FoI developments in the United Kingdom White Paper — 'Your Right To Know'

The Blair Government's proposals on Freedom of Information in the United Kingdom were published on 11 December 1997 in the White Paper *Your Right to Know.* Launching what he described as one of the most radical sets of Freedom of Information proposals in the world, Dr David Clark, Chancellor of the Duchy of Lancaster said:

> the people of this country have waited long enough for a legal right to know. That wait is nearly over... Our proposals, if fully implemented would transform this country from one of the most closed democracies to one of the most open. They represent a fundamental change in the relationship between government and the people.

The UK Government outlined its commitment to information access and the introduction of an FoI Act in its introduction to the Paper:

> Unnecessary secrecy in government leads to arrogance in governance and defective decision-making. The perception of excessive secrecy has become a corrosive influence in the decline of public confidence in government. Moreover, the climate of public opinion has changed: people expect much greater openness and accountability from government than they used to.[1]

It appears that the UK Government is ready to adopt a pro disclosure regime that incorporates the best features of FoI legislation from jurisdictions such as Canada, USA, New Zealand and Australia. Proposals such as the introduction of an Information Commissioner model, the wide ambit of coverage of the Act, the 'substantial harm' test and the attempt to clarify what is meant by ' the public interest' can only be viewed as positive steps for the introduction of a truly effective information access regime. The Government is to be commended on preferring not to simply enact the existing voluntary Code of Practice, but rather to seek a 'complete root and branch examination of this whole area [FoI] in order to produce a better and more lasting scheme'.[2] It is also significant that the White Paper represents a very real change from the Conservative Government's response to the Second Report from the Select Committee on the Parliamentary Commissioner for Administration — Open Government (1995–1996). Indeed, should the recommendations voiced in the White Paper take effect, the UK will be armed with a Freedom of Information Act that in a number of key areas far surpasses present legislation in many jurisdictions, particularly Australia. The Campaign for Freedom of Information has welcomed the White Paper, noting that 'the proposals were much bolder than we expected' but has also expressed certain reservations concerning particular features of the proposed act.

Yet there are several features and design elements which are a cause for concern. The UK Constitution Unit in its commentary on the White Paper noted that:

> The White Paper offers a very generous FoI regime — probably the most generous yet seen amongst countries that have introduced Freedom of Information. It is almost too good to be true. That is the central concern: that this is an unreal White Paper which has been brought out without full understanding or wholehearted commitment on the part of Departments or their Ministers, or proper consultation of the other public bodies which will be affected. It is an aspirational White Paper, in which the staffing and resource implications are never mentioned; but without adequate resources FoI risks becoming a hollow shell. So against the many positive features of the White Paper must be set a lesser number of concerns focused on:
>
> - **Resources**, on which the White Paper is completely silent
> - **Collective Ministerial commitment**, without which FoI risks being stillborn
> - **Commitment of other public bodies and agenci s**, which will not be forthcoming without proper consultation
> - **Publicity and public information**, without which requesters will not know about the Act or how to use it.

In addition to these concerns the White Paper contains several potential deficiencies which could be exploited by a begrudging bureaucracy or a government tiring of the rigours of openness and accountability. These deficiencies include a screening test for applicants, a fee regime whose finer details are left uncertain and several major areas of frequent usage (in other jurisdictions) deliberately excluded by the government.

As a side note, submissions on the White Paper may be viewed on the Web at <http://foi.democracy.org.uk/index.html>. The web site is managed by UK Citizens Online Democracy (UKCOD) a non-profit organisation whose objectives include developing opportunities for wider public participation in the democratic process using electronic online communication, and to provide a wide range of information that will encourage online political discussion between members of the public. Submissions are invited until 28 February 1998.

OVERVIEW: AT A GLANCE

The positives

- Under most exemptions, only information capable of causing 'substantial harm' could be withheld. This is a more difficult test for the government to meet than applies under FoI regimes in the US and countries like Australia and Canada. Exemptions in most jurisdictions refer to 'damage' (or 'harm' or 'injury') but do not require the harm to be 'substantial'.
- The scope of the proposed Act would be impressively wide — it would even cover the privatised utilities, and private bodies working on contracted-out functions, as well as government departments, NHS bodies, quangos and local authorities.
- All records and information held will be accessible — the right of access applies to all existing records, regardless of how long ago they were compiled, to historical records not yet available under the Public Records Acts, and even to information which was known to officials (adopting one of the key outstanding features of the New Zealand *Official Information Act*) but had not been recorded in official files.
- The Act would be enforced by an Information Commissioner with legal enforcement powers. In addition the Commissioner would have the powers of a court to compel government to release information, but complainants would not have to bear the potentially prohibitive cost of going to court to enforce their rights.
- Some access to civil service advice and internal discussion will be possible, where disclosure does not cause harm. Although the harm test for the exemption

for advice is easier for the government to meet than other exemptions (it refers to 'harm' not 'substantial damage') it does make clear that internal advice and discussion may be obtained under the Act.

- The government intends to repeal or amend existing statutory restrictions on disclosure.

  Some form of 'public interest' balancing test would apply, allowing the Commissioner to consider whether any refusal to disclose was in line with the Act's general objective of encouraging more accountability.

The negatives

Fees could become an obstacle to access. The White Paper proposes that requesters of information would be charged an application fee of up to £10, plus additional charges for requests which 'involve significant additional work'.

The proposed legislation would apply only to 'the administrative functions' of the police. The UK Campaign for Freedom of Information believes that information relating to law enforcement functions should be available, so long as disclosure did not damage those functions.

