



## australian network of environmental defender's offices

**Submission to the Privacy and FOI Policy  
Branch, Department of the Prime Minister and  
Cabinet**

21 May 2009

The Australian Network of Environmental Defender's Offices (ANEDO) consists of nine independently constituted and managed community environmental law centres located in each State and Territory of Australia.

Each EDO is dedicated to protecting the environment in the public interest. EDOs provide legal representation and advice, take an active role in environmental law reform and policy formulation, and offer a significant education program designed to facilitate public participation in environmental decision making.

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## Introduction

The Australian Network of Environmental Defender's Offices (ANEDO) welcomes the opportunity to provide comment on the review of the *Freedom of Information Amendment (Reform) Bill 2009 (FOI Bill)* and the introduction of the *Information Commissioner Bill 2009 (IC Bill)*.<sup>1</sup> ANEDO is a network of community legal centres with over 20 years experience specialising in public interest environmental and planning law.

As ANEDO operates predominantly within the field of public interest environmental law, one of our key priority areas is access to justice. Indeed government accountability and transparency play an integral role in facilitating access to justice through the provision of information to the community which assists them in protecting their rights. ANEDO therefore welcomes the review of the Commonwealth FOI laws.

The legislation administering freedom of information on a federal level is, and has been for some time, a contentious instrument that “encapsulates the key tension in representative democracy, between the right of individual voters and the public at large to be informed about the workings of government, set against the Executive’s claims for confidentiality in those areas where it is required for the effective conduct of government business.”<sup>2</sup> ANEDO submits that despite these tensions, the FOI Act must be predicated on the notion that access to information held by the government is guaranteed except in limited circumstances. This will ensure that the objects of the Act and the expectations of the community of an open and transparent government are met. ANEDO is optimistic that the review process is an indication of a desire by the Federal Government to transition towards a FOI regime that encourages transparency, accountability and responsibility.

Tasmania, Queensland and NSW have recently undergone, or are undergoing, extensive reviews of their respective FOI regimes, with the EDO offices in all three states tendering submissions<sup>3</sup> on this very important area of access to justice. As such, this Commonwealth submission will draw extensively on the recommendations made in each of those state based submissions.

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<sup>1</sup> We note that this is the second stage of the Government implementing reforms to the *Freedom of Information Act 1982 (FOI Act)* and welcome the first stage of the review which abolished the power to issue conclusive certificates in the *FOI Act* and *Archives Act 1983*.

<sup>2</sup> NSW Parliamentary Library Research Service, *Freedom of Information – Issues and Recent Developments in NSW*. Available at: [http://www.parliament.nsw.gov.au/prod/parlament/publications.nsf/0/1572d6956a794b4eca2572ea0004439a/\\$FILE/FOIFINAL&INDEX.pdf](http://www.parliament.nsw.gov.au/prod/parlament/publications.nsf/0/1572d6956a794b4eca2572ea0004439a/$FILE/FOIFINAL&INDEX.pdf).

<sup>3</sup> Tasmanian EDO Submission to the State FOI Review. Available at: [http://www.edo.org.au/edotas/pdf/foi\\_review\\_0902.pdf](http://www.edo.org.au/edotas/pdf/foi_review_0902.pdf). Environmental Defenders Office (QLD) INC. and Environmental Defender’s Office of Northern Queensland INC submission on the Right to Information Bill 2009(QLD). Available at: <http://www.edo.org.au/edoqld/edoqld/new/Submission-DraftNewFOILaws.pdf>; and NSW EDO Submission to the NSW Ombudsman on the *Freedom of Information Act 1989*. Available at: [http://www.edo.org.au/edonsw/site/pdf/subs08/081112\\_foi.pdf](http://www.edo.org.au/edonsw/site/pdf/subs08/081112_foi.pdf).

