

Senate Finance and Public Administration Committee
Email: fpa.sen@aph.gov.au

28 January 2010

Dear Finance and Public Administration Committee,

Re: Freedom of Information (Reform) Bill 2009 and Information Commissioner Bill 2009

Thank you for the opportunity to comment on the above Bills. Liberty Victoria is one of Australia's leading civil liberties organisations; working since 1936 to defend and extend human rights in Victoria and across Australia. We believe open and accountable government is a cornerstone of any democratic society.

The Senate Finance and Public Administration Committee (the Committee) has sought public comment on whether the above Bills:

- i. ensure the right of access to documents is as comprehensive as it can be;
- ii. can be further improved;
- iii. assist in creating a pro-disclosure culture in government;
- iv. adequately confer functions, powers and resources on the Information Commissioner.

Liberty makes the following comments in respect of each Bill.

Freedom of Information (Reform) Bill 2009

In March 2009, Senator Faulkner stated that open government was a key objective of the newly released FOI Reform Bill.

However, the draft objects of the Bill are more ambiguous than the current objects (as contained in section 3) which themselves are poorly reflected in government practice. The insertion of notes exhorting agencies to have regard to the objects of the Act and guidelines issued by the Information Commissioner are useful, but not binding as per section 13 of the *Acts Interpretation Act 1901* (Cth).

Rather than changing the objects of the Act or non binding notes, greater effort should be directed to ensuring government practice to meet the ideals espoused by the legislation. Any reform of the FOI Act must be accompanied by significant organisational cultural reforms if it is to succeed in changing the culture toward a more open and transparent government.

**GPO Box 3161
Melbourne VIC 3001**

info@libertyvictoria.org.au
www.libertyvictoria.org.au

☎ 03 9670 6422

Reg No. A0026497L

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Liberty notes that clause 8D provides that charges may be imposed for access to information not published on the relevant agency's website. This clause should be accompanied by a positive requirement for agencies to publish information on their website wherever possible (in a searchable format).

Liberty supports the use and publication of Agency FOI plans and the reduction of 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 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 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.

Liberty also flags with concern the 'deemed affirmation' contained in section 54D which provides that an internal review will be deemed to affirm a decision if an agency is inactive for 30 days. In effect this rewards an agency for inactivity on an internal review by automatically affirming its original decision after 30 days. If anything, a decision should be deemed to have been overturned if an agency fails to conduct its own internal review within 30 days. Anything less promotes an antithesis of good government; inactivity and unresponsiveness by agencies.

Section 89 allows for the Information Commissioner to declare an applicant to be a vexatious applicant if any of several conditions are met. One of these includes where even a single application unreasonably interferes with the operations of an agency. Given that many agencies refuse FOI requests on the basis that the request would unduly tax the limited resources of the agency's FOI personnel, it is foreseeable that many FOI requests could be considered 'unreasonable' given the paucity of resources assigned to FOI applications.

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. This undertaking was given in early 2009. At the current rate, the Bill will not be enacted before late 2010 and any meaningful review at least 4 years after it was first promised. Nonetheless, Liberty looks forward to its further involvement in both these undertakings.

Information Commissioner Bill 2009

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

Further FOI reforms are to be commended. However, these reforms cannot succeed without *significant* concomitant cultural reforms. At present, there is a tendency within government to provide oral communications thereby avoiding written records which may embarrass either themselves or the government of the day. Other jurisdictions, most notably Norway, provide a useful examples of well executed FOI systems.

Liberty observes that there is an inherent inconsistency between the objectives of the Act and its implementation, including the Regulations. The Act creates a general right of access whilst Government consistently imposes financial and administrative barriers to anyone seeking to access that right. The imposition of fees, charges, time limits and unnecessarily complex regulation confound the objectives of the Act and undermine the credibility of the FOI reforms.

If implemented properly and with sufficient resources, the Information Commissioner may improve open and accountable government. However, if poorly resourced and politically appointed, this development will prove counterproductive to the Government's much lauded objectives.

Finally, it is disappointing to see that despite the substance of these comments being provided to the Government in April 2009, there have been few, if any, changes to the Bill. Liberty hopes that the above comments and the Committee's considered recommendations are adopted by the Government and result in meaningful reforms being enacted in the near future.

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

Kind regards,

A handwritten signature in blue ink, appearing to read 'G King-Siem', written in a cursive style.

Georgia King-Siem
Vice-President
Liberty Victoria