkner (2009b), above n36, at 1. Senator John Faulkner (2009a), above n13, at 1.
43 Commissioner Bill, above n37, s 10(d).
44 Id, s 10(j).
45 Recommendation 19, ALRC 77, above n11.
46 Commissioner Bill s 33 provides that the Commissioner must prepare an annual report for the Minister on the operations of the Office of the Information Commissioner, but the Commissioner is not required to report upon the specific operations and FOI compliance of individual agencies. David Solomon AM, *The Right to Information: Reviewing Queensland's Freedom of Information Act, The report by the FOI Independent Review Panel* (Queensland: 2008), at 6.
47 For example, the Western Australian Commissioner has established an 'FOI Standards and Performance Measures' guide to encourage administrative compliance with FOI. See Office of the Information Commissioner Western Australia: <http://www.foi.wa.gov.au/> (accessed: 1 May 2009).
48 See new Pt VIIB of the Reform Bill, above n31. However, the proposed investigatory powers of the NSW Commissioner are perhaps more robust, extending to the inquiry powers of a Royal Commission: Department of Premier and Cabinet (NSW), *Companion Guide: Open Government Information – FOI Review in New South Wales* (Sydney: DPC, May 2009), at 5.
49 Reform Bill, above n31, s 89A(2). The only substantive offences created by the Reform Bill are: an offence for a failure to comply with a notice to produce a document for the purposes of an investigation (s 79(5)) or review (s 55Q(5)) and an offence for a failure to comply with a notice to appear before the Commissioner to answer questions for the purposes of an investigation (s 82(3)) or review (s 55V(3)).
50 *Open Government Information Bill 2009* (NSW) (OGI Bill), Part 6, Division 2, clauses 111-15. The *Freedom of Information Act,* 5 U.S.C. § 552 (1986) also makes it an offence to improperly withhold documents from disclosure. See also the Indian *Right to Information Bill* (2004), s 17.
51 Peter Timmins, *Submission to the Department of Prime Minister and Cabinet Privacy and FOI Policy Branch*

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52 The budget allocation for the establishment and ongoing operation of the Office of the Information Commissioner is: $2.961 million in 2009-10, $4.982 million in 2010-11, $5.031 million in 2011-12 and $5.080 million in 2012-13. Whether these sums will be adequate remains to be seen. Department of Prime Minister & Cabinet, *Budget: Portfolio Budget Statements 2009-10, Budget Related Paper No 1.15A* (Canberra: PM&C Portfolio, 2009), at 25.

53 Recommendation 7, ALRC 77, above n11 . Commonwealth Ombudsman, *Needs to know: Report on investigation of administration of FOI in Commonwealth agencies* (Commonwealth Ombudsman, Canberra: 1999), at 1: noting that because of limited staffing resources, the Ombudsman was not able to fulfil its broad legislative mandate to monitor agency compliance with the FOI Act. In turn, the Act was amended in 1991 to limit the role of the Ombudsman to the investigation of FOI complaints.

54 Reform Bill, above n31, s 8(1)(h).

55 Id, s 8(1)(g).

56 Roger Douglas & Melinda Jones, *Douglas & Jones's Administrative Law* (Annandale, NSW: Federation Press, 2006, 5th ed.), at 116.

57 Matthew Flinders 'Freedom of Information and Open Government in the UK' in A. Sobanska, A (ed.) *Freedom of Information: A Comparative Perspective* (Warsaw: PMC, 2001), at 79.

58 Reform Bill, above n31, s 9A.

59 Id, s 93A: 'The Information Commissioner *may,* by instrument in writing, issue guidelines' [emphasis added]. This issue was raised at the PM&C, FOI Reform Public Forum, above n25.

60 *Freedom of Information Act* 2000 (UK), s 19.

61 Department of Justice (State of Tasmania), *Strengthening Trust in Government: everyone's right to know – Review of Freedom of Information Act 1991 Directions Paper* (Department of Justice: 2008), at 11.

62 Susan Nevelow Mart 'The Internet's Public Domain: Access to Government Information on the Internet' (2009) 12 *Journal of Internet Law* (forthcoming), at 16.

63 OGI Bill, above n49, clauses 6,18 and 20-22. Department of Premier and Cabinet (NSW), above n47, at 11.

64 *Freedom of Information Act,* 5 U.S.C. § 552 (1986). A similar publishing scheme exists in Mexico, see: the Federal Institute for Access to Public Information in Mexico, *'ZOOM'* database, cited in Benjamin Bogado, Emilene Martinez-Morales, Bethany Noll and Kyle Bell, *The Federal Institute for Access to Information and a Culture of Transparency (IFAI), a Follow-up Report* (University of Pennsylvania, Annenberg School of Communications, 2007), at 4. David Solomon AM, above n45, at 230.

65 Id, at 234.

66 Seth Kreimer 'The Freedom of Information Act and the Ecology of Transparency' (2008) 10(5) *The University of Pennsylvania Journal of Constitutional Law* 1011, at 1025.