## Key Comments and Recommendations

### *Freedom of Information Amendment (Reform) Bill 2009*

- ANEDO supports the stronger wording of the objects clause in favour of disclosure, which “requires agencies to publish”<sup>4</sup> information and provides for a “right of access;”<sup>5</sup>
- ANEDO submits that the objects of the Act be better operationalised within the Act, particularly in situations where discretion is afforded to the Information Officers;
- ANEDO supports the proposal to abolish all application fees made under Part III;
- ANEDO supports the development of the Information Publication Scheme;
- ANEDO supports the requirement of all government agencies to develop an Information Publication Scheme (IPS);
- ANEDO submits that the review periods of each agency’s Information Publication Scheme be reviewed every two years as opposed to the current 5 year<sup>6</sup> period stipulated in the legislation;
- ANEDO supports the re-formulation of the public-interest test;
- ANEDO supports the introduction of guiding principals for the “public interest” both the “Factors favouring access”<sup>7</sup> and “Irrelevant factors;”<sup>8</sup>
- ANEDO supports the proposition that the exemption for personal privacy,<sup>9</sup> business affairs,<sup>10</sup> national economy,<sup>11</sup> and research<sup>12</sup> be subjected to the public interest test;
- ANEDO submits that the *FOI Bill* be amended to incorporate a provision for expedited information requests;
- ANEDO submits the *FOI Bill* should be amended to allow, in special circumstances, external review be undertaken without the prerequisite of an internal review;
- ANEDO recommends the removal of the deemed default position<sup>13</sup> and the implementation of a trigger mechanism which automatically requires an internal review to take place following the expiration of the reply period; and
- ANEDDO recommends that the internal review process raised in Section 54D Internal Review – Deemed Affirmation of Original Decision, be removed.

### *Information Commissioner Bill 2009*

- ANEDO submits that the wording in Section 9(b) setting out the functions to be carried out by the Information Commissioner, require further clarification;
- ANEDO recommends that any discretionary powers provided for in the FOI legislation, be confined by the objects clause of the FOI Bill; and
- ANEDO submits that the IC Bill be amended to stipulate that the Privacy Commissioner is not permitted to carry out the freedom of information functions.<sup>14</sup>

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<sup>4</sup> FOI (Reform) Bill 2009 Section 3(1)(a).

<sup>5</sup> FOI (Reform) Bill 2009 Section 3(1)(b).

<sup>6</sup> FOI (Reform) Bill 2009 Section 9(1)(b).

<sup>7</sup> FOI (Reform) Bill 2009 Section 11B(3).

<sup>8</sup> FOI (Reform) Bill 2009 Section 11B(4).

<sup>9</sup> FOI (Reform) Bill 2009 Section 41.

<sup>10</sup> FOI (Reform) Bill 2009 Section 43.

<sup>11</sup> FOI (Reform) Bill 2009 Section 44.

<sup>12</sup> FOI (Reform) Bill 2009 Section 43A.

<sup>13</sup> FOI (Reform) Bill 2009 Section 15AB(3)(a).

<sup>14</sup> IC Bill Section 10.

This submission makes comment on the *FOI Bill* under the following headings:

- Objects;
- Fees and Charges;
- Public Interest Test;
- Exemptions;
- Information Publication Scheme;
- Time Periods;
- Internal Review; and
- Deemed Refusal

Having addressed these, the submission will comment briefly on a number of issues arising under the *IC Bill*.

### **1) Freedom of Information (Reform) Bill 2009**

#### **Objects**

ANEDO supports the stronger wording adopted in the objects clause, that will encourage greater disclosure as the objects clauses now requires “agencies to publish”<sup>15</sup> information and provides for a “right of access”<sup>16</sup> to documents as opposed to “general right of access.”<sup>17</sup> Furthermore what is fundamentally important is that the amendments to the *FOI Bill* now makes reference to the reasons underlying the objects clause, with a clear purpose to “promote Australia’s representative democracy”<sup>18</sup> through:

- (a) increasing public participation in Government processes, with a view to promoting better-informed decision-making; and*
- (b) increasing scrutiny, discussion, comment and review of the Government’s activities.*<sup>19</sup>

ANEDO also supports the fact that the objects contained in the *FOI Bill* make reference that “Parliament intends, by these objects, to increase recognition that information held by the Government is to be managed for public purposes, and is a national resource” and is “to facilitate and promote public access to information, promptly and at the lowest reasonable cost.”<sup>20</sup> Both these statements establish a clear pro-disclosure inference, a position that ANEDO supports.

#### **Fees and Charges**

ANEDO offices all support a need for reforms in regard to the costing process associated with obtaining information.<sup>21</sup> As EDO (NSW) submitted in relation to the application fee:

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<sup>15</sup> *FOI (Reform) Bill 2009* Section 3(1)(a).

<sup>16</sup> *FOI (Reform) Bill 2009* Section 3(1)(b).

