

**CCL Submission in response to the exposure drafts of the Freedom of Information Amendment (Reform) Bill 2009 and the Information Commissioner Bill 2009****1. The NSW Council for Civil Liberties**

The New South Wales Council for Civil Liberties (CCL) is committed to protecting and promoting civil liberties and human rights in Australia.

CCL is a non-government organisation in special consultative status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

CCL was established in 1963 and is one of Australia's leading human rights and civil liberties organisations. Our aim is to secure the equal rights of everyone in Australia and oppose any abuse or excessive power by the State against its people.

**2. Overall Comments about the FOI Reforms**

The CCL welcomes the opportunity to comment on the Commonwealth Government's exposure drafts of the Freedom of Information Amendment (Reform) Bill 2009 (FOIR Bill) and the Information Commissioner Bill 2009 (IC Bill).

The *Freedom of Information Act 1982* (Cth) (FOI Act) was the first freedom of information legislation introduced both in Australia and in any Westminster system of government. Since its introduction, freedom of information legislation has been enacted in all other Australian states and territories and in various overseas jurisdictions including Canada, New Zealand and the United Kingdom.

However, the history of freedom of information legislation in Australia has been disappointing. Almost fourteen years ago, the Australian Law Reform Commission and the Administrative Review Council undertook a major review of the FOI Act and made over 100 recommendations in the ALRC & ARC Report 77 'Open Government: a review of the federal Freedom of Information Act 1982'. In particular, the ALRC concluded that the FOI Act suffered from the following deficiencies:

- *There is no person or organisation responsible for overseeing the administration of the Act.*
- *The culture of some agencies is not as supportive of the philosophy of open government and FOI as the Review considers it should be.*
- *The conflict between the old 'secrecy regime' and the new culture of openness represented by the FOI Act has not been resolved.*
- *FOI requests can develop into legalistic, adversarial contests.*
- *The cost of using the Act can be prohibitive for some.*

- *The Act can be confusing for applicants and difficult to use.*
- *The exemption provisions are unclear, open to misuse by agencies and, because of their prominence, tend to overwhelm the purpose of the Act.*
- *Records management, which is fundamental to the effectiveness of the FOI Act, is not given sufficient prominence.*
- *Current review mechanisms could be improved.*
- *There are uncertainties about the application of the Act as government agencies are corporatised.*
- *The interactions between the FOI Act and the Privacy Act, and the potential conflicts they give rise to, have not been adequately addressed.<sup>1</sup>*

However, since the ALRC & ARC published their report in 1995, there has not been any major overhaul of the FOI Act. The current Federal Government is therefore to be congratulated for its initiative to restructure the FOI Act to remedy many of the deficiencies highlighted by the ALRC & ARC in their report.

It is also useful that the Commonwealth government's proposed changes to the FOI Act coincide with FOI review in a number of other states. Tasmania, Western Australia, Victoria, Queensland and New South Wales are all in the process of reviewing their freedom of information regimes. Of particular interest has been the Queensland government's comprehensive review of its FOI legislation. The resulting report – the Solomon Report<sup>2</sup> – is, to date, the most far reaching and insightful of these reviews and provides a particularly valuable analysis which the CCL has drawn on in responding to the FOIR and IC Bills.

The CCL supports many of the changes contained in the FOIR and IC Bills. Accordingly, in this submission, CCL has chosen to raise some major issues of principle rather than focusing on the technical detail of many of the proposed reforms.

### **3. Cultural Change**

The central focus for change must be a major shift in the values and culture among politicians and public administration officials. The Solomon Report's comments on this aspect of reforms is apposite:

*History in Queensland, as in many other jurisdictions, has proven unambiguously that there is little point in legislating for access to information if there is no ongoing political will to support its effects. The corresponding public sector cultural responses in administration of FOI inevitably move to crush the original promise of open government and, with it, accountability'.<sup>3</sup>*

This is not a new insight. The dilemma is always how to counter this seemingly inherent flaw. In addition, to the proposed reforms to the FOI Act contained in the FOIR and IC Bills, the CCL proposes that the government should undertake other non-legislative measures to address this 'cultural issue' including increasing the

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<sup>1</sup> ALRC & ARC, ALRC Report 77, 'Open Government: A Review of the Federal Freedom of Information Act 1982', [2.12].

<sup>2</sup> FOI Independent Review Panel, *The Right to Information. Reviewing Queensland's Freedom of Information Act*, (June 2008).

