Justice and Equity Centre

Submission to Inquiry into Freedom of Information Amendment Bill 2025

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About the Justice and Equity Centre

The Justice and Equity Centre is a leading, independent law and policy centre. Established in 1982 as the Public Interest Advocacy Centre (PIAC), we work with people and communities who are experiencing marginalisation or disadvantage.

The Centre tackles injustice and inequality through:

- legal advice and representation, specialising in test cases and strategic casework;
- research, analysis and policy development; and
- advocacy for systems change to deliver social justice.

We actively collaborate and partner in our work and focus on finding practical solutions. We work across five focus areas:

Disability rights: challenging discrimination and making the NDIS fairer to ensure people with disability can participate equally in economic, social, cultural and political life.

Justice for First Nations people: challenging the systems that are causing ongoing harm to First Nations people, including through reforming the child protection system, tackling discriminatory policing and supporting truth-telling.

Homelessness: reducing homelessness and defending the rights of people experiencing homelessness through the Homeless Persons' Legal Service and StreetCare's lived experience advocacy.

Civil rights: defending the rights of people in prisons and detention, including asylum seekers, modernising legal protection against discrimination, raising the age of criminal responsibility to 14, advancing LGBTIQA+ equality and advocating for open and accountable government.

Energy and water justice: working for affordable and sustainable energy and water and promoting a just transition to a zero-carbon energy system.

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1. Introduction

The Justice and Equity Centre (formerly the Public Interest Advocacy Centre) welcomes the opportunity to provide this submission to the Senate Legal and Constitutional Affairs Legislation Committee's inquiry into the Freedom of Information Amendment Bill 2025 ('the Bill').

We make this submission based on long-standing expertise in the operation of the *Freedom of Information Act 1982* (Cth) ('the FOI Act'). Over four decades we have relied on freedom of information ('FOI') laws to seek government-held information to expose unfair practices, challenge unjust decisions and policies, and to inform the legal advice and assistance we give our clients: people experiencing disadvantage or marginalisation.

We are informed by recent experiences seeking information from agencies, primarily the Department of Home Affairs, the National Disability Insurance Agency and Services Australia. These agencies tend to receive the highest volume of FOI requests each year.[1]

In our view, the Bill is a missed opportunity for meaningful reform to the FOI system. We consider that many proposals in this Bill will act as a deterrent to those who seek to exercise their right to information under the FOI Act and will undermine its broader objectives. At the same time, the Bill fails to enact a number of issues identified in various reviews which would improve the FOI system.

We are therefore of the view that the Bill **should not proceed** in its current form.

However, if the Committee considers that the Bill should pass, we make a number of recommendations for improving the Bill.

2. General comments

The problems with Australia's FOI regime are well-recognised. Mr Allan Hawke AC's 2013 review into the FOI system[2] ('Hawke Review') found legislative and administrative changes were needed

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[1] Office of the Australian Information Commissioner ('OAIC'), *Annual report* 2023-24 (Report, 8 October 2024) 134 <https://www.oaic.gov.au/__data/assets/pdf_file/0025/243592/OAIC_Annual-Report-2023-24_Digital.pdf>; OAIC, *Annual report* 2022-23 (Report, 25 September 2023) 137 <https://www.oaic.gov.au/__data/assets/pdf_file/0029/94295/OAIC_Annual-Report-2022-23.pdf>; OAIC, *Annual report 2021-22* (Report, 28 September 2022) 134 <https://www.oaic.gov.au/__data/assets/pdf_file/0021/23097/OAIC_annual-report-2021-22_final.pdf>; OAIC, *Annual report 2020-21* (Report, 23 September 2021) 132 <https://www.oaic.gov.au/__data/assets/pdf_file/0020/10829/oaic-annual-report-2020-21.pdf>; OAIC, *Annual report 2019-20* (Report, 21 September 2020) 139 <https://www.oaic.gov.au/__data/assets/pdf_file/0021/9291/oaic-annual-report-2019-20.pdf>; OAIC, *Annual report 2018-19* (Report, 12 September 2019) 166 <https://www.oaic.gov.au/__data/assets/pdf_file/0024/9285/oaic-annual-report-2018-19.pdf>; OAIC, *Annual report 2017-18* (Report, 17 September 2018) 154 <https://www.oaic.gov.au/__data/assets/pdf_file/0012/9300/oaic-annual-report-2017-18.pdf>; OAIC, *Annual report 2016-17* (Report, 14 September 2017) 93; OAIC, *Annual report 2015-16* (Report, 27 September 2016) 137; OAIC, *Annual report 2014-15* (Report, 28 September 2015) 111; and OAIC, *Annual report 2013-14* (Report, 23 September 2014) 127.