<sup>17</sup> *FOI Act 1982* Section 3(1)(b).

<sup>18</sup> *FOI (Reform) Bill 2009* Section 3(2).

<sup>19</sup> *FOI (Reform) Bill 2009* Section 3(2)

<sup>20</sup> *FOI (Reform) Bill 2009* Section 3(3) and (4)

<sup>21</sup> Tasmanian EDO Submission to the State FOI Review Available at: [http://www.edo.org.au/edotas/pdf/foi\\_review\\_0902.pdf](http://www.edo.org.au/edotas/pdf/foi_review_0902.pdf); Environmental Defenders Office (QLD) INC. and Environmental Defender’s Office of Northern Queensland INC submission on the Right to Information Bill 2009(QLD). Available at: <http://www.edo.org.au/edoqld/edoqld/new/Submission->

*The EDO submits that this fee should be removed. In addition to making the FOI system accessible to all, the removal of the fee would also be important symbolically. It would signify to both agencies and the public that access to public information is a fundamental democratic right, and 'not a utility, such as electricity or water, which can be charged according to the amount used by individual citizens.'*<sup>22</sup>

ANEDO therefore agrees with the proposal by the FOI Bill to abolish all application fees made under Part III.<sup>23</sup> We also support the Government's policy position outlined in the Companion guide:

*Applicants who seek access to their own personal information will not pay any charges. For all other applications (other than those applications made by journalists and not-for-profit community groups) the first hour of decision making time will be free of charge. For applications made by journalists and not-for-profit community groups the first five hours of the decision making time will be free of charge.*<sup>24</sup>

If the proposed amendments outlined in the Companion Guide are passed, it would demonstrate a significant effort by the Government to reduce the costs associated with FOI requests. Given their importance, ANEDO therefore submits that these intended changes to the *Freedom of Information (Fees and Charges Regulation)* should be made available for public comment.

### **Public Interest Test**

There has undoubtedly been a need for increased clarity surrounding the application of the Public Interest Test. ANEDO therefore welcomes the re-formulation of the public-interest test proposed in the *FOI Bill*. In addressing the QLD FOI reforms, the QLD EDO submission stated that "public interest considerations must be given a greater role in determining whether information is released under the Act."<sup>25</sup> Specifically the submission stated that the public interest test should:

*balance the harm that may be caused by release of the exempt information against the public interest in disclosure. Unless the harm caused would outweigh the public benefit. The information should be released.*<sup>26</sup>

Similarly, EDO (Tas) in its submission stated that it "would strongly support the listing of factors relevant to deciding whether the public interest favours release of a document,"<sup>27</sup> with the EDO (QLD) submission also stating that it "would encourage

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[DraftNewFOILaws.pdf](#); and NSW EDO Submission to the NSW Ombudsman on the *Freedom of Information Act 1989*. Available at: [http://www.edo.org.au/edonsw/site/pdf/subs08/081112\\_foi.pdf](http://www.edo.org.au/edonsw/site/pdf/subs08/081112_foi.pdf).

<sup>22</sup> Electoral and Administrative Review Commission, *Report on Freedom of Information*, December 1990, pg 183.

<sup>23</sup> Proposed repeal of Subsection 29(1) and 30A of the FOI Act 1982.

<sup>24</sup> Freedom of Information (FOI) Reform Companion Guide. Available at: [http://www.pmc.gov.au/consultation/foi\\_reform/docs/Companion\\_Guide.pdf](http://www.pmc.gov.au/consultation/foi_reform/docs/Companion_Guide.pdf).

<sup>25</sup> Environmental Defenders Office (QLD) INC. and Environmental Defender's Office of Northern Queensland INC submission on the Right to Information Bill 2009(QLD). Available at: <http://www.edo.org.au/edoqld/edoqld/new/Submission-DraftNewFOILaws.pdf>.

<sup>26</sup> Environmental Defenders Office (QLD) INC. and Environmental Defender's Office of Northern Queensland INC submission on the Right to Information Bill 2009(QLD). Available at: <http://www.edo.org.au/edoqld/edoqld/new/Submission-DraftNewFOILaws.pdf>.

