



**AUSTRALIAN  
PRESS  
COUNCIL**

## **SUBMISSION**

**May 14, 2009**

Suite 10.02, 117 York Street, Sydney NSW 2000  
Phone: (02) 9261 1930 Fax: (02) 9267 6826

Internet: <http://www.presscouncil.org.au/>  
Email: [info@presscouncil.org.au](mailto:info@presscouncil.org.au)

**Australian Press Council submission  
to the Department of Prime Minister and Cabinet  
in response to  
the draft *Freedom of Information Amendment (Reform) Bill*  
and the draft *Information Commissioner Bill 2009***

**Executive Summary**

- The Australian Press Council endorses the proposed new objects clause to be inserted into the *Freedom of Information Act 1982* and, in particular, the removal of any reference to exemptions from the objects clause.
- The Australian Press Council supports the reduction of the length of restricted access for documents under the *Archives Act*, but is of the view that the periods of 30 years and 20 years respectively are still excessively long.
- The Press Council endorses the principle that access to government information should be available to the public unless such access would be contrary to the public interest. However, the Press Council is of the view that this principle should apply to all government information rather than being restricted to specific classes of information.
- The Press Council supports the notion that the exemption for Cabinet documents should be reformulated. However, the Press Council is of the view that the revised Cabinet exemption set down in the draft bill is still too restrictive. If there is no risk to the public interest from releasing material to the public, that material should be proactively published as soon as possible after the relevant meeting of Cabinet.
- The “deliberative processes” exemption should be removed.
- The “research” exemption should be removed.
- The revised legislation should include a clause making it an offence to withhold information for an improper purpose.
- The Press Council endorses the proposed insertion of a clause excluding certain factors from being taken into account in the application of the public interest test.
- The Press Council endorses the inclusion of factors favouring disclosure into the amended legislation.
- The Press Council endorses the proposed removal of initial application fees.
- The Press Council endorses the proposed five hours of free decision-making time for requests by journalists.
- The Press Council endorses the proposed appointment of an independent commissioner to oversee Freedom of Information.
- The Press Council endorses the introduction of “proactive disclosure” mechanisms.
- The Press Council endorses the proposal to extend Freedom of Information to contractors who provide services on behalf of the Commonwealth.

## **Submission**

The Australian Press Council congratulates the Rudd Government on addressing the need for significant reform of Freedom of Information in Australia. The reforms set out in the draft *Freedom of Information Amendment (Reform) Bill* and the draft *Information Commissioner Bill 2009* promise greater transparency of public administration and improved accountability of government to the people of Australia.

From the limited statistics available to the Council, it appears that Freedom of Information has worked well for applicants seeking access to their own personal information. However, this has not been the case for applicants seeking public interest information to aid in the task of scrutinising government conduct and decision-making. Council's research has demonstrated that this is particularly the case for journalists, editors and publishers who, for some time, have experienced frustration in their attempts to obtain material under the *Freedom of Information Act 1982* ("the FoI Act"). Such attempts have been obstructed by organisational culture within the Public Service, by political interference and by judicial interpretation. Indeed, the irony of Freedom of Information in Australia is that the legislation itself, despite its apparent aim of opening up government processes to scrutiny, has played a key role in effectively preventing public access to information. And, in particular, public access via the news media. Revision of the FoI Act is an essential first step in opening government, and government processes, to proper public scrutiny.

The most significant obstruction to free access contained in the FoI Act is that which is presented by the broadly defined exemptions, in conjunction with the objects clause, which makes reference to the exemptions as a limitation upon the Act's operation. For this reason, the Press Council is pleased to note that the draft *Freedom of Information Amendment (Reform) Bill* includes amendments to both the objects clause and to the treatment of exemptions. In particular, the Press Council supports the principle that material should be accessible to the public unless its release would be contrary to the public interest. However, the Press Council is of the view that, rather than setting out a complex scheme that depends on distinguishing between different categories of information, it would be preferable if there were just one criterion for all classes of information: if the release of the information would pose no significant threat to the public interest, it should be released. This test should be applicable to all classes of information, including "research" documents, Cabinet documents and documents which disclose "deliberative processes".

Regardless of how exemptions are formulated, their application can be distorted by the way they are construed administratively and judicially. The failure of the FoI Act to achieve the aims of openness and accountability can be partly attributed to its interpretation by the courts. The inclusion in the objects clause of the FoI Act of the phrase "limited only by exceptions and exemptions ..." has contributed to the tendency to apply the exemptions in a manner inconsistent with the goal of openness. The Press Council is pleased that the government proposes to omit the reference to exemptions from the revised objects clause.

The *raison d'être* of the public interest aspects of Freedom of Information is to make government processes transparent in order to facilitate democratic accountability. With this in mind, it is one of the paradoxes of FoI in Australia that the material that has perhaps the greatest potential to contribute to transparency is exempt. The Cabinet exemption is consistent with the conservative traditions of Westminster government practices, but it is utterly inconsistent with open and accountable government - the underlying aim of Freedom of Information. The Press Council is disappointed that Cabinet documents will continue to be exempt under the revised legislation. While the proposed revision to the exemption is a positive improvement, it does not address the fundamental problem that Cabinet documents are not available to the public. As stated above, the Press Council's view is that government documents should only be withheld where disclosure would present a serious risk to the

public interest. Cabinet documents should not be treated any differently from other government documents in this respect. Further, the Press Council is of the view that those Cabinet documents which do not pose a risk to the public interest, and which would inform public debate on government decisions and how they come about, should be proactively published by the government via the internet as soon as possible after the relevant Cabinet meeting.

