

The Parliament of the Commonwealth of Australia

Senate Legal and Constitutional Legislation Committee

**Consideration of legislation referred
to the Committee**

**Inquiry into the Freedom of Information Amendment
(Open Government) Bill 2000**

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CHAPTER 1

INTRODUCTION

Referral of the inquiry

1.1 The *Freedom of Information Amendment (Open Government) Bill 2000* was introduced into the Senate on 5 September 2000 by Senator Andrew Murray as a private member's Bill.¹ On 10 October 2000 the Selection of Bills Committee referred the provisions of the Bill to the Legal and Constitutional Legislation Committee for inquiry and report by 31 March 2001.² The Senate agreed to this reference.

Background

Purpose

1.2 The Bill is designed to amend the *Freedom of Information Act 1982* (the FOI Act) and the *Freedom of Information (Fees and Charges) Regulations* to give effect to recommendations made by the Australian Law Reform Commission and the Administrative Review Council in their joint report of 1996.³

Historical overview of the development of federal freedom of information legislation

1.3 The Bill constitutes the most significant reform proposed to the freedom of information legislative scheme since its inception in 1982.

1.4 The first federal freedom of information bill was introduced into the Senate in 1978 and was subsequently referred to the Senate Standing Committee on Constitutional and Legal Affairs. That Committee reported in November 1979⁴ and the then Attorney-General, Senator Durack, made a statement in the Senate setting out the Government's response to that report in September 1980.⁵ In April of the following year, the Attorney-General introduced the Freedom of Information Bill 1981 as a Bill for an Act to give to members of the public rights of access to official documents of the Government of the Commonwealth and of its agencies. This second Bill took account of the changes suggested in the Government's response.⁶ It received bipartisan support and was assented to in March 1982 and commenced

1 Senate, *Official Hansard*, 5 September 2000, p.17319

2 Selection of Bills Committee Report No. 16 of 2000

3 Australian Law Reform Commission Report No 70 and Administrative Review Council Report No 40, *Open government: a review of the federal Freedom of Information Act 1982*, Canberra 1996

4 Senate Standing Committee on Constitutional and Legal Affairs, *Freedom of Information. Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978, and aspects of the Archives Bill 1978*, AGPS Canberra, 1979

5 Senate, *Official Hansard*, 11 September 1980, p. 797

6 Senate, *Official Hansard*, 2 April 1981, p. 1059

operation in December 1982. It was the first time any country with a Westminster style of government had moved to incorporate the elements of freedom of information into its legislative framework. The move reflected the recognition that the capacity of citizens to access official information held by governments and its agencies is consistent with the concept of open and transparent government and fundamental to the notion of democracy.⁷

1.5 The enactment of the FOI Act accompanied other significant legislative initiatives directed at reforming government processes so as to improve citizens' access to government information and to establish a system of review of administrative decisions. Other legislation included the Ombudsman's Act 1976, the Administrative Appeals Tribunal Act 1975, the Privacy Act and the Administrative Decisions (Judicial Review) Act. In the two decades following, improvements to the accessibility of official information was considerable and complemented the statutory and enforceable right of access provided under the FOI Act. By all accounts, the FOI Act had a substantial impact on the way that government agencies recorded information, especially in relation to decision-making processes, and on the way the public sector perceived requests by non-government applicants for information.⁸

1.6 During that time, however, there have been concerns that the FOI Act's central objective of improving access to official information has been obstructed by the very framework set up under the Act and that the reforms have encountered an enduring culture of resistance from within the public sector. In July 1994, the then Acting Attorney-General, the Honourable Duncan Kerr, tasked the Australian Law Reform Commission (ALRC) jointly with the Administrative Review Council (ARC) with inquiring into whether the basic purposes and principles of the freedom of information legislation had been satisfied and to recommend any improvements identified during the inquiry. The report (the *Open Government* report) was subsequently presented in December 1995. While the *Open Government* report concluded that the freedom of information legislation had had a 'marked impact' on the culture of the public sector, the review concluded that more needed to be done to give full effect to the right to access government-held information.⁹ Accordingly, the review made a significant number of recommendations (numbered to 106B).¹⁰

1.7 In June 1999, Mr Ron McLeod, the then Commonwealth Ombudsman, presented the *Needs to Know* report based on his 'own motion' investigation under section 35A of the *Ombudsman Act 1976* into the administration of the FOI Act in Commonwealth agencies.¹¹

7 Australian Law Reform Commission, Report No 77 and Administrative Review Council, Report No 40, *Open Government: a review of the federal Freedom of Information Act 1982*, December 1995, pp. 11-12

8 Australian Law Reform Commission, Report No 77 and Administrative Review Council, Report No 40, *Open Government: a review of the federal Freedom of Information Act 1982*, December 1995, pp. 15-16

9 Australian Law Reform Commission, Report No 77 and Administrative Review Council, Report No 40, *Open Government: a review of the federal Freedom of Information Act 1982*, December 1995, pp. 15-16. The Report states: 'The knowledge that decisions and processes are open to scrutiny, including under the FOI Act, imposes a constant discipline on the public sector. The assessment is not entirely positive, however. A number of people, many of them dissatisfied users of the Act, consider that a more accurate title for the Act would be Freedom From Information.'

10 Australian Law Reform Commission, Report No 77 and Administrative Review Council, Report No 40, *Open Government: a review of the federal Freedom of Information Act 1982*, December 1995, Appendix D (List of recommendations), pp. 227-237

11 Commonwealth Ombudsman, 'Needs to Know' Own Motion Investigation into the administration of the *Freedom of Information Act 1982* in Commonwealth Agencies, June 1999

The Ombudsman's decision to investigate was based on the fact that the Ombudsman has a statutory responsibility to examine complaints about decisions in relation to freedom of information requests.¹² Initially, the Ombudsman was given a more substantial role to monitor the administration of the FOI Act¹³ but this was later modified because the Ombudsman's limited resources precluded a proper discharge of that function. The 1991 FOI Amendment Act confined the Ombudsman's role to the investigation of complaints about the exercise of powers under the FOI Act by government agencies. In deciding to conduct an own motion investigation, the Ombudsman noted:

In the absence of any agency having legislative responsibility for oversight of administration of the FOI Act and mounting material to suggest a decline in understanding within government agencies of the provisions of the Act, I decided to conduct an 'own motion' investigation into administration of FOI in Commonwealth agencies.¹⁴

1.8 Amongst other things, the report canvassed the history of the legislative arrangements for the monitoring of the freedom of information processes and concurred with the view that there is a need for an agency to be responsible for that role on a day to day basis. Although the Attorney-General's Department reports annually on the administration of the FOI Act, that form of supervision does not include the kind of close supervision identified by the Ombudsman as necessary.¹⁵

1.9 In addition, the Committee notes the efforts of this Committee's predecessors in considering the operations of the Freedom of Information legislation.¹⁶

1.10 In introducing the Bill, Senator Andrew Murray described the Bill as a 'moderate and sensible' response to the matters raised and documented by the ALRC, the ARC and the Commonwealth Ombudsman:

It is not the objective of this Bill to create a raft of new rights to access governmental information. Much of it is devoted to giving effect to rights that currently exist in theory but are frequently denied in practice. The Bill makes FOI more accessible to ordinary people. The FOI Commissioner will have a role in publicising the Act in the community and ensuring that people have the

12 *Freedom of Information Act 1982*, section 57

13 Section 27 of the *Freedom of Information Amendment 1983* section 27 inserted a new Part VA (sections 52A-52F) into the FOI Act giving the Ombudsman a substantial role in monitoring freedom of information processes under the Act

14 Commonwealth Ombudsman, 'Needs to Know' Own Motion Investigation into the administration of the *Freedom of Information Act 1982* in Commonwealth Agencies, June 1999, p. 1

15 Commonwealth Ombudsman, 'Needs to Know' Own Motion Investigation into the administration of the *Freedom of Information Act 1982* in Commonwealth Agencies, June 1999, pp. 6-7

16 Senate Standing Committee on Constitutional and Legal Affairs, *Freedom of Information. Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978, and aspects of the Archives Bill 1978*, AGPS Canberra, 1979; Senate Standing Committee on Legal and Constitutional Affairs, *Report on the Operation and Administration of the Freedom of Information Legislation*, December 1987. The latter report recommended the repeal of those sections that gave the Ombudsman the expanded monitoring role and those recommendations were taken up in the *Freedom of Information Amendment Act 1991*

information and assistance that they need to exercise their legal rights. Unjustified and prohibitive fees will be eliminated.

Most importantly, the Bill provides for a system of accountability in FOI administration. At present, oversight of FOI is palpably inadequate, resulting in the denial of important democratic rights. The proposed FOI Commissioner will provide, for the first time, an independent and effective check on the administration of the Act.

And again:

Openness, accountability and transparency are essential principles and protections in a democracy. It is up to the Parliament to establish and safeguard the democratic rights of the people. This includes the ability to access the information they need to engage in informed political debate and to scrutinise the exercise of public power. This is precisely what the Freedom of Information Act promises, but it has failed to deliver.¹⁷

Conduct of the inquiry

1.11 Following the referral of the Bill to the Committee on 10 October 2000, the Committee placed advertisements on the Committee's web site, and in major newspapers around the country on 21 October 2000.¹⁸ In addition, the Committee wrote to a range of interested organisations and relevant individuals on 24 October 2000 inviting submissions. In response to the Committee's efforts, the Committee received a total of 18 submissions which are listed in Appendix 1.