<sup>27</sup> Tas Submission to the State FOI Review. Available at;

guidelines to be produced outlining the various issues to be considered when weighting the public interest.”<sup>28</sup> Furthermore, the EDO (NSW) submission suggested that the introduction of criteria into the legislation outlining how and when a public interest test is to be applied would greatly assist in the development of a more transparent and consistent application of the public interest test.<sup>29</sup> ANEDO therefore supports the re-formulation of public interest test that firstly is weighted in favour of disclosure as outlined in s11A(5):

*The agency or Minister must give the person access to the document if it is conditionally exempt at a particular time unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest.*<sup>30</sup>

Secondly ANEDO supports the amendments that have introduced both the “Factors favouring access”<sup>31</sup> and “Irrelevant factors.”<sup>32</sup> Having such guidance set out within the legislation should increase both the transparency and consistency of the application of the public interest test.

## **Exemptions**

ANEDO submits that no category of documents should automatically be considered an exempt document under the FOI Act. ANEDO welcomes the amendments that apply the public interest test (discussed above) to the exemption for personal privacy,<sup>33</sup> business affairs,<sup>34</sup> national economy,<sup>35</sup> and research.<sup>36</sup> As they are now subject to the public interest test, then they are considered conditional exemptions which ANEDO supports.

Moreover, ANEDO believes that the amendments to the Cabinet exemption to ensure that only those documents that are “at the core of the cabinet process”<sup>37</sup> are within its scope is a positive step towards increasing transparency. Although ANEDO considers this a positive step, we would ultimately advocate for removal of the blanket Cabinet exemption and instead make these documents subject to the public interest test.<sup>38</sup>

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[http://www.edo.org.au/edotas/pdf/foi\\_review\\_0902.pdf](http://www.edo.org.au/edotas/pdf/foi_review_0902.pdf).

<sup>28</sup> Environmental Defenders Office (QLD) INC. and Environmental Defender’s Office of Northern Queensland INC submission on the Right to Information Bill 2009(QLD). Available at: <http://www.edo.org.au/edoqld/edoqld/new/Submission-DraftNewFOILaws.pdf>.

<sup>29</sup> NSW Submission.

<sup>30</sup> FOI (Reform) Bill 2009 Section 11A(5).

<sup>31</sup> FOI (Reform) Bill 2009 Section 11B(3).

<sup>32</sup> FOI (Reform) Bill 2009 Section 11B(4).

<sup>33</sup> FOI (Reform) Bill 2009 Section 41.

<sup>34</sup> FOI (Reform) Bill 2009 Section 43.

<sup>35</sup> FOI (Reform) Bill 2009 Section 44.

<sup>36</sup> FOI (Reform) Bill 2009 Section 43A.

<sup>37</sup> Freedom of Information (FOI) Reform Companion Guide. Available at: [http://www.pmc.gov.au/consultation/foi\\_reform/docs/Companion\\_Guide.pdf](http://www.pmc.gov.au/consultation/foi_reform/docs/Companion_Guide.pdf)

<sup>38</sup> Environmental Defenders Office (QLD) INC. and Environmental Defender’s Office of Northern Queensland INC submission on the Right to Information Bill 2009(QLD). Available at: <http://www.edo.org.au/edoqld/edoqld/new/Submission-DraftNewFOILaws.pdf>.

## Information Publication Scheme

ANEDO supports the requirement for all government agencies to develop an Information Publication Scheme (IPS) set out in Part II of the *FOI Bill*. The Bill sets out that every agency must develop an IPS which must set out the following information:

- a) *what information the agency proposes to publish...*
- b) *how, and to whom, the agency proposes to publish information...*<sup>39</sup>

ANEDO also supports the further requirements that every agency is to publish, amongst other information:

- b) *details of the structure of the agency's organisation;*
- c) *details of the functions of the agency, including its decision making powers;*
- g) *the information in documents to which the agency routinely gives access in response to requests under Part III; and*
- j) *the agency's operational information.*<sup>40</sup>

We submit that the fact that this information must be published on a website<sup>41</sup> with the detail of any charge<sup>42</sup> for accessing the information published in the same way as the information, all encourage the development of an FOI regime that is both transparent and pro-disclosure. ANEDO therefore supports the development of the Information Publication Scheme. However we submit that the review periods of each agency's scheme should be reviewed every two years as opposed to the current 5 year period<sup>43</sup> proposed in the Bill. ANEDO recommends that in addition to these individual agency Information Publication Schemes, the Office of the Information Commissioner release a template of overarching guidelines, that include mandatory criteria and information that must be released, which are applicable to all agencies.

