Law Council
OF AUSTRALIA

Freedom of Information Amendment Bill 2025

Senate Legal and Constitutional Affairs Legislation Committee

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About the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level; speaks on behalf of its Constituent Bodies on federal, national, and international issues; promotes and defends the rule of law; and promotes the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts, and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents its Constituent Bodies: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
- Law Society of Western Australia
- Law Firms Australia

Through this representation, the Law Council acts on behalf of more than 104,000 Australian lawyers.

The Law Council is governed by a Board of 23 Directors: one from each of the Constituent Bodies, and six elected Executive members. The Directors meet quarterly to set objectives, policy, and priorities for the Law Council. Between Directors' meetings, responsibility for the policies and governance of the Law Council is exercised by the Executive members, led by the President who normally serves a one-year term. The Board of Directors elects the Executive members.

The members of the Law Council Executive for 2025 are:

- Ms Juliana Warner, President
- Ms Tania Wolff, President-elect
- Ms Elizabeth Shearer, Treasurer
- Mr Lachlan Molesworth, Executive Member
- Mr Justin Stewart-Rattray, Executive Member
- Mr Ante Golem, Executive Member

The Chief Executive Officer of the Law Council is Dr James Popple. The Secretariat serves the Law Council nationally and is based in Canberra.

The Law Council's website is www.lawcouncil.au.

Acknowledgements

The Law Council gratefully acknowledges input from its National Human Rights Committee, the Administrative Law Committee of the Federal Dispute Resolution Section, the Law Society of the Australian Capital Territory (**ACT Law Society**), the Law Institute of Victoria and the Law Society of New South Wales.

Executive summary

1. The Law Council welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Legislation Committee (**Committee**) in response to its inquiry into the *Freedom of Information Amendment Bill 2025* (**Bill**).

2. The Law Council has previously identified Freedom of Information (**FOI**) as an area of substantial concern in need of significant reform. That reform involves both statutory and cultural change, and to that end the Law Council welcomes government initiatives intended to give effect to the foundation principles of FOI and meaningful implementation of them.

3. While the Law Council welcomes efforts to streamline FOI processes and minimise misuse of these processes, this must be balanced with the overarching objective for the *Freedom of Information Act 1982* (Cth) (**FOI Act**) to promote access to information, which is a fundamental right in our democracy. The Law Council considers a number of the proposals in the Bill extend beyond efficiency gain and weigh against the central objectives of the FOI Act.

4. We are of the view that the Bill does not address core issues raised in previous consultations with the FOI framework with respect to its design, administration, and delay.

5. Aspects of the Bill tend to work against the governing principles of FOI. We suggest the Bill includes several amendments which may have the effect of *reducing* transparency around Government decision-making and hindering scrutiny of matters in the public interest, contrary to the obligations under the FOI Act to 'facilitate and promote access to information promptly and at the lowest cost'.[1]

6. On balance, the Law Council recommends that the Bill not be passed in its current form. The Law Council is opposed to those areas of the Bill that have the tendency to undermine the core principles of FOI, implement barriers to the public accessing information, and enlarge the scope of exemptions.

7. Before proceeding with the proposed legislative reforms—particularly those reforms that are likely to reduce access to information—the Australian Government should commission an independent review of the FOI Act and the broader operation of the federal FOI framework.

[1] *Freedom of Information Amendment Act 1982* (Cth) s 3(4).

Introduction

9. We note the proposed amendments will make changes to the *Freedom of Information Act 1982* (Cth) (**FOI Act**), the *Australian Information Commissioner Act 2010* (Cth) and the *Public Interest Disclosure Act 2013* (Cth) (**PID Act**).

10. The declared intention of the Bill is to:

    (a) modernise the FOI framework;

    (b) reduce systemic inefficiency;

    (c) address abuse of process purportedly consuming a disproportionate amount of agency resources; and

    (d) clarify the operation of the FOI Act.[2]

11. We note that the FOI Act also intends to give effect to the recommendations of previous inquiries into the FOI framework, including:

    - the 2013 Review of the Freedom of Information Act 1982 and Australian Information Commissioner Act 2010 (**Hawke Review**);[3] and

    - the Senate Legal and Constitutional Affairs References Committee's 2023 Inquiry into the operation of Freedom of Information Laws (2023) (**2023 Inquiry**).[4] The Law Council made a submission to the 2023 Inquiry on 14 June 2023.[5]

12. In response to a Senate Order on 3 September 2025, the Attorney-General, the Hon Michelle Rowland MP, wrote to the Committee on 3 September 2025, advising that the Bill responds to issues raised in the recommendations made in the Final Report of the 2023 Inquiry.[6]

13. We also note that the Report of the Royal Commission into the Robodebt Scheme was critical of the reliance on exemptions by the Australian Government and, in its closing observations, specifically supported the repeal of the cabinet documents exemption (section 34),[7] which has not been implemented.

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[2] Explanatory Memorandum, Freedom of Information Amendment Bill 2025 (Cth) [2] ('**Explanatory Memorandum**').
[3] Allan Hawke AC, Review of the Freedom of Information Act 1982 and Australian Information Commissioner Act 2010 (2 August 2013) ('**Hawke Review**').
[4] Senate Legal and Constitutional Affairs Reference Committee, Parliament of Australia, The Operation of Commonwealth Freedom of Information (FOI) Laws (Final Report, December 2023).
[5] Law Council of Australia, Submission No 20 to the Senate Legal and Constitutional Affairs Reference Committee, Parliament of Australia, The operation of Commonwealth Freedom of Information laws (14 June 2023).
[6] Hon Michelle Rowland MP, Attorney-General, Australian Government response to the Inquiry into the Operation of Commonwealth Freedom of Information (FOI) laws (3 September 2025).
[7] *Royal Commission into the Robodebt Scheme*, Report (2023), xxi, 656-657.

Principles of Freedom of Information

14. An evaluation of any reforms to the FOI Act and the position of the Law Council must be understood by reference to the core principles of FOI.

15. FOI is a fundamental mechanism for transparency and accountability in a representative democracy. It serves essential functions.[8]

16. *First*, it is an integral part of the commitment to the rule of law. FOI facilitates access to information held by institutions and government essential to hold power to account. In a representative democracy, the public and their representatives cannot make informed decisions without the best available information and are entitled to know when government is not acting in the public interest.

17. Accordingly, FOI is linked to the communications between the public and Government and where a law seeks to impose a legal or practical impediment to access to information, it arguably may enliven concerns about its compatibility with the implied freedom of political communication.[9] In 1996, in a synthesis of cases decided by the High Court of Australia at the time, the Australian Law Reform Commission stated:

> *The High Court in the 'free speech cases' demonstrated the importance it places on ensuring the proper working of representative democracy. The Court determined that freedom of public discussion of government (including the institutions and agencies of government) is not merely a desirable political privilege, but inherent in the idea of a representative democracy. It held that the Constitution contains an implied freedom of political speech and communications. Although the High Court did not go so far as to suggest that a right of access to government information is constitutionally guaranteed, the view of the Court indirectly supports FOI objectives and suggests that it is important for Australia that the FOI Act functions properly and is interpreted in a way that promotes the disclosure of information.*[10]

18. FOI requests play a critical role in the political realm and in matters involving administrative decisions made by government and its agencies affecting the rights and legitimate interests of the public. Here 'the public' can involve any person affected by or interested in a decision of government, which includes non-citizens.

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[8] For an overview of the role of FOI in democratic government generally, and Australia specifically, see Australian Law Reform Commission, Open government: a review of the federal *Freedom of Information Act 1982* (Report No 77: January 1996), Chapter 2.