1.12 The Committee held a public hearing in Canberra on 5 March 2001. A list of witnesses at the public hearing is at Appendix 2.

Notes on References

1.13 References in this Report to submissions are to individual submissions as received by the Committee, and not to a bound volume. References to the Hansard transcript are to the proof Hansard. Page numbers may vary between the proof and the final Hansard transcript.

17 Senate, *Official Hansard*, 5 September 2000, pp. 17320-17321 per Senator Andrew Murray

18 Advertisements were placed in the Weekend Australian, Sydney Morning Herald and the Melbourne Age on Saturday 21 October 2000

CHAPTER 2

THE BILL

Objective of the Bill

2.1 The principal objective of the Bill is to address perceived inadequacies of the *Freedom of Information Act 1982* (FOI Act) and, more particularly, inadequacies in the manner in which the Act has been interpreted and implemented.

2.2 In the Second Reading Speech, Senator Murray stated that the United States had embraced freedom of information legislation in the 1960's, a move followed by liberal democracies throughout the world. Senator Murray described Australia's comparatively 'belated' enactment of the FOI Act in 1982 as only a 'partial enactment of the recommendations put to the Government' by this Committee's predecessor at that time.¹ In addition, Senator Murray noted that, while the FOI Act established 'a rebuttable legal presumption in favour of the disclosure of requested documents', some agencies use the list of statutory exemptions inappropriately to justify their decision not to release information. Senator Murray described this trend as 'the growing culture of passive resistance to the disclosure of information'.²

2.3 In the *Open Government* report, the ALRC and the ARC identified important deficiencies in the current FOI system. These included:

- Lack of a person/body responsible for overseeing the administration of the Act;
- Some agencies do not properly support the notion of open government and FOI;
- Conflict between the old 'secrecy regime' and the openness of FOI is unresolved;
- FOI requests can become costly, legalistic and adversarial;
- Excessive use (and misuse) of exemption provisions by some agencies;
- Record management, fundamental to the effectiveness of FOI, is inadequate;
- Uncertainty about the extension of FOI to government corporations;
- Current review mechanisms could be improved; and
- The potential for conflict between the FOI Act and the Privacy Act.³

2.4 The aim of the Bill is to improve access to information in the possession of the Commonwealth by giving effect to the recommendations contained in the *Open Government* report. Most of the existing safeguards that protect information in the possession of the

1 Senate, *Official Hansard*, 5 September 2000, p. 17319

2 Senate, *Official Hansard*, 5 September 2000, p. 17320

3 Australian Law Reform Commission, Report No. 77 and Administrative Review Council, Report No. 40, 'Open government: a review of the federal *Freedom of Information Act 1982*', 1995, pp. 17-18

government from disclosure are preserved under the Bill such as those protecting private personal information and those protecting sensitive policy information such as that relating to national security. In essence, rather than providing new rights of access to government information, the Bill aims to give full effect to existing rights to information.⁴

2.5 This chapter deals with the more significant changes proposed in the Bill. It is not intended to be an exhaustive list of the amendments proposed.

Object of the FOI Act

2.6 The Bill proposes to amend the Object section of the FOI Act (item 1, new section 3) to promote a pro-disclosure interpretation of the provisions following by removing any reference at this point to exceptions and exemptions. New subsection 3(1) emphasises that the object of the FOI Act is to extend the right of citizens to access official information by:

- creating a right of access to documentary personal information existing about the applicant;
- creating a general right of access to the national resource of information; and
- creating a right to facilitate the amendment of records containing personal information that are incomplete, incorrect or misleading.

2.7 Similarly, new subsection 3(2) comprises a statement of intention that the provisions of the Act are to be interpreted to further the objects of the Act and to give effect to the principles of representative democracy. The current direction in subsection 3(2), that any discretions conferred by the Act must be exercised to facilitate and promote the disclosure of information, is also preserved.

2.8 The Bill further promotes the notion of disclosure by stating that in determining whether the disclosure of a document would be contrary to the public interest it is irrelevant that the disclosure may embarrass the Government (item 6, new subsection 4(5A)).

Access to Documents - Part III of the FOI Act

Amendment to general application of access provisions

2.9 Part III of the FOI Act deals with access to documents and sets some limits in relation to that access under the Act. The FOI Act establishes that every person has a legally enforceable right to access any document of an agency that is not exempt and to access any *official* document of a Minister that is not exempt (section 11(1)). This right of access is not affected by any reasons a person gives for seeking access, or the Minister's belief as to the applicant's reasons (subsection 11(2)). Consistent with the new pro-disclosure objects clause, the Bill amends the provisions governing access to:

- entrench a right of access to documents that contain personal information about the applicant (new section 11A states that in deciding whether it is in the public

4 Senate, *Official Hansard*, 5 September 2000, p. 17320

interest to grant such access, the fact that it is a document containing personal information about the applicant is to be taken into account (item 8)); and

- widens the scope of documents able to be accessed under the FOI Act so that documents held by an agency or Minister for up to 30 years can be accessed (rather than the current 5 years) (item 9, subsection 12(2)).

Compliance timeframes

2.10 The Bill significantly amends the timeframes for government agencies to comply with FOI requests:

- Section 15(5)(a) is amended so that an agency or Minister must, within 7 days (reduced from 14 days) after receiving an FOI request, take all reasonable steps to enable the applicant to be notified that the request has been received (item 11);
- Section 15(5)(b) is amended so that the agency or Minister must, not later than 14 days (reduced from 30 days) after the request is received, take all reasonable steps to enable the applicant to be notified of a decision on the request (item 12);
- A request to access personnel records⁵ must not be made under the FOI Act if there are other established procedures for employees to access those records. If, however, the agency has not notified the employee of the outcome of the request within 14 days (reduced from 30 days), the employee can make the request under the FOI Act (item 13, paragraph 15A(2)(d)(ii)).

Refusal of requests

2.11 Section 24 of the FOI Act allows agencies to refuse requests where compliance would ‘substantially and unreasonably divert the resources of the agency’, ‘substantially and unreasonably interfere with the performance of the Minister’s functions’ or where the request does not contain the information required under section 15(2)(b).⁶ Such refusal must be advised in writing and applicants provided with the name of a contact officer within the agency who can discuss the request and assist the applicant to modify it so that it would not substantially or unreasonably divert the agency’s resources. Subsection 24(5) allows an agency to refuse an FOI request without having identified any of the requested documents if it is apparent from the nature of the documents described in the request that all of them are exempt.

2.12 The Bill proposes to make the following significant changes to those provisions:

- redrafted section 24 requires agencies to give applicants an earlier opportunity to consult with them in cases where a request for access is likely to be refused on the grounds set out in paragraph 2.10. The process of consultation must take place prior to the request being refused (item 14);

5 Records that contain personal information and are kept for personnel management purposes (section 15)

6 Section 15(2)(b) requires that the request must provide such information concerning the document as is reasonably necessary to enable a responsible officer of the agency, or the Minister, to identify it

- subsection 24(5) is repealed with the effect that a blanket refusal is no longer possible and each document has to be assessed individually; and
- new subsection 24(7) requires agencies to refund application fees in cases where access has been refused and applicants have not challenged the decision.

2.13 Section 26 of the FOI Act requires that reasons and other particulars of decisions must be given where an FOI request is refused or access is deferred. The Bill amends section 26 to require the decision-maker to also, if applicable, provide the applicant with the factors taken into account in applying the public interest test. For example, the test must be applied when determining whether access to a document should be denied by reason of the application of certain exemption provisions, discussed below (item 17, paragraph 26(1)(a)).⁷

Charges and remission of charges

2.14 Significant changes proposed by the Bill in relation to fees and charges are:

- charges are only to be imposed in respect of released documents as opposed to the current subsections 29(1) and (3) where charges are also imposed in relation to FOI requests (items 18 and 19);
- charges must be set in accordance with a scale of fees set out by the FOI Commissioner (item 98);
- agencies are given a general discretion to waive or reduce charges (item 20, subsection 29(5));
- agencies are given a general discretion to remit fees (item 22, paragraph 30A(1)(b)); and
- fees for internal review are abolished (items 21 and 126, section 30A),

2.15 Other important amendments made in relation to FOI charges, though not contained within Part III of the FOI Act, are:

- the FOI Commissioner will set photocopying and transcribing charges (item 98, new section 94);
- access to an applicant's personal information is to be free of charge (item 99, section 99), and
- fees are not to apply to supervision of inspection of documents accessed under FOI (items 100 and 126 amending section 94 and inserting a new regulation 5 in the *Freedom of Information (Fees and Charges) Regulations* respectively).

7 Note: Where a decision is made to refuse access to an internal working document (exempt under section 36), section 36(7) requires that the notice provided to the applicant under section 26 will state the ground of public interest on which the decision is based.

