

**ALRC submission to the Department of the Prime Minister and Cabinet on the draft
Freedom of Information Amendment (Reform) Bill 2009 (Cth) and the Information
Commissioner Bill 2009 (Cth)**

The Australian Law Reform Commission (ALRC) makes the following submission to the Department of the Prime Minister and Cabinet on the draft Freedom of Information Amendment (Reform) Bill 2009 (Cth) and the Information Commissioner Bill 2009 (Cth).

In making this submission, the ALRC draws on its experience from its major inquiries into:

- the *Freedom of Information Act 1982* (Cth) (with the Administrative Review Council (ARC)), which culminated in the final report *Open Government: A Review of the Federal Freedom of Information Act 1982* (ALRC 77, 1995) (available online at <http://www.alrc.gov.au/inquiries/title/alrc77/index.htm>);
- the *Archives Act 1983* (Cth), which concluded with the release of the report Australia's *Federal Record: A Review of Archives Act 1983* (ALRC 85, 1998) (available online at <http://www.alrc.gov.au/inquiries/title/alrc85/index.htm>); and
- the *Privacy Act 1988* (Cth), which resulted in the release of the final report *For Your Information: Australian Privacy Law and Practice* (ALRC 108, 2008) (available online at <http://www.alrc.gov.au/inquiries/title/alrc108/index.html>).

The ALRC strongly supports the great bulk of the provisions of the Freedom of Information Amendment (Reform) Bill and the Information Commissioner Bill. In the ALRC's view, these amendments represent a very positive and significant step toward open and accountable government, and substantially implement the recommendations of ALRC 77, which was produced in association with the Administrative Review Council (ARC).

The ALRC also acknowledges and congratulates the Australian Government on other initiatives in this area, in particular, the Freedom of Information (Removal of Conclusive Certificates and Other Measures) Bill 2008 (Cth). The ALRC notes that this Bill goes beyond many of the recommendations in ALRC 77 by removing all conclusive certificates in the *Freedom of Information Act 1982* (Cth) (FOI Act) and reflects the progress in public thinking in the intervening years.

The ALRC also notes that the Government has announced that it will implement a number of ALRC 108 recommendations relevant to provisions of the FOI Act and the Information Commissioner Bill—including recommendations governing access to, and correction of, documents containing personal information, as well as those defining the powers and functions of the Privacy Commissioner.

Implementation of ALRC 77 recommendations

As noted above, many of the provisions of the Freedom of Information Amendment (Reform) Bill and the Information Commissioner Bill implement ALRC 77 recommendations. The ALRC strongly supports these amendments, in particular:

- the insertion of a new Objects Clause that explains clearly the underlying rationale for the FOI Act and its significance for the proper working of representative democracy (implementing Recommendations 1–5 of ALRC 77);
- the establishment of a dedicated Freedom of Information Commissioner. The ALRC recommended the establishment of such a statutory office in ALRC 77,¹ and affirmed that view in ALRC 108;²
- the expansion of the information publication scheme outlined in the Freedom of Information Amendment (Reform) Bill. Although the ALRC did not recommend such a scheme in ALRC 77, it is broadly consistent with the pro-disclosure approach in that report. The ALRC assumes that the Information Commissioner and the FOI Commissioner will be responsible for oversight of these obligations under s 10 of the Information Commissioner Bill;³
- the extension of the FOI Act to contracted service providers and subcontractors delivering services for and on behalf of the Commonwealth by requiring agencies to take contractual measures (consistent with Recommendations 99–102 of ALRC 77);
- the abolition of application fees for access requests under Part III of the FOI Act, which is consistent with Recommendations 82, 88, 92 and 93 of ALRC 77;
- the reformulation of a public interest test weighted in favour of disclosure of documents—although the ALRC did not specifically recommend the formulation proposed by s 11B, many features of the reformulation are consistent with ALRC 77 recommendations, including Recommendations 6, 38 and 39;
- the amendment of the Cabinet documents exemption to ensure that it only covers documents at the core of the Cabinet process. The reformulation implements recommendations 46–48 of ALRC 77. The ALRC notes, however, that the amendments to s 34 use the term ‘officially published’ and ‘officially disclosed’. In the ALRC’s view these terms should be defined as recommended in ALRC 77;⁴
- the amendment of the internal working documents exemption to relate to deliberative processes. The ALRC strongly supports the reformulation and notes that these amendments are broadly consistent with the ALRC recommendations in ALRC 77, in particular Recommendations 51–52; and
- the repeal of exemptions for Executive Council documents, documents arising out of companies and securities legislation and documents relating to the conduct of an agency of industrial relations. The ALRC recommended the repeal of each of these recommendations in ALRC 77.⁵

