

The Senate

Finance and Public Administration
Legislation Committee

Freedom of Information Amendment (Reform) Bill
2009 [Provisions]
Information Commissioner Bill 2009 [Provisions]

March 2010

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Membership of the Committee

42nd Parliament

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List of Abbreviations

AAT	Administrative Appeals Tribunal
ABC	Australian Broadcasting Corporation
ALRC	Australian Law Reform Commission
ARC	Administrative Review Council
FOI	Freedom of Information
FOI Act	<i>Freedom of Information Act 1982 (Cth)</i>
FOI Bill	Freedom of Information Amendment (Reform) Bill 2009
FOI Commissioner	Proposed new Freedom of Information Commissioner
IC Bill	Information Commissioner Bill 2009
PIAC	Public Interest Advocacy Centre
SBS	Special Broadcasting Service

Recommendations

Recommendation 1

3.21 The committee recommends that section 49 of the *Administrative Appeals Tribunal Act 1975* be amended to provide that the Information Commissioner is an *ex officio* member of the Administrative Review Council.

Recommendation 2

3.49 The committee recommends that, if and when established, the Information Commissioner give consideration to whether it is necessary and appropriate for entire agencies and organisations to be exempt from the Commonwealth's freedom of information scheme.

Recommendation 3

3.58 The committee recommends that the government give consideration to the issues raised with respect to fees and charges in this inquiry, and particularly to the feasibility of removing processing charges, while retaining application fees, in the context of drafting regulations.

Recommendation 4

3.79 The committee recommends that proposed section 61, in item 42 of Schedule 4 to Part 1 of the Freedom of Information Amendment (Reform) Bill 2009, which provides that whichever party that appeals a decision of the Information Commissioner bears the onus of proof in the Administrative Appeals Tribunal, as well as any other relevant sections of the Bill and *Freedom of Information Act 1982*, be amended to remove the concept of an onus of proof from the Act.

Recommendation 5

3.103 The committee recommends that the Freedom of Information Amendment (Reform) Bill 2009 and the Information Commissioner Bill 2009 be amended such that all references to the 'Information Commissioner' are replaced by references to the 'Australian Information Commissioner'.

Recommendation 6

3.111 The committee recommends that, subject to the amendments outlined in Recommendations 4 and 5 being made, the Freedom of Information Amendment (Reform) Bill 2009 and the Information Commissioner Bill 2009 be passed by the Senate as soon as practicable.

Chapter 1

Introduction

1.1 On 30 November 2009 the Senate, on the recommendation of the Selection of Bills Committee (report number 19 of 2009) referred the provisions of the Freedom of Information Amendment (Reform) Bill 2009 and the Information Commissioner Bill 2009 to the Finance and Public Administration Legislation Committee for inquiry and report by 16 March 2010.

1.2 According to the Explanatory Memoranda, the purpose of the Freedom of Information Amendment (Reform) Bill 2009 is to make major reforms to the *Freedom of Information Act 1982* to promote a pro-disclosure culture across government and to build a stronger foundation for more openness in government; and the purpose of the Information Commissioner Bill 2009 is to establish three independent statutory office holders (the Information Commissioner, the Freedom of Information Commissioner and the Privacy Commissioner).

1.3 The reasons given for the Selection of Bills Committee's referral of the bills to the committee were:

- whether the bills contain measures effective to ensure that the right of access to documents is as comprehensive as it can be;
- whether the improvements to the request process are efficient and could be further improved;
- whether the measures will assist in the creation of a pro-disclosure culture with respect to government and what further measures may be appropriate; and
- assessment of the functions, powers and resources of the Information Commissioner.

Conduct of the inquiry

1.4 The committee advertised the inquiry in *The Australian* and contacted a number of organisations and individuals, inviting submissions to be lodged by 28 January 2010. Twenty seven submissions were received by the committee, and these are listed at Appendix 1.

1.5 The committee held public hearings in Canberra on 5 February 2010, and in Melbourne on 15 February 2010. Details of the public hearings are at Appendix 2. The submissions and Hansard transcript of evidence may be accessed through the committee's website at http://www.aph.gov.au/Senate/committee/fapa_ctte/foi_ic/index.htm.

1.6 The committee would like to thank all those who contributed to the inquiry.

Structure of the report

1.7 Chapter 2 of the report outlines the provisions of the Freedom of Information Amendment (Reform) Bill 2009 and the Information Commissioner Bill 2009, focussing on the aspects of the bills which make substantive changes to the *Freedom of Information Act 1982*.

1.8 Chapter 3 discusses the key issues raised during the inquiry in response to the terms of reference, and makes recommendations as to how the bills might be improved.

Chapter 2

Proposed reforms to freedom of information laws

2.1 The Freedom of Information Amendment (Reform) Bill 2009 (FOI Bill) and Information Commissioner Bill 2009 (IC Bill) are intended to be complementary, each forming part of the government's proposed reform of Australia's freedom of information (FOI) laws.

2.2 The government's stated purpose for introducing the amendments to the *Freedom of Information Act 1982* (FOI Act) contained in the bills is 'to promote a pro-disclosure culture across government and to build a stronger foundation for more openness in government'.¹

2.3 The FOI Bill contributes to this aim by:

- amending the objects of the FOI Act;
- introducing an information publication scheme;
- decreasing the open access periods for Commonwealth records and Cabinet notebooks;
- amending the public interest test for exemptions;
- adding a new level of external review of FOI decisions;
- providing that the Information Commissioner can investigate the conduct of agencies in FOI matters;
- introducing a process for declaring a person to be a 'vexatious applicant';
- removing the requirement for FOI application fees; and
- providing for a process by which an agency's time to respond to a request may be increased.

2.4 The IC Bill proposes to establish two new statutory offices: the Information Commissioner; and the Freedom of Information Commissioner. The Office of the Information Commissioner is intended to 'bring together the functions for independent oversight' of the FOI Act and the *Privacy Act 1988*.

2.5 This chapter sets out the key provisions of each of the bills.

1 Explanatory Memorandum, FOI Bill, p. 1.

Freedom of Information Amendment (Reform) Bill 2009

Objects

2.6 Schedule 1 of the FOI Bill repeals the existing objects in section 3 of the FOI Act, and replaces it with an objects clause which emphasises that Parliament's intention is to ensure open access to government documents and information in order to enable public participation in and scrutiny of government.²

2.7 Subsection 3 of the proposed objects clause highlights that government information is a 'national resource', and should be managed accordingly. The Explanatory Memorandum notes that proposed subsection 3:

...responds to recommendation 4 of the *Open government report* that the object clause should acknowledge that the information collected and created by public officials is a national resource.³

Publication of information

Publication scheme

2.8 Part two of Schedule 2 to the FOI Bill introduces a new information publication scheme. The proposed scheme would require Commonwealth departments and agencies to publish information and documents:

- detailing its organisational structure;
- explaining its functions;
- setting out statutory appointments;
- contained in annual reports;
- explaining how the public may comment on specific policy proposal;
- that are routinely provided to Parliament in response to requests and orders; and
- containing operational information, which is defined in proposed section 8A of Schedule 2 as:

information held by the agency to assist the agency to perform or exercise the agency's functions or powers in making decisions or recommendations affecting members of the public (or any particular person or entity or class of persons or entities).

2.9 Proposed section 8A sets out an example of what may constitute 'operational information', which includes rules, guidelines, practices and precedents.

2 FOI Bill, Schedule 1, section 3.

3 Explanatory Memorandum, FOI Bill, p. 5.

2.10 In addition, agencies and departments are required to publish 'information in documents to which the agency routinely gives access in response to requests under [the Act]' other than personal information, information about the business, commercial, financial or professional affairs of any person or other information that the Information Commissioner determines is exempt.⁴ Agencies are also not required to publish exempt information.⁵ The Explanatory Memorandum states that:

The intention is that information in which there has been a demonstrated level of interest from the community by way of access request should be pro-actively made available to the public (without requiring – or at least limiting the need for – applications to be made).⁶

2.11 The provision allowing the Information Commissioner to determine that certain information or documents are exempt from the publication requirement is intended to address situations where there are high resource implications of proactively publishing certain information on an agency's website.⁷ In addition, the Information Commissioner would play a role in assisting agencies to comply with the publication scheme⁸ and in reviewing and investigating agencies' compliance with the scheme.⁹

2.12 Agencies are under an obligation to ensure that information published under proposed section 8 is up-to-date, complete and accurate.¹⁰ Information is to be published 'to members of the public generally',¹¹ and to specific groups of people if appropriate,¹² on the agency's website.¹³

2.13 The government has argued that the purpose of the proposed publication scheme is:

to allow the FOI Act to evolve as a legislative framework for giving access to information through agency driven publication, rather than as a scheme that is only reactive to requests for documents.¹⁴

2.14 Under the proposed publication scheme agencies would also be required to develop and publish a plan which shows what information it intends to publish to

4 FOI Bill, Schedule 2, paragraph 8(2)(g).

5 FOI Bill, Schedule 2, subsection 8C(1).

6 Explanatory Memorandum, FOI Bill, p. 6.

7 Explanatory Memorandum, FOI Bill, p. 7.

8 FOI Bill, Schedule 2, section 8E.

9 FOI Bill, Schedule 2, section 8F.

10 FOI Bill, Schedule 2, section 8B.

11 FOI Bill, Schedule 2, paragraph 8D(2)(a).

12 FOI Bill, Schedule 2, paragraph 8D(2)(b).

13 FOI Bill, Schedule 2, section 8D(3).

14 Explanatory Memorandum, FOI Bill, p. 6.

comply with the scheme and how and to whom it proposes to publish that information.¹⁵

2.15 The proposed publication scheme will not apply to ministers.

Publication of documents disclosed under the Act

2.16 The publication scheme is complemented by proposed section 11C, which provides that if a minister or agency gives a person access to documents under the Act, then they must publish those documents on a website within 10 working days of the applicant being given access. The provision does not apply to documents:

- which contain personal information about the applicant;
- about the business, commercial, financial or professional affairs of any person if it would be unreasonable to publish that information;
- determined by the Information Commissioner to be unreasonable to publish; or
- that are not reasonably practicable to be published because of the extent of modifications needed to exclude the above information.

2.17 The agency may impose a charge for accessing these documents, if the agency incurs specific costs in reproducing the documents.¹⁶ The provision does not specify how long information must remain on the minister or agency's website.¹⁷

Decreasing open access periods

2.18 Schedule 3 to the FOI Bill amends various sections of the FOI Act and the *Archives Act 1983*. The cumulative effect of the proposed amendments is to bring forward the 'open access period' for most government records. The 'open access period' is the time after which a record is made available for public access on request under the Archives Act.

2.19 The FOI Bill reduces the open access period for most Commonwealth records (all those except Cabinet notebooks, records containing Census information and exempt records under section 33 of the Archives Act) from 30 years to 20 years. The Bill also reduces the open access period for Cabinet notebooks from 50 years to 30 years.

New public interest test

2.20 Part 2 of Schedule 3 to the FOI Bill also proposes a new public interest test to apply to all those exemptions which are proposed to involve a public interest test. The

15 FOI Bill, Schedule 2, subsection 8(1).

16 FOI Bill, Schedule 3, subsections 11C(4) and (5).

17 Explanatory Memorandum, FOI Bill, p. 15.

exemptions that the Bill proposes this general test will apply to are set out in proposed Division 3 of Part IV, and are called 'public interest conditional exemptions'.

Conditionally exempt documents (exemption conditional on satisfying public interest test)

2.21 Proposed Division 3 of Part IV is at item 33 of Schedule 3 to the Bill, and sets out the categories of documents 'conditionally exempt' from disclosure, which are those which if disclosed:

- would, or could reasonably be expected to, damage Commonwealth-State relations or divulge information communicated in confidence by a State to the Commonwealth (proposed section 47B);
- would disclose a deliberative matter – i.e. opinion, advice or recommendations prepared for the deliberative processes involved in the functions of an agency or minister. However, this exemption does not apply to report of experts or agency bodies, or to records or formal statements of reasons for final decisions given in the exercise of an adjudicative function (proposed section 47C);
- would have a substantial adverse effect on the financial or property interests of the Commonwealth or an agency (proposed section 47D);
- would, or could reasonably be expected to, prejudice the effectiveness or the attainment of objects of tests, examinations or audits being conducted by an agency, have a substantial adverse effect on the management or assessment of personnel by the Commonwealth or an agency, or have a substantial adverse effect on the proper and efficient conduct of an agency (proposed section 47E);
- would involve an unreasonable disclosure of personal information about any person (proposed section 47F);
- would disclose information concerning a person or organisation in respect of his/her/its business or professional affairs and would, or could, reasonably be expected to unreasonably affect the person or organisation in conducting their affairs, or could reasonably be expected to prejudice the future supply of information to the Commonwealth. This exemption does not apply to trade secrets. The trade secrets exemption is not conditional on the fulfilment of a public interest test (proposed section 47G);
- would disclose information about research being, or to be, conducted by an officer of an agency, which would unreasonably expose the agency or officer to disadvantage (proposed section 47H); or
- would or could reasonably be expected to have a substantial adverse effect on Australia's economy by influencing a decision, or giving a person undue benefit (proposed section 47J).

2.22 Proposed subsection 11A(5) provides that:

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.

2.23 Proposed section 11B sets out factors to be taken into account by agencies and ministers in determining whether the disclosure of conditionally exempt documents would, on balance, be contrary to the public interest. It sets out 'factors favouring access', and 'irrelevant factors', and also provides any guidelines on the issue by the Information Commissioner must also be taken into account.

2.24 The 'factors favouring access' are, if disclosure of the document would:

- promote the objects of the Act;
- inform debate on a matter of public importance;
- promote effective oversight of public expenditure; or
- allow a person to access his or her own personal information.

2.25 'Irrelevant factors' that must not be taken into account are that:

- access to the document could result in embarrassment to the Commonwealth Government or cause loss of confidence in the Commonwealth Government;
- access to the document could result in a person misinterpreting or misunderstanding the document;
- the author of the document is of high seniority in the agency to which the request for access to the document was made; and
- access to the document could result in confusion or unnecessary debate.

Exempt documents (not conditional on satisfying public interest test)

2.26 The public interest test does not apply to those exemptions set out in proposed Division 2 of Part IV, which are:

- documents the disclosure of which would, or could reasonably be expected to, cause damage to national security, defence or international relations;
- Cabinet documents;
- documents the disclosure of which would or could reasonable be expected to prejudice law enforcement or the protection public safety; and
- documents to which secrecy provisions apply.