ANEDO also supports the amendments made to the *Archives Act 1983*, which stipulates that the open access period for most records have been altered from 30 years to 20 years, and that Cabinet notebooks have been reduced from 50 to 30 years.

## Time Periods

EDO offices have reported issues surrounding the failure by agencies to comply with the statutory time frames in their respective jurisdictions. For example, EDO (NSW) has historically encountered difficulties accessing information under the Commonwealth FOI regime. In 2007 EDO (NSW) represented WWF in proceedings in the AAT to obtain documents.

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<sup>39</sup> FOI (Reform) Bill 2009 Section 8(1)(a-b).

<sup>40</sup> FOI (Reform) Bill 2009 Section 8(2).

<sup>41</sup> FOI (Reform) Bill 2009 Section 8D(3).

<sup>42</sup> FOI (Reform) Bill 2009 Section 8D(4).

<sup>43</sup> FOI (Reform) Bill 2009 Section 9(1)(b).

### *WWF-Australia v Department of Agriculture, Fisheries and Forestry*

The NSW EDO acted for WWF-Australia in the Administrative Appeal Tribunal against the Department of Agriculture, Fisheries and Forestry (DAFF) in relation to a Freedom of Information matter. WWF-Australia was appealing the decision of the Australian Bureau of Agricultural and Resource Economics (ABARE) to refuse access to the responses of a number of farmers to questionnaires used by ABARE to obtain information and views about land clearing in NSW. ABARE is a division of DAFF.

In May 2007, the NSW Farmers Association joined the proceedings. After negotiations between WWF-Australia and ABARE in early 2008, ABARE provided aggregated information about the underlying survey results to WWF-Australia. WWF-Australia was satisfied with the provision of this information and therefore discontinued the application on 4 April 2008.

This applicant had to undertake an 11-month period and forego significant costs to access information to which they were rightly entitled. ANEDO submits that this is an unreasonable amount of time and would welcome heavier consequences for those agencies failing to comply with time periods.

The changes proposed by the FOI Bill require that an agency may “apply to the Information Commissioner for an extension” beyond the 30 day period<sup>44</sup> for “complex or voluminous requests.”<sup>45</sup> ANEDO acknowledges the fact that some requests may require additional time. However we submit that the Bill should be amended to ensure that when making the decision the Information Commissioner should consider the objects of the Act; that information be disclosed “promptly, and at the lowest reasonable cost.”<sup>46</sup> ANEDO recognises that adequate resourcing of agencies must accompany these reforms to ensure that the changes being proposed can be carried out in accordance with the objects of the legislation.

Furthermore, ANEDO submits that the FOI Act is amended to incorporate a provision for expedited information requests. As the Solomon Report states:

*For some applicants seeking documents through FoI, it would be fair to say that access delayed, is access refused.*

Expedited determinations could be made available in specific or exceptional circumstances such as litigation deadlines.<sup>47</sup>

### **Internal Review**

EDO (Tas) has raised the concern that “while internal review is appropriate in many cases, it can provide an unwarranted additional hurdle where information is required quickly”<sup>48</sup> Furthermore EDO (NSW) submitted that the NSW FOI legislation should be

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<sup>44</sup> FOI Act 1982 Section 15(5)(b).

<sup>45</sup> FOI (Reform) Bill 2009 Section 15AA.

<sup>46</sup> FOI (Reform) Bill 2009 Section 3(4).

<sup>47</sup> An example that the EDO often encounters concerns the 28 day period within which a merits appeal must be initiated to the Land and Environment Court.

<sup>48</sup> Tas Submission to the State FOI Review. Available at: [http://www.edo.org.au/edotas/pdf/foi\\_review\\_0902.pdf](http://www.edo.org.au/edotas/pdf/foi_review_0902.pdf).