However, a number of ALRC 77 recommendations have not been incorporated into the Freedom of Information Amendment (Reform) Bill and the Information Commissioner Bill 2009 (Cth).⁶ This submission focuses on ALRC 77 recommendations requiring legislative amendment. However, the ALRC would also like to highlight that ALRC 77 made a large

¹ *Open Government: A Review of the Federal Freedom of Information Act 1982* (ALRC 77, 1996), Ch 6 and Recs 18–27.

² *For Your Information: Australian Privacy Law and Practice* (ALRC 108, 2008), [15.106].

³ *Open Government: A Review of the Federal Freedom of Information Act 1982* (ALRC 77, 1996), Rec 30.

⁴ *Ibid*, Rec 49.

⁵ *Ibid*, Recs 50, 57, 72.

⁶ For example, *Ibid*, Recs, 28, 52, 61 and 83.

number of recommendations relating to government practice and the administration of the FOI Act. In the ALRC's view, the implementation of these recommendations is also essential to ensure that the public sector is committed to open government, and that the objects of the FOI Act are realised. The ALRC appreciates that the Australian Government has recently taken steps to encourage a culture of disclosure in government departments. For example, Senator the Hon John Faulkner, Cabinet Secretary, has recently written to heads of agencies requiring them to make it clear to their freedom of information officers that the starting point for considering freedom of information requests should be a presumption in favour of giving access to documents.

The Information Commissioner

The ALRC supports the establishment of an Office of the Information Commissioner, headed by an Information Commissioner and supported by the Privacy Commissioner and a Freedom of Information Commissioner.

It should be noted that in ALRC 77, the ALRC and ARC expressed the view that there is a need to ensure that the principles of openness and privacy each have a clearly identifiable and unambiguous advocate.⁷ The ALRC considered this proposal again in its recent review of the *Privacy Act*. In ALRC 108, the ALRC stated that it did not recommend the establishment of a single body to administer the Privacy Act and the FOI Act because there was little support for such a change among stakeholders. In particular, some stakeholders expressed the view that the *Privacy Act* and the FOI Act have different focuses, and so should be administered by two different bodies.⁸

The ALRC did have regard to the Rudd Government's stated intention to establish an Information Commissioner, and expressed the following view:

While the ALRC does not recommend a single regulator to administer the Privacy Act and the FOI Act, the ALRC notes that the Government's proposal for an Office of the Information Commissioner is not inconsistent with any of the ALRC's recommendations in this Report. In particular, the ALRC notes that the Government's policy maintains a separate focus for the Privacy Commissioner and a Freedom of Information Commissioner. The ALRC also notes the advantages of having the Privacy Commissioner and a Freedom of Information Commissioner co-located in a single office to deal with complaints about access, particularly when a document contains a mixture of personal and non-personal information.⁹

Given that ss 14–15 of the Information Commissioner Bill provide for the FOI Commissioner and the Privacy Commissioner to perform each other's functions, there is some potential to blur the focus of the Privacy Commissioner and the FOI Commissioner, and care should be taken to avoid this arising in practice.

Interaction with the *Privacy Act 1988*

The Freedom of Information Amendment (Reform) Bill proposes a new s 11B(2), which states that if an agency or Minister has given a person access to a document under s 11A ('Access to documents on request'), then it must publish the information to members of the public generally on a website within 10 working days after the day the person was given access to the document.

⁷ Ibid, [6.29].

