



Submission to the Hawke Review of Freedom of Information laws

April 2013

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The New South Wales Society of Labor Lawyers aims, through scholarship and advocacy, to effect positive and equitable change in the substantive and procedural law, the administration of justice, the legal profession, the provision of legal services and legal aid, and legal education.

This submission was approved by the New South Wales Society of Labor Lawyers' Executive. It is in line with the Society's principles, objectives and values.

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Review of the Freedom of information (FOI) legislation

Submission by the New South Wales Society of Labor Lawyers to the Hawke Review

March 2013

1 Executive summary

The New South Wales Society of Labor Lawyers (the **Society**) welcomes the opportunity to provide a submission to the review of the *Freedom of Information Act 1982* (Cth) (**FOI Act**) and the *Australian Information Commissioner Act 2010* (Cth) (**IC Act**) being conducted by Dr Allan Hawke AC (the **Hawke Review**).

In summary, the Society expresses strong support for:

- the Government's 2010 package of reforms to FOI law and processes, honouring commitments of greater openness;
- the recognition of public ownership of information and the commitment to greater openness by Departments and agencies in the proactive publication of material;
- the reforms in the key areas of exemptions and review processes at that time, including the public interest test;
- the establishment of the Office of the Australian Information Commissioner;
- the role played to date by the Information Commissioner and the FOI Commissioner; and
- the introduction of the Information Publication Scheme and Department and Agency disclosure logs.

In terms of further reforms, the Society would support:

- clarification of the status of Incoming Government Briefs, and possibly excluding them from FOI;
- stronger provisions enabling agencies to reject vexatious or frivolous requests, or requests which require unreasonable Departmental time and resources to process;
- removal of the right to seek AAT review without prior review by the Information Commissioner, provided such review is conducted within a reasonable time; and
- re-introduction of a relatively low fee for all FOI applications other than personal files, to clearly identify requests as such and promote genuine applications.

2 New South Wales Society of Labor Lawyers

The NSW Society of Labor Lawyers aims to promote changes in both substantive and procedural law, the administration of justice, the legal profession, legal services, legal aid and legal education to help bring about a more just and equitable society.

The Society also provides a forum for people involved in the law who believe in Labor principles of fairness, social justice, equal opportunity, compassion and community.

The Society supports the principles which underlie progressive FOI laws, including enhancing openness and transparency in government decision-making, and providing a statutory right of access for members of the public to Government documents and records.

3 Background to the Commonwealth Government's Freedom of Information reforms

The Australian Labor party has a long, and well publicised, commitment to both the establishment and maintenance of freedom of information laws. The establishment of a Commonwealth FOI Act first became Labor Party policy in 1972 – some ten years before the FOI Act first came into law – as detailed in a speech by the then Leader of the Opposition, Gough Whitlam MP.¹

Prior to the 2007 election, the Federal Labor Party made an election commitment to substantially overhaul the FOI Act as part of its policy platform to restore trust and integrity in Government. Those commitments were set out in the policy document titled "Government information: Restoring trust and integrity".²

While many of the commitments were formulated in response to the secrecy of the Howard government, others were also informed by the public campaign for free speech by a coalition of 12 major media organisations and journalists who together were known as "Australia's Right to Know".

Following extensive consultation by the Government in 2008 and 2009, along with a Parliamentary enquiry by the Senate Finance and Public Administration Legislation Committee, the bills containing the reforms were passed into law by Parliament on 13 May 2010.

The reforms were almost universally praised by not only FOI and governance experts, but also the media.

While the review of the FOI Act and IC Act are legislatively mandated, the Society would urge the Government not to use this review as an opportunity to wind back any of the substantive pro-disclosure reforms which have been made. In this regard, it is worth recalling that the reforms were described by the then Parliamentary Secretary in the second reading speech in the House of Representative as "fulfil[ling] the government's promise to the Australian public."³

Such promises should not be broken without very good reasons.

