Detailed Analysis of the Malawi civil society draft *Access to Information Act 2005* & Recommendations For Amendments

"The great democratising power of information has given us all the chance to effect change and alleviate poverty in ways we cannot even imagine today. Our task, your task…is to make that change real for those in need, wherever they may be. With information on our side, with knowledge a potential for all, the path to poverty can be reversed." *--- Kofi Annan*

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For more information, please contact:
Mrs Maja Daruwala, Director or
Ms Charmaine Rodrigues, Co-Coordinator, Right to Information Programme
Ph: +91 11 2685 0523
Fax +91 11 2686 4788
Email: maja@humanrightsinitiative.org or charmaine@humanrightsinitiative.org

ANALYSIS OF MALAWI CIVIL SOCIETY
DRAFT *ACCESS TO INFORMATION ACT 2005*

The Media Institute of Southern Africa Malawi Chapter has forwarded a copy of the draft *Access to Information Bill 2005* to the Commonwealth Human Rights Initiative (CHRI) for review and comment. CHRI understands that the Bill has been drafted by civil society, with a view to submitting it to the Malawi Government for enactment as a law. CHRI welcomes the opportunity to comment on the Bill. We encourage both the drafters and eventually the Government to consult widely with the public and other key stakeholders before the Bill is finalised and tabled in Parliament. Experience has shown that a participatory law-making process can be a major factor in laying a strong foundation for an effective right to information regime. Implementation is strengthened if right to information laws are 'owned' by both the government and the public. Best practice requires that officials proactively engage civil society groups and the public during the legislative process. This can be done in a variety of ways, for example, by: setting up a committee of stakeholders (including officials and public representatives) to consider and provide recommendations on the draft Bill; inviting submissions from the public before Parliament votes on the Bill; convening public meetings to discuss the proposed law; and strategically and consistently using the media to raise awareness and keep the public up to date on progress.

ANALYSIS AND SUGGESTIONS FOR IMPROVEMENT

1. Overall, the Bill is adequate. However, the drafting is overly complicated in some parts and could be simplified and reordered to promote clarity and effective implementation. The exemptions sections should be tightened and combined for ease of application. The sections on the Information Commission should also be reconsidered to ensure that the Commission has sufficient power to act as a strong, independent, impartial body which can compel disclosure and promote open government. Likewise, the penalties sections could be strengthened.

Preamble / Objects clause

2. It is very positive that the bill includes a Preamble which, in addition to explaining the process aims of the Act, recognises the broader democratic objective of the law, which is to promote transparency and accountability. However, because the Preamble can be an important tool for the courts when interpreting the operative provisions of the law, consideration should be given to extending the list of objectives to make a clearer statement regarding the key aims of the law. Suggested additional wording has been included below:

Recommendations

Redraft the Preamble to make it explicit that the objectives of the Act include - to:

- *(i) Give effect to the Fundamental Right to Information, which will contribute to strengthening democracy, improving governance, increasing public participation, promoting transparency and accountability and reducing corruption*
- *(ii) Establish voluntary and mandatory mechanisms or procedures to give effect to right to information in a manner which enables persons to obtain access to records of public authorities, and private bodies where the information is needed for the exercise and/or protection of a right, in a swift, effective, inexpensive and reasonable manner.*
- *(iii) Promote transparency, accountability and effective governance of all public authorities and private bodies by including but not limited to empowering and educating all persons to:*
  - *Understand their rights in terms of this Act in order to exercise their rights in relation to public authorities and private bodies.*
  - *Understand the functions and operation of public authorities; and*
  - *Effectively participating in decision making by public authorities that affects their rights.*

Part I - Preliminary

Section 1

3. Section 1(2) requires the date of enactment of the Act to be notified by the Minister. However, failure to specify a commencement date in the legislation itself can be a risky approach. In India for example, the Freedom of Information Act 2002 was passed by Parliament and even assented to by the President but it NEVER came into force because no date for commencement was ever notified. Although, it is understandable that the Malawi Government may wish to allow for time to prepare for implementation, best practice has shown that the law itself should specify a maximum time limit for implementation, to ensure there is no room for the provision to be abused and implementation to be stalled indefinitely. Experience suggests a maximum limit of 1 year between passage of the law and implementation is sufficient (see Mexico for example).

Recommendations

- *Amend s.1(2) to include a maximum time limit for the Act coming into force in, ideally immediately but not later than 1 year from the date the Act receives Presidential assent.*

Section 2

4. The draft Bill currently contains a definition for "records" as well as "information". It is recommended that the definition of "records" should be incorporated into the definition of "information" because the former is a sub-set of the latter. Information is a much broader term and is therefore preferable because it means that more will be captured by the law and accessible by the public. Also, if one term is chosen and defined – "information" - then that term can be used consistently throughout the Bill.

5. It is not clear why the term "public authority" is mentioned in the definitions section, but the content of the term is then defined in Schedule 2. It is recommended that Schedule 2 be incorporated into s.2 to promote clarity and ease of application of the law. The definition of "public authority" should also then be reviewed to ensure that it is as broad as possible to make sure that as many bodies are covered by the Act. Specifically, the definition should make it explicit that the Executive, and legislature (Parliament and MPs advisors) are covered.

Recommendations

- *Incorporate the definition of "record" into the definition of "information" and then use the term "information" consistently throughout the Bill*
- *Incorporate Schedule 2 into the definition of "public authorities" and extend the definition to clarify that the Executive and legislature are covered (see also paragraph 10 below)*

Section 3

6. Section 3(2) is basically an exemptions clause, because it seeks to exclude certain bodies and certain types of information from the purview of the law. For ease of application, all of the exemptions should sit together. As such, section 3(2) should be should moved to sit with sections 8-10.

7. If s.3(2)(b) is retained, it should be reworked to make it explicit exactly what types of privilege it is attempting to protect, otherwise it may inadvertently exempt certain information which should be made public. Legal professional privilege is a common ground for withholding information – it could specifically be mentioned. What other types if privilege should legitimately be protected? These should be listed. Notably, medical records (ie. doctor-patient confidentiality) could be protected by the privacy exemption at s.8 (subject to the recommendations in this critique).

8. Section 3(2)(c) should be deleted because it is contrary to international best practice to exempt entire bodies/institutions from the purview of an access law. While it is understandable that there should be protection against the disclosure of sensitive security/intelligence information, this is adequately provided for by the national security exemption in s.9(a). It is unnecessary and unjustifiable to go beyond this and simply assume that *all* the information held by certain security/intelligence organisations is sensitive and needs to be put beyond the scope of the Act. For example, basic information such as personnel records, procurement contracts and general budget information cannot be justifiably exempted.

Recommendations

- *Move s.3(2) to sit with the exemptions in ss.8, 9 and 12*
- *Make explicit what types of privilege are protected under s.3(2)(b)*
- *Delete s.3(2)(c) because it is an unjustifiably broad exemption*

Section 4

9. It is positive that s.4 explicitly provides that the new access law overrides all other inconsistent legislation. A right to information law should be comprehensive, both in the right it extends and the restrictions it recognises. The list of exemptions included in the law should be exhaustive and other laws should not be permitted to extend them. In this context, it is important to note that best practice requires that the *Official Secrets Act* and other laws or civil services rules which entrench secrecy should in time be repealed and/or substantially amended. If other laws restricting the right are kept on the law books, there will be confusion about which provisions have priority – secrecy or openness.

Part II – Right of Access to Information

Section 5

10. Section 5(1) is one of the most crucial provisions in the Bill because it enshrines the actual right of the public to access information. In this context, each sub-section should be separated out into a separate provision because they each deal with a different aspect of the right. The following issues should then be addressed:

    - Sections 5(1)(a), (b) and (d) should be combined and simplified to simply extend a "*right to access information held by or under the control of public authorities [and private bodies where the information is needed for the exercise or protection of a right* (see below for further discussion]". This can then be elaborated upon in later sections, but a clear statement will ensure that officials are clear on their duty under the law and the fact that the public have an actual "right";
    - If section 5(1)(d) is not combined as recommended above, it should at least be reworded to clarify that the "*every person has a right to access information held by or under the control of a private body where the information is needed for the exercise or protection of a right*". Currently, section 5(1)(d) is too narrow because it should not only permit access to personal information. Private bodies are increasingly exerting significant influence on public policy. It is unacceptable that these bodies, which have such a huge effect on the rights of the public, should be exempted from public scrutiny simply because of their private status. As one commentator aptly observed, the scope of a right to information law needs to be "resolved by reference to its role in protecting the fundamental interests of citizens, and not by reference to the provenance or structural characteristics of the institution holding the contested

information."[1] Part 3 of the South African *Promotion of Access to Information Act 2000* (POAIA) already provides a working example of this approach.