External review by the Information Commissioner

2.27 Schedule 4 to the FOI Bill provides for certain FOI functions of the proposed Information Commissioner. Key amongst these functions is the Information Commissioner's review function.

2.28 A number of proposed provisions remove the existing requirements for internal review (review of the merits of a decision within the agency) to take place prior to an applicant being able to appeal an FOI decision externally.¹⁸ The Explanatory Memorandum states that:

By making internal review optional, agencies should be encouraged to make the best decision at first instance.¹⁹

2.29 Proposed new Part VII of the FOI Act sets up a system for review of decisions by the Information Commissioner. Under the part, persons whose application under the FOI Act has been refused, deemed to have been refused because of no decision having been made within the requisite timeframes, or partially refused, as well as some interested third parties, have a right to seek review of the decision by the Information Commissioner. The Information Commissioner performs merits review in the same way as the AAT, which involves 'standing in the shoes of the original decision maker' and reconsidering the decision based on all the available facts.²⁰

2.30 Proposed Part VII provides for how applications for review are to be made, notification requirements to affected third parties, time limits, assistance by the Information Commissioner, the conduct of the Information Commissioner's review and other procedural aspects of the Information Commissioner review process.

2.31 Proposed section 55F allows the parties to a review by the Information Commissioner to reach agreement between themselves.

2.32 In conducting reviews, the Information Commissioner will have the powers to require the production of documents, including those claimed to be exempt, except national security or cabinet documents. It is an offence to fail to comply with an order for documents by the Information Commissioner.²¹ The Commissioner only has the power to require the production of Cabinet and national security documents if he or she is not satisfied on affidavit or other evidence that the document is exempt.²² The Information Commissioner will not have the power to order that a person be given access to documents he or she finds to be exempt.

2.33 The Commissioner will have the powers to order an agency to undertake further searches for a document, and to compulsorily require people to answer questions.²³ However, legal professional privilege is retained before the Information Commissioner.²⁴

18 Including proposed section 51DA; paragraphs 54L(2)(a) and 54M(2)(a)

19 Explanatory Memorandum, FOI Bill, p. 27.

20 Explanatory Memorandum, FOI Bill, p. 34.

21 FOI Bill section 55R(5).

22 FOI Bill, section 55U.

23 FOI Bill, sections 55V and 55W respectively.

24 FOI Bill, section 55Y.

2.34 The Explanatory Memorandum states that:

It is intended that Information Commissioner review will provide a simple, expedient and cost efficient system for external merits review. To achieve this, the Information Commissioner is authorised to conduct a review in whatever way considered appropriate (proposed subsection 55(2)) and to use as little formality and technicality as possible (subsection 55(4)).²⁵

2.35 Division 5 of proposed Part VII provides that the Information Commissioner may decide not to undertake a review if he or she is satisfied that the application is frivolous, vexatious, misconceived, lacking in substance or not made in good faith. The Information Commissioner can also decline to undertake a review if the applicant has not been cooperative, the Commissioner believes review is more suitably undertaken by the Administrative Appeals Tribunal (AAT), or the applicant refuses to comply with the Commissioner's directions. If the Information Commissioner declines to undertake a review, notice must be provided to both parties, and either party may seek review of that decision by the AAT.

2.36 The FOI Bill provides a right of review from decisions of the Information Commissioner to the AAT (which currently conducts external reviews directly from agencies). The AAT can make decisions directly from agencies if the Information Commissioner determines that is the most appropriate course of action.²⁶

2.37 Item 42 of Schedule 4 to the Bill makes some significant changes to the AAT's jurisdiction when reviewing decisions of the Information Commissioner. Proposed new section 61 of the FOI Act provides that both agencies and applicants will have a right to appeal decisions of the Information Commissioner. Subsection 61(1) sets out that whichever party appeals to the AAT will bear the onus of proof.

2.38 Proposed new section 61A makes further amendments to the AAT's jurisdiction, in effect providing that the Information Commissioner is not to 'defend' his or her decisions in the AAT, but instead the relevant department or agency will take on that role.

Investigations by the Information Commissioner

2.39 Proposed Part VIIB of the FOI Act would give the Information Commissioner the function of investigating actions by an agency relating to the handling of FOI matters. The part sets out the investigation powers of the Commissioner and the investigation process.

2.40 The Information Commissioner may conduct investigations in response to complaints, as well as on his or her own motion, in a similar way to the

25 Explanatory Memorandum, FOI Bill, p. 32.

26 FOI Bill, section 57A.

Commonwealth Ombudsman. Like the Ombudsman, the Commissioner can only investigate the actions of agencies, not ministers.²⁷

2.41 The Commissioner is empowered to transfer matters to the Ombudsman if appropriate.²⁸ The Ombudsman's powers to conduct investigations under the FOI Act are preserved by the Bill, however, the Explanatory Memorandum states that:

While the Ombudsman may still investigate complaints concerning action under the FOI Act, it is intended that the Information Commissioner will deal with most complaints of this kind. The Ombudsman will have capacity to investigate FOI complaints where the Ombudsman could more effectively or appropriately deal with a complaint (for example, where the FOI complaint forms one aspect of a wider grievance concerning agency action or relations to action by the Information Commissioner in dealing with an FOI request).²⁹

2.42 Professor John McMillan, the Commonwealth Ombudsman discussed the way he envisages the Ombudsman and Information Commissioner managing this overlapping jurisdiction:

The Ombudsman can still receive complaints about freedom of information and privacy matters. That is important because in my experience FOI and privacy matters can often be a small component of a larger administrative problem that a person has with an agency. On the other hand, I have followed the principle that if the Parliament establishes a specialist body similar in all respects to the Ombudsman's office then we should defer to the expertise of that body and to its primary role in overseeing a particular area. So it would be my intention early on to hold discussions with the Information Commissioner and possibly to sign a memorandum of understanding for transfer of cases between us.³⁰

Declaring vexatious applicants

2.43 Proposed section 89K gives the Information Commissioner discretionary power to declare a person a 'vexatious applicant'. This can be done at the request of an agency or minister, or on the Commissioner's own motion.

2.44 The joint Australian Law Reform Commission (ALRC) and Administrative Review Council (ARC) *Open government report* considered such a power for agencies and recommended against it on the basis that it may be misused.³¹ The Explanatory Memorandum states:

27 Explanatory Memorandum, FOI Bill, p. 40.

28 FOI Bill, section 74

29 Explanatory Memorandum, FOI Bill, p. 46.

30 Professor John McMillan, Commonwealth Ombudsman, *Proof Committee Hansard*, 5 February 2010, p. 2.

31 ALRC and ARC, *Open government: a review of the federal Freedom of Information Act 1982*, ALRC Report 77, 1995, paragraph 7.18.

Under [the Bill], the power is exercised by the Information Commissioner who is an independent statutory office holder. If an agency or Minister makes an application to the Information Commissioner the effect of proposed subsection 89K(3) is that the agency or Minister bears the onus of establishing that the Commissioner should make the declaration.³²

2.45 Proposed section 89L sets out the grounds on which the Information Commissioner may declare a person a 'vexatious applicant', which are that:

- the person has repeatedly engaged in access actions and the repeated engagement involves an abuse of the process for the access action;
- a particular access action in which the person engages involves an abuse of the process for that access action; or
- a particular access action in which the person engages would be manifestly unreasonable.

2.46 Proposed subsection 89L(2) defines 'access actions' as:

- making an FOI request;
- making an application for amendment of records;
- making an application for internal review; and
- making an Information Commissioner review application.

2.47 A declaration that a person is a vexatious applicant has the effect of enabling an agency or minister to refuse to consider requests and applications by the person. Declarations may be subject to any terms and conditions that the Information Commissioner sees fit.³³

2.48 Decisions to declare a person a vexatious applicant may be reviewed by the AAT.

Removal of fees

2.49 The Explanatory Memorandum explains that:

Upon releasing the exposure draft of this Bill, the Government announced that the first five hours of decision-making time for journalists and not-for-profit community groups would be free of charge.³⁴

2.50 Paragraph 94(2)(a) of Schedule 6 to the Bill amends existing restrictions on the ability of the regulations to apply different charges to different classes of applicants.

32 Explanatory Memorandum, FOI Bill, p. 44.

33 FOI Bill, section 89M.

34 Explanatory Memorandum, FOI Bill, p. 56.

2.51 In terms of the financial impact of this change, the Financial Impact Statement in the Explanatory Memorandum states that:

The amendments in this Bill will have minimal financial impact on Government revenue. While the requirement for FOI application fees is proposed to be removed, the total amount of application fees collected (only \$150,771 in 2007-08) represents a very small fraction of the total cost of administering the FOI Act (approximately 0.5% in 2007-08).³⁵

Extending FOI to contractors

2.52 Schedule 6 to the Bill proposes to extend the scope of the FOI Act so that requests for access may be made for documents held by contracted service providers, and subcontractors, delivering services for or on behalf of an agency to the community. The Explanatory Memorandum explains that:

The proposal is tied to recommendation 99 of the *Open government report* which was concerned with 'the trend towards government contracting with private sector bodies to provide services to the community' on the basis that it 'poses a potential threat to the government accountability and openness'.³⁶

2.53 The proposed amendments will require agencies to take contractual measures requiring contracted service providers to provide copies of documents subject to an FOI request on the request of the contracting agency. A document provided under this measure may still be exempt from disclosure if an exemption applies under the Act, however the onus will be on the government agency to make that determination.

2.54 Proposed section 24A provides that a minister or agency may refuse a request if all reasonable steps have been taken to obtain a relevant document in the exercise of a contractual right and the document has not been provided by the contractor.

Information Commissioner Bill 2009

2.55 The IC Bill establishes the Office of the Information Commissioner, which will comprise of the existing Privacy Commissioner plus the new statutory office of Freedom of Information Commissioner, both overseen by the new statutory office of Information Commissioner.

2.56 The Explanatory Memorandum notes that:

The functions of the Office will be threefold:

- the FOI functions – which are about giving the Australian community access to information Held by the Government in accordance with the FOI Act;
- the privacy functions – which are about protecting the privacy of individuals in accordance with the Privacy Act and other Acts; and

35 Explanatory Memorandum, p. 3.

36 Explanatory Memorandum, FOI Bill, p. 52.

- the information commissioner functions – which are strategic functions concerning advice to Government on information management.³⁷

2.57 Each Commissioner will be appointed by the Governor-General as independent office holders for a term of up to five years. Each may be reappointed.³⁸ Under subclause 14(3), the FOI Commissioner is to have legal qualifications. Neither the Information Commissioner nor the Privacy Commissioner is required to have legal qualifications.

2.58 The Information Commissioner will be the head of an office for the purposes of the *Public Service Act 1999* and the *Financial Management and Accountability Act 1997*. The Information Commissioner will be empowered to perform all of the functions of both the FOI Commissioner and the Privacy Commissioner, and each of those offices will be also empowered to perform the other's functions.

2.59 Key powers and functions given to the Information Commissioner under the IC Bill include:

- promoting awareness and understanding of the FOI Act and its objects (clause 8);
- assisting agencies to comply with, and reviewing, the information publication scheme under the FOI Bill (subclauses 8(b) and (c));
- issuing guidelines under the FOI Act (subclause 8(d));
- monitoring, investigating and reporting on compliance with the FOI Act (subclause 8(h));
- undertaking investigations under the FOI Act (subclause 8(j)); and
- conducting all the existing functions of the Privacy Commissioner (clause 9).

2.60 The Financial Impact Statement in the Explanatory Memorandum states that:

Funding for the Office of the Information Commissioner was provided in the 2009–10 Budget. An amount of \$19.5 million over 4 years (post MYEFO) is additional to resources for the existing office of the Privacy Commissioner, which will be transferred to the office of the Information Commissioner.³⁹

37 Explanatory Memorandum, IC Bill, p. 1.

38 IC Bill, clause 14.

39 Explanatory Memorandum, IC Bills p. 2.

Chapter 3

Committee's consideration of terms of reference

3.1 It is important to note that all witnesses were ultimately supportive of the bills. Professor John McMillan, the Commonwealth Ombudsman and Information Commissioner Designate commented that:

Along with all of the other submissions to this inquiry I commend the reform initiative in the legislation that is under consideration by this committee and, along with all other submissions to this inquiry, I urge parliament to enact these reforms at the earliest opportunity.¹

3.2 Mr Peter Timmins, an FOI consultant who appeared before the committee in a private capacity agreed, stating that 'I think the legislation is a good and positive move in the direction of more open and accountable government'.² Similarly, Dr Johan Lidberg, the Academic Chair of Journalism at Murdoch University commented:

It is great to see that FOI is on the agenda. Quite often it is not, so it is great that it is up there. I would like to commend the whole process. I think it has been quite terrific thus far.³

3.3 During its inquiry, witnesses and submitters raised a number of issues with the bills, and made various recommendations as to how they might be improved. Many of these were contradictory and, with the exception of one issue—that of the alteration of the onus of proof in proposed section 61 of the FOI Bill—there was little consensus amongst submitters and witnesses as to what aspects of the bills ought to be amended. Accordingly, and particularly given the significant support that all witnesses ultimately expressed for the bills, the committee considers that, with respect to most aspects of the bills, the government has done an outstanding job of taking competing interests into account and has developed a new FOI framework which is focused on achieving open and accountable government.

3.4 Furthermore, despite the various suggestions for improvement made by many submitters and witnesses, each one ultimately emphasised the point that the reforms proposed by the FOI and Information Commissioner Bills are important reforms, which address the key issues with the current Act. As Mr Michael McKinnon, from Australia's Right to Know summarised:

[W]hile this may not be the best reform of FOI, it is the best reform since 1982. We think it is very important that this reform go through before the end of the first term of government.⁴

1 Professor John McMillan, Commonwealth Ombudsman, *Proof Committee Hansard*, 5 February 2010, p. 1.

2 Mr Peter Timmins, private capacity, *Proof Committee Hansard*, 15 February 2010, p. 15.

3 Dr Johan Lidberg, Academic Chair of Journalism, Murdoch University, *Proof Committee Hansard*, 15 February 2010, p. 7.

3.5 The Australian Press Council commended the government on addressing its main concerns—fees, delays and exemptions—in the bills.⁵ And the President of the Australian Law Reform Commission (ALRC), Professor Rosalind Croucher, signalled that the ALRC is 'very supportive of many of the reforms in both the bills and that we consider the proposed amendments will improve the operation of the Freedom of Information Act and represent a very positive step towards open and accountable government'.⁶

3.6 This chapter sets out the key issues raised in relation to the bills during this inquiry and responds to each of reasons for referral of the bills. Given the emphasis by witnesses and submitters when discussing the bills, on the need for a fundamental shift in the way in which government perceives and treats FOI, the term of reference relating to the creation of a pro-disclosure culture is discussed first. The remaining three terms of reference, relating to: the right of access provided in the bills; the FOI application process; and the Information Commissioner are then discussed in turn.

