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Dear Privacy & FOI Policy Branch,

Re: Freedom of Information (FOI) Reform

Thank you for the opportunity to comment on the Information Commissioner Bill 2009 and the Freedom of Information Amendment (Reform) Bill 2009. Liberty Victoria is one of Australia's leading civil liberties organisations; working since 1936 to defend and extend human rights and freedoms in Victoria and across Australia. We believe open and accountable government is a cornerstone of any democratic society. In keeping with that belief, we welcome the government's FOI reforms and offer the following comments.

Freedom of Information (Reform) Bill 2009

Senator Faulkner launched the exposure drafts at the 'Australia's Right to Know' conference held on 24 March 2009. At the time, Senator Faulkner suggested that one of the key FOI reforms was to expressly make open government an objective of FOI legislation. However, the current objects of the FOI Act quite clearly promote open government whereas the proposed replacement is more ambiguous. Moreover, the current objects of the Act (as contained in section 3) are not reflected in government practice. Thus any reform of the FOI Act must be accompanied by organisational cultural reforms.

Liberty supports the use and publication of Agency FOI plans. Liberty also congratulates the government on reducing the open access periods for records and Cabinet notebooks. Liberty believes that all 'non-secret' information should be publicly accessible and that all 'secret' information should be reviewed and declassified on a regular basis (see Liberty's recent submission to the ALRC inquiry into Australia's secrecy laws). The publication of information in accessed documents is also an appropriate reform (clause 11C).

Liberty also supports the list of irrelevant factors to public interest exemptions (contained in clause 11B). However, the use of guidelines issued by the Information Commissioner to determine public interest exemptions highlights the need for the Information Commissioner to have post admission legal experience (see below).

Liberty commends the tightening of exemptions under Division 2. However, the introduction of the dominant purpose test is offset by the extension of the exemption to documents which the Minister intends to submit to Cabinet. Indeed, subclause (1) contains a number of broad exemptions which apply to documents which brief a Minister about an exempt document or any draft documents thereof. Nonetheless, the specific exclusion of an exemption to documents merely attached to exempt documents is a welcome development.

Clause 47C contains an extremely broad conditional exemption for any documents which include a deliberative matter. Deliberative matters extend to any opinion, advice, consultation or deliberation of government. Although operational information and factual

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materials are expressly excepted from this conditional exemption, a significant amount of government information is potentially exempted from public scrutiny.

Clause 47E(d) provides for the conditional exemption of information that will have an adverse affect on the proper and efficient conduct of the operation of the agency. Although this conditional exemption is appropriate in principle, some concern remains that it will be abused by agencies seeking to withhold 'damaging' information.

Clause 47F(7) should include a legal practitioner in the list of qualified persons authorised to receive personal information on another person's behalf. The business public interest conditional exemption contained in clause 47G is unnecessarily broad. It is foreseeable that information embarrassing to the government may be withheld on the grounds it would diminish its commercial value if disclosed or would prejudice future dealings. For instance, the release of information which shows the government is either overpaying or underpaying for a service or product could be exempted on this basis.

Similarly, the economy public interest conditional exemption in clause 47J could be (mis)used to withhold information revealing negligence or incompetence. It is foreseeable that almost any information highly critical of government operations could affect Australia's economy. For instance, information about live exports could affect that sector of the economy or information revealing financial blowouts could affect future spending or even foreign investment. Broad conditional exemptions such as this are contrary to the objectives of the Act and undermine the Government's credibility in reforming FOI.

The reforms also fail to remove the broad exemption of military and intelligence agencies. Liberty believes that the all of government (whole of government) should be subject to FOI legislation. Exemptions should then apply to specific types of information including those that are directly relevant to national security. Not only would this provide greater uniformity, but it would assist in cultural change toward more open and accountable government.

In general, Liberty supports the powers and review functions of the Information Commissioner. However, Liberty recommends that each information officer have at least 5 years post admission experience in law. Liberty also welcomes the abolition of application fees although it notes that it is the significant charges subsequent to an FOI application that prevent many FOI requests from proceeding.

