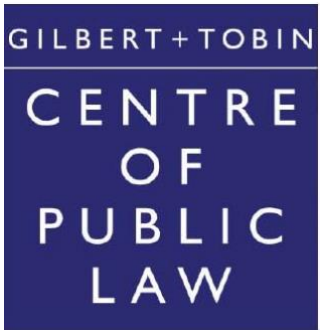

Committee Secretary
Senate Legal and Constitutional Affairs Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600
By email: legcon.sen@aph.gov.au

Dear Secretary

Re: Freedom of Information Amendment Bill 2025 (FOI Amendment Bill)

Thank you for the opportunity to make a submission to the Senate Legal and Constitutional Affairs Legislation Committee in its inquiry into the FOI Amendment Bill.

We write in our capacity as academics at the Faculty of Law & Justice, University of New South Wales and members of the Gilbert + Tobin Centre of Public Law. We are solely responsible for the views and content of this submission. We consent to this submission being published on the Committee's website and would be happy to speak with the Committee further regarding any aspect of it.

The Bill would make a range of amendments to the *Freedom of Information Act 1982* (Cth) (FOI Act) and the *Australian Information Commissioner Act 2010* (Cth) (Information Commissioner Act). We do not comment on the detail of each of the proposed amendments in this submission. Rather, we focus on our two overarching concerns with the Bill. Our first concern is that the Bill will not achieve the government's stated aims, due the fact that the amendments contained in the Bill have not been developed following a full and comprehensive review of the FOI regime as recommended by the Hawke Review.[1] Our second overarching concern is that *most* (though not all) of the proposed amendments will have the effect of further limiting Australians' access to government information. These moves are directly contrary to the core public law principles of transparency and accountability that are increasingly critical to engendering public trust in government, and we submit that this is not the general direction the Australian Parliament and government ought to take with respect to access to government information.

[1] Allan Hawke, *Review of the Freedom of Information Act 1982 and Australian Information Commissioner Act 2010* (Report to Australian Government, 1 July 2013) ('Hawke Review').

The rationale for the amendments

1. The Explanatory Memorandum (EM) to the FOI Amendment Bill begins by stating that the amendments aim to 'reduce system inefficiencies' and 'address abuses of process that can consume a disproportionate amount of agency resources and impact on the right of genuine applicants to access information'.[2] Throughout the EM, there are regular references to the need to alter the balance between Australians' rights to access to government information and the 'administrative burden' of the FOI regime.[3]

2. In her second reading speech, the Attorney-General justified the amendments on the basis of the cost and time spent by government in responding to requests. She stated that:[4]

   > *The administrative impost of processing large and complex requests, or treating vexatious and frivolous requests with the same procedural rigour, can divert resources and risks inhibiting agencies from providing important and essential government services and delivering on reform priorities that would benefit all Australians.*

   She cited technology as a cause of 'large volumes of vexatious, abusive and frivolous requests'.

3. Most of the provisions of the FOI Amendment Bill are directed at this objective—of rebalancing the access to information regime *against* disclosure. They do this by:
   a. Creating additional barriers for applicants requesting government information by:
      - Allowing the Regulations to re-introduce fees for FOI applications and review applications (Sch 6); and
      - Prohibiting anonymous and pseudonymous requests by requiring applicants to provide their full name and, if applying on behalf of another person, the full name of that other person (Sch 2, Part 5, Div 1).
   b. Making it easier and simpler for agencies to decline requests, including by:
      - Giving Ministers and agencies the power to stop dealing with *requests* which the relevant Ministers or agencies consider to be vexatious, frivolous, or an abuse of process, without the *applicant themselves* being declared vexatious by the Information Commissioner (Sch 2, Part 4);
      - Giving Ministers and agencies discretion to refuse to process applications if they would take more than 40 hours to process (or a higher 'processing cap' if prescribed by the regulations) (Sch 3, Part 2);
      - Allowing applications to be refused without having identified the relevant documents if 'it is apparent from the nature of the document

[2] Explanatory Memorandum, Freedom of Information Amendment Bill 2025 (Cth) 3 ('Explanatory Memorandum').
[3] See, eg, Explanatory Memorandum, 4, 6, 13, 75.
[4] Commonwealth, *Parliamentary Debates,* House of Representatives, 3 September 2025, 8 (Michelle Rowland, Attorney-General).

described in the request' that it would be exempt and either not editable or that the applicant would not want an edited version (Sch 7, Part 1, Div 1).

c. Widening the scope of the Cabinet documents exemption (Sch 7, Part 2) and the deliberative process exemption (Sch 7, Part 3).
d. 'Streamlining' review processes by:
    - Empowering the Information Commissioner to remit decisions to the relevant agency without an applicant's agreement (Sch 5, Part 1); and
    - Removing third party review rights (Sch 5, Part 3).
e. Amending the objects provision of the Act (s 3(2)) to emphasise that participation and scrutiny are to be balanced against 'the protection of essential private interests and the proper and effective operation of government' (Sch 1, Part 1, Div 1).