“amended to make internal reviews optional, not as a mandatory prerequisite to obtaining an external review.” As such ANEDO submits that the *FOI Bill* should be amended to allow, in special circumstances (such as where there is antipathy between the applicant and the agency holding the information requested) external review be undertaken without the prerequisite of an internal review.<sup>49</sup>

## Deemed Refusal

Section 15AB of the *FOI Bill* addresses the situation where a decision has not been made by the relevant agency or Minister. The Bill proposes that if after the initial decision period<sup>50</sup> the applicant has not received notice of a decision, then “the principal officer of the agency or the Minister is taken to have made a decision personally refusing to give access to the document on the last day of the initial decision period.”<sup>51</sup> ANEDO submits that making this option available to agencies does not “promote a pro-disclosure culture across the Government” nor does it build “a stronger foundation for more openness in government.”<sup>52</sup>

ANEDO therefore submits that the deemed refusal provision should be removed from the Bill, as it contributes to a culture where the default position is one of withholding, as opposed to disclosing, information. If an applicant has been refused the information requested, ANEDO submits that at the very least the applicant should be contacted and informed of the decision, and should be made aware of their rights of appeal under the legislation to have the decision reviewed. This would assist in both keeping the applicant informed throughout the application process, as well as encouraging transparency and accountability. As opposed to a position of deemed refusal, ANEDO recommends the implementation of a trigger mechanism which automatically requires an internal review to take place following the expiration of the reply period.

Furthermore in terms of deemed refusal, ANEDO recommends that the proposed provisions for the internal review process raised in *Section 54D Internal Review – Deemed Affirmation of Original Decision*, should be removed. The section proposes that if an application for internal review has been made to an agency, and 30 days has passed since the application was lodged and the applicant has not received a decision then “the principal officer of the agency is taken to have made a decision personally affirming the original decision.”<sup>53</sup> This provision contributes to a culture that is not predisposed to disclosure.

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<sup>49</sup> *Ibid.*

<sup>50</sup> The initial decision period is specified as 30 days, FOI (Reform) Bill 2009 Section 15AB(2).

<sup>51</sup> FOI (Reform) Bill 2009 Section 15AB(3)(a).

<sup>52</sup> Freedom of Information (FOI) Reform Companion Guide. Available at: [http://www.pmc.gov.au/consultation/foi\\_reform/docs/Companion\\_Guide.pdf](http://www.pmc.gov.au/consultation/foi_reform/docs/Companion_Guide.pdf).

<sup>53</sup> FOI (Reform) Bill 2009 Section 54D(2)(a).

## 2) Information Commissioner Bill 2009

The *Information Commissioner Bill 2009 (IC Bill)* establishes the Office of the Information Commissioner. This centralised office is headed by the Information Commissioner, with the Freedom of Information Commissioner and the Privacy Commissioner making up the other two information officers. The *FOI Bill* proposes that the Information Commissioner functions include the power to make own motion investigations into agency compliance under the *FOI Act*.

EDO (NSW) discussed in detail the need for the introduction of an Information Commissioner for a number of reasons.<sup>54</sup> The primary reasons behind this recommendation were due to the fact that within the NSW FOI regime there was a “lack of monitoring, auditing and centralised consideration of lessons for good administration.”<sup>55</sup> As such EDO NSW key recommendations were:

- That an independent statutory position of Information Commissioner be created whose role would include determinative powers, compliance and monitoring, as well as the authority to implement proposed sanctions; and
- That the legislation require all NSW agencies to provide annual reports to the Information Commissioner, containing information such as the number of FOI applications received as well as those granted full disclosure and those refused.

Hence, ANEDO is pleased to see the proposed introduction of an Information Commissioner within the IC Bill who reports to the Minister on;

- (i) *the collection, use, disclosure, management, administration or storage of, or accessibility to, information held by the Government; and*
- (ii) *the systems used, or proposed to be used, for the activities covered by subparagraph (i);*<sup>56</sup>

The introduction of such provisions should encourage a system where monitoring and auditing is given “centralised consideration.” Furthermore ANEDO supports the fact that the Information Commissioner is given all powers necessary to oversee the:

- a) *the information commissioner functions;*
- b) *the freedom of information functions;*
- c) *the privacy functions.*<sup>57</sup>

These provisions assist in identifying central authority with “the power to do all things necessary or convenient” to carry out the three functions outlined above. Furthermore ANEDO supports the Bill’s proposal to allocate specific positions (information officers) to both the freedom of information functions<sup>58</sup> and the privacy functions.<sup>59</sup>

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<sup>54</sup> NSW EDO Submission to the NSW Ombudsman on the *Freedom of Information Act 1989*. Available at: [http://www.edo.org.au/edonsw/site/pdf/subs08/081112\\_foi.pdf](http://www.edo.org.au/edonsw/site/pdf/subs08/081112_foi.pdf).