[9] The implied freedom of political communication was first recognised by the High Court in 1992 in *Australian Capital Television v Commonwealth* (1992) 177 CLR 106 and *Nationwide News v Wills* (1992) 177 CLR 1. It was then confirmed by the Court in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 ('*Lange*'). In *Lange*, the Court established a two-step test for assessing whether a restriction on political communication is valid: does the law (in its terms, operation or effect) burden freedom of communication about government or political matters, and if so, is it reasonably appropriate and adapted to serve a legitimate end. In *McCloy v New South Wales* (2015) 257 CLR 178, the High Court reframed the Lange test to also include a structured proportionality analysis. There has been some recent disagreement among members of the High Court has to whether structured proportionality analysis is required in every case: see *Babet v Commonwealth* [2025] HCA 21.

[10] Australian Law Reform Commission, Open government: a review of the federal *Freedom of Information Act 1982* (Report No 77: January 1996), [2.4]. We note the age of the Report.

19. The right to seek and receive information is embedded in Article 19 of the Universal Declaration of Human Rights,[11] and in the International Covenant on Civil and Political Rights (**ICCPR**).[12] In this regard, the United Nations Human Rights Committee states:

> *To give effect to the right of access to information, States parties should proactively put in the public domain Government information of public interest. States parties should make every effort to ensure easy, prompt, effective and practical access to such information. States parties should also enact the necessary procedures, whereby one may gain access to information, such as by means of freedom of information legislation. The procedures should provide for the timely processing of requests for information according to clear rules that are compatible with the Covenant.*[13]

20. Article 19(3) of the ICCPR provides that the right is not absolute. It may be subject to limitations, but only where those limits are necessary for the protection of others, national security or public order.

21. Domestically, FOI principles are expressly articulated in human rights statutes of states and territories, including the *Human Rights Act 2004* (ACT),[14] the *Human Rights Act 2019* (Qld),[15] and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).[16] While these statutes are not of course binding on the Commonwealth, they are well settled human rights norms also reflected in section 3 of the FOI Act.

22. *Second*, FOI plays a critical part in facilitating access to justice, as it enables a person to access both information and evidence affecting a perceived grievance or challenge to a right, interest or legitimate expectation. It is a practical mechanism necessary for the assertion of political and legal rights and interests.

23. As a general proposition, the Commonwealth Parliament has expressed an intention to give effect to these principles in the FOI Act, most notably in section 3 which in its current form outlines objectives including to:

    (a) provide the Australian community with access to information held by the Government and its agencies by requiring release of that information;

    (b) provide an enforceable right to information (outside the requirement of subpoena);

    (c) promote representative government by facilitating participation in decision making, scrutiny of action and related debate;

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[11] *Universal Declaration of Human Rights*, adopted 10 December 1948, UNGA Res 217 A (III): 'Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.'

[12] *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (ICCPR). Signed by Australia 18 December 1972; ratified 13 August 1980; entered into force in Australia13 November 1980.

[13] Human Rights Committee, *General Comment No. 34: Article 19 – Freedoms of opinion and expression*, 102nd sess, UN Doc CCPR/C/GC/34 (12 September 2011).

[14] *Human Rights Act 2004* (ACT) s 16.

[15] *Human Rights Act 2019* (Qld) s 21. In 2023, the Queensland Government introduced amendments to the *Right to Information Act 2009* (Qld) that will mean the proactive publication of Cabinet documents, subject to the removal of sensitive information: *Information Privacy and Other Legislation Amendment Act 2023* (Qld).

[16] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 15.

(d) recognise that information held by the Government is a national resource to be used for the benefit of the public; and

(e) encourage the functions and powers available under the Act to be performed and exercised so as to promote public access to information, promptly and at the lowest reasonable cost.

24. The objects of the FOI Act reflect the inherent tensions in FOI: the competition of interests between demands for information from government in the pursuit of private or public interest, the costs associated with responding to those requests, and the extent to which release of that information is contrary to the interests of peace, order and good government.

25. To the extent that information held by government is embarrassing or scandalous, we are of the view that this is not a sufficient reason for any government to withhold that information—either from the public or the representatives of the public in either house of Parliament. We affirm the view that there should be a presumption in favour of the release of all information held by the Australian Government, subject only to a range of limited exceptions that are narrowly construed.

Reported issues with the current FOI system

26. It is well recognised that the current FOI system needs serious reform. It is a system characterised by significant delay attributed to extensive processing time by both Commonwealth agencies and the Office of the Australian Information Commissioner (**OAIC**).[17] Those delays are very likely to increase as the digital age expands the capacity for record keeping and facilitates instant communication across platforms.

27. The Law Council has previously identified numerous issues with the operation of the FOI system and has referred those matters to government.[18] These include:

- general delay across the public sector in processing FOI requests;
- extended delay in processing Information Commissioner (**IC**) reviews by the OAIC;[19]
- insufficient resourcing for processing FOI requests;
- poor quality decision making; and
- overuse of redaction and exemptions.

28. Members of the legal profession have raised additional concern about the timeliness of responses to FOI requests, particularly in the context of migration cases. Reports include the absence of official acknowledgement of receipt of a request and considerable delays in response times. This is especially problematic in cases

[17] Centre for Public Integrity, Delay and Decay: Australia's Freedom of Information Crisis (Briefing Paper, June 2023); Centre for Public Integrity, Freedom of Information: Secrecy and Delay (Final Report, July 2025).
[18] Law Council of Australia, Submission No 20 to the Senate Legal and Constitutional Affairs Reference Committee, Parliament of Australia, The operation of Commonwealth Freedom of Information laws (14 June 2023).
[19] We note that the average time to process an IC Appeal by the OAIC is 15.5 months: see Office of the Australian Information Commissioner, Annual Report 2023-24 (31 October 2024).

involving visa applications. In one example it was reported that an FOI request had not been finalised more than 12 months after it was lodged.

29. Notwithstanding the 2023 Review by the Senate Legal and Constitutional Affairs Reference Committee, there has not been a comprehensive independent review of the operation of the FOI laws and practices since the Hawke Review in 2013. Claims that have been made about the 'misuse' of FOI cannot properly be assessed in the absence of credible evidence, particularly where proposed reforms may limit access by design or practice. When the FOI Act was introduced in 1982 the legislation was based on paper documentation. It urgently needs to be modernised to account for electronic communications and developments in technology. However, a prior Government public consultation process is needed to arrive at the solutions, having careful regard to the FOI Act's longstanding objects, prior to any legislative reforms being introduced.[20]

Recommendation

- **Before proceeding with legislative reform, the Australian Government should commission an independent review of the FOI Act and the broader operation of the federal FOI framework, which provides for public consultation.**

Schedule 1—Scope and objects

Part 1—Objects provision

Clause 1

30. Clause 1 will amend the objects of the FOI Act by inserting the words 'as far as possible' in section 3(1) as follows:

> *(1) The objects of this Act are to give**, as far as possible,** the Australian community access to information held by the Government of the Commonwealth, by:*
>
> *(a) requiring agencies to publish the information; and*
>
> *(b) providing for a right of access to documents.*

31. This inclusion would seem to suggest, and provide, a level of discretion that an agency may exercise, not previously contemplated, when assessing an FOI application. The Law Council considers the proposed language in Clause 1 is unclear and could be construed widely and result in poor decision making.

32. The Explanatory Memorandum (**EM**) states that this measure is 'intended to support the explicit recognition of competing interests to be balanced when giving people access to information held by the Government'.[21]

33. The broadening of the section explicitly recognises that core reasoning for the FOI Act involves the balancing of competing interests. However, the High Court of Australia has cautioned against giving weight to an approach to the FOI Act as a

[20] See Law Council of Australia, Best Practice Legislative Development Checklist, 21 July 2025.
[21] Explanatory Memorandum, [25].