[2] Allan Hawke, *Review of the Freedom of Information Act 1982 and the Australian Information Commissioner Act 2010* (Report, Attorney-General's Department, 1 July 2013) ('Hawke Review').

'to streamline FOI procedures, reduce complexity and increase capacity to manage FOI workload both by agencies'.[3] No substantive changes were made following the Hawke Review and now, over ten years on, Australia's FOI system continues to decline in effectiveness.

In recent years we have observed multi-year delays, excessive use of exemptions, restrictive legal interpretations and unsupportive attitudes among some agencies, which others have termed a 'culture of secrecy'.[4] These trends have led to an unreasonably slow and constrained FOI system, and the erosion of governmental accountability. In 2023, this Senate Committee unanimously acknowledged the need for urgent reform to the FOI system.[5]

The 2023 Senate Committee inquiry focused on inefficiencies and cultural issues within the Office of the Australian Information Commission ('OAIC'). Many submissions to that inquiry called for an urgent injection of resources into the OAIC to address the substantial backlog of applications for review by the Information Commissioner ('IC Review').[6] We commend this Government for funding a Strategic Review of the OAIC and improving resourcing of the OAIC's FOI functions. We understand the OAIC has, for the first time in years, started to clear the backlog of IC Review applications.

We welcome the Government's interest in amending the FOI Act. The current FOI laws are overly complex and cumbersome. However, in our view, the Bill fails to respond to the variety of problems within the FOI system and should not be passed in its current form.

We suggest that passage of the Bill should be deferred to allow for a comprehensive review to be conducted, taking into account all the recommendations made in the Hawke Review; properly assessing the impact of modern technologies (like artificial intelligence) on the FOI system; and including perspectives of the public and users of FOI Act in the process.

A comprehensive review was a headline recommendation of the Hawke Review. Mr Hawke also recommended 'a complete rewrite of the FOI Act in plain language' to make it 'readily accessible and easily understood'.[7]

The FOI Act is a tool for the public. More than with other regulatory frameworks, it is important that its wording is clear and accessible. We suggest that a comprehensive review of the FOI Act would lay the groundwork for designing a more accessible FOI Act and one that provides timely, open and transparent access to government records for the public.

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[3] Ibid, 3.
[4] See Centre for Public Integrity, Delay and Decay: Australia's Freedom of Information Crisis, (Report, August 2022).
[5] Senate Legal and Constitutional Affairs References Committee, *The Operation of Commonwealth Freedom of Information (FOI) Laws* (Report, Parliament of Australia, December 2023).
[6] Ibid, [4.22].
[7] Hawke Review (n 2), ii.

3. The Freedom of Information Bill 2025

3.1 Objects of the FOI Act

We consider the objects of the FOI Act should not be amended in the manner contemplated in Schedule 1 of the Bill.

The current objects recognise the fundamental purpose of the FOI Act is to create a right of access to government-held information.[8] Section 3 of the Act provides that it:

a. promotes Australia's representative democracy by providing for public participation, to lead to better-informed decision-making, and increasing scrutiny, discussion, comment and review of governmental activities;[9] and

b. recognises that government-held information is a national resource.[10]

We are concerned that the proposed amendments seek to qualify these purposes and the right of access by promoting private interests, contrary to the spirit and intent of the FOI regime.

The FOI Act should promote access to government information as its overriding purpose. Only extremely limited restrictions should be permitted to qualify this principle, eg where an important government interest to the contrary exists, such as a national security concern.

Private interests are already extensively protected under the FOI Act. Exemptions exist for trade secrets and commercially valuable information (s 47) and business information (s 47G). There is insufficient evidence that these exemptions have been inadequate to protect private interests, such that the changes proposed by the Bill are needed.

We are concerned that any expansion of the recognition of private interests may further complicate access to information for government programs where subcontractors play a central role. For example, from our work with asylum seekers, it has at times been difficult to use the FOI Act to obtain information about practices of immigration detention contractors, notwithstanding their critical role in contributing to humane conditions in detention centres.

Amending the objects is no small change. Objects clauses outline the purpose of legislation and guide interpretation of the FOI Act by agency decision-makers, the OAIC, the Administrative Review Tribunal and courts. Courts are instructed to consider objects clauses to resolve ambiguity by favouring interpretations that promote the purpose or object underlying the legislation.[11] As the Hawke Review noted:

[8] See FOI Act, s 3(1)(b).
[9] FOI Act, s 3(2).
[10] FOI Act, s 3(4).
[11] *Acts Interpretation Act 1901* (Cth), s 15AA.

