

AUSTRALIA'S RIGHT TO KNOW

STANDING COMMITTEE ON FINANCE AND PUBLIC ADMINISTRATION

Legislation

Inquiry into Freedom of Information Amendment (Reform) Bill 2009 and Information
Commissioner Bill 2009

27 January 2010

Introduction

Australia's Right to Know (ARTK) is a coalition of twelve major media organisations formed in 2007 to address the troubling state of freedom of speech in Australia. Since inception of ARTK, reform of Australia's freedom of information regimes has been a priority issue for the group.

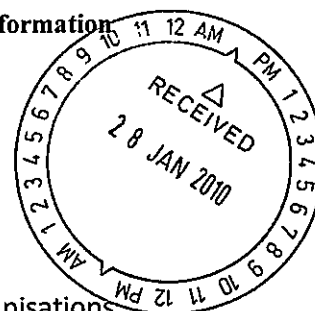
ARTK welcomes the Government's moves to reform the Commonwealth Freedom of Information Act 1982 (FOI Act) and the Archives Act 1983 (Archives Act) and welcomes the opportunity to provide this submission to the inquiry into the Freedom of Information Amendment (Reform) Bill 2009 and the Information Commissioner Bill 2009 (the FOI Bills).

ARTK supports the Government's proposed significant FOI reforms and is confident the amended bill can significantly improve the Australian public's access to Government information and documents.

ARTK had the opportunity to comment on the Exposure Drafts of the FOI Bills in June 2009 (the 2009 Exposure Drafts).

A significant change has been made from the Exposure Drafts to the Bills introduced to the Parliament, relating to the onus of proof on appeal to the Administrative Appeals Tribunal (section 61). We view this change as a major backward step in the move towards more open government as it will allow little to no chance of appeal against a government decision made in favour of secrecy.

However, ARTK welcomes the change to the bill where internal reviews will become optional with a direct review available from the Information Commissioner. We also view the ability to appoint external members to the Information Advisory Commission also as a positive step.



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Section 61 : Freedom of Information Amendment Bill 2009

On release of the 2009 Exposure Drafts, the government highlighted the issues the proposed reform focus on. The first two items listed by the government as key issues were:

- “ensuring that the right of access to documents under the FOI Act is as comprehensive as it can be, limited only where a stronger public interest lies in withholding access to documents;
- giving greater weight to the role that the FOI Act serves in the pro-active publication of government information;”

But the new amendment now contained in the FOI Bills, which reverses the existing onus of proof for review of a decision before the Tribunal, not only falls short of these objectives but also takes FOI reform backwards from the existing 1982 law.

Sub-section 61(1) of the existing Freedom of Information Act 1982 states:

“Onus

(1) Subject to subsection(2), in proceedings under this Part, the agency or Minister to which or to whom the request was made has the onus of establishing that a decision given in respect of the request was justified or that the Tribunal should give a decision adverse to the applicant.”

This sub-section remained unaltered in the 2009 Exposure Drafts.

Under the existing law, the agency or Minister must establish that their decision to refuse access to a document was justified or must prove that the Tribunal should make a decision against an applicant for access to a document.

In the FOI Bills now introduced, the sub-section now states:

“Onus

61 (1) In proceedings under this Part, the person who applied to the Tribunal has the onus of establishing that:

- (a) a decision given in respect of the relevant request or application is not justified; or
- (b) the Tribunal should give a decision adverse to a party to the proceeding.

This new provisions means that if a person seeking access to a document is refused access and appeals the decision to the Tribunal, that person has the onus of establishing that the decision to refuse access to the document was justified or that the Tribunal should make a decision which overturns the decision of the agency.

This is contrary to the new objects of the Act centred on giving the Australian community access to information held by the government. A new central principle of the FOI regime is that government documents are presumed to be available to the public unless good reason is shown to the contrary.

In light of this, agencies should be required to justify and prove the reasons for secrecy by withholding release. They should be required to provide the evidence relevant to their claims.

It should not be the responsibility of an applicant to disprove a refusal to release particularly when the applicant is faced with the expert, government-funded legal teams typically used in that jurisdiction on appeals.

ARTK comments on the 2009 Exposure Drafts

Dated 1 June 2009, ARTK provided to the government a submission commenting on the Exposure drafts of the FOI Bills. A copy of the submission is attached.

The submission discussed a number of areas of the FOI regime which we are of the view, require further amendment:

- claims by public servants that disclosure will discourage full and frank advice should be listed as an irrelevant factor in FOI decision making;
- the new single public interest test should be applied to all exemptions in the Bill;
- the Cabinet exemption should be extended to apply to factual/statistical extracts of documents contained in Cabinet documents and whole factual/statistical documents attached to Cabinet documents; and
- the administrative functions of security agencies, the Parliament and the Governor-General should be subject to the FOI Act.

In the submission, ARTK also:

- supported the announced review of the FOI Act to be conducted in two years, but commented that it should be a wholesale review addressing the entire FOI regime.
- endorsed the announced changes to the charging regime for FOI applications;
- welcomed the Information Commissioner's pending review of costs and time-frames as vital in ensuring the FOI regime is cost effective and the FOI's Act's objectives are met.

We consider these issues remain relevant issues to future FOI reform in Australia.