'balancing act'.[22] In *McKinnon v Secretary, Department of Treasury*, Gleeson CJ and Kirby J stated:

> *We have avoided reference to 'balancing'. This is a concept that assumes prominence in a different context, in which courts are required to deal with claims of public interest immunity advanced in opposition to the production of documents, for example under subpoena, in civil or criminal litigation. There, it is the public interest in the administration of justice, and considerations of fairness to litigants, that may need to be weighed against aspects of the public interest put at risk by disclosure of documents. The image of the scales of justice is pervasive in legal thinking, and it is natural to talk of taking account of competing considerations in those terms. Under the FOI Act, however, the matter of disclosure or non-disclosure is not approached on the basis that there are empty scales in equilibrium, waiting for arguments to be put on one side or the other. There is a 'general right of access to information ... limited only by exceptions and exemptions necessary for the protection of essential public interests [and other matters not presently material]' (s 3(1)(b)). That is the context in which a Minister makes a decision under s 36(3), and in which such a decision is reviewed under s 58(5). References to 'balancing' create a danger of losing sight of that context. That is the context in which the question of reasonableness raised by s 58(5) is to be addressed. To lose sight of that would be to lose sight of the principal object of the FOI Act.*[23]

34. Our concern is that the alteration of the objects of the FOI Act alters the presumptive right to information, replacing that with a discretion that promotes economic factors into decision making as a primary consideration or justification, whereas the primary purpose of the FOI Act should be to facilitate access to documents in the public interest.

Recommendation

- **The proposed change to section 3(1) should be rejected.**

Clause 3

35. Clause 3 would, in effect, add the following qualification to subsection 3(2) of the FOI Act (which outlines Parliament's intent in outlining the Act's objects):

> *… while, at the same time, providing safeguards to ensure the protection of essential private interests and the proper and effective operation of government.*

36. The expressed intention in the EM is 'an explicit recognition of countervailing public interest in protection of private and business information as well as the proper administration of government'.[24]

37. The Law Council recognises that the protection of private and business information is a legitimate basis for refusal or redaction in certain circumstances. However, the Law Council does not support the proposed alteration of subsection 3(2).

[22] *McKinnon v Secretary, Department of Treasury* [2006] HCA 45.
[23] [2006] HCA 45, [19].
[24] Explanatory Memorandum, [27].

38. While safeguards to protect essential private interests are required, we suggest these do not form the essential underlying purpose of an FOI regime in a responsible and representative democratic system of government. In our view, this language serves to dilute the focus of public participation and scrutiny of government activities, which are core tenets of the regime.

39. The Law Council is particularly concerned by the vagueness of the phrase 'proper and effective operation of government'. This may create uncertainty for both decision-makers and applicants.

40. In the absence of clear legislative intent or supporting guidance, there is a risk that these terms could be interpreted in a manner that unduly restricts access to information, contrary to the underlying purpose of the FOI Act.

41. The Law Council notes that this qualification could, for example, be used broadly to limit access to government information on grounds relating to:

    (a) Resourcing concerns and whether an FOI request may be too resource-intensive and affect the operations of government (noting that government agency resourcing should not, in principle, come at the expense of the primary object of the Act).

    (b) Any perceived 'communication privilege' that public servants may wish to rely upon to have 'frank and fearless' internal discussion that may be unfavourable or contrary to government views if it were released via FOI.

42. It may also impede the efficient administration of the FOI framework by introducing uncertainties in the application of the public interest test.[25] It would likely result in an increase in appeals as the parties contest the meaning of the phrase 'proper and effective operation of government'.

43. The Law Council opposes the amendment. In our submission, the relevant public and private interests are already sufficiently protected by the existing exemptions. As the amendment is concerned with the accountability and transparency of government in a representative and responsible system of government, we consider that the current objects of the FOI Act should not be disturbed or qualified.

44. If clause 3 is to be maintained, the Law Council considers that further clarification—either in the legislation, the EM, or supporting guidelines—would assist in ensuring that the objects are applied consistently and do not become a basis for unnecessarily broad refusals of access. In particular, it may be helpful to articulate the types of government activities or interests that are intended to be protected, and to provide examples of how the balance between transparency and effective administration should be struck in practice.

Recommendation

- **The proposed amendment to section 3(2) should be rejected.**

[25] *Freedom of Information Act 1982* (Cth) s 11B. See also the recent decision of the UK Supreme Court in *Department of Business and Trade v The Information Commissioner* [2025] UKSC 27.

Position of the ACT Law Society

45. The Law Council notes that—subject to the comments at paragraph 44 above regarding the provision of additional clarification and guidance—the ACT Law Society supports the amendments to the objects clause in Part 1 of Schedule 1, which, in its view, seek to clarify the balance between promoting transparency and ensuring the proper and effective operation of government. Members of the Law Society recognise that a clear and contemporary statement of objects is essential to guide both agencies and applicants in interpreting and applying the FOI Act, particularly as the nature of government information and public expectations continue to evolve.

Part 2—Definition of document of an agency

46. The Law Council supports the intention behind the amendments in Part 2 of Schedule 1, which seek to exclude from the scope of the Act documents that are wholly personal and unrelated to agency operations. It is appropriate to limit the application of the FOI Act to documents that have a genuine connection to the functions and activities of government agencies, and to avoid the administrative burden of processing requests for purely private material.

47. However, the phrase 'operations of the agency' may be interpreted narrowly, and there is a risk that documents relating to program delivery, policy development, or the implementation of government initiatives received from other agencies or entities could be excluded from access. Further clarification should be provided in the EM to ensure that the exclusion is not applied in a way that undermines the public's right to scrutinise the activities of Government, particularly in areas of significant public interest or where accountability is paramount.

Schedule 2—Access requests

Part 2—Non-disclosure of certain identifying information

48. Schedule 2, Part 2 of the Bill is intended to clarify the circumstances in which identifying information of employees of agencies or Ministers is required to be disclosed under the Act.

49. The stated purpose of the change is protective. The EM provides:

> *The amendments recognise that, in the digital era, publication of employee identifying information, by the agency or applicant, in response to FOI requests may increase employees being subject to abuse, harassment, doxxing, confrontation in their personal environments, and being targeted for grooming by malicious groups seeking to access information or systems or for engagement in fraudulent behaviour.*[26]

50. The Law Council recognises that respecting the privacy of individuals and protecting them from harm is a legitimate policy end. Some of the behaviours described are threatening and potentially criminal acts. The policy is a reasonable response, promotes the protection of privacy rights and serves the purpose of shielding

[26] Explanatory Memorandum, [52].

employees from unnecessary identification where there is no basis for publishing personal information.

51. Clause 20 will alter section 22 of the FOI Act. Section 22 empowers the relevant Minister or their delegate to redact information that contains exempt or irrelevant information. Clause 20 will extend section 22 to include employee identification information. Proposed subsection 22(7) excludes general information about the Minister, agency and Senior Executive Service (**SES**) employees.[27]

52. The Law Council welcomes the extension to include SES employees, as this maintains an important mechanism for transparency and accountability at the most senior levels of the public service. The Law Council recognises that SES officers are often responsible for significant decision-making and public-facing roles, and that the disclosure of their identities can be critical to public confidence in government processes.

53. However, there is a risk that the drafting of the provision may be too broad and used by relatively senior public servants (as decision makers) to obscure their role in Government operations contrary to the FOI Act policy intent.

54. The Law Council understands that it is relatively common for SES employees to delegate matters to subordinate non-SES staff. The complex web of delegations and tensions between Ministers and their subordinates was clearly demonstrated in the Robodebt Royal Commission. The practical effect of that is that the identification of actual decision makers may be obscured by delegation if mechanisms do not exist to confirm parties relevant to the FOI request otherwise outside the scope of the amendment.

55. Members of the legal profession have also raised concerns about the potential for these provisions to be applied in a manner that inadvertently limits legitimate scrutiny or impedes the ability of applicants to understand the context of government decision-making. For example, there may be circumstances where knowledge of the identity of a decision-maker is relevant to assessing the integrity or impartiality of a process, or where the exclusion of such information could hinder the investigation of systemic issues. The Law Council considers it important that agencies apply these provisions with careful regard to the objects of the FOI Act and the broader public interest in transparency.

Recommendation

- **Proposed paragraph 22(7)(b) should be amended to include relevant officers who have been delegated executive functions by the Minister or Senior Executives.**

[27] *Public Service Act 1999* (Cth) s 34.

