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Submission to the review of the Government information (Public Access) Act 2009 (the Act)

The New South Wales Council for Civil Liberties (CCL) is committed to protecting and promoting civil liberties and human rights in Australia.
CCL is a non-government organisation in special consultative status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).
CCL was established in 1963, and is one of Australia's leading human rights and civil liberties organisations. Our aim is to secure the equal rights of everyone in Australia and oppose any abuse or excessive use of power by the State against its people.

CCL thanks the Director for permission to make this late submission.

1. Freedom of information is fundamental to democracy. We adduce four reasons.

1.1 The CCL is of the view that as we live in a representative democracy the information that government holds about our society should be available to everybody in the society. This is based on the rationale for *representative* democracy, that the government represents the citizens. They are our employees and our servants. Their role exists for the general benefit. Therefore, if the government is claiming ownership rights to any information held about our society, they are misled. They are confusing their status, granted to them by citizens, who are in effect the principals of this social contract—their status as agents. The basic point is that the information actually belongs to us; the public.

1.2 There is a fundamental entitlement (a human right) of people to have input into the formulation and implementation of policies that affect them. But effective participation is impossible without knowledge, not only of the issues, but of the arguments that are being put forward and the factual claims that are being advanced. There is, then a right to information. It is not a favour bestowed by government.

1.3 One of the major democratic values—one of the reasons why we ought to have a democracy—is that the collective knowledge and experience of citizens far exceeds the knowledge that a group of public servants and politicians can have. Decisions accordingly should be open to public criticism. To deny the people access to the basis on which decisions are made is to frustrate this critical purpose of democracy.

1.4 Secrecy moreover is a cloak for wrongdoing and incompetence. It encourages a culture of denial and obfuscation. It fosters corruption. It can be a tool of repression.

1.5 The High Court has recognised that out system of government will not function without public scrutiny of government action.[1]

For these reasons it is essential that information held by government agencies and by private ones which contract to offer government services is freely available.

However, there frequent reports in the press of long fights by journalists to obtain information. This is disappointing.

Recommendation 1. The object of the Act (s.3) should be amended by adding the words 'and to enable people to exercise their right to participate in the policy and decision-making process of government' after the word 'effective'.

2. Absolute exemptions should be kept to a minimum.

2.1 The problem with absolute exemption provisions, even when they are clearly expressed, is that they tend to be interpreted with ever-increasing scope. We might usefully call this 'exemption stretching'. The principal counter to exemption stretching in the Act is the public interest test.

2.2 Accordingly, CCL believes that wherever possible, the exemptions set out in Schedules 1 and 2 of the act should be subject to a public interest test. Incorporating a single overarching public interest test into exceptions would also provide greater clarity, and foster re-thinking by government agencies about the tension between the public interest in disclosure and the concerns that are reflected in the exceptions.

2.3 It is true that in some cases is it obvious that the public interest supports exemptions. But it should not be thought that this justifies making the exemptions absolute. For making the exemptions subject to an overarching public interest test delivers a symbolic benefit, making it clear that the key issue is not whether an exemption applies, but where the balance of public interest lies. To use a popular phrase, it sends a message.

Recommendation 2. The list of matters in Schedules 1 and 2 (i.e. those for which there is a conclusive presumption against disclosure) should be revised, with a public interest test replacing the presumption wherever that is reasonable.

3 Cabinet documents

[1] Coleman v Power (1994) 220 CLR 1.

CCL submits that there should be no blanket exceptions for cabinet information. Every request should be subject to the single overarching interest test. Clause 2 of Schedule 1 should be repealed.

3.1 This is possible.

It has been achieved in New Zealand. New Zealand's *Official Information Act* 1982 has a default position for release of all information, unless there is a good reason for keeping the information secret which outweighs the public interest to release the information.

(1)Where this section applies, good reason for withholding official information exists, for the purpose of section 5, unless, in the circumstances of the particular case, the withholding of that information is outweighed by other considerations which render it desirable, in the public interest, to make that information available.

(2) /subject to section 6, 10 and 18, his section applies if, and only if, the withholding of the information is necessary to…

(f) Maintain the constitutional conventions for the time being which protect ...

Sovereign or her (i)the confidentiality of communications by or with the representative:
(ii)collective and individual ministerial responsibility:
(iii)the political neutrality of officials:
(iv)the confidentiality of advice tendered by Ministers of the Crown and officials; or

(g)maintain the effective conduct of public affairs through—
(i)the free and frank expression of opinions by or between or to Ministers of the Crown or members of an organisation or officers and employees of any department or organisation in the course of their duty; or
(ii)the protection of such Ministers, members of organisations, officers, and employees from improper pressure or harassment…

The point is to focus on the consequences of revealing this particular Cabinet information as opposed to 'this is Cabinet information, so it must be exempt'.