⁸ *For Your Information: Australian Privacy Law and Practice* (ALRC 108, 2008), [5.104]–[5.108].

⁹ Ibid, [5.108].

This requirement is subject to some exceptions under s 11C(1), including where the document contains: information relating the personal information of the person; personal information relating to a member of that person's family; or information about business, commercial, financial or professional affairs. The ALRC notes, however, that these exceptions only protect the privacy of the person requesting access to the document. They do not the personal information or other sensitive information of third parties that may be included in the accessed document.

While the disclosure of personal information of third parties will often be dealt with by consulting with the relevant third parties, the FOI Act exemption relating to personal privacy, or the provisions of the *Privacy Act*; there may be some benefit in clarifying how ss 11B and 11C interact with the *Privacy Act*.

In ALRC 77, the ALRC and ARC sought to clarify the relationship between s 41 of the FOI Act (document affecting personal privacy) and the *Privacy Act*. It was recommended that the *Privacy Act* be amended to provide that a release of personal information under the FOI Act constitutes a release that was 'required or authorised by law' for the purpose of IPP 11, provided the consultation requirements in the FOI Act were complied with.¹⁰ It was thought that this would eliminate any possible confusion about the meaning of IPP 11 in so far as it relates to a release of information under the FOI Act.

Time limits

The current time limit for processing freedom of information requests is 30 days. The Freedom of Information Amendment (Reform) Bill does not propose to reduce that time limit.

In ALRC 77, the ALRC and ARC noted suggestions that advances in information technology and records management meant that it should be easier for agencies to identify and retrieve information and that, consequently, the time limit for processing a request should be reduced.

ALRC 77 suggested that it was reasonable to expect agencies to take advantage of technological developments to improve their freedom of information administration. However, there was a concern at that time that it might be premature to reduce the 30 day period immediately, since some agencies did not yet have the facilities to store all documents electronically. Instead, it was recommended that in three years the time limit should be reduced to 14 days.¹¹

In the ALRC's view, the Australian Government should consider reducing the time it takes to process a freedom of information request, considering that there have been major advances in information technology over the last decade.

¹⁰ *Open Government: A Review of the Federal Freedom of Information Act 1982* (ALRC 77, 1996), Rec 65. The ALRC made a similar recommendation in *For Your Information: Australian Privacy Law and Practice* (ALRC 108, 2008), Rec 15–1.

¹¹ *Open Government: A Review of the Federal Freedom of Information Act 1982* (ALRC 77, 1996), Rec 31.

Fees

The ALRC congratulates the Australian Government on the abolition of all application fees (including for internal review) under Part III of the FOI Act. The ALRC notes, however, that charges will still be applied for the administration of some FOI requests.

In ALRC 77, the ALRC and ARC expressed the view that agencies should continue to be able to impose charges for FOI access to documents other than the applicant's personal information. It was noted that, although charging for access to information undoubtedly reduces its accessibility, some form of contribution from applicants is appropriate.

However, the ALRC and ARC also acknowledged that the fees and charges regime was unduly complicated, and often penalised applicants for the inefficient information management practices of agencies. Consequently, a new approach was recommended, specifying that charges only should be levied in respect of documents that are released.¹²

The ALRC and ARC noted that some agencies might be unhappy if they could only charge for documents disclosed to the applicant, even if they had processed many more. However, the ALRC and ARC considered any concern along these lines to be substantially outweighed by the greater degree of fairness accorded to applicants—particularly if this approach encouraged agencies to release more documents than they would under the current regime.

The ALRC notes that the proposed new Information Commissioner is scheduled to undertake a comprehensive review of charges under the FOI Act within 12 months of his or her appointment—and it hoped the Information Commissioner will consider the approach to fees and charges recommended in ALRC 77 as part of that review.

Parliamentary departments

Under the Freedom of Information Amendment (Reform) Bill 2009, Parliamentary departments continue to be excluded from the coverage of the FOI Act.

