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Council for
Civil Liberties

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Submission of the New South Wales Council for Civil Liberties to the Senate Finance and Public Administration Committee Inquiry into 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 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 both the first piece of freedom of information legislation introduced in Australia and the first in a Westminster system of government. Since its introduction, freedom of information legislation has been enacted in all 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 their report '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.*[1]

However, since the ALRC & ARC published their report in 1995, there has not been any major overhaul of the FOI Act. The CCL therefore welcomes the initiative to restructure the FOI Act and to begin to remedy the deficiencies highlighted by the ALRC & ARC report.

The proposed changes to the FOI Act coincide with FOI review in a number of the 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[2] – 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 reform 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 supports its effects. The corresponding public sector cultural responses in administration*

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

[2] FOI Independent Review Panel, *The Right to Information: Reviewing Queensland's Freedom of Information Act*, (June 2008).

> *of FOI inevitably move to crush the original promise of open government and, with it, accountability'.* [3]

This is not a new insight. The dilemma is always how to counter this seemingly inherent flaw. The bills attempt to do so by the creation of the office of the Information Commissioner and the role of Freedom of Information Commissioner, with the task of fostering an ethos of openness and overseeing decisions about the release of material. It will be important that governments undertake other non-legislative measures to address this 'cultural issue' including increasing the funding, training and statues of FOI decision-makers within government agencies and ensuring that the Information Commissioner is also given appropriate funding. (We note that the Second Reading Speech on the IC Bill accepts this need.) It will also be important that Ministers sending their departments and agencies clear instructions to the effect that the FOI regime should be upheld and complied with.

A last resort of a threatened official is to destroy or to conceal materials they believe ought not to be released, or whose release they fear. The Senate Committee should also consider adding 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.[4]

Recommendations:

1. ***That the Senate Committee reinforce the Minister's comments on the need for sufficient funding and training to be provided to FOI decision- makers within government departments and agencies.***

2. ***That the FOI Bill be amended to make it an offence to conceal or destroy any records to avoid disclosing information pursuant to the FOI Act.***

4. Exemptions and the Public Interest Test

One of the key aspects of the reforms contained in the bills is the changes to Part III of the FOI Act—changes 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 bills are the introduction of

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[3] Ibid, 2.

[4] See for example 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'.

a list of public interest factors favouring disclosure, the repeal of some exemptions and the creation of a number of conditional examptions.

In 1996 as part of their 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".5

The problem with absolute exemption provisions, even when they are clearly expressed, is that they tend to be interpreted with ever-increasing scope. We might usefully call this 'exemption stretching'. The principal counter in the bills to exemption-stretching is the application of the public interest test.

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 also provide greater clarity, and foster a rethinking by government agencies about the tension between the public interest in disclosure and the concerns that are reflected in exemptions.

It is true that in some cases it is obvious that the public interest supports exemptions. But it should not be thought that this justifies making the exemptions absolute. For making all exemptions subject to an overarching public interest test delivers a symbolic benefit, making it clear that the key issue is not whether an exemption applies, but where the balance of public interest lies. To use a popular phrase, it sends a message.

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 the agencies currently listed in the schedule should be required to explain why their exclusion is warranted, and why conditional exemptions and the public interest test would not protect documents which should be kept confidential.

Recommendations:

> ***3. That all exemptions in the FOI Act be made subject to an overarching public interest test.***
>
> ***4. That schedule 2 of the FOI Act be reconsidered and all agencies that are listed (or whose documents are listed) in the schedule should be required to explain why the exclusion is warranted.***

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[5] ALRC & ARC, 'Open Government' n 1, [2.12].

5. The Cabinet Documents Exemption

5.1. Rationale

The CCL believes that because 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—the government represents the citizens. Government officials are our employees and servants. Their role exists for our benefit. Therefore, if they claim ownership or rights to any information held about our society, they are misled. 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.