Proposed amendments to FOI Act, Part IV: Exemptions

Current arrangements

2.16 Significant amendment is proposed in relation to the area of exemptions although the present structure of the FOI Act is preserved. The FOI Act is structured so as to balance the public interest in making official information more accessible against the public interest in protecting certain information from disclosure. It does this, on the one hand, by promoting disclosure, but, on the other hand, only allowing disclosure to occur in practice if the documents are not subject to one of the eighteen categories of exemptions.⁸ In addition, a Minister may reinforce the exempt status of some documents by issuing a conclusive certificate. This ensures that such documents cannot be disclosed while the certificate remains in force. Regulations govern the periods for which conclusive certificates may remain in force, although a Minister may revoke such a certificate at any time. Currently, conclusive certificates may be issued for the following categories of exempt documents:

- Documents affecting national security, defence or international relations (s 33);
- Documents affecting relations with States (s 33A);
- Cabinet documents (s 34);
- Executive Council documents (s 35); and
- Internal working documents (s 36).

2.17 Although the AAT can review the issue of a conclusive certificate, the AAT can only recommend, as distinct from ordering, that a certificate be revoked (section 58). If, however, a Minister chooses not to accept the recommendation of the AAT, the Minister must advise the Parliament by tabling a notice in both Houses and reading the notice in the House in which the Minister sits. The Bill does not seek to alter these review processes in relation to conclusive certificates (section 58A).

Arrangements proposed by the Bill

Categories of exemptions

2.18 The Bill reduces the classes of documents that can be categorised as exempt. Documents removed from the exempt category include:

8 The FOI Act provides that the following categories of documents are exempt from disclosure: documents affecting national security, defence or international relations (s. 33); documents affecting relations with States (s. 33A); Cabinet documents (s. 34); Executive Council documents (s. 35); internal working documents (s. 36); documents affecting enforcement of law and protection of public safety (s. 37); documents to which secrecy provisions of enactments apply (s. 38); documents affecting financial or property interests of the Commonwealth (s. 39); documents concerning certain operations of agencies (s. 40); documents affecting personal privacy (s. 41); documents subject to legal professional privilege (s. 42); documents relating to business affairs etc (s. 43); documents relating to research (s. 43A); documents affecting national economy (s. 44); documents containing material obtained in confidence (s. 45); documents disclosure of which would be contempt of Parliament or contempt of court (s. 46); certain documents arising out of companies and securities legislation (s. 47); and electoral rolls and related documents (s. 47A)

- Executive Council documents (section 35, item 33);
- Documents to which secrecy provisions of enactments apply (section 38, item 41);
- Documents relating to research (section 43A, item 46);
- Documents affecting national economy (section 44, item 47);
- Certain documents arising out of companies and securities legislation (section 47, item 48); and
- Electoral rolls and related documents (section 47A, item 49).⁹

2.19 In addition, the Bill modifies other categories of exempt documents, generally limiting the reach of the exemption so as to promote disclosure. Modifications include:

- Cabinet documents are to be exempt for only 20 years after their creation (item 31, section 34);
- the exemption in relation to internal working documents (retitled ‘documents revealing deliberative processes’) is diminished - it does not apply to purely statistical information (as well as to purely factual information) (item 35, subsection 36(5));
- the exemption in relation to documents concerning certain operations of agencies is to be amended to protect internal or administrative investigations (section 40, item 42);¹⁰
- the scope of the legal professional exemption category is redefined on the basis of the sole purpose test. A document will only be exempt if it was created for the sole purpose of seeking or providing legal advice or for use in legal proceedings. In addition, the exemption does not apply if the client has waived legal professional privilege at common law (section 42, item 44).

2.20 Section 41 of the FOI Act deals with exemptions for documents affecting personal privacy. Modifications in relation to section 41 are:

- Inclusion of Information Privacy Principle 11(1) in the Privacy Act¹¹ so that under new subsection 41(1), a document is an exempt document if it contains

9 Categories of exempt documents unaffected either totally or in part are: documents affecting national security, defence or international relations, documents affecting relations with States, Cabinet documents, Internal working documents (retitled Documents revealing deliberative processes), documents affecting enforcement of law and protection of public safety, Documents affecting financial or property interests of the Commonwealth, documents concerning certain operations of agencies, documents affecting personal privacy, documents subject to legal professional privilege, documents relating to business affairs, documents containing material obtained in confidence and documents disclosure of which would be contempt of Parliament or contempt of court

10 But note the suggestion that section 40 should not be amended so as to apply to investigations that have been concluded: *Submission 4*, Mr Julian Knight, p. 1

11 Essentially, privacy principle 11(1) provides that a record-keeper shall not disclose records containing personal information unless the individual concerned is aware that information of that kind is usually passed on in that way, the individual has consented to the disclosure, the record-keeper believes on

personal information about any person, its disclosure would breach Information Privacy Principle 11(1) and its disclosure would not, on balance, be in the public interest;

- New subsection 41(2) provides for situations where access is requested to documents containing personal information about third persons so that regard will be had to any special relationship between the applicant and the third person (item 43); and
- In addition, new subsection 41(4) confers a discretion on Ministers or principal officers of agencies to disclose information in a way that will minimise the risk of detriment to an applicant's health or well-being (item 57).

2.21 Certain other categories of documents have been modified so that the exemption only applies if disclosure is contrary to the public interest. Public interest tests have been introduced for certain documents in the national security, defence or international relations category. Those documents involving communications by an international organisation to the Commonwealth are subject to the public interest test, but those documents related to national security and communications from foreign governments to the Commonwealth are not subject – new paragraph 33(1)(b), item 27). The public interest test also applies to some documents affecting the enforcement of law and the protection of public safety (new subsection 37(2B), item 40) and to documents affecting relations between the Commonwealth and the States (item 28, new subsection 33A(2)).¹²

Conclusive certificates

2.22 The Bill amends the provisions relating to conclusive certificates by eliminating conclusive certificates for internal working documents (amended section 36, item 34) and for documents affecting relations with the States (amended section 33A, item 28). In addition, the Bill limits the use of certain other conclusive certificates: the maximum duration of conclusive certificates is limited to two years (amended section 36A, item 38); and the new FOI Commissioner will monitor the use of conclusive certificates by agencies and identify any cases where a Minister has failed to revoke a certificate after the AAT has found that there are no reasonable grounds for the exemption (section 66R, item 95).

Other forms of exemptions: amendment to the schedule

2.23 Under the current FOI regime, the bodies specified in Part 1 of Schedule 2 of the FOI Act are not to be prescribed authorities for the purposes of the FOI Act (that is, those bodies are exempt from the operation of the FOI Act). The Bill modifies Part 1: although the intelligence agencies would remain in Part I of Schedule 2, other agencies would either have to demonstrate to the Attorney-General their need for continuing exclusion or be automatically removed after 12 months (subclause 2(4) and items 102, 103, 104, and 105).

reasonable grounds that the disclosure is necessary to prevent or lessen a serious and imminent threat to life or health of the individual concerned, the disclosure is required or authorised by law, or the disclosure is reasonably necessary for the enforcement of the criminal law or for the protection of the public revenue

12 Note: The application of the public interest test in new subsection 33A is not mentioned in the table of amendments that constitutes the Explanatory Memorandum.

Also, currently under Part II of Schedule 2 of the FOI Act, certain agencies are exempt in respect of particular documents. The Bill, however, removes competitive commercial activities of agencies from Part II and requires that other agencies have to demonstrate to the Attorney-general their need for continuing exemption or be automatically removed after 12 months (subclause 2(5) and items 107-122).

Amendment and Annotation of personal records

2.24 Part V of the FOI Act deals with the amendment and annotation of records. Section 48 provides that in certain circumstances, a person can apply to have personal information amended or annotated in documents held by government. Such an application can be made where a person has lawfully accessed a document which contains personal information that is incomplete, incorrect, out of date or misleading and where the document has been or could be used for an administrative purpose. The Bill seeks to amend section 48 by removing the qualification that the documents must have been lawfully accessed by the person (item 50) and by adding irrelevance as a ground for amendment or annotation of personal records (item 51).

2.25 A new section 50 replaces that which currently governs the amendment process of personal records so as to require the Minister or agency to act reasonably in trying to amend the record. The effect is that, where an Agency or Minister is satisfied that personal information contained in an official or agency document is incorrect, out of date, incomplete, misleading or irrelevant, the Minister or agency must take *reasonable* steps to amend it (item 52).

Review of decisions

Current arrangements

2.26 The Bill proposes some changes to the provisions governing the review of decisions made under the FOI Act and to aspects of the AAT's powers in reviewing such decisions. Currently, under section 54, an applicant refused access to documents may seek an internal review of that decision from the agency concerned. If access is still denied the applicant may apply to the Administrative Appeals Tribunal (AAT) for external review under section 55. Internal review is a prerequisite for review by the AAT (subsection 55(2)) except in specified circumstances.¹³ The review processes can be triggered by either the making of a decision, or by a decision deemed made. Decisions of the latter kind are where an application has been made for access to documents under section 15 of the FOI Act and a notice of a decision on that request has not been received after 30 days. In those circumstances, a decision is deemed to have been made refusing the request.

2.27 The review conducted by the AAT is to some degree circumscribed by the exemption provisions. Section 64 of the FOI Act states that section 37 of the *Administrative Appeals Tribunal Act* (AAT Act), which requires decision-makers to lodge all relevant documents with the AAT, does *not* apply to reviews of decisions by the AAT about exempt

13 A person who is entitled to internal review can apply directly to the AAT for review if 30 days has passed since that person's application was received by the agency concerned for review under section 54 and the applicant has not been informed of the result of the review: subsection 55(3)

documents. The combined effect of section 64 and section 37 then, is that agencies are *not* required to lodge a document that it claims to be exempt. Although currently under section 58E of the FOI Act, the AAT can require production of exempt documents for inspection by the AAT, this generally occurs at a later stage of the proceedings when the tribunal has to determine whether it is an ‘exempt’ document. In addition, under section 58, once it is established that a document is an exempt document, the AAT does not have the power to decide that access should be granted to it.