In the Discussion Paper for the ALRC-ARC review of the FOI Act (DP 59), it was proposed that parliamentary departments should be brought within the scope of the FOI Act on the basis that documents that warrant protection would be adequately protected by the exemption provisions, for example s 46 (parliamentary privilege).

A number of submissions to the ALRC and ARC Inquiry, including that of the Clerk of the Senate, supported the proposal. The ALRC noted:

The Department of the Senate has, in any case, always acted as though it were subject to the FOI Act, releasing documents unless they would have fallen within an exemption. In contrast the Department of Parliamentary Reporting Staff considers that it should remain outside the Act because it does not have a public policy role or provide services to the public. It claims that extending the FOI Act to the parliamentary departments could expose them to lengthy and costly legal challenges in respect of material they would claim to be exempt under s 46. The Department of the Parliamentary Librarian also opposes extending the Act to the parliamentary departments for similar reasons. The Review is not persuaded by these arguments. It remains convinced, particularly in light of the experience of the Department of the Senate, that there is no justification for the parliamentary departments to be excluded from the Act and that being subject to the Act will not cause any greater inconvenience for them than is caused to other agencies subject to the Act.

¹²

Ibid, rec 88.

Accordingly, the ALRC and ARC recommended that parliamentary departments be made subject to the FOI Act,¹³ and the ALRC continues to support this recommendation.¹⁴

Schedule 2 agencies

ALRC 77 also includes a range of recommendations relating to the agencies listed in Schedule 2 of the FOI Act. These recommendations have not been incorporated into the Freedom of Information Amendment (Reform) Bill 2009.

The ALRC and ARC recommended that the intelligence agencies should remain in Schedule 2 Part I, but that all other agencies listed (other than Government Business Enterprises) should be required to demonstrate to the Attorney-General, within 12 months, that they merited exclusion from the operation of the Act.¹⁵ The ALRC is not aware of such an exercise being undertaken to date.

The ALRC and ARC also recommended the amendment of Schedule 2 Parts II and III. These recommendations were contingent on the amendment of s 43 of the FOI Act (the exemption for documents relating to business affairs), to make clear that the exemption applies to documents that contain information about the competitive commercial activities of agencies. ALRC 77 recommended that:

- the exemptions in Schedule 2 Part II for documents relating to competitive commercial activities of agencies should be repealed. All other agencies listed in Schedule 2 Part II should be required to demonstrate to the Attorney-General that the documents specified warrant exclusion from the operation of the Act. If they do not do this within 12 months, those documents should be removed from Schedule 2 Part II;¹⁶ and
- Schedule 2 Part III should be repealed.¹⁷

The Freedom of Information Amendment (Reform) Bill repeals s 43 and has replaced it with a provision that is consistent with the ALRC's recommendation in ALRC 77. The ALRC would urge the Australian Government also to review Schedule 2.

The ALRC considered the agencies listed in Schedule 2 of the FOI Act for the purposes of its recent review of the *Privacy Act*, and made a number of relevant recommendations in Chapter 36 of ALRC 108.¹⁸

Enforcement of law and protection of public safety exemption

The ALRC notes that the Freedom of Information Amendment (Reform) Bill does not alter the exemption relating to enforcement of law and protection of public safety.

A number of recommendations were made in ALRC 77 relating to this exemption. In particular, the ALRC and ARC considered that an express public interest test should be

¹³ Ibid, rec 73.

¹⁴ For example, see *For Your Information: Australian Privacy Law and Practice* (ALRC 108, 2008), Rec 41–3.

¹⁵ Ibid, Rec 74.

¹⁶ Ibid, Rec 75.

¹⁷ Ibid, Rec 75.

¹⁸ *For Your Information: Australian Privacy Law and Practice* (ALRC 108, 2008), Ch 36 and Recs 36–1 to 36–4.

introduced into s 37, with respect only to particular kinds of law enforcement documents. A similar approach is used in the equivalent provision in state FOI legislation. For example, in New South Wales, the following do *not* fall within the law enforcement exemption if, on balance, their disclosure would be in the public interest:

- a document revealing that the scope of a law enforcement investigation has exceeded the limits imposed by law;
- a document containing a general outline of the structure of a programme adopted by an agency for dealing with any contravention or possible contravention of the law;
- a report on the degree of success achieved in any programme adopted by an agency for dealing with any contravention or possible contravention of the law;
- a report prepared in the course of a routine law enforcement inspection or investigation by an agency the functions of which include that of enforcing the law (other than the criminal law); or
- a report on a law enforcement investigation that has already been disclosed to the person or body the subject of the investigation.