¹ For a brief account of the history of the establishment of the FOI Act see Senator the Hon Joseph Ludwig, 'The Freedom of Information Act – no longer a substantial disappointment', (May 2010) Admin Review, no. 59.<
http://www.google.com.au/url?sa=t&rct=j&q=joe%20ludwig%20foi%20administration&source=web&cd=1&sqi=2&ved=0CC8QFjAA&url=http%3A%2F%2Fwww.arc.ag.gov.au%2FDocuments%2FAdmin%2BReview%2B59.doc&ei=ZV9KUebgKMWxIAWZpoG4Cw&usq=AFQjCNFhzbexl_PYHclHiwvypthX1iNmPQ&bvm=bv.44158598.d.dGI&cad=rjt >

² Kevin Rudd MP and Senator the Hon Joseph Ludwig, *Government information: Restoring trust and integrity*, October 2007 Election Policy Document
<<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=ld%3A%22library%2Fparty%2FEFRO6%22> .

³ Anthony Byrne MP, *Second Reading of Freedom of Information Second Reading Amendment (Reform) Bill 2009* (26 November 2009)
<[http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=BillId_Phrase%3Ar4163%20Title%3A%22second%20reading%22%20Content%3A%22!%20move%22%7C%22and%20move%22%20Content%3A%22be%20now%20read%20a%20second%20time%22%20\(Dataset%3Ahansard%20%7C%20Dataset%3Ahansards\);rec=0](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=BillId_Phrase%3Ar4163%20Title%3A%22second%20reading%22%20Content%3A%22!%20move%22%7C%22and%20move%22%20Content%3A%22be%20now%20read%20a%20second%20time%22%20(Dataset%3Ahansard%20%7C%20Dataset%3Ahansards);rec=0) >

4 Terms of reference

The views of the Society, in respect of each of those matters the subject of the Hawke Review's terms of reference, are set out below.

1(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.*

The Society believes that the FOI reforms have on the whole been very effective. In particular, they have had a significant impact in enabling the release of extensive Government material in response to requests, on issues of national importance and public interest. The passage of the reforms also appears to have ushered in a new period of heightened media interest in making FOI applications for policy documents, which have resulted in the release of material in areas of high public interest, from taxation policies to the handling of the Julian Assange case.

In addition to the increase in activity by the media, FOI is becoming a tool of greater interest to business, particularly seeking policy, data, market or competitive information, and litigants.

The most significant reform has been the establishment of the Office of the Information Commissioner, and the introduction of a review option at that level. In the short period of its operation to date, the Office has played a valuable role not only in the review process, but also in engaging with Government Departments and Agencies to promote greater disclosure and access, proactively.

The introduction of the Information Publication Scheme and Disclosure Logs has also been significant, with Department and Agency information being provided in an organised form, more readily accessible from websites.

However it is also likely that the introduction of the reforms may have created challenges within Government. Not surprisingly, as people test the new laws after amendments, the number, complexity, or currency of applications some Departments and Agencies may be receiving could be higher, leading to them incurring much higher internal costs in processing substantial documentation for release under the Act.

While to some extent this is an inevitable consequence of any effective or meaningful FOI scheme, the Society does not believe that there is or should be an unlimited obligation on stretched Government resources to devote excessive time to processing large requests, particularly not requests from the media or business. This Submission endorses reforms which would restrain such requests and limit the costs involved.

1(b) *The effectiveness of the Office of the Australian Information Commissioner.*

Despite early delays in processing reviews as the Office geared up, the FOI Commissioner review process has been extremely effective in enabling efficient, non-litigious resolution and determination of FOI disputes. The Commissioner's role in providing a review option sitting between Government and more litigious processes has been significant, providing a source of independent analysis of the Act and the application of exemptions, and low cost outcomes. Particularly welcome are the relatively short decisions which the Office has produced, which provide clear answers and helpful precedents.

1(c) The effectiveness of the new two-tier system of merits review of decisions to refuse access to documents and related matters.

The Society understands that the rationale for the two-tier system of merits review was as is set out in the then Government's Companion Guide⁴ that accompanied the release of the exposure draft bills. That guide stated:

A right of review to the AAT after review by the Information Commissioner will be available to applicants and to agencies. AAT review would continue to include hearings. Retention of the AAT creates a two-level merits review system for FOI matters. It is anticipated that review by the Information Commissioner should facilitate resolution of most FOI matters. The AAT, as an experienced review body, has the expertise to deal with highly contested matters involving extensive evidence. The retention of the AAT also provides FOI applicants with a cost effective option for a review of the Information Commissioner's decision, without bearing a costs risk.