Further, one of the major democratic values (of the values that support the view that we ought to have a democracy) is that the collective knowledge and experience of citizens far exceeds the knowledge that a group of public servants and politicians can have. Decisions accordingly should be open to public criticism. To deny the people access to the basis on which decisions have been made is to frustrate this critical purpose of democracy.[6]

5.2. Cabinet documents

Based on this rationale, the CCL believes 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[7] 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:

> *(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 –*

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[6] **'The effective operation of a representative democracy depends on the people being able to scrutinise, discuss and contribute to government decision making. To do this, they need information.' ALRC & ARC, 'Open Government', p. 12.**

[7] at pp. 106-7

(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 Gregorczuk 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."*[8]

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.[9]

One of the most important ways our government decides what actions it will take is 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."[10]

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.

The Australian Press Council's Executive Secretary, Jack Herman, has asked "why should cabinet documents, regardless of their subject matter, be automatically exempt from Freedom of Information?" He put forward the example of the Welsh parliament, which in 2002 started publishing its cabinet minutes on the internet. He notes that there are other grounds under which cabinet documents could be kept from publication, for example, if revealing the information would jeopardise security or invade personal privacy. He observed, "There are a number of other exemptions which could be relied upon to withhold cabinet documents from the scope of Freedom of Information without resorting to a universal exemption. The cabinet exemption is unnecessary and should be removed."[11]

The APC support our recommendation that there should be no blanket exemptions and there should be one test with the default on disclosure, unless it would on balance be against the public interest.[12]

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[8] p. 107
[9] *Coleman v Power* (1994) 220 CLR 1
[10] Australian Press Council, 21 August 2004 speech by Jack R Herman, Executive Secretary, p6 at www.presscouncil.org.au/pcsite.fop/foi/html
[11] p. 6 above
[12] 2004 speech p. 1 and August 2008 article, p. 1

5.4. The wrong purposive test

CCL believes there is a grave risk in a blanket policy of 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.

The only secrecy there should be around Cabinet documents is that which is absolutely imperative for the maintenance of effective democratic government; that is, supporting the Westminster system of collective ministerial responsibility. The test should be what the harm or benefit to ministerial collective responsibility will be and what other public benefit there will be, if the material is released, not what purpose the document was produced for. The restrictions should be limited to this consideration, not allowed to carve out the most important documents which can inform the public how the government is running our country.

The 'dominant purpose' test put forward in the suggested amendments, while purposive, focuses on the wrong purpose.

CCL submits that there will be significant public benefit from release of some Cabinet material that does outweigh the potential harm, and this is too important to our system of government and an informed citizenry to use a fire blanket approach of keeping all Cabinet documents secret.

Recommendations:

5. ***If Cabinet documents are to be singled out for secrecy, it should only be if disclosure would, on balance, be contrary to the public interest. One of the factors contrary to the public interest could be if release of the information would compromise the collective ministerial responsibility of Cabinet.***

6. ***Only documents created for the purpose of submission to cabinet should be subject to this Freedom of Information test.***

7. ***For all other documents Cabinet looks at, it should not be necessary to submit a Freedom of Information application. They should be released to the public proactively by Cabinet.***

6. Other Exemptions

6.1. The ALRC/ARC Recommendations

CCL notes that in their 1996 report, the ALRC and ARC concluded that sections 38 (secrecy provisions exemption), 43A (research documents exemption) and 44 (national economy exemption) should be repealed as these documents would be covered by other existing exemptions.[13] We are happy to see that it is proposed to replace sections 43A and 44 with new sections 47

[13] ALRC & ARC, above n1,[9.28] and [11.3-4].

H & J, making the exemptions conditional. However, section 38 remains an absolute exemption. CCL urges the Committee to recommend that these exemptions (and all other existing exemptions) be trimmed down to ensure that they do not continue to dominate the operation of the FOI Act.

Recommendation:

8 That section 38 of the FOI Act be repealed.

6.2 Exclusion of Intelligence Agency Documents

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

However, section 7(1) exempts some people and bodies listed in Schedule 2, Part 1, Division 1.

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 are not be considered part of the Department of Defence and will not be an agency in their own right and therefore will continue to 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 restrictions are unnecessary and should be removed.

As before, a better position would be if all documents held by the government were subject to the one 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:

9. That all exemptions contained in the FOI Act be made subject to the public interest test.

10. That in particular the provisions which exclude all 'intelligence agency documents' from the operation of the FOI Act be made subject to the public interest test.