The ALRC and ARC considered that this approach would provide an appropriate balance without risking prejudice to law enforcement operations or public safety, recommending that s 37 should be amended to include a public interest test in respect of those categories of information.¹⁹ The ALRC continues to support this balanced approach.

Secrecy provisions

On 5 August 2008, the ALRC received Terms of Reference from the Attorney-General of Australia to review relevant laws and practices relating to the protection of Commonwealth information, including the scope and appropriateness of legislative provisions regarding secrecy and confidentiality.

Section 32 of the Information Commissioner Bill amounts to a secrecy provision. It criminalises the unauthorised dealing with information acquired by a person in the course of performing functions or exercising powers conferred for the purposes of an information commissioner function, freedom of information function or privacy function.

The ALRC also notes that the Freedom of Information Amendment Bill does not repeal s 38 of the FOI Act as recommended in ALRC 77²⁰ or s 33(3) of the *Archives Act* (which provides special protection for personal or business affairs relating to taxation laws) as recommended in *Australia's Federal Record: A Review of Archives Act 1983* (ALRC 85, 1998).²¹ The ALRC, notes, however, that both these provisions are currently being considered in the ALRC's secrecy review.

The ALRC released an Issues Paper, *Review of Secrecy Laws* (IP 34) (available online at <http://www.austlii.edu.au/au/other/alrc/publications/issues/34/>), in December 2008. IP 34 outlines the scope of the review, and seeks stakeholder feedback on a number of questions. At this stage, the ALRC has not yet formulated any proposals for law reform in this area—a

¹⁹ *Open Government: A Review of the Federal Freedom of Information Act 1982* (ALRC 77, 1996), rec 55.

²⁰ *Ibid*, Rec 70.

²¹ *Australia's Federal Record: A Review of Archives Act 1983* (ALRC 85, 1998), Rec 171.

more detailed Discussion Paper, containing preliminary proposals for reform for community discussion, is planned for release in June 2009.

Archives Act 1983 (Cth)

The Freedom of Information Amendment (Reform) Bill 2009 amends the *Archives Act* to bring forward the open access period for most records from 30 to 20 years, and for Cabinet notebooks from 50 years to 30 years. This is consistent with the ALRC's recommendation in ALRC 85, 1998.²²

The Government may wish to consider the large number of recommendations in relation to the *Archives Act* in ALRC 85. The Freedom of Information Amendment (Reform) Bill amendments relating to s 33(1)(b) of the *Archives Act* (the exemption relating to information or matter communicated in confidence by or on behalf of a foreign government) are consistent with ALRC 85;²³ and ALRC notes that the *Archives Amendment Act 2008* (Cth) implemented a number of the report's recommendations. However, many recommendations in ALRC 85 remain to be considered for implementation.²⁴

Some of these recommendations relate to the FOI Act. For example, the ALRC recommended that the FOI Act should contain a right of privileged access for former Governors-General, ministers, departmental secretaries and other specified senior officials to Commonwealth records relating to their respective terms in office for the purposes of refreshing their memories or preparing biographical works. This right would apply only in relation to records which are not yet in the open period.²⁵

The ALRC also recommended that both archives legislation and the FOI Act should include an exemption category relating to information that, under Indigenous tradition, is confidential or subject to particular restrictions on disclosure.²⁶

²² Ibid , Rec 171.

²³ Ibid , Rec 157.

²⁴ As noted above, some of these issues are being considered in the ALRC's current review of legislative provisions regarding secrecy and confidentiality.

²⁵ Ibid , Rec 138.

²⁶ Ibid, Recs 164 and 165.