2.28 An applicant may also complain to the Ombudsman but the Ombudsman has no power to set aside a decision of an agency. The Ombudsman can only make recommendations to the agency concerned (section 57). Where a complaint is made to the Ombudsman under the Ombudsman Act, an application must not be made to the AAT until the applicant is notified of the result of the complaint investigated under section 12 of the Ombudsman Act.

2.29 Applicants may also appeal against an AAT decision to the Federal Court on a question of law.

Changes to the review arrangements proposed in the Bill

2.30 The Bill proposes three important changes to review provisions under the FOI Act:

- The Bill removes the prerequisite for internal review before an applicant may proceed to external review (although this option will remain) (item 58);
- Section 64 of the FOI Act is amended so that section 37 of the AAT Act *does* apply so that the AAT can require agencies to produce ‘exempt’ documents at an earlier stage of the review process (items 85 and 86). In addition, new subsection 64(7) requires that where an exempt document has been so produced, the Tribunal must, after inspecting the document, return it without disclosing it to any other persons other than Tribunal members or staff (item 91); and
- Section 58 of the FOI Act is amended so that the AAT can grant access to a document containing exempt material under section 43 (documents relating to business affairs etc) if, after consulting the Auditor-General, the AAT believes the public interest justifies it (new subsection 58(2A)). This public interest override is not included with respect to any other class of exempt documents (items 64 and 65).

2.31 Further, under section 66 of the FOI Act, the AAT may recommend to the Attorney-General that the Commonwealth pay a person’s AAT review costs in certain circumstances. The Bill broadens the circumstances where that may happen. The AAT will be able to do so where, after an application is lodged for review by the AAT, the relevant agency issues a certificate in relation to the document or claims a new ground for refusing access which fails to satisfy the AAT (new subsection 66(2A), item 93).

Establishment of FOI Commissioner

2.32 One of the most significant aspects of the new Bill is the proposal to create a new statutory position of FOI Commissioner. The intention is that the Commissioner will have general responsibility for overseeing and monitoring the administration of the FOI Act, for

identifying and addressing problems and for providing assistance and advice to the public on FOI issues. Many deficiencies in the current operation of the FOI Act have been attributed to the lack of an independent monitor of, and advocate for, FOI. Details of the position and of the functions and powers of the Commissioner are set out in new Part VIA of the Bill (item 95).

2.33 The FOI Commissioner is to be appointed by the Governor-General on a full-time basis and will hold office for the period specified in the instrument of appointment. The period must not exceed 5 years (new section 66A) and, to the extent that the terms and conditions of that office are not covered by the Act, the Commissioner will hold office on the terms and conditions as determined by the Governor-General (new section 66B). The Commissioner's remuneration, allowances and recreation leave entitlements will be determined by the remuneration tribunal, subject to the *Remuneration Tribunal Act 1975* but the Attorney-General may grant the Commissioner other leave of absence on such terms and conditions as the Attorney-General determines (new sections 66C and D). The Commissioner must not engage in other paid employment without the approval of the Attorney-General (new section 66E).

2.34 The Governor-General may terminate the appointment of the Commissioner for misbehaviour or physical or mental incapacity. The Governor-General, however, must terminate the Commissioner's appointment if the Commissioner becomes bankrupt, enters into arrangements with debtors and creditors indicating bankruptcy or insolvency, is absent without leave for 14 consecutive days or for 28 days in any 12 months, or engages in outside employment without the Attorney-General's approval (new section 66G). Certain provision is also made for the appointment of acting FOI Commissioners in the absence of the Commissioner (new section 66H).

2.35 The functions of the Commissioner are listed in new section 66J and include:

- reviewing the compliance of agencies with this Act;
- preparing and publishing guidelines for agencies in complying with the FOI Act;
- advising Ministers or agencies on matters related to the operation of the FOI Act;
- providing information or advice on request to applicants and others on matters relevant to an application for access to information under the FOI Act;
- promoting an understanding of the FOI Act in the Commonwealth public sector and the community;
- making determinations about the scale of charges applying to requests for access to information under the FOI Act;
- consulting with the Privacy Commissioner, the Ombudsman, the Director-General of the Australian Archives and the Chief Executive of Commonwealth information policy and practice; and
- making reports to the Attorney-General for presentation to Parliament.

2.36 Under new subsection 66K(1), the Commissioner will be required to make guidelines in relation to the application and operation of specific areas of the FOI Act including access to an applicant's personal information, amendment of an applicant's

personal information and the application of the public interest test. When making guidelines about access to or amendment of an applicant's personal information, the Commissioner must consult the Privacy Commissioner (new subsection 66K(2)). According to new section 66L, any persons making decisions under the FOI Act must take the Commissioner's guidelines into account, as must the Tribunal. Further, guidelines that are taken into account in the making of decisions under the FOI Act must be provided to the applicant.

2.37 Under new section 66M, the Commissioner is required to advise ministers and agencies about how information technology can be used to improve access to information and appropriate arrangements for access to information about services and functions provided to the public on behalf of the Commonwealth by organisations other than agencies. New section 66N will require the Commissioner to promote an understanding of the FOI Act by publishing information about the FOI Act at least twice a year in major newspapers around Australia. The Commissioner will also be required to determine a scale of charges to be applied by agencies in relation to access to information under the FOI Act and that scale must be reviewed by the Commissioner after every 12 months (new section 66P).

2.38 New section 66Q empowers the Commissioner to do all things necessary or convenient in connection with the performance of his or her statutory functions.

2.39 The Bill seeks to enhance accountability in relation to the administration of the FOI Act by providing that the Commissioner must report annually under section 9 of the *Commonwealth Authorities and Companies Act 1997*. The report must include, amongst other things: yearly statistics of each agencies administration of FOI procedures; an assessment of the quality of statements of reasons prepared by agencies in relation to FOI requests; and an assessment of the adequacy of arrangements for access to information made by agencies in respect of services or functions which have been contracted out. Significantly, the Commissioner is required to identify those agencies, if any, whose statements of reasons are below an appropriate standard. The Commissioner must also identify any cases in which a Minister has failed to revoke a conclusive certificate despite a finding by the Tribunal that there are no reasonable grounds for the exemption claim (new section 66R).

2.40 In addition, the Commissioner may report to the Attorney-General on any matter relating to the functions of the Commissioner if the Commissioner believes it is appropriate to do so and those reports must be laid before each House of the Parliament (new section 66S). Finally, after 5 years, the ARC must review the Commissioner's functions and report to the Attorney-General in relation to the same (new section 66T).

CHAPTER 3

FREEDOM OF INFORMATION: VIEWS ON THE PROPOSAL FOR REFORM

Introduction: A need for change

3.1 As noted in chapter 1, the outcome of the review conducted by the ALRC jointly with the ARC and that of the Commonwealth Ombudsman, is a clearly identified need for change in relation to the federal legislative arrangements for freedom of information. The deficiencies identified in the *Open Government* report¹ in 1995 in relation to the administration of the FOI Act were reiterated in the *Needs to Know* report in 1999² and highlighted in the Second Reading Speech to this Bill.³ In addition to the specific deficiencies referred to above,⁴ the Commonwealth Ombudsman reported that:

... the investigation also identified a more pervasive malaise in the administration of FOI: a growing culture of indifference or resentment towards the disclosure of information, ailing standards of training and development and a profound lack of understanding of or commitment to the ethos and purpose of the legislation. It appeared that, although the FOI Act had wrought some change in the culture of public administration, its goals had been imperfectly achieved. Many of the early FOI practitioners were advocates of open government, but had, over time, been replaced by staff who had grown up in a very different environment, with FOI just one of a number of competing demands on agency time and resources.⁵

3.2 Evidence received by the Committee centred on both the inadequacies of the FOI Act and the way in which government departments and agencies implement freedom of information. The collective view of submitters, consistent with the above-mentioned reports, is that the FOI Act does not achieve its objectives.

