Committee Secretary

Senate Legal and Constitutional Affairs Committee

PO Box 6100

Parliament House

Canberra ACT 2600

1 October 2025

Dear Officer,

RE: Freedom of Information Amendment Bill 2025

The Australian National University Law Reform and Social Justice Research Hub ('ANU LRSJ Research Hub') welcomes the opportunity to provide this submission to the Senate Legal and Constitutional Affairs Legislation Committee.

The ANU LRSJ Research Hub falls within the ANU Law School's Law Reform and Social Justice program, which supports the integration of law reform and principles of social justice into teaching, research and study across the School. Members of the group are students of the ANU Law School, who are engaged with a range of projects with the aim of exploring the law's complex role in society, and the part that lawyers play in using and improving law to promote both social justice and social stability.

Summary of Recommendations:

1. That the Committee recommend the Bill **not** be passed.

If the Parliament is to pass the Bill, it should be subject to the following amendments:

2. That Schedule 7 Part 2 of the Bill concerning exemptions for Cabinet documents be replaced by an alternative harm-based formulation of the Cabinet secrecy exemption, comparative to the New Zealand model;
3. That the proposed s93C in Schedule 6 of the Bill should be amended so that FOI fees are prescribed in legislation or regulation, and not be left to the discretion of agencies(s 93C(2)(a));
4. That the proposed s93C in Schedule 6 of the Bill should include a clear, exhaustive list of circumstances where fees are waived that cover public interest matters, the news media, not-for-profits, and academic research (s 93C(2)(b));
5. That the proposed s 15AD is amended to set out clear criteria which must be met before an agency or Minister makes a decision to not proceed upon the basis that the application is vexatious.
6. That the proposed s 15AD is amended to maintain the duty of an agency to render reasonable assistance, so as enable an applicant to submit a non-frivolous request;

7. That the proposed s 15 AD be amended such that mere intent of annoyance on the part of an applicant must not permit an agency or Minister to refuse a FOI request.

If further information is required, please contact us at . We would be happy to appear before the Committee to provide further evidence.

On behalf of the ANU LRSJ Research Hub,

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1. Changes to the Cabinet secrecy exemption

Framework

Currently, s 34 of the *Freedom of Information Act 1982* (Cth) ('FOI Act') provides that a document is exempt from Freedom of Information ('FOI') requests for reasons of Cabinet secrecy if: i) **it has been submitted** to the Cabinet for its consideration, or is or was proposed by a Minister to be so submitted; and (ii) it was brought into existence for the **dominant purpose** of submission for consideration by the Cabinet. The proposed amendment in the *Freedom of Information Amendment Bill 2025* ('the Bill') seeks to replace s 34 to provide that a document will be exempt if (i) **it has been prepared by** a Minister, on a Minister's behalf or by an agency; and (ii) **a substantial purpose** for its preparation was submission for consideration by the Cabinet.

Element	**Current s 34(1)(a) of *FOI Act***	**Proposed Amendment**	**Material Effect of the Amendment**
Who prepares the document	Must be prepared for **cabinet submission** (narrow).	Prepared by or on behalf of a Minister or agency (wide).	Expands scope of exemption to include working papers that might be linked to Cabinet.
Stage required	Document only needs to be **submitted** for Cabinet exemption to apply.	Document needs only be **prepared** for Cabinet exemption to be exempt.	More documents are now exempt from FOI requests. These includes drafts of advice and working papers.
Purpose test	**Dominant purpose** must be Cabinet submission to attract the exemption.	**Substantial purpose** is enough to attract the exemption.	Lower threshold. More documents will be exempt even if Cabinet exemption was incidental.

A proper construction or approach to amending s 34 must be consistent with the objects of the *Act*, which really treat openness as the central consideration. Though Cabinet confidentiality has been a long-recognised and important principle, it is of course limited to the extent necessary to enabling effective decision-making. Therefore, any reform that expands the category of documents subject to the exemption must make the case that s 34, the dominant purpose test, and class of documents available (under s 34(1)(a)) has deprived the ability of Cabinet to debate policy. The Explanatory Memorandum and broader justification for the amendments, at large, have not embarked on that endeavour, instead starting from the broad-strokes position that Cabinet confidentiality is justified.