- Security and intelligence services would not be subject to the Act.
- It is unclear whether information relating to defence, international relations, security and law enforcement will be subject to the strict ' substantial harm' test or to the lower tests set out in the *Official Secrets Act.*

Comparison Between UK White Paper and Australian Law Reform Commission Recommendations

	United Kingdom	Australian Reforms
Scope of application of Act	Very wide — includes coverage of private bodies and those services contracted out by the government.	Private bodies and GBE's that are engaged in 'commercial activities in a competitive market' excluded from coverage.
Rights of access	To information, documents and records regardless of date of creation.	To information, documents and records regardless of date of creation.
Charging mechanisms	£10 application fee no charge for internal or external review.	$30 application fee $40 internal review fee should be abolished $300 fee for AAT review.
Overcoming 'agency culture'	Duty to be imposed on public authorities to release certain information (e.g. factual government proposal information) as a matter of course.	Education of FoI officers, dissemination of public FoI information, performance agreements of senior officers.
Exemption provisions	No standard class-based exemption provisions *per se.* Disclosure to be on a 'contents' basis according to 7 'specified interests' such as national security and third party protection	Traditional categorical exemptions such as National Security and defence, Cabinet documents, Executive Council and internal working documents.
Test for disclosure	Test to apply to most provisions — whether 'substantial harm' would result from disclosure of information. Contains a public interest test.	Only applies to certain provisions — whether harm or a 'substantial adverse effect' would occur if information was disclosed. Contains a public interest test.
Personal information	Data to be used only for a specified and lawful purpose, to be kept accurate and up to date Right to correct inaccurate personal information and a right to compensation for any damage and associated distress caused by the organisation's misuse of the information.	Right to amend incorrect personal information without prerequisite of access to the document. Amendment may be sought on the basis that information is not relevant for the purpose it was collected. Obligation on agency to amend if information is incorrect, misleading etc
Appeal mechanisms	Internal review Information Commissioner Model for external review. Commissioner has discretion to review request application without internal review. Commissioner to hold the powers to order the release of information, to access any records within the scope of the Act, to review or waive a charge if in the public interest, to resolve disputes via mediation, and to apply for a warrant to enter and search premises and remove records if suspecting they are relevant to an investigation and being withheld. Introduction of criminal offence for the willful or reckless destruction, or withholding of records relevant to an investigation of the Commissioner.	Internal review Internal review should not be a prerequisite to AAT review. The AAT should remain the sole determinative reviewer of FoI decisions. The AAT holds the power to require production of documents claimed to be exempt at any time after an application for review has been lodged. Ombudsman to retain current recommendatory approach to review of FoI decisions — holding no powers to set aside or substitute a decision.
Ministerial Certificates	Recommended against	Currently in use for s.33 (national security and defence), s.33A (Commonwealth/State relations), s.34 (Cabinet documents), s.35 (Executive Council documents and s.36 (internal working documents). The ALRC recommended that certificate provisions be removed from ss.33A and 36 and that certificates have a maximum life of 2 years. The Administrative Review Council suggested that certificates issued under ss.33 and 34 should be unlimited in duration.

	United Kingdom	Australian Reforms
Historical/ archival records	To be disclosed after 30 years Those documents not released after 30 years to have a ceiling life of 100 years.	To be disclosed after 30 years.
Commitment to government openness	Public to be given user friendly guide. Training of agency officials Monitoring of the Act, annual reports.	The establishment of an Independent Monitor to oversee the administration of the Act.

ANALYSIS OF THE UK WHITE PAPER

CHAPTER 2

Scope of the Act — Who will it cover?

The UK Government states that 'freedom of information, as a fundamental element of our policy to modernise and open up government, should have very wide application'.[3] Following such tenets, the scope of the Act appears to very broad, certainly much more so than the existing Code of Practice. At a glance it will cover government departments, including non-ministerial departments and their executive agencies; nationalised industries, public corporations, as well as over 1200 Quangos (non-departmental public bodies).

The National Health Service, the administrative functions of the courts, tribunals and police, the armed forces, local authorities and local public bodies, schools and universities, and private organisations insofar as they carry out statutory functions will also fall under the Act's ambit. Further, it is specifically stated that FoI provisions will be applied to information relating to services performed for public authorities under contract.

However, as noted by the Campaign for Freedom of Information, the operations and activities of the Security Service, Secret Intelligence Service, the Government Communications Headquarters and the Special Forces (SAS and SBS) will not be made subject to the Act. The Campaign criticises this perceived failing noting that the CIA is subject to the USA *FoI Act* and the equivalent Canadian and New Zealand services are covered by their countries' laws also.

The recommendations made by the Australian Law Reform Commission in its report *Open Government: A Review of the Federal Freedom of Information Act 1982* concerning the breadth of the application of the Australian *FoI Act* were not as progressive as those put forward in the White Paper. The ALRC recommended against the extension of the *FoI Act* to the private sector on the basis that as a general rule, private sector bodies do not exercise the executive power of government and do not have a duty to act in the interest of the whole community.[4] Further it was believed that existing regulations currently keep private sector bodies sufficiently accountable. While the Commission recommended that Government Business Enterprises (GBEs) should be made subject to the Act, those that were engaged predominantly in commercial activities in a competitive market (such as Telstra) were to be excluded from the Act's ambit.

Since that report the peak administrative law body in Australia, the Administrative Review Council, has issued discussion papers attempting to explore ways and mechanisms to handle access to information issues involving outsourcing and contracting out of public sector activities.

