Law Institute Victoria

Draft Freedom of Information Reform

Submission to the Cabinet Secretary and Special Minister of State

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Table of Contents

1. Introduction **3**

2. Information Commissioner Bill 2009 .... **3**

2.1 Freedom of Information Functions – Review of Decisions 3

2.2 Information Officers – Relationship of functions and powers 4

2.3 Information Officers – Delegations to staff 4

2.4 Information Officers – Appointment 4

3. Freedom of Information Amendment (Reform) Bill 2009 .... **5**

3.1 Information publication scheme (Schedule 2, cl.3, new Part II, commencing p.5) 5

3.2 Exemptions (Schedule 3, Part 2, commencing p.16) 6

3.3 Information Commissioner amendments (Schedule 4, Part 1, commencing p.43) 7

4. Conclusion **8**

1. Introduction

The Law Institute of Victoria (LIV) is pleased to have the opportunity to comment on the Exposure Drafts of the *Information Commissioner Bill* 2009 and the *Freedom of Information Amendment (Reform) Bill* 2009 (respectively the IC Bill and the FOI Reform Bill and together the Bills). The LIV is a constituent body of the Law Council of Australia (LCA). We are aware that the LCA is also proposing to make a submission and the LIV makes these comments in addition to those of the LCA.

The LIV welcomes the government's intention through these Bills and other proposed reforms to give the Australian community improved access to information held by the Australian Government. We agree with the new objects proposed in the FOI Reform Bill (Schedule 1, cl.1, new s.3(2)) that improved public access to government information can facilitate public participation in the political processes and enhance the accountability of government. Effective participation in public affairs is, we note, a human right under the *International Covenant on Civil and Political Rights* and the Victorian *Charter of Human Rights and Responsibilities*.

Our comments on select aspects of the Bills are set out below.

2. Information Commissioner Bill 2009

The LIV supports the structural reform proposed in the IC Bill to create an Office of the Information Commissioner and the three positions of Information Commissioner, Freedom of Information (FOI) Commissioner and Privacy Commissioner (together, the 'Commissioners' or 'information officers'). The structural reform could improve access to information by relieving the existing Privacy Commissioner of some of the large administrative burden associated with FOI procedures and by referring those responsibilities to an FOI Commissioner with specialised functions. The LIV would, however, like to see the following issues addressed in the IC Bill.

2.1 Freedom of Information Functions – Review of Decisions

Clause 10 of the IC Bill proposes freedom of information functions that would require the Commissioners to perform a range of roles including educator (e.g. promoting awareness), regulator (e.g. issuing guidelines), reviewer of decisions and investigator. The LIV considers it inappropriate to include in the extensive range of roles to be performed by the Commissioners the function of reviewing decisions under Part VII of the *Freedom of Information Act* 1982 (Cth) (the FOI Act as proposed to be amended by the FOI Reform Bill) (see clause10(h) of the IC Bill).

Review of decisions should, in the LIV's view, be undertaken by *only one* independent body such as the Administrative Appeals Tribunal (AAT). If review of decisions could be undertaken by both the Commissioners and the AAT, this would create unnecessarily burdensome and inefficient duplicated merits review. No matter how detailed the Commissioners' review decisions and reasons might be, an unsuccessful party is likely to seek further review by the AAT rather than appealing to the Federal Court of Australia. At the AAT, there would be a hearing on the merits and the applicant would not run the risk of an adverse costs order. If the applicant were to go to the Federal Court, the issues would be limited to questions of law and the applicant would run the risk of an adverse costs order if unsuccessful. We believe that it will be easier for the Commissioners to

maintain the other proposed roles if they are detached from the review of the decision-making process.

If the review function of the Commissioners is retained, we consider that they should all be required to hold appropriate legal qualifications (see comments below on 'Appointments').

2.2 Information Officers – Relationship of functions and powers

The IC Bill describes the functions and powers of the Information, FOI and Privacy Commissioners in proposed Division 3, Subdivision A. The relationship between the Information, FOI and Privacy Commissioners is, however, not clear.

The LIV considers that the IC Bill should be amended to make it clear that the three positions are required to be held by three different people to ensure effective and efficient allocation of functions.