<sup>3</sup> Ibid, 2.

funding, training and statuses of FOI decision-makers within government agencies, ensuring that the Information Commissioner is given appropriate funding and Ministers sending their departments and agencies clear instructions to the effect that the FOI regime should be upheld and complied with.

The government should also add new provisions to the FOI Act, which make it an offence to conceal or destroy any records to avoid disclosing information pursuant to the FOI Act.<sup>4</sup>

Finally the government should undertake an immediate review of all other pieces of federal legislation and other relevant policies, such as the Commonwealth public service practice, to ensure that they are consistent with the message that government information is a national resource. Those that are not consistent with the objectives of the FOI regime should be amended to ensure that they are compatible.

***Recommendations:***

- 1. That the government ensure that sufficient funding and training is provided to FOI decision- makers within government departments and agencies.***
- 2. That the government introduce provisions to the FOI Act which make it an offence to conceal or destroy any records to avoid disclosing information pursuant to the FOI Act.***
- 3. That the government undertake an immediate review of all other pieces of federal legislation and other relevant policies to ensure that they are consistent with the FOI regime and make all necessary changes to ensure this consistency.***

#### **4. Exemptions and the Public Interest Test**

In 1996 as part of its review of the FOI Act, the ALRC and ARC concluded that: “[t]he exemption provisions are unclear, open to misuse by agencies and, because of their prominence, tend to overwhelm the purpose of the Act”.<sup>5</sup>

One of the key aspects of the reforms contained in the draft bills is changes to Part III of the FOI Act which should begin to open up government information. For example, proposed section 11A recasts the starting point for considering FOI requests so that there the general rule is that documents should be disclosed unless they are either (i) exempt documents; or (ii) conditionally exempt documents, and it is contrary to the public interest for the documents to be disclosed. Other important changes to this part of the freedom of information legislation included in the draft bills are the introduction of a list of public interest factors favouring disclosure, the repeal of a small number of exemptions and increasing the number of ‘conditionally exempt’ documents.

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<sup>4</sup> See for eg, section 110 of the *Freedom of Information Act 1992* (WA) which makes it an offence to ‘conceal, destroy or dispose of a document or part of a document...for the purpose of preventing an agency being able to give access to that document’.

<sup>5</sup> ALRC & ARC, above n 1, [2.12].

Ideally, CCL believes that all of the exemptions set out in Part IV of the FOI Act should be subject to the public interest test. Incorporating a single overarching public interest test into all exemptions would provide greater clarity and a complete rethinking of the way the public interest in disclosure versus the weight of exemptions is approached by government agencies.

In addition, making all exemptions subject to an overarching public interest test delivers a symbolic benefit as it makes it clear that the key issue is not whether an exemption applies, but where the balance of public interest lies.

In particular, schedule 2 of the FOI Act which has remained more or less completely untouched by the proposed reforms should be significantly pared back. CCL submits that all agencies currently listed in the schedule should be required to explain why this exclusion is warranted and existing exemptions would not protect documents which should be kept confidential.

***Recommendations:***

- 4. That all exemptions in the FOI Act be made subject to an overarching public interest test.***
- 5. That schedule 2 should be reconsidered and all agencies who are listed (or whose documents are listed) in the schedule should be required to explain why this exclusion is warranted and existing exemptions would not protect documents which should be kept confidential.***

**5. Cabinet Documents Exemption**

**5.1. Rationale**

The CCL is of the view that as we live in a representative democracy the information the government holds about our society should be available to everyone in the society. This is based on the rationale for representative democracy ie; the government represent the citizens. They are our employees and servants. Their role exists for our benefit. Therefore, if the government is claiming ownership or rights to any information held about our society, they are mislead. They are confusing (forgetting?) their status as agents, granted to them by citizens, who are in effect the principals of this social contract. The base point is the information actually belongs to us; the public.

**5.2. Cabinet documents**

Based on this rationale, the CCL submits that there should be no blanket exemptions for any class of documents, including Cabinet documents. Every request should be subject to the single overarching public interest test mentioned earlier.

This is possible. It has been achieved in New Zealand. The Solomon report<sup>6</sup> states New Zealand's *Official Information Act* 1982 has a default position for release of all information, unless there is a good reason for keeping the information secret which outweighs the public interest to release the information. Good reasons can include:

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<sup>6</sup> at p 106-7

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

...