Finally, the Government has promised to review the FOI Act after 2 years and provide the ALRC with a reference to consider extending FOI legislation to the private sector. Liberty looks forward to its further involvement in both these undertakings.

Information Commissioner Bill 2009

As explained by Senator Faulkner, the proposed reforms appear to create an additional level of bureaucracy; the new Information Commissioner oversees the two other information officers; the current Privacy Commissioner and the new Freedom of Information Commissioner. Although the additional funding for this critical element of open government is to be applauded, it remains to be seen whether it will facilitate or hinder access in practice.

It is suggested that the functions of the Information Commissioner, particularly clause 10(f) should be extended to providing advice to the Minister on any legislative change which may affect the operation of the FOI or Privacy Acts (or indeed any legislation relevant to the public's right to access government held information).

Clauses 14 and 15 of the Bill set out the functions and powers of the FOI and Privacy Commissioners. In each, reference is made to the 'state of mind' or the Commissioner. This term is not defined and should be removed unless a case for its inclusion can be made publicly.

Clause 15 allows the Privacy Commissioner to perform any of the FOI Commissioner's functions even though the Privacy Commissioner may not have the requisite qualifications. Theoretically this means FOI Commissioner functions could be performed by someone not qualified to undertake them. Liberty believes that both the Privacy and FOI Commissioners should have similar prerequisite qualifications. As recognised by the proposed reforms, the

'information officers' provide an important review mechanism to ensure open and accountable government. Accordingly, it is equally important that any information officer have adequate qualifications and experience to undertake such a critical role. Under the proposed reforms, only the Freedom of Information Commissioner would be required to have any legal qualification. Clause 17 fails to set any prerequisite qualifications or experience for either the Privacy or Information Commissioners. However, post admission experience in law is essential to ensuring statutorily independent officers are independent, objective and have sufficient experience to fulfil the role. Thus Liberty strongly recommends that each of the information officers have at least 5 years post admission legal experience.

It is not clear why an information officer must hold the office on a full time basis (clause 18). However unlikely, 'full time' is an artificial constraint which does not materially add to the Bill. Further, to avoid possible misunderstandings, clause 19 should require *written* permission before an information officer may engage in paid employment outside of their duties as an information officer.

Clause 23(2)(b) requires the Governor-General to terminate the appointment of an information officer if the information officer is absent, except on leave of absence, for 14 consecutive days or for 28 days in 12 months. This appears overly prescriptive and consideration should be given to amending it to allow for any absence with a legitimate and reasonable excuse or as allowed under his or her existing leave entitlements.

Clause 30 establishes an information advisory committee. It is recommended that this committee should include at least one non-government person to provide an external perspective on the performance of the information officers.

Clause 32 is poorly drafted. At present the offence created by subclause (1) applies to anyone performing his or her functions unless saved by subclause (2). Moreover, subclause (3) then applies to anyone to whom the section applies (i.e. everyone not specifically excluded by subclause (2)). Consideration should be given to redrafting this clause and providing explanatory notes.

Similarly subclause 35(2) is ambiguous. Clause 35 should clearly set out exactly what are 'privacy matters' beyond those described by the *Privacy Act 1988* (Cth).

Conclusion

The proposed FOI reforms are a significant step in the right direction. However, as noted by participants at 'Australia's Right to Know' conference, FOI reforms will not succeed without concomitant cultural reforms. At present, there is a significant risk that government employees will favour oral communications to avoid creating written records which may embarrass either themselves or the government of the day. While it may not be possible to emulate Norway's FOI performance, it provides a worthy aspiration.

It remains to be seen whether this creation of an overarching Information Commission will facilitate or hinder open government. If implemented carefully and with sufficient resources, the use of 3 information officers may improve open and accountable government. However, if poorly resourced and politically appointed, the information officers will prove counterproductive.

Should you wish to discuss any aspect of this submission further, please do not hesitate to contact either myself or Liberty Victoria more generally.

Kind regards,



Georgia King-Siem

Vice-President
Liberty Victoria