In the LIV's view, the IC Bill should also be amended to make it clear that the Information Commissioner sits above the FOI and Privacy Commissioners and delegates FOI and privacy functions to them respectively and exclusively. The LIV does not consider it appropriate to create a regime where the Information Commissioner can duplicate the functions of the FOI and Privacy Commissioners or that the FOI and Privacy Commissioners can duplicate each other's functions (see respectively clauses 14(2) and 15(2) of the IC Bill), especially with respect to those functions that require specialised qualifications and skills (see comments below on 'Appointments').

2.3 Information Officers – Delegations to staff

Clause 16 of the IC Bill sets out the functions that the Information Commissioner *cannot* delegate to staff.

The LIV would be grateful if you could clarify why clause 16 of the Bill appears to provide for delegations to staff only by the Information Commissioner but not also by the FOI and Privacy Commissioners. We think it would be useful if the Bill explained how the FOI and Privacy Commissioners will effect delegations to staff, even if this is by reference to other legislation.

The effect of clause 16(d) prohibiting delegation of the power to make decisions on an IC review is that all reviews will have to be conducted by one or other of the three Commissioners. The LIV notes that, roughly consistent with numbers in past years, a total 142 applications for review were made to the AAT under the FOI Act in 2007-2008.[1] Some applications require few resources to resolve and others are more complex. The LIV considers that there is more work in review decisions and correcting errors than these three persons could undertake while producing decisions of an appropriate quality and performing their other duties. If the LIV's suggested removal of the review function is not accepted, the IC Bill should be amended to allow the review function to be delegated to staff.

2.4 Information Officers – Appointment

Clause 17 of the Bill provides for the appointment of the three Commissioners. Only the FOI Commissioner is specifically required to have particular qualifications, namely 'a

[1] .AAT Annual Report 2007-2008 at 124 available at http://www.aat.gov.au/CorporatePublications/annual/AnnualReport2008.htm.

degree from a university, or an education qualification of a similar standing, after studies in the field of law.'

The LIV considers that clause 17(1) concerning the Information Commissioner's appointment should be amended to prescribe the qualifications required for the position and that clause 17(3) concerning the FOI Commissioner's requisite qualifications should be more specific.

The Information and FOI Commissioners have functions requiring legal knowledge and understanding. The FOI functions include, for example, a review power (see clause10(h) of the IC Bill and new Part VII FOI Act), a power to refer questions of law in a review to the Federal Court of Australia (new section 55G FOI Act) and the power to issue guidelines (new section 93A FOI Act). The Information and FOI Commissioners should therefore be required to hold a law degree (such as an LLB or JD) as opposed to another degree with a legal component (such as a BA, MA, LLM, PhD or JSD) and be admitted to practise law in Australia.

Moreover, the effect of clause 15(2) is that the Privacy Commissioner may also perform FOI functions (including review under Part VII). This is undesirable if the Privacy Commissioner does not hold appropriate legal qualifications.

3. Freedom of Information Amendment (Reform) Bill 2009

The LIV is highly supportive of the reforms proposed to be made to the FOI Act in the FOI Reform Bill. We would, however, like to see the following issues addressed in the FOI Reform Bill.

3.1 Information publication scheme (Schedule 2, cl.3, new Part II, commencing p.5)

The FOI Reform Bill proposes a new section 7A for the FOI Act to guide government agencies on the publication of information and a new section 8 setting out what information is to be published. The LIV considers that these sections should be amended to acknowledge expressly that the FOI Act does not create the standard in relation to the publication of documentary information; it creates only the minimum standard. Agencies are encouraged to publish or disclose information in accordance with laws, policies or practices other than those specified in the FOI Act.

To this end, the LIV considers that:

- the third paragraph of the guide in new section 7A could be amended to insert after 'including information' the clause 'required to be published under the FOI Act or any other law and information';
- the fourth paragraph of the guide in new section 7A could be amended to read 'In addition, an agency may publish other information held by the agency, whether under the FOI Act or any other law, policy or practice applicable to the agency.';
- in new section 8(2)(g), the word 'made' could be inserted before 'under Part III' and the following clause could be inserted at end of that paragraph 'or other than under this Act' to reflect the fact that information is routinely provided in many circumstances, not just under the FOI Act;

- in new section 8(2)(g), the following clause should be inserted at the end of the paragraph 'whether under the FOI Act or any other law, policy or practice applicable to the agency.'

