SUBMISSION TO STANDING COMMITTEE ON LEGISLATIVE AND CONSTITUTIONAL AFFAIRS INQUIRY INTO FREEDOM OF INFORMATION AMENDMENT BILL 2025

Introduction

1. The Freedom of information Amendment Bill is a retrograde step backwards for open government that will take FOI back to the dark ages for Australia's federal government. What was once one of the strongest FOI jurisdictions in Australia will quickly become one of the weakest if these changes are adopted. The amendments are unnecessary and unjustified, and have been introduced without proper consultation with the public or with regular FOI users. The claims made about the limitations of the current Act to deal with vexatious requests and the use of AI broadly lack evidence and are not accurate.

2. The Bill purports to "modernise" the operation of the Act. While there is plainly a case for modernisation, this Bill does nothing of the sort. A number of the changes have been cherrypicked from the Hawke Review, which was completed in 2013 in the final months of the Rudd Labor government. It is hardly a modernisation to draw on a review of the Act that was conducted more than a decade ago.

3. Most importantly, the Bill overlooks the vital first recommendation of the Hawke Review; recommendation 1(a) urged the Labor government of 2013 that "a comprehensive review of the FOI Act be undertaken". This is a necessary and vital step that successive Labor and Coalition governments have failed to undertake. The current Bill should be withdrawn, and a full review of the Act with appropriate consultation should be undertaken.

Background

4. Until quite recently I was an investigative journalist with the Australian Broadcasting Corporation. I am now a barrister at the New South Wales Bar. Over the last 15 years I have been a frequent and regular user of the freedom of information system. I estimate I have lodged more than 500 FOI requests under the federal system. I have lodged approximately 221 reviews with the Office of the Australian Information Commissioner since 2013. I made these requests in my role as an investigative journalist at the Guardian, BuzzFeed and the Australian Broadcasting Corporation, and they routinely revealed importance matters of significant public interest.

5. My observation as a regular FOI user over the last 15 years is that agencies are generally hostile to releasing government information. Aggressive attempts to delay, evade, stymie and frustrate access to important government information are regularly made. Agencies use every trick in the book to frustrate access to important government information, and their decisions are regularly overturned on review, and

subject to findings in complaint investigations. The Office of the Australian Information Commissioner does not deal with matters in a timely way, limiting access to remedies for applicants.

6. This Bill does not address the broad structural problems with the current Act and the regulator at all, and will likely embolden agencies to reject requests on spurious grounds. It will also open up new ways for agencies to engage in new types of behaviour that stymie legitimate requests for information. The proposed changes are unlikely to have any measurable impact on the cost effectiveness of FOI, and may even increase litigation due to the increased powers of agencies.

AI and FOI: Purported goals of the Bill can be achieved without reform

7. The federal government has relied on a number of particular claims to justify these reforms. In particular, the attorney-general advances the argument that artificial intelligence is being deployed in a vexatious and inappropriate way, and the Act does not have the capacity to deal with these technological challenges. The Second Reading Speech sets out:

"This is in part due to technology enabling large volumes of vexatious, abusive and frivolous requests—tying up resources, costing taxpayers money and delaying genuine requests. There is no reason to believe that this problem will not grow worse over time, particularly given the advancing capabilities of artificial intelligence."

8. No particular evidence has been provided to support this claim. However, the attorney-general has referenced one matter where:

"FOI requests have been generated, sometimes around 600 of them in one instance, going to a small agency which tied up the services of that agency for over two months. Now, you might think that's not important, but let me tell you what that agency was. That was eSafety. That is an organisation responsible for ensuring the safety, particularly of young people, online, getting tied up, doing 600 frivolous FOI requests that they are required by law to deal with. "

9. As a starting point, the requests referenced by the attorney-general do not appear to have anything to do with AI. The requests formed part of a crowd-sourced campaign to encourage individual X users to obtain access to any records held by the e-safety commissioner about their accounts. It would be best characterised as a use of FOI enabled by fairly simplistic computer driven processes to make it easier for individuals to lodge requests for information on a common topic.

10. High volume computer assisted crowd-sourcing endeavours are nothing new, and can be easily managed using the existing FOI framework. In 2013 I co-founded a website called Detention Logs which encouraged users to lodge a request for incident reports

from immigration detention centres.[1] More than 120 users submitted FOI requests to the department in relation to particular requests they considered to be in the public interest.

11. In *Farrell and Department of Immigration and Border Protection* [2014] AICmr 74 Commissioner Popple ruled that the Department could treat all 121 FOI requests as a single request, and then issue the combined Applicants with a s24AB notice that they intended to refuse the requests on the basis they were a substantial diversion of resources. Adopting this approach permitted the Department to slow the flow of requests and manage them more effectively.

12. This is a mechanism that already exists, and would have been open to the E-Safety office to adopt in this circumstance. Nothing would prohibit them doing this right now to assist in managing the flow of such a volume of requests. It is incorrect to claim the current Act cannot meet this challenge.

Use of anonymous requests are an important protection for whistleblowers and the public interest

13. The Bill seeks to prevent applicants from lodging requests anonymously. The basis for this, according to the Second Reading Speech, is that anonymous requests "risks undermining the integrity of the framework, and, in combination with new technology, creates risk vectors that could be exploited by offshore actors seeking government-held information for potentially nefarious purposes."

14. The rationale ignores an obvious problem: Any information obtained under FOI goes through a careful process of applying and considering a wide range of exemptions. If it is eligible to be released, there can be no harm that flows from the release of the information. The various exemptions built into the Act ensure this. If there were potential harm that flowed from the release of information, there are ample ways for the Act to consider this. Imposing identification requirements on applicants will not materially change the way that exemptions are applied.