7. Oversight and Accountability

CCL believes that the lack of an independent watchdog and champion of the Commonwealth freedom of information legislation challenging the continuing culture of secrecy and suspicion of opening up government information to the public has had a deleterious effect on the operation of the FOI Act. CCL therefore strongly supports the creation of an Information Commissioner with a wide range of advocacy, investigatory, monitoring, training, and advisory responsibilities under the FOI legislation. CCL also supports the structure of the office of the Information Commissioner contained in the 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 regimes are informed by principles that can come into conflict, so that each needs a separate advocate. However, there is a risk that without adequate funding that this ambitious new office of the Information Commissioner will flounder and CCL repeats that the key to its success lies in ensuring that it is given appropriate political support and resources to fulfil each of the vital areas of its work.

The Government has suggested that Information Commissioner reviews would be faster, less adversarial and more informal than the procedures of the Administrative Appeal Tribunal (AAT). Giving the Information Commissioner the power to make determinations may also give him/her a higher profile and status within the FOI regime. However, in cases where there is going to be a further appeal to the AAT, the total time involved may be considerable. It is true that the Bill proposes in section 55 that IC reviews should be 'as timely as is possible'. However, following the Solomon Report, CCL proposes that the IC should be given 20 working days to conduct preliminary enquiries and a further 40 working days to make a determination.[14] 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.

Recommendation:

11. 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.

8. 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

14 Solomon report, p. 253.

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: fewer than half of these 'other' requests were processed within the statutory time period, and 27.9% took over 90 days to process.[15] The situation improved, it is true, in the subsequent year; but still 10.34% of 'other' requests took more than 30 days.[16]

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 Bill is on the other hand, opening up the way for agencies to extend the time limits for processing requests. Under proposed section 15AB 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 15AC 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 subsection 15AB(4)). There is also no requirement under 15AB for the IC or agency to consult an applicant in making such a request.

Recommendations:

12. That proposed section 15AB 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.

13. That proposed subsections 15AC (4) and (5) be deleted, or at the very 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. At times, agencies have imposed 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, has been a deterrent to individuals making requests under the FOI Act.

The Bill makes some improvements to the charges and fees that will be imposed on future FOI requests, limiting them to reproduction costs and 'specific incidental costs'. 'Incidental costs', however, lacks a definition.

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[15] Department of Prime Minister and Cabinet, *FOI Annual Report 2007-8*,[1.25].

[16] ***FOI Annual Report*** **2008-9 Appendix C.**

Recommendation:

14. ***That the FOI Act be amended so that it is made plain that incidental costs do not entitle and agency to charge for the time taken to process an application .***

Summary of CCL Recommendations:

1. That the Senate Committee reinforce the Minister's comments on the need for sufficient funding and training to be provided to FOI decision-makers within government departments and agencies.

2. That the FOI Bill be amended to make it an offence to conceal or destroy any records to avoid disclosing information pursuant to the FOI Act.

3. That all exemptions in the FOI Act be made subject to an overarching public interest test.

4. That schedule 2 be reconsidered and all agencies that are listed (or whose documents are listed) in the schedule should be required to explain why the exclusion is warranted.

5. If Cabinet documents are to be singled out for secrecy, it should only be if disclosure would, on balance, be contrary to the public interest. One of the factors contrary to the public interest could be if release of the information would compromise the collective ministerial responsibility of Cabinet.

6. Only documents created for the purpose of submission to cabinet should be subject to this Freedom of Information test.

7. For all other documents Cabinet looks at, it should not be necessary to submit a Freedom of Information application. They should be released to the public proactively by Cabinet

8 That section 38 of the FOI Act be repealed.

9. That all exemptions contained in the FOI Act be made subject to the public interest test.

10. That in particular the provisions which exclude all 'intelligence agency documents' from the operation of the FOI Act be made subject to the public interest test.

11. 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.

12. That proposed section 15AB 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.

13. That proposed subsections 15AC(4) and (5) be deleted, or at the very least amended so that an applicant must be consulted if an agency applies for an extension of time pursuant to this provision.

14. That the FOI Act be amended so that it is made plain that incidental costs do not entitle and agency to charge for the time taken to process an application.