- Consideration should be reworking section 5(1) to permit not only access to information but also inspection of public works and taking of samples from public works. Such an approach has been incorporated in the India *Right to Information Act 2005* in recognition of the fact that corruption in public works is a major problem in many countries, which could be tackled by facilitating greater public oversight through openness legislation.
- Sections 5(1)(c) should be separated out into a separate sub-sections because it deals with the right of the public to attend public meetings

11. Section 5(2) is an excellent provision, but it should be noted that if the recommendation above is accepted regarding the extension of the law to cover private bodies where the information is needed to protect rights, then a purpose *can* be requested in those cases.

Recommendation

- *Sections 5(1)(a), (b) should be combined and simplified to simply extend a "right to access information held by or under the control of public authorities"*
- *Additionally, consideration should be given to combining s.5(1)(d) with s.5(1)(a) and (b) and extending the right to "private bodies where the information is needed for the exercise or protection of a right*"
- *Section 5(1)(c) should be made into a separate provision because it deals with the issue of access to public meetings*

Sections 6-9 and 12 (Exemptions)

12. Sections 6 and 7 should be merged for clarity as they add little to the legislation. In fact, consideration could even be given to merging sections 6-9 and section 12 as they all deal with exemptions. As such, the could be combined into a single section which simply states: *"Subject to section 10 (the public interest override), information does not need to be released if it is covered by any of the following exemptions [insert list]"*. The current drafting is complicated and could be confusing for the officials trying to apply the law.

13. Even if the above recommendation is not accepted, then at the very least section 7(a) needs to be reworded because the cross-references are incorrect. The exemptions are in ss.8, 9 and 12 only. Section 10 is a public interest override, s.11 protects whistleblowers and s.16 deals with proactive disclosure.

14. In terms of the exemptions in sections 8, 9 and 12, it is important to note that while it is well-accepted that there can be a small number of legitimate exemptions in any access regime, exemptions should be kept to an absolute minimum and should be narrowly drawn. They should also all include a harm test – that is, they must require that some actual harm would be likely to occur to some legitimate interest before withholding a document can be justified. In that context, the following issues need to be addressed:

    - Section 8 is much too broadly drafted. It contains no harm test, but rather simply allows information to be withheld if it "involves" a third party. This is completely against international best practice. Third parties should have a right to note why they think their information should not be released, but they should not have a complete veto over disclosure. Such a provision could very easily be abused, particularly by private companies and consultants engaged by the

[1] Lewis, D. (2003) "The need and value of access to information from no-state agencies", CHRI unpublished, p.9.

government. Instead of such a broad provision, it is more appropriate that the provision be reworked to protect against the unwarranted invasion of the privacy of third parties (see the point below for more). Section 24 of the draft Ugandan *Access to Information Bill 2004* provides a useful model to draw on when formulating an provision to protect third parties' privacy rights:

(1) Subject to subsection (2), an information officer shall refuse a request for access if its disclosure would involve the unreasonable disclosure of personal information about a person, including a deceased individual.

(2) A person may be granted access to a record referred to in subsection (1) in so far as the record consists of information -

(a) about a person who has consented in writing to its disclosure to the person requesting the record;

(b) that was given to the public body by the person to whom it relates and the person was informed by or on behalf of the public body, before it is given, that the information belongs to a class of information that would or might be made available to the public;

(c) already publicly available;

(d) about a person who is deceased and the person requesting the information is -

(i) the person's next of kin; or

(ii) making the request with the written consent of the person's next of kin; or

(e) about a person who is or was an official of a public body and which relates to the position or functions of the person, including, but not limited to -

(i) the fact that the person is or was an official of that public body;

(ii) the title, work address, work phone number and other similar particulars of the person;

(iii) the classification, salary scale or remuneration and responsibilities of the position held or services performed by the person; and

(iv) *the name of the person on a record prepared by the person in the course of employment*

- Section 9(a) is legitimate in the protection it attempts to provide for information which could damage Malawi's security, but the protection provided for information provided by foreign governments should be reconsidered because the current drafting requires no harm to be shown as a result of disclosure, requiring instead only that the information is "exchanged in confidence" between governments. This part of the provision could be abused by unscrupulous governments and should either be deleted, amended to require some harm or at least narrowed so that information provided by a foreign government will only be protected where it was provided in confidence, relates to lawful activities and does not relate to human rights violations or corruption.

- Section 9(c) has a legitimate aim, but its wording is currently much too broad and could be open to abuse. What are the "legitimate interests" of Malawi in the context of crime prevention? This could be easily abused by corrupt police and security agents. It is therefore important to specify that secrecy will only be permitted where disclosure is *"reasonably likely to cause serious harm to lawful law enforcement activities"*. Consideration may even be given to detailing what those activities include, to narrow the provision further. It should also be made clear that victims of crime should be able to access as much information as possible about their cases, subject to legitimate law enforcement requirements.

- Section 9(d) is not appropriate because it could too easily be abused by secretive officials who believe that all their decision making processes are sensitive and should not be open to the scrutiny of the public. This is a very common reaction within the bureaucracy and needs to be broken down by an access law – not protected. Ironically, information which discloses advice given to the government during the policy and decision-making process is exactly the kind of information that the public *should* be able to access, unless it is particularly sensitive. The public has the right to know what advice and information the Government bases its decisions

on and how the Government reaches its conclusions. It is not enough to argue that disclosure would inhibit internal discussions. Officials should be able – and be required – to ensure that their advice can withstand public scrutiny. To fear such transparency raises questions about the soundness of the entire decision-making process. Of course, it will generally not be appropriate to disclose advice *prior* to a decision being reached. In this context, protection should be provided for "premature disclosure which could frustrate the success of a policy or substantially prejudice the decision-making process". Of course, relevant information should still eventually be disclosed – it is only premature disclosure that should be protected.

- Section 12 is an exemption provision and should therefore be moved to sit with the other exemptions. It also needs to be reworded because it is currently much too broadly drafted. While it is legitimate to protect commercial information, the rights of third parties are given much too much weight in the current provision. On the current wording, where a third party opposes disclosure, it is assumed that information shall be withheld. This is not appropriate. Third parties should be notified where confidential information they have provided to public authorities might be disclosed, but in the final analysis, even where a third party argues for non-disclosure, it is up to the public authority to make the final decision, balancing the public interest against the interests of the third party.

Recommendations

- *Sections 6, 7, 8, 9 and 12 should be combined into a single list of exemptions (listed in sub-sections), which are subject to the public interest override currently contained in s.10*
  - Section 9(a) should either be deleted from Line 11 onwards, amended to require some harm or narrowed so that information provided by a foreign government will only be protected where it was *"provided in confidence, relates to lawful activities and/or does not relate to human rights violations or corruption".*
  - Section 9(c) should be drafted to narrow the protection to permit secrecy only where disclosure is *"reasonably likely to cause serious harm to lawful law enforcement activities, etc…"*.
  - Section 9(d) should be replaced with the following provision:
    A body may refuse to indicate whether or not it holds a record, or refuse to communicate information, where to do so would, or would be likely to: -
    (a) cause serious prejudice to the effective formulation or development of government policy;
    (b) seriously frustrate the success of a policy, by premature disclosure of that policy".
  - Section 12 should be replaced with the following provision:
    A body may refuse to communicate information if: –
    (a) the information was obtained from a third party and to communicate it would constitute an actionable breach of confidence;
    (b) the information was obtained in confidence from a third party and: –
    (ii) it contains a trade secret; or
    (iii) to communicate it would, or would be likely to, seriously prejudice the commercial or financial interests of that third party

Section 10

15. It is excellent that section 10 attempt to make all of the exemptions in law subject to a public interest override. This ensures that every case is considered on its individual merits and public officials do not just assume that certain documents will always be exempt. It ensures that the "public interest" is always at the core of the right to information regime. Notably however, the current wording of the clause is very complicated and may cause difficulties in practice when

officials try to apply it. The clause should be simplified to make it clear that even where a document falls within the terms of a *general* exemption provision, it should still be disclosed if the public interest in the *specific* case requires it.