15. Even if there were credible evidence that offshore actors were using FOI to obtain information, such actors are likely to be sophisticated enough to obtain identification credentials to allow them to overcome an identification requirement. The changes are therefore unlikely to meet the stated goal.

16. The Bill also ignores the importance of anonymous requests. As a journalist I was aware of occasions where whistleblowers within government agencies sought access to government information under FOI anonymously, as a way to ventilate serious matters of public interest they believed ought to be released. These requests could

[1] https://www.theguardian.com/commentisfree/2013/jun/11/detention-logs-open-journalism

then be seen by journalists and other participants in civil society to report on those matters. Shutting off this important valve will rob the broader public of countless revelations of public importance.

Vexatious litigant provisions open to misuse

17. The proposed vexatious applicant provisions go far beyond merely stopping vexatious requests, and may be deployed against applicants making legitimate requests for information.

18. The sweeping power under s 15AD gives agencies a broad discretion to refuse to deal with applications on a unilateral basis. S 15AD(1) applies to both 'vexatious or frivolous requests'. The term 'frivolous' in particular lacks specificity. What a decision-maker determines to be frivolous may well be a legitimate and important request.

19. For instance, as a journalist I had a practice of occasionally making requests for documents that related to particularly controversial FOI requests. The purpose of this was to understand how decisions were arrived at and who influenced decisions inside or outside government agencies. These requests often yielded vital information of significant public interest.

20. However, under the terms of this Bill such a request could simply not be dealt with on the basis it is 'frivolous'. While the decision is IC reviewable, this would take years to be resolved based on current processing times.

21. The Information Commissioner has broad existing power to declare an applicant vexatious. The power is broad. Previous decisions such as *Sweeney and Australian Information Commissioner & Ors* [2014] AATA 531 rely on the provision to prevent an applicant from using a pseudonym or another agent to make a request. Agencies that are concerned about vexatious litigants already have an importance mechanism they can rely on.

Government discretion to set charges poses significant risks

22. The proposed charges regime in the Bill is not fit for purpose. Contrary to the operation of FOI regimes in many other jurisdictions, the proposed new charges regime does not set out a legislated application fee. Instead, it allows charges to be imposed by Regulation pursuant to proposed s 93C. This regime is open to abuse by a future government; there would be nothing to stop charges being levied at $500 per FOI request if a government determined this was appropriate.

23. Further, the purported goal of the charges regime is to limit the resources burden on agencies. The goal is unlikely to be met. The proposed changes rightly exempt

requests for this type of information from an application fee. Personal requests make up the bulk of FOI requests, and imposing application fees of non-personal requests are unlikely to measurably reduce charges. What they will do is limit scrutiny of government actions by parts of civil society such as journalists and advocacy groups. From personal experience, my own use of FOI in other state based jurisdictions was more limited when I was a journalist due to the application fees that were imposed by those governments. This reduced my capacity to scrutinise government actions in other jurisdictions, and is a likely consequence if charges are re-introduced for application fees.

40 hour processing cap sets bar too low

24. The processing cap the Bill imposes would enshrine something that agencies have sought for many years. However, it would lock out applicants from many legitimate FOI requests for government information. Many matters of public importance relate to complex matters of government. A single internal government audit could amount to hundreds of pages of documents. Were a request like this to be made under this proposed regime, an agency may refuse to process it on this basis. The cap is not fit for purpose and will shut out many legitimate requests.

25. Further, it is open to misuse from agencies. A common problem I experienced as an applicant is agencies vastly overestimating processing time for requests. Numerous matters of this type have been set aside by the Information Commissioner, and the practice appears to be common. It will continue with a processing cap, and agencies will try to shoehorn requests over the 40 hour cap in order to refuse to process them. Such a cap is therefore likely to generate a significant volume of reviews that is not cost effective for the operation of the scheme.

Retrospective application of provisions

26. Numerous provisions in the Bill apply retrospectively and will substantially alter the rights and interests of FOI applicants with ongoing requests and matters for review by the OAIC. For instance, the rights and interests of applicants seeking access to documents held by a minister where the minister changes office will be altered even where their requests are lodged before the act commences, pursuant to Schedule 8, Part 3. Numerous provisions that relate to the power of the OAIC will also apply retrospectively, such as proposed s 55GA and proposed s 55A. These changes would shift the goalposts on a large number of ongoing FOI reviews, particularly ones that are before the OAIC, in a way that would be unfair to applicants. Retrospective changes like these should be avoided and will likely complicate the operation of the regime.

Government should appoint members to Information Advisory Committee

27. Irrespective of the outcome of the passage of the Bill, the Government must address a serious failure by successive governments and appoint committee members to the Information Advisory Committee. S 27 of the *Australian Information Commissioner Act 2010* (Cth) established this body to advise on the performance of the OAIC. The body consists of the information commissioner, senior agency members and 'such other persons as the minister thinks fit' who hold suitable qualifications and are appointed by the Minister.

28. It is unclear if the Committee is actively functioning, and there is no information available about it published online. The OAIC website advises that "There are no current appointments to the Information Advisory Committee under section 27 of the *Australian Information Commissioner Act 2010 (Cth)*." If it is functioning, but only with agency heads and the Information Commissioner as committee members, then this must urgently be corrected. There is an urgent need for oversight of the federal FOI system and the functions of the OAIC by individuals who are suitably qualified to give impartial advice and perspectives on the operation of the Act. This is even more pressing if these proposed changes are passed.

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