3.3 Mr Ron Fraser, lawyer and Information Access Consultant asserted that the FOI Act is ‘fast developing a hardening of the arteries’⁶ and that the Bill provides an opportunity to implement some of the reforms in the *Open Government* report.⁷ Mr Rick Snell from the University of Tasmania, agreed:

1 Australian Law Reform Commission Report No 70 and Administrative Review Council Report No 40, *Open government: a review of the federal Freedom of Information Act 1982*, Canberra 1996

2 Commonwealth Ombudsman, ‘Needs to know’ Own Motion Investigation into the administration of the *Freedom of Information Act 1982* in Commonwealth Agencies, Canberra, 1999

3 Second Reading Speech, 5 September 2000, p. 17318

4 See paragraph 2.3 of this report

5 *Submission 17*, Commonwealth Ombudsman, p. 10

6 *Submission 16*, Mr Ron Fraser, p. 6

7 *Submission 16*, Mr Ron Fraser, p. 3: Mr Fraser said - ‘Major difficulties are developing both in the practical administration of the Commonwealth FOI Act and in the structure and basic assumptions of the

Instead of enhancing and expanding the quality of Australia's informational commons the increasingly dilapidated, antiquated and flawed *Freedom of Information Act 1982* (Cth) continues to diminish that commons. This amendment bill, in so far as it implements the majority of the Australian Law Reform Commission and Administrative Review Council's reforms, should be implemented immediately with or without amendment.⁸

3.4 Notwithstanding that Mr Snell assessed the Bill as 'a temporary fix',⁹ he urged the Committee to recommend its passage because the FOI Act is flawed and the proposed reforms at least go some way to remedying what is already in place. In his view, the alternative is to do nothing, a far worse proposition than adopting the Bill.¹⁰ Mr Snell referred to the culture of FOI resistance in government agencies and asserted there needs to be a champion for FOI at high levels in the public sector, as the attitude to FOI tends to flow on down through the system.¹¹

3.5 The Bill incorporates many of the recommendations in the *Open Government* report. Most of the submissions supported this approach notwithstanding individual differences of opinion in relation to specific amendments.¹² Generally, the Committee was told that this 'timely update' of the FOI regime¹³, would address some of the difficulties of applicants in accessing information under the FOI Act¹⁴ and that the Bill would, if enacted, significantly increase the probability of government agencies giving effect to Parliament's intention in the FOI Act.¹⁵

3.6 As yet, there has been no formal Government response to the *Open Government* report.¹⁶ The Attorney-General's Department, however, commented that 'many of the means adopted to achieve the Bill's objectives are inappropriate or unnecessary' and that although a

Act. There has been a disintegration of specialist knowledge available to Commonwealth agencies on FOI and a lack of central concern with the implementation of the Act by agencies'.

8 Rick Snell, *Briefing Paper of evidence to be given to the Public Hearing of the Senate Legal and Constitutional Legislation Committee*, 5 March 2001, p. 1

9 *Transcript of evidence*, 5 March 2001, p. 2

10 *Transcript of evidence*, 5 March 2001, p. 4

11 *Transcript of evidence*, 5 March 2001, p. 7

12 Of those recommendations not included, some, such as those relating to charging, the making of guidelines and to improving the general availability of government documents, could reasonably be expected to be implemented by the FOI commissioner, if the Bill becomes law and that statutory position is created. A further small number of recommendations relate to the Privacy Act and the Archives Act and are outside the scope of the Bill

13 *Submission 2*, Townsville Community Legal Service Inc., p. 2. See also the comment of Dr William De Maria above and that of the Law Society of South Australia that the proposed amendments are 'about 18 years too late, but better late than never': *Submission 3*, The Law Society of South Australia, p. 2

14 *Submission 7*, Communications Law Centre of Victoria University, p. 7

15 *Submission 6*, Electronic Frontiers Australia Inc, p. 1

16 The ALRC asserted that the only recommendation that received government consideration is in relation to the application of the FOI Act to private sector contractors undertaking work for the government: *Submission 5*, Australian Law Reform Commission, p. 2. The ALRC also noted that there had been no response to the *Open Government* report notwithstanding its endorsement by other reviews including the Ombudsman's 'Own Motion' report and reviews conducted in Tasmania and Queensland

formal response is yet to come, the Government is considering the recommendations in the report and claimed that many have already been addressed.¹⁷

3.7 This chapter deals with the evidence in relation to the key proposals under the Bill.

The Object of the Act: Section 3

3.8 As noted in paragraph 2.6, the Bill amends the object clause of the FOI Act to:

- emphasise that the right of the community to access government information enables people to participate in the processes of government, opens government to scrutiny, and increases accountability of the executive branch of government;
- remove references to exemptions to the general principles of freedom of information to promote a pro-disclosure interpretation of the FOI Act; and
- emphasise that the intention of the Parliament is that the FOI Act should be interpreted so as to give effect to the principles of representative democracy.

3.9 The view of inquiry participants was that the objects clause should be amended so as to promote the interpretation of the FOI Act in a pro-disclosure manner.¹⁸ For example, the Communications Law Centre of Victoria University commented that the proposed section creates an unambiguous presumption in favour of disclosure as well as giving legislative recognition to the notion that access to information encourages an active engagement by people within a democracy.¹⁹ Similarly, the Townsville Community Legal Service Inc (TCLS) contended that the amendment would provide the citizens of Australia with a more readily identifiable and potentially enforceable right of access, without initial reference to the potential limitations suggested by inclusion of a reference to statutory exemptions. TCLS also commented on the appropriateness of the reference in the proposed amendment to the connection between the capacity to access information and representative democracy.²⁰

3.10 According to Mr Chris Finn, Law School, University of Adelaide, judicial authority has established that there is no presumption in favour of disclosure arising from section 3 of the FOI Act. Mr Finn submitted that, therefore, it would be preferable to have a 'presumption of disclosure discoverable in the Act, to be displaced only by the clear

17 *Submission 14*, Attorney-General's Department, p. 1. The Department told the Committee that although the intention is to respond as quickly as possible to a report of the ALRC, it does not have the same imperatives as a report of a committee of the Parliament: *Transcript of evidence*, 5 March 2001, p. 17

18 *Submission 16*, Mr Ron Fraser, pp. 14-15. Note: although Mr Fraser suggested alternative wording to that used in the Bill, he summarised his position as follows: 'The proposed amendments to the objects clause of the FOI Act are supported and expanded, in the interests of obtaining a more pro-disclosure approach by agencies and review bodies in order to redress the present balance against applicants'

19 *Submission 7*, Communications Law Centre of Victoria University, p. 2

20 *Submission 2*, Townsville Community Legal Service Inc., p. 2. See also the comment by Mr Chris Finn that: 'The reference in 3(1)(c) to the role of FOI in increasing accountability of the executive branch is an important and valuable assertion of the significance of the Act in a representative parliamentary democracy: *Submission 15*, Mr Chris Finn, Law School, University of Adelaide, p. 1

application of a relevant exemption’ and confirmed that the suggested words in the Bill would assist this.²¹ Mr Rick Snell emphasised the need for this amendment:

..., if you did nothing else but change the objects clause as advocated in this particular bill ... , you would produce a fundamental transformation in the way that the FOI game is played in Australia at the moment. While it is largely symbolic and really does not have much sway as far as interpretation goes, I think it would have a dramatic impact on the way that agencies approach the interpretation of the exemption provisions and the application of the Act, in the same way as the AAT and the courts in general do.²²

3.11 The Committee notes that the changes proposed in the Bill to the object clause are consistent with recommendations 1-5 in the *Open Government* report. In addition, inquiry participants are in general agreement that the proposal to change the object clause will send a clear message to agencies that the FOI Act is to be interpreted with the concept of pro-disclosure at the fore, thus giving greater effect to the original intention of the legislation. Given also the concerns raised in both the *Open Government* report and the *Needs to Know* report, and the insistence by experts in the field that, if nothing else, this particular amendment should be passed, the Committee supports the proposal.

New provision excluding ‘government embarrassment’ factor

3.12 A related amendment is the inclusion of a new subsection 4(5A), which excludes government embarrassment from the criteria to be used in determining whether the disclosure of information would be in the public interest. The TCLS supported the proposed amendment which ‘protects the rights of citizens where the documents requested warrant release despite the embarrassment they may cause, and where no legitimate exemptions exist’.²³ Electronic Frontiers Australia Inc (EFA) also supported amendments to exclude government embarrassment. EFA commented that:

Such a change may assist in ensuring that agencies ... would not be able to use embarrassment as criteria for denying access to information which, for example, may disclose inadequacies in their operations and/or in government policy or legislation.²⁴

3.13 The Attorney-General’s Department, however, described the proposed amendment as ‘unnecessary’ since numerous decisions of the Federal Court and AAT already clearly indicate that possible embarrassment is not a factor to be taken into account in determining the public interest.²⁵ The ALRC responded to this assertion by stating that it supports the

21 *Submission 15*, Mr Chris Finn, Law School, University of Adelaide, p. 1

22 *Transcript of evidence*, 5 March 2001, p. 2. See also the comment of Professor David Weisbrot, President of the Australian Law Reform Commission at *Transcript of evidence*, 5 March 2001, p. 23

23 *Submission 2*, Townsville Community Legal Service Inc., p. 2

24 *Submission 6*, Electronic Frontiers Australia Inc., p. 4. EFA suggested, however, that the undefined term ‘Government’ might be too narrowly interpreted. EFA recommended that the words ‘government embarrassment’ in new subsection 4(5) should be deleted and the provision should be changed to read: ‘it is irrelevant that the disclosure may cause embarrassment to the Government or an agency’

25 *Submission 14*, Attorney-General’s Department, p. 4. In its supplementary submission, the Department referred to *Harris v Australian Broadcasting Corporation* (1983)50ALR551 at 564 per Beaumont, J and the AAT decision in *Marr v Telstra Corporation* (P93/337 of 29 October 1993 reported at (1993) FOIR

insertion of a clear and unambiguous provision in the FOI Act that reflects this principle.²⁶ The Department also submitted that inserting interpretive provisions in legislation can result in the legislation being overly prescriptive whereas leaving matters of interpretation to the courts means it can be adapted to fit new circumstances.²⁷

3.14 The Committee notes the law on this issue and is of the view that the decisions referred to by the Attorney-General's Department have already made the situation reasonably clear without the need for this amendment.