16. Section 10(2) is also a useful provision in the sense that it gives officials some guidance on what some relevant public interest considerations should be. However, it should be clear that the list is only indicative, and not exhaustive.

Recommendations

- *Section 10 should be reworded to simply state that "A public authority shall, notwithstanding the exemptions specified in section [X], provide access to information where the public interest in disclosure outweighs the harm identified by the exemption"*

Section 11

17. It is very positive that s.11 of the Bill attempts to protect whistleblowers. international practice endorses the inclusion of whistleblower protection provisions in access to information laws. This is justified on the basis that maximum information disclosure requires that individuals who disclose information in contravention of the law and/or their employment contracts because they believe that such disclosure is in the pubic interest should be protected. The inclusion of strong whistleblower protection is important in order to send a message to the public and officials that the government is serious about opening up to legitimate scrutiny.

18. However, on the current wording of section 11(1), it is notable that whistleblowers will not be protected if they disclose information to media. What is the justification for this approach? While it may be understandable to encourage whistleblowers to go to the Information Commissioner first, if the Information Commissioner takes no action or if in fact, other circumstances means that this is not possible, then whistleblowers should still be protect if they go to the media – or go public in some other way.

19. While it is useful that 11(3) gives some guidance on what constitutes wrongdoing, it should be clarified that the list is not exhaustive. What is most important is that bona fide whistleblowers are protected. While the legislation can provide that framework, there should be some room for movement in terms of the what wrongdoing constitutes, because governments and officials commit wrongful acts in a multitude of different ways which are difficult to capture in an exhaustive list. The legislation should make it explicit that the list in s.11(3) is not exhaustive, and the courts should be left to interpret the meaning of "wrongdoing" in difficult cases.

Recommendation

- *Section 11(1) should be reworded to permit whistleblowers to be protected if they disclose information to the media*
- *Section 11(3) should be reworded to make it clear that does not provide an exhaustive list of what constitutes "wrongdoing"*

Section 13

20. It is very positive that the Bill specifically permits partial disclosure, but it should also specify the contents of notices sent to applicants to whom information is only partially disclosed. Notably, section 32 specifies the contents of notices where a request is rejected. Section 13 could cross-

reference this section, noting that it should be modified to account for the fact that the request is only being partially rejected.

Recommendation

- *Section 13 should cross-reference s.32 to require that a similar notice is sent to requesters where it is decided to only partially disclose information*

Part III – Obligation to Provide Information

Section 14

21. It is positive that the Bill specifically deals with the issue of records management because the huge volume of information in governments' hands requires that information be carefully managed so that authorities can locate and provide requested information in a timely and efficient way. In this context, consideration should be given to more explicitly requiring in s.4(1) that appropriate record keeping and management systems are in place "*to ensure the effective implementation of the law"*. This should be the guiding principle underpinning all government records management systems.

22. It may also be worthwhile considering s.6 of the Pakistan *Freedom of Information Ordinance 2002* which provides useful guidance in this context, specifically requiring computerization of records and networking of information systems over time, to promote access. Consideration should also be given to empowering an appropriate body to develop guidelines or a Code on records management to this end. This has been done in the United Kingdom where, under s.46 of the *Freedom of Information Act 2000*, the Lord Chancellor is responsible for developing a Code of Practice on records management.

Recommendation

- *Section 14(1) should be amended to make it explicit that record keeping and management systems are in place "which are designed to ensure the effective implementation of the law".*
- *A new provision should be included requiring the computerisation of records and networking of information management systems*
- *A new provision should be included requiring the Information Commission to develop a Code on Records Management which must be followed by all public authorities*

Section 15

23. Section 15 is superfluous and should simply be incorporated into s.5 which sets out the public's right to access information. It is unnecessary to restate the right.

Recommendation

- *Section 15 should be combined with s.5*

Section 16

24. It is very positive that s.16 seeks to impose obligations on public authorities to proactively disclose key information to the public. If this minimum amount of information is retained, nonetheless, s.16(1) should be amended to require that the information is disseminated more broadly than just in the Gazette – which very few people actually read – and newspapers, which are mainly directed at urban, literate people. Consideration should be given to effective methods for ensuring the

information reaches the villages – for example, by posting it on noticeboards, broadcasting it on the radio or including it in telephone directories.

25. In any case, consideration should be given to extending the categories of information which need to be automatically disclosed. The new generation of access laws are now recognising the proactive disclosure can be a very efficient way of servicing the community's access needs efficiently, while reducing the burden on individual officials to response to specific requests. The more information is actively put into the public domain in a systemised way, the less information will be requested by the public. Section 4 of the new India Right to Information Act 2005 provides a very good model. Likewise, Article 7 of the Mexican *Federal Transparency and Access to Public Government Information Law 2002* provides an excellent model for consideration. The following list of provisions is drawn from the Mexican and Indian Acts:

"(1) Every public body shall

(a) publish before the commencement of this Act:
(i) the particulars of its organisation, functions and duties;
(ii) the powers and duties of its officers and employees;
(iii) the procedure followed in the decision making process, including channels of supervision and accountability;
(iv) the norms set by it for the discharge of its functions;
(v) the rules, regulations, instructions, manuals and records, held by it or under its control or used by its employees for discharging its functions;
(vi) a statement of the categories of documents that are held by it or under its control;
(vii) the particulars of any arrangement that exists for consultation with, or representation by, the members of the public in relation to the formulation of its policy or implementation thereof;
(viii) a statement of the boards, councils, committees and other bodies consisting of two or more persons constituted as its part or for the purpose of its advise, and as to whether meetings of those boards, councils, committees and other bodies are open to the public, or the minutes 'of such meetings are accessible for public;
(ix) a directory of its officers and employees;
(x) the monthly remuneration received by each of its officers and employees, including the system of compensation as provided in its regulations
(xi) the budget allocated to each of its agency, indicating the particulars of all plans, proposed expenditures and reports on disbursements made;
(xii) the manner of execution of subsidy programmes, including the amounts allocated and the details of beneficiaries of such programmes;
(xiii) particulars of concessions, permits or authorisations granted by it;
(xiv) details in respect of the information, available to or held by it, reduced in an electronic form;
(xv) the particulars of facilities available to citizens for obtaining information, including the working hours of a library or reading room, if maintained for public use;
(xvi) the names, designations and other particulars of the Public Information Officers;
(xvii) such other information as may be prescribed;
and thereafter update there publications within such intervals in each year as may be prescribed;

(b) publish all relevant facts while formulating important policies or announcing the decisions which affect public;

(c) provide reasons for its administrative or quasi judicial decisions to affected persons;

(d) before initiating any project, or formulating any policy, scheme, programme or law, publish or communicate to the public in general or to the persons likely to be affected thereby in particular, the facts available to it or to which it has reasonable access which in its opinion should be known to them in the best interest of natural justice and promotion of democratic principles.

(e) Upon signing, public authorities must publish all contracts entered into, detailing at a minimum for each contract:
(i) The public works, goods acquired or rented, and the contracted service, including any sketches, scopes of service and/or terms of reference;
(ii) The amount;
(iii) The name of the provider, contractor or individual to whom the contract has been granted,
(iv) The periods within which the contract must be completed.

(2) It shall be a constant endeavour of every public authority to take steps in accordance with the requirements of clause (b) of sub-section (1) to provide as much information suo moto to the public at regular intervals through various means of communications so that the public have minimum resort to the use of this Act to obtain information.

(3) All materials shall be disseminated taking into consideration the cost. Effectiveness, local language and the most effective method of communication in that local area and the information should be easily accessible, to the extent possible in electronic format with the Public Information Officer, available fee or at such cost of the medium or in print cost price may be prescribed"

26. Section 16(1) should be amended to require that the first publication of the information should be completed within 3 months of the law coming into force. After that, section 16(6) could be amended to recognise that the different categories of information will need to be updated regularly, with each category possibly needing updating at different times, because some information will change more rapidly than other types of information. Notably, although the initial effort of collecting, collating and disseminating the information may be a large undertaking, over time it will be worth the investment as it will reduce requests in the long run because people will be able to easily access routine information without having to apply to public bodies.

27. While it is positive that s.16(7) specifically recognises that citizens should have a right to complain against non-compliance with the proactive disclosure provisions of the law, to minimise costs for applicants, s.16(7) should be amended to permit the public to complain to the Information Commission in the first instance, and to go to the courts where they are unhappy with the response of the Commission.