Will the measures assist in the creation of a pro-disclosure culture with respect to government and what further measures may be appropriate?

3.7 One of the key positive aspects of the bills that witnesses emphasised was their potential to bring about a change in the culture of executive government towards information disclosure.

3.8 Witnesses agreed that there is a need for a shift in the way executive government treats FOI, and the handling of information generally. The committee received submissions from individuals and organisations representing professional groups who use existing FOI laws, many of whom have found the laws to be ineffective as a result of negative attitudes to disclosure within government agencies.⁷

3.9 Mr Andrew Murray, former Australian Democrats Senator, argued that:

In the last 25 years the ability of individuals and organisations to access information held by Government departments has been slowly eroded. Many agencies are less than supportive of an open approach.⁸

3.10 Dr Lidberg, Academic Chair of Journalism at Murdoch University, was much more critical, and referred to the current FOI Act as 'severely dysfunctional'.⁹

4 Mr Michael McKinnon, Australia's Right to Know, *Proof Committee Hansard*, 5 February 2010, p. 4.

5 Mr Jack Herman, Executive Secretary, Australian Press Council, *Proof Committee Hansard*, 15 February 2010, p. 20.

6 Professor Rosalind Croucher, President, Australian Law Reform Commission, *Proof Committee Hansard*. 15 February 2010, p. 23.

7 See for example Name Withheld, *Submission 1*; Ms Karen Kline, *Submission 5*; Mr Andrew Murray, *Submission 4*; and Associate Professor Anne Twomey, *Submission 2*.

8 Mr Andrew Murray, *Submission 4*, p. 1.

Dr Lidberg, explained the results of a study he conducted comparing the attitudes of various governments to information disclosure:

I did a study in 2004-05 that surveyed a number of leading public servants and then government ministers; it clearly showed that the base notion within the Australian Commonwealth administration was that the government owns the information. Compared with the four other countries in this survey, this stood out clearly. The four other countries surveyed were Thailand, the United States, Sweden and South Africa, and their replies to the survey were very clearly that the government holds information on behalf of the people. So it is changing that owning of the information that is at the absolute core of this.¹⁰

3.11 Professor McMillan, the Commonwealth Ombudsman, noted that the proposed reforms 'address the three main deficiencies that have been made of freedom of information law and administration in Australia'.¹¹ Professor McMillan listed the deficiencies which the bills address as:

- the lack of a champion for FOI issues within government;
- the need to revise the terms of the FOI Act to encourage a pro-disclosure culture more clearly, 'give greater recognition to the public interest as a consideration weighing in favour of disclosure of most documents' and reduce of fees; and
- 'the need for a cultural shift within government both at the agency and at the political level'.¹²

3.12 One of the ways witnesses saw the bills as encouraging a pro-disclosure culture is through the revised objects clause. Mr Herman, the Executive Secretary of the Australian Press Council, expressed the view that:

One of the reasons [that Australian FOI laws has not worked as well as New Zealand's laws] is that the Australian law has never contained an objects clause that has made it clear that an object of the legislation is to enable the release of information. If for no other reason than that this [Bill] actually includes an objects clause—one that makes clear what its objects are and makes clear to officials, to those administering the legislation and to

9 Dr Johan Lidberg, Academic Chair of Journalism, Murdoch University, *Proof Committee Hansard*, 15 February 2010, p. 9.

10 Dr Johan Lidberg, Academic Chair of Journalism, Murdoch University, *Proof Committee Hansard*, 15 February 2010, p. 8.

11 Professor John McMillan, Commonwealth Ombudsman, *Proof Committee Hansard*, 5 February 2010, p. 1.

12 Professor John McMillan, Commonwealth Ombudsman, *Proof Committee Hansard*, 5 February 2010, p. 1.

the courts that the aim of the exercise is to release information—then it has improved the situation.¹³

3.13 The ALRC also commented on the objects clause favourably, stating that the proposed new clause 'reflect[s] the democratic principles underpinning freedom of information'.¹⁴ Similarly, Associate Professor Moira Paterson explained:

Obviously what you need is a pro-disclosure culture. There are some elements—for example, the additional protection that is given to people who release where the document is exempt. That kind of thing helps. The rephrasing of the objects clause helps. Some of the other changes in terms of procedures and so on help.¹⁵

3.14 However, Associate Professor Paterson went on to comment that '[i]deally, what you would have in the Act would be a stronger statement of that pro-disclosure'.¹⁶ Associate Professor Paterson argued that Queensland's FOI laws go 'much further' than the Commonwealth's bills, and have been successful in changing the culture of the executive with respect to FOI.¹⁷

3.15 Dr Lidberg warned that laws alone cannot bring about a cultural change:

The law gives the foundation for change, but it is not the law that will change the culture; it is the people who are applying and administering it who will. That is the key. And that is why the commissioner has become so pivotal in this.¹⁸

3.16 Professor McMillan argued that one of the most important ways in which the proposed laws address the problems with the current regime is by creating an advocate for FOI. He explained to the committee that there have been four major reviews of FOI laws over the last decade and that '[t]he common theme in all those reports has been a lack of overt cultural support for FOI laws'.¹⁹ Professor McMillan argued that having a senior official to champion the FOI cause would go a long way to addressing the cultural issues with FOI that witnesses mentioned.

13 Mr Jack Herman, Executive Secretary, Australian Press Council, *Proof Committee Hansard*, 15 February 2010, p. 22.

14 Professor Rosalind Croucher, President, ALRC, *Proof Committee Hansard*, 15 February 2010, p. 23.

15 Associate Professor Moira Paterson, private capacity, *Proof Committee Hansard*, 15 February 2010, p. 2.

16 Associate Professor Moira Paterson, private capacity, *Proof Committee Hansard*, 15 February 2010, p. 2.

17 Associate Professor Moira Paterson, private capacity, *Proof Committee Hansard*, 15 February 2010, p. 2.

18 Dr Johan Lidberg, Academic Chair of Journalism, Murdoch University, *Proof Committee Hansard*, 15 February 2010, p. 8.

19 Professor John McMillan, Commonwealth Ombudsman, *Proof Committee Hansard*, 5 February 2010, p. 3.

3.17 Ms Elizabeth Simpson from the Public Interest Advocacy Centre (PIAC) described the problems with the existing FOI regime as 'endemic', however agreed with Professor McMillan's assessment of the bills, and stated that 'having an information commissioner as an independent body to oversee these kinds of things will make a huge difference'.²⁰ Ms Simpson noted that the powers given to the Information Commissioner in the bills will form a powerful basis on which to begin the necessary cultural shift.²¹

Conclusion

3.18 The committee is satisfied that the proposed new objects clause and the creation of the office of the Information Commissioner will be strong and effective measures for changing the culture and attitudes towards FOI within government.

3.19 However, the committee notes the substantial and challenging role that will be expected of the Information Commissioner in changing the culture of executive government towards FOI. This role will require significant support, as well as high-level policy input. The Information Commissioner will need avenues through which to ensure that the message of that office is received and implemented by government departments.

3.20 In order to facilitate this aspect of the Information Commissioner's role, the committee recommends that the Information Commissioner be made an *ex officio* member of the Administrative Review Council (ARC). The ARC is an expert body which provides advice to the Attorney-General and Commonwealth government on strategic the Commonwealth system of administrative law. As freedom of information has long been recognised as an integral aspect of Australian administrative law, adding the Information Commissioner as an *ex officio* member will also ensure that the ARC has a complete picture of all aspects of Australian administrative law.

Recommendation 1

3.21 The committee recommends that section 49 of the *Administrative Appeals Tribunal Act 1975* be amended to provide that the Information Commissioner is an *ex officio* member of the Administrative Review Council.

Do the Bills contain measures effective to ensure that the right of access to documents is as comprehensive as it can be?

3.22 The committee has identified three key elements of the FOI Bill which contain measures to ensure a comprehensive right of access to documents. These are: the new publication requirements; changes to exemption provisions; and fees and charges. The committee is satisfied that these changes proposed in the FOI Bill will be

20 Ms Elizabeth Simpson, PIAC, *Proof Committee Hansard*, 15 February 2010 p. 31.

21 Ms Elizabeth Simpson, PIAC, *Proof Committee Hansard*, 15 February 2010, pp 33-34.

effective in ensuring that the right of access under the FOI Act is as comprehensive as it can be.

Publication requirements

3.23 Numerous witnesses emphasised to the committee the benefits of the proposed new publication requirements under the FOI Bill. For example, Associate Professor Paterson stated that 'I think they are really, really important'.²² The ALRC also commended this aspect of the FOI Bill which it stated is 'consistent with the pro-disclosure culture'²³ which the ALRC and Administrative Review Council (ARC) recommended in the *Open government report*.²⁴

3.24 However, Associate Professor Paterson, who appeared before the committee in a private capacity, commented that publication requirements will only be effective if there are suitable penalties for non-compliance.²⁵ She noted that disclosure requirements are an aspect of both state and Commonwealth FOI laws that:

...really has not been very strongly complied with in the past and I think it is important to send out that message and to fairly clearly spell out what should happen if those requirements are not complied with.²⁶

3.25 In this regard, Associate Professor Paterson argued that:

I think proactive disclosure, what could be termed push rather than pull, is a very, very important element of modern FOI—that you try and put out as much as possible rather than requiring people to put it in. Therefore that is a very important aspect of the bill and it would be helpful if those aspects could be further strengthened.²⁷

3.26 Mr Timmins, who appeared before the committee in a private capacity, argued that it should not be left up to agencies to decide what information ought to be published. He explained:

The explanatory memorandum, however, states that agencies are generally best placed to identify information they hold which should be published, taking into account the object of the act. My response to that is, with about

22 Associate Professor Moira Paterson, private capacity, *Proof Committee Hansard*, 15 February 2010, p. 2.

23 ALRC, *Submission 9*, p. 2.

24 ALRC and ARC, *Open government: a review of the federal Freedom of Information Act 1982*, ALRC Report 77, 1995.

25 Associate Professor Moira Paterson, private capacity, *Proof Committee Hansard*, 15 February 2010, p. 2.

26 Associate Professor Moira Paterson, private capacity, *Proof Committee Hansard*, 15 February 2010, p. 4.

27 Associate Professor Moira Paterson, private capacity, *Proof Committee Hansard*, 15 February 2010, p. 4.

28 years of experience, I do not think they support the fact that government agencies are best placed to do that.²⁸

3.27 Professor McMillan agreed that he, too would be concerned if the regime relied on agencies to 'gauge its own compliance with the disclosure requirements of the legislation'.²⁹ However, Professor McMillan, pointed out that he:

...would expect that the Information Commissioner and the Freedom of Information Commissioner will play a very active role in ensuring adequate compliance by all agencies with the publication requirements.³⁰

Exemptions

3.28 The FOI Bill makes some significant changes to the exemption provisions within the FOI Act, which attempt to clarify the extent of exemptions, and simplify the exemption provisions. One of the key changes made by the FOI Bill surrounds the new public interest test and its application. Witnesses also raised concerns about the continued exemption of whole agencies from the scheme.

Application of public interest test

3.29 Witnesses and submitters raised some concerns about the application of the public interest test to various exemptions. However, the committee notes that there was a distinct lack of consensus between witnesses and submitters as to which exemptions should attract a public interest test.

3.30 The FOI Bill's proposed application of a public interest test to the business affairs exemption, but not to the trade secrets exemption (clause 47G at item 33 of Schedule 3 to the FOI Bill), was argued by a number of submitters and witnesses to be inconsistent. Telstra noted the 'legal uncertainty' that would result from the different types of commercial information being subject to differing tests.³¹

3.31 With respect to the lack of public interest test for trade secrets, Associate Professor Paterson argued that:

I think that is very unfortunate because more and more of the information in government is commercial in nature in some way—government is more commercialised and there are a lot more contracted service providers—so a very large proportion of the documents that are held by government have some sort of commercial flavour to them. To the extent that you allow this

28 Mr Peter Timmins, private capacity, *Proof Committee Hansard*, 51 February 2010, p. 15.

29 Professor John McMillan, Commonwealth Ombudsman, *Proof Committee Hansard*, 5 February 2010, p. 2.

30 Professor John McMillan, Commonwealth Ombudsman, *Proof Committee Hansard*, 5 February 2010, p. 2.

31 Telstra, *Submission 10*, p. 3.

exemption you are actually then allowing for a lot of those dealings to be claimed to be trade secrets or commercial information and to be exempt.³²

3.32 Telstra³³ and the Law Council of Australia³⁴ also raised this issue, however from a different perspective. The Law Council argued that no public interest test should apply to the business affairs exemption as 'there will rarely be any public interest in releasing documents which record trade secrets or which divulge commercially valuable information'.³⁵

3.33 In relation to the personal privacy exemption, the Victorian Privacy Commissioner, Ms Helen Versey, argued that 'the changes to the protection of personal information were really a step backwards'.³⁶ The issue Ms Versey raised with the bills is that:

The model now being proposed includes not just an exemption based on an unreasonable intrusion into someone's privacy but a threshold decision by the organisation or the minister as to whether the person might want to rely on the exemption.³⁷

3.34 Ms Versey further explained that this is not a mandatory decision that the agency or minister has to make, but involves discretion in deciding whether the person might wish to rely on the exemption, in which case they must, if it is reasonably practical, give notice to that person. Ms Versey argued that if an agency had already decided that information met the condition of being an unreasonable intrusion on a person's privacy, she did not see how it would be in the public interest to intrude on that person's privacy by releasing the information based on the discretionary question of whether the person might object.³⁸

3.35 On the other hand, the PIAC argued that a public interest test should apply to all exemptions.³⁹ Australia's Right to Know also supported this position, and argued for the application of a public interest test to Cabinet documents.⁴⁰

32 Associate Professor Moira Paterson, private capacity, *Proof Committee Hansard*, 15 February 2010, p. 5.

33 Telstra, *Submission 10*, p. 3.

34 Law Council of Australia, *Submission 12*, p. 4.

35 Mr Mark Robinson, Law Council of Australia, *Proof Committee Hansard*, 5 February 2010, p. 15.

36 Ms Helen Versey, Victorian Privacy Commissioner, *Proof Committee Hansard*, 15 February 2010, p. 29.

37 Ms Helen Versey, Victorian Privacy Commissioner, *Proof Committee Hansard*, 15 February 2010, p. 29.

38 Ms Helen Versey, Victorian Privacy Commissioner, *Proof Committee Hansard*, 15 February 2010, p. 29.

39 Ms Elizabeth Simpson, PIAC, *Proof Committee Hansard*, 15 February 2010, p. 30.

40 Mr Michael McKinnon, Australia's Right to Know, *Proof Committee Hansard*, 5 February 2010, p. 4.

3.36 Mr McKinnon, from Australia's Right to Know, compared the situation in Australia with that in New Zealand, where a public interest test applies to Cabinet documents. He explained that in New Zealand Cabinet documents are subject to a very high public interest test, which he described as 'entirely appropriate', given the public interests in 'the solidarity and secrecy of the cabinet process'.⁴¹ Yet, Mr McKinnon stated, the fact that a public interest test applies to Cabinet documents minimises the ability for that exemption to be overused by government in order to avoid FOI.⁴²

3.37 From the above discussion it is evident that there was little consistency or consensus between witnesses as to whether, when and in what form a public interest test should apply to various exemptions. It is the committee's view that in the FOI Bill, the government has successfully dealt with the various, competing views when formulating the proposed exemption provisions.