In the context of the judicial interpretation of current law on Cabinet exemptions, democratic implications, and comparative practice, this section of the submission will outline why this proposed Amendment is unnecessary, disproportionate, and contrary to the stated objects of the *Act* — namely under s 3(2)(a-b): increasing public participation in Government processes, with a view to promoting better-informed decision-making, and increasing scrutiny, discussion, comment and review of the Government's activities.

In evaluating the weigh-up between this widening of exemptions, the explanatory memorandum justifies it on the basis that this intends to 'accurately reflect how the Cabinet process works in practice'.[1] The LRSJ Research Hub considers this line of reasoning to be quite circular, and lacking critical nuance on the need to balance ministerial responsibility with public scrutiny.

The 'dominant' vs 'substantial' purpose debate

Currently, s 34 of the *FOI Act* requires that for a document to be exempt it must be prepared for the **dominant purpose** of submission for consideration by the Cabinet. In our view, this standard strikes the right balance between the confidentiality of the Cabinet's deliberations and freedom of information considerations.

The purported justification for amending this test is that it better 'protects Cabinet confidentiality'.[2] Presently under the dominant purpose test, if a document was created partly for Cabinet and partly for another purpose (such as routine policy research or for circulation in the Parliament), it will generally not be treated as a Cabinet document. This may include documents such as drafts, working papers, and advice.

The benefit of the proposed amendment, as mentioned in the Explanatory Memorandum, is that there is a class of documents which might be created for multiple purposes and ought to attract the Cabinet secrecy exemption, but do not by virtue of sharing a non-Cabinet purpose. One such example might be the Treasury's advice on the constitutionality of the taxes on superannuation above $3 million which might be prepared for a dominant purpose of Cabinet consideration, but has ancillary purposes such as caucus understanding, or referral for the Australian Government Solicitor's consideration.[3] Under the proposed amended s 34, that dual-purpose class of document would be captured by the exemption.

The detriment is that this gives Ministers too much latitude in preventing public access to advice which might be prepared for Cabinet. A non-cabinet Minister could classify a document (in the request for it, or after the fact) as substantially for the Cabinet's consideration, which automatically attracts the immunity in s 34(1)(a). It gives latitude for any advice prepared in the public service to be deemed exempt from the FOI scheme because it could be rubber-stamped

[1] Explanatory Memorandum [370].
[2] Explanatory Memorandum [368].
[3] Ronald Mizen, 'Labor election pledges at risk of being unconstitutional', *The Australian Financial Review* (Sydney, 14 September 2025) <https://www.afr.com/politics/federal/labor-election-pledges-at-risk-of-being-unconstitutional-20250905-p5msm6>.

with the Cabinet exemption, even if its primary purpose is not for the Cabinet. Schedule 7 part 2 s 10 of the amending Act does, on the face of things, seek to prevent this 'rubber-stamp' effect:

> (7) To avoid doubt, the presence or absence in a document of any security marking or other feature identifying the document as a Cabinet document (however described) does not of itself determine whether or not subsection (1), (2) or (3) applies to the document.

However, this caveat does little work in practice. That is because the disclaimer that labels are indeterminative of an exemption cannot counteract the breadth of this substantive change from a dominant to a substantial purpose. This is unfavourable to free and fair debate, and contradicts the express objects of the *Freedom of Information Act 1982* (Cth) s 3(2)(a-b) which are to increase public participation in Government processes, and increase scrutiny, discussion, comment and review of the Government's activities. The public service has access to data and subject-matter experts. Restricting the ability of academics, journalists, and the public to scrutinise how the Cabinet acts on advice prepared by public servants is inimical to the democratic process.

Access to Cabinet advice is crucial for meaningful integrity in government. We provide several examples to show that advice should be widely available for public scrutiny. If the class of documents is widened to include documents that are only 'substantially' prepared for Cabinet, we risk running into several situations where undue use of the Cabinet secrecy exemption may lead to significant distrust in government. One past example is the use of the exemption to block the release of Phil Gaetjens' report into the sports rorts affair, for the purported reason that the report was prepared for the dominant purpose of Cabinet consideration.[4] Moreover, former Prime Minister Scott Morrison's National Cabinet' was, in part, given that name in an attempt to unlawfully attract the Cabinet exemption. Both incidents drew overwhelmingly negative reactions among the Australian public, and eroded perceptions of transparency and good governance. It follows that if the government intends to exercise its FOI refusal rights more frequently, Committee members should be aware that a broader approach to exempting Cabinet documents is unlikely to be well-received.

