Human Rights Law Centre

Submission: *Inquiry into Freedom of Information Amendment Bill 2025*

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Human Rights Law Centre

Author

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Human Rights Law Centre

We take fearless human rights action for a fairer future for everyone. We work in partnership with people and communities to advance human rights. We use strategic legal action and advocacy to defend hard-won human rights progress.

In 2023, the Human Rights Law Centre launched the Whistleblower Project, Australia's first dedicated legal service to protect and empower whistleblowers who want to speak up about wrongdoing. We provide legal advice and representation to whistleblowers, as well as continuing our longstanding tradition of advocating for stronger legal protections and an end to the prosecution of whistleblowers. The Human Rights Law Centre is a member of Whistleblowing International Network.

The Human Rights Law Centre acknowledges the Traditional Owners of the lands across Australia, including the lands of the Wurundjeri, Boon Wurrung, Gadigal, Ngunnawal, Cammeraygal, Darug, Wadawurrung, Turrbal and Jagera people where we work from. We pay our respect to Elders past and present. This land always was, and always will be Aboriginal and Torres Strait Islander land. Sovereignty has never been ceded.

We acknowledge the role of the colonial legal system in establishing, entrenching, and continuing the oppression and injustice experienced by First Nations peoples and that we have a responsibility to work in solidarity with Aboriginal and Torres Strait Islander people to undo this. We support the self-determination of Aboriginal and Torres Strait Islander peoples.

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Introduction

The Human Rights Law Centre (the **Centre**) thanks the Senate Legal and Constitutional Affairs Legislation Committee (the **Committee**) for the opportunity to make a submission to the inquiry into the Freedom of Information Amendment Bill 2025 (**the Bill**).

Freedom of information (**FOI**) requests are routinely used by journalists, civil society, and the public to find out crucial information about government decision-making. A well-functioning FOI system is therefore vital to a healthy, transparent and accountable democracy. It incentivises sound decision-making by public bodies and public servants, allows the public to remain informed about government decisions, especially when they are adversely affected by those decisions, and enables the scrutiny of government by journalists, civil society, and the public. Public access to government information is a keystone of Australia's integrity landscape and creating a robust, effective, and pro-disclosure FOI system is undeniably in the public interest.

While the Centre supports the modernisation of the *Freedom of Information Act 1982* (Cth) (***FOI Act***), the Bill is a step in the wrong direction. By departing from a pro-disclosure stance and dampening the public's right to access government information, the Bill seeks to weaken the FOI system, which, in turn, weakens our democracy.

This submission, drawing on the Centre's Whistleblower Project and its practical experience working with whistleblowers, will focus on section 53 of Schedule 2 of the Bill, which proposes to amend section 15(2)(b) of the *FOI Act* to prohibit anonymous and pseudonymous FOI requests, including those made by a third party on someone else's behalf. However, the Centre also echoes the views of our civil society partners in their concerns that the Bill:

- Was informed significantly by the *Review of the FOI Act*, conducted by Allan Hawke AC in 2013, which is now extremely outdated;
- Introduces a 40-hour processing cap for FOI requests;
- Imposes a fee on submitting FOI requests, which will limit accessibility;
- Expands the availability of the class-exemption for Cabinet documents, which is contrary to recommendations made by the Royal Commission into the Robodebt Scheme; and
- Shifts the focus of the *FOI Act* from a pro-disclosure stance to one which seeks to 'balance' that right with effective government.

We make the following recommendations:

- **Recommendation 1:** The Committee should recommend that this Bill does not pass and that the government proceed with an independent, comprehensive review of the *FOI Act*.
- **Recommendation 2:** In particular, the Committee should recommend that the Bill should not prohibit anonymous and pseudonymous FOI requests.

1: The significance of FOIs

A well-functioning FOI system is critical to integrity, open government and high-quality government decision making. Whether it is an individual seeking information about how their personal matter was determined by a government body, a journalist seeking documents to write a public interest story, or a civil society organisation looking to hold the government to account, a well-functioning FOI system is coherent with the tenets of democracy and international best practice. The value it provides to the public is well worth the cost of the FOI system's administration and should outweigh concerns about its misuse.

