Mr Richard Glenn  
Assistant Secretary  
Business and Information Law Branch  
Attorney-General’s Department  

By email: foireview@ag.gov.au  

Dear Mr Glenn  

Submission to the review of the Freedom of Information Act 1982  

The National Health and Medical Research Council (NHMRC) welcomes the review of the Freedom of Information Act 1982.  

We provide our submission on the following terms of reference.  

(a) The impact of reforms to freedom of information laws in 2009 and 2010, including the new structures and processes for review of decisions and investigations of complaints under the FOI Act, on the effectiveness of the FOI system  

NHMRC welcomes many of the reforms. Some reforms are burdensome, that require agencies to make very high volumes and scope of reporting to the OAIC on a regular basis, together with the limited options for extensions of time, especially at the internal review stage. We address particular instances of these burdens under term of reference (g).  

We would welcome any streamlining or reduction of these requirements without compromising the need for the OAIC to be able to perform its role effectively.  

(b) The effectiveness of the Office of the Australian Information Commissioner  

In our view the OAIC has proved very effective in fulfilling an independent central regulatory mechanism and information provider on FOI generally. In particular, the IC’s role in producing guidance material for agencies, where very little was available in the past, has been very valuable, and has contributed to consistency in Commonwealth FOI decision-making.  

We are aware that there is a large backlog of IC review requests and any means to reduce this backlog would be welcome.
(d) The reformulation of the exemptions in the FOI Act, including the application of the new public interest test, taking into account:

(i) the requirement to ensure the legitimate protection of sensitive government documents including Cabinet documents; and
(ii) the necessity for the government to continue to obtain frank and fearless advice from agencies and from third parties who deal with government;

NHMRC administers significant numbers and sizes of grants to persons who perform important health and medical research for Australia (National Health and Medical Research Council Act 1992, s 7 and s 51). Due to the competition for these grants, the majority of grant applicants are unsuccessful.

In order to assess the quality of these complex grant applications, NHMRC relies heavily on a peer review system for their assessment. Eminent researchers from outside the agency are asked to participate, at minimal remuneration, as external assessors and in NHMRC’s peer review panels across its range of granting schemes every year. Without a peer review system, NHMRC would not be able to administer its grant system.

The scientific and medical research community is a small one, particularly when conflicts of interest and expertise issues limit the pool of potential peer reviewers. There is potential significant detriment to this system should unsuccessful grant applicants learn the identities of the peer reviewers who reviewed their grants. NHMRC does not make public, or provide to individual grant applicants, the names of the persons who assessed specific applications. If unsuccessful applicants were to become aware who reviewed their application, this would be likely to further impact on the frank and fearless advice provided by reviewers and the range and number of peer reviewers willing to participate in this system.

NHMRC FOI decision-makers have generally not released the names of peer reviewers when documents containing this information are subject to an FOI request, relying on s 47F and s 47E(d).

However, whilst these exemptions are potentially available, several others applicable to other scientific documents or similar deliberative documents are not.

We note that some exemptions that cover documents that relate to scientific research were not amended in 2010. In particular we note that (leaving aside the application of the public interest test):

- Section 38 (secrecy provisions) was not amended;
- Section 47H (formerly s 43A) (research documents) was not substantively amended; and
- Section 47C (formerly s 36) (deliberative processes) was not substantively amended.

Because of their wording, and/or the absence of relevant provisions in the Schedules to the FOI Act, NHMRC does not have the benefit of any of these exemptions in relation to its peer review documents. This may also be the case for other agencies that administer research grants, though we do not purport to speak for them.

We would appreciate the review considering whether it is appropriate to recommend that one or more of the above exemptions be reviewed, with the possibility of them being made applicable to the names of peer reviewers of agencies that administer Commonwealth grants for scientific research.
We emphasise that we are not seeking to apply these arguments to documents containing identities of peer reviewers who provide expert advice and assistance to NHMRC in the preparation of NHMRC guidelines and advice to the community.

(f) The role of fees and charges on FOI, taking into account the recommendations of the Freedom of Information Commissioner’s review of the current charging regime

NHMRC supports most of the recommendations on fees and charges set out in the FIC’s review.

In particular, NHMRC strongly supports the recommendation for the simplification of the practical refusal mechanism to a ceiling in processing time of 40 hours (Recommendation 4).

We would also welcome a strengthening and clarification of the charges that may be imposed for access to documents under the IPS, where the documents cannot readily be made available on a website, in accordance with s 8D(4) of the FOI Act (if that matter is within the terms of reference of this review).

(g) The desirability of minimizing the regulatory and administrative burden, including costs, on government agencies.

Whilst NHMRC supports the rationale and principles behind the FOI Act, as a small agency, the processing of FOI requests places a significant burden on its resources.

This is particularly so given the overall upward trend in FOI request volume since the introduction of the reforms and that fact that, as for other small agencies, NHMRC cannot afford to employ dedicated FOI officers.

NHMRC finds the following matters administratively burdensome and would welcome any measures to streamline them:

- The absence of an automatic extension of time on internal reviews where there is a need to consult third parties who were not consulted by the initial decision maker – presently the decision maker must apply under s 54D(3) for such an extension;
- The 30 day limit on extensions of time by agreement with the applicant under s 15AA;
- The large number of requirements to report to, or apply to, the OAIC on particular extension matters, for example:
  - notifying the OAIC when an extension of time is obtained by negotiation with the applicant under s 15AA;
  - the need to apply to the OAIC for an extension when time has expired, under s 15AB, and only on the grounds permitted under that section;
  - the need to apply to the OAIC for an extension of time for internal reviews (s 54D(3)).

We submit that:

- there should be an option to negotiate extensions of time with the applicant beyond the limit of 30 days provided for by s 15AA;
- s 15AB should be subsumed under s 15AA as one of the grounds on which an agency can seek an extension of time from the applicant;
- the Act should be amended to provide for an additional 30 days to the decision due date where an internal review decision maker sees the need for third party consultation on documents that were not the subject of that consultation at first instance;
- whilst the OAIC should retain a monitoring role to ensure agency compliance with timeframes, the Act could leave more in the hands of the parties on extensions of time,
with the OAIC’s role to perform a decision-making role on extensions only when there is a breakdown in negotiations (in much the same way as the Courts do in relation to interlocutory disputes between parties to proceedings).

NHMRC staff would be happy to meet to explain these in further detail, should you so require.

Yours sincerely,

Tony Kingdon  
Chief Executive Officer (A/g)  
National Health and Medical Research Council

6 December 2012