# Freedom of Information

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# Opinion

The Commonwealth Ombudsman has released a report on his investigation into Commonwealth government agencies' administration of the *FoI Act 1982* (Cth). Titled *Needs to Know,* its findings that Commonwealth agencies exhibit 'a growing culture of passive resistance to information disclosure' come as no surprise. The Attorney-General, Daryl Williams, bears chief responsibility for public servants who misuse exemptions in FoI legislation or feel that it is acceptable practice to take longer than statutory time limits to determine requests or to charge overly high fees.

The Attorney-General has repeatedly ignored calls for the urgent need to revamp the *Freedom of Information Act* by a number of its leading law reform and independent review bodies as set out below.

| Date | Body | Report | Key recommendations | Action to dat |
|---|---|---|---|---|
| Dec 1995 | Australian Law Reform Commission and Administrative Review Council | Report No 77 'Open Government' | 106+ reforms | • Minimal<br>• Focus on privacy |
| May 1998 | ALRC | Archives Act | National Archives Authority | • None |
| August 1998 | Administrative Review Council | Report No. 42 'Contracting Out' | 7 major recommendations in relation to FoI | • Under consideration by an interdepartmental committee |
| June 1999 | Commonwealth Ombudsman | Special Report | 19 major recommendations | • Agencies to fix own problems |

The Secretary of the Attorney-General's Department has made the following comments in response to the Commonwealth Ombudsman's concerns (p.36 of the Ombudsman Report):

> However, as you know, this Government has a preference that Departments, should be the primary vehicle for ensuring the effective discharge of government responsibilities and obligations, which would, of course, include ensuring efficient and effective practices and performance in implementing the FoI Act. I have written to all Departmental Secretaries to remind them of their obligations under that Act and to seek their assistance in ensuring the effective and efficient discharge of those obligations by their Departments and portfolio agencies.

Whilst the plea to do better under the legislation, and the reminder of statutory and administrative obligations under the *FoI Act,* is commendable it is a gross dereliction of good law reform practice to leave such recommendations gathering dust.

The Commonwealth Ombudsman states that the 'Administration of FoI is at a crossroads'. The continual lack of action on the reports by bodies like the Australian Law Reform Commission, Administrative Review Council and Commonwealth Ombudsman indicates that the Howard Government has already chosen the low road in its approach to openness and accountability.

The Commonwealth Ombudsman quoted Malcolm Fraser who said: 'First, people and Parliament must have the knowledge required to pass judgement on the government ... Too much secrecy inhibits people's capacity to judge the government's performance.'

*Continued on p.56*

by the RRT to dismiss the review application for want of jurisdiction. This was because Subramanian also had, at that time, a complaint to the Ombudsman. The AAT decided that the costs relating to this directions hearing were a result of Subramanian's complaint to the Ombudsman and that Subramanian should pay those costs.

**Comment**

Even though three of the four criteria required to be considered by the AAT under s.66(2) may have operated against the applicant, the AAT was prepared to exercise its discretion to recommend the Commonwealth pay costs on the basis of the fourth, namely failure of the RRT to follow the recommended practice of considering every document on its merits, onerous though this may be.

It is also worth noting that, under subsection 66(1), the AAT recommends to the Attorney-General that the Commonwealth pay the costs. Subsection 66(3) provides that the Attorney-General 'may' authorise the payment of costs to an applicant.

**[N.D.]**

# Recent Developments

The Victorian Parliament is in the last stages of passing the *Freedom of Information (Amendment) Act 1999*. This Act was born out of controversy and provoked reams of Hansard debate.

Under the amendments, a government agency or Minister will decide what is 'personal information', and must delete it from all documents released. The legislation inserts a new s.27A that defines 'personal information' as information:

(a) that identifies any person or discloses their address or location; or

(b) from which any person's identity, address or location can reasonably be determined.

It also inserts a new s.27B that allows for the release of personal information where that information is:

(a) personal information that the applicant already knows or ought to know; or

(b) personal information that the applicant could reasonably obtain (other than as a result of a request under this Act) from documents generally available to the public for inspection or purchase.

The Victorian Attorney-General argues that the 'names of ministers, secretaries of departments and other office holders, which are available on a public register, will not be deleted'.

These amendments allow for the return of the faceless and nameless bureaucrat. The term 'public' in public official, public officer and public servant is not a meaningless and redundant term. It is meant to symbolise the virtue and necessity of exercising public power and public decision making in public on behalf of the public. The amendments also protect companies and business names.

When designing their Freedom of Information Act the Irish government deliberately included provisions that required the release of the names public servants when they were carrying out their normal duties and functions. The Canadian privacy legislation specifically ensures that public officials cannot claim privacy protection when their names appear on public records or documents relating to their official positions and duties. In those two jurisdictions Parliaments have merely codified the VCAT interpretation of Freedom of Information laws and best practice in Australia.

We should start from the basis that all of us on the public payroll, from university teachers to attorney-generals, cannot hide beyond the rubric of 'personal affairs' to keep our names from being released under FoI. We are in a different position from the citizen whose name has been mentioned in some government document who may very well deserve to have their name deleted in an FoI application on the grounds of protecting personal privacy. If the release can be shown as threatening to our personal safety or that of our families then the *FoI Act* offers sufficient protection mechanisms. The device fashioned by the Attorney-General and her advisers, intentionally or unintentionally, allows for the routine cover up of administrative malpractice.

The current provisions of the *FoI Act* more than suffice to protect the legitimate personal privacy of public officials. The Attorney-General has conceded that the Frankston nurses' case could have been decided differently or that more attention could have been given to the legitimate concerns of the nurses in that case.

The convergence of technology and media, the rapidly changing dynamics of policy formulation and the multiplicity of public/private partnerships in service delivery require a fundamental rethink about access to information. There are parliamentarians, including liberals like Victor Perton, who are turning their thoughts to these developments. Yet a knee jerk reaction such as the Premier's in January to the release of the Frankston nurses' names and a cynical manipulation of privacy concerns is not the way the Victorian government ought to be handling this issue.

**[R.S.]**

*Opinion continued from p.37*

It seems that the Attorney-General and his cabinet colleagues are quite happy to see the *Freedom of Information Act* fall apart from neglect and the failure to ensure adequate administrative compliance with the legislation.

The two articles in this issue focus on compliance issues raised by the Commonwealth Ombudsman. The first on compliance in NSW and the second on the difficulties faced by journalists who try to use FoI when agencies are quite prepared to produce fee estimates of $110,000.

I urge that compliance audits be undertaken in each Australian jurisdiction.

I hope that the national conference on FoI in Melbourne on the 19-20 August will start to see some action on positive reforms to Australian FoI.

**Rick Snell**

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