Refusal of Requests

3.15 As noted in paragraph 2.11, section 24 of the Act allows Ministers and agencies to refuse access to documents where compliance would 'substantially or unreasonably divert the resources of the agency' or 'substantially and unreasonably interfere with the performance of a Minister's functions' or where the request does not contain the information required under paragraph 15(2)(b). After a request is refused on those grounds, applicants must be provided with an opportunity to discuss their requests and given assistance to modify them, if possible, so they will not require an unreasonable diversion of agency resources.

3.16 It has been claimed that some agencies improperly use section 24 to defeat FOI requests by citing 'substantial and unreasonable diversion of resources' when, in fact, the difficulty in retrieving the information stems from the inadequacies of the agencies' record keeping systems. Applicants, then, are refused access because of deficient agency organisation.²⁸

3.17 Section 24(5) of the Act allows an agency to refuse an FOI request without having identified any of the requested documents if it is apparent from the nature of the documents described that none of them is exempt. The *Open Government* report noted with concern that this allows documents to be assessed on a group rather than an individual basis.²⁹

3.18 Although the Bill preserves 'substantial and unreasonable diversion of resources' as a reason to refuse an FOI request, the Bill addresses these concerns in three ways:

- section 24 is redrafted so that the requirement to consult and assist applicants arises prior to a request being refused;

70 as authority for the proposition that embarrassment to government officers as a result of disclosure is not in itself sufficient to establish 'substantial adverse effect' for the purposes of the exemption in paragraphs 40(1)(c), 40(1)(d) and 40(1)(e) of the *Freedom of Information Act 1982*. The Department stated: 'While there are advantages in inserting interpretive provisions in legislation, overprescriptive legislation can become inflexible and unadaptable in its application. On the other hand, by leaving the interpretation of legislation to the courts, it can be adapted to fit new circumstances as they arise': *Submission 14A*, Attorney-General's Department, p. 2

26 *Submission 5A*, Australian Law Reform Commission, p. 3

27 *Submission 14A*, Attorney-General's Department, p. 2

28 See, for example, Australian Law Reform Commission Report No 70 and Administrative Review Council Report No 40, *Open government: a review of the federal Freedom of Information Act 1982*, Canberra 1996, pp. 85-88

29 Australian Law Reform Commission Report No 70 and Administrative Review Council Report No 40, *Open government: a review of the federal Freedom of Information Act 1982*, Canberra 1996, p. 87

- subsection 24(5) is repealed so that each document covered by a request must be assessed on its individual merits (a blanket refusal is no longer permissible); and
- new subsection 24(7) is inserted requiring agencies to refund application fees in cases where access is refused and applicants have not challenged the decision.

3.19 As mentioned in paragraph 2.12, section 26 of the FOI Act requires that reasons and other particulars of decisions must be given where an FOI request is refused or access is deferred. The Bill amends section 26 to require decision-makers to provide the applicant with the factors taken into account in applying the public interest test, if relevant (for example, in relation to certain categories of exemptions).³⁰

Issues: Refusal of requests (proposed new section 24)

3.20 Amendments to section 24 have been widely supported in evidence. The Law Society of South Australia, for example, welcomed the proposed changes to section 24, in particular, that to bring forward the process of consultation between applicants and agencies. The Law Society noted that currently, that process of consultation does not usually occur until the pre-hearing stage at the AAT. By contrast, the Bill requires that applicants will be afforded an opportunity to consult prior to a decision being made to refuse access.³¹ The Law Society suggested, however, that section 24 should be further amended to require agencies to advise unsuccessful applicants that they may seek the advice of the FOI Commissioner.³²

Committee's comments

3.21 The Committee acknowledges that the proposed amendments implement the recommendations in the *Open Government* report. The Committee also notes that the functions and powers given to the FOI Commissioner under the Bill complement the amendments proposed to section 24. In particular, the FOI Commissioner will be able to identify (report adversely) those agencies that do not administer the Act properly and this will safeguard against misuse of the provision. The FOI Commissioner will also be required to issue guidelines about the operation of the provision and this should provide valuable assistance to agencies.

3.22 The Committee notes the concern about the provision for requests to be refused on the basis that they are too resource intensive, the concern being that FOI requests might be refused because of the deficient practices of an agency. The Committee, however, notes that the subject of the record keeping practices of agencies was highlighted in the *Open Government* report.³³ Those concerns were taken into account in the drafting of recommendation 15 of that report (that the Archives Act should be reviewed) and also

30 Note: section 36(7) requires that where decisions are made under Part III of the FOI Act that an applicant is not entitled to access under section 36 (internal working documents), the section 26 notice must state the ground of public interest on which the decision is based. This remains unchanged by the Bill

31 *Submission 3*, The Law Society of South Australia, p. 2

32 *Submission 3*, The Law Society of South Australia, p. 2

33 Australian Law Reform Commission Report No 70 and Administrative Review Council Report No 40, *Open government: a review of the federal Freedom of Information Act 1982*, Canberra 1996, p. 52

considered in the recommendations concerning the functions of the proposed FOI Commissioner (those functions to include auditing of agencies' practices).³⁴ Although the Bill does not confer a function on the FOI Commissioner to 'audit the practices of agencies', the Bill confers the function on the Commissioner to 'review the compliance of agencies with this Act' (new section 66J(a)). In addition, the FOI Commissioner is to make guidelines 'for the use of agencies in complying with this Act' (new section 66J(b)) and to report annually on the administration of the Act (new section 66R). The Committee notes the advice of the ALRC that, following its report *Australia's Federal Record: a review of the Archives Act 1983*, ALRC 85, 1998, the National Archives of Australia introduced extensive measures to improve record keeping across all federal government agencies.³⁵

3.23 On balance, the Committee considers that the provision will operate successfully given the move to improve the practices of agencies record keeping systems and the appropriate safeguards provided in the Bill.

Issues: Statement of reasons include application of public interest test (Amended section 26)

3.24 The amendment to section 26 (the inclusion of information about the application of the public interest test in the Statement of Reasons) was widely supported. The TCLS is of the view that the amendment reinforces the concept of open and accountable decision-making. In addition, TCLS submitted that if the reasons for decisions are better articulated, fewer frivolous and vexatious appeals will be lodged.³⁶

3.25 EFA supported the proposal to require agencies to account for how they applied the public interest test when refusing an FOI request:

In our view, the 'not in the public interest' claim is presently used as a catch-all when no other excuse for denial of access is apparent. We acknowledge that the 'public interest' is a subjective concept and therefore defies prescriptive definition. However, restriction needs to be placed on its all encompassing use and this may be achieved, at least in part, by a combination of guidelines on how to apply a public interest test issued by the FOI Commissioner (as proposed in amendments – 66(1)(c) 26 and a requirement on agencies to detail the factors taken into account in claiming an exemption on public interest grounds.³⁷

Committee's comments

3.26 The proposed amendment to section 26 implements recommendation 39 in the *Open Government* report. Clearly, the applicants will have a better understanding of the process if the statement of reasons provided to them in relation to the outcome of their FOI requests is comprehensive.

34 Australian Law Reform Commission Report No 70 and Administrative Review Council Report No 40, *Open government: a review of the federal Freedom of Information Act 1982*, Canberra 1996, pp. 64 - 71

35 *Submission 5A*, Australian Law Reform Commission, p. 3

36 *Submission 2*, Townsville Community Legal Service, p. 3

37 *Submission 6*, Electronic Frontiers Australia Inc., p. 6

Exemptions

3.27 The FOI Act balances the public interest in making government information generally available against the public interest in protecting certain government information by exempting it from disclosure.³⁸ Documents that may be exempt under the FOI Act fall into two broad groups – those related to the responsibilities and operations of government (such as documents affecting national security, defence, international relations and relations with the States, Cabinet documents, Executive Council documents and internal working documents) and those that protect third party information (such as personal information and business affairs).³⁹ Some of the exemption categories are subject to public interest tests.

3.28 A number of concerns have emerged with respect to the exemption provisions of the FOI Act including that:

- the exemption provisions are far broader than are required to protect the public interest and work counter to the presumption of disclosure;⁴⁰
- as the concept of public interest test is not defined in the FOI Act, agencies have interpreted the concept according to essentially subjective criteria so that interpretations vary between agencies and tend to support the withholding rather than the disclosure of information;⁴¹
- conclusive certificates undermine the objects of the FOI Act;⁴²
- the apparent extensive use of the section 41 exemption category by agencies to justify non-disclosure. A major concern for agencies relates to the interface between FOI and privacy in cases in which an applicant requests a document containing personal information about another person. Disclosure of such information may breach both FOI and Information Privacy Principle 11 of the *Privacy Act 1988*. It is therefore not surprising that this appears to be one of the most frequently claimed exemptions in both Federal and State FOI legislation.⁴³

38 The Committee notes that there are alternative ways in which the exemption regime could be structured apart from that used in the FOI Act. For example, Mr Ron Fraser submitted that the most appropriate way to structure exemption provisions is to base them on the consequences of disclosure, in other words, the ‘harm’ that would result from disclosure: *Submission 16*, Mr Ron Fraser, pp. 50-57, Attachment 2. Similarly, Mr Rick Snell commented that ‘the basic operating principle that we should have is that any claim for any type of an exemption, from cabinet information to a background paper, must be contestable, there must be a contest about justification of that process’. In Mr Snell’s view, information should be treated as having a limited life cycle of sensitivity. Some information such as Cabinet documents, might have a long life cycle of about five to ten years. Other documents may have no life cycle sensitivity at all: *Transcript of evidence*, 5 March 2001, p. 3