<sup>55</sup> Kirby, M. 1997, *Freedom of Information: The Seven Deadly Sins*, British Section of the International Commission of Jurists, Fortieth Anniversary Lecture Series, London. Available at: [http://www.hcourt.gov.au/speeches/kirbyj/kirbyj\\_justice.htm](http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_justice.htm).

<sup>56</sup> IC Bill Section 9(a)(i-ii).

<sup>57</sup> IC Bill Section 13(1)(a-c).

<sup>58</sup> IC Bill Section 10.

<sup>59</sup> IC Bill Section 11.

However, ANEDO submits that the wording in Section 9(b) of the *IC Bill* that sets out the functions to be carried out by the Information Commissioner, requires further clarification. If the intention of the section is to ensure that the responsibilities of the Information Commissioner are to include not only the functions proposed by the Bill, but also “any other function conferred by another Act (or instrument under another Act)” then this should be more clearly identified. ANEDO proposes that s9(b) of the Bill be rewritten to read:

*any other freedom of information function or privacy function conferred by another Act (or an instrument under another Act)*

As it currently is worded, whether or not the Information Commissioner could be made responsible for a freedom of information function or a privacy function conferred by another act is ambiguous.

### **Information Officers**

In addition to the Information Commissioner, the *IC Bill* also establishes the positions of the Freedom of Information Commissioner and the Privacy Commissioner within the Office of the Information Commissioner. One of the major points that have been raised throughout the EDO responses to the various state NSW, QLD and Tasmanian FOI amendment process has been a call for increased accountability. ANEDO therefore strongly supports the establishment of both the Freedom of Information Commissioner as well as the Privacy Commissioner.

We also support the fact the *IC Bill* sets out the provisions<sup>60</sup> which fall under the responsibility of the Privacy Commissioner. With such guidance included in the Bill, accountability and transparency should be increased.

Although ANEDO generally supports the establishment of the Office of the Information Commissioner, we have a number of concerns with the specific powers attributed to each of the Information Officers and the way in which decisions are made. ANEDO submits that the discretion afforded to the Information Commissioner, FOI Commissioner and Privacy Commissioner is largely unfounded. The *IC Bill* states that the FOI Commissioner is to “perform the function, or the exercise of the power, upon his or her own opinion, belief or state of mind.”<sup>61</sup> Further more the Privacy Commissioner, when exercising his or her functions “must perform the function upon his or her own opinion, belief or state of mind.”<sup>62</sup> Although these powers exist in relation to the powers in other pieces of legislation, ANEDO submits that such unfettered discretion does not contribute to consistency, accountability or transparency as the rationale for decision making is not clearly apparent. As such ANEDO recommends that any such discretion should be carried out in accordance with the Objects.

ANEDO has further concerns regarding the overlap of powers between the information officers. ANEDO submits that there needs to be a clearer delegation of the powers

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<sup>60</sup> See Section 11 of the *IC Bill*. Responsibilities include specific provisions included in the *Privacy Act 1988*, *Crimes Act 1914*, *Data-matching Program (Assistance and Tax) Act 1990*, *National Health Act 1953*, and the *Telecommunications Act 1997*.

<sup>61</sup> FOI (Reform) Bill 2009 Section 14(5).

<sup>62</sup> FOI (Reform) Bill 2009 Sec 15(5).

of the FOI Commissioner who may also perform the privacy functions.<sup>63</sup> The Bill specifies that:

“a person may only be appointed as the Freedom of Information Commissioner if he or she has obtained a degree from a university, or an education qualification of a similar standing, after studies in the field of law.”<sup>64</sup>

ANEDO submits that as the *IC Bill* sets out this specific criterion for the Freedom of Information Commissioner, it is unclear why the Privacy Commissioner, who has to carry out the same functions, does not need the same qualifications:

“The Privacy Commissioner may also perform the freedom of information functions (whether or not the Privacy Commissioner holds the qualifications mentioned in 17(3)).”<sup>65</sup>

Finally, we submit that all measures must be taken to ensure that the Commonwealth FOI reforms enable the powers to be carried in a consistent manner. ANEDO therefore submits that the IC Bill be amended to stipulate that the Privacy Commissioner is not permitted to carry out the freedom of information functions.<sup>66</sup>

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<sup>63</sup> IC Bill Section 14(2).

<sup>64</sup> IC Bill Section 17(3).

<sup>65</sup> IC Bill Section 15(2).

<sup>66</sup> IC Bill Section 10.