Rights of acc ss under the Act

The right of access to information is stated by the Government as 'at the heart of the Act'.[5] Anyone can apply for information and applicants do not need to demonstrate or state their purpose in applying for information. It is significant that while the existing Code of Practice provides access to information, but not to actual records or documents, (which is in contrast to most statutory FoI schemes) the Paper suggests that information access should cover both records and information, with the term 'records' covering all forms of recorded information including electronic records, tape and film etc.

The access right is to apply to records of any date, regardless of whether they were created before or after the Act comes into force. The access right will apply to recorded information that the public authority concerned already holds. The public authority does not have to have originated this information itself.

A submission on the White Paper by Adrian Norman <http://foi.democracy.org.uk/html/submission_stack_1_3.html> alluded to the fact that the White Paper does not specify whether all information, or only documents on paper are within the scope of the proposed bill. Norman notes that decision-making activities such as committee meetings, telephone calls, and video conferences are recorded in digital form, often without additional paper records.

Australian FoI legislation generally provides a statutory right of access to government information, including documents and 'records' subject to certain exemptions. The ALRC noted that while not all documents in the possession of a Commonwealth agency are records in a technical sense (i.e. being information that is created, received or maintained by an organisation in the transaction of business or the conduct of affairs and kept as evidence of this activity) nevertheless most of the documents sought under the *FoI Act* will be.[6] Good record keeping and record management practices were therefore recommended as vital to the success of any FoI Act.

The ALRC made similar recommendations to the White Paper concerning a right of access to all documents regardless of date, in suggesting the amendment of the Australian Act so that it applied to documents that were less than 30 years old, regardless of when they were created. The ALRC sought to close the 'access gap' that had occurred between the *FoI Act* and the *Archives Act* where the latter only provided access to documents that were more than 30 years old, and the *FoI Act* only access to documents that were created after 1977.[7]

Duties to publish information

The Government appears ready to voice a commitment to the recognition and changing of 'agency culture' noting that:

> a Freedom of Information Act must be a catalyst for changes in the way that public authorities approach openness ... Experience overseas consistently shows the importance of changing the culture through requiring 'active' disclosure, so that public authorities get used to making information publicly available in the normal course of their activities.[8]

The Act will impose duties on public authorities to make certain information available as a matter of course. This requirement is consistent with the other provisions of the Act — including its harm and public interest tests (see Chapter 3). The provisions are broadly along the lines in the Code of Practice, namely facts and analysis which the Government considers important in framing major policy proposals and decisions, explanatory material on dealings with the public, reasons for administrative decisions to those affected by them, as well as operational information about how public services are run, how much they cost, targets set, expected standards and results and complaints procedures.

Agency culture was similarly alluded to by the Australian Law Reform Commission as an important factor in the success of any FoI regime when it stated:

> the culture of an agency and the understanding and acceptance of the philosophy of FoI by individual officers can play a significant part in determining whether the Act achieves its objectives. A negative attitude, particularly on the part of Senior Management can influence an agency's approach to FoI and seriously hinder the success of the Act in that agency.

In seeking to combat a negative agency culture the ALRC recommended the education of FoI officers so that they were aware of the purpose and philosophy behind the Act. The Commission considered that a positive culture of disclosure was more likely to occur through the linkages of good public information, communication and FoI practices to performance appraisal, particularly, through the application of performance agreements of all senior officers. Further the ALRC recommended that greater disclosure of information should occur independently of the Act, in that agencies should regularly examine the types of requests for information they receive to determine whether there are particular categories that could be dealt with independently of the Act. The Law Commission in New Zealand and the Information Commissioner in Canada have both stressed the pivotal role of agency culture and attitude in making access to information legislation operate effectively.

What the UK FoI Act is intended not to do

The Government states that an FoI Act is not appropriate for certain purposes and that the legislation should exclude limited categories of information held by public authorities. First, it is not intended that the Act should cover public sector employment law. For example the Act would not cover access to the personnel records of public authorities by their employees. This approach is justified on the basis that allowing public sector employees a right of access to their personnel files under the FoI Act would, among other things, result in public and private sector employees having different statutory rights.

Second, it is envisaged that the Act will exclude information relating to the investigation and prosecution functions of the police, prosecutors, and other bodies carrying out law enforcement work such as the Department of Social Security. The Government justifies this stance by stating the need to avoid prejudicing effective law enforcement, the need to protect witnesses and informers, the need to maintain the independence of the judicial and prosecution processes, and the need to preserve the role of the criminal court as the sole forum for determining guilt.

Lastly, it is suggested that the Act should not cover legal advice obtained by the Government from any source or any other advice within government which would normally be protected by legal professional privilege.

Similarly, the Australian Act contains exemptions which relate to law enforcement and public safety (s.37) and legal professional privilege (s.42). However Australian FoI Acts have played an important role in allowing public sector employees (including teachers and academics) the opportunity to access their own personnel records and to ensure those records are correct and accurate. The argument about differential rights between public sector and private sector employees is too inadequate to justify this widely accepted benefit of FoI in countries like Australia.

Gateways to the Act

The Government states that it is determined that the Act 'should be open, fair, straightforward and simple to operate both from the point of view of the applicant and of those who hold the information. The bodies covered by the Act will be expected to act reasonably and helpfully when applying the qualifying "harm tests" as described in Chapter 3.' Consequently the Government has viewed it necessary to include some basic tests of reasonableness for applications for information. The White Paper states that these tests are intended to give an applicant rapid entry into the FoI process by encouraging applications which are reasonable and practicable for public authorities to deal with and to also encourage the authority and the applicant to co-operate in this process.

The Government states that in most cases the 'gateway' process will simply be a matter of ensuring that the request is well-informed and clear, but that the tests of reasonableness will also serve as the FoI equivalent of the procedures preventing the law being misused by vexatious litigants.