> The FOI Act's objects should always guide administration of the FOI scheme. Agencies and ministers should consider these central principles underpinning the right to access documents held by government.[12]

We do not support the proposed changes to the objects of the FOI Act.

3.2 Expanding existing exemptions

The Justice and Equity Centre has consistently noted its concerns about the broad exemptions in the FOI Act.[13] These exemptions can greatly impede the ability of individuals and civil society to access information and ensure government decision-making is transparent and accountable.

We maintain our previous recommendation that a review be conducted of both the exemptions and conditional exemptions in the FOI Act to consider whether each remains in the public interest, so that unnecessary or overly expansive exemptions can be amended or removed.

3.2.1 Deliberative processes exemption

We do not support the changes to the deliberative processes exemption in Schedule 7, Part 3 of the Bill. These amendments would expand the deliberative processes exemption substantially.

There is inadequate evidence to support this change. The deliberative process exemption is already one of the most claimed exemptions by agencies[14] and reliance on this exemption has climbed in recent years. In 2013, the deliberative processes exemption was applied in 1.5% of FOI requests.[15] In 2023-24, it has been applied to 6% of requests.[16]

Frankness and candour is protected under the FOI Act.[17] However, anecdotal evidence shared to some reviews relating to the Australian Public Service have suggested FOI legislation 'is inhibiting the provision of frank and fearless advice to government on deliberative matters, especially in writing'.[18]

Similar concerns were raised to the Hawke Review. We agree with the review's conclusion, that:

> This Review inclines to John Wood's view that officials should be happy to publicly defend any advice given to a minister and if they are not happy to do so then they should rethink the advice. This is consistent with the view expressed by Senator Faulkner in launching the reforms; that the

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[12] Hawke Review (n 2), 15.
[13] See, for instance, Michelle Cohen et al, *Review of Freedom of Information Laws* (Submission, Public Interest Advocacy Centre, 7 December 2012) 10 <https://jec.org.au/resources/submission-to-the-2012-review-of-freedom-of-information-laws>; and Sophie Farthing and Edward Santow, *Freedom of Information Amendment (New Arrangements) Bill 2014* (Submission, Public Interest Advocacy Centre, 6 November 2014) <https://jec.org.au/resources/review-of-the-freedom-of-information-amendment-new-arrangements-bill-2014>.
[14] OAIC, *Annual report 2023-24* (n 1), 141-142.
[15] Hawke Review (n 2), 4.
[16] OAIC, Annual report *2023-24* (n 1), 142.
[17] OAIC, *Freedom of Information Guidelines* (Compilation, 2 April 2025), [6.246]-[6.248].
[18] Department of the Prime Minister and Cabinet, *Our Public Service, Our Future: Independent Review of the Australian Public Service* (Report, September 2019), 121. See also: Peter Shergold, *Learning from Failure: An Independent Review of Government Processes for the Development and Implementation of Large Public Programmes and Projects* (Report, Department of the Prime Minister and Cabinet, 12 August 2015).

> tradition of frank and fearless advice is more robust, and that public servants would be able to work professionally within the new FOI framework as they do within other accountability mechanisms.[19]

If public servants are taking steps to avoid creating deliberative materials to circumvent disclosure obligations under the FOI Act, this signals the erosion of transparency and accountability within the Australian Public Service. The solution should not be promoting further secrecy.

In our experience, agency decision-makers exercise substantial discretion in applying exemptions, which can sometimes result in agencies claiming sweeping exemptions to limit disclosure. For example, the case study below shows the National Disability Insurance Agency relied on several exemptions in the FOI Act to extensively redact information, citing the need to protect a range of interests including under the deliberative process exemption. Given the documents were subsequently published in full and the agency has formally revised its decision, our view is those exemptions were applied in an unnecessarily broad fashion.

Case study

To inform public debate on the sustainability of the National Disability Insurance Scheme, we sought access to certain reports prepared by the Scheme Actuary.

The agency refused access to the documents on the basis they contained 'deliberative matter'. On internal review, the agency agreed to provide us the reports subject to substantial redactions.

The agency's redactions obscured so much information that we could not understand the context of many of the reports' conclusions.

On 18 January 2022, we appealed to the OAIC.

While awaiting IC Review, **18 months** after our initial FOI request, the agency published these reports on its website, not in response to our FOI request and without any of the substantial redactions it had applied to the documents it had released to us.

When our IC Review application arrived at the front of the queue, the agency formally revised its decision to release the reports to us in full. This was almost **4 years** after our initial FOI request.

3.2.2 Cabinet exemption

We do not support the changes to the Cabinet exemption in Schedule 7, Part 2 of the Bill. The cabinet exemption should not be broadened when a Royal Commission has recently recommended that provision be repealed.