Exemption of whole agencies

3.38 A number of witnesses and submitters questioned the continued exemption of entire agencies from the FOI scheme. Under the current FOI Act, security agencies, such as the Australian Security Intelligence Organisation and the Defence Signals Directorate, are exempt, as are various other agencies listed in Schedule 2 to the FOI Act, including the Australian National Audit Office, parliamentary departments and the Australian Government Solicitor. Other bodies have partial exemptions such as the ABC and SBS.⁴³

3.39 Associate Professor Paterson submitted to the committee that as a matter of principle, classes and types of documents should be exempted from disclosure under FOI, not entire agencies.⁴⁴ She explained that:

If you look at the [FOI] act you see it has a very good, strong national security exemption provision or if you look at bodies that have commercial information or other information you will see again that there are business affairs and other exemption provisions that would seem to address the issue of concern. What that means therefore is that these bodies are perceived to be outside of transparency regimes, when that does not need to be the case.⁴⁵

41 Mr Michael McKinnon, Australia's Right to Know, *Proof Committee Hansard*, 5 February 2010, p. 7.

42 Mr Michael McKinnon, Australia's Right to Know, *Proof Committee Hansard*, 5 February 2010, p. 7.

43 Mr Peter Timmins, private capacity, *Proof Committee Hansard*, 15 February 2010, p. 16.

44 Associate Professor Moira Paterson, private capacity, *Submission 20*, p. 4.

45 Associate Professor Moira Paterson, private capacity, *Proof Committee Hansard*, 15 February 2010, p. 5.

3.40 Associate Professor Paterson argued that removing an organisation in its entirety from the FOI Act removes that method of public scrutiny. She argued that this should not be necessary, even for security agencies, as:

...the harms that might result from the disclosure of their [the exempt agency's] documents should logically be capable of being dealt with by the exemption provisions.⁴⁶

3.41 Furthermore, Associate Professor Paterson argued that the increasing powers of security agencies heightens the need to ensure the accountability of those agencies through FOI.⁴⁷

3.42 Dr Lidberg, the Academic Chair of Journalism at Murdoch University, noted that neither of the 'benchmark' FOI systems—those in the United States and Sweden—exempt any agencies entirely from FOI:

The CIA is not exempt. You would be aware that there were manuals handed out regarding certain interrogation methods, like waterboarding, for instance. Those manuals came from the CIA. That sends a very clear message: when you put any agency at all under general exemptions, it sends a message of secrecy rather than transparency.⁴⁸

3.43 In addition to security agencies, parliamentary departments are currently exempt from the FOI scheme. A number of witnesses commented on this including Dr Lidberg,⁴⁹ Mr McKinnon from Australia's Right to Know⁵⁰ and Ms Simpson from PIAC, who argued that:

[I]f you come back to first principles, that the houses of parliament and parliamentary members are equally part of the government and also produce information and should also equally be accountable to the public. So to simply leave them outside the act leaves a part of government effectively unknowable to the public.⁵¹

3.44 Mr Timmins, who appeared in a personal capacity, told the committee that failure of the FOI Bills to:

...act on a law reform recommendation that the act extend to parliamentary departments is a significant gap in the accountability and transparency framework. This year the parliamentary departments had \$320 million to

46 Associate Professor Moira Paterson, private capacity *Proof Committee Hansard*, 15 February 2010, p. 1.

47 Associate Professor Moira Paterson, *Submission 20*, p. 4 & p. 5.

48 Dr Johan Lidberg, Academic Chair of Journalism, Murdoch University, *Proof Committee Hansard*, 15 February 2010, p. 7.

49 Dr Johan Lidberg, Academic Chair of Journalism, Murdoch University, *Proof Committee Hansard*, 15 February 2010, p. 8

50 Mr Michael McKinnon, Australia's Right to Know, *Proof Committee Hansard*, 5 February 2010, p. 4.

51 Ms Elizabeth Simpson, PIAC, *Proof Committee Hansard*, 15 February 2010, p. 32.

spend. Some of that money goes on payments to members and senators in the form of allowances and salaries. I think the lack of accountability in this area, as I detailed in my submission, is one that we should address.⁵²

3.45 As was pointed out in the submission of the Queensland Information Commissioner,⁵³ this issue was examined by the Senate Standing Committee on Legal and Constitutional Affairs in 1979 when it examined the Freedom of Information Bill 1978. That committee found at the time that:

The total exemption for parliamentary departments conferred by clause 3 of the Bill appears even less justified than in respect of the courts. The only official justification is that the Freedom of Information Bill is concerned with the granting of access to the documents of the Executive. Seen as an exercise in ensuring accountability of governmental decision making, there clearly is a difference between the executive and parliamentary departments. But that is not to say that there is not a corresponding need to open up for public inspection the activities of the parliamentary departments. The public has a legitimate interest in ensuring, first, that its parliamentary representatives are properly going about their tasks of representation and executive scrutiny, and secondly, that its parliamentary representatives are properly assisted to fulfil those functions.⁵⁴

3.46 The ALRC and ARC's *Open government report* also recommended that parliamentary departments be made subject to the FOI Act,⁵⁵ and the Queensland Information Commissioner's submission points out that the FOI laws in both New Zealand and the United Kingdom apply to parliamentary departments.⁵⁶

3.47 Various suggestions were made as to how the decision as to which, if any, agencies should continue to be exempt from FOI should be made. For example, PIAC recommended in its submission that all exempt agencies should be required to demonstrate public interest grounds for their continued exemption from the FOI Act.⁵⁷

Conclusion

3.48 While the committee accepts the strength of the arguments regarding the inappropriateness of exempting entire agencies or organisations from the FOI regime, it also considers that the issues involved are more complex than can be dealt with by this committee in the timeframe available for report. Furthermore, the committee is of the view that the new Information Commissioner will be best placed to make

52 Mr Peter Timmins, private capacity, *Proof Committee Hansard*, 15 February 2010, p. 15.

53 Queensland Information Commissioner, *Submission 3*, pp 3-4.

54 Senate Standing Committee on Legal and Constitutional Affairs, *Freedom of Information*, 1979, pp 158-9.

55 ALRC and ARC, *Open government: a review of the federal Freedom of Information Act 1982*, ALRC Report 77, 1995, para 11.8, Recommendation 73.

56 Queensland Information Commissioner, *Submission 3*, p. 4.

57 PIAC, *Submission 24*, p. 16.

decisions about this issue, and recommends that further consideration be given to the issue whether it is appropriate and necessary for entire agencies and organisations to be exempt from the FOI scheme.

Recommendation 2

3.49 The committee recommends that, if and when established, the Information Commissioner give consideration to whether it is necessary and appropriate for entire agencies and organisations to be exempt from the Commonwealth's freedom of information scheme.

Fees and charges

3.50 The third aspect of the FOI Bill which the committee identified that effectively improves access under the FOI scheme relates to the proposed removal of certain fees and charges. As noted in chapter 2, the FOI Bill enables different charges to be applied to different groups of people, with the intention that journalists and public interest organisations will be exempt from fees for the first five hours. Witnesses were generally in favour of this amendment, although some argued that it did not go far enough.

3.51 For example, Dr Lidberg, the Academic Chair of Journalism at Murdoch University, proposed that processing fees for journalists and public interest groups ought to be waived for the first day of processing.

3.52 The issue of the fairness of treating journalists and public interest groups as special, and exempting them from fees when making third party FOI applications, while not exempting other individuals, such as bloggers, from fees, was raised as an issue by the committee. Dr Lidberg commented that:

[T]hat is a good point...it makes sense to me that non-profit organisations that have few resources and so on should not be slapped with big processing request...Some journalists have a lot of money behind them in terms of media organisations...Perhaps, as an individual making a third-party request, you should be given some sort of provision as well. This all comes back to the ownership again.⁵⁸

3.53 The Australian Press Council raised similar concerns, with the Executive Secretary, Mr Herman stating that:

The council is always wary about singling out groups, whether journalists or others. When journalists are making applications under FOI for public interest information, they should be in the same position as any other individual or group who is making similar sorts of applications...So I think

58 Dr Johan Lidberg, private capacity, *Proof Committee Hansard*, 15 February 2010, p. 12.

we would rather see it being expressed in terms of the sorts of information rather than the class of person making the application.⁵⁹

3.54 Furthermore, Mr Timmins pointed out the difficulties in defining 'journalists' and suggested that 'individuals, community or similar groups who individually or on behalf of others seek access to documents for the purpose of participating in government processes' should all get some special concession under the scheme.⁶⁰ PIAC made similar comments on this issue.⁶¹

3.55 However, if free access to documents under FOI is not defined by the class of person applying, then the only other obvious option is to define the type of information that may be freely accessed, for example by distinguishing between information that is in the public interest to be released and that which is simply being requested to make a profit for a media organisation. However, the Australian Press Council noted the difficulties with this approach:

Yes, newspapers, the press and the media generally tend to be profit-making organisations but they also happen to be organisations that are acting on behalf of the public in disseminating information that is of interest to the public, that is of public interest. To make the distinction between those two things I think is very difficult.⁶²

3.56 Another suggestion was that the government retain application fees but eliminate processing charges.⁶³ This is the approach taken in the new Tasmanian FOI laws,⁶⁴ and was supported by Ms Simpson from PIAC, who argued that:

From an individual's point of view, it is really the charges that are particularly prohibitive. We find that people have two issues with them. One is that sometimes they pay the charges and then discover that all of the material is exempt. So they pay up to several thousand dollars not to receive very much information or any information at all...The other is that...if an agency, for example, has bad record-keeping measures which mean they have to spend a lot of time working out what information is subject to an FOI request we do not believe that the individual should be required to pay for that.⁶⁵

59 Mr Jack Herman, Executive Secretary, Australian Press Council, *Proof Committee Hansard*, 15 February 2010, p. 20.

60 Mr Peter Timmins, private capacity, *Proof Committee Hansard*, 15 February 2010, p. 18.

61 Ms Elizabeth Simpson, PIAC, *Proof Committee Hansard*, 15 February 2010, p. 33.

62 Mr Jack Herman, Executive Secretary, Australian Press Council, *Proof Committee Hansard*, 15 February 2010, p. 22.

63 Mr Peter Timmins, private capacity, *Proof Committee Hansard*, 15 February 2010, p. 16.

64 Mr Peter Timmins, private capacity, *Proof Committee Hansard*, 15 February 2010, p. 17.

65 Ms Elizabeth Simpson, PIAC, *Proof Committee Hansard*, 15 February 2010, p. 32.

Conclusion

3.57 The committee notes that the issue of fees and charges is dealt with in the Freedom of Information (Fees and Charges) Regulations, and not in the Act itself. The committee urges the government, when drafting the relevant regulations, to give full and serious consideration to the issues raised by witnesses with respect to fees and charges, and particularly to the feasibility of removing processing charges while retaining application fees, as has been done in Tasmania. The committee also urges the government to consider what has been done with respect to fees and charges in other jurisdictions.

Recommendation 3

3.58 The committee recommends that the government give consideration to the issues raised with respect to fees and charges in this inquiry, and particularly to the feasibility of removing processing charges, while retaining application fees, in the context of drafting regulations.

Are the improvements to the request process efficient and could they be further improved?

3.59 There are a number of aspects of the FOI Bill that, if enacted, will significantly improve the cost and efficiency of the request process, particularly those relating to the Information Commissioner's new oversight role. The FOI and Information Commissioners will be charged with overseeing the way government agencies are managing FOI, and will have the power to issue directions, make recommendations, and assist in making agencies' processes more efficient. The committee sees this new FOI advocacy role as pivotal to improving the efficiency of the request process under the FOI Act.

3.60 Only one aspect of the proposed changes to the request process attracted any substantial criticism from witnesses and submitters—the appeal process. As noted in chapter 2 of this report, the bills make some significant changes to the structure of internal and external merits review with respect to FOI decisions.

3.61 Currently individuals who are dissatisfied with the decision of an officer of an agency regarding their FOI claim must request review of the decision internally by a senior officer within the same agency, before they may request external review of the decision. If the applicant is dissatisfied with the decision made by the senior officer, they may then request a review of that decision by the Administrative Appeals Tribunal (AAT).

3.62 Decisions by a minister or principal officer of an agency may be reviewed directly by the AAT.

3.63 The bills add a second level of external review before the AAT's review—by the Information Commissioner. However, in acknowledgment of the time that this change adds to the review process, the bills remove the requirement that internal

review be undertaken prior to external review. In addition, the FOI Bill amends the format of review in the AAT, altering the onus of proof in AAT reviews, such that the onus will be borne by the applicant. These two issues attracted comment from a range of witnesses.

Onus of proof in the Administrative Appeals Tribunal

3.64 It was strongly argued in evidence that the alteration of the onus of proof in AAT proceedings would be a retrograde step.

3.65 As outlined briefly in chapter 2, proposed section 61 provides that whichever party appeals a decision of the Information Commissioner—either the applicant, or the agency—bears the onus of proof in the AAT. This means that if the applicant is denied documents by the Information Commissioner and requests a review of the decision to the AAT, they will bear the onus of proving that the Commissioner's decision was not correct or preferable, and that they should be allowed access to the documents on the facts.