Approaches to Cabinet exemptions for FOI requests in other jurisdictions

Currently, Australian law on Cabinet secrecy is middle-of-the-road vis-à-vis comparative jurisdictions. Changing the test from 'dominant' to 'substantial' purpose would place Australia firmly on the less-transparent side of the spectrum.

In New Zealand, under the *Official Information Act 1982*[5], no 'dominant' vs 'substantial' distinction is maintained. Instead, information can be withheld if necessary to maintain

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[4] Christopher Knaus and Josh Taylor, 'Sports Rorts: Coalition Blocking Release of Phil Gaetjens' Secret Report, Citing Cabinet Exemption', *The Guardian* (online, 18 July 2021) <https://www.theguardian.com/australia-news/2021/jul/18/sports-rorts-coalition-blocking-release-of-phil-gaetjens-secret-report-citing-cabinet-exemption#:~:text=The%20federal%20government%20is%20trying,for%20the%20purposes%20of%20cabinet>.

[5] *Official Information Act 1982* (New Zealand) No 156.

constitutional conventions (namely, collective ministerial responsibility). This is not a purpose test, as in Australia, but rather a harm test. That is because Cabinet material can only be withheld to the extent necessary to protect the convention enabling the provision of free and frank advice. This is, however, subject to a public interest override and an agency must release the document if the public interest in disclosure outweighs confidentiality. It is a lesser standard than the proposed legislation in Australia, and arguably the current FOI scheme.

In Canada, the *Access to Information Act* excludes Cabinet documents entirely from FOI requests. This extends to proposals, Cabinet agendas, minutes and records, and briefing notes whether they are dual- or single-purpose. That said, 'discussion papers' lose protection once a decision related to the advice is made.

In the United Kingdom, the *Freedom of Information Act 2000* (UK) prescribes that any information that 'relates to … the formulation or development of government policy' or to 'Ministerial communications' is exempt. If the content falls within that class (that is, it relates to Cabinet discussions or policy advice) it qualifies for immunity. However, this is qualified by a public interest test.

Unlike New Zealand or the United Kingdom's approach, which both require a need to show harm or reason to show that disclosure is not in the public interest in order to enliven the exemption, the Australian amendment would more closely represent a sweeping class exemption, similar to the Canadian case. A fairly simple way to see how these differences all manifest it to distinguish between harm-based and categorical approaches to keeping documents secret. Canada maintains a categorical model, which is a near-absolute model. New Zealand represents the more appropriate, in our view, harm-based model where Cabinet can only justify refusal if it would undermine the operation of the decision-making body. The United Kingdom sits in the middle, applying a category-based exemption which is subject to a public interest consideration which raises the bar for exemption. This Bill moves Australia into the categorical box. It is not concerned with case-by-case decisions, or the merits of documents being kept secret, but rather starts from the position that all Cabinet discussions should be secret.

Case Study on Cabinet document secrecy: Robodebt

To give one such example of why the proposed approach in the Bill is overly broad, one need not look further than the Robodebt scandal. In January 2017, Justin Warren made a request for Cabinet documents relating to what later became known as Robodebt.[6] This included the business case for documents for the Pay As You Go (PAYG) data matching initiative, and documents that described the analysis process for how the value of 'historical discrepancies' were calculated. They revealed that the government's claim that it had overpaid social services entitlements was untrue. The Department of Human Services invoked the substantial purpose test to enliven the Cabinet exemption, and the documents were withheld. This was an incorrect

[6] Justin Warren, 'Business case and pilot for data matching', *Right to Know* (online, 14 January 2017), <https://www.righttoknow.org.au/request/business_case_and_pilot_for_data>.

decision, as the Full Court of the Federal Court held in *Warren v Chief Executive Officer, Services Australia* [2024] FCAFC 73. From the period 2017 – 2024, Warren appealed this claim through the Information Commissioner, Administrative Appeals Tribunal, and the Courts. The reason that the AAT wrongly treated the documents as exempt was because their subject matter overlapped with Cabinet deliberations — this was incorrect as the exemption only applies if the document itself reveals a Cabinet deliberation or decision; a mere coincidence in the subject matter is not enough:

> [143] *In my view the Tribunal erred in the construction of s 34(3). Commencing with the plain meaning of the text, the provision is* ***confined to information that is contained in a document which would reveal a deliberation or decision of the Cabinet****. And it is only to that extent that the exemption applies.*

The thrust of our submission is if the current legislation was properly applied in 2017, this mistake could have been recognised at the time. However, if the Parliament narrowed this to a 'substantial purpose' rather than 'dominant purpose' relating to deliberations, as proposed by the Bill such documents and data would be excluded.

What the *Warren* litigation also demonstrates is that the judiciary has played an important role in resisting executive overreach. The Full Court said that the overlap of subject matter is not enough to justify an exemption under s 34. Instead, the exemption should only apply if the document itself reveals Cabinet deliberations. This is a narrow construction which balances the need for Cabinet secrecy with the imperative of transparent and open governance.. The proposed shift to a substantial-purpose test, would replace this authoritative and judicially-balanced test with a less balanced, more blanket approach.

The narrower class of documents now susceptible to FOI requests

Under the Amendment, s 34(1)(a) will enable an exemption for materials prepared by or on behalf of a Minister or agency, and not merely those actually submitted to Cabinet. This is incongruent with the stated policy objective of Cabinet Ministers being able to receive frank and fearless advice, and debate policy internally. If there is no material submitted to Cabinet, it cannot be said to need to be withheld on those grounds, because it will never have reached Cabinet. The effect of this Amendment is to exclude a larger class of documents from being accessed by the public. This would now include drafts of Treasury modelling, department briefing notes, and working papers prepared for circulation now earmarked 'for Cabinet'.

The ANU LRSJ Research Hub, in prior submissions to Parliamentary inquiries, has used such documents on several occasions. One such example was sanctions designations listing advice provided from DFAT, which this Research Hub used in the preparation of the submission to the Inquiry into Australia's sanctions regime before the Senate Standing Committee on Foreign Affairs, Defence and Trade References Committee. It is case in point that the wider scope would limit research and discourse about the workings of the executive.

A more reasonable formulation of the exemption would apply to documents if, and only if, it would otherwise jeopardise Cabinet decision-making. This would allow journalists to interpret policy advice, enable academic analysis, and promote dialogue between the media, policymakers, and citizens. That is the stated purpose of the *Act*.

Risks of the reforms and the adequacy of existing protections

Gleeson CJ and Kirby J outlined the relevant principles for when a document is exempt from disclosure in *McKinnon v Secretary, Department of Treasury* (2006) 228 CLR 423. This is primarily whether the disclosure of an internal working document would be contrary to the public interest, which, in the process of merits review (by the IC or Administrative Review Tribunal) is a question of fact. Under the power of review currently conferred upon by the Tribunal under s 58(5) of the *FOI Act,* the ordinary powers of merits review are somewhat more constrained. The Tribunal is not asked to determine whether, on the evidence before it, the Tribunal is satisfied that the disclosure of the document would be contrary to the public interest. Instead, it is 'whether there exist **reasonable grounds for the claim** that the disclosure of the document would be contrary to the public interest': see s 58(5) of the *FOI Act*. This is a low bar.

It is our submission that this broad 'reasonable grounds' test is sufficient to grant the Cabinet an appropriate level of protection over documents where they may want to receive advice freely. Reforming the test from 'dominant purpose' to 'substantial purpose' is unnecessary, when the purported policy rationale of the Cabinet wishing to receive frank and fearless advice from the public service is balanced against the need for transparency.

Based on this submission, s 34 should not be amended. If amendment is required, the most proportionate and necessary way to reformulate it in alignment with the purported policy objective could be as follows:

s 34 Cabinet Documents

General rules

(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; and
    (ii) It was brought into existence for the dominant purpose of submission for the Cabinet's consideration

Harm test

(2) A document is also an exempt document if its disclosure would, on balance, be reasonably likely to
  (a) Prejudice the convention of collective ministerial responsibility; or
  (b) Inhibit the provision of full and frank advice to the Cabinet

Public interest override

(3) Notwithstanding subsection (1) or (2), access to a document must be given if, on balance, the public interest in disclosure outweighs the harm to Cabinet confidentiality

Recommendations:

That the Committee recommend the Bill **not** be passed.