Part 3—Valid requests and practical refusal reasons

56. The Law Council notes that clause 36 would repeal and replace subsection 24AA(1) of the FOI Act, with the particular effect of omitting current paragraph 24AA(1)(b).

57. The Hawke Review identified the following ambiguity relating to paragraph 24AA(1)(b) and recommended that it be repealed:

> *Section 24AA(1)(b) provides that a practical refusal reason exists if the request does not satisfy the requirement in section 15(2)(b) (identification of documents)* [that is, that the request must provide such information concerning the document as is reasonably necessary to enable a responsible officer of the agency, or the Minister, to identify it]. *If a request does not meet these requirements, an agency must take reasonable steps to assist the person to make a request that complies with the FOI Act (s 15(3)). However, this implies that a request can reach the practical refusal stage even if it is not valid, which can cause confusion about whether the time period for processing the request has commenced. Removing this overlap would make clear that the practical refusal mechanism can only be used after an applicant has provided the information reasonably necessary to identify the documents sought. The Review agrees with this proposal.*[28]

58. The Law Council supports clause 36 which would address Recommendation 30 proposed by the Hawke Review in 2013.

59. As clause 36 amends procedures and processes that seek to serve the FOI Act objects, we advise ongoing Parliamentary monitoring of how the proposed amendment operates in practice.

Part 4—Vexatious applications

60. The primary focus of Part 4 of the FOI Act is declared to be the implementation of recommendation 32 of the Hawke Review,[29] intended to ensure that vexatious applications may be refused on that basis, without impacting the applicant's ability to make other requests or remake the request that was not accepted. We also note that a secondary purpose is to shift the determination of vexatious applications to the relevant agency/Minister at first instance away from the Office of the Information Commissioner (**OAIC**), though making the decision reviewable by the OAIC.

61. The key provision is Clause 41, which would insert a new section 15AD into the FOI Act. Proposed subsection 15AD(1) would permit an agency or Minister to refuse to deal with (or refuse to continue to deal with) a request which they are satisfied:

    (a) is 'vexatious or frivolous'—paragraph 15AD(1)(a);

    (b) is, or is likely to have the effect of, 'harassing' or 'intimidating' or otherwise 'causing harm (or reasonable fear of harm)'—paragraph 15AD(1)(b); or

    (c) is otherwise an abuse of process.

[28] See Hawke Review, 87 (and Recommendation 30).
[29] Hawke Review, Recommendation 32.

62. The Law Council has reservations about the broad scope of these provisions. We note the EM provides some (limited) guidance.

63. As to 'vexatious' and 'frivolous', the EM states:

> *The terms 'vexatious' and 'frivolous' are intended to take their ordinary meaning. A vexatious request may include where the request includes racist or offensive language. A frivolous request will be one that does not have any serious purpose or value.*[30]

(We note, in passing, that section 11 of the FOI Act provides that, subject to the rest of the Act, 'every person has a legally enforceable right to obtain access' to documents, and that that right 'is not affected by any reasons the person gives for seeking access' or 'the agency's or Minister's belief as to what are his or her reasons for seeking access'. Refusing access on the basis that a request does not have any serious purpose or value—and is therefore, according to the EM, a 'frivolous' request—would be a restriction of the right enunciated in section 11.)

64. As to harassing and harmful requests, the EM states:

> *The 'effect of' the request does not require that it in fact caused harassment etc to a person, it is sufficient if the request is considered to be likely to have that effect. This enables an agency or Minister to consider the impact that processing a request may have on staff or another person (for example, if processing the request may release information or require consultation with a person who has a domestic violence order in place against the applicant). The terms 'harassing' and 'intimidating' have their ordinary meaning. The term 'harm' may include, but is not limited to, harm to health (including psychological health and wellbeing), safety and welfare.*[31]

65. The Law Council recognises the legitimacy of the underlying policy in relation to these provisions. However, the proposed amendments are substantially broad, and may not be sufficiently detailed to guide assessment on what is frivolous or vexatious, or made simply on the basis of the identity of the applicant. They are cast in subjective terms and there is no requirement that the Minister or agency's satisfaction must be reached on reasonable grounds. There is a real risk that officials could use these provisions to refuse legitimate requests in the interest of resourcing at the expense of fulfilling the FOI Act's intended purpose.

66. We also note that repeated requests are not necessarily problematic in cases where there has been persistent delay in responding to requests, and in complex and protracted litigation that may require multiple requests at different points in the dispute as the facts of a case unfold.

67. Allowing agencies or ministers to determine whether requests are vexatious may also lead to inconsistent application across agencies which undermines fairness and equity. By contrast, current arrangements with the OAIC making that declaration (under section 89L) provide a level of consistency in decision-making with respect to vexatious applicants that helps maintain a just and equitable process. The proposed changes remove this safeguard and risk undermining FOI system integrity.

[30] Ibid [102].
[31] Ibid [103].

68. The Law Council appreciates that the proposal intends to create a new basis for dealing with vexatious requests (proposed section 15AD) while leaving the handling of vexatious applicants with the OAIC (existing section 89L). The intention may be to direct vexatious matters from the OAIC to individual agencies, so as to decrease considerable resource demands on the OAIC. This may, in turn, support the OAIC and facilitate other key FOI objectives.

69. Though the Law Council understands this rationale, an alternative would be to simply better resource the OAIC, and maintain a more consistent, integrity-based approach. If this proposal is adopted, we expect that the OAIC would necessarily continue to bear the main burden in this area. The Law Council foresees that, if an agency or Minister determines that a request is vexatious, it is highly likely that the requester would appeal the decision to the OAIC. The OAIC would then have to determine not only the appeal from the agency decision that the request is vexatious, but most probably also decide whether to make a vexatious applicant declaration under section 89L (whose scope is proposed to be limited only in a modest way by proposed new section 89LA). It is therefore possible that this measure will have no significant impact upon the OAIC's caseload and may well increase the complexity of the burden.

70. Section 15AD(1)(c) covers where the request is 'otherwise an abuse of process'. The EM states at paragraph 104 that 'an abuse of process includes taking an action not for the purpose of seeking access to information consistent with the objects of the Act, but for another purpose. This may include requests received as part of a campaign designed to disrupt agency, Ministerial or government operations.'

71. The Law Council queries this limb. The term 'abuse of process' is more commonly used in legislation concerned with court proceedings and refers to the general powers of a court.[32] It is not commonly used, to our knowledge, with respect to agency decisions as to public access to information. FOI access requests may necessarily disrupt agency and government operations. There is (appropriately) no requirement under the FOI Act for individuals to describe the purposes for which they are making FOI requests and therefore agencies are not in a position—and nor should they be—to second-guess whether the purpose aligns with the FOI Act objects. There is a real risk that an agency may perceive requests as 'abuse of process' because they disrupt government operations when they are simply inconvenient.

Recommendation

- **Schedule 2, Part 4, concerning vexatious applications should not be passed in its current form. Instead, public consultation should occur on alternative options to address concerns in this area.**

[32] See eg, *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth), s 19; *Evidence Act 1995* (Cth), s 11, *Family Law Act 1975 (*Cth), ss 102QAB, 102QAA.

Part 5—Anonymous requests

72. Part 5 of Schedule 2 will require the identification of a person making an FOI request, including a requirement for a person to identify whether they are making an FOI request on behalf of another person.

73. The EM states that the reform implements a recommendation from the Hawke Review.[33] This recommendation was prompted by submissions made by the Australian Competition and Consumer Commission, which cited a range of adverse consequences linked to the receipt of anonymous requests, including the inability to determine whether multiple requests were from the same source (and therefore proliferating the work involved by the agency when it could be more efficiently aggregated), an inability to determine whether the source of the request is a declared vexatious applicant, the impact on consultation with the party making the request, and the effect of anonymity on subsequent appeals.[34]

74. While the declared policy attached to these provisions is linked to preventing misuse of the FOI Act and increasing efficiencies, the Law Council has concerns about the chilling effect of these provisions where they are made by whistleblowers, journalists, and parties seeking information on sensitive matters of public interest.