Similarly, while the proposal to amend the *Archives Act* to shorten the periods of restricted access from fifty years to thirty years and from thirty years to twenty years is an improvement, the Press Council is of the view that the periods of restricted access are far too long. If there is no threat to the public interest from making the documents public there is no sound reason for keeping the documents confidential, regardless of the length of time since the documents were created.

One aspect of freedom of information that has had the effect of discouraging applications, or making it impractical to proceed with them, has been the cost incurred by applicants. While the initial application fee has been acceptable, applicants are often quoted significant amounts before the documents will be provided. The Press Council is pleased to note that the government proposes that journalists will be given five hours of free processing time to offset the costs of applications. This should go some way to lifting the barriers to journalists pursuing Freedom of Information applications. However, there may be instances when the “decision making time” claimed to be required for a given application is well in excess of five hours. In such instances it is essential that there be a mechanism to ensure that the time quoted is not inflated and that the fees quoted are reasonable. Such a mechanism might involve a cap on the amount of fees chargeable for any single application, or a rebate when the number of documents ultimately received by the applicant is small. There should be in all instances a mechanism available to enable the applicant to negotiate the fees quoted and to seek review when no agreement can be reached.

In order to avoid the problem of ministers and government officers withholding information for political reasons, or otherwise withholding information which ought to be released, the Press Council urges the government to insert a clause into the draft legislation that would make it an offence to withhold information for improper purposes, such as the concealing of corruption or incompetence.

In spite of the Press Council’s concerns with respect to certain aspects of the proposed revision of Freedom of Information, the Council nonetheless endorses the vast majority of the proposed reforms. In particular, the Press Council is pleased to note that, in future, decision makers will be specifically excluded from giving consideration to irrelevant factors, such as the potential for embarrassment to the government or misunderstanding by the public, when applying the public interest test. The Press Council also endorses the proposal to appoint an independent commissioner to oversee Freedom of Information, and the proposed extension of Freedom of Information to bodies contracted to provide services to the public on behalf of government.

Notwithstanding the Council’s criticisms, the Australian Press Council overwhelmingly supports the government’s proposed revision of the FoI Act.

## **The Australian Press Council**

The Australian Press Council is a voluntary association of organisations and persons established on 22 July 1976. The membership of the Council is set out in the attachment.

The objects of the Australian Press Council are to promote freedom of speech through responsible and independent print media, and adherence to high journalistic and editorial standards, by:

- considering and dealing with complaints and concerns about material in newspapers, magazines and journals, published either in print or on the Internet;
- encouraging and supporting initiatives by the print media to address the causes for readers' complaints and concerns;
- keeping under review, and where appropriate, challenging political, legislative, commercial or other developments which may adversely affect the dissemination of information of public interest, and may consequently threaten the public's right to know;
- making representations to governments, public inquiries and other forums as appropriate on matters concerning freedom of speech and access to information;
- undertaking research and consultation on developments in public policy affecting freedom of speech, and promoting public awareness of such issues;
- promoting an understanding of the Objects, Principles and workings of the Council especially among editors, journalists and journalism schools, through forums and consultations; and encouraging feedback for Council's consideration.

## **The Australian Press Council**

### **Members**

**May 2009**

#### **Chairman**

Professor Ken McKinnon

#### **Industry Members (10)**

Phillip Dickson

John Dunnet

Roslyn Guy

Peter Jeanes

Peter Kerr

Bob Osburn

Peter Owen

Campbell Reid

John Trevorrow

Pam Walkley

#### **Representing**

Australian Associated Press

Country Press Australia

The Age

WA Newspapers

Fairfax Media

Community Newspapers Aust

Regional Dailies

News Group

Herald & Weekly Times Ltd

ACP Magazines Ltd

#### **Alternates**

Selina Day

David Sommerlad

Zoltan Kovacs

Leonie Lamont

Bruce Morgan

Sharon Hill

#### **Panel of Public Members (9 members - 7 attend each meeting)**

Professor H P Lee (Vic) Vice-Chairman

Cheryl Attenborough (Tas)

Helen Edwards (SA)

John Fleetwood (SA)

Professor Ron Grunstein (NSW)

Brenton Holmes (ACT)

Katherine Sampson (Vic)

Lisa Scaffidi (WA)

Melissa Seymour-Dearnness (Qld)

#### **Panel of Independent Journalist Members (3 members - 2 attend each meeting)**

Bruce Baskett

Prue Innes

Adrian McGregor

#### **Journalist Member representing the Media Entertainment and Arts Alliance**

Alan Kennedy

#### **Panel of Editor Members (2 members of whom 1 attends each meeting)**

Warren Beeby

Gary Evans

#### **Executive Secretary (non voting)**

Jack R Herman

For details and biographies see:

<http://www.presscouncil.org.au/pcsite/about/members.html>