3.66 This is a significant change from the status quo, where the concept of an 'onus of proof' does not apply in AAT proceedings,⁶⁶ and the role of a respondent agency is 'to assist the Tribunal to reach the correct or preferable decision; but not simply to seek to uphold the existing decision'.⁶⁷ In practice this means that the respondent agency provides the AAT with documents and evidence relevant to the making of the decision, but does not take a partisan role.⁶⁸

3.67 In a document comparing the main changes between the exposure draft and the FOI and Information Commissioner Bills as introduced, the Department of Prime Minister and Cabinet described the alteration of the onus of proof as a 'minor change to ensure the effective operation of the review process in the AAT'.⁶⁹

3.68 Mr Mark Robinson, from the Law Council of Australia, responded that 'nothing could be further from the truth'.⁷⁰ Mr Robinson also noted the Law Council's

66 *McDonald v Director-General of Social Security* (1984) 1 FCR 354.

67 The Hon Justice Garry Downes AM, *Government Agencies as Respondents in the Administrative Appeals Tribunal*, Paper delivered to the Australian Government Solicitor Government Law Group, 3 February 2005, at <http://www.aat.gov.au/SpeechesPapersAndResearch/speeches/downes/governmentagencies.htm>

68 The Hon Justice Garry Downes AM, *Government Agencies as Respondents in the Administrative Appeals Tribunal*, Paper delivered to the Australian Government Solicitor Government Law Group, 3 February 2005, at <http://www.aat.gov.au/SpeechesPapersAndResearch/speeches/downes/governmentagencies.htm>

69 Department of Prime Minister and Cabinet, *Summary of main changes between the exposure draft and introduced FOI reform Bills*, November 2009, available at: http://www.dpmpc.gov.au/consultation/foi_reform/index.cfm, p.7, tabled by Law Council of Australia, 5 February 2010.

70 Mr Mark Robinson, Law Council of Australia, *Proof Committee Hansard*, 5 February 2010, p. 19.

serious concerns about the fairness of AAT appeals if section 61 is amended in the manner proposed in the FOI Bill.⁷¹ Mr Robinson gave evidence that the alteration of the onus of proof in the AAT:

It puts the applicant in an impossible position, both practically and as a matter of fairness, and as a matter of law. On one view of it, that onus could never be discharged, ever.⁷²

3.69 Associate Professor Paterson further explained that:

[I]f a person has been knocked back by the commissioner and then goes to the AAT, they do not know what they are looking for. The government knows what it is looking for. The person then has to prove something they do not have, and do not have a description of, is in the public interest. This strikes me as an almost impossible burden of proof to bear.⁷³

3.70 Mr McKinnon, the spokesperson from Australia's Right to Know coalition, told the committee that his organisation was extremely concerned about this aspect of the bills, and had raised the issue with the Minister.⁷⁴ Mr McKinnon explained to the committee his personal experiences as a journalist with FOI appeals, and outlined the difficulty that he, as an applicant, would face if the onus of proof in the AAT were reversed:

I have done more than 50 appeals to the AAT because you have a chance given the onus rests of the government to prove why documents should be secret. That means that the government has to put up its evidence and its witnesses and we are in a position to cross-examine and to develop our arguments from the government. Equally, it is only logical that it is very difficult to prove that documents should not be secret when you have no access to those documents.⁷⁵

3.71 Furthermore, Associate Professor Paterson commented that the ability of the AAT to hear evidence from agencies and ministers without the applicant present 'is a reasonable safety valve to protect confidential information', arguing that the alteration of the onus of proof in the AAT is therefore unnecessary for protecting confidential information held by agencies.⁷⁶ Professor Zifcak, Vice President of Liberty Victoria

71 Mr Mark Robinson, Law Council of Australia, *Proof Committee Hansard*, 5 February 2010, p. 19.

72 Mr Mark Robinson, Law Council of Australia, *Proof Committee Hansard*, 5 February 2010, p. 19.

73 Associate Professor Moira Paterson, *Proof Committee Hansard*, 15 February 2010, p. 3.

74 Mr Michael McKinnon, Australia's Right to Know, *Proof Committee Hansard*, 5 February 2010, p. 4.

75 Mr Michael McKinnon, Australia's Right to Know, *Proof Committee Hansard*, 5 February 2010, p. 5.

76 Associate Professor Moira Paterson, private capacity, *Proof Committee Hansard*, 15 February 2010, p. 3.

reiterated Associate Professor Paterson's position with regard to this aspect of the bills.⁷⁷

3.72 The Department of Prime Minister and Cabinet explained the reasons for the alteration of the onus of proof in the AAT to the committee:

The issue behind that is that at present, if you appeal from a decision of an agency, you appeal straight to the AAT, and you are appealing from the agency's decision, so the agency bears the onus of defending its position. With the interposition of the Information Commissioner as a new review opportunity for people, if an agency or applicant wishes to appeal from the Information Commissioner's decision to the AAT, they are actually appealing the Information Commissioner's decision, not the department's decision. So the provision in relation to the onus of proof was included because it would not be appropriate for the Information Commissioner to be a party in the AAT, having to defend their position.⁷⁸

3.73 In a response to a question on notice put by the committee, the Department of Prime Minister and Cabinet reiterated this point arguments, stating that:

The introduction of the IC review before AAT review means that the AAT will be reviewing the decision of the Information Commissioner not the decision of the agency or minister. The Information Commissioner will not be a respondent to AAT review proceedings and will not be defending his or her decision. It is for those reasons that the Bill placed the onus on whoever applies for AAT review.⁷⁹

3.74 Ms Lynch explained that the position is analogous to that of appeal from a decision of the AAT to the Federal Court, in which the AAT does not defend its position, but instead, the relevant department does.⁸⁰

Conclusion

3.75 The department's explanation satisfies the committee with respect to those aspects of item 42 of Schedule 4 to Part 1 of the FOI Bill which give the responsibility for appearing before the AAT in FOI matters to the relevant department or agency instead of the Information Commissioner (proposed section 61A). This is also consistent with the role of departments and agencies when the AAT is reviewing the decision of an intermediate external merits review body, such as the Social Security Appeals Tribunal.

77 Professor Spencer Zifcak, Vice President, Liberty Victoria, *Proof Committee Hansard* 15 February 2010, p. 36.

78 Ms Philippa Lynch, First Assistant Secretary, Department of Prime Minister and Cabinet, *Proof Committee Hansard*, 5 February 2010, p. 13.

79 Department of Prime Minister and Cabinet, *Answer to question on notice*, 2 March 2010, pp 1-2.

80 Ms Philippa Lynch, First Assistant Secretary, Department of Prime Minister and Cabinet, *Proof Committee Hansard*, 5 February 2010, p. 13.

3.76 However, when questioned on the issue of the applicant bearing the onus of proof in the AAT, legal academic, Associate Professor Paterson, President of the ALRC, Professor Croucher,⁸¹ and barrister, Mr Robinson⁸², were all unaware of examples of the onus of proof being altered in such a way in similar situations.⁸³

3.77 The committee notes that there are other situations where individuals may request review of decisions of an external merits review body to the AAT, such as social security decisions by the Social Security Appeals Tribunal, and that in those situations government has not considered it necessary to require an individual aggrieved by an administrative decision to bear the onus of proof in the AAT. The committee is not satisfied that there are any reasons for the onus of proof to be altered in this situation, when it is not in others.

3.78 The committee considers that the alteration of the onus of proof such that whichever party applies for review by the AAT bears the onus of proof is inappropriate, unnecessary and unfair to individuals. Accordingly, in order to make the FOI Act consistent with the lack of onus in the rest of the AAT's jurisdiction, the committee recommends that proposed section 61 be amended to remove the concept of onus of proof from the FOI Act entirely. The committee recommends that any other amendments required to give effect to the removal of the notion of onus from the FOI Act also be made.

Recommendation 4

3.79 The committee recommends that proposed section 61, in item 42 of Schedule 4 to Part 1 of the Freedom of Information Amendment (Reform) Bill 2009, which provides that whichever party that appeals a decision of the Information Commissioner bears the onus of proof in the Administrative Appeals Tribunal, as well as any other relevant sections of the Bill and *Freedom of Information Act 1982*, be amended to remove the concept of an onus of proof from the Act.

3.80 Mr Timmins noted that, while he also has concerns with this aspect of the FOI Bill, he is more concerned with the fact that agencies could appeal decisions from the Information Commissioner to the AAT, and that this may be used as a delaying tactic by departments.⁸⁴ He argued that there is no reason for agencies or ministers to have a right of appeal to the AAT:

They should have the right to seek review where it is alleged that there is an error of law in the Information Commissioner's decision. But when it comes

81 Professor Rosalind Croucher, President, ALRC, *Proof Committee Hansard*, 15 February 2010, p. 25.

82 Mr Mark Robinson, Law Council of Australia, *Proof Committee Hansard*, 5 February 2010, p. 22.

83 Associate Professor Moira Paterson, private capacity, *Proof Committee Hansard*, 15 February 2010, p. 4.

84 Mr Peter Timmins, private capacity, *Proof Committee Hansard*, 15 February 2010, p. 17.

to simply asserting that it is wrong and therefore asking for full merit review again, a process that has been undertaken by the Information Commissioner previously, I think we should be looking closely at that because of the prospect of delay.

3.81 Similar concerns regarding delay were raised by the Law Council of Australia.⁸⁵

3.82 However, while the committee acknowledges Mr Timmins' concerns with respect to this issue, the committee notes that model litigant provisions apply to the behaviour of agencies before the AAT and courts. Model litigant provisions should limit any possibility of the Commonwealth's right of review being used as a delaying tactic. Furthermore, the committee notes that it is not unprecedented for Commonwealth departments and agencies to have a right of review or appeal to a higher tribunal or court.

Removal of compulsory internal review

3.83 The body charged with advising government with respect to administrative law matters, the Administrative Review Council (ARC) has, in a number of its reports, highlighted the importance of internal review.⁸⁶ As noted in chapter 2, the FOI Bill proposes to make internal review an optional step, rather than a mandatory step as it currently is under the FOI Act.

3.84 Professor McMillan noted that:

Generally I have been in favour of internal review as a mandatory stage in all administrative processes. Indeed, even in the Ombudsman's office, we insist that a person first complain to and take up an issue with an agency before coming to the Ombudsman.⁸⁷

3.85 However, Professor McMillan also acknowledged that as the bills add multiple appeal stages:

Multiple appeal stages run the risk of prolonging disputes and exhaustion of complainants. So the balance that has been struck is to make internal review optional. My view is that it is best to go with that balance for the moment and to allow the Information Commissioner to review whether it is

85 Mr Mark Robinson, Law Council of Australia, *Proof Committee Hansard*, 5 February 2010, p. 16.

86 See for example Administrative Review Council, *Internal Review of Agency Decision-Making*, Report No 44, November 2000; and *Better Decisions: review of Commonwealth Merits Review Tribunals 1995*, Report No 39, September 1995.

87 Professor John McMillan, Commonwealth Ombudsman, *Proof Committee Hansard*, 5 February 2010, p. 2.

receiving an undue number of small matters that could more suitably be resolved within an agency.⁸⁸

3.86 Similarly, Associate Professor Paterson expressed the view with respect to internal review that:

On balance, I favour it being optional. I think an internal review can certainly be of value in terms of changing processes within an agency, providing a quick and easy form of review, but I think there are circumstances where it is going to slow down the process. Where time is of the essence and where you have to go through that first, that would be a disadvantage to applicants. So I would favour, on balance, it being optional.⁸⁹

3.87 Dr Lidberg expressed much stronger support for making internal review optional rather than mandatory:

I find it very good that the change bypassing the internal review was made. I am much harsher in my judgment on that than Professor Paterson, because I think that with internal review, even though the stats say that it does work, that decisions are changed, it does not quite show how those decisions are changed. Very often, internal review does nothing, so it is fantastic that it has been changed and that we can go straight to the commissioner.⁹⁰

3.88 Similarly, Mr McKinnon from Australia's Right to Know stated that:

It is rare in my view that important policy issues are overturned on internal review...Right to Know argued for that optional internal review even though agencies are bloody minded and you never win on internal review, so what is the point. What an internal review process does do is remove at least to some extent the timeliness of the information and in journalism that is all.⁹¹

3.89 Therefore, despite the general advice of the ARC regarding the advantages of internal review, it appears that in this instance, there are sufficient review mechanisms and accountability safeguards so as to justify making internal review an optional rather than mandatory step.

88 Professor John McMillan, Commonwealth Ombudsman, *Proof Committee Hansard*, 5 February 2010, p. 2.

89 Associate Professor Moira Paterson, private capacity, *Proof Committee Hansard*, 15 February 2010, p. 2.

90 Dr Johan Lidberg, Academic Chair of Journalism, Murdoch University, *Proof Committee Hansard*, 15 February 2010, p. 10.

91 Mr Michael McKinnon, Australia's Right to Know, *Proof Committee Hansard*, 5 February 2010, p. 10.

Assessment of the functions, powers and resources of the Information Commissioner

3.90 As with other aspects of the bills, the establishment of the Information and FOI Commissioners was overwhelmingly regarded as a positive step by witnesses, although a number of suggestions were made regarding the specific aspects of the commissioners' roles.

3.91 It has been contended that FOI and privacy interests often conflict, and accordingly it may be inappropriate to combine both roles within one office.⁹² However, the Victorian Privacy Commissioner, Ms Helen Versey disagreed with this argument, and stated:

...my submission is that there is a close interconnection between the laws. Both laws in effect promote transparency of government. Privacy laws promote transparency in that they promote the right of individuals to know what information government collects about them, how it is used and who it is disclosed to. Such rights are incorporated in the general right of access to government information.⁹³

3.92 However, Ms Versey also pointed out in both her submission and in evidence to the committee, that there is a lack of detail in the legislation regarding when the Privacy and FOI Commissioners are to exercise the privacy and FOI functions of the Information Commissioner respectively.⁹⁴ Ms Versey also expressed concern that the independence and autonomy of the Privacy Commissioner may be undermined by placing them within the Information Commissioner's office. However, Ms Versey emphasised that this would depend on the practical operation of the bills, and could be fixed by greater clarity within the Information Commissioner Bill specifically.⁹⁵

3.93 Other witnesses also raised concerns with the lack of clarity in the Information Commissioner Bill regarding the roles of the new commissioners. The NSW Privacy Commissioner commented that the model proposed in the Information Commissioner Bill 'appears open to confusion, as the Commissioner's functions are interchangeable and no provision is made for the finality of decisions'.⁹⁶ The Public Interest Advocacy Centre argued that 'having an FOI Commissioner who can use or perform the functions of a Privacy Commissioner undermines the value of having these different subordinate commissioners, who are each meant to be an independent

92 NSW Privacy Commissioner, *Submission 6*, p. 2.

93 Ms Helen Versey, Victorian Privacy Commissioner, *Proof Committee Hansard*, 15 February 2010, p. 26.

94 Ms Helen Versey, Victorian Privacy Commissioner, *Proof Committee Hansard*, 15 February 2010, p. 27; Victorian Privacy Commissioner, *Submission 15*.

