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Senator the Hon. Ian Macdonald
Chair, Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: legcon.sen@aph.gov.au

Dear Senator

**Freedom of Information Legislation Amendment (Improving Access and
Transparency) Bill 2018**

The Law Institute of Victoria (**LIV**) welcomes the opportunity to provide this submission to the Senate Legal and Constitutional Affairs Legislation Committee's inquiry into the Freedom of Information Legislation Amendment (Improving Access and Transparency) Bill 2018 (**the Bill**).

The Bill proposes to make amendments to the *Freedom of Information Act 1982* (**FOI Act**), the *Archives Act 1983* (**Archives Act**), and the *Australian Information Commissioner Act 2010*.

The LIV is broadly supportive of measures which aim to improve the effectiveness of Australia's freedom of information (**FOI**) laws and ensure open government and transparency. The LIV supports the measures in the Bill that seek to ensure that there are three independent statutory officers with appropriate legal qualifications, and measures that seek to respond to delays in the IC review process.

The LIV is concerned that the measures in this Bill that propose to limit agencies' ability to rely on exemptions in the IC review process that were not relied on in the decision that is subject to review may result in negative unintended consequences.

Three independent statutory officers

The Bill seeks to ensure that there are three independent statutory officers that perform the three separate functions of the Information Commissioner, the FOI Commissioner, and the Privacy Commissioner.

The LIV supports this proposed measure which will ensure independent oversight of the three separate functions. The three independent statutory officers must also be individually

adequately resourced to ensure that they can effectively perform their separate functions. This would demonstrate the government's commitment to open government and transparency.

Legal qualifications of statutory officers

The LIV believes that the FOI Commissioner should always have the appropriate legal qualifications to engage in the complex legal decision-making required to perform the functions of the FOI Commissioner. The functions of the FOI Commissioner should not be performed by another statutory officer in order to avoid the requirement that the FOI Commissioner must have appropriate legal qualifications.

The LIV is concerned that the FOI Commissioner's role was vacant in recent years and the functions of the office were performed by the Information Commissioner, Mr Timothy Pilgrim, who does not hold the appropriate legal qualifications.

The LIV supports the proposed measures which require the Information Commissioner and the Privacy Commissioner to have appropriate legal qualifications when reviewing FOI decisions.

Delays in Information Commissioner review

The Bill proposes to provide a mechanism for FOI applicants to require the Information Commissioner to transfer the review of a decision that is delayed, or will be delayed, by more than 120 days directly to the Administrative Appeals Tribunal ('the AAT') at no cost to the applicant (including no application fee at the AAT).

The Bill also proposes that the Information Commissioner be required to notify an applicant if it is likely that more than 120 days will elapse before a decision is made.

The LIV supports measures which will contribute to addressing substantial delays in the IC review process for FOI decisions.

Anecdotal evidence from LIV members demonstrates a great deal of frustration about the delays encountered when a matter is taken to IC review.

Under the FOI Act there are currently two avenues available for applicants to attempt to avoid delays in the IC review process which are both unsatisfactory:

1. Applicants can attempt to persuade the Information Commissioner that it is in the interests of the administration of the FOI Act that the IC reviewable decision be considered by the AAT (s 54W(b)). However, the LIV understands that this is rarely invoked.
2. Alternatively, it might be possible to persuade the AAT that an inordinate delay is tantamount to a refusal by the Information Commissioner to make a determination which itself might be, but is unlikely to be, a reviewable decision under s 3(3) of the *Administrative Appeals Tribunal Act 1975*. This would be a costly exercise to attempt in any event.

Additional exemption grounds during Information Commissioner review

The Bill inserts proposed section 55EA into the FOI Act which seeks to prevent an agency or Minister from proposing to rely on exemptions at the IC review stage that were not relied upon in making the IC reviewable decision.

The Explanatory Memorandum notes that the current practice “allows agencies and ministers to remake decisions half way through a review, something not normally permitted in merits review processes run in superior jurisdictions and never intended under the FOI Act.”

The LIV submits that if the intention of the proposed measure is to more accurately reflect merits review processes, agencies should actually be permitted to raise additional exemptions. Merits review involves a fresh decision to be made on information and on grounds that may not have been before the initial decision-making agency.

The LIV is concerned that if agencies are not permitted to raise additional exemptions for the Information Commissioner to consider during an IC review, the Information Commissioner may not have to hand all information relevant to make the correct and preferable decision – it would detract from the intention that IC review be a pure form of merits review.

The LIV is opposed to the insertion of proposed section 55EA for the following additional reasons:

- Not permitting agencies to raise additional exemptions may be contrary to their statutory and ethical duty to properly and fully assist the Information Commissioner during IC reviews.
- If additional exemptions are raised by agencies, that does not mean that the Information Commissioner necessarily needs to agree that they apply; it just means that they ought to properly be considered if they have been appropriately raised.
- If additional exemptions were properly available and agencies were precluded from raising them at IC review just because they were not originally raised by the decision-making agency at first instance, that may have the unintended consequences of more agencies seeking review of Information Commissioner decisions from the AAT – a pure merits review body.
- The effectiveness of the FOI process is enhanced by promoting good communication between agencies and applicants, and formality and technicality in clarifying the documents sought in the FOI request and other aspects of the FOI process. Proposed section 55EA may result in a heightened risk that agencies would take a more rigid approach to drafting statements of reasons by looking for any conceivable exemption claim and including it at the outset, giving the perception that agencies may be seeking to obstruct access to information.
- If additional exemptions continue to be permitted to be raised by agencies, and if the 120 day time limit for IC reviews is put in place as proposed, the Information Commissioner may be more likely to make an assessment that consideration of the matter, including the additional exemptions, will take the matter beyond 120 days. This will increase the ability of FOI applicants to request that the matter be transferred to the AAT free of charge.

Further information

The LIV would welcome an opportunity to provide further information on the matters raised in this submission. If you would like to discuss any of these matters further, please contact Lara Freidin, Policy Lawyer for the Administrative Law and Human Rights Section of the Law Institute of Victoria at

Yours sincerely

Belinda Wilson

President

Law Institute of Victoria