If the Parliament is to pass the Bill, it should be subject to the following amendment:

2. That Schedule 7 Part 2 of the Bill concerning exemptions for Cabinet documents be replaced by an alternative harm-based formulation of the Cabinet secrecy exemption, comparative to the New Zealand model;

2. Introduction of Application Fees

The proposed amendments in Schedule 6 of the Bill enable an application fee to be applied for FOI requests, internal reviews and IC reviews.[7] These fees may only be waived if they meet requirements set by the regulations, concern personal information of the applicant, or in circumstances of financial hardship.[8] The Explanatory Memorandum states that this has the 'legitimate purpose of managing resourcing pressures in the FOI system, which affects timely FOI decision-making for all applicants'.[9] However, this unduly privileges bureaucratic efficiency over government accountability.

Principles governing fees under the FOI Act

Under the *FOI Act* s 3(4) ('Objects'), the legislation provides that powers conferred under the Act 'are to be performed and exercised, as far as possible, to facilitate and promote public access to information, **promptly and at the lowest reasonable cost**'.[10] In *MacTiernan v Secretary, Dept of Infrastructure and Regional Development* 'lowest reasonable' cost requires comparing the quantum of the charge against the public significance of the request.[11] In that case, a $2,291 processing fee for 498 pages of documents was waived because they related to a $1bn public infrastructure project, and it was substantially in the public's interest to have information. In *Re Apache Energy Pty Ltd and NOPSEMA* it was found that fees must be administratively fair so that citizens seeking access to information through the FOI scheme are not exposed to disproportionate or arbitrary costs.[12] To summarise, and in accordance with the OAIC

[7] Explanatory Memorandum [344].
[8] Explanatory Memorandum [344].
[9] Explanatory Memorandum [25].
[10] *Freedom of Information Act 1982* (Cth) s 3(4) ('*FOI Act*').
[11] [2015] AATA 584, [53].
[12] [2016] AATA 547, [39].

guidelines,[13] fees placed on FOI access must be weighed against (1) the public interest of accessing the documents; (2) the need for open democracy and transparency;[14] and (3) the least costly practical way of processing the request.

s93C(2)(a)

The onus must not rest on the agencies themselves to determine the amount that will be charged to submit an FOI request. Section 93C(2)(a) incentivises the bodies processing FOIs to charge large amounts as it would decrease their workload costs. Whilst this provision may allow 'greater flexibility in updating fee arrangements'[15], it may be in violation of the Government's statutory duty to provide FOIs at the 'lowest reasonable cost'.[16]

Further, the effect of this incentive to charge more in the FOI process is that the Amendment will inadvertently privilege large corporations and media conglomerates over smaller media organisations, not-for-profits, researchers and everyday citizens. The Explanatory Memorandum claims that these amendments will 'not disproportionately affect [...] any particular class of persons',[17] yet evidence suggests otherwise.[18] In British Columbia, Canada, where fees of a mere $10 CAD saw media FOI requests drop from 756 in 2021 (the year the fee was introduced) to 286 in 2022.[19] Further, studies from the US show that private citizens, journalists and NGOs see fees as blocking access whereas corporate requesters were undeterred.[20] FOI requests made by student-led research hubs like ours, without funding, may simply no longer be possible. These equity concerns must not be taken lightly. As per the *MacTiernan* test, public significance must be considered as part of the calculus for a 'lowest reasonable cost'.[21] It is clearly in the public's interest that FOI applications be accessible to diverse groups, not just those with established power or financial backing.

s93C(2)(b)

The Parliament must be more prescriptive about what circumstances merit fees being waived. As discussed regarding s 93C(2)(a), placing the onus on the agencies as to when FOI fees will be waived incentivises erecting barriers to information to lower agency costs. Not only does this impact accessibility, but limits open democracy[22] by effectively placing a 'transparency tax' on