95 Ms Helen Versey, Victorian Privacy Commissioner, *Proof Committee Hansard*, 15 February 2010, p. 27.

96 NSW Privacy Commissioner, *Submission 6*, p. 3.

specialist advocate for their own regime'.⁹⁷ The ALRC echoed these concerns, however, its President, Professor Croucher, ultimately concluded that the ALRC does not object to the specifics of the proposal in the Information Commissioner Bill as 'that could readily be dealt with in practise'.⁹⁸

3.94 A second issue that arose during the inquiry regarding the specifics of the Information Commissioner model was the requisite qualifications of each of the commissioners. The Information Commissioner Bill requires that the FOI Commissioner have legal qualifications, but no similar requirement is placed on either the Information Commissioner or the Privacy Commissioner.

3.95 Dr Lidberg argued that the requirement that the FOI Commissioner has legal qualifications⁹⁹ should be reconsidered.¹⁰⁰ In this respect, Dr Lidberg argued that the requirement does not take into account the wider components of the job of an FOI Commissioner. He stated:

It would be good if this person [the FOI Commissioner] had done possibly, research into FOI, had a good knowledge of the international systems, and was keen on benchmarking and explaining why it is important to benchmark Australia towards other systems. It would be good if this person understood that this is a long-term thing.¹⁰¹

3.96 The Victorian Privacy Commissioner, Ms Helen Versey, agreed with Dr Lidberg's view on this issue, noting that 'I do not necessarily think that regulators have to have legal qualifications'.¹⁰²

3.97 On the other hand, Professor Zifcak from Liberty Victoria strongly supported this aspect of the Bill, and argued that the Information Commissioner should also be required to have a legal background.¹⁰³

3.98 Dr Lidberg also argued that the FOI Commissioner should not be appointed from within the public service, in order to foster the requisite change in culture. He noted:

Unfortunately, because of the tradition of secrecy that comes with the Westminster system and because of our Public Service to such a great

97 Ms Elizabeth Simpson, PIAC, *Proof Committee Hansard*, 15 February 2010, p. 31.

98 Professor Rosalind Croucher, President, ALRC, *Proof Committee Hansard*, 15 February 2010, p. 24.

99 Information Commissioner Bill 2009, clause 14.

100 Dr Johan Lidberg, Academic Chair of Journalism, Murdoch University, *Proof Committee Hansard*, 15 February 2010, p. 7.

101 Dr Johan Lidberg, Academic Chair of Journalism, Murdoch University, *Proof Committee Hansard*, 15 February 2010, p. 9.

102 Ms Helen Versey, Victorian Privacy Commissioner, *Proof Committee Hansard*, 15 February 2010, p. 28.

103 Professor Spencer Zifcak, Vice President, Liberty Victoria, *Proof Committee Hansard*, 15 February 2010, p. 38.

extent being modelled on the UK Civil Service, I do not think the FOI Commissioner should be drawn from the Australian Public Service.¹⁰⁴

3.99 Mr Timmins disagreed with Dr Lidberg on this point arguing that 'I do not think anyone should be excluded—we want the best person for the job'.¹⁰⁵

Conclusion

3.100 The committee notes that on 26 February 2010, Professor John McMillan was appointed as the Information Commissioner Designate. Despite the varied nature of the numerous suggestions made by witnesses as to what category of person would make an appropriate Information Commissioner, Professor McMillan's appointment manages to fulfil them all. Professor McMillan has a strong background as an advocate for FOI, has done exceptional work as the Commonwealth Ombudsman in improving government administration, and has an outstanding legal credentials. The committee commends the government on this appointment.

3.101 The Commonwealth Ombudsman suggested in his submission that the name of the Information Commissioner be changed to the Australian Information Commissioner, in order to distinguish the position from that of information commissioners in other states and internationally, as well as to identify that the Information Commissioner's role relates to the Australian Government.¹⁰⁶ This suggestion was supported by the Administrative Review Council¹⁰⁷ and Dr Lidberg.¹⁰⁸

3.102 The committee supports this suggestion, and recommends that the government make the necessary amendments to the Information Commissioner and FOI Bills.

Recommendation 5

3.103 The committee recommends that the Freedom of Information Amendment (Reform) Bill 2009 and the Information Commissioner Bill 2009 be amended such that all references to the 'Information Commissioner' are replaced by references to the 'Australian Information Commissioner'.

104 Dr Johan Lidberg, Academic Chair of Journalism, Murdoch University, *Proof Committee Hansard*, 15 February 2010, p. 9.

105 Mr Peter Timmins, private capacity, *Proof Committee Hansard*, 15 February 2010, p. 18.

106 Commonwealth Ombudsman, *Submission 8*, p. 8.

107 Administrative Review Council, *Submission 28*, p. 2.

108 Dr Johan Lidberg, Academic Chair of Journalism, Murdoch University, *Proof Committee Hansard*, 15 February 2010, p. 8.

Resources of the Information Commissioner

3.104 As noted in chapter 2, the Office of the Information Commissioner will be resourced with \$19.5 million over four years, in addition to existing resources of the Privacy Commissioner (approximately \$6.4 million in 2008-09¹⁰⁹).

3.105 The committee raised concerns regarding whether this level of resourcing will be adequate to enable the commissioners to perform the significant role required of them. In this respect, the Department of Prime Minister and Cabinet stated:

The budget process itself requires a very robust process internally and it would be based on the number of cases in the past, the expected number of cases in the future, and current activity levels. It went through our budget process.¹¹⁰

3.106 The Commonwealth Ombudsman pointed out that the amendments to the FOI scheme may result in increased costs to government, as it would likely encourage more requests.¹¹¹ Specifically, the reduction in fees, and the removal of a requirement of an Australian address remove significant practical barriers to the making of FOI applications. The Ombudsman submitted that, in his experience, 'these are the most common causes of a request being considered invalid by the receiving agency' and the removal of these barriers will accordingly result in more valid requests.

3.107 However, there was not unanimity amongst witnesses that an increase in FOI applications would result from the proposed amendments. Dr Johan Lidberg disagreed with the Ombudsman's analysis, explaining that:

In a study done by Greg Terrill...that drew from the discussions leading up to the 1982 act, it was anticipated that each government agency would deal with tens of thousands of requests per year. This did not happen at all, and I do not think it will happen with this change either.¹¹²

Conclusion

3.108 The committee is concerned that the Financial Impact Statement for the FOI Bill, and the basis on which resourcing has been determined do not take into account the increase in FOI applications across government that is likely to result from the proposed amendments. The committee urges the government to monitor the funding of the Office of the Information Commissioner on an ongoing basis, and ensure that the commissioners have sufficient resources to undertake the significant and important role that has been designated to them by the proposed legislation.

109 Office of the Privacy Commissioner, *Annual Report 2008–09*, p. 145

110 Ms Glenys Beauchamp, Deputy Secretary, Department of Prime Minister and Cabinet, *Proof Committee Hansard*, 5 February 2010, p. 13.

111 Commonwealth Ombudsman, *Submission 8*, p. 7.

112 Dr Johan Lidberg, Academic Chair of Journalism, Murdoch University, *Proof Committee Hansard*, 15 February 2010, p. 8.

Conclusion

3.109 It is evident from the above discussion that FOI in Australia is in need of significant legislative reforms, and particularly of a cultural shift in the way in which FOI laws are administered. The reform package proposed by the government in the FOI and Information Commissioner Bills has the ability to address the key problems that have been identified with the 1982 FOI Act, including, through its objects clause and the introduction of the FOI and Information Commissioners, to bring about the requisite cultural change.

3.110 The committee commends the government for the consultative approach taken to the development of this legislation, and strongly supports the FOI and Information Commissioner Bills. The committee considers that, but for a few minor suggestions for amendment, the bills effectively take into account the various competing views on how FOI laws should operate. Accordingly, the committee recommends that the bills be passed by the Senate without delay.

Recommendation 6

3.111 The committee recommends that, subject to the amendments outlined in Recommendations 4 and 5 being made, the Freedom of Information Amendment (Reform) Bill 2009 and the Information Commissioner Bill 2009 be passed by the Senate as soon as practicable.

Senator Helen Polley

Chair

Coalition Senators' Dissenting Report

INTRODUCTION

The Coalition is committed to responsible and open government.

The *Freedom of Information Act 1982* was introduced by the Fraser Government as a vital measure to ensure that government is accountable and information is available to facilitate this.

Coalition Senators support many of the provisions of these bills, but have substantial concerns with one aspect of them.

This legislation introduces a substantial change in the onus of proof for appeals to the Administrative Appeals Tribunal. This change has the potential to diminish accountability and transparency, in stark contrast to the stated objectives of this legislation.

In effect, this change demands that applicants must show why secret government documents should not remain secret.

The change in the onus of proof will make it incredibly difficult for applicants to successfully appeal a decision by the Information Commissioner.

The majority report of the Committee recommends that this onus be removed altogether – this recommendation is also opposed by Coalition Senators.

Coalition Senators have further concerns regarding the changes to fees and charges under the proposed legislation. In particular, the possibility of discriminating between individual researchers vis-à-vis those deemed journalists and non-government organisations.

LABOR'S RECORD ON FREEDOM OF INFORMATION

The Rudd Government's position on freedom of information (FOI) has been heavy on rhetoric and short of action. Prior to the 2007 Federal Election, the Rudd Labor Opposition stated that:

“A Rudd Labor Government will restore trust and integrity in the use of Commonwealth Government information, promoting a pro-disclosure culture and protecting the public interest through genuine reform.”¹

¹ *Government information – Restoring trust and integrity*, Election 2007 Policy Document, October 2007.

Indeed, the Labor Party, when in Opposition, described its approach to making information more accessible to the general public with the colourful (if Orwellian) phrase “Operation Sunlight”.

However, the *Freedom of Information Act 1982* Annual Report 2008-09 provides substantial evidence that the Rudd Government is keeping very tight control over the flow of information.

The report shows that there has been a significant increase in the number of FOI access requests that have been refused in the first full financial year (2008-09) of the Rudd Government.²

The number of FOI access requests refused increased from 1368, or 4.36 per cent of the total number of requests in 2007-08 to 1530 or 6.09 per cent in 2008-09. The 2008-09 figures represent an 11.8 per cent increase on the total number of refused FOI access requests over 2007-08. This comes despite a 19.8 per cent decrease in the total number of determined FOI access requests – a decrease from 31,367 to 25,139.

This is substantially more than the number of access requests that were refused in 2007-08, and in the last full financial year of the Howard Government. The increase in the number of refusals comes in spite of a substantial decline in the total number of FOI access requests that the Government received in 2008-09, compared to previous years.³

The cost of facilitating FOI requests has also increased substantially under the Labor Government.

From the last full financial year of the Howard Government, until the first full financial year of the Rudd Government, the cost of FOI increased from just under \$25 million to over \$30 million – an increase of 21.7 per cent.⁴

Given the increasing cost of facilitating FOI requests and the decline in the number of FOI access requests, there has been an extraordinary increase in the average cost per FOI request from 2006-07 to 2008-09. In 2006-07, the average cost per FOI request was \$642.90 and in 2008-09 the cost per request was \$1,101.50 – an increase of 71 per cent over two years.⁵

These facts contradict the government’s purported commitment to ‘promoting a pro-disclosure culture and protecting the public interest’.

The government’s commitment to a pro-disclosure culture was put to the test last year, Mike Steketee reported in *The Australian* on 30 January 2010 of the behaviour of

² *Freedom of Information Act 1982*, Annual Report 2008-09, p. 5.

³ *Freedom of Information Act 1982*, Annual Report 2008-09, p. 2.

⁴ *Freedom of Information Act 1982*, Annual Report 2008-09, p. 19.

⁵ *Freedom of Information Act 1982*, Annual Report 2008-09, p. 2 and p. 19.

public servants in the Department of Climate Change, in their response to an FOI request from Dr Richard Denniss from the Australia Institute:

“Even though the department rang Denniss to confirm that he wanted advice to the minister, and the department's lawyers said this was covered by the request, it was excluded on the instruction of departmental head Martin Parkinson and his deputy Blair Comley.”

“Not easily deterred, Denniss fired in another request asking for documents prepared to help inform Wong and her advisers of the details, merits, limitations and criticisms of the ETS. The response: he may be able to get what he wants if he hands over \$256,586.98, although, catch-22, if he proceeds with his request, the department may decide it involves an unreasonable diversion of resources.”⁶

This example about a prominent public policy issue further illustrates that the Labor Government is not honouring its election commitment to creating a pro-disclosure culture and that Labor’s rhetoric on FOI does not match the reality of continued denial of access to information.

REVERSAL OF THE ONUS OF PROOF FOR APPEALS TO THE AAT

The Government's bills propose a substantive change to the onus of proof for AAT appeals by FOI applicants that will diminish accountability. This clearly undermines the Government’s commitment to creating a ‘pro-disclosure culture’.

The current legislation *Freedom of Information Act 1982* states, in relation to the onus of proof under section 61:

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.

The proposed legislation repeals this section and replaces it with:

In proceedings under this Part, the person who applied to the Tribunal has the onus of establishing that:

- (a) a decision given in respect of the relevant request or application is not justified; or
- (b) the Tribunal should give a decision adverse to a party to the proceeding.

Astonishingly, the Government attempted to pass this change off as a “minor change”,⁷ which was relegated to the section dealing with trivial and technical

⁶ Steketee, Mike. “Labours in the ministry of truth”, *The Australian*, 30 January 2010. Retrieved 1 March 2010: <http://www.theaustralian.com.au/news/opinion/labours-in-the-ministry-of-truth/story-e6frg6zo-1225824638788>

⁷ Summary of main changes between the exposure draft and introduce FOI reform Bills, Department of Prime Minister and Cabinet, November 2009, p. 7.

amendments in the comparative table produced by the Department (which, it should also be noted, was not provided to the Committee until specifically requested).

The sincerity of the Rudd Government's commitment to freedom of information may be gauged from the fact that it actually sought to conceal, by burying it among the miscellany of technical amendments and passing it off as a minor change, a provision which, as we will see from the evidence of experienced expert witnesses, will "undermine" the entire scheme of the *Freedom of Information Act* and make successful applications for the review of refusals "impossible."