Notwithstanding that the current system has now been in operation for more than two years and since that time the Office of the Australian Information Commissioner (**OAIC**) has published more than 60 decisions with no decisions overturned to date, the Society submits that the further level of merits review to the AAT is warranted. The AAT provides parties to an FOI dispute with a more substantive review right, with hearings, witnesses and legal submissions, than the FOI Commissioner can provide. If FOI rights are to be enforceable, applicants or respondents who are dissatisfied with the "quick justice" of the FOI Commissioner's decision should have the opportunity for a Tribunal based merits review. The cost of maintaining the option should be minor given its utilisation to date, but it remains a valuable fall back for applicants and respondents alike.

1(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.**

The Society strongly urges the Government not to amend the FOI Act so as to broaden the existing exemptions with the effect of reducing the public's ability to access government information.

To this end the Society endorses the views of the OAIC in this respect, namely that:

- first, there is no need so soon after the introduction of the new public interest test in the 2010 reforms to consider further amendment of the FOI Act in this regard; and

⁴ Senator the Hon John Faulkner, *Freedom of Information (FOI) Companion Guide*, March 2009
<http://www.google.com.au/url?sa=t&rct=j&q=foi%20march%202009&source=web&cd=1&sqi=2&ved=0CC8QFjAA&url=http%3A%2F%2Fwww.dpmc.gov.au%2Fconsultation%2Ffoi_reform%2Fdocs%2Fcompanion_guide.pdf&ei=PYRJUcnTC4PDkwX5n4D4AQ&usq=AFQjCNEmKAjDkuxvFFdD59lhowRR-8-i3Q&bvm=bv.44011176,d.dGl&cad=rjt> See also a discussion on the rationale by Senator the Hon Joseph Ludwig, 'The Freedom of Information Act – no longer a substantial disappointment', (May 2010) Admin Review, no. 59. .<
http://www.google.com.au/url?sa=t&rct=j&q=joe%20ludwig%20foi%20administration&source=web&cd=1&sqi=2&ved=0CC8QFjAA&url=http%3A%2F%2Fwww.arc.gov.au%2FDocuments%2FAdmin%2BReview%2B59.doc&ei=ZV9KUebgKMWxIAWZpoG4Cw&usq=AFQjCNFhzbxl_PYHclHwvypthX1iNmPQ&bvm=bv.44158598,d.dGl&cad=rjt>

- secondly, the existing exemptions in the FOI Act are adequate to provide protection for government documents that legitimately warrant protection against disclosure under the FOI Act.

In respect of the second point, the Society is not aware of any decision of the Freedom of Information Commissioner that has resulted in the provision of access to government information, which on any reasonable view is not in the public interest to be disclosed, because of the changes introduced by the re-formulated exemption regime.

The Society notes that term of reference 1(d) appears to conflate “sensitive government documents” with “Cabinet documents”. While the Society agrees that Cabinet documents are sensitive government documents that should not be released under the FOI Act, the Society does not agree that the sensitivity of a document should necessarily have a bearing on whether government documents are released under FOI. It is trite to say that government documents can be sensitive for a variety of reasons, including because they may embarrass a government or a Minister, however it is the basis for that sensitivity that should guide decision makers in determining FOI requests and not the sensitivity of the document per se.

The Society would be extremely concerned with any reformulation of the exemptions in the FOI Act, including the adaptation of the new public interest test, on the basis of arguments that they are operating to diminish the Government’s ability to “obtain frank and fearless advice from agencies and from third parties who deal with government”. In the Society’s view, to the extent that this is a real concern, then the problem lays with the givers of that advice, who fear that advice ever being made public, and not the FOI Act itself. Further, such a basis for withholding access to government documents has been roundly and, in the Society’s view, correctly discredited by not only academic commentators but also by former Ministers of the Government.

The Government will recall that on 24 March 2009⁵ when announcing the reforms then Minister Faulkner stated the following:

This is not an easy task. I’m sure no-one here will be surprised to hear that FOI reforms are not universally supported by public servants. It is proper for me today to acknowledge those concerns. I know they are genuinely held. I know that some in the Australian Public Service feel that FOI reforms may inhibit their ability to provide frank and fearless advice.

But I believe that the tradition of frank and fearless advice is more robust than that. I believe that our public servants will work professionally within the new FOI framework as they do within other accountability mechanisms.