3.2. Why?

One of the most important ways our government decides what actions it will take are through Cabinet meetings. Therefore Cabinet documents are 'the very documents that would be of the greatest utility in scrutinising governments and keeping them accountable to the voting public.'[2]

[2] Australian Press Council, 21 August 2004 speech by Jack R Herman, then Executive Secretary

Jack Herman, when Executive Secretary of the Australian Press Council (APC), argued that cabinet documents should not automatically be exempt from Freedom of Information. There are, as he notes, criteria which would justify keeping some documents secret (such as those which invade personal privacy, or whose publication would jeopardise Australia's security). He said: '[t]he cabinet exemption is unnecessary, and it inhibits democratic processes. It should be removed.'[3]

Further, CCL believes there is a grave risk in refusing access to all documents prepared for the 'dominant purpose' of Cabinet discussions. The risk is that government members will use this unquestioned class of documents to hide controversial or unpopular points of view from the public.

It is true that section 106 allows such decisions to be overridden by the NSW Civil and Administrative Tribunal. But first, someone must suspect the existence of the document and make an application for its disclosure.

3.3. The wrong purposive test

Some cabinet documents will need to be kept secret in order to maintain the Westminster system of collective Cabinet responsibility. However, the 'dominant purpose' test proposed in the suggested amendments, while purposive, focuses on the wrong purpose. The test should be what is the harm or benefit to ministerial collective responsibility if released, not what purpose the document was produced for.

Recommendation 3. Cabinet information, like Cabinet documents, should be subject to an overarching public interest test.

Recommendation 4. Alternatively, the Cabinet information exemption provisions should be amended so that this exemption only applies to documents whose disclosure would compromise the collective ministerial responsibility of Cabinet.

Recommendation 5. The government should adopt a practice of pro-actively disclosing all other Cabinet material.

4. Ministerial Code of Conduct.

A register of interests of Minsters of the Crown should be a public document, not something private to the Premier of the day. There are few things more obviously needed to discourage corruption and conflict of interest by Ministers.

[3] ibid. p.6

Recommendation 6. Clause 11 of Schedule 1 (Ministerial Code of Conduct), which deals with the register of interests of Minsters of the Crown, should be repealed.

6. Despite the above, the Act contains many important provisions. CCL supports their general thrust. It is their implementation that may be defective.

6.1 We note in this regard the frequent reports by journalists of long struggles to obtain information—often information that it is clearly the right of citizens to obtain.

6.2 The principal problem, as we see it, arises from the difficulty of continually developing a culture of openness, in which information is made available freely, in advance of requests or speedily in response to them. It is desirable that the Information Commissioner be supported by sufficient staff and resources to foster such a culture. The Office of the Information and Privacy Commission should be expanded for this purpose.

6.2 It would assist in this if disclosure logs had to be reviewed and approved by the Information Commissioner.

Recommendation 7. The Office of the information and Privacy Commission should be expanded to ensure there are sufficient staff to support the Information Commissioner's role of continually developing and supporting a culture of openness, in which information is made freely available in advance of requests, and speedily in response to them.

Recommendation 8. Division 4 of the Act should include a requirement that disclosure logs should be submitted to the Information Commissioner for review and approval.

Summary of recommendations:

1. The object of the Act (s.3) should be amended by adding the words 'and to enable people to exercise their right to participate in the policy and decision-making process of government' after the word 'effective'.

2. The list of matters in Schedules 1 and 2 (i.e. those for which there is a conclusive presumption against disclosure) should be revised, with a public interest test replacing the presumption wherever that is reasonable.

3. Cabinet information, like Cabinet documents, should be subject to an overarching public interest test.

4. Alternatively, the Cabinet information exemption provisions should be amended so that this exemption only applies to documents whose disclosure would compromise the collective ministerial responsibility of Cabinet.

5. The government should adopt a practice of pro-actively disclosing all other Cabinet material.

6. Clause 11 of Schedule 1 (Ministerial Code of Conduct), which deals with the register of interests of Minsters of the Crown, should be repealed.

7. The Office of the information and Privacy Commission should be expanded to ensure there are sufficient staff to support the Information Commissioner's role of continually developing and supporting a culture of openness, in which information is made freely available in advance of requests, and speedily in response to them.

8. Division 4 of the Act should include a requirement that disclosure logs should be submitted to the Information Commissioner for review and approval.

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