(ii) *Collective and individual ministerial responsibility;*

(iii) *The political neutrality of officials;*

(iv) *The confidentiality of advice tendered by Ministers of the Crown and officials, or*

(g) *Maintain the effective conduct of public affairs through –*

(i) *The free and frank expression of opinions by or between or to Ministers of the Crown [or members of an organisation] or officers and employees of any Department or organisation in the course of their duty (s8)*

Solomon quotes Helen Gregorczyk stating the point is to focus on

*‘the consequences of revealing this particular Cabinet information as opposed to the Australian position which is a blanket approach of ‘this is a Cabinet document and therefore it must be exempt.’<sup>7</sup>*

### **5.3. Why?**

Public scrutiny of government action is of great importance, indeed it is a crucial part of our electoral system, so great that the High Court has recognised our system of government will not function without it.<sup>8</sup>

One of the most important ways our government decides what actions it will take are through Cabinet meetings. Therefore Cabinet documents are “the very documents that would be of the greatest utility in scrutinising governments and keeping them accountable to the voting public.”<sup>9</sup>

Information the government uses to decide what income tax to charge, how to intercept refugee boats, how to care for mentally ill defence personnel, whether to fund public or private schools or how much our politicians (our servants) are spending in allowances is canvassed in this forum.

Jack Herman, the Executive Secretary of the Australian Press Council (APC) has argued that cabinet documents should not be automatically exempt from Freedom of Information. There are, as he notes, criteria, which would justify keeping some documents secret (such as those which invade personal privacy, or whose publication would jeopardise Australia's security). He has said: ‘[t]he cabinet exemption is unnecessary, and it inhibits democratic processes. It should be removed.’<sup>10</sup>

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<sup>7</sup> p 107

<sup>8</sup> *Coleman v Power* (1994) 220 CLR 1

<sup>9</sup> Australian Press Council, 21 August 2004 speech by Jack R Herman, Executive Secretary, p6 at [www.presscouncil.org.au/pcsite.fop/foi/html](http://www.presscouncil.org.au/pcsite.fop/foi/html)

<sup>10</sup> p6 above

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

#### **5.4. The wrong purposive test**

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

#### ***Recommendations:***

- 6. Cabinet documents should be subject to an overarching public interest test.***
- 7. Alternatively, the Cabinet documents exemption provision should be amended so that this exemption only applies to documents whose disclosure compromise the 'collective ministerial responsibility of Cabinet'.***
- 8. The government should adopt a practice of pro-actively disclosing all other Cabinet documents.***

#### **6. Other Exemptions**

CCL notes that in their 1996 report, the ALRC and ARC concluded that sections 38 (secrecy provisions exemption), 43A (research documents exemption) and section 44 (national economy exemption) be repealed as these documents would be covered by other existing exemptions.<sup>11</sup> However, none of these provisions have been repealed or even narrowed in the exposure draft bills. Indeed, section 38 will remain an absolute exemption under the current government reform proposals. CCL calls on the government to reconsider whether these exemptions (and all other existing exemptions) can be trimmed down to ensure that the exemptions do not continue to dominate the operation of the FOI Act.

#### ***Recommendation:***

- 9. That sections 38, 43A and 44 of the FOI Act be repealed.***

#### **7. Exclusion of Intelligence Agency Documents**

Under section 4 of the FOIR Bill a number of government bodies are included in the definition of a 'prescribed authority' people can apply to access their information.

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<sup>11</sup> ALRC & ARC, above n1, [9.28] and [11.3-4].

However, under section 7(1), the Commonwealth proposes to exempt some people and bodies listed in Schedule 2, Part 1, Division 1. That Division states the Australian Secret Intelligence Service, the Australian Security Intelligence Organisation and the Inspector General of Intelligence and Security will under section 7(1) “not be prescribed authorities for the purposes of this Act.”

As well, under section 7(1A), parts of the Department of Defence called Defence Imagery and Geospatial Organisation, the Defence Intelligence Organisation and the Defence Signals Directorate, according to section 7(1A) will not be considered part of the Department of Defence and will not be an agency in their own right and therefore will exist outside this legislation.

This means any document these bodies hold will not be open to any requests to reveal information, regardless of the content of these documents, nor will they be subject to any proactive release under this Act.

The CCL believes these are unnecessary restrictions and should be removed from the FOIR Bill.

A better position would be if all documents held by the government were subject to the one purposive test of whether it is in the public interest to release them, and a factor weighing against release is if the national security of Australia would be threatened. This would balance protecting Australia’s security from being undermined and at the same time respect our system of representative democracy, which at a basic level means the information the government holds already belongs to all applicants under the FOI laws in the first place.