39 The exemption provisions in the FOI Act are contained in Part IV, sections 32 – 47A

40 Australian Law Reform Commission Report No 70 and Administrative Review Council Report No 40, *Open government; a review of the federal Freedom of Information Act 1982*, Canberra 1996, p. 93

41 Australian Law Reform Commission Report No 70 and Administrative Review Council Report No 40, *Open government; a review of the federal Freedom of Information Act 1982*, Canberra 1996, pp. 95-96

42 Australian Law Reform Commission Report No 70 and Administrative Review Council Report No 40, *Open government; a review of the federal Freedom of Information Act 1982*, Canberra 1996, p. 99

43 Australian Law Reform Commission Report No 70 and Administrative Review Council Report No 40, *Open government; a review of the federal Freedom of Information Act 1982*, Canberra 1996, p. 125

Changes proposed in the Bill

3.29 Some of the amendments that relate to exemptions have already been discussed above.⁴⁴ These include:

- the amendments to the objects clause in the FOI Act to reinforce the presumption of disclosure (and the subsidiary nature of the exemptions);
- the amendment to section 26(1)(a) requiring agencies to provide unsuccessful applicants with information about how the public interest test was applied; and
- the insertion of new subsection 4(5A) which states that ‘it is irrelevant that the disclosure may cause embarrassment to the Government.’

3.30 Other amendments are referred to in greater detail later in this report such as the provision for the newly created FOI commissioner to issue guidelines on how to apply the public interest test in relation to exemptions (new sections 66J and 66K - paragraph 3.95)

3.31 The principal concern, however, about the operation of the exemption provisions is that there is a perception that agencies utilise the exemption provisions⁴⁵ and the conclusive certificates⁴⁶ to avoid disclosure. As noted in chapter 2, the Bill addresses these concerns by:

- repealing a number of the categories of exempt documents;⁴⁷
- limiting the use of certain categories of exempt documents including:
 - (a) Cabinet documents exempt for 20 (not 30) years after their creation (item 31);
 - (b) the exemption for internal working documents⁴⁸ will not apply to purely statistical information (item 35);

44 Paragraphs 3.8, 3.12 and 3.19

45 As noted in chapter 2, the FOI Act provides that the following categories of documents are exempted from disclosure: documents affecting national security, defence or international relations (s.33); documents affecting relations with States (s.33A); Cabinet documents (s.34); Executive Council documents (s.35); internal working documents (s.36); documents affecting enforcement of law and protection of public safety (s.37); documents to which secrecy provisions of enactments apply (s.38); documents affecting financial or property interests of the Commonwealth (s.39); documents concerning certain operations of agencies (s.40); documents affecting personal privacy (s.41); documents subject to legal professional privilege (s.42); documents relating to business affairs etc (s.43); documents relating to research (s.43A); documents affecting national economy (s.44); documents containing material obtained in confidence (s.45); documents disclosure of which would be contempt of Parliament or contempt of court (s.46); certain documents arising out of companies and securities legislation (s.47); and electoral rolls and related documents (s.47A).

46 As noted in chapter 2, conclusive certificates may be issued in respect of the following categories of documents: documents affecting national security, defence or international relations (s.33); documents affecting relations with States (s.33A); Cabinet documents (s.34); Executive Council documents (s.35); and Internal working documents (s.36).

47 Exemption categories repealed are: Executive Council documents, documents to which secrecy provisions of enactments apply, documents relating to research, documents affecting national economy, certain documents arising out of companies and securities legislation, and electoral rolls and related documents)

48 This exemption category is retitled ‘documents revealing deliberative processes’

- (c) documents affecting enforcement of law and protection of public safety are not exempt if their release would be in the public interest; (item 42);
 - (d) the exemption for documents concerning certain operations of agencies will not apply to internal or administrative investigations (item 44);⁴⁹
 - (e) the exemption for documents affecting personal privacy is redrafted: to include a reference to Privacy Principle 11(1) (item 43); so that regard will be had to any special relationship between the applicant and the third person (item 43); and so that information is released directly to an applicant rather than through a qualified person in a way that minimises the risk to the applicant (items 43 and 57); and
 - (f) the legal professional privilege exemption is redefined on the basis of the sole purpose test (not the current dominant purpose test) and will not apply if the client has waived legal professional privilege at common law (item 44).
- eliminating conclusive certificates for internal working documents (item 34) and for documents affecting relations with the States (item 28);
 - limiting the use of certain other conclusive certificates: the maximum duration of conclusive certificates will be two years (item 38) and the new FOI Commissioner will monitor the use of conclusive certificates by agencies and identify any cases where a Minister has failed to revoke a certificate after the AAT has found that there are no reasonable grounds for the exemption (item 95);
 - introducing a public interest test for some categories of exempt documents so Ministers will be required to demonstrate that the issuing of a conclusive certificate is not in conflict with the public interest (items 27 and 28);⁵⁰ and
 - revoking the exempt status of many of the agencies and particular documents of certain agencies listed in Schedule 2 of the FOI Act (items 74-76).

3.32 At the same time, the Bill aims to ensure that governments retain the ability to protect sensitive material and material provided to them in confidence.⁵¹

Removal of exempt status from certain categories of documents

3.33 The removal of exempt status from certain categories of documents, and its limitation in the case of some others was widely supported. Referring to the proposal to

49 But note the suggestion that section 40 should not be amended so as to apply to investigations that have been concluded: *Submission 4*, Mr Julian Knight, p. 1

50 Public interest tests have been introduced for some documents affecting international relations (but not those affecting national security and defence - item 27) and for some documents affecting the enforcement of law and the protection of public safety (item 40)

51 It should be noted that the Bill extends the exemption status of documents relating to business affairs to cover also the competitive commercial activities of agencies: item 45. This amendment was supported by Mr Ron Fraser who argued that it should be complemented by retaining the exempt status of agencies in Part II of Schedule 2 in relation to their competitive commercial activities: *Submission 16*, Mr Ron Fraser, p. 29

remove the exemption status from Executive Council documents, Mr Ron Fraser submitted that:

Most such documents no longer justify a class exemption after the decisions in them have been announced. There is no need to protect them in terms of collective ministerial responsibility, and the provisions of s36 concerning deliberative process documents are sufficient to protect information that remains sensitive. They do not warrant any greater protection than that.⁵²

3.34 Referring to the proposal to remove the exemption status from secrecy provisions, Mr Fraser advised that there is an inherent tension between secrecy regimes and the FOI Act. As Mr Fraser noted, the proposal to remove the exemption from documents to which secrecy provisions of enactments apply was the option favoured in the *Open Government* report. The effect of the provision is that only that information protected by absolute secrecy provisions would be exempt if they come within other categories of exemptions in the FOI Act. The proposal will prevent access to documents containing no sensitivity being refused simply because they were obtained under a secrecy provision.⁵³

3.35 The Attorney-General's Department opposed the proposals to remove the exemption status from:

- Executive Council documents: In the Department's view, the current exemption is appropriate in that it does not exempt documents containing purely factual information unless its disclosure would involve the disclosure of any of the Council's deliberations or advice as yet unpublished. Nor does the Department agree with the ALRC's and ARC's recommendation 50 that other more specific exemptions would protect sensitive Council documents in all cases.⁵⁴
- documents to which secrecy provisions apply: The Department does not agree with the conclusion of the *Open Government* report that all secrecy provisions protected by section 38 must otherwise themselves correspond to an exemption allowed under the FOI Act so that the FOI Act should be the sole source of all exemptions from disclosure. The Department also rejected the proposal in that report that the FOI Act should provide that any secrecy provision in any other legislation does not exclude the operation of the FOI Act. In the Department's view, the exemptions in the FOI Act are, of necessity, in general terms whereas the secrecy provisions in other legislation are tailored to the specific requirements of that legislation and may cover situations, not covered by the FOI Act, which nevertheless warrant exemption from disclosure.⁵⁵

52 *Submission 16*, Mr Ron Fraser, p. 19

53 *Submission 16*, Mr Ron Fraser, p. 21: Mr Fraser also suggested that in addition to repealing section 38 and Schedule 3 of the FOI Act, it may be necessary to include a clause precluding subsequent repeal of FOI access in relation to particular information by later individual secrecy provisions, unless those provisions specifically claim to be amending the FOI Act. He also suggested it might be necessary to technically exclude the operation of other secrecy provisions predating the amendment

54 *Submission 14*, Attorney-General's Department, p. 4

55 *Submission 14*, Attorney-General's Department, pp. 5-6

- documents relating to research: The Department argued that premature disclosure of proposals for research may unfairly nullify an academic research advantage. The Department stated that the exemption applies if disclosure, before completion of research, would ‘be likely to unreasonably expose the agency or officer to disadvantage’ and that it does not apply to completed research. In addition, it only applies to those agencies listed in Schedule 4 and the only agencies listed are the Australian National University and the CSIRO.⁵⁶ Nor does the Department agree that other exemptions such as those in sections 36 and 40(1)(d) will cover all situations. Also, the Department claimed that the deferral procedures of section 21(c) will not always apply.⁵⁷