In contrast, Coalition Senators believe that this is not a minor change, and creates a barrier to accessing government information. Associate Professor Moira Paterson agreed with Senator Ryan that the changes to the onus of proof, would be a 'retrograde step':

Senator RYAN—Would reversing the onus of proof be a 'retrograde' step, a term I think you used earlier in your verbal submission?

Prof. Paterson—Yes, I think it would be. How serious that turns out to be really depends on to what extent applicants need to go on to the AAT. But if you are going to have an AAT review and you are going to reverse the onus, then you are going to make it very difficult for applicants to make use of that.⁸

In practice, the applicant will have to justify to the Administrative Appeals Tribunal why secret documents should not remain secret. Applicants will only be able to make their case for access in the most general way, while the government will have complete access to the information and are in a substantially stronger position than the applicant to defend their denial of access.

Coalition Senators believe that the change in the onus of proof from the Minister or agency to the applicant will place an insurmountable barrier to government information that will make the FOI applicant quest for information virtually impossible.

Ms Philippa Lynch, First Assistant Secretary Government Division, Department of the Prime Minister and Cabinet, outlined the reasoning behind the change to onus of proof:

Ms Lynch—I can explain to you a little the reasons why that provision was put in the bill. The issue behind that is that at present, if you appeal from a decision of an agency, you appeal straight to the AAT, and you are appealing from the agency's decision, so the agency bears the onus of defending its position. With the interposition of the Information

⁸ *Hansard*, Finance and Public Administration Legislation Committee, Reference: Freedom of Information Amendment (Reform) Bill 2009, 15 February 2010, p. 2.

Commissioner as a new review opportunity for people, if an agency or applicant wishes to appeal from the Information Commissioner's decision to the AAT, they are actually appealing the Information Commissioner's decision, not the department's decision. So the provision in relation to the onus of proof was included because it would not be appropriate for the Information Commissioner to be a party in the AAT, having to defend their position.⁹

Mr Mark Robinson, who appeared on behalf of the Law Council of Australia, is one of Australia's most experienced Freedom of Information practitioners, having appeared in hundreds of applications, both for and against governments, in the course of 17 years, having sat as a judicial officer hearing applications under the New South Wales *Freedom of Information Act*, and in fact having been the draftsman of the NSW Act. He said in response to the Department of Prime Minister and Cabinet's argument for the change that:

Mr Robinson—It is an irrelevant assertion. I say this because the applicant does not normally know what document it is that he or she is seeking, and he or she does not normally know what it contains. They may think they do but they may be wrong. And how can an applicant meaningfully assist the tribunal by presenting his or her case first and by bearing the onus of proving something? You only have to think about it logically, I submit. As an applicant I can stand up and say: 'I put an FOI application in. I don't have to tell you why I did it, because that's irrelevant. I don't have to tell you who I am, because that's irrelevant. I don't have to tell you what I'm going to do with the document when I get it, because that's often irrelevant—and I want the document.' And I sit down. Now, how is that possibly going to discharge the onus of proof? It puts an applicant in an impossible position, both practically and as a matter of fairness, and as a matter of law. On one view of it, that onus could never be discharged, ever.¹⁰

Mr Robinson went on to offer the following observations:

Senator BRANDIS— ... I put it to you, was that where a refusal of an FOI application is before the tribunal it is the government which knows what is in the document and which has the monopoly of knowledge. In those circumstances ... it is almost impossible to imagine how an applicant could succeed if he bears the onus of proof since he has no means of knowing what is in the document.

Mr Robinson—What are they going to say?

Senator BRANDIS—Do you agree with that proposition that I have just put to you?

⁹ *Hansard*, Finance and Public Administration Legislation Committee, Reference: Freedom of Information Amendment (Reform) Bill 2009, 5 February 2010, p. 13.

¹⁰ *Ibid.* p. 19.

Mr Robinson—Absolutely, if they are self represented then they will talk. They will make submission after submission after submission about what they think the document will be, and if they do not want know what it is then about what it should be. All of that will of course waste the tribunal's time.

Senator BRANDIS—Yes.

Mr Robinson—An applicant who has a legal representative hopefully would not do that and ordinarily would not do that. It is a recipe for disaster in the sense that it is giving them a platform and giving them a burden and telling them to discharge an onus that in ordinary circumstances they cannot.

Senator BRANDIS—If I may say so, with respect, I think that is absolutely right. You would be aware, Mr Robinson, as a lawyer, that in fact the very set of circumstances in which you find reversals of onus in statutes is where one party has the monopoly of knowledge of the relevant facts so that it is appropriate that it bear the onus of supporting its decision rather than the party which is information deprived seeking to discharge an onus.

Mr Robinson—I would accept that, but, more fundamentally, in this case the FOI legislation makes it clear that the identity of an applicant is not relevant; and the reason an applicant wants the material is not relevant. The wording of the legislation is 'every Australian has a right'. The wording of the new objects clause in section 3 is 'to give to the Australian community access to information by Commonwealth publishing' but also by providing a right of access to the documents and combined with subsection 4 of section 3 of the new objects clause 'the parliament intends that the functions and powers given by the act to be performed and exercised as far as possible—and here is the important part—to facilitate and promote public access to information promptly and at the lowest reasonable cost'.

Senator BRANDIS—That is the objects clause. What effect will the proposed new section 61 have on that?

Mr Robinson—It will not facilitate and promote the flow of public access to information. How can you put an applicant up and say, 'Prove the case against the Commonwealth,' when you do not know the case against the Commonwealth; or, 'Prove why we should release the document,' when they do not know what the document is. Often a brief bullet point or a cryptic statement of reasons from the Commonwealth is the only document they have to comment on let alone attack. You can only make submissions on those things. You cannot discharge an onus of proof by adducing evidence; you can only make oral submissions. You cannot put on evidence to fight reasoning, let alone brief, cryptic or incomplete reasoning. It is only when a matter gets to the AAT or possibly, hopefully, before the information commissioner under this new system, that the Commonwealth reasons will become more expensive because the information commissioner will have, hopefully, extracted more detailed reasoning out of them. Only then will things be a little more clear.

Senator BRANDIS—What impact does the proposed new section 61 have?

Mr Robinson—It will undermine it.

Senator BRANDIS—So what we see is declarations of intent in the objects clause saying one thing, but, when one drills into the details of the legislation, in this particular case the reversal of the onus of proof, the substance is at variance with the declaration of intent.

Mr Robinson—The most stark way to appreciate this is to accept that, in most FOI cases since the beginning of the FOI Act, in the AAT the Commonwealth goes first. The Commonwealth agency has presented its case first in every case I have been involved in and in almost every case that I am aware of. I think there may be one or two cases where it has been reversed in very unique circumstances. For example, third parties who want to preserve their trade secrets may sometimes come in. They are called reverse FOI applications by other people. The situation is different there, but in the ordinary FOI case of an FOI applicant wanting a document from the Commonwealth the Commonwealth goes first. This will change that.

Senator BRANDIS—Would you agree with my characterisation that the effect of section 61 is at variance with the declaration of intent in the objects clause?

Mr Robinson—Yes

A number of other witnesses at the inquiry stated that the change in the onus of proof will make it virtually impossible for applicants to succeed. Mr Jack Herman, the Executive Secretary of the Australian Press Council also criticised the change in the onus of proof:

Mr Herman—If, however, the Senate decided to have two levels of merit review, first by the information commissioner and then by the AAT, the council would suggest that the onus of proof in either merit review should rest with the officials who are contending that the information should not be released. The objects clause of the act makes it clear that the object of freedom of information is the release of information. Therefore, the onus to show that the information should not be released should always rest with the official trying to forestall release.¹¹

Professor Spencer Zifcak, the Vice-President of Liberty Victoria also expressed his concern with the change to the onus of proof:

Senator RYAN—I should add that that onus of proof is only reversed for appeals from the Information Commissioner to the AAT. But with all your expertise that would be an almost impossible onus to surmount given the information, as you mentioned, resides with the person or the agency or government.

¹¹ *Hansard*, Finance and Public Administration Legislation Committee, Reference: Freedom of Information Amendment (Reform) Bill 2009, 15 February 2010, p. 21.

Prof. Zifcak—I agree with that.¹²

Under the current legislation, Ministers and agencies have the onus of showing why secret government documents should remain secret. The proposed change to the onus of proof places a virtually impossible burden for applicants to show that secret government documents should not remain secret. There is a substantial asymmetry of information between the government and the applicant and the change in onus will place an insurmountable barrier to some FOI requests.

As Mr Robinson – who was more acquainted with FOI practice than any other witness – was at pains to stress, that asymmetry is the very reason why it is, from a functional point of view, necessary to reverse the onus. Since it is the applicant, who is not possessed of the information whose disclosure the government has refused, it is not possible for an applicant to mount a positive argument about material of which he is ex hypothesis ignorant.

These are the very circumstances – i.e. where one of the two adverse parties possesses a monopoly of information – that Parliament routinely casts the onus on that party to defend its position, since it is not, from an evidentiary point of view, practically possible for the other party to attack it.

COALITION SENATORS OPPOSE RECOMMENDATION 4 OF THE MAJORITY REPORT – THE PROPOSAL TO REMOVE OF THE ONUS OF PROOF FOR APPEALS TO THE AAT

Government Senators recommend, by Recommendation 4, that relevant sections of the *Bill* and of the *Freedom of Information Act* itself, “be amended to remove the concept of an onus of proof from the Act.” The only rationale of this recommendation appears to be the following statement in para. 3.146:

“The committee considers that the alteration of the onus of proof such that whichever party applies for review by the AAT bears the onus of proof is inappropriate, unnecessary and unfair to individuals. Accordingly, in order to make the FOI Act consistent with the lack of onus in the rest of the AAT’s jurisdiction, the committee recommends that proposed section 61 be amended to remove the concept of onus of proof from the FOI Act entirely. The committee recommends that any other amendments required to give effect to the removal of the notion of onus from the FOI Act also be made.”

That statement reveals a lamentable ignorance of the structure and functioning of the FOI Act. Under the terms of the existing s. 61(2), the onus “of establishing that a decision refusing the request [for access] is justified” lies upon “the party to the proceedings that opposes access being given to a document in accordance with a request”. Consistency with the merits review procedures elsewhere in the *Administrative Appeals Tribunal Act*, which appears to be the only consideration resembling a rationale for the Government Senators’ recommendation, ignores the fact

¹² *Ibid*, p. 36.

that, in a typical merits review, both parties will have access to the relevant facts, of which review is sought.

The peculiarity of applications for review of refusals of access under the FOI Act is that, *ex hypothesi*, the party seeking review cannot know of the contents and substance of the document, the refusal of access to which is sought to be overturned. In those circumstances, as we have pointed out, there is an asymmetry of information – an asymmetry so absolute that, but for the provisions of s. 61(2), the unsuccessful applicant for access is literally helpless in bringing its review application. Since it cannot be made aware of the contents of the disputed document, how is it to advance arguments that the document should have been released? It is for these reasons that experienced practitioners before the hearing warned that removal of the reverse onus of proof would effectively destroy the scheme of the FOI Act.

The expedient recommended by Government Senators is no better. Just as surely as the Government amendment which they criticize, the Government Senators' proposal (Recommendation 4) would remove the mechanism of the reverse onus. The same mischief, which the Government Senators criticize as "inappropriate, unnecessary and unfair to individuals" would remain. It is only by retaining the *status quo* in s. 61(2) that an applicant for review is able to be ensured a reasonable opportunity to put forward his case.

Opposition Senators point out that the reversal of the onus in review proceedings before the AAT has been a feature of the FOI Act since its inception. Indeed, it was a feature each of the two Bills which were precursors of the existing *Act* – the *Freedom of Information Bill 1978* and the *Freedom of Information Bill 1981*, where it appeared in substantially similar form in cl. 41 and 51 respectively.

The Explanatory Memorandum to the current Act explains the point which Opposition Senators are now making:

“Clause 61 places the onus of establishing that a decision given in respect of a request was justified on the agency or Minister to whom the request was made. *This is because the applicant does not have access to the document concerned, and so it is not necessarily in a position to argue that the decision was wrong.*”¹³

So clear was the understanding of the drafters of the current FOI Act and its predecessors that the reverse onus was essential, and so uncontroversial was it, that in the course of the 526-page report of the Senate Standing Committee on Constitutional and Legal Affairs into the *Freedom of Information Bill 1978*, tabled on 6 November 1979,¹⁴ that the matter was not even adverted to.

¹³ *Freedom of Information Bill 1981 Explanatory Memorandum* Circulated by the Honourable Ian Viner M.P., n.d., p. 51.

¹⁴ Parliamentary Paper 272/1979

For the reasons well understood by the framers of Australia's freedom of information laws, well understood by all of the expert practitioners who appears before the Committee, and which Opposition Senators have explained - but which seem to have escaped the comprehension of Government Senators - both the proposed amendment to s. 61, and the Government Senators' alternative proposal, would equally deal a mortal blow to freedom of information in Australia.

No amendment to s. 61 should be countenanced.

THE POTENTIAL FOR BUREAUCRATIC MANIPULATION AND RECALCITRANCE

It is clear that the substantive change to place the onus of proof on the applicant will make it extraordinary difficult for applicants to get the information they are looking for, there are a number of related concerns that were raised during the hearings.

In particular, there is the potential for departments and agencies to instigate time wasting strategies in order to delay the release of politically sensitive information beyond its use by date.

Mr Timmins—My point is really that, under proposed section 60, an agency, an applicant or a third party may seek further review of an Information Commissioner decision simply on the basis that they assert that decision is wrong. I think this opens up the prospect of delaying tactics from an agency or a minister who is not happy with an Information Commissioner decision and seeking to delay disclosure by simply lodging an application with the AAT.¹⁵

A further concern was raised by Mr Mark Robinson of the Law Council of Australia, who said that as a consequence of the asymmetry of information between the applicant and the government, there is the potential for an endless cycle of applicant submissions.

Mr Robinson—Absolutely, if they are self represented then they will talk. They will make submission after submission after submission about what they think the document will be, and if they do not want know what it is then about what it should be. All of that will of course waste the tribunal's time.¹⁶

While the Information Commissioner does have the capacity to declare a person to be a vexatious applicant for the purposes of the FOI Act,¹⁷ the point raised by Mr

¹⁵ *Ibid.* p. 17.

¹⁶ *Hansard*, Finance and Public Administration Legislation Committee, Reference: Freedom of Information Amendment (Reform) Bill 2009, 5 February 2010, p. 20.

¹⁷ Freedom of Information Amendment (Reform) Bill 2009, Explanatory Memorandum, 2008-09, p. 2.

Timmins suggests that the public servants and Ministers could frustrate the FOI process – in contrast to the stated objectives of the legislation.