67 Id, at 1027.

68 Commonwealth Ombudsman, above n51, at 12.

69 FOI Act, above n1, s 35.

70 Id, s 47.

71 Jack Herman 'The urgent need for reform of Freedom of Information in Australia' (Speech: Australian Press Council, Right to Know Conference, 21 August 2004), at 3.

72 ALRC 77, above n1 1, at para [9.7].

73 Reform Bill, above n31, s 34(1)(a).

74 ALRC 77, above n11 , at para [9.9]. Rick Snell 'The Kiwi Paradox: A Comparison of Freedom of Information in Australia and New Zealand' (2000) 28 *Federal Law Review* 575, at 595.

75 This problem has been cited frequently in case law, for example: *National Parks Association New South Wales Inc v Department of Lands* [2005] NSW ADT 124. Compare: *Re Fewster and the Dept of the Prime Minister and Cabinet (No. 2)* (1987) 13 ALD 139; *Re Porter and the Dept of Community Services and Health* (1988) 14 ALD 403; *Re Reith and Minister of State for Aboriginal Affairs* (1988) 20 ALD 264.

76 A class classification assumes that a document is exempt if it falls within a defined class of documents irrespective of whether disclosure would have a harmful effect upon government operations. See Moira Paterson (2005), above n18.

77 1982 (NZ), ss2(1), 6, 7, 9, 27.

78 These provisions require an examination of the nature of the information at issue and the likely consequences of disclosure before a document can be claimed as exempt.

79 Robert Buchanan 'Cabinet, policy documents and freedom of information: the New Zealand experience' (1991) 31 *FOI Review* 2, at 2.

80 Note that under the reform proposals, a 'class' classification still applies for documents affecting national security, defence or international relations (Reform Bill, above n31, s 33).

81 Australia's Right to Know, above n9, at 4.

82 Senator John Faulkner (2009a), above n13, at 2.

83 Ibid.

84 Jack Herman, above n69, at 3.

85 Peter Timmins 'Who knows what parliamentarians do with our money?' *Open and shut (blog)* <http://www.foiprivacy.blogspot.com/> (accessed 10 May 2009). Although information concerning travel

allowance payments is reported twice yearly by the Department of Finance and Deregulation, the detail is limited and travel at government expense by spouses and dependants is not reported.

86 Report of the Standing Committee on Justice and Solicitor General on the Review of the *Access to Information Act* and the *Privacy Act, Open and Shut: Enhancing the Right to Know and the Right to Privacy* (Queen's Printer of Canada: Ottawa, 1987). Report of the Standing Committee on Justice and Solicitor General, *Report of the Access to Information Review Task Force, Access to Information: Making it Work for Canadians* (Queen's Printer of Canada: Ottawa, 2002).

87 ALRC 77, above n11, at [11.8]

88 Reform Bill, above n31, ss47B–47J. This is to be applied to all conditional exemptions under s 11A(5).

89 Reform Bill, above n31, s11B. Department of Prime Minister and Cabinet, *Freedom of Information (FOI) Reform Companion Guide* (Canberra, 2009) (PM&C Companion Guide), at 11.

90 ALRC 77, above n11.

91 Reform Bill, above n31, s 11A(5).

92 Judith Bannister 'Case Notes: McKinnon v Secretary, Department of Treasury – The Sir Humphrey Clause, Review of Conclusive Certificates in Freedom of Information Applications' (2006) 30 *Melbourne University Law Review* 961, at 965.

93 At present, the requirement that an agency or Minister that refuses access to a document on the grounds of a conditional exemption must identify the public interest factors taken into account in the decision only applies to the internal working documents exemption (s36). The Reform Bill extends this requirement to all conditional exemptions.

94 Reform Bill, above n31, s 11B(3)(a).

95 Reform Bill, above n31 s 11B(3)(b).

96 (2006) HCA 45, at [54]-[56] (Hayne J).

97 *Re Howard and the Treasurer of Australia* (1985) 7 ALD 645.

98 Reform Bill, above n31, s11B(4)(a).

99 Reform Bill, above n31, s11B(4)(d).

100 These factors include: that advice to Ministers or other senior officers or free expression of opinion, if disclosed, would hamper the flow of advice from bureaucrats or others if they thought this advice could be subject to later scrutiny; disclosure would mean officers would be reluctant to record sensitive issues; and disclosure would inhibit full and frank discussions and may leave some people reluctant to record an opinion or provide advice: *Haneef and Department of Immigration and Citizenship* [2008] AATA 587, at [4] (Tamberlin J).

101 A document is conditionally exempt if its disclosure would involve 'the *unreasonable* disclosure of personal information about any person' [emphasis added]: Reform Bill, above n31, s 47F(1).

102 A document containing trade secrets or other information having commercial value is conditionally exempt if it: 'would, or could reasonably be expected to, *unreasonably affect* that person adversely in respect of his or her lawful business or professional affairs' [emphasis added]: Reform Bill, above n31, s 47G(c)(i).