Reasonableness tests

The Paper suggests that applications for information covered by the Act should normally progress to the point where they are assessed against the harm and public interest tests. Circumstances where public authorities could deal differently with applications are stated to include the following:

- where applications include information that has already been published. Disclosure could be refused, but information to help identify existing publications should be given to the applicant;
- applications which are not specific enough to provide the relevant authority with a reasonable indication of what is being sought. The authority would need to indicate the nature of the problem and invite the applicant to be more specific;
- large scale 'fishing expeditions' or other applications which would result in a disproportionate cost or diversion of the public authority's resources in order to review etc. the required records. The authority would need to give an indication of why the application caused this problem — or if it intended to meet the application but at a significant charge — the likely cost to the applicant of doing so;

  multiple applications from the same source for related material in order to avoid the previous restriction. It is envisaged that public authorities would have flexibility in such cases over how they treated such applications for charging and cost threshold purposes;

- large multiple applications for similar information from different sources which are clearly designed to obstruct or interfere with the public authority's business. The public authority would have the option of publishing the information at an early stage in the process, avoiding the need for repeated disclosure to individuals.

While the object should be for the public authority to be helpful in dealing with problematic requests, should this not be possible an applicant should normally be able to appeal to the Information Commissioner. There may also be scope for the Commissioner to mediate where an authority and an applicant have failed to reach agreement on what constitutes a valid application.

Certain reforms suggested by the Australian Law Reform Commission appear relevant to the White Paper. With regard to the making of an FoI application, the ALRC notes the problem whereby an applicant who lacks information about what documents an agency holds and who is unfamiliar with its operations may have difficulty identifying the specific documents relevant to his or her request. Consequently, the ALRC suggests that more rigorous compliance with ss.8 and 9 of the Act is required. Section 8 requires agencies to publish certain information in their annual reports including a statement of the categories of documents that are maintained in the possession of the agency. Section 9 requires agencies to have certain documents such as manuals containing guidelines available for inspection and purchase.

The Australian Act permits agencies to refuse to process an FoI request on the ground that the work involved would substantially and unreasonably divert the resources of the agency from its other operations (s.24).The ALRC noted that the ability to refuse a request without even beginning to process it is a powerful one and should only be used as a last resort after the agency has made every attempt to assist the applicant to narrow his or her request.[9] It is further stated that agencies should not be permitted to use s.24 just because their information management systems are poorly organised and documents take an unusually long time to identify and retrieve. The ALRC suggested that s.24 be redrafted to emphasise the importance of agencies consulting with applicants about their requests.

With regard to vexatious applications, the ALRC considered that the proposal to allow an agency to reject a request on the basis that it is vexatious be refused. The ALRC considered that that 'the potential for agencies to invoke such a provision to avoid requests merely because they regard them as nuisances outweighs any advantages there may be in such a provision'.[10] In noting, however, that the Act does not provide agencies with a mechanism for dealing with repeated requests for documents to which access has already been refused, the ALRC recommended that a provision be introduced to allow an agency to refuse a request that seeks access to documents to which the applicant has been refused access before if there are no reasonable grounds for the request being made again.

To long-term observers of access to information legislation in operation, the notion of 'gateways' to screen potential applicants in terms of numbers, types and frequency of requests seems to be a very crude device to deal with the occasional 'serial' or 'daily' requester of information. There is the amusing story of an Australian agency in the 1970s which predicted that its warehouses of information would be so sought after that it could expect over 60,000 requests in the first two years of an FoI Act coming into force. Yet two years after the Australian FoI Act had commenced, that agency was still waiting for its first request. There are examples in some jurisdictions of an FoI Act revealing a pent up demand for information. For example in Tasmania over 70% of requests have been for police prosecution briefs for Magistrate Court proceedings (generally for drink driving, minor assaults and similar type of offences). The solution has been to provide this information, some times for a fee, outside of the FoI process.

Who pays

In recognising that information access carries costs and that every major FoI regime in the world contains provisions for charging, the Government compares the current charging provisions in UK legislation. It notes that 'Data Users' — bodies holding information covered by the *Data Protection Act* are able to levy a maximum fee of £10 per request, but cannot impose a charge relating to the work done to respond to the request. Under the Code of Practice the position is reversed, fees are not permitted, but charges can be made for work done to deal with requests.

The Government states that the following aims were considered in the development of a fees and charges structure:

- to provide a system which is as fair as possible to applicants based on the assumption that the bulk of the costs of FoI will be borne by public authorities;
- to provide a mechanism which reinforces the 'gateway' tests by deterring frivolous requests and encouraging responsible use of the Act; and
- to provide a means of applying some control over flows of 'subject access' requests for personal information between FoI and the new *Data Protection Act.*

On this basis, the Government proposes that:

- public authorities covered by the Act should be able to charge a limited access fee per request which should be no more than £10;
- where the request is for an individual's own personal information, the authority can charge a flat fee up to a maximum of £10;
- no fees will be charged for access to review and appeal procedures;
- complaints about misuse of fees may be made to the Information Commissioner;
- public authorities will be able to set charging schemes within parameters laid down either in the Act itself or (more probably) an Order made under it. These parameters would require that charging schemes:
  - exclude any power to make a profit, ensuring that charges reflect only 'reasonable' costs;
  - should not apply to information which a public authority is required under the FoI Act itself to make publicly available;
  - should be structured to fall primarily on the limited number of applications which involve significant additional work and considerable costs, rather than straight forward applications.

– must provide early notification of any prospective charge to applicants, to enable them to choose whether to proceed with their applications.