Recommendations

- *Section 16 should be amended to substantially extend the proactive disclosure obligations imposed on public bodies.*
- *An additional clause should be inserted elaborating how information should be published:*
  " For the purpose of this section, information should be published widely and in a manner easily accessible to the public. "Publish" shall mean appropriately making known to the public the information to be communicated through notice boards, newspapers, public announcements, media broadcasts, the internet or other such means and shall include inspection at all of the bodies offices. All materials shall be published keeping in mind the local language and the most effective method of communication in that local area."
- *An additional clause should be inserted requiring information to be updated at least every 6 months, but recognising that certain information needs more regular updating, to be specified in the Rules*
- *Section 16(7) should be amended to permit the public to complain to the Information Commission in the first instance where proactive disclosure is not properly implemented*

Section 17

28. It is positive that the Bill includes a requirement that public authorities appoint Information Officers but it is not entirely clear what their role is in terms of actually interacting with the public and/or processing applications. In many access laws, Information Officers are considered the frontline of

the access regime because they receive and process applications but from s.27 it appears that the head of the public authority receives applications. To ensure proper implementation of the law in practice, consideration should be given to moving s.17 to sit in Part V of the Bill and clarifying their role.

29. While it is positive that the Information Officer is specifically given a promotional role under the law, once moved to sit with s.27:

    - S.17(1)(a) could specify more clearly that as many Information Officers need to be appointed in all offices and units of public authorities as are necessary to ensure maximum accessibility for the public and to simply the process of submitting an application and actually accessing information;
    - S.17(1)(b) could be amended to ensure that the Government will clarify specific procedures for access to ensure that there is consistency across the public service. Otherwise, each public authority may develop a different regime for enabling access to information. Alternatively, the provision may need to be reworked to clarify that each public authority will develop its own "internal procedures" for handling requests.
    - S.17(2) could be reworked to provide more clarity about how Information Officers will assist applicants who want to lodge requests.

Recommendations

- *Section 17 should be moved to sit with Part V of the Bill*
- *Section 17 should be amended to specify that as many Information Officers as possible should be appointed to maximise accessibility of information and to clarify the role of Information Officers in receiving and processing applications*

Part IV – the Independent Public Information Commission

30. Best practice international standards require that an effective access to information law include an appeals mechanism which is independent of government, as well as cheap, quick and procedurally simple. Oversight by an umpire independent of government pressure is a major safeguard against administrative lethargy, indifference or intransigence and is particularly welcome where court-based remedies are slow, costly and uncertain. The fear of independent scrutiny ensures that exemption clauses are interpreted responsibly and citizens' requests are not unnecessarily obstructed. While the courts satisfy the first criteria of independence, they are notoriously slow and can be difficult to access for the common person. As such, it is very positive that the Bill includes the establishment of an independent oversight bodies to deal with non-compliance with the law. Such bodies have found to be a cheaper, more efficient alternative to courts and enjoy public confidence when they are robustly independent, well-funded and procedurally simple.

31. Before proceeding to review the substantive provisions individually, it is recommended overall that Part IV and Schedule 1 should be incorporated and then reviewed to ensure that similar provisions are grouped together and the entire Part flows more clearly.

Recommendations

- *Sections 18, 19 and 23 of the Bill and sections 1-5 of Schedule 1 should be grouped together as they all deal with the composition of the Commission and the selection and removal of Commission members*
- *Sections 20 and 21 and sections 6-9 of Schedule 1 should be grouped together as they all deal with the powers and remit of the Commission*
- *Sections 24-26 and sections 10-12 of Schedule 1 should be grouped together as they all deal with administrative and financial matters*

Section 19

32. The composition of the Information Commission is quite unusual and for that reason, a number of issues could usefully be reconsidered:
    - Section 19(1)(d) – which was possibly meant to be split into another subsection – notes that there will be two members chosen "who shall be reputable persons". This provision could be abused to appoint pro-government members to the Commission who combined with the public service nominee could tip the balance on the Commission towards the bureaucracy and secrecy. Consideration should be given to whether these 2 additional members are necessary and if so, whether additional selection criteria should be included to ensure that appropriate people are chosen. For example, should it be specified that the 2 additional members cannot be members of the public service – or ever have been public servants? Who is it envisaged that these people will be? It may be useful to at least mention this in a footnote or an explanatory memorandum. At the very least, consideration could be given to specifying that the additional members should be well-respected and have a demonstrated commitment to transparency, accountability and open government.
    - Section 19(1) specifies that the Commission will have "part-time members", but what will happen if the Commission receives a large number of appeals? In a number of countries, even those with relatively small populations, Information Commissions or Tribunal are usually full-time. While the position of Director is a good way of reducing the time Commission members will need to spend on cases – presumably because the Director will manage administrative issues - nonetheless, consideration needs to be given to whether a part-time set of Commissioners will be sufficient. How can part-time Commissioners manage investigations? How can Commissioners promote good practice in public authorities? How can Commissioners properly monitor on-going implementation by public authorities?
    - Section 19(3) should be reconsidered to require that the High Court nominee is always the Chairperson of the Commission. On the face of it, the High Court Commission member is likely to the most consistently unbiased because the selection process for judges is already specifically designed to ensure they are impartial and unbiased. This is the type of person who would best be equipped to lead the Commission. Additionally, the judges knowledge of the law and judicial processes will be invaluable expertise which should always be brought to bear on complaints coming before the Commission

33. The key issue for any Information Commission is that it must be independent, which requires that nominees to the Commission must be selected through a process which is impartial and will not allow for government, political or any other bias to ensure that Information Commissioners are seen as non-partisan. As a rule of thumb, appointment and removal procedures should reflect those currently used for appointment of judges. In that context, consideration should be given to whether the Public Appointments Committee of the National Assembly is the most independent body available to manage selections.

34. As noted earlier, to promote easier understanding and implementation of the law, the provisions in Schedule 1 which deal with the selection process should be incorporated into Part IV. This would ensure that the relevant provisions are all consistent. For example, it is currently not clear whether it is the Public Appointments Committee (s.19) or a specially appointed selection committee (Schedule 1, s.3) or both, which are responsible for approving the selection of the Information Commission members. This process should be clarified. Additionally, some of the provisions in the Schedule in relation to the selection process deserve to be in the body of the law because they reinforce the principle of openness which the law seeks to entrench. For example, it is positive that according to Schedule 1, s.3(4) and (5) the selection process appears to be open to the public.

35. Section 19(4), which details the ineligibility criteria for members of the Information Commission should be extended to specify that a member of the Commission can:
    - *not have any criminal conviction or charge pending and not have been a bankrupt;*
    - *not be or have been the President, Vice President, a Minister or Deputy Minister, a serving public officer or a Member of Parliament;*
    - *at the time of taking up the position, not be a member of a political party.*

Recommendations

- *Further consideration should be given to the membership of the Commission to ensure the independence of members, in particular by specifying qualification criteria for choosing the additional members of the Commission under s.19(1)(e)*
- *Further consideration should be given to whether it is appropriate for ALL the members of the Commission to be part-time considering the sensitivity of materials the Commission may see and the number of appeals it may need to handle*
- *Section 19(3) should be amended to make the High Court nominee the Chairperson of the Commission*
- *When combining the Schedule with the main Bill, the selection process should be clarified, including the role of the Public Appointments Committee and the selection committee*
- *Section 19(4) should be amended to extend the ineligibility criteria for Commissioners*

Section 20

36. Section 20 is a very good provision. However, s.20(3) could be amended to specify that the Commission will also have complete budget autonomy – which means that it will have a line item allocated from the Consolidated Fund and not channelled through any other Ministry – and can recruit its own staff, rather than use officials seconded from the public service.

37. Section 20(2) should be separated out into its own provision for clarity. It deals with the publication of a "Users Guide" for the public and should be recognises as a different type of obligation to those in s.21(1). Likewise, s.20(3) should be separated out because it goes to the Commission's independence, not its functions.