[19] Hawke Review (n 2), 48.

This Committee has the benefit of the Royal Commission into the Robodebt Scheme having recently considered and made a recommendation about the cabinet exemption.[20] We commend the Royal Commission's observations to the Committee and agree with its conclusion that the 'blanket approach' to confidentiality created by Cabinet exemption cannot be justified, that greater transparency of Cabinet decision-making is needed, and the cabinet exemption should be repealed.

Prior to the Royal Commission into the Robodebt Scheme, the Hawke Review had suggested minor changes to this exemption, proposing that it be clarified by including definitions of 'consideration' and 'draft of a document'.[21] The proposed amendments go well beyond these suggestions.

In the alternative to repealing section 34, this exemption could be made subject to a countervailing public interest in disclosure. New Zealand, for example, does not have a blanket cabinet exemption. It has somewhat similar exemptions (eg those relating to constitutional conventions and maintaining public affairs), but these are subject to a public interest test. They are conditional exemptions. We submit s 34 could be amended to be subject to a public interest test, if it is to remain in the FOI Act at all.

Further, we endorse the proposal by the Centre for Public Integrity that cabinet documents should only be exempt for 30 days (unless another valid exemption applies).[22] It may not be in the public interest to release a document containing cabinet considerations while certain deliberations are on foot (although these deliberations would likely be captured by the exemption discussed above). When deliberation is complete, we cannot see compelling reasons to deny access to these documents, unless another exemption applies.

3.3 Refusing a request on its terms

We do not support the changes to the power to refuse a request on its terms in Schedule 7, Part 1 of the Bill. Certain classes of documents should not be automatically excluded from disclosure because they appear likely to contain sensitive information.

This amendment would substantially reinstate the former section 24(5) which was repealed in 2010. We are concerned the Bill reverts the provision to blanket secrecy and is a retrograde step.

The Hawke Review acknowledged the complexities surrounding this provision and recommended that any reconsideration of section 24(5) should be part of a comprehensive review of the FOI framework. We support this recommendation.

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[20] See Royal Commission into the Robodebt Scheme, *Report of the Royal Commission into the Robodebt Scheme* (Final Report, 7 July 2023), 656-657.
[21] Hawke Review (n 2), 6, 45-47.
[22] Centre for Public Integrity, *Freedom of Information: Blueprint for Reform* (July 2025) <https://publicintegrity.org.au/wp-content/uploads/2025/07/Freedom-of-Information-Blueprint-for-Reform-2025.pdf-5.pdf>.

3.4 Change of Minister amendment

We do not support the amendment to the change of Minister provision in Schedule 8 of the Bill. These amendments are overly complex, difficult to follow and seek to address an issue that has been resolved.

The Explanatory Memorandum indicates that these amendments respond to the decision of a Full Court of the Federal Court of Australia in *Attorney-General (Cth) v Patrick* [2024] FCFAC 126 ('*Patrick*').

Prior to that decision, the OAIC and agencies had favoured a narrow interpretation of section 11A(1)(a)(ii) of the FOI Act, which provides that FOI requests made for documents held by a Minister are construed, as applying to the specific person acting as Minister at the date of the request, rather than to the Ministerial office. This created an undesirable result where the government could avoid scrutiny through ministerial reshuffles – where a Minister left their position while an FOI request was being processed, the FOI request could then be refused.

The decision in *Patrick* clarified the proper interpretation of the provision, closing this loophole and providing agencies clear guidance on how to process FOI requests where a Minister ceases to hold the relevant office. We consider no further clarification is necessary.

Even were a further change warranted, the amendments in the Bill are unclear, and it is difficult to understand how they are likely to operate in practice. If a change is to be introduced, these amendments and the issue of change of Minister should be thoroughly considered as part of a comprehensive review of the FOI Act.

3.5 Application fees and fee waivers

We do not support the introduction of application fees in Schedule 6 of the Bill. We consider the recovery of costs from applicants to be at odds with the fundamental principle of open and accessible government that the FOI Act seeks to further. Costs were removed from the FOI Act in 2010, and their reintroduction would be a backwards step.

If an application fee is to be introduced, fees and charges should not be payable when applications for government documents are made:

c. for an individual's own personal information; and/or

d. in the public interest.

We suggest that an application be presumed to be in the public interest where it is made by a not-for-profit organisation or a journalist. Consideration should also be given to a waiver on the grounds of financial hardship, where a person does not otherwise fall within a waiver category and might consider factors such as whether the person is represented by a legal aid commission or community legal centre.