75. Forcing disclosure of identity places those in vulnerable situations at risk, particularly where requests concern contentious government policies or potential misconduct. Allowing anonymous requests safeguards the public interest by enabling individuals to seek information without fear of reprisal. Removing this protection undermines transparency, discourages the exposure of wrongdoing, and threatens genuine public accountability.

76. We note that characterising a misuse of process is not dependent on the mere identity of a person making an application for FOI but is determined by the quality of the application itself. As the application of the exemptions under the FOI Act is generally judged against disclosure to the 'world at large', unless the request is for information relating to the applicant's own affairs, it is arguable that this provision is unnecessary. For example, a disclosure might be contrary to Australia's national security interests and would therefore qualify for an exemption, regardless of the identity of the applicant. It is also unclear why the practical refusal reason could not be better relied upon in this context (where there would be a substantial and unreasonable diversion of the resources of the agency from its other operations, or interference with the performance of the Minister's functions).[35]

77. If the requirement is to be maintained, a mechanism could be established where an applicant is able to make an anonymous request through an independent intermediary, such as the Commonwealth Ombudsman, able to make the request on behalf of another without the requirement to disclose identifying particulars to the agency, and with the obligation to ensure the confidentiality of the applicant.

78. We note that remarks have been made by members of the Government suggesting that the proposed reforms to the FOI Act are, in part, intended to address concerns

[33] Explanatory Memorandum, [125]. Hawke Review, 9 (Recommendation 33): 'The Review recommends the FOI Act be amended so that an FOI request cannot be made anonymously or under a pseudonym. 33(b) It should be necessary for an applicant to provide an address in Australia.'
[34] Hawke Review, 93-94.
[35] FOI Act, ss 24, 24AA.

relating to requests generated by AI-bots or foreign actors.[36] The Law Council is not convinced by the evidence base provided as justifying this concern. In response to Order for Production of Documents No 155, the Government has relied on two articles from the US and otherwise claimed public interest immunity.[37] We are not aware of evidence of an influx of AI-generated requests in Australia. An independent review of the operation of the FOI Act—as recommended earlier in this submission—could consider the impact of AI and the appropriate mechanisms to address any identified concerns.

79. In the Law Council's view, the solution to this purported issue should be a practical rather than legislative one, in which appropriate information technology is deployed. Many automated requests or requests from vexatious foreign actors, we suggest, are also already capable of being rejected under the existing processes.

Recommendations

- **The amendments preventing anonymous requests should be rejected.**
- **Alternatively, the Committee should propose that a mechanism is established where an applicant can make an anonymous request through an independent intermediary, such as the Commonwealth Ombudsman.**

Schedule 3—Practical refusals

Part 2—Discretionary 40-hour processing cap for FOI requests

80. Part 2 of Schedule 3 would introduce a discretionary 40-hour processing cap for FOI requests, primarily through amendments to section 24AA of the FOI Act which outlines when a 'practical refusal reason exists'.

81. The Law Council does not support this proposal. The practical outcome of the amendments will likely be to stifle the operation of the Act especially for vulnerable applicants.

82. The stated intention of the policy is to 'introduce a discretionary 40-hour processing cap for FOI requests, reflecting that there needs to be an appropriate balance between an applicant's access rights and the administrative burden on agencies in providing such access'.[38]

83. While the intention to improve efficiency and manage agency workloads is acknowledged, members of the legal profession have expressed concern that a fixed cap may have unintended consequences for applicants seeking access to

[36] See, eg, The Hon Mark Butler MP, Minister for Health and Ageing, Minister for Disability and the National Disability Insurance, Doorstop interview with Minister Butler (2 September 2025). See also Tom Williams, 'AI and trolls clogging 'broken' FOI system, govt claims', *Information Age* (online), 4 September 2025; Tom McIlroy and Josh Butler, 'Labor facing backlash over plans to curb access to government information', *The Guardian* (online), 2 September 2025; David Hollingworth, 'Labor blames AI bots and 'foreign actors' for its move to charge for FOI requests', *Cyber Daily* (online), 2 September 2025.

[37] Senator the Hon Don Farrell, Response to Order for Production of Documents (OPD) No. 155 of 2025 relating to freedom of information (17 September 2025). See also Charlie Lewis, '"National security" is why you can't see any examples of "nefarious" FOI interference. Sounds familiar…', *Crikey* (online), 5 September 2025.

[38] Explanatory Memorandum, [7].

complex, voluminous, or historical records—particularly in matters involving systemic issues or significant public interest.

84. The introduction of a processing cap could encourage a more disciplined approach in the framing of an FOI request, which could create efficiency gains. However, that assumption is based on the applicant knowing what it is they are seeking, and the applicant being skilled enough to frame the request. In addition, it could also mean that important information outside the scope of a targeted request would be missed. This may put certain applicants, particularly vulnerable individuals, at a disadvantage.

85. The broad discretion given to agencies to determine a legitimate request risks creating a loophole that could be exploited to deny complex, high-impact requests on matters of substantial public interest. Many critical FOI requests, such as substantive policy inquiries/reviews, may inherently require more than 40 hours to process. The cap not only hinders access to such information but could be used to avoid scrutiny and undermine the FOI Act objects. The proposed cap as outlined remains unjustified and detrimental to transparency.

86. Additionally, in practice, the impact of the processing cap will be heavily influenced by the efficiency, resourcing, and technological capability of individual agencies. Agencies with well-developed information management systems and experienced FOI teams may be better placed to process large or complex requests within the cap, whereas less-resourced agencies may be more likely to rely on the cap as a basis for practical refusal. This could result in inconsistent access outcomes across government, potentially undermining the objectives of the FOI Act.

87. We consider that the existing provisions in section 24AA are sufficiently broad to capture the problem as it stands. As noted, the FOI Act contains provisions that enable an application to be refused where a 'practical refusal reason' exists. Section 24AA(1) provides grounds for refusal where the request 'would substantially and unreasonably divert the resources of the agency' or 'interfere with the performance of the Minister's functions'. Section 24AA(2) provides a non-exhaustive set of matters that can be considered in reaching that conclusion, which does include the logistical impact of a request. In that context the proposed amendments appear to be unnecessary.

88. An alternative approach is to continue to require agencies and dedicated staff to communicate clearly with applicants, advise what information or documents it can provide, and work collaboratively to facilitate access, either in full or in part. Further, we suggest that releasing information in tranches could also ensure applicants receive what they need without placing excessive strain on agency resources, provided applicants are kept informed.

89. Should this amendment be pursued, we recommend that certain activities be excluded from the determination of time in the request. For example, the consideration of the public interest by the organisation should be excluded from calculation of the time. This would assist in preserving the objects of the FOI Act.

90. Further, the introduction of a processing cap should be accompanied by increased transparency around agency performance. In particular, the publication of agency-level metrics—such as the number of requests refused on the basis of the cap, average processing times, and the types of requests most affected—would assist in monitoring the practical impact of the amendment and identifying any emerging trends or inequities.

Recommendations

- **The amendments proposing a 40-hour processing cap for FOI requests should be rejected.**
- **If, contrary to our position above, these provisions are progressed, amendments should be made to exclude nominated activities from the calculation of time and increase transparency around agency performance.**

Schedule 4—Requests and review processes

Part 2—Extension of time arrangements

91. Part 2 of Schedule 4 seeks to 'streamline extension of time arrangements'.[39] In particular, the Bill will insert section 15AA into the FOI Act, which will facilitate an extension of time for the agency to respond to a request.

92. These provisions are based on agreement between the relevant Minister and the applicant, and in principle are not controversial. At a practical level, complex requests impose substantial resourcing burden on the Minister and agency which cannot be met within a hard deadline.