Recommendations

- *Sections 20(1), (2) and (3) should be separate out because they deal with different but important issues*

Section 21

38. It is positive that s.21(1) sets out a fairly wide range powers of the Commission, but consideration should be given to including the following additional powers:

    The Information Commissioner has, in relation to the carrying out of the investigation of any complaint under this Act, power:
    - *to summon and enforce the appearance of persons before the Information Commissioner and compel them to give oral or written evidence on oath and to produce such documents and things as the Commissioner deems requisite to the full investigation and consideration of the complaint, in the same manner and to the same extent as a superior court of record;*
    - *to converse in private with any person in any premises entered pursuant to paragraph (d) and otherwise carry out therein such inquiries within the authority of the Information Commissioner under this Act as the Commissioner sees fit; and*
    - *to examine or obtain copies of or extracts from books or other records found in any premises entered pursuant to paragraph (d) containing any matter relevant to the investigation.*

39. An additional provision should also be inserted replicating s.30(3) of the Canadian *Access to Information Act 1982*, which gives the Information Commission the power to initiate its own investigations into non-compliance with the law – even in the absence of a complaint from a member of the public. In practice, this will be useful in allowing the Commission to investigate delays in providing information, because these cases will often not reach the Commission as a complaint if the information is finally handed over, but may still be worthy of review and the imposition of a penalty, particularly if the Commission uncovers a pattern of non-compliant behaviour.

40. Section 21(3) should be reconsidered in light of s.34. Section 34 correctly recognises that no document should be kept from the Information Commission, even if officials are arguing that it is covered by an exemption. However, s.23 may conflict with s.34 in practice because it appears that it may permit some documents to be withheld from the Commission. How is it intended that the two provisions will work together in practice? It is recommended that s.21(3) be deleted.

Recommendations

- *Section 21(1) should be amended to extend the Investigatory powers of the Commission*
- *A new provision should be included to empower the Information Commission to undertake investigations regarding non-compliance even in the absence of a specific complaint*
- *Section 23 should be reconsidered in light of s.34, with a view to deleting s.23*

Section 21A: Procedures of the Commission

41. As noted earlier, it is recommended that sections 6-9 of Schedule 2 be incorporated into the body of the Bill because they deal with the proceedings of the Commission, which are key provisions and should not be relegated to a Schedule.

Schedule 1, Section 6

42. Section 6(2) of Schedule 1 should be reconsidered entirely, because the requirement for a quorum of only 3 members of the Commissions means that the Commission could easily be captured by

pro-bureaucracy Commission members with a tendency towards secrecy. Of course, it is to be hoped that all Commission members will be pro-openness, but it would not be surprising if those members selected by Government – including the two general members referred to in s.19(1)(e), could lean towards supporting government non-disclosure. Quorum should at least be 4 but ideally 4 members, and the Chairperson – who it is recommended should automatically be the High Court nominee – should always be required to be present.

43. Section 6(5) of Schedule 1 should be amended to require that at a minimum, anyone against who an adverse finding is to be made, shall be invited to make a submission – whether oral or written – to the Information Commission. This means that both the applicant or a third party would have the right to explain their case to the Commission before a decision is made.

44. Section 6(6) of Schedule 1 should be reconsidered because it is not clear what justification there is to maintain the validity of proceedings where there may have been a defect in an appointment of a Commission member. In reality, such a defect could be a sign of much more serious problems – for example, the partisan selection of a Commission or the appointment of someone who is a member of a political party. If an appointment is being challenged, that member should simply not be able to take part in any further proceedings, and if an applicants requests, cases which they were involved in should be reviewed.

Schedule 1, Section 7

45. It is not clear what purpose the Committees proposed in s.7 of Schedule 1 are supposed to serve. The intent of this provision should be included in a footnote or an explanatory memorandum, which should clarify in particular, why a Committee should be set up as opposed to work being delegated to the staff of the Commission. The worry is that such Committees could be abused and easily become a means of diverting Commission resources unless there are strict criteria for the role they are to play. In that context, s.7 should be amended to specifically prohibit any Committee from taking on the decision-making function of the Commission in relation to complaints under the Act, even if they are delegated some of the Commissions investigations functions.

Schedule 1, Section 8

46. While it is positive that s.8 attempts to disqualify Commission members from taking part in decisions where they have a conflict of interest, the grounds for such conflicts are much too narrowly drawn. Members should not just declare interests in which they or their spouse are interested, but should have to disclose any matter in which any member of their family or a body or company to which they are connected is involved.

Schedule 1, Section 9

47. It is positive that there is a clear duty on Commission members not to disclose information which they come to know about as a result of their role on the Commission. However, in practice, this provision highlights again the possible problems from having a part-time Commission where some of the members continue to carry on other professions – most notably, in an NGO or as a journalist. For a journalist for example, there may be conflict between their duty to their employer and their duty to the Commission, For this reason it may be necessary to consider making Commission members full-time so that for the duration of their time on the Commission their sole obligation is to the Commission. Alternatively, all Commission members should be required to agree to an oath of secrecy, in accordance with their obligations under the Act.

Recommendations

- *When incorporating the provisions of Schedule 1 into the body of the Bill, re the Schedule clauses:*
  - *Amend s.6(2) to increase the quorum to 4 and to require that the Chairperson (who should be the High Court nominee) must always be present*
  - *Amend s.6(5) to allow all parties against whom an adverse finding may be made to make representations before the Commission if desired*
  - *Delete section 6(6)*
  - *Amend s.7 to set clear guidelines for when Committees may be constituted and to prohibit a Committee from undertaking the Commission's decision-making function*
  - *Amend s.8 to broaden the types of conflicts of interest which must be declared*

Section 24

48. The appointment of a Director to run the Information Commission is a very good idea because it will ensure efficient administration as well as freeing up Commissioners' time to focus on the key responsibilities of the Commission.

Recommendations

- *Consideration should be given to clarifying that the Director will be recruited through a competitive and open selection process and does not need to be drawn from the Malawi public service.*

Section 25

49. For the Information Commission to be truly independent, it is key that the Commission can employ his/her staff and define their job descriptions, etc. In this context, it is essential that the law specify that Commission employees will be competitively recruited and not simply be seconded public servants. This will ensure staff have the specific skills needed to do the job and the necessary commitment. Additionally, in a position where it is of crucial importance that staff are impartial and not biased towards the bureaucracy, it is essential for the Information Commissioner to have the power to employ staff who are not members of the public service, if they have relevant skills.

Recommendations

- *Section 25 should be amended to clarify that the Information Commission is empowered to recruit staff from outside the public service through a competitive and open selection process*

Section 26

50. Recognising the cost of the Commission will be an additional burden on the Government's budget, it is understandable that consideration has been given to permitting the Commission to raise funds themselves, most notably through donations, However, considering that one of the most essential features of the Commission is its independence – actual and perceived – it is seriously worrying that if the Commission can accept donations it could become beholden to its benefactors. The definition of public authorities currently contained in the Bill covers some private bodies (and this analysis recommends the broadening of the coverage of the law to cover more private bodies). What would happen if a major private company which does significant work for the Government donated funds to the Commission and the Commission was then called on to determine a complaint in relation to information held by that private company? There could be a serious conflict of interest for the Commission. It is recommended therefore, that section 26(1)(b) be deleted and

the Commission be solely – and adequately – funded by the Government. The Commission performs a vital public function – it is therefore not too much to expect that public funds should be used to support the Commission. This is common practice throughout the world.

51. Likewise, s.26(2) should be deleted and s.26(4) should be reconsidered because the ability for the Commission to invest funds could too easily be abused or lead to simple mismanagement. The Commission has a particular function to perform and should be given powers to focus on that function only.

Recommendations

- *All of the provisions in s.26 which enable the Commission to raise funds from outside sources and invest them should be reconsidered with a view to deleting them because they jeopardise the impartiality and independence of the Commission in practice*

Part V: Procedure for Access to Information

52. Consideration should be given to moving s.17 to sit in Part V because the Information Officers mentioned in that section are an integral part of the practical regime for accessing information.

Section 27

53. Section 27(1) needs to be reconsidered because in nominating the Head of each public authority as the person to whom applications should be sent, it appears to assume that applications will be made by post. But what about people in rural areas who want to make applications in person? Who should they submit their application to? Even in the urban areas, unless an applicant posts their application, who exactly should they meet to hand in an application and who should they direct a telephone or email application to?

54. As discussed in paragraphs 28 and 29 above, consideration should be given to specifying in more detail the role of the Information Officer in managing applications and ensuring that such Officers are available at all offices in public authorities to ensure maximum accessibility. This would also deal with the situation recognised in s.27(2) of illiterate applicants. Such people will need assistance to formulate their applications and this should be recognised in the Bill. A duty could be imposed on the Information Officer – or any other official – to provide assistance in such cases. Section 17 of the South African Promotion of Access to Information Act 2000 provides one useful model.