4. As noted in the EM to the Bill, several of these amendments were recommended by Allan Hawke in his 2013 review of the FOI and Information Commissioner Acts.[5] However, the first, and principal, recommendation of the Hawke Review was that a comprehensive review be conducted of the FOI Act, and associated legislation. The Hawke Review found that the FOI Act was overly complex and outdated, and recommended that a comprehensive review of the Act be undertaken (for example, by the Australian Law Reform Commission) and that consideration ought to be given to completely rewriting it.[6] No comprehensive review has taken place in the intervening 12 years. Instead the government has cherry-picked recommendations from the Hawke Review without regard to whether those recommendations remain current and appropriate 12 years on, nor to whether implementation of just some of a package of recommendations might subvert the overall intent of the recommendations.

5. This is particularly concerning because some of the amendments in fact directly contradict the Hawke Review's recommendations. For instance, the Hawke Review expressly recommended against the re-introduction of application fees.[7] The government cannot claim that this Bill implements the substance of the Hawke Review's recommendations.

6. The need for a comprehensive review and rewrite of the FOI Act has only become more pressing since the Hawke Review. The issues that the government points to in the EM—of the FOI Act being overly complex and no longer fit for purpose—are widely recognised.[8] Indeed, as the government notes, they have been exacerbated by developments in technology. However, the FOI Amendment Bill will not address these issues. By picking up some recommendations from the Hawke Review, ignoring others, and failing to respond to its principal recommendation for a comprehensive review of

[5] Hawke Review (n 1).
[6] Hawke Review (n 1) 16.
[7] Hawke Review (n 1) 74.
[8] See, eg, Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *The Operation of Commonwealth Freedom of Information (FOI) Laws* (Report, December 2023) ch 3 ('2023 Senate FOI Review').

FOI laws, the FOI Amendment Act will only serve to increase the complexity of the FOI Act.

Further limiting access to government information

7. Most of the amendments in the FOI Amendment Bill will have the effect of further restricting Australians' access to government information under the FOI Act. This is the stated intention of many of the proposed amendments. We do not think this is the direction in which FOI laws should head.

8. Of particular concern in this respect is the expansion of the Cabinet documents and deliberative process exemptions. Each of these exemptions has already proved controversial in inhibiting access to government information arguably beyond the scope necessary to protect legitimate interests (eg in Cabinet confidentiality and the provision of frank and fearless advice by public servants). The landmark Robodebt Royal Commission Report indeed recommended the abolition of the Cabinet documents exemption, noting the need for greater transparency in Cabinet decision-making and the availability of other exemptions to deal with the *content* of such documents as appropriate.[9] That Report also highlighted the need for greater transparency and accountability within the public service more broadly. FOI played a role (albeit a hampered one due to these exemptions)[10] in uncovering the problems of Robodebt.

9. As noted in the Robodebt Royal Commission Report, there is comparative evidence that highlights how the objectives of the protection of Cabinet confidentiality and the provision of frank and fearless advice can still be met without strict exemptions of Cabinet documents from public disclosure, and indeed can even be met where there is proactive release of Cabinet documents. For example, Cabinet documents are not (and have never been) exempt from disclosure under the *Official Information Act 1982* (NZ),[11] and since 2019, all Cabinet and Cabinet committee papers and minutes have been required to be proactively released by New Zealand Ministers within 30 days of final decisions being taken by Cabinet (and following a review process). Similarly, since March 2024 the Queensland Government has instituted a policy of proactively releasing documents considered by Cabinet within 30 business days of final decisions being taken by Cabinet.[12] To now expand, rather than consider the retraction of, Cabinet exemptions in the FOI Act flies in the face of the findings and recommendations in the Robodebt Royal Commission Report. This step is unjustified when undertaken outside of the context of a comprehensive review of the Act and following consideration of clearly relevant comparative examples of moves in the opposite direction, and risks undermining the important role that FOI laws can play in supporting the degree of transparency which is needed to ensure government accountability.

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[9] *Royal Commission into the Robodebt Scheme* (Final Report, July 2023) vol 1, 656.
[10] See eg *Warren v Chief Executive Officer, Services Australia* [2024] FCAFC 73.
[11] See Matthew S R Palmer and Dean R Knight, *The Constitution of New Zealand: A Contextual Analysis* (Hart Publishing, 2022) 83–84; New Zealand Cabinet Office, 'Proactive Release of Cabinet Material: Updated Requirements' (29 June 2023) CO(23)04.
[12] Department of the Premier and Cabinet Queensland, *The Queensland Cabinet Handbook: Governing Queensland* (2024) [7.0].