3.2 Exemptions (Schedule 3, Part 2, commencing p.16)

The LIV notes the following 'drafting' issues arising in the proposed exemptions provisions in Schedule 3 Part 2 of the FOI Reform Bill:

- the bracketed language in clause 8 concerning a new definition of edited copy, and the heading of the new section 22 in clause 14, do not reflect the scope of section 22 in its entirety: they should be amended to acknowledge that, in addition to 'exempt matter', 'irrelevant information' can also be deleted.
- the definition of 'run out' in clause10 should allow for time to appeal and extensions of time: in our view, the words 'and appeal' could be inserted in the opening phrase after 'opportunities for review'; a further paragraph '(e)' could be inserted to cover all opportunities to appeal, including appeals to the Federal Court of Australia; and paragraph (c)(ii) could be amended to allow for extensions of time granted by the AAT under s.29(7) of the *Administrative Appeals Tribunal Act 1975*.
- in the new section11B(3) (factors favouring access), the word 'giving' should be deleted so that the provision refers simply to 'whether access to the document would do any of the following' because it is not the giving of access that is at issue but access itself.
- the meaning of the term 'Commonwealth Government' (e.g. new s.11B(4)(a) setting out a factor irrelevant to the concept of public interest) needs to be clarified so that it is apparent, for example, that it includes government agencies.
- new section 11B(4)(b) (setting out a factor irrelevant to the concept of public interest) should not be limited to the 'applicant': we suggest either replacing 'applicant' with 'any person' *or*, like the language of paragraph (d), remove the reference to the 'applicant' and refer simply to 'access to the document could result in misinterpretation or misunderstanding of the document';
- new section 11B(4)(c) (setting out a factor irrelevant to the concept of public interest) should not be limited to the 'author' but should also include the 'recipient' being of high seniority to cover, for example, circumstances in which a briefing to a Minister (i.e. a senior recipient) has been prepared and authorised by a junior officer (i.e. a junior author).
- new sections 26A(4), 27(7) and 27A(6) proposed in clause 18 of the FOI Reform Bill (access not to be given until after review opportunities have run out), and any other relevant provisions referring to 'run out' as defined in clause 10, need to allow for appeals to the Federal Court of Australia, in addition to appeals to the AAT (see our comments above on the definition of 'run out').
- new section 27(1)(b)(ii) proposed in clause 18 of the FOI Bill (scope of requirement to consult on business documents) inaccurately cross-refers to the new sub-section 11A(5) because the wording of sub-section is such that it will always apply: the phrase 'access would, on balance, be contrary to the public interest' should be substituted for the language currently proposed in new section 27(1)(b)(ii) and any similar references elsewhere in the FOI Bill.
- new section 34(4) (non-exempt cabinet documents) proposed in clause 23 of the FOI Bill refers only to documents that are 'attached': for the sake of clarity, it should also refer to documents 'incorporated by reference'.
- new section 47C(1) (deliberative process public interest conditional exemptions) proposed in clause 28 of the FOI Bill should revert to the language of the existing provision in the FOI Act (s.36) so that, instead of the phrase 'if it includes', it reads

'if it would disclose' because the words of a document may not disclose exempt matter *on their face* but will do so when read with other publicly available material.
- new section 47F(2) (personal privacy public interest conditional exemption) proposed in clause 28 of the FOI Bill should be amended to make it clear that the list of matters is inclusive and not exclusive of other matters.

The LIV would also like to see the following issues concerning exemptions addressed:

Reinstatement of industrial relations exemption

- the existing sub-section 40(1)(e) of the FOI Act (concerning disclosure having a substantial adverse effect on the conduct by or on behalf of the Commonwealth or an agency of industrial relations) has been deleted from the new section 47E (certain operations of agencies public interest conditional exemption): the LIV believes that sub-section 40(1)(e) of the FOI Act should be retained in the new section 47E. In our view, the 'industrial relations' exemption has very limited application. It enables industrial relations negotiations to be effectively conducted without risk of prejudice arising from premature disclosure in the course of a negotiation. Such broader information would not be covered by the reference to "management…of personnel" in the proposed sub-section 47E(c).