Under the Australian Act, an FoI applicant must pay a $30 application fee, but may seek remission of that fee on the ground of either financial hardship or that access is in the general public interest. The ALRC was of the opinion that access to an applicant's personal information should be free. While agencies hold a general discretion not to levy charges, any charges they do impose must be determined in accordance with the FoI regulations. Search and retrieval time can be charged at $15 an hour. Decision making time can be charged at $20 an hour. Before an FoI request is processed the agency must give the applicant an estimate of the charges it intends to impose. The applicant may then seek the reduction or waiver of those charges.

It was acknowledged by the ALRC that the current FoI fees and charges regime was the subject of considerable criticism by both agencies and applicants. Applicants complained that costs were high and not related to whether they received any information, so that they might have to pay even if all the documents they requested were withheld on the basis that they were exempt. A number of submissions to the Review also opposed the charge for decision-making time on the ground that it was open to abuse by agencies that want to discourage applicants. Agencies stated that they viewed the current regime as too complicated, time consuming and expensive to administer, and so often did not bother imposing charges for access to documents under the Act.

In response, the ALRC recommended that a new fees and charges regime for information (other than personal information of the applicant) be imposed. The ALRC considered that charges should only be levied in respect of documents that are released. The charges that agencies may impose in respect of documents released should be determined in accordance with a scale fixed by the proposed Information Commissioner. It was suggested that the scale should fix a charge for a specific number of pages rather than for an individual page — for example, 1-20 folios: $30; 21-50 folios: $45; 51-80 folios: $80; and that the scale should be set on the basis of a realistic assessment of the average number of hours a competent administrator in an agency with efficient record management systems would spend on search and retrieval. It should not take into account decision- making time.

A submission on the White Paper by the Chairman of MORI (Market and Opinion Research International) proposes a similar fee structure <http://foi. democracy. org.uk/html/submission_stack_1_19.html>. The submission suggested that a frequency of use charging system be considered, in that an annual fee structure be imposed, providing for up to e.g. five requests to be processed free of charge, from six to ten at £10 each and for over ten requests a more significant amount.

With regard to review charges in Australia, the ALRC recommended that the $40 fee for internal review be abolished. An application to the AAT for review of an FoI decision must be accompanied by a $300 filing fee. The AAT may refund the fee if proceedings have 'terminated in a manner favourable to the applicant'. The AAT also holds the discretion to recommend to the Attorney-General that an FoI applicant's costs be paid by the Commonwealth where the applicant is successful or partially successful. As the provisions are rarely used,

the ALRC considered that they should be employed more widely and their existence publicised by the Information Commissioner.

CHAPTER THREE

The right to know and the public interest

The White Paper states that decisions on disclosure under the Act will be based on a presumption of openness, so that public authorities taking such decisions will need to start by assessing the effect of disclosing, rather than withholding, the information.

Significantly, the Paper rejects the approach of the existing Code of Practice which contains over 15 exemptions (more than any of the main statutory FoI regimes anywhere in the world), as this 'inevitably makes it complex for applicants to use and encourages accusations that Departments "trawl" for anything that might serve as a reason for non-disclosure'.[11] Other criticisms of the Code include that its wording encourages the use of a 'class based' approach toward exemptions (i.e. where a whole category of information or record is protected, leaving no scope for partial disclosure of a record) and that it often requires a balance to be struck, whereby the harm that the disclosure could cause to one or more of the exemptions is set off against the public interest in disclosure.[12]

The substantial harm test

The White Paper states that while it is right that the test for disclosure under FoI should be based on an assessment of the harm that disclosure might cause and the need to safeguard the public interest, reforms are required that are designed to clarify and simplify the harm test that should be applied. Specifically, the Paper notes that the harm test should give an indication of the degree of harm which is likely to justify protecting information. There should also be clarification as to how a decision on the 'public interest' can be determined. Thus, it is proposed that for most exemptions a substantial harm test replace the current simple harm test, the question being asked then is whether the disclosure of information will cause substantial harm.

The 'specified int r sts'

The Paper proposes that the Act should not contain specific exempt categories at all, but rather that disclosure should be assessed on a 'contents basis' whereby records are disclosed in a partial form with any necessary deletions, rather than being completely withheld. In place of the Code's exemptions there are seven 'specified interests'. The Paper proposes that the Bill will set out, to the necessary extent particular factors in respect of each interest so that those considering applications, including the proposed Information Commissioner, should have regard to those factors when deciding whether a disclosure would cause harm or substantial harm to anyone of them. The proposed key interests include national security, defence and international relations, law enforcement, personal privacy, commercial confidentiality, the safety of the individual, the public and the environment, information supplied in confidence, decision making and policy advice processes in government.

It is noted that factors which would need to be taken into account in determining whether the relevant harm test would prevent disclosure of information are likely to include the maintenance of collective responsibility in government, the political impartiality of public officials, the importance of internal discussion and advice being able to take place on a free and frank basis, and the extent to which the relevant records or information relate to decisions still under consideration, or publicly announced.

The Campaign for Freedom of Information draws attention to the fact that it is unclear by the wording of this chapter whether and to what extent the substantial harm test applies to all seven of the 'specified interests.' It is stated in that Paper that it is proposed 'to move in most areas from a simple harm test to a substantial harm test'[13] but further clarification in the Bill is obviously necessary to determine the precise breadth of the test. This issue has also been raised by the Oxford Research Group (ORG) in their submission on the White Paper <http://foi.democracy.org.uk/html/submission_stack_1_26.html> with the suggestion that if only the test of 'harm' is required, that there is not a clear enough justification for it in the Paper. The ORG also suggest that the 'specified interests' require further clarification, in that currently in terms of applying protection under each limb, too much subjectivity will be involved. An example is given of the specified interest of 'the national and international interests of the State' — in that state may include the body of citizens, the institution of government and the democratic system, or simply the government of the day.