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[13] Office of the Australian Information Commissioner, *Freedom of Information Guidelines* (Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982 (Cth), 1 July 2023) [4.112].
[14] *Scholes v Decision Maker* [2018] AATA 4091, [74]-[76].
[15] Explanatory Memorandum [351].
[16] *Freedom of Information Act 1982* (Cth) s 3(4).
[17] Explanatory Memorandum [351].
[18] Explanatory Memorandum [26].
[19] Luke Conkin, *"The Truth Shall Set You Back a Fee – The Impacts of British Columbia's $10 Application Fee for Freedom of Information Request, Two Years Later"* (Student Essay, Canadian Bar Association, 8 November 2024) ["Impacts of British Columbia's Application Fee"], 2.
[20] A Jay Wagner and David Cuillier, "To Fee or Not to Fee: Requester Attitudes toward Freedom of Information Charges" (2023) 40 *Government Information Quarterly* 101879, 101879, 4-5.
[21] *MacTiernan v Secretary, Dept of Infrastructure and Regional Development* [2015] AATA 584, [53].
[22] *Scholes v Decision Maker* [2018] AATA 4091, [74]-[76].

FOI.[23] Allowing unrestrained selection of waiving criteria also risks placing disproportionate and arbitrary costs on groups seeking information in a legitimate, non-vexacious manner that is inconsistent with the Government's FOI obligations.[24]

Therefore, we recommend that the Parliament prescribe the situations in which FOI fees must be waived, bearing the above principles of transparency and equity in mind. s 93C(4) ('Financial hardship') and s 93C(5) ('Fee must not amount to taxation') are a step in the right direction, but are insufficient to address these concerns. s 93C could be improved by adding tiered pricing to remove price barriers for smaller organisations or offering free access hours to academics accessing information for their research. The Government could also follow the US FOI Act model, where there is a statutory category for representation of the news media that qualifies for free FOI requests.[25] Fees would be waived for public interest investigations including by education organisations, not-for-profits and media. This would remove financial barriers without overly burdening agencies.

Recommendations:

If the Parliament is to pass the Bill, it should be subject to the following amendments:

3. That the proposed s93C in Schedule 6 of the Bill should be amended so that FOI fees are prescribed in legislation or regulation, and not be left to the discretion of agencies(s 93C(2)(a));

4. That the proposed s93C in Schedule 6 of the Bill should include a clear, exhaustive list of circumstances where fees are waived that cover public interest matters, the news media, not-for-profits, and academic research (s 93C(2)(b));

4. Vexatious litigants

Under a newly added s 15AD, the amendments would allow an agency or Minister to 'refuse to deal with a request' if they believe it is: (a) vexatious or frivolous; (b) likely to harass, intimidate, or otherwise cause harm (or a reasonable fear of harm) to another person; or (c) otherwise an abuse of process.[26]

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[23] Transparency International Australia, *'Plan to fix FOI system step in right direction though risks greater secrecy'* (Media Release, 3 September 2025), 2.
[24] *Re Apache Energy Pty Ltd and NOPSEMA* [2016] AATA 547, [39].
[25] Kelly Cox and Matthew Haber, "Does Freedom of Information Mean 'Free'? How the Hidden Costs of FOIA and Open Records Laws Impact the Public's Ability to Request Government Documents" (2020) *NYU Journal of Legislation & Public Policy Quorum* https://nyujlpp.org/quorum/cox-haber-does-freedom-of-information-mean-free/, 4.
[26] Freedom of Information Amendment Bill 2025 (Cth) cl 41 ('Amending Bill').

The definition issue

Neither the Amending Bill nor the *FOI Act* clearly defines 'vexatious or frivolous'. Relevantly, in doctrine, the generally accepted definition has been applications that:

- are designed to annoy or embarrass someone; or
- are so obviously untenable or manifestly groundless as to be hopeless.[27]

Alternatively, the Macquarie Dictionary defines 'vexatious or frivolous' as applications 'instituted without sufficient grounds, and serving only to cause annoyance'.[28]

Under the current scheme, the Information Commissioner may make such a declaration pursuant to defined criteria.[29] Contrastingly, the vagueness here created presents a concern. There is no clear process by which a decision under the proposed s 15AD can be made. Ironically, though the amendments claim to improve transparency and accountability, this opens the FOI process to misuse and abuse by agencies and Ministers if they are allowed to make decisions about which applications are 'vexatious or frivolous' without clear criteria for such a decision. Far from improving transparency, the Bill risks entrenching secrecy.