Similarly, Senator Ludwig who replaced Senator Faulkner as the Minister responsible for FOI noted the following after the passage of the reforms:

At the heart of the contention within government is a debate about the compatibility of freedom of information with one of the strongest traditions of the Westminster system of responsible government—the provision of frank, candid and confidential advice by public servants to ministers.

⁵ Senator the Hon John Faulkner, “Open and Transparent Government – the Way Forward” (speech given at Australia’s Right to Know Freedom of Speech Conference, Sydney, 24 March 2009)
<<http://www.senatorjohnfaulkner.com.au/file.php?file=/news/ROLJYZXTFL/index.html>>

It cannot be denied that a tension does exist between the fundamental goal of freedom of information—namely, access to government information—and the Westminster tradition of confidentiality. ... however, I believe claims that the two are incompatible are overstated. This is because the FOI Act, through the application of the exemptions and the public interest test, gives both decision makers and review bodies sufficient scope and instructive precedent to support the weighing up of competing interests.

The Society endorses those views.

While no doubt there will be significant pressure on the Government to alter the existing exemption regime from officials, that pressure should be resisted. The only area in which the Society would consider that a clarifying exemption may be appropriate is in relation to Incoming Government Briefs. The Society accepts that given the nature of these documents there may be scope for them being exempt for a specified period of time (say the term of a Government). Thereafter, agencies would be obliged to proactively disclose them after having redacted relevant information which remains appropriately exempt under the general FOI exemption provisions.

1(e) *The appropriateness of the range of agencies covered, either in part or in whole, by the FOI Act.*

The Society recognises that the objects expounded in s 3 of the FOI Act are furthered by as broad a coverage of government agencies as possible. Under the legislation as it stands, a number of agencies enumerated in Schedule 2 of the Act are specifically exempt from FOI obligations. Various intelligence agencies (amongst some other entities) listed in Pt 1 of Schedule 2 are granted complete exemptions, while a range of agencies listed in Pt II are granted partial exemptions in respect of documents relating to some aspect of their operations – predominantly their commercial activities.

It is the view of the Society that, both as a matter of substance and of drafting, it is preferable that any necessary exemptions are implemented through general provisions applicable to the documents of all covered agencies, rather than through specific provisions applicable to particular agencies. Specific exemption of agencies under Schedule 2 invites the drawing of questionable distinctions between like documents held by different agencies, and in the case of those agencies named in Pt 1 risks being overly broad. The Office of the Australian Information Commissioner submitted that “exemptions applied on a document-by-document basis allow a more nuanced approach to managing appropriate information disclosure.”⁶

Intelligence agencies

The Society encourages the Hawke Review to reconsider the blanket exemption of the intelligence agencies listed in Pt 1 of Schedule 2 of the Act.

We note that the Australian Law Reform Commission (**ALRC**) initially recommended the repeal of Pt 1 in a Discussion Paper,⁷ but retreated from that position in its 1996 Final Report.⁸ The stated basis for repeal was that the general exemptions provided by the Act, and chiefly s 33, provided adequate protection for the sensitive operations of intelligence agencies. It was noted that FOI laws in comparable jurisdictions such as the United States extended no such general exemption to their intelligence organisation. In reversing its

⁶ OAIC, *Submission to the Hawke Review* (2013) 44.

⁷ ALRC, *Freedom of Information*, Discussion Paper No 59 (1995) Recommendation 6.36.

⁸ ALRC, *Freedom of Information*, Final Report No 77 (1996) Recommendation 74.

position, the ALRC took into account the effect of FOI laws on the relationships of Australian agencies with their international peers, the accountability of the agencies to parliamentary oversight and the Inspector-General of Intelligence and Security, and the fact that the vast majority of documents held by the agencies would be exempt under the general exemption provisions of the Act.

Several submissions to the current Review echo these rationales for the maintenance of the general exemption.⁹ As to the maintenance of international relationships by our intelligence agencies, the Society notes that most of our key allies' intelligence communities are themselves subject to FOI laws in their own jurisdictions.¹⁰ The Society accepts the contention by the Australian Intelligence Community that the FOI laws in force in jurisdictions such as the United Kingdom or the United States differ in their general substance from the FOI Act such that general exemptions suffice to protect national security.¹¹ The Review should consider whether the Act's general exemptions should be refashioned such that Pt 1 Schedule 2 can be dispensed with. The Society accepts that Australian intelligence agencies are subject to various forms of accountability other than FOI, but notes that the FOI Act is intended to serve broader purposes than administrative accountability.¹²

Other specific exemptions

For the general reasons discussed above, the Society recommends that the Hawke Review examine other exemptions under Schedule 2 with a view to their repeal.