Meaning of undertaking in the business exemption to be clarified

- new section 47G(3) proposed in clause 28 of the FOI Bill concerns the meaning of 'undertaking' for the purpose of the business public interest conditional exemption, stating that the term applies to government agencies and, as such, they may avail themselves of this conditional exemption: the LIV considers that new section 47G(3) should be amended to better reflect that there are government agencies which are engaged in competitive commercial activities and deserving of protection under this section. We are not satisfied that adequate clarity is provided by new section 47G(3) (current section 43(3)) or section 7(2) of the FOI Act (which provides that the persons, bodies and Departments specified in Part II of Schedule 2 of the FOI Act are exempt from the operation of the FOI Act in relation to the documents referred to in that Schedule in relation to them). New section 47G(3) does not, in our view, clearly reverse the effect of the decision of the Federal Court of Australia in *Harris v ABC* (to the effect that the conditional exemption does not apply to government agencies).[2]

3.3 Information Commissioner amendments (Schedule 4, Part 1, commencing p.43)

The FOI Reform Bill refers interchangeably to 'received' and 'given' (e.g. new s.15AB(1)(c) and (3)(b) proposed in clause 23 of Schedule 4). Section 28A of the *Acts Interpretation Act 1901* provides for the manner in which documents may be served whether the term "*serve*", "*give*" or "*send*" is used. Section 29 provides when that service is deemed to have been effected when one or other of those words is used. Is it intended that these deeming provisions apply to determine whether the person has "*received*" the decision or is it intended that actual receipt is required? The LIV considers that this needs

[2] *Harris v ABC* (1983) 50 ALR 551 at 365 Beaumont J states 'In my view, the benefit of the operation of s 43 is not available to a person within an agency or undertaking. Nor, in my view, is it available to the agency or undertaking itself: the section read in conjunction with s 3(1)(b) and the explanatory memorandum make it plain enough that it is a provision the object of which is to protect, within reasonable limits, the interests of third parties dealing with the agency or undertaking and supplying information to it in the course of that dealing' (citations omitted).

to be clarified and that there should be consistent use of terminology in new s.15AB(1)(c) and (3)(b) and elsewhere in the FOI Reform Bill.

The existing and proposed new section 24A (see Schedule 6, Part 1, clause 31) of the FOI Act allows an agency or Minister to refuse a request for access to a document if all reasonable steps have been taken to find the document and the agency or Minister is satisfied that the document cannot be found or does not exist. New section 55U(2) proposed in clause 35 of Schedule 4 of the FOI Reform Bill states that, in a review conducted by the Information Commissioner, the Information Commissioner may require an agency or Minister to conduct further searches for a document where a request for access to that document has been refused under section 24A.

At present, decisions under s.24A of the FOI Act can be reviewed by the AAT (see ss. 55(1)(a) and 55(1)(b) of the FOI Act). If the AAT finds that not all reasonable steps have been taken, it can make a decision adverse to the agency and order that further searches be undertaken. Such decisions could then be subject to appeal to the Federal Court of Australia. Under the proposed new regime, it is not clear whether the power of the IC under s55U(2) is a "decision" of the IC which would be reviewable by the AAT under new section 57A.

The LIV would be grateful if you could clarify what if any recourse an agency or Minister would have if it wished to challenge a requirement by the Information Commissioner that it conduct further searches where the agency or Minister is of the view that all reasonable searches have been undertaken. The LIV believes that, if an order requiring further searches be conducted is made under new section 55U(2), it should be made clear that such a decision is reviewable by the AAT under new section 57A.

4. Conclusion

The LIV would welcome an opportunity to participate in any further consultation on the Bills and look forward to reviewing further reform initiatives concerning privacy and issues arising out of the Australian Law Reform Commission 1995 Report on *Open Government*.[3]

[3] Australian Law Reform Commission Report 77 *Open Government: A review of the federal* Freedom of Information Act 1982 http://www.austlii.edu.au/au/other/alrc/publications/reports/77/