Other concerns of the Campaign centre around the interplay between the proposed Act and the *Official Secrets Act,* as the latter covers areas such as defence, international relations, national security and law enforcement and contains a much lower damage test which may apply instead. Indeed, the Paper notes that:

> we are concerned to preserve the effectiveness of the Official Secrets Act and there may in some cases be a need to ensure that a decision taken under the FoI Act would not force a disclosure resulting in a breach of the harm tests that prohibit disclosure under the Official Secrets Act.[14]

The public interest

The Paper notes that the current public interest test as meant to be applied under the Code of Practice is unclear and can be difficult for both the disclosing authority and the applicant to understand. Two proposals that are put forward to deal with this problem include ensuring that any decision on disclosure safeguarding the public interest should be a separate and identifiable step in the FoI process and that there be an attempt in the Bill to increase the clarity and certainty of individual decisions by defining what constitutes the public interest.

It is acknowledged that no single factor can be said to constitute the 'public interest' and that a case by case approach will be necessary. Nevertheless it is suggested that public authorities can seek to ensure that decisions under FoI safeguard the public interest by checking:

(1) that the preliminary decision on whether or not to disclose, resulting from the substantial harm test, is not itself perverse. Eg would a decision not to disclose particular information itself result in substantial harm to public safety, or the environment, or the commercial interests of a third party?

and then by ensuring

(2) that the decision is in line with the overall purpose of the Act, to encourage government to be more open and accountable, or if not, that there is a clear and justifiable reason for this; and

(3) that the decision is consistent with other relevant legislation including European Community Law which requires either the disclosure or the withholding of information (in particular the *Official Secrets Act).*[15]

It was suggested by the organisation Clifford Chance, in its submission on the White Paper <http://foi.democracy.org.uk/html/submission_stack_1_4 html> that it is unclear how the 'substantial harm' test will work and specifically how it will interact with the public interest dimension of the legislation.

The above proposals contained in the White Paper comprise some of the most forward and far reaching of all recommendations put forward. While the ALRC made significant recommendations relating to reform of the Australian FoI exemption provisions and public interest test, they do not compare as favourably in substance to the UK Government's proposals.

The ALRC agreed that the overriding philosophy behind the exemption provisions should be that the applicant has a right to obtain the requested material, but with the recognition that the public interest in the general availability of government information will in some cases be outweighed by the public interest in protecting information from disclosure. Only a number of exemptions in the Australian Act are subject to the question of whether a specified harm 'would or could reasonably be expected to result from disclosure.'[16] Further, the decision maker must have real and substantial grounds for the expectation that harm will occur. Similarly several provisions require decision makers to determine that disclosure will have a 'substantial adverse effect' before the exemption can be claimed.[17] The Commission recommended against legislative amendment for the clarification of either of the phrases.

The ALRC similarly recommended that the public interest test was in need of clarification, stating that although a statutory definition was not appropriate, guidelines issued by the proposed Information Commissioner would be helpful. The ALRC suggested that the guidelines could contain factors to be taken into account that could be viewed as relevant and irrelevant to the consideration of the public interest.

Suggested relevant factors included:

- the general public interest in government information being accessible;

- whether the document would disclose the reasons for a decision;

  whether disclosure would contribute to debate on a matter of public interest;

- whether disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation.[18]

  Suggested irrelevant factors included:

- the seniority of the person who is involved in preparing the document or who is the subject of the document;
- that disclosure would confuse the public or that there is a possibility that the public might not readily understand any tentative quality of the information;
- that disclosure would cause a loss of confidence in the government.

The Commission also recommended that the *FoI Act* should be amended to provide that, for the purpose of determining whether release of a document would be contrary to the public interest, it is irrelevant that the disclosure may cause embarrassment to the government.

CHAPTER FOUR

The right to personal information

The proposed UK Act intends to give individuals a statutory right of access to the personal information about them which is held by public authorities, consistent with FoI legislation in other jurisdictions. It is intended that the Act will apply to all personal data held by public authorities and other relevant organisations, whether on computer or paper files and therefore will cover a wider range of information held by public authorities than either the existing or the proposed data protection legislation.

The Act is to be drafted so that it is compatible with the Data Protection Principles which are set out in the *Data Protection Act.* These include for example the requirements that the data should only be used for a specified and lawful purpose, that it should be adequate and relevant for that purpose, and that it should be accurate and kept up to date.

Current data protection legislation provides the individual with a number of rights. These include a right to correct inaccurate personal information and a right to compensation for any damage and associated distress caused by the organisation's misuse of the information. It is intended not to limit these rights to personal information covered by the *Data Protection Act,* but that as far as possible, the rights applying under the *Data Protection Act* will apply to all personal information held by public authorities irrespective of the coverage of the data protection regime or the route of access.

The ALRC recommendations relating to personal information were predominantly concerned with deficiencies in the Act in providing the individual with the right to seek amendment or annotation of a record containing their personal information. The ALRC suggested that access to the document should not be a prerequisite to seeking amendment or annotation under the Act and that amendment or annotation of personal information may be sought on the ground that, having regard to the purpose for which the information was collected or is to be used, it is not relevant. Further, if on an application for amendment of a document containing personal information, an agency considers that the information is incorrect or out of date, incomplete, not relevant or misleading it must take reasonable steps to amend the document.