It is not clear, in particular, why a number of agencies listed in Schedule 2 receive partial exemptions for documents relating to their commercial activities given the very broad range of government agencies which now undertake commercial operations. In a similar manner as is contemplated in respect of intelligence agencies, the amendment of s 47 could facilitate the removal of the specific exemptions granted in the Schedule to the 'commercial' activities of various agencies. The Society endorses the recommendation to this effect made by the ALRC in its 1996 Final Report.¹³

More broadly, the Society commends the analysis of the Law Council of Australia's submission to the Review in respect of the reform of Schedule 2.¹⁴

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

The Society appreciates that there is a significant cost to the Government in administering the FOI Act. However, given that the FOI Act "represents the pinnacle of citizens' right to know: a legal requirement to give the Australian community access to information held by the Australian Government"¹⁵, the Society submits that such costs are in large part a necessary corollary of this right.

⁹ See submissions by the Australian Intelligence Community and the Law Council of Australia.

¹⁰ See eg *Freedom of Information Act 2000* (UK); *Freedom of Information Act 1966* (USA); *Official Information Act 1982* (NZ).

¹¹ Australian Intelligence Community, *Submission to the Review of the Freedom of Information Act 1982 (FOI Act) and the Australian Information Commissioner Act 2010* (2013) 3-4.

¹² FOI Act s 3.

¹³ ALRC, *Freedom of Information*, Final Report No 77 (1996) Recommendation 68.

¹⁴ With the exception of the Council's recommendations concerning intelligence agencies.

¹⁵ Senator the Hon John Faulkner, "Open and Transparent Government – the Way Forward" (speech given at Australia's Right to Know Freedom of Speech Conference, Sydney, 24 March 2009)
<<http://www.senatorjohnfaulkner.com.au/file.php?file=/news/ROLJYZXTFL/index.html>>

Notwithstanding the above, the Society can see the case for the re-introduction of a small FOI application fee, of \$50 or less, with appropriate waiver provisions, to minimise vexatious or multiple applications, and clearly distinguish FOI requests from other requests for Government documents or information.

The Society also supports the general thrust of the recommendations contained within the Information Commissioner's review of charges released in March 2012, and in particular the four principles proposed to underpin a new FOI charging framework, namely, "supporting a democratic right", "lowest reasonable cost", "uncomplicated administration" and "free informal access as a primary avenue".

However, whereas applicants presently can go straight to the FOI Commissioner to seek a review of an initial decision by an agency, in recognition of the substantial workload of the OAIC and the need to reduce that workload in the absence of additional funding, the Society recommends that applicants should be required to seek internal review from within an agency before proceeding to the OAIC.

Similarly, where an applicant wishes to ultimately proceed to the OAIC for review, the Society recommends that applicants pay a nominal fee of \$50 (which may be waived in appropriate circumstances and could even be refunded if the applicant is successful in whole or in part) in recognition of the substantial work involved in making these decisions.

The Society believes that such a fee would also reduce the number of applicants seeking review where their prospects of success are very low.

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

The society recognises that reducing the regulatory burden created by FOI is an important consideration and acknowledges the \$41 million that was spent last year fulfilling FOI requests. However, in the effort to minimise the regulatory and administrative burden the Government should not reduce or avoid transparency. The Society fully supports improvements to the efficiency in processing FOI requests but stresses the importance of transparency.

Notwithstanding the significant reforms now contained within the FOI Act, in particular the creation of the publication scheme and the use of disclosure logs, in practice the current system of FOI requests still appears to favour a reactionary style of transparency: a request is made and the relevant department responds to it. This is particularly the case in respect of deliberative documents. The Society believes there should be a greater emphasis placed on the pro-active publication of all government materials. No doubt, a more active approach would ultimately lead to fewer FOI requests and a general reduction in regulatory burden.

The Society does support reasonable limits on request processing, to ensure FOI resources are effectively utilised. The Society would support the OAIC's "40 hour" proposal, as the benchmark for when voluminous requests can be rejected, and indeed would support a lower threshold. FOI requests should be easy to process, not a lengthy research or redaction exercise.