93. It is well known that FOI requests are affected by considerable delays. Law Council respondents emphasise that the proposed amendments do not adequately address ongoing procedural issues. In particular, there is a lack of consistent and proper notice when extensions are sought, and a lack of consistent updates on progress. These shortcomings undermine transparency and frustrate applicants who are left uninformed about the status of their request. As discussed above, an FOI request can sometimes be an essential component in related proceedings.

94. The Law Council submits that the Bill could be improved by including measures that strengthen oversight of extensions, ensure timely and clear communication, and enhance access to information. Addressing these matters directly would better fulfil the objects of the FOI Act and support the effective operation of the FOI framework.

Part 4—Working days and agency consultation

95. Part 4 of Schedule 4, seeks to 'amend the timeframes for agencies to respond to requests to reflect on working days where consultation processes with an agency in relation to a document require an extension of time'.[40]

96. The proposed amendments extend the FOI response timeframe to 30 business days instead of calendar days. This allows agencies more time to respond to a request at the expense of prompt access to information. This shift means applicants and the public may experience even longer waits before receiving information. Additionally, where it is reported that applicants already experience delays, there is concern that this will simply extend processing times which unjustly delay the administration of justice.

97. The Law Council recognises, however, that in practice government agencies face a clear constraint in responding to FOI requests because of the nature of employment

[39] Explanatory Memorandum, [8].
[40] Ibid [4].

and the operation of government to a 5-day working week. The clarification of time reflects the realities of ordinary bureaucratic arrangements.

Recommendations

- **Best practice guidelines should be developed for the management by agencies of FOI requests in a timely manner.**
- **Amendments should be proposed to strengthen oversight of extensions and ensure timely and clear communication.**

Schedule 5—Information Commissioner reviews and complaints

98. Schedule 5 introduces two proposals linked to the role of the OIAC:

    - A new power for the IC to remit IC review applications with directions to decision-makers for further consideration (Part 1 of Schedule 5); and
    - Provision for the resolution of IC review applications by agreement, without requiring a formal written IC review decision (Part 2 of Schedule 5).

99. The Law Council welcomes these proposals, provided there is the appropriate rigour and balance to fulfill the intent of the FOI Act.

Schedule 6—Application fees for FOI requests

100. Schedule 6 to the Bill proposes to enable regulations to prescribe an application fee for certain FOI requests.

101. Proposed subsection 93C(1) would provide that regulations may make provision for the payment of a fee by an applicant in relation to:

    - a request under section 15 (request for access);
    - an application under section 54B (internal review application); and
    - an application under section 54N (IC review application).

102. Subsection 93C(2) would enable the regulations to:

    - prescribe the amount of the application fee (or a method for working out the amount of the fee);
    - prescribe the circumstances in which an applicant is exempt from paying the fee; and
    - make provision for the remission, refund or waiver of the fee.
      Subsection 93C(4) clarifies that the regulations must provide for the waiver or remission of the fee in prescribed circumstances of financial hardship.

103. Subsection 93C(3) states that the regulations must not provide for the payment of an application fee where the applicant (or the applicant's representative) is seeking to access a document containing personal information.

104. The Attorney-General, in her Second Reading Speech about the Bill, outlined the reasoning for enabling application fees to be charged as follows:

> *The government has carefully considered options on how to deter frivolous and vexatious requests, while maximising accessibility of the system for genuine applicants.*
>
> *…*
>
> *This measure will aid in deterring frivolous requests, and ensure agency resources are not unduly diverted from processing genuine requests, particularly requests for personal information which account for the vast majority of overall requests.*

105. These proposals must be put in the context of the national position with respect to fees charged under existing legislation, including the Commonwealth. All jurisdictions in Australia charge fees for FOI requests. What differs is the amount charged and the reason for the charge. Most jurisdictions charge an application fee in addition to other charges,[41] although the ACT specifically excludes application fees.[42]

106. The Commonwealth already charges for certain matters arising from the FOI Act. Section 29 of the FOI Act authorises the Minister to levy a charge for information requested under the FOI Act[43] in the form of regulations, updated in 2019.[44] Under the *Freedom of Information (Charges) Regulations 2019* (Cth) (**Regulations**) a charge is payable for administrative costs for access to a document. Under these Regulations there is no charge if the requested document contains personal information,[45] or the request was not dealt with on time.[46] We note that the last major review of fees and charges under the FOI Act was undertaken in 2012.[47]

107. What is novel in the Bill, is the introduction of provision for an *application* fee.

108. While there are reasonable grounds for the imposition of fees and charges within an FOI framework, the Law Council has concerns about the potential for fees to be used as an economic barrier to an FOI request. In practice, even modest fees may deter applicants experiencing disadvantage from exercising their rights under the FOI Act.

109. We note that the role of fees and charges in the FOI regime was considered in the Hawke Review:

> *Fees and charges should not be used to discourage applicants from exercising their rights under FOI, nor as a mechanism to seek full costs recovery or to generate revenue for agencies. Nevertheless, it is appropriate for users to make some contribution to the costs of processing applications as in many cases the costs of processing individual requests can be substantive. Costs should be set at an appropriate level to reflect the type of information sought and the resources of the applicant.*[48]

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[41] New South Wales, the Northern Territory, Queensland, South Australia, Tasmania and Western Australia.
[42] *Freedom of Information Act 2016* (ACT) s 105.
[43] *Freedom of Information Act 1982* (Cth) s 29.
[44] *Freedom of Information (Charges) Regulations 2019* (Cth).
[45] Ibid r 7(1).
[46] Ibid r 7(2).
[47] Commonwealth, *Review of charges under the Freedom of Information Act 1982: Report to the Attorney-General* (20 April 2012)
[48] Hawke Review, 70.

110. The Law Council supports that statement. The imposition of fees and charges can have a significant impact both on the interests of the individual and the functioning of a representative democracy.

111. Members of the Law Institute of Victoria, for example, report that in practice (particularly migration) FOI requests are routinely made on behalf of non-citizens (concerning a visa application) with applications before the Department of Home Affairs, the Tribunal, or the courts. In this context imposing a fee would restrict many individuals' ability to access information about their own case, amounting to a denial of one's right to access justice. The imposition of fees, charges and deposits may have the effect of slowing down an already slow process and tends to preclude individuals with no income from making those applications unless the costs are absorbed by a third party.

112. We add that there is currently a significant—and in our view, unjustifiable—disparity between standard and migration matters in the fees prescribed to access the Administrative Review Tribunal. For example, a standard application fee for the ART is $1,148 (but for concessional circumstances, is $100). The fee for a reviewable migration decision is $3,850 (with a financial hardship deduction of 50 per cent).[49] If a similar approach were adopted here, this would obviously pose significant difficulties for non-citizens to obtain information under the FOI Act, undermine transparency in this area of Government policy and practice, and in our view, be similarly unfair and unjustifiable.

113. On balance, if the proposed measures are maintained, the Law Council recommends that a generous exemption and fee waiver system be implemented as part of the proposed regulations, and the regulations be clear on the considerations to be taken into account on exemptions and fee waivers. We recommend that explicit categories of applicants be articulated as exempted from being required to pay application fees, search charges and photocopying/scanning charges. Further safeguards should also be included in the primary legislation to ensure that fees remain modest, fair and reasonable across the board. Independent review provisions should be included to ensure that these objectives are met over time.

114. Additionally, there are certain categories of FOI requests, for example those made for the purpose of challenging a decision under the *Migration Act 1958* (Cth), which should be exempt from fees as a matter of course. This should be provided for in the FOI Act, in addition to the proposed exception for documents containing personal information about the applicant as proposed in subsection 93C(3).

[49] Administrative Review Tribunal, 'News and updates/Upcoming increases to application fees', online page, 16 June 2025.

Recommendations

- **If the proposed measures are maintained, a broad and clear set of exemptions and fee waivers should be implemented to protect the interest of vulnerable applicants. Certain fee categories of FOI requests should be exempt from fees as a matter of course.**
- **Further safeguards should be included in the legislation to ensure that fees remain modest, fair and reasonable across the board and independent review provisions should be included to ensure that these objectives are met over time.**

Schedule 7—Exemptions

Part 2—Cabinet documents

FOI Act amendments

115. Schedule 7, Part 2 of the Bill proposes to make changes to section 34 of the FOI Act, with related changes to the PID Act.