South Africa: (1) For the purposes of this Act, each public body must, subject to legislation governing the employment of personnel of the public body concerned, designate such number of persons as deputy information officers as are necessary to render the public body as accessible as reasonably possible for requesters of its records.

(2) The information officer of a public body has direction and control over every deputy information officer of that body.

(3) The information officer of a public body may delegate a power or duty conferred or imposed on that information officer by this Act to a deputy information officer of that public body.

(4) In deciding whether to delegate a power or duty in terms of subsection (3), the information officer must give due consideration to the need to render the public body as accessible as reasonably possible for requesters of its records.

55. Section 27(3) should be amended to clarify that applications can be made in any of Malawi's local languages. It should be the duty of the relevant public body to translate the request. To require all requestors to submit an application in English could in practice exclude people from utilising the law.

56. A new provision should be inserted which requires the provision of a receipt to an applicant, which at a minimum notes the date the application was received, the name of person who received it, the name of the person who will handle the application and the date by which a response should be received. The receipt should be provided immediately if the application is given in person of electronically and within no more than 5 days if it is received by post.

Recommendations

- *Section 27(1) should be reconsidered with a view to clarifying in practice who will accept applications from the public, ie. what is role of Information Officers? what application system will ensure maximum accessibility?*
- *Section 27(3) should be amended to clarify that applications can be made in any of Malawi's local languages.*
- *A new clause should be inserted requiring public authorities to provide requesters with a receipt upon submission of their application*

Section 28

57. Section 28(1) should be simplified in its wording to simply make it clear that *"subject to the exemptions in sections [insert final provision numbers], the head of the public authority or any other authorised person will respond to the request for information within 14 days after its receipt"* and then specifying the contents of the written notice that must be sent to the requester. Note that the provision should be careful to refer to records because the Bill gives the public a broader right to access "information".

58. Section 28(2) should be separated out and put before s.28(1) because it deals with processing the application not the final decision. While it is permissible for a public authority to attempt to clarify an information request, the provision should be amended to make it clear that the request should be clarified as quickly as possible and there can only be a single extension of 14 days within which an application can be clarified. Officials should not be able to go back again and again to requesters because otherwise this provision could easily be used as delaying tactic. The should be allowed to clarify the request once, by the quickest method possible.

Recommendations

- *Section 28(1) should be amended to simply the wording and make it clearer what is required to be done when an application is accepted*
- *Section 28(2) should be separated out because it does not deal with decisions on applications. It should then be amended to permit an official of a maximum of only a single 7 day extension of the time limits in order to clarify a request*

Section 29

59. Section 29(1) should be amended to make it clear that the form of access shall be the choice of requester, not the public authority – subject to cost and the need to preserve certain records. Currently, the provision reads as if the public authority has the choice as to what form of access will be permitted, but such an approach cold be too easily abused by officials intent on providing obstacles to access. For example, officials may demand the costly provision of copies to requesters rather than permitting free inspection. Officials may also choose to provide summaries in accordance with s.29(1)(c) because this is one way of avoiding disclosing specific embarrassing or incriminating statements.

60. The Bill does not currently address the issue of translation of requested information. A society which promotes democratic participation and aims to facilitate the involvement of all of the public in its endeavours should ensure that people are able to impart and receive information in their own language and cultural context. Section 12 of the Canadian *Access to Information Act 1983* provides a useful example:

(2) Where access to a record or a part thereof is to be given under this Act and the person to whom access is to be given requests that access be given in a particular official language, a copy of the record or part thereof shall be given to the person in that language

(a) forthwith, if the record or part thereof already exists under the control of a government institution in that language; or

(b) within a reasonable period of time, if the head of the government institution that has control of the record considers it to be in the public interest to cause a translation to be prepared.

Recommendations

- *Section 29(1) should be amended to make it clear that the form of access shall be the choice of requester, not the public authority*
- *A new section should be inserted to permit translations of requested information, at least where it is in the public interest*

Section 30

61. While the transfer provisions in the Bill are appropriate, consideration should be given to moving them to sit with s.28(2) because all of these provisions deal with processing an application. To put the transfer provisions after the clauses which deal with approving an application and granting access could be confusing for the officials applying the legislation.

Recommendation

- *Section 30 should be moved to sit after s.27 and could incorporate the current s.28(2)*

Section 31

62. Best practice requires that no fees should be imposed for accessing information, particularly government information, as costs should already be covered by public taxes. It is positive that the Bill at least appears to impose no fee for submitting applications or appeals. This could be made explicit. Notably, the Bill could go further and replicate s.17(3) of the Trinidad & Tobago Act and s.7(6) of the Indian *Right to Information Bill 2004* which state that even where fees are imposed, if a body subject to the Act fails to comply with the time limits for disclosure of information, access to which the applicant is entitled shall be provided free of charge.

63. Fees have been imposed under the Bill for access. In this case, the rates should be set with a view to ensuring that the costs imposed for access are not so high as to deter potential applicants. At the most, fees should be limited only to cost recovery, with no additional margin for profit, and a maximum limit should be imposed. Charges should only cover reproduction costs, not search or collation/compilation time. Imposing fees in respect of the latter could easily result in prohibitive costs, particularly if bureaucrats deliberately drag their heels when collating information in order to increase fees. Also, where the costs of collecting the fee outweighs the actual fee (for example, where only a few pages of information are requested), fees should be waived.

64. Although s.31(2) permits regulations to be made to permit non-payment of fees in some circumstances, most access laws actually include such provisions in the legislation itself. In this

context, it is recommended that provision be made to allow the waiver of fees levied under the Act where that is in the public interest, such as where a large group of people would benefit from release/dissemination of the information or where the objectives of the Act would otherwise be undermined (for example, because poor people would be otherwise excluded from accessing important information). Such provisions are regularly included in access laws in recognition of the fact that fees may prove a practical obstacle to access in some cases. A definition of "public interest" may be included to provide direction to officials implementing the law. Section 29(5) of the Australian Freedom of Information Act provides a useful model:

Recommendations

- *A new clause should be inserted clarifying that any fees charged for provision of information "shall be reasonable, shall in no case exceed the actual cost of providing the information such as making photocopies or taking print outs and shall be set via regulations at a maximum limit taking account of the general principle that fees should not be set so high that they undermine the objectives of the Act in practice and deter applications".*
- *A new clause should be inserted which states that "if a body subject to the Act fails to comply with the time limits for disclosure of information, access to which the applicant is entitled shall be provided free of charge".*
- *A new clause should be inserted which allows for the waiver or remission of any fees where their imposition would cause financial hardship or where disclosure is in the general public interest.*

Section 32

65. Section 32(1) should be reworded to take into account the fact that a similar notice will need to be sent to requesters whose applications are only partially accepted in accordance with s.13. Additionally, s.32(2) should be reworded to clarify that an application will be deemed to have been refused where a public authority fails to respond to the application at all, not just where it fails to provide access. The point of a deeming provision is to permit requesters to continue with any appeal even where their application has been completely ignored.

Recommendation

- *Section 32(1) should be reworded to ensure similar notices are sent out where partial disclosure of information is permitted*

Part VI: Review of Decisions of Public Authorities

Section 33

66. Section 33(1) overlaps with s.20(1) in that both provisions set out the jurisdiction of the Commission, in terms of its duties and roles under the law. Consideration could be given to merging the provisions or at least, to cross-referencing them so that officials applying the law have a clearer picture of the role of the Commission. More specifically, consideration should be given to including an additional sub-clause in s.20(1) giving the Commission the power to review decisions as to the form of access granted to a requester.

67. Section 33(2) is appropriate, but the cross-referencing to sections 8 and 12 should be reviewed. Additionally, time limits should be included in the Bill for making such a third party appeal to avoid third parties abusing the provision to unjustifiably delay the release of information to the public.

68. Section 33(3) should be reworded to make it explicit that not only must a complaint be investigated within 30 days if its receipt, but a decision must be issued within 30 days. One of the most important features of a Commissions is that it provides timely redress to complainants, so it is vital that a clear time limit be imposed on the Commission to avoid delays. Consideration may be given to inserting a new clause permitting the Commission one extension of up to 15 days for particularly complex cases.

69. Section 33(8)(c) needs to be reviewed because the cross-referencing does not make sense. In any case, the provision should be reworked to include a clause which simply states that proceedings will be considered concluded when the Commission issues a decision or when the time limit for issuing that decision lapses (a deemed rejection).