Recommendations:

If the Parliament is to pass the Bill, it should be subject to the following amendment:

> 5. That the proposed s 15AD be amended to set out clear criteria which must be met before an agency or Minister makes a decision to not proceed (which must entrench a high bar for use).

The judicial review issue

A refusal under these provisions is a *merits decision*. That means it cannot be challenged in a Chapter III court unless it raises a narrow point of legality. In plain terms: if an agency or Minister decides a request is 'vexatious or frivolous', an applicant may have no meaningful way to contest it, especially given there are — at present — no clear criteria for a s 15AD decision, meaning even merits review will be tenuous at best.

This is dangerous for democratic accountability and open government. At a minimum, clear criteria should be set out in legislation for how s 15AD decisions can *legally* be made. This will also make refusals more easily reviewable in court as setting clear criteria allows greater ease

[27] *Ford v Child Support Registrar* [2009] FCA 328, [26] (Ryan J) ('*Ford*'), citing *Attorney-General (Vic) v Wentworth* (1998) 14 NSWLR 481.
[28] *Macquarie Dictionary* (online at 1 October 2025) 'vexatious' (def 2).
[29] *FOI Act* (n 10) pt VIII div I.

in raising points of legality; indeed, assisting in merits review as well. Anything less risks leaving agencies as judges in their own cause.

The untenability issue

At present, agencies must take 'reasonable steps to assist the person to make the request in a manner' that complies with certain provisions of the *FOI Act*,[30] for example that the applicant provides such information as is 'reasonably necessary to enable a responsible officer of the agency, or the Minister, to identify it'.[31] Astoundingly, the Amending Bill would remove that duty where a request is denied as 'vexatious or *frivolous*' under s 15AD.[32]

This presents a concerning tautology: an agency or Minister can label a request frivolous for being 'obviously untenable or manifestly groundless as to be hopeless' even where they otherwise would have a duty to render the very assistance that would have prevented it from being so frivolous.[33] This is a dangerous loophole that disadvantages the ability of ordinary Australians — those without legal training — to make use of open government most. Good government means catering to their democratic needs; not creating further procedural hurdles.

If the Parliament is to pass the Bill, it should be subject to the following amendment:

Recommendations:

If the Parliament is to pass the Bill, it should be subject to the following amendment:

6. That the duty of an agency to render reasonable assistance be maintained so as enable an applicant to submit a non-frivolous request.

Purpose of FOI

It may be argued that this is necessary to protect the FOI system from abuse; the global experience certainly shows that vexatious litigants are a threat.[34] We agree that this is so. However, if this was the legitimate concern, this Amending Bill is no answer: this Bill could very easily become a Trojan horse for less transparency.

[30] Ibid s 15(3).
[31] Ibid s 15(2)(b).
[32] Amending Bill (n 26) cl 41.
[33] *Ford* (n 27) [26] (Ryan J).
[34] See e.g., Katherine Revello, 'Vexatious Requestor: Testing the Limits of Connecticut's FOI Laws', *Inside Investigator* (Web Page, 11 June 2023) <https://insideinvestigator.org/vexatious-requestor-testing-the-limits-of-connecticuts-foi-laws/>.

Under s 3(4), powers conferred by the *FOI Act* must be performed, so far as possible, 'to facilitate and promote public access to information, promptly and at the lowest reasonable cost'. This is the Act's object and purpose. It is deleterious to this purpose that the two loopholes above exist.

The annoyance issue

It is also detrimental to the purpose above stated to allow the mere intent of annoyance on the part of the applicant to allow for the denial of a request for information.

The Amending Bill at no point proposes that annoyance be the *sole* or dominant intent of an applicant for which an agency or Minister may refuse to proceed with their request under s 15AD. Here, it may well be the case that causing annoyance is *one* purpose of the applicant. However, even where a legitimate intent may subsist, the Amending Bill would have the applicant and the broader Australian public without access to information. Indeed, even where it is in the public interest that information be released, it would be prevented upon the unilateral decision of an agency or Minister.

Recommendations:

If the Parliament is to pass the Bill, it should be subject to the following amendment:

7. That the proposed s 15 AD be amended such that mere intent of annoyance on the part of an applicant must not permit an agency or Minister to refuse a FOI request.