103 ALRC 77, above n1 1, at 95.

104 Reform Bill, above n31, Part VII.

105 Reform Bill, above n31, s 57(2).

106 PM&C, FOI Reform Forum, above n25.

107 Rick Snell (2000), above n72, at 595.

108 ARLC77, above n1 1, Recommendation 83. The right to an internal review is made optional in the proposed NSW Bill: *Open Government Bill 2009* (NSW), ss 84(2), 95. Both Canada and New Zealand have gone further, deliberately rejecting the need for an internal review and only providing for external review: Rick Snell (2000), above n74, at 580.

109 David Solomon AM, above n45, at 4.

110 Ibid.

111 Robin Banks, *Submission on the Freedom of Information (Removal of Conclusive Certificates and Other Measures) Bill* 2008 (Cth): *Public Interest Advocacy Centre* (7 January 2007), at 2.

112 Ibid.

113 Frank Essier, Carsten Reinemann & David Fann 'Spin Doctoring in British and German Election Campaigns' (2000) 15(2) *European Journal of Communication* 209, at 212.

114 Rick Snell, 'Using Comparative Studies to Improve Freedom of Information Analysis: Insights from Australia, Canada and New Zealand' *University of Tasmania Law School Paper* (2004): www.bibliojuridica.org/libros/5/2404/5.pdf (accessed 10 April 2009), at 47.

115 Gold Coast Bulletin submission to the FOI Independent Review Panel discussion paper, at 1, quoted in David Solomon AM, above n45, at 233.

116 See Australia's Right to Know, above n9.

117 Denis O'Brien 'Freedom of Information Law in Need of Overhaul' (2005) *Public Sector Informant,* 1 March , Canberra, 1, at 6.

118 See the Senate Standing Committee on Constitutional and Legal Affairs, above n2, at 37.

119 Andrew McDonald & Greg Terrill (eds.) *Open Government: freedom of information and privacy* (Basingstoke, UK: McMillan, 1998), at 108.

120 PM&C Companion Guide, above n87, at 10.

121 Moira Paterson (2008), above n6, at 3.

122 ALRC 77, above n11 .

123 *Freedom of Information Amendment (Open Government) Bill2003* (Cth), Schedule 1, clause 18-19.
124 Compare the OGI Bill , above n49, clause 63 - which affords applications for which there is a special public benefit a 50% discount on processing fees.
125 John Roberts MP 'Legislation on Public Access to Government Documents' *Green Paper* (Canada: Ottawa Ministry of Supply and Services, 1977) at 21.
126 Alasdair Roberts 'Less Government, More Secrecy: Reinvention and the Weakening of Freedom of Information Law' (2000) 60(4) *Public Administration Review* 298, at 302.
127 FOI Act, above n1, s15. Australia's Right to Know, above n9, at 8.
128 PM&C, FOI Reform Public Forum, above n25.
129 Recommendation 31, ALRC 77, above n3. The time period for dealing with initial applications in the OGI Bill is 20 working days: above n49, clause 54.
130 Reform Bill, above n31, ss 15(6)-(7); s 15AA.
131 Compare the *Freedom of Information Act,* 5 U.S.C (1986) §552(a)(6)(E)(i)(I) (2000), as amended by the *Electronic Freedom of Information Act Amendments of 1996,* Pub. L. No. 104-231 §8, 110 Stat. 2048: which provides that expedited processing is available where the requester 'demonstrates a compelling need'. This can be demonstrated by 'a person primarily engaged in disseminating information' who shows an 'urgency to inform the public concerning actual or alleged Federal Government activity'. The Regulations also provide expedited processing for matters 'of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence': 28 C.F.R. § 16.5(d)(1)(iv) (2006).
132 *Official Information Act* (1982) (NZ), s12. *Freedom of Information Act* 5 U.S.C (1986) §552(a)(6)(E)(v)(II).
133 Moira Paterson (2008), above n6, at 3.
134 Rick Snell & Peter Sebina, above n12, at 58.
135 PM&C, FOI Reform Public Forum, above n25 .
136 Reform Bill, above n31, ss 26A, 27, 27A and 43(1)(c).
137 The conditional exemptions include: documents affecting inter-governmental relations (s 47B); documents affecting personal affairs (s 47F); documents affecting business affairs (s 47G); and documents affecting conduct of research (s47H): Reform Bill, above n31.
138 Graeme Johnson (Freehills), *Amendments to the Freedom of Information Act 1982 (Cth),* 26 March, 2009 <http://www.freehills.com.au/4791.aspx> (accessed 28 March, 2009), at 1.
139 For example, the Victorian Ombudsman has recommended that to assist in the more timely processing of requests, businesses should be given a maximum of seven days to respond to consultations regarding the disclosure of documents concerning their business affairs: Ombudsman Victoria, *Review of the Freedom of Information Act – Report of Ombudsman of Victoria* (Victorian Government Printer, June 2003), at 114.
140 Rick Snell 'Releasing the potential of FOI – Making the transition from FOI version 1.0 to version 2.0' Paper presented at the University of Tasmania, November 2008 <www.ricksnell.com.au/Articles/Ottawa%20Info%20Comm.ppt> (accessed 1 May 2009), at 1.
141 New Zealand Committee on Official Information (Danks Committee), above n30, at 5.