Recommendations

- *Section 33(1) and s.20(1) should cross-reference each other as they both deal with the Commission's powers*
- *Section 33(2) should be amended to impose time limits for third parties to make representations during appeals*
- *Section 33(3) should be amended to clarify that appeals to the Commission must be disposed of within 30 days*
- *Section 33(8) should be review to clarify that cases are concluded once the Commission makes a decision*

Section 33A – Burden of Proof

70. The burden of proof should be on the body refusing disclosure and/or otherwise applying the law to justify their decision. This is justified because it will be unfair and extremely difficult for members of the public – who will never have seen the document they are requesting – to be forced to carry the burden of proof. Section 61 of the Australian *Freedom of Information Act 1982* provides a useful model:

    (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.

    (2) In proceedings [relating to third parties], the party to the proceedings that opposes access being given to a document in accordance with a request has the onus of establishing that a decision refusing the request is justified or that the Tribunal should give a decision adverse to the applicant.

Recommendation

- *A new section should be inserted clarifying that the burden of proof during the appeals process is on the body refusing disclosure and/or otherwise applying the law to justify their decision.*

Section 34

71. Section 34 is an essential and good provision. In that context though, as noted in paragraph 40 above, s.21(3) needs to be reviewed to ensure that it does not conflict with s.34.

72. Also, as noted in paragraph 47 above, consideration may need to be given as to how to deal with the possible difficulties of having a part-time Commission with members from professions where openness is valued having to deal with highly sensitive government information. It goes without

saying that the Information Commission MUST be able to see all the information which is in dispute, but in practice, will it be a problem for a journalist for example, to be given access to secret national security information? One way of dealing with this issue may perhaps be to require the High Court member of the Commission sitting alone to deal with particularly sensitive cases (in their position as a Commissioner not as a judge however).

Recommendations

- *Section 34 should be reviewed to ensure that, in practice, the Commission will have the legal power and practical ability to review all information that is subject to appeals whether or not an exemption is claimed*

Section 35

73. It is unclear what the exact purpose of s.35 is and what legitimate end it seeks to achieve. As noted in the provision itself, statements made in proceedings under the Act can be used in contempt or perjury proceedings – both of which are serious offences. What is the justification for precluding statements being used in other hearings – for example, a disciplinary hearing from a public servant. It is recommended that this clause be deleted because it could inadvertently result in officials getting away with lying to their employer – the Government – and there appears to be no public interest reason why the protection in s.35 is necessary.

Recommendations

- *Section 35 should be deleted*

Section 36

74. Section 36 is one of the most significant provisions of the Bill because it sets out the decision-making powers of the Commission in relation to appeals, In this context, it is a serious deficiency in the Bill that it appears that the decisions of the Commission are recommendatory rather than binding. This is not in accordance with international best practice and could severely undermine the entire access regime because it will mean that the only body able to compel disclosure will remain the High Court – a body which, as discussed earlier, while capable, is costly, time consuming and inaccessible for most ordinary people. The strength and value of an Information Commission comes from its ability to compel disclosure in a timely manner. Strong powers of compulsion are particularly necessary in countries where the bureaucracy has an entrenched culture of secrecy and where legal processes are long and the rule of law weak

75. It is recommended that s.36(1) be reworked that to make it explicit that the Commission can make binding decisions following its investigations. The powers given to the new Indian Information Commission under the Right to Information Act 2005 provide a good model:

(1) The Information Commission has the power to:

(b) require the public authority to take any such steps as may be necessary to bring it into compliance with the Act, including by;

(i) providing access to information, including in a particular form;

(ii) appointing an information officer;

(iii) publishing certain information and/or categories of information;

(iv) making certain changes to its practices in relation to the keeping, management and destruction of records;

(v) enhancing the provision of training on the right to information for its officials;

(vi) providing him or her with an annual report, in compliance with section X;

(a) require the public body to compensate the complainant for any loss or other detriment suffered;
(b) impose any of the penalties available under this Act;
(c) reject the application.

(1) The Information Commission shall serve notice of his/her decision, including any rights of appeal, on both the complainant and the public authority.
(2) Decisions of the Information Commission shall be notified within 30 days of the receipt of the appeal notice
(3) Decisions of the Information Commission are binding.
(4) Decisions of the Information Commission may be appealed to the High Court.

76. In the event that the above recommendation is not accepted and the Information Commissions is only able to make recommendations, then s.36 should still be amended to at least require that any public authority which decides to take no action to implement a decision of the Commission must provide their response to their Minister who must table that response in Parliament.

77. It is not clear how s.36 and s.39 interact because it does appear from s.39(1) that if a public authority does not implement a decision of the Commission, the Commission can take the public authority to the High Court. However, it is unclear what the High Court's role is in that context (see paragraph 80 below for further discussion). The decision-making and compulsion powers of the Commission and the High Court need to be specified more clearly in the Bill.

Recommendations

- *Section 36 should be amended to clarify the Commission's decision-making powers, in particular by making it explicit that the Commission has the power to make binding decisions*
- *If it is determined that the Commission will only have the power to make non-binding recommendations, s.36 should be amended to at least require that where a public authority decides to take no action to implement a decision of the Commission, it provide a specific response to the Minister who must table that response in Parliament.*

Sections 37 and 38

78. Section 37 appears to be a basic process requirement, but again, it is troubling that the Commission does not appear to be issuing the requester or third party with a decision notice but simply advising them of their recommendations and updating them on the subsequent actions of the public authority. At the very least, the provision should be reworked to require that any report made to the requester should include details of any additional review/appeal rights the requester has.

79. Section 38 should be combined with s.37 because both deal with communicating a decision/recommendation to a requester or third party. Notably though, s.38 should be reconsidered because it is not clear why there are different time limits for releasing information depending on whether or not a third parties rights are involved. If it is decided that third party information will be released, what additional rights – if any – does the third party have? These should be specified in s.38 because otherwise, the fact that a requester will only get access to information 14 days (not 7 days) after a decision is made to grant a request which involved third party information makes no practical sense. Why are an additional 7 days provided? If this time is permitted to enable a third party to lodge an appeal, that should be specified.

Recommendations

- *Sections 37 and 38 should be combined because they both deal decision notices of the Information Commission, and the combined provision should clarify the rights of requesters and third parties at this stage, regarding further appeals, if any*

Part VII: Miscellaneous Provisions

Section 39

80. Section 39 should be moved to sit in Part VI because it concerns enforcement of Commission orders rather than being a "miscellaneous" provision. Enforcement is a key issue in terms of the efficacy of the Commission in practice. If public authorities can flout Commission directives with impunity, the Commission's role as an openness champion will be seriously undermined.

81. As noted in paragraph 77 above, the role of the High Court within the access enforcement framework needs to be explicitly clarified, particularly if the Commission's decisions are recommendatory, not binding. Section 39 assumes great importance in terms of enforcement because it would strengthen an otherwise relatively weak Commission. Even if the Commission can make binding decisions, it is important that their orders cannot be ignored with impunity.

82. As discussed earlier, s.39(2) needs to be reconsidered to determine how the jurisdiction of the High Court will be exercised in practice. Currently, the High Court "may make such order on the application as it thinks fit". It is not clear though whether this mans that the High Court can actually overturn the order of the Information Commission or whether it is simply intended to allow the High Court to do whatever is necessary to ensure the Commission's orders are implemented. This should be clarified. On what basis will the High Court make its decisions? What powers does it have in relation to information appeals? And can a public authority itself actually approach the High Court to overturn a decision?

Recommendations

- *Section 39 should be moved to sit in Part VI*
- *Sections 36 and 39 need to be reviewed with a view to clarifying the role of the High Court as an enforcement mechanism for the Information Commission as opposed to a separate avenue of appeal for aggrieved requesters, third parties or public authorities*

Section 40

83. It is very positive that the Bill includes some monitoring provisions, but these need to be extended considerably because at the moment they do not impose very comprehensive obligations on public authorities, the Information Commission or the Minister responsible for the Act to ensure that implementation is being monitoring properly. Monitoring is important - to evaluate how effectively public bodies are discharging their obligations and to gather information which can be used to support recommendations for reform. Different monitoring models are found in various jurisdictions. Some countries require every single public body to prepare an annual implementation report for submission to parliament, others give a single body responsibility for monitoring – a particularly effective approach because it ensures implementation is monitored across the whole of government and allows for useful comparative analysis – and still others prefer a combination of both.