CHAPTER 5

Review and appeals

The Paper acknowledges the clear need for an independent review and appeals mechanism under the Act, stating:

> we see independent review and appeal as essential to our Freedom of Information Act. We favour a mechanism which is readily available, freely accessible and quick to use, capable of resolving complaints in weeks and not months.[19]

The Paper proposes to build on the current Code's two-stage system of appeal. At present, under the Code, in the first instance a complainant can ask a government department to carry out an internal review of its decision not to disclose information. If the complainant remains dissatisfied, he or she can then ask the Parliamentary Ombudsman to conduct an investigation.

While it is stated that such a system has worked relatively well, the Paper nevertheless proposes that the internal review stage should be formalised and a new independent Information Commissioner introduced with wide ranging powers. It is proposed that the Commissioner should be able to challenge authorities which refuse to release records and information which is subject to the Act. Significantly, the Commissioner will have the power to order disclosure. It is envisaged that while the Information Commissioner will fulfill a role similar to that performed by the present Parliamentary Ombudsman under the Code, he or she will remain an independent office holder, rather than an officer accountable to Parliament.

Internal review

It is predicted that internal review will be the first step in the FoI appeals process, providing a quick, low cost and simple mechanism for resolving many complaints. While it is intended that an internal review will be a pre condition for making a complaint to the Information Commissioner, the Commissioner will hold the discretion to accept a complaint which has not been the subject of an internal review where:

- a complaint concerns unreasonable delay in dealing with an initial request for information or in conducting the internal review itself;
- the public authority is too small to have its own review procedure.[20]

Appeals to the Information Commissioner

It is intended that the new Information Commissioner will play a key role in promoting, interpreting and enforcing the Act. Specifically it is stated that the Commissioner's primary role will be 'to investigate complaints that a public authority has failed to comply with the requirements of the Act either by refusing to disclose information, or by taking an unreasonable time to respond to requests or by imposing excessive charges for information'.[21] Other duties of the Commissioner will include the publication of an annual report to Parliament on the operation of his/her function and the Act, the publication of reports on the outcomes of investigations and the promotion of greater public awareness and understanding of the Act.

The wide ranging powers that are proposed to enable the Information Commissioner to fulfill these functions effectively include:

the power to order disclosure of records and information which are subject to the Act;

the right of access to any records within the scope of the Act and relevant to an investigation;

the power to review and adjust individual charges or charging systems, or to waive a charge if disclosure is considered to be in the wider public interest;

the right to resolve disputes via mediation.

Further the Information Commissioner will be allowed to report any failure by a public authority to comply with a disclosure order, or to supply records relevant to an investigation to court. The Commissioner will also be given the power to apply for a warrant to enter and search premises and examine and remove records where he or she suspects that records that are relevant to an investigation are being withheld. A new criminal offence is to be created for the willful or reckless destruction, alteration or withholding of records relevant to an investigation of the Information Commissioner.

Right of appeal beyond the Information Commissioner

It is not proposed that there should be a right of appeal to the courts, although a disclosure order of the Commissioner (or a decision not to grant an order) would be subject to judicial review. This approach is justified on the basis that it is in the best interests of the FoI applicant as 'overseas experience shows that where appeals are allowed to the courts, a public authority which is reluctant to disclose information will often seek leave to appeal simply to delay the implementation of a decision'.[22]

Australia's federal system of review and appeals for FoI decisions remains much more limited in scope than the proposed White Paper reforms. The Commission recommended that the Administrative Appeals Tribunal should remain the sole determinative review body of FoI decisions. This was despite the acknowledgment by the Commission that the effectiveness of the AAT in this role has been challenged. Criticisms have been made about the cost of AAT review, the length of time taken to finalise reviews, the formality of AAT proceedings and the quality of AAT decisions. Nevertheless the Commission chose to reject an Information Commissioner review model, although it did propose the establishment of an Independent Monitor to oversee certain functions of the Act (not review). In stating that there was room for improvement in the way that the AAT conducted its review of decisions, the Commission noted that certain reforms by the AAT were already underway — such as conducting the review through a series of meetings rather than a formal hearing and allocating case managers to receive and stream applications for review of FoI decisions. Further, the Commission recommended that certain powers of the AAT should be extended — for example that the AAT is able, at any time after an application for review is lodged, to require production of documents claimed to be exempt.

The Commission recommended against the extension of the Ombudsman's role to having determinative review powers, instead limiting it to that of investigating FoI complaints. The Ombudsman retains no power to set aside a decision and substitute a decision, but can make recommendations to the particular agency concerned or the responsible Minister, and if necessary may make a report to Parliament.

Ministerial certificates

The practice in many FoI jurisdictions of the use of Ministerial Certificates (where a Minister can certify that particular documents lie outside the appeals process) has been rejected by the Paper, on the basis that a government veto would undermine the authority of the Information Commissioner and erode public confidence in the Act.

Currently the Australian Commonwealth *FoI Act,* contains provision for conclusive certificates in s.33 (national security and defence), s.33A (Commonwealth/State relations), s.34 (Cabinet documents), s.35 (Executive Council documents and s.36 (internal working documents). Australian State jurisdictions have severely limited the number of ministerial certificates. The Commission recommended that certificate provisions be removed from ss.33A and 36. However, while appreciating the concerns about the potential for conclusive certificates to reduce the effectiveness of the Act, the Commission considered that they were justified in respect of the remaining provisions. The Australian Law Reform Commission proposed that the certificates be limited to a maximum duration of two years, while the Administrative Review Council differed in view, suggesting that conclusive certificates issued under ss.33 and 34 remain unlimited in duration. The latter body further suggested that certificates issued under s.36 should be limited to a maximum duration period of five years.

CHAPTER 6

Public records

It is acknowledged that the introduction of an FoI Act will have a considerable impact on the present public records system in the United Kingdom. Government records of historical value are selected for permanent preservation and when they are 30 years old they are made available to the public in the Public Records Office.