116. Section 34 sets out an exemption from the operation of the FOI Act for certain 'Cabinet documents'. Section 34 currently provides that:

> *(1) A document is an exempt document if:*
>
> *(a) both of the following are satisfied:*
>
> *(i) it has been submitted to the Cabinet for its consideration, or is or was proposed by a Minister to be so submitted;*
>
> *(ii) it was brought into existence for the dominant purpose of submission for consideration by the Cabinet; or*
>
> *(b) it is an official record of the Cabinet; or*
>
> *(c) it was brought into existence for the dominant purpose of briefing a Minister on a document to which paragraph (a) applies; or*
>
> *(d) it is a draft of a document to which paragraph (a), (b) or (c) applies.*
>
> *(2) A document is an exempt document to the extent that it is a copy or part of, or contains an extract from, a document to which subsection (1) applies.*
>
> *(3) A document is an exempt document to the extent that it contains information the disclosure of which would reveal a Cabinet deliberation or decision, unless the existence of the deliberation or decision has been officially disclosed.*

117. The proposed amendments to paragraph 34(1)(a) would mean that, where a document 'has been prepared by a Minister, on a Minister's behalf or by an agency' with 'a substantial purpose' of submission for consideration by the Cabinet, the document will be exempt from disclosure (emphasis added).

118. Similarly, the proposed amendment to paragraph 34(1)(c) would mean that where the 'a substantial purpose' for the preparation of a document was to brief a Minister in relation to issues to be considered by the Cabinet, the document will be exempt from disclosure (emphasis added).

119. In both instances, a lower requirement of 'substantial' purpose is proposed, replacing the current 'dominant' purpose requirement. This will have the effect of enlarging the range of documents captured as exempted Cabinet documents.[50] The EM contains a clear statement of intention to capture what are effectively preparatory documents linked to Cabinet deliberations as exempt documents.[51] In our view, the proposed changes to the thresholds would be a significant dilution and cannot be supported.[52]

120. Further, the proposed changes would extend protection from disclosure to a document to the extent it 'summarises, describes or refers to the contents of a document to which subsection 34(1) applies'. We note that 'refers to' is a broad, relational term which could mean that any reference to the contents of a Cabinet document, however small or indirect, could suffice to make it exempt from disclosure.

121. The amendment to section 34 also introduces new provisions in proposed subsections 34(6)(a), 34(8) and 34(7). Proposed subsection 34(8) relates to a definition of the term 'consider', while proposed subsection 34(7) will confirm that the status of a Cabinet document does not depend on any formal marking as a Cabinet document. The definition of the term 'consider' includes 'discuss, deliberate, note and decide'. In our view, the fact that a matter is included in a Cabinet agenda for noting as opposed to deliberation and debate should not be a satisfactory basis for an exemption from disclosure. The practical effect of section 34(7) is that any document can be claimed as an exempt document without formal identification as such.

122. We suggest that the practical effect of these amendments will be to exclude more documents in the 'public interest' from disclosure under the FOI regime under the cloak of cabinet confidentiality. This is of particular concern given the Robodebt Royal Commission, in its closing observations, suggested that section 34 of the FOI Act be repealed.[53] It was also the view of the Commissioner that an amendment to section 34 should 'make clear that confidentiality should only be maintained over any Cabinet documents or parts of Cabinet documents where it is reasonably justified for an identifiable public interest reason'.[54] We also note the recommendation that the Commonwealth Cabinet Handbook should be amended so that the description of a document as a Cabinet document is no longer itself justification for maintaining the confidentiality of the document, and this recommendation is reflected in the Bill's proposal to add a new section 34(7).

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[50] Explanatory Memorandum, [371], [374].
[51] Ibid [380].
[52] See 'sole purpose' test versus 'dominant purpose' test in *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49.
[53] *Royal Commission into the Robodebt Scheme*, Report (2023), 656-657.
[54] Ibid 657.

123. We note the following statement of the Royal Commissioner, the Hon Catherine Holmes AC SC, in her concluding observations:

> *As with all Government documents, there may be reasons why disclosure of Cabinet documents, or parts of those documents, would not be in the public interest. Obvious examples include documents, or parts of documents, that would prejudice national security, law enforcement or Australia's international relations if released. Whether non-disclosure for those, or other, reasons, is warranted by the public interest would of course depend on the individual circumstances of each case.*
>
> *However, the Government should end the blanket approach to confidentiality of Cabinet documents. To give effect to this, section 34 of the FOI Act should be repealed. The wide range of class and conditional exemptions in the FOI Act is sufficient to protect the public interest in relation to Cabinet documents. The mere fact that a document is a Cabinet document should not, by itself, be regarded as justifying maintenance of its secrecy.*[55]

124. The Law Council notes that the effect of the proposed amendments to section 34 the Bill will be to broaden what is captured by the cabinet documents exemption and further limit access to information. This contradicts the closing observations of the Royal Commission. The Law Council, therefore, considers these amendments should be rejected, other than the addition to subsection 34(7).

PID Act amendments

125. Schedule 7, Part 2, Clause 11 will repeal and substitute section 8(2) of the PID Act.

126. Section 8 of the PID Act contains the definitions used in that Act. The proposed change relates to the definition of Cabinet documents used in the PID Act. This is a two-part definition. The proposed change is noted in bold.

> *Cabinet information means:*
>
> *(a) information contained in a document that is an exempt document under section 34 of the Freedom of Information Act 1982; or*
>
> ~~*(b) information the disclosure of which would involve the disclosure of any deliberation, or decision, of the Cabinet or a committee of the Cabinet.*~~
>
> *(b) information the disclosure of which would involve the disclosure of* ***any consideration of the Cabinet or a committee of the Cabinet, including any discussion, deliberation, noting or decision of the Cabinet or a committee of the Cabinet****.*

127. The change to the definition appears to have the effect of broadening the definition of Cabinet information that is engaged in the PID Act.

128. Under the current PID Act, an 'external disclosure' may be a 'public interest disclosure'—giving rise to potential protections—where the disclosure is not, on balance, contrary to the public interest.[56] In determining whether an external disclosure is contrary to the public interest, regard is to be had to 'the principle that

[55] Ibid.
[56] *Public Interest Disclosure Act 2013* (Cth) s 26(1) item 2.

Cabinet information should remain confidential unless it is already lawfully publicly available'.[57]

129. Therefore, the broadening of the definition of 'Cabinet information' would reduce the potential circumstances in which a whistleblower making an external disclosure might be able to access protections under the PID Act.

130. We note that Attorney-General's Department is in the process of consulting on potential reforms to the public sector whistleblowing protection framework.[58] The reforms being considered by the Department include a significant redesign of the provisions of PID Act. Any amendments introduced through the current Bill may need to be reworked in the future to accord with the proposed redesign of the PID Act.

Part 3—Deliberative processes exemption

131. The Bill would amend the public interest exemption factors in section 11B of the FOI Act as they relate to the deliberative processes exemption in section 47C. Currently, section 47C provides a conditional exemption for disclosure of information that relates to matters:

> *… in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of [an agency, Minister or government].*

132. Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest.[59] This is reiterated under section 11A(5).

133. Section 11A links to section 11B which in turn, sets out non-exhaustive factors to be considered in determining whether release of the document is contrary to the public interest.

(a) Section 11B(3) highlights factors which favour access to the document in the public interest, including whether access would: promote the objects of the Act, inform debate on a matter of public importance, promote effective oversight of public expenditure, and allow a person to access his or her own personal information.

(b) Section 11(4) emphasises that certain matters must not be taken into account in determining what would be contrary to the public interest, including that access could cause embarrassment to the Commonwealth or a loss of confidence in the Commonwealth, could result in a person misinterpreting a document, that the author was of high seniority, or that access to the document could result in confusion or unnecessary debate.