No application fees should be payable for internal review or review to the Information Commissioner. The oversight provided by these pathways is a desirable and necessary part of decision-making from government agencies.

In the alternative, FOI applicants should be entitled to recover their application fee for internal review or review to the Information Commission, unless the reviewer affirms the original decision in its entirety. FOI applicants should not bear a cost consequence for poor agency decision-making.

It would be appropriate for a separate mechanism to be included in the FOI Act to resolve the costs of dealing with vexatious requests. One of the rationales for imposing charges for applications made under the FOI Act is to create a disincentive for vexatious applicants to make requests that only harass or intimidate staff, or unreasonably interfere with the operations of any agency. Specific provisions that address vexatious requests, as proposed in this Bill, would sufficiently provide agencies with a way to control their costs with respect to vexatious applications and create a disincentive for vexatious applicants.

3.6 Removing the cap on extensions of time and introducing another mechanism for agencies to extend time

We do not support the changes to extension of time provisions in Scheule 4, Part 2 of the Bill. We are doubtful that providing agencies more time to process FOI requests will address the excessive delays in the FOI system.

We submit extension requests should remain capped, but the notification requirement to the OAIC may be removed. Maintaining the cap recognises the unequal power imbalance between agencies and applicants, and ensures agencies are accountable to applicants when making extension requests, particularly in the absence of the OAIC's oversight. Without the cap, we are concerned extensions may be open to abuse or poor practice.

We consider current powers for agencies to request extensions are sufficient. Agencies may request an extension of time to process an FOI request in circumstances including where the request is complex or requires consultation with third parties.[23]

As the various powers to extend time are cumulative, the use of multiple extensions in a single case can create significant delay. It is possible, in a single FOI application, for:

- An applicant to agree to a 30 day extension of time (s 15AA); then
- The agency to extend time by 30 days after determining that it needs to consult with a third party (s 15(6)); then
- The agency to seek and receive a further 30 day extension of time from the OAIC based on the complexity of the request (s 15AB).

This would amount to a total of 120 days for the agency to process the FOI request. Further extending processing period does not accord with the objects of the FOI Act.

If the FOI system is to promote open government and democratic accountability, information must be released in a timely manner. Unfortunately, processing times for FOI requests by government

[23] FOI Act, ss 15(6)-(8), 15AA, 15AB.

agencies, and IC Reviews, have blown out dramatically in recent years. These delays have serious negative consequences for the FOI regime, and for its objects.

Our experience is that delays cause a loss of confidence in the FOI system. In some cases, clients and partners have declined our suggestions to lodge FOI requests and told us that, while the information sought would be valuable, it would be of little use if only released after many months. Similarly, in some of our projects, significant delays have led us to seek information by other means (such as using informal release processes by agencies) or simply proceed without it.

'FOI fatigue' amongst practitioners in the community legal centre sector is common, reflecting the demoralisation and cynicism that comes from repeated experiences of significant delay with the FOI system.

3.7 Replacing calendar days with working days

We support amending timeframes to replace calendar days with working days. This change reflects the ordinary working schedule of public servants, by accounting for weekends, public holidays and the close down period.

We submit this change should be applied across the FOI Act. This would afford applicants the same benefit and promote drafting consistency. It would also reflect that FOI requests are routinely made by professionals (such as legal practitioners and journalists) who are working the same schedule as public servants.

3.8 Introducing a 40-hour discretionary processing cap

We tentatively support the processing cap provisions in Schedule 3, Part 2 of the Bill, but suggest these amendments be implemented for a trial period then reviewed.

It is reasonable to set a clear limit on the time agencies should spend processing a single FOI request. The FOI Act provides agencies may refuse a request if it would substantially and unreasonably divert resources or interfere with their functions.[24] This substantial and unreasonable diversion test is often misunderstood and inconsistently applied across departments. Establishing a clear, fixed time limit for processing may help reduce confusion and promote consistency.

However, these amendments propose to maintain the substantial and unreasonable diversion test in addition to introducing the processing cap. We submit layering these provisions may increase complexity rather than resolve it.

Further, we are concerned applicants may be penalised if agencies do not have efficient record-management systems. Some agencies may have systems that allow for processing large requests within 40-hours, but if an agency's record-keeping systems are such that it takes many hours to process even a simple FOI request, the applicant should not be refused access for these inefficiencies.

[24] FOI Act, s 24AA(1)(a).

We submit the processing cap should be implemented subject to a two-year sunset clause, this provision should be closely considered in a comprehensive review of the FOI Act, and agencies should be required to report to the OAIC the number of FOI requests refused under this provision. The OAIC should publish this data, broken down by agency, in its annual report.