10. The reintroduction of application fees is also of significant concern. While the amendments provide carveouts for requests involving personal information or on grounds of financial hardship (cl 93C(3)–(4)), the imposition of fees is contrary to the FOI Act's recognition of government information as a national resource (FOI Act s 3(3)). We also note that there are no restrictions on the scale of such fees other than the limitation that a fee must not amount to taxation (cl 93C(5)), leaving open the possibility that a future government might set fees that significantly inhibit use of FOI for its intended purposes of increasing public participation in government processes and scrutiny of government action.

11. As submissions to the Senate Legal and Constitutional Affairs References Committee's 2023 inquiry into the FOI Act emphasised, access to government information is: [13]

> *vital to a healthy and well-functioning democracy, a fundamental aspect of the rule of law, crucial to ensuring government transparency and accountability, and essential to enabling the public to participate in and scrutinise government decision-making.*

12. The overwhelming evidence to that 2023 inquiry was that the FOI Act is currently not working well to provide Australians with access to government information in a timely manner. Submitters pointed to inappropriate reliance on exemptions and lengthy delays, as a result of a culture within government that is antagonistic to FOI.[14]

13. Recent research by the Centre for Public Integrity confirms that the rates of refusals and partial grants of FOI requests have continued to rise under the current government. Since the 2010 reforms to the FOI scheme (which introduced the Office of the Australian Information Commissioner (OAIC), abolished fees and clarified exemptions, among other things), the 'refusal gap' (the difference between the proportion of requests granted in full and those refused) has gone from almost 50% to -4% in 2022–23 and 3% in 2023–24.[15] In 2011–12 around 60% of requests were granted in full and around 10% were refused entirely. Now both figures are at around 20%.[16]

14. The Centre for Public Integrity notes that 'Worse still, these refusals often don't withstand scrutiny' with almost half of decisions being changed on external appeal.[17]

15. Finally, the Centre for Public Integrity's recent research confirms that delays in OAIC reviews have gotten worse[18] (although there has been a decline in delays in first-instance decisions).[19]

16. These recent statistics confirm our own experience as researchers in attempting to use the FOI process. Our experiences have been of lengthy delays, spurious claims of

[13] 2023 Senate FOI Review (n 8) [2.2].
[14] 2023 Senate FOI Review (n 8) ch 3.
[15] Centre for Public Integrity, *Freedom of Information: Secrecy and Delay* (Report, July 2025) 6. https://publicintegrity.org.au/wp-content/uploads/2025/09/FOI-Secrecy-and-Delay-Update-Sept-22.pdf
[16] Centre for Public Integrity (n 15) 5.
[17] Centre for Public Integrity (n 15) 6.
[18] Centre for Public Integrity (n 15) 7.
[19] Centre for Public Integrity (n 15) 3.

exemptions, and ultimately, after constant follow-up, release of documents that did not answer the requests. This makes research into government policies and processes impossible, even when that research is funded by the Commonwealth government.

17. There is overwhelming evidence that the Commonwealth FOI system is not working well. Exemptions are being over-used.[20] There are long delays at first instance and on appeal. There is strong evidence that this is, at least in part, due to the lack of a pro-disclosure culture within government. Government resistance to FOI is nothing new. There was 'vigorous oppos[ition]' to the FOI Act from within the public service in the 1970s and 80s when the Act was first being debated and drafted, despite it having support from both major political parties.[21] Resistance has re-emerged regularly throughout its 43-year history.[22]

18. It is this resistance that is the cause of much of the inefficiency and cost within the FOI system. If there were a pro-disclosure culture in government, with proactive disclosure and a presumption of informal, administrative access, then government resources could be preserved for dealing with information the release of which has a *real* possibility of adversely affecting important competing interests, such as personal privacy or national security.[23] We submit that further expanding already over-used exemptions, and placing further barriers that inhibit people seeking information about government decisions and processes, including via fees, is not the solution to the problems with Australia's FOI regime.

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[20] On the over-use of commercial-in-confidence exemptions in the context of governments' use of technology, for instance, see Janina Boughey, 'Transparency in outsourced automated decision-making' [2023] *Public Law* 206.
[21] Ernst Willheim, 'Reflections of an Attorney-General's Department Lawyer' (2001) 8 *Australian Journal of Administrative Law* 151, 157.
[22] John McMillan, Submission No 7 to Senate Legal and Constitutional Affairs References Committee, *The Operation of Commonwealth Freedom of Information (FOI) Laws* (2023).
[23] McMillan (n 22).