84. It is a good start that s.16(1) requires the Information Commission to report annually. Every single public authority covered by the law must also report on implementation every year. It is not enough that s. 16(2) permits the Information Commission to call for reports from public authorities on an ad hoc basis – this must be a regular, ongoing obligation. Section 40 of the Trinidad & Tobago *Freedom of Information Act 1999* and s.49 of the United Kingdom *Freedom of Information Act 2000* provide useful models of potential monitoring approaches:

Trinidad & Tobago: *(1) The Minister shall, as soon as practicable after the end of each year, prepare a report on the operation of this Act during that year and cause a copy of the report to be laid before each House of the Parliament.*

(2) Each responsible Minister shall, in relation to the public authorities within his portfolio, furnish to the Minister such information as he requires for the purposes of the preparation of any report under this section and shall comply with any prescribed requirements concerning the furnishing of that information and the keeping of records for the purposes of this section.

(3) A report under this section shall include in respect of the year to which the report relates….:

- *(a) the number of requests made to each public authority;*
- *(b) the number of decisions that an applicant was not entitled to access to a document pursuant to a request, the provisions of this Act under which these decisions were made and the number of times each provision was invoked;*
- *(c) the number of applications for judicial review of decisions under this Act and the outcome of those applications;*
- *(d) the number of complaints made to the Ombudsman with respect to the operation of this Act and the nature of those complaints;*
- *(e) the number of notices served upon each public authority under section 10(1) and the number of decisions by the public authority which were adverse to the person's claim;*
- *(f) particulars of any disciplinary action taken against any officer in respect of the administration of this Act;*
- *(g) the amount of charges collected by each public authority under this Act;*
- *(h) particulars of any reading room or other facility provided by each public authority for use by applicants or members of the public, and the publications, documents or other information regularly on display in that reading room or other facility; and*
- *(i) any other facts which indicate an effort by public authorities to administer and implement the spirit and intention of this Act.*

United Kingdom: *49(1) The Commissioner shall lay annually before each House of Parliament a general report on the exercise of his functions under this Act.*

(2) The Commissioner may from time to time lay before each House of Parliament such other reports with respect to those functions as he thinks fit

85. Consideration should also be given to including an additional provision in the law permitting the Information Commission to issue ad hoc reports on important issues that arise during the year. This can be an important power for the Commission in terms of enabling it to draw problems to the attention of the Parliament in a timely manner. Section 48 of the United Kingdom *Freedom of Information Act 2000* specifically permit this.

48(1) If it appears to the Commissioner that the practice of a public authority in relation to the exercise of its functions under this Act does not conform with that proposed in the codes of practice under sections 45 and 46, he may give to the authority a recommendation (in this section referred to as a "practice recommendation") specifying the steps which ought in his opinion to be taken for promoting such conformity.

(2) A practice recommendation must be given in writing and refer to the particular provisions of the code of practice with which, in the Commissioner's opinion, the public authority's practice does not conform

Recommendation

- *The monitoring provisions in the Bill need to be elaborated upon to ensure that monitoring and annual reporting is effective as a means of promoting open government. In particular, all public authorities should undertake annual reporting in some form.*
- *The Information Commission should be able to make ad hoc reports if necessary*

Section 41

86. It is positive that the Bill contains some offences and penalties provisions, but the sections could be extended to ensure that all examples of non-compliance by officials can be punished. Sanctions for non-compliance are particularly important incentives to timely disclosure in jurisdictions where the bureaucracy is unused to hurrying at the request of public.

87. It is important that the offences provisions are comprehensive and identify all possible offences committed at all stages of the request process. While s.41(1) currently identifies a number of deliberate instances of non-compliance, it does not address practical problems like refusal to accept an application, unreasonable delay or withholding of information, knowing provision of incorrect information, obstruction of the work of any public body under the Act and/or non-compliance with the Information Commissioner's orders. These are all serious offences and should be punished. Consideration should also be given to imposing departmental penalties for persistent non-compliance with the law. Poorly performing public authorities should be sanctioned and their bad behaviour even brought to the attention of their Minister who should have to table an explanation in Parliament.

88. it is positive that the Bill at least provides for both fines and imprisonment. However, it is important to recognise that any fines need to be sufficiently large to act as a serious disincentive to bad behaviour. Corruption – the scourge that access laws assist to tackle – can result in huge windfalls for bureaucrats. The threat of fines and imprisonment can be an important deterrent, but must be large enough to balance out the gains from corrupt practices.

89. It is also important to clarify who will be responsible for paying any fine – the department or the official. This should be clarified because financial penalties which able to imposed on individual officers are key - without personalised penalty provisions, many public officials may be content to shirk their duties, safe in the knowledge that it is their employer that will suffer the consequences. The relevant provisions need to be carefully drafted though, to ensure that defaulting officers, at whatever level of seniority, are penalised. It is not appropriate for penalty provisions to assume that penalties will always be imposed on Information Officers. If they have genuinely attempted to discharge their duties but has been hindered by the actions of another official, the official responsible for the non-compliance should be punished.

90. To remove any ambiguities from the law, it should be clear that the Information Commission, as well as the courts, are empowered to impose sanctions under the law.

Recommendation

- *Section 41 should be amended to make the list of offences more comprehensive, by including penalty provisions to deal with unreasonable delay or withholding of information, knowing provision of incorrect information, concealment or falsification of records, wilful destruction of records without lawful authority, obstruction of the work of any public body under the Act, non-compliance with the Information Commissioner's orders and/or persistent non-compliance with the Act by a public authority.*
- *Consideration should be given to enabling sanctions to be imposed personally on any individual found guilty of an offence under the Act*
- *The Information Commission and courts should be explicitly empowered to impose sanctions under the Act.*

Insert new section – Protection for bona fide disclosures

91. Officials responsible for making decisions regarding disclosure of information may legitimately be concerned that wrong decisions on their parts, that is, decisions which result in the disclosure of information that their superiors believe should not have been released, could result in action being taken against them. Similar concerns could be harboured at an institutional level. In order to encourage openness and guard against this possibility, a new provision should be included to protect officials/bodies acting in good faith to discharge their duties under the law. Some model provisions are listed below:

    - Section 89 of the South African *Promotion of Access to Information Act 2000*

      No person is criminally or civilly liable for anything done in good faith in the exercise or performance or purported exercise or performance of any power or duty in terms of this Act.

    - Section 38 of the *Trinidad and Tobago Freedom of Information Act 1999*

      (1) Where access to a document has been given in accordance with the requirements of this Act or in good faith, in the belief that it was required to be given in accordance with this Act, unless malice is proved –

      (a) no action for defamation, breach of confidence or infringement of copyright may be brought against the public authority or against the responsible Minister, or an officer or employee of the public authority as a result of the giving of access;

      (b) no action for defamation or breach of confidence may be brought, in respect of any publication involved in the giving of access by the public authority, against –

      (I) any person who was the author of the document; or

      (II) any person as a result of that person having supplied the document or the information contained in it to the public authority;

      (c) no person shall be guilty of an offence by reason only of having authorised, or having been involved in the giving of the access.

      (2) The giving of access to a document, including an exempt document, in consequence of a request shall not be taken for the purposes of the law relating to defamation, breach of confidence or copyright, to constitute an authorisation or approval of the publication of the document or its contents by the person to whom access is given.

      (3) Nothing in this Act affects any privilege, whether qualified or absolute, which may attach at common law to the publishing of a statement.

Recommendations

- *A new provision should be inserted to protect officials from liability where they bona fide disclose information in accordance with the Act*

Insert new section – Declassification of documents

92. Best practice supports the inclusion of a provision which permits ALL documents to be released after a certain amount of time, in recognition of the fact that sensitivity usually wanes over time. Declassification periods range from 10 to 50 years. Ideally, a median time limit should be chosen – perhaps 20 years – after which time, all information will be released.

Recommendations

- *A new provision should be inserted which operates to declassify all information held by public authorities (except private companies) after a certain period of time*

For more information or to discuss this paper, please contact:
Ms Charmaine Rodrigues
Right to Information Programme,
Commonwealth Human Rights Initiative (New Delhi)
Email: charmaine@humanrightsinitiative.org
Phone: +91-11 2686 4678 / 2685 0523
Fax: +91-11 2686 4688