***Recommendations:***

10. *That all exemptions contained in the FOI Act be made subject to the public interest test.*
11. *That the government remove the provisions of the FOIR Bill which purport to exclude all ‘intelligence agency documents’ and certain Department of Defence documents from the operation of the FOI Act.*

**8. Publication of Government Information**

CCL supports both proposed section 8D (information publication schemes and also 11C (publishing already accessed information). However, CCL submits that any references to charges for documents provided under either scheme should be deleted as this is contrary to the idea of opening up government information and acknowledging that government information should be thought of as a ‘national resource’. This concern is particularly apposite to documents that have already been provided in response to an FOI request – if charges have already been imposed for the FOI request, charging other people to access this information is akin to double-dipping.

***Recommendation:***

***12. That proposed section 8D and 11C be amended to remove any references to charges being imposed for accessing documents via an agency's information publication scheme or via a publication of already accessed information.***

## **9. Oversight and Accountability**

CCL believes that the lack of an independent watchdog and champion of the Commonwealth freedom of information legislation has had a deleterious effect on the operation of the FOI Act, and particularly challenging the continuing culture of secrecy and suspicion of opening up government information to the public. CCL therefore strongly supports the creation of an Information Commissioner with a wide range of advocacy, investigatory, monitoring, training, and advisory responsibilities under the freedom of legislation. CCL also supports the structure of the office of the Information Commissioner contained in the draft bills. Placing the Information Commissioner at the head, with two deputies who are respectively responsible for FOI and privacy functions should ensure improved consistency and management of these regimes without compromising the fact that these values are sometimes in conflict and so each need a separate advocate. However there is a risk that without adequate funding that this ambitious new office of the Information Commissioner will flounder. The key to the success of the new office of the Information Commissioner lies in ensuring that it is given appropriate political support and resources to fulfil each of the vital areas of its work.

The question of whether the Information Commissioner should have determinative powers is complicated. On the one hand, the government has suggested that Information Commissioner reviews would be faster, less adversarial and more informal. Giving the Information Commissioner the power to make determinations may also give him/her a higher profile and status within the FOI regime.

On the other hand, given that AAT reviews have been retained in the draft bill, the creation of IC reviews represents yet another layer in the process and to some extent appears to be a duplication of the functions of the AAT. Furthermore, given that the Commissioner will have other wider roles including monitoring the FOI Act (including monitoring all external reviews), and an advisory role, there is some question as to whether it is appropriate and effective for it to also have determinative powers.

In order to avoid some of the risks associated with giving these determinative review powers to the Information Commissioner, CCL submits that proposed Part VII of the FOI Act be amended to build specified time periods into reviews by the Information Commissioner. CCL submits that it is no more unreasonable for the Information Commissioner to be subject to specified time periods for making preliminary enquiries and then a determination, than for initial FOI decisions and internal reviews to be subject to time limits. In this respect, the current safeguard found in proposed section 55, namely that IC reviews should be 'as timely as possible' is not, in CCL's view, sufficient. Instead, CCL suggests that similar time frames as were suggested by the Solomon report should be adopted and the IC should be given 20 working days to conduct preliminary enquiries and a further 40 working days to make a determination.<sup>12</sup>

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<sup>12</sup> Solomon report, p. 253.



***Recommendation:***

***13. That the proposed Part VII of the FOI Act be amended to specify that the IC has 20 working days to conduct preliminary enquiries and a further 40 working days to make a determination.***

**10. The overlap between privacy and FOI legislation**

CCL is disappointed that the federal government has not taken this opportunity to include any reforms that would rectify the overlap and duplication of the *Privacy Act 1988* (Cth) and the FOI Act.

On balance, CCL supports the conclusion reached by the Solomon review panel<sup>13</sup> that personal information matters should be transferred to privacy legislation. However, at the very least, these two regimes should be amended to ensure greater consistency in how they deal with personal information and make it clearer to applicants how they can access and amend their own information.

***Recommendation:***

***14. That the Government introduce additional provisions as part of the current FOI reforms that rationalise and clarify the relationship between the privacy and freedom of information legislation.***

**11. Processing Issues and Charges**

CCL wishes to briefly raise two issues about the processing of FOI requests.