FEES AND CHARGES

In his second reading speech on the Freedom of Information Amendment (Reform) Bill 2009, the Parliamentary Secretary to the Prime Minister, the Hon Anthony Byrne MP said, that *“The First five hours of decision-making time for application from journalists and not-for-profit organisations will be free, and for all other applications the first hour of decision-making time will be free.”*¹⁸

Some of the changes to fees and charges will be made through changes to regulations. Additionally, the Information Commissioner will be tasked with reviewing all charges within 12 months of their appointment. Mr Peter Timmins raised expressed some concerns relating to the special concession for journalists and not-for-profits.

Mr Timmins—But I have suggested that one hour free for John and Mary Citizen, which is what it amounts to, and five hours free for anyone an agency reasonably believes to be a journalist or anyone an agency reasonably believes to be a non-profit organisation are both unsatisfactory. There is no definition of journalists, and of course it is very hard to define. In my submission I suggested that individuals, community or similar groups who individually or on behalf of others seek access to documents for the purpose of participating in government processes, or the purpose of scrutiny and review of government activities that impact on members of the public generally, or in a particular instance, should get some special concession if we are going to maintain this idea of special concession for charges under the act.¹⁹

Coalition Senators have concerns that someone who is making a third party application for government documents will not be treated in the same way as a journalist or an applicant associated with a not-for-profit organisation.

In effect, ordinary Australian citizens will be treated in a different manner to those from selected organisations or occupations. This will undermine independent research and scrutiny by individuals, purely on the basis of a lack of association with favoured organisations.

A further issue raised by the Australian Press Council was that the structure of fees and charges proposed in the legislation will “encourage administrative inefficiency”:

“If there is no search fee nor a decision-making fee, then agencies have an incentive to make production and assessment of information efficient,

¹⁸ Byrne, Anthony. “Freedom of Information Amendment (Reform) Bill 2009”, Second Reading Speech, 26 November 2009.

¹⁹ *Hansard*, Finance and Public Administration Legislation Committee, Reference: Freedom of Information Amendment (Reform) Bill 2009, 15 February 2010, p. 18.

whereas fees applied on the basis of time simply encourage administrative inefficiency.”²⁰

JURISDICTION SHOPPING

The Privacy Advisory Committee (PAC) raised issues relating to ‘Commissioner shopping’. If all three Commissioners: the Privacy Commissioner, the Information Commissioner and the FOI Commissioner; have the same powers over information and privacy, there is the potential for different interpretations of the legislation and inconsistent rulings by the different commissioners.²¹

A further issue raised by Ms Philippa Lynch from the Department of Prime Minister and Cabinet was the issue of ‘forum shopping’ between the Information Commissioner and the Ombudsman.

Ms Lynch—I heard a little bit of that evidence before we came up. There is always some potential for there to be some degree of forum shopping and overlapping of jurisdictions, and I think the Ombudsman mentioned this morning that he will be subject to Information Commissioner investigation in cases and vice versa.²²

Thus there are at least two layers of bureaucracy where some degree of ‘forum shopping’ or ‘Commissioner shopping’ could take place – between the Information Commissioner and the Ombudsman, and between the Information Commissioner, the FOI Commissioner and the Privacy Commissioner.

As a consequence of the overlapping jurisdictions relating to government information, there is a potential for conflicting or inconsistent decisions regarding the release of information, increased paper shuffling between the Commissioners and unnecessary bureaucracy, and the corresponding inefficiency and delays. As the PAC states:

“...we also believe this tri-part “sharing” of functionality in a practical setting will rely on extraordinarily close working relationships between all three information officers. The potential for duplication of effort, inconsistency in application and confusion around role responsibility is significant.”²³

²⁰ Disney, Julian. “Australian Press Council submission to the Senate Standing Committee on Finance and Public Administration on its Inquiry into the *Freedom of Information Amendment (Reform) Bill 2009* and *Information Commissioner Bill 2009*”, Australian Press Council.

²¹ Privacy Advisory Committee, “Comments on Information Commissioner Bill 2009”, Submission to the Senate Finance and Public Administration References Legislation Committee, Freedom of Information Amendment (Reform) Bill 2009.

²² *Hansard*, Finance and Public Administration Legislation Committee, Reference: Freedom of Information Amendment (Reform) Bill 2009, 5 February 2010, p. 12.

²³ Privacy Advisory Committee, “Comments on Information Commissioner Bill 2009”, Submission to the Senate Finance and Public Administration References Legislation Committee, Freedom of Information Amendment (Reform) Bill 2009.

This point is confirmed by the Commonwealth Ombudsman, Professor John McMillan, who said in his submission to the inquiry that:

“The combined impact of the proposed changes will be a greater workload for agencies in providing access to information, formally and informally. Dealing with access requests is likely to be a larger agency function than at present.”²⁴

The Ombudsman also expressed concern that the number of FOI requests could increase creating administrative bottlenecks and time delays. More time could be spent on resolving disputes, rather than processing requests. Prof. McMillan said:

“Our experience is that when delays become entrenched in FOI, it can take considerable time and resources for them to be resolved.”²⁵

PRIVACY CONCERNS

Both the Australian Privacy Foundation and the Cyberspace Law and Policy Centre (CLPC) expressed reservations about the universal application of the public interest test to all government information.

Their particular concern is that departments and agencies could misapply the public interest test to “information which has traditionally been freely available, or to information which under the new regime should be made freely available.”²⁶

The CLPC acknowledges that the application of the public interest test applies to formal requests under section 11A, however the CLPC notes that there is a need for explanatory and guidance material from the Information Commissioner that would “head off” any misunderstanding.

The CLPC is concerned that the public interest test allows departments and agencies some discretion to apply “strict ‘gatekeeper’ processes to all decisions to public or otherwise proactively

The CLPC also outlined its concerns regarding the application of privacy provisions:

“In my view, and I suspect the view of most privacy regulators and experts, the proposed change would weight the scales too heavily against privacy – personal information would have to pass the double test to qualify for withholding. Firstly its disclosure would have to be ‘unreasonable’ and then ‘contrary to the public interest’. It is difficult to see why a disclosure

²⁴ McMillan, John. “Submission by the Commonwealth Ombudsman”, Senate Finance and Public Administration Legislation Committee, Freedom of Information Amendment (Reform) Bill 2009 and Information Commissioner Bill 2009, January 2010.

²⁵ Ibid.

²⁶ Waters, Nigel. “Commonwealth FOI amendments shouldn’t miss the opportunity for real reform”, Submission on the Freedom of Information Amendment (Reform) Bill 2009 and Information Commissioner Bill 2009 to the Senate and Finance Public Administration Committee, Cyberspace Law & Policy Centre, January 2010, p. 5.

of personal information could be ‘unreasonable’ and yet in the public interest.’²⁷

The CLPC also expressed grave concerns with the fact that commercial interests receive greater protection than personal information. Of concern to the CLPC was that there could be a substantial increase in the number of FOI requests that are refused on the basis that commercially valuable information ‘could reasonably be expected to be, destroyed or diminished if the information were disclosed’. The CLPC believes that the threat of diminished value of commercial information due to exposure could lead to more FOI access requests being refused despite meeting the public interest test.

RECOMMENDATIONS

Coalition Senators are strongly opposed to the burden of the onus of proof for appeals to the AAT lying with the applicant. The Government has not provided sufficient grounds for this drastic step, which would represent the first known occasion where the onus of proof has been so reversed in relation to Freedom of Information regimes.

Coalition Senators recommend that onus of proof for appeals from the Information Commissioner to the AAT should remain with Government – it must establish why a document or information should not be released. The bills should be amended to reflect this.

Accordingly, Coalition Senators oppose both the bill in its current form and the proposal at recommendation 4 of the majority report of the Committee.

Coalition Senators are also opposed to the potential for discrimination by the government between individuals and those deemed to be journalists or non-government organisations through the application of different cost regimes.

As there is no definition of ‘journalist’ outlined in the bill, and given the increasing fragmentation of media and evolving technology, Coalition Senators believe the government should ensure that no such discrimination based on costs occurs if these bills are enacted.

Senator Scott Ryan
Deputy Chair

Senator the Hon George Brandis SC

²⁷ Ibid. p. 6.

Australian Greens

Additional Comments

The Australian Greens support reform of the Freedom of Information Act and welcome the arrival of these long awaited amendments. Reform to the current Act is long overdue. The effectiveness of the regime, and the ability of Australian citizens to access information about government decision-making, has been greatly diminished.

The Greens believe open and transparent government is a prerequisite to an effective democracy. We believe that creating a culture of openness at all levels of government is essential if the Australian people are to have any faith at all in the parliament.

Response to Committee Recommendations

With regard to the Committee's report the Australian Greens wish to provide the following additional comments on each of the Committee's Recommendations.

Committee Recommendation 1

The Australian Greens support the amendment of section 49 of the Administrative Appeals Tribunal Act 1975 to provide that the Information Commissioner is an ex officio member of the Administrative Review Council.

Committee Recommendation 2

The Australian Greens believe that the issue of exemption from the Act are central to the successful operation of the Act and these issues are more appropriately dealt with by the Parliament rather than by a statutory officer. We also advocate that it is beyond the scope of the role of the Information Commissioner to decide such fundamental aspects of the legislation, after the bill has been passed.

The Greens do not believe that, simply because a document originated in a security agency, it automatically has implications for national security and therefore should receive automatic exemption from the freedom of information act. An extract from my second reading speech on the Freedom of Information (Removal of Conclusive Certificates and Other Measures) Bill 2008, and our subsequent amendments moved in committee of the whole, illustrates our concerns:

"In fact, many documents pass through any number of agencies, including some security and intelligence agencies, before they reach a minister. It is ludicrous simply to tick a box and say that if it has come through a certain department then it is in the national interest and should be excluded...

It was put to me in a conversation with a very senior legal counsel who has worked on many of the terror cases where these sorts of laws might come into effect that the security intelligence agencies need to be tightly circumscribed under law and not be exempt from the sorts of provisions that we see under the Freedom of Information Act. This is partly to their own protection, so that the laws and the boundaries within which they

operate are made clear. We must have a freedom of information regime that gives us the power to review the work of these agencies where possible, within the provisions as they exist to protect national security. We must have an FOI regime that gives us the flexibility to weigh the public interest in national security against the public interest in accountability and transparency because sometimes the latter will outweigh the former."

Committee Recommendation 3

The Australian Greens will seek that the government respond to this issue before the bill is voted on in the Senate. We request that the government give consideration to the issues raised with respect to fees and charges and we do not support leaving consideration of this matter, which was of particular interest to many witnesses in this inquiry, to the drafters of the regulations.

Committee Recommendation 4

The Australian Greens strongly support this recommendation that the proposed section 61, in item 42 of Schedule 4 to Part 1 of the Freedom of Information Amendment (reform) Bill 2009 be amended to remove the concept of an onus of proof from the Act. We take this opportunity to emphasise the Committee's view that this recommendation must be adopted before the passage of this bill.

Committee Recommendation 5

The Australian Greens support the recommendation changing all references to the 'Information Commissioner' to the 'Australian Information Commissioner'.

Additional Areas of Interest

In addition to these recommendations made by the Committee I would like to indicate additional areas of interest to the Australian Greens:

- the application of the public interest test to all exemptions, in particular to Cabinet notebooks and the exemption of whole agencies from the scheme;
- the fee and charges structure;
- leadership from the government and the culture of disclosure embodied in the Rudd Government including the proposed publication scheme not applying to ministers;
- the application of freedom of information laws to the parliament.

These areas will be examined in light of the Australian Greens desire to promote further accountability and transparency in government decision-making and activities.

Senator Scott Ludlam
Australian Greens

APPENDIX 1

Submissions and Additional Information received by the Committee

1	Name Withheld
2	Twomey, Dr Anne
3	Kinross, Ms Julie
4	Murray, Mr Andrew
5	Kline, Ms Karen
6	Office of the NSW Privacy Commissioner
7	Lidberg, Dr Johan
8	Office of the Commonwealth Ombudsman
9	Australian Law Reform Commission
10	Telstra
11	Australian Network of Environmental Defender's Office
12	Law Council of Australia
	<i>Additional Information</i>
	Table of main changes to draft Bills - tabled 5 February 2010
13	Community and Public Sector Union
14	Australia's Right to Know
15	Office of the Victorian Privacy Commissioner
16	Cyberspace Law & Policy Centre
17	Liberty Victoria
18	Jones, Mr David
19	Timmins, Mr Peter
20	Paterson, Ms Moira
21	Australian Privacy Foundation
22	Commonwealth Human Rights Initiative
23	Australian Press Council
24	Public Interest Advocacy Centre Ltd
25	New South Wales Council for Civil Liberties
26	Privacy Advisory Committee
27	Barber MLC, Mr Greg

Additional Information

Department of the Prime Minister and Cabinet
Information provided following hearing of 5 February 2010

APPENDIX 2

Public Hearings

Friday, 5 February 2010

Parliament House, Canberra

Committee Members in attendance:

Senator Helen Polley (Chair)

Senator Scott Ryan (Deputy Chair)

Senator Doug Cameron

Senator Jacinta Collins

Senator Helen Kroger

Senator the Hon George Brandis

Senator Scott Ludlam

Witnesses

Commonwealth Ombudsman

Professor John McMillan AO

The Right to Know Coalition

Mr Michael McKinnon

Department of Prime Minister and Cabinet

Ms Joan Sheedy, Assistant Secretary, Privacy & FOI Policy Branch

Ms Maia Ablett, Senior Advisor, Privacy & FOI Policy Branch

Law Council of Australia

Mr Mark Robinson, Committee Member

Ms Téa Paris, Policy Lawyer

Monday, 15 February 2010

Victorian Parliamentary Committee Rooms, Melbourne

Committee Members in attendance:

Senator Helen Polley (Chair)

Senator Scott Ryan (Deputy Chair)

Senator Doug Cameron

Senator Helen Kroger

Senator Scott Ludlam (via teleconference)

Witnesses

Associate Professor Moira Paterson

Dr Johan Lidberg, Academic Chair of Journalism, Murdoch University

Mr Peter Timmins, Managing Director, Timmins Consulting (via teleconference)

Australian Press Council

Mr Jack Hermann (via teleconference)

Australian Law Reform Commission

Professor Rosalind Croucher (via teleconference)

Victorian Privacy Commissioner

Ms Helen Versey, Privacy Commissioner

Ms Felicity Wright, Policy and Compliance Officer

Public Interest Advocacy Centre

Ms Elizabeth Simpson, Solicitor (via teleconference)

Liberty Victoria

Professor Zifcak