If the Committee wishes to have reference to practical examples of how FOIs are used to enhance government accountability, they only need to look as far as the Royal Commission into the Robodebt Scheme. In its report, the Commission detailed how victims of the Robodebt Scheme used FOIs to understand how their debts were wrongfully calculated, and then used that information to appeal their debt notices.[1] The Commission also detailed how journalists, activists, and academics made FOI requests to seek information about the decision-making behind Robodebt, but had their requests rejected because they were labelled 'cabinet documents'. The Commission noted that "if the Executive Minute…had been available for public scrutiny, it would have become apparent firstly, that there was advice that income averaging in the way it was proposed to be used could not occur without legislative change, and secondly that Cabinet was told nothing of those things."[2]

As a civil society organisation and a community legal service, the Whistleblower Project sees first-hand that a well-functioning FOI system is critical. Whether it is our clients or us who are requesting information about government decision-making, FOI requests are key tools with which we advocate for human rights in Australia. They should not be seen as burdensome to the government, but rather a fundamental facet of a healthy democracy.

2: The ban on anonymous and pseudonymous requests

Removing the ability to make anonymous and pseudonymous FOI requests will prevent whistleblowers, civil society organisations, lawyers and other key actors in the integrity landscape from accessing crucial government information. Often, these actors choose to make anonymous requests for legitimate reasons. When they are able to gain the requested information, they can prompt regulatory action, apply public pressure, and bring about media scrutiny, meaning that wrongdoing does not continue on in the dark. This should take precedence over unsubstantiated claims that anonymous FOI requests are being used by foreign actors or vexatious applicants. The government has provided no verifiable evidence to support these claims.

[1] *Royal Commission into the Robodebt Scheme* (Report, 7 July 2023) vol 2, 367.
[2] Ibid 656-6.

Whistleblowers

The Centre's Whistleblower Project regularly assists whistleblowers to make disclosures about wrongdoing to agencies, regulators, and the media. In speaking up, whistleblowers commonly face a range of challenges, including:

- Needing to provide detailed information and documentary evidence when making reports to regulatory agencies, as these agencies are significantly under resourced and do not investigate the majority of disclosures they receive;
- Sometimes being directly asked by investigators to provide substantiating evidence;
- A lack of guidance from agencies and regulators as to how to treat potentially confidential and sensitive information when following public interest disclosure pathways; and
- Experiencing reprisal as a result of their disclosures, which can take the form of their employment being terminated, being demoted, and being bullied and harassed.

Due to these factors, whistleblowers often rely on FOI requests to gather the requisite information without being at risk of breaching their employment or secrecy obligations. In particular, the value of **anonymous** FOI requests cannot be understated. Anonymity adds a necessary layer of security for whistleblowers, as the agency they are making FOI requests to are often the agency that employs them and the agency about which they are making disclosures. Anonymity therefore provides assurance to whistleblowers that their identity will remain confidential and that they are taking the requisite steps to protect themselves from suffering detriment as a result of speaking up.

The ability to make anonymous FOI requests has become even more crucial following the high-profile prosecutions of whistleblowers, which has had a deterrent effect on public servants wanting to blow the whistle. The recent judgment in *Boyle v Commonwealth Director of Public Prosecutions*[3] found that Boyle's acts done in preparation of blowing the whistle were not covered by the immunities in the *Public Interest Disclosure Act 2013* (Cth) (the ***PID Act***). As many acts of evidence gathering are now likely unprotected, whistleblowers are more reliant than ever on anonymous FOI requests to satisfy themselves that the misconduct meets the relevant legal threshold for disclosable conduct, to provide evidence to regulators to encourage them to investigate, and to generate media interest when making external disclosures.

We recognise that the *PID Act* does not require whistleblowers to provide substantiating evidence when making disclosures, and instead only requires a 'reasonable belief' that the information tends to show disclosable conduct. However, our practical experience shows that this is rarely the reality for whistleblowers. In their disclosures to regulators, whistleblowers often need to provide evidence to encourage investigation, as these agencies are significantly under resourced and are very selective about which disclosures to investigate. Many of our clients have also been directly asked by regulators for documentary evidence to aid their investigations. Additionally, when going through the external and emergency disclosure pathways contemplated by the *PID Act*, whistleblowers often need evidence to compel action from media and MPs. Without evidence, their disclosures may not be seen as serious

[3] [2024] SASCA 73.

or credible. The reality is that even though the *PID Act* does not require evidence from whistleblowers, they are pressured and compelled to provide evidence at various stages of the whistleblowing process, making anonymous FOI requests an indispensable tool for anyone wanting to speak up about wrongdoing.