One of the most common complaints about the freedom of information legislation is the delays that people experience when making requests for government information. For example, although the FOI Annual report 2007-8 records that 67.89% of requests are dealt with in the statutory time period (30 days), 14.91% took over 90 days to be processed. This figure gets significantly worse when one considers the position for FOI requests for non-personal information: less than half of these 'other' requests were processed within the statutory time period, and 27.9% took over 90 days to process.<sup>14</sup>

While CCL believes that the creation of an independent watchdog in the shape of the Information Commissioner should go some way to ameliorating delays in the system, CCL is concerned that the government is on the other hand, opening up the way for agencies to extend the time limits for processing requests. Under proposed section 15AA an agency or Minister can seek an extension of time from the Information Commissioner when dealing with complex or voluminous requests. There is no requirement that the Information Commissioner or the agency or Minister have to consult with the applicant when seeking such an extension.

Further, proposed section 15AB appears to allow an agency or Minister to ask the Information Commissioner to extend the time limit for any reason even if the time limit has already expired and the request would otherwise be assumed to be a 'deemed refusal decision' (see proposed section 15AB(4)). There is also no

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<sup>13</sup> Solomon report, pp 38-59.

<sup>14</sup> DPMC, *FOI Annual Report 2007-8*, [1.25].

requirement under 15AB for the IC or agency to consult an applicant in making such a request.

***Recommendations:***

- 15. That proposed section 15AA be amended so that an applicant must be consulted about any request to the IC to extend the time limit if the agency considers that the request is complex or voluminous.***
- 16. That proposed section 15AB be deleted, or at least amended so that an applicant must be consulted if an agency applies for an extension of time pursuant to this provision.***

The second issue that CCL would like to raise in respect of the processing of FOI requests is the issue of processing charges. Although the government has announced some improvements to the charges and fees that will be imposed on future FOI requests, it has skirted around the most contentious part of the charging regime – namely, the fees charged for processing requests. At times, agencies can impose fees completely out of kilter with the amount of documents actually provided to an applicant. Indeed applicants have on occasions been charged several hundred dollars in cases where they don't actually receive any documents at all (because the agency concludes that the documents are exempt). This process is unfair and at times, is a deterrent to individuals making requests under the FOI Act.

***Recommendation:***

- 17. That the FOI Act be amended so that charges are calculated according to the number of documents released not the time taken to process requests and that these changes should be made as part of the current reforms.***

## **Summary of CCL Recommendations:**

1. *That the government ensure that sufficient funding and training is provided to FOI decision- makers within government departments and agencies.*
2. *That the government introduce provisions to the FOI Act which make it an offence to conceal or destroy any records to avoid disclosing information pursuant to the FOI Act.*
3. *That the government undertake an immediate review of all other pieces of federal legislation and other relevant policies to ensure that they are consistent with the FOI regime and make all necessary changes to ensure this consistency.*
4. *That all exemptions in the FOI Act be made subject to an overarching public interest test.*
5. *That schedule 2 should be reconsidered and all agencies who are listed (or whose documents are listed) in the schedule should be required to explain why this exclusion is warranted and existing exemptions would not protect documents which should be kept confidential.*
6. *Cabinet documents should be subject to an overarching public interest test.*
7. *Alternatively, the Cabinet documents exemption provision should be amended so that this exemption only applies to documents whose disclosure compromise the 'collective ministerial responsibility of Cabinet'.*
8. *The government should adopt a practice of pro-actively disclosing all other Cabinet documents.*
9. *That sections 38, 43A and 44 of the FOI Act be repealed.*
10. *That all exemptions contained in the FOI Act be made subject to the public interest test.*
11. *That the government remove the provisions of the FOIR Bill which purport to exclude all 'intelligence agency documents' and certain Department of Defence documents from the operation of the FOI Act.*
12. *That proposed section 8D and 11C be amended to remove any references to charges being imposed for accessing documents via an agency's information publication scheme or via a publication of already accessed information.*
13. *That the proposed Part VII of the FOI Act be amended to specify that the IC has 20 working days to conduct preliminary enquiries and a further 40 working days to make a determination.*
14. *That the Government introduce additional provisions as part of the current FOI reforms that rationalise and clarify the relationship between the privacy and freedom of information legislation.*

15. *That proposed section 15AA be amended so that an applicant must be consulted about any request to the IC to extend the time limit if the agency considers that the request is complex or voluminous.*
16. *That proposed section 15AB be deleted, or at least amended so that an applicant must be consulted if an agency applies for an extension of time pursuant to this provision.*
17. *That the FOI Act should be amended so that charges are calculated according to the number of documents released and that these changes should be made as part of the current reforms.*

**Elizabeth Simpson, Committee member and member of the FOI Working Group**

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**Lesley Lynch, Assistant Secretary and member of the FOI Working Group**

**19 May 2009**