(c) Section 11(5) provides that in working out whether access to the document would be contrary to the public interest, an agency or Minister must have regard to any guidelines issued by the Information Commissioner for the purposes of section 93A.

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[57] Ibid s 26(3)(b).
[58] Attorney General's Department, Public sector whistleblower reforms (10 September 2025).
[59] FOI Act, ss 11A, 47C,

134. Schedule 7, Part 3 of the Bill proposes to insert a new subsection (3A) into section 11B, explicitly identifying factors *against* giving access:

> *(3A) If the document is conditionally exempt under section 47C (deliberative processes), factors that are against giving access to the document in the public interest include whether giving access to the document would, or could reasonably be expected to, have any of the following effects (whether in a particular case or generally):*
>
> *(a) prejudice the frank or timely discussion of matters or exchange of opinions between participants in deliberative processes of government for the purposes of consultation or deliberation in the course of, or for the purposes of, those processes;*
>
> *(b) prejudice the frank or timely provision of advice to or by an agency or Minister, or the consideration of that advice after it is provided;*
>
> *(c) prejudice the orderly and effective conduct of a government decision-making process.*

135. These amendments appear in part designed to codify the 'Howard criteria' identified by Justice Davies in *Re Howard and the Treasurer* [1985] AATA 100, some of which were rejected by some justices of the High Court in *McKinnon v Secretary, Department of Treasury* (2006) 228 CLR 423.

136. We are concerned that the proposed factors, particularly 11B(3A)(c), which includes prejudice to the orderly and effective conduct of a government decision-making process, are far too broad and ambiguous.[60] A reasonable expectation of having the effect generally of prejudicing the timely discussion of matters between participants for the purposes of consultation is also, for example, a low bar which does not signify any real harm caused to the public interest through disclosure.

137. These amendments, as proposed, would have the effect of significantly expanding the circumstances in which the deliberative processes exemption is relied upon, contrary to the original design of the relevant sections which are directed towards narrowly constructing the public interest for the purposes of the deliberative processes exemption. In turn, this would undermine the objects of the Act as originally drafted. In our view, they are unwarranted incursions into the freedom of information regime.

138. We therefore consider that Schedule 7, Part 3 should not be passed. If, contrary to our recommendation, these amendments are progressed, the factors in proposed section 11B(3A) should be redrafted with a focus on addressing much more tangible harm.

[60] Note commentary by the Queensland Information Commissioner in *Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60, [107]-[108].

Recommendations

- **The proposed amendments to section 34, other than the addition of section 34(7), should be removed from the Bill.**
- **Schedule 7, Part 3 (deliberative processes exemption) should be removed from the Bill. If, contrary to our position, it is progressed, the factors in proposed section 11B(3A) should be redrafted with a focus on addressing much more tangible harm.**

Position of the ACT Law Society

139. The ACT Law Society notes that the amendments in Schedule 7 of the Bill provide greater clarity regarding the scope of Cabinet exemptions and the application of the public interest test. The Law Society's members consider these changes to be a positive step towards improving the consistency and predictability of exemption decisions, particularly in relation to Cabinet documents and deliberative processes. By more clearly articulating the types of information that are exempt and the factors to be weighed in the public interest test, the amendments are likely to assist both agencies and applicants in understanding the boundaries of access and the rationale for withholding certain information.

140. Members of the ACT Law Society have observed that, in practice, uncertainty around the application of Cabinet exemptions and the public interest test has contributed to inconsistent decision-making and, at times, unnecessary disputes. The Law Society welcomes the Bill's efforts to address these issues by refining the relevant definitions and providing more explicit guidance on the factors that may weigh against disclosure. This is expected to support a more transparent and accountable FOI regime, while still safeguarding the confidentiality of Cabinet deliberations and other sensitive government processes.

141. The Society also acknowledges that the balance between transparency and the protection of sensitive government information is a dynamic one, and that the practical impact of these amendments will only become fully apparent over time. For this reason, the Law Society recommends that a statutory review mechanism be included in the Bill. Such a mechanism would enable the Government to assess, in consultation with stakeholders, whether the amended exemptions are operating as intended, and to make further adjustments if necessary to ensure that the FOI framework continues to promote both openness and good governance.

Other Areas of Reform

142. The Law Council considers that the amendments introduced by the Bill will not address many of the identified problems facing the FOI regime, most of which are linked to resourcing and executive decision-making in the public sector. In particular, we draw attention to the systemic and cultural issues raised as part of the 2023 Inquiry. These included a particular focus on the under-resourcing of the OAIC, in light of changes to the volume and nature of FOI applications and delays in finalising FOI applications and reviews.[61]

143. The Law Council understands that the resourcing of the OAIC has been addressed in part through increases in funding and staffing at the OAIC. However, we note

[61] Senate Legal and Constitutional Affairs Reference Committee, Parliament of Australia, The Operation of Commonwealth Freedom of Information (FOI) Laws (Final Report, December 2023) 60.

that, in the experience of members of the legal profession, delays remain a significant barrier at the review stage. This is reflected in a recent report of the Centre for Public Integrity, which found that the time taken by the OAIC to process IC review applications had risen to 15.5 months in 2023–24.[62] As noted in that report:

> *This delay is disastrous for transparency and democracy. By the time a review is completed, the documents in question have often lost their political and public relevance—blunting the FOI regime's democratic function.*[63]

144. In our view, this could be addressed in part by amending paragraph 55K(4)(a) of the FOI Act so that a complete statement of reasons is not required in all cases. Rather, the Information Commissioner could be entitled to produce a short form of reasons, for example, which would only be required to address in detail any divergence in reasoning from the decision at the agency internal review stage.

145. Cultural change is required within agencies to ensure that FOI officers are aware of the objectives of the FOI regime, and that their role is to support them.[64] Officers should be encouraged to assist the applicant to narrow their request. Further, there should be a statutory means by which the agency can create a document to provide the information sought by the applicant as opposed to spending time locating and reviewing multiple documents. See, for example, section 75 of the *Government Information (Public Access) Act 2009* (NSW), which is set out as follows:

> *75 Providing access by creating new record*
>
> *(1) An agency is not prevented from providing access in response to an access application to government information held by the agency by making and providing access to a new record of that information.*
>
> *(2) An agency's obligation to provide access to government information in response to an access application does not require the agency to do any of the following— (a) make a new record of information held by the agency, (b) update or verify information held by the agency, (c) create new information, or produce a new record of information, by deduction, inference or calculation from information held by the agency or by any other use or application of information held by the agency.*

146. The Government may also wish to consider the establishment of alternative access schemes, such as that which already exists under section 15A of FOI Act in relation to the personnel records of staff. Similarly, greater consideration could be given to agency-specific arrangements or 'off ramps' to provide public documents outside of the FOI framework. We note that further consultation would be required on such schemes, which would require strict review protocols, coupled with detailed explanations of materials that could be accessed 'as a matter of course' and those which would be withheld.

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[62] Centre for Public Integrity, Freedom of Information: Secrecy and Delay (Final Report, July 2025) 7.
[63] Ibid.
[64] Office of the Victorian Information Commissioner, *The culture of implementing Freedom of Information in Australia* (Final Report, 18 June 2024): Australia-Linkage-Council-Research-Project-FOI-Culture-study-Final-report.pdf.

147. These protocols could potentially assist in reducing the volume and breadth of FOI applications, as well as creating clear principles for providing access regarding common types or classes of documents. The establishment of such access rules or principles are, arguably, in line with section 8A of the FOI Act and requirements for agencies to publish 'operational information'.

Recommendations

- **Section 55K(4)(a) of the FOI Act should be amended so that a complete statement of reasons is not required in all cases on the part of the OIAC.**
- **Consideration should be given to the establishment of alternative access schemes, such as that which already exists under section 15A of FOI Act in relation to the personnel records of staff.**
- **Consideration should be given to agency-specific arrangements or 'off ramps' to provide public documents outside of the FOI framework.**