The Government wants the two systems — Freedom of Information for current records and Public Records for historical records, to complement each other to provide a unified approach to openness. Thus it is intended that the *FoI Act* should cover access to both current and historical material, providing a comprehensive right of access to all records regardless of their age.

It is proposed that the 30-year rule for release be retained. It is suggested that under the new FoI regime a greater number of records should be released within the 30-year period.

Criteria for withholding documents for longer than 30 years

The overriding presumption is that all records preserved for historical reasons will be made available to the public after 30 years. The 1993 White Paper on Open Government laid down strict criteria that must be met if the records are to be withheld from the public for longer than the 30 years. It is proposed that these criteria be incorporated into the Act and are expected to relate to some of the specified interests identified for FoI purposes — such as defence, international relations and national security, information provided in confidence, and personal information. The route of appeal against extended closure or

retention of records beyond the 30 year period will rest with the Information Commissioner.

An upper time limit of 100 years on the withholding of material is proposed to be introduced. However, due to the perceived inherent sensitivity of the records in question it is proposed to test whether their disclosure could still cause substantial harm to the public interest.

The Australian regime similarly provides for information access in two ways — the *Freedom of Information Act* for information created after 1977 and the *Archives Act* for documents greater than 30 years old. As noted in the summary for Chapter Two of the White Paper, the Commission recommended the closure of the 'access gap' that had formed for documents created prior to 1977, but that were younger than 30 years old. The Commission further suggested that the *Archives Act* be amended to require the head of an agency to ensure the creation of such records as are necessary to document adequately government functions, policies, decisions, procedures and transactions and to encourage good record keeping practices in ensuring that records in the possession of the agency are appropriately maintained and accessible.

CHAPTER 7

Making government more open

The Paper states:

> openness does not begin and end with a Freedom of Information Act. Overseas experience shows that statutory provisions need to be championed within government itself if openness is to become part of the official culture rather than irksome imposition ... We believe that this sort of culture change has taken place in some countries — the USA and New Zealand are examples. We see no reason why it should not also be possible in the UK, despite a more entrenched culture of secrecy extending back at least to the 19th century and the *Official Secrets Act* from 1989 onwards.[23]

It is proposed that a number of key tasks be undertaken if the *FoI Act* is to form the beginning of a real culture change. These include:

> that the general public will given a user friendly 'How to use FoI Guide';
>
> that public authorities covered by the Act be encouraged and helped to fulfill their obligations (whether statutory or otherwise) to pursue active openness (such as publishing internal manuals, performance indicators, giving reasons for decisions etc.);
>
> providing public authorities with access to authoritative and up to date guidance in working with and interpreting the Act;
>
> providing effective training for officials so that a learning culture be developed as the Act takes effect;

- monitoring the operation of the Act, leading to an annual report to Parliament.

The Government's commitment to openness is further reflected in the following statement:

> some of the functions listed above may well also properly fall to the Commissioner, in furtherance of his or her role. In general however we believe that the role of champion should best be supplied by government itself. It is vital that FoI should not result in a position where all the pressure for an open and positive approach to the disclosure of information lies outside the government, while a resulting counter-culture of reluctance develops within.[24]

The Australian Law Reform Commission recognised that while the *FoI Act* provided a statutory right of access to government held information, it did not establish a program management regime to oversee the implementation of the accompanying and sometimes complex obligations. Accordingly, the ALRC recommended the introduction of an Independent Monitor — an independent person to oversee the administration of the Act. The independent monitor's role was to fall into two categories — firstly on the basis of regular audits, monitoring agencies' compliance with and the administration of the Act, and secondly, to promote the Act and provide advice and assistance to agencies and members of the public.

The Commission perceived that the existence of an Information Commissioner would lift the profile of FoI, both within agencies and in the community and would assist applicants to use the Act. As stated by the Commission it would 'give agencies the incentive to accord the higher priority required to ensure its effective and efficient administration.'[25]

In his submission on the White Paper, David Flint suggested that the proposed legislation was too passive an approach to the provision of information. (http://foi.democracy.org.uk/html/submission_stack_1_5html). Flint puts forward the view that in many instances people are unaware of the existence of information that would be of value to them. Thus his suggestions are that public bodies should, even before the Bill becomes law, consult as to the classes of information that will be of the most value and interest to the public, and should publish and catalogue the relevant information using the Internet as well as other media outlets.

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References

1. UK Government White Paper, *Your Right to Know,* 1997, para. 1.1. Unless otherwise stated all para nos below refer to this report.
2. Para. 1.6.
3. Para. 2.1.
4. ALRC, *Open Government: A Review of the Federal Freedom of Information Act 1982*, AGPS, 1995, para. 15.5.
5. Para. 2.6.
6. ALRC report, para. 5.8.
7. ALRC report, para. 5.7.
8. Para. 2.17.
9. ALRC report, para. 7.14.
10. ALRC report, para. 7.18.
11. Para. 3.3.
12. Para. 3.3.
13. Para. 3.7.
14. Para. 3.19.
15. Para. 3.19.
16. See *FoI Act 1982* (Cth), e.g. s.33, s.33A, s.37, s.40 , s.44.
17. See *FoI Act 1982* (Cth), s.39, s.40(1)(c),(d) and (e), s.44(1)(a).
18. ALRC report, para. 8.14.
19. Para. 5.3.
20. Para. 5.9.
21. Para. 5.10.
22. Para. 5.16.
23. Paras 7.1 & 7.2.
24. Para. 7.6.
25. ALRC report, para. 6.4.