Whistleblowers make Australia a better place. Prohibiting anonymous FOI requests will impose more barriers on what is already a psychologically, professionally, and financially taxing process and stands to deter whistleblowers who are critical in exposing wrongdoing in government.

Others speaking up

While whistleblowers are essential actors in promoting integrity and accountability, they are not the only ones speaking up about wrongdoing. Other individuals and organisations who speak up about wrongdoing also regularly use anonymous FOI requests for a variety of reasons, including that they fear reprisal from the community or from the agency, that they are otherwise bound by another obligation (for example, a deed of settlement or non-disclosure agreement), or that they are offered no protections for speaking up. Again, prohibiting anonymous FOI requests stands to deter such people from speaking up about wrongdoing.

Third party requests

In addition, third parties regularly make FOI requests on the basis of information from whistleblowers and other sources. For example, the Whistleblower Project regularly makes FOI requests on behalf of our clients to seek information that will assist them in their dealings with regulators, agencies, and the media. Civil society organisations, journalists, and activists regularly do the same to substantiate and use information that sources have passed on.

Requiring third parties to identify the name of the person on whose behalf they are making the request erodes the ability of these crucial actors to seek information and act accordingly. The ability for third parties to make anonymous requests is critical as it adds another layer of anonymity for the source, especially in circumstances where they are easily identifiable, have erroneously gone through a pathway not protected by whistleblowing legislation, or where the risk of experiencing detrimental action is high. Prohibiting anonymous FOI requests will have a deterrent effect on third parties who seek to make legitimate FOI requests in the public interest.

Interaction with the Privacy Act

Under the Australian Privacy Principle (**APP**) 2 of the *Privacy Act 1988* (Cth), individuals have a right to anonymity or pseudonymity when dealing with an APP entity. All Commonwealth agencies are APP entities and are bound by the APP. The APP guidelines outline the importance of the right to anonymity and pseudonymity when dealing with APP entities, noting that they "enable individuals to exercise greater control over their personal information and

decide how much personal information will be shared or revealed to others."[4] The guidelines further note that the right to anonymity and pseudonymity not only benefits the individual, who can keep their identity private when they prefer, but can increase engagement with government bodies and services, enhance freedom of expression, decrease the likelihood of identity fraud, and lessen the compliance burden for APP entities.

The Explanatory Memorandum to the Bill has engaged with the Bill's encroachment on privacy, claiming that the amendments limit the right to privacy in a way that is reasonable, proportionate, and necessary to achieve legitimate objectives, which include reducing the number of vexatious applicants, ensuring FOIs are not used to enable identity fraud, and safeguarding against foreign actors making FOI requests. However, we echo the concerns of several journalists and civil society partners that the issues the objectives are predicated on have not been substantiated by the government.

While the APPs do not prevent contrary legislation in another context, the APPs set the standard for how APP entities should consider privacy. The right to anonymity and pseudonymity is clearly important and, in these circumstances, it is hard to see how the limitations to this right imposed by the Bill are reasonable, proportionate, and necessary to serve a legitimate and substantiated purpose.

Conclusion and recommendations

FOIs are critical to Australian democracy and any attempts to encroach on the public's ability to access government information should not proceed without good reason and careful consideration. While we support the modernisation of the *FOI Act,* the amendments in this Bill are not in the public interest and will only add to Australia's growing government secrecy problem. We therefore urge the Committee to recommend that this Bill does not pass.

Recommendation 1: The Committee should recommend that this Bill does not pass and that the government proceed with an independent comprehensive review of the *FOI Act*.

Recommendation 2: In particular, the Committee should recommend that the Bill should not ban anonymous and pseudonymous FOI requests.

[4] *Australian Privacy Principles Guidelines Chapter 2 – Anonymity and Pseudonymity* (2019), 4.