Committee’s comments

3.36 The Committee notes that the repeal of certain exemption categories was recommended by the *Open Government* report (recommendations 50, 58, 69, 70, 71, and 72). The Committee is concerned, however, about the repeal of those exemption categories at this stage. Evidence was given about the existence of alternative systems for determining which documents should be exempt and which should remain undisclosed.⁵⁸ The Committee was advised of other, better systems that, in the longer term, would be preferable to the one currently employed in the FOI Act based on individual exemption categories. The Committee considers that repeal of the categories is premature and that this issue should await the longer-term revision of the FOI Act referred to in evidence.⁵⁹

Limiting the use of certain categories of exempt documents

Cabinet documents to be accessible after 20 (not 30) years

3.37 Mr Ron Fraser supported the proposal although he submitted that in his view, 10 years would be more effective (with the effect of making more information publicly available about matters of significance), as is the case in most State FOI legislation. Referring to the proposal to reduce the exemption to 20 years, however, he asserted that:

It is difficult to see that a reduction to 20 years would undermine the collective ministerial responsibility which is the rationale for the exemption, in that the availability after 20 years of material concerning Cabinet decisions and deliberations (subject to the operation of other exemptions) is unlikely to have a chilling effect on the written or oral material put to Cabinet or prepared by or for Ministers in connection with Cabinet meetings, or to reveal differences among the Ministers of the government in power at the time of actual or potential release.⁶⁰

56 *Submission 14A*, Attorney-General’s Department, p. 3

57 *Submission 14*, Attorney-General’s Department, p. 6

58 See for example *Transcript of evidence*, 5 March 2001, p. 3 and *Submission 16*, Mr Ron Fraser, p. 16 and Attachment 2

59 *Transcript of evidence*, 5 March 2001, p. 2: Mr Snell referred to this Bill as a ‘temporary fix’

60 *Submission 16*, Mr Ron Fraser, pp. 18-19

3.38 Mr Fraser noted, however, that some agencies (especially Prime Minister and Cabinet) might receive a large number of requests from journalists, historians and others who would otherwise have to wait for the statutory period prescribed by the Archives Act to pass, although there are possible solutions to this eventuality.⁶¹

3.39 Mr Snell went further. In his view, cabinet information should theoretically be accessible under FOI and any claim for cabinet information to be exempted from release should be on the basis that there will be ‘some real threat to concepts of cabinet collegiality and the Westminster system’. Mr Snell argued, therefore, in favour of a public interest test for Cabinet documents. In terms of time limits, Mr Snell favoured ten years as is the case in some state jurisdictions.⁶²

3.40 The Attorney-General’s Department opposed the proposal. In respect of making Cabinet documents accessible after 20 years, the Department advised:

The purpose of the Cabinet exemption is to protect the collective responsibility of Cabinet in accordance with long-established practice. Documents which are more than 30 years old are available under the Archives Act.⁶³

Limiting the exemption status of internal working documents

3.41 Although the limiting of the exemption for internal working documents received some support, it was suggested that the proposal did not go far enough. The Committee was told by Mr Snell that the release of internal working documents should be subject to the application of a public interest test and a time limit. Mr Snell favoured release after five years.⁶⁴

3.42 The Attorney-General’s Department, however, opposed removing the exemption status from certain internal working documents and the availability of conclusive certificates from the responsible Minister advising that the ultimate responsibility for deciding whether the release of documents would be contrary to the public interest appropriately lies with the responsible Minister.⁶⁵

Limiting the exemption status on certain law enforcement documents

3.43 According to Mr Ron Fraser, the Bill strikes the appropriate balance in respect of allowing access to documents affecting enforcement of law and protection of public safety:

61 *Submission 16*, Mr Ron Fraser, p. 19

62 *Transcript of evidence*, 5 March 2001, p. 3

63 *Submission 14*, Attorney-General’s Department, p. 4. In its supplementary submission, the Department stated that: ‘The FOI Act applies to the whole of Government and any significant amendment requires consultation with all FOI agencies and, in particular, on this matter, the Department of the Prime Minister and Cabinet which has portfolio responsibility for the maintenance of Cabinet documents. The current provision reflects Government policy’. The Department also noted that the 30 year exemption is consistent with the *Archives Act 1983* and it would be preferable to maintain that consistency in regulating the release of Cabinet documents: *Submission 14A*, Attorney-General’s Department, p. 2

64 *Transcript of evidence*, 5 March 2001, p. 3

65 *Submission 14*, Attorney-General’s Department, p. 4

This proposed provision is closely similar to a provision of the NSW FOI Act (cl. 41 of Schedule 1). It operates by excepting certain categories of documents from the very broad law enforcement exemption, but where on balance disclosure would be in the public interest. The provision is welcome in identifying some kinds of documents that will often be appropriate to be released, but does not *require* their release if the public interest test is not satisfied.⁶⁶

Limiting the exemption status of documents affecting personal privacy

3.44 As noted above, the Bill proposes to redraft section 41 of the FOI Act and makes three significant changes in doing so.

3.45 First, new subsection 41(1) includes a reference to Privacy Principle 11(1), with the intention of enhancing the relationship between FOI legislation and privacy legislation in relation to decisions about the disclosure of personal information. In general, it was claimed that this amendment would improve access to information held by government.⁶⁷

3.46 It was suggested, however, that the intended protections are weakened because not all of the components of Information Privacy Principle 11 are included.

...proposed amendments to the FOI Act refer to IPP 11(1) but not 11(3), thereby excluding one component of the protection for personal information provided by IPP 11 of the Privacy Act.

...EFA [Electronic Frontiers Australia Inc] considers the proposed partial application of IPP 11 to the FOI Act leaves too much to the guesswork of agency personnel. It neither implements protection of personal information in accord with the Privacy Act nor, alternatively, does it meet the objective of assisting agency officers to determine whether information should be disclosed under the FOI Act in the public interest.⁶⁸

3.47 Secondly, new subsection 41(2) requires an agency, when releasing a document containing personal information about a third person, to have regard to any special relationship between that person and the applicant when determining the public interest in disclosure. Concern was raised that this provision could be used to infringe personal privacy and that its use should be subject to guidelines issued by the new commissioner:

EFA considers that the inclusion of an undefined term ‘special relationships’ in the Act is a recipe for infringement of personal privacy by inadequately trained officers... we caution against section 41(2) becoming effective prior to the appointment of an FOI Commissioner and subsequent preparation and dissemination of guidelines.⁶⁹

66 *Submission 16*, Mr Ron Fraser, p. 20

67 *Submission 1*, Anti-Discrimination Commission (Qld), p. 2; *Submission 2*, Townsville Community Legal Service Inc, p. 4

68 *Submission 6*, Electronic Frontiers Australia Inc., p. 7

69 *Submission 6*, Electronic Frontiers Australia Inc., p. 8. See also the comment by Mr Ron Fraser that although the amendment is based on the recommendation of the ALRC/ARC report, it seems to run contrary to the reasoning there. The Report stated that there should be no presumption that personal information is exempt because the general philosophy of the FOI Act is that information should be

3.48 Thirdly, new subsection 41(4) removes the requirement that if an agency releases a medical or psychiatric report to an applicant it must, if practicable, advise the qualified person who prepared the report that it has been released to the applicant.⁷⁰ New subsection 41(4) allows an agency to disclose information directly to an applicant (even when it might be detrimental to that person's physical or mental health) but 'in a way that minimises the risk of detriment to the applicant's health or well-being'.

3.49 The Attorney-General's Department acknowledged that many large agencies had difficulty in complying with the requirement in subsection 41(4) and that some practitioners had indicated they did not wish to be informed about the release of reports to applicants. In the Department's view, subsection 41(5) applies in those cases because it provides that practitioners need not be informed if it is not reasonably practicable to do so.⁷¹ The Department submitted that subsection 41(4) should remain to cover those cases where it would be appropriate to disclose personal information to a health professional rather than to the applicant direct.⁷² The ALRC, however, responded that the Department's concerns are effectively covered by new subsection 41(4) of the Bill which imposes a requirement on the Minister or agency to disclose the information in a manner that minimises the risk to the applicant's health or well-being.⁷³

3.50 Mr Fraser argued that retaining the existing provision for indirect disclosure is preferable although the main difficulty with the present provision is that there is no requirement as to what should be done after disclosure has been made to a third party. Mr Fraser asserts that 'probably in most cases ... this will not matter as the medical practitioner or other practitioner is likely to give the applicant the essence of the information'. In summary, Mr Fraser suggested:

... making provision for indirect disclosure of the above-mentioned kinds of information through a medical practitioner, a psychiatrist, a psychologist, a marriage guidance counsellor, or a social worker (as appropriate in the circumstances, but allowing for the applicant's GP to be the conduit of disclosure for all kinds of such reports) nominated by the applicant, but also requiring that the person concerned must convey to the applicant the essential information contained in the document, and providing specifically for an appeal by an applicant against the quality of disclosure.⁷⁴

disclosed unless harm will result from the disclosure (paragraph 10.6). According to Mr Fraser, however, the inclusion of Privacy Principle 11(1) will operate as a prima facie presumption that such information is exempt unless there is a positive public interest favouring its release. Mr Fraser suggested that either section 41 should be left as it is or reworded to spell out the elements of exemption: *Submission 16*, Mr Ron Fraser, pp. 25-26

70 Recommendation 64 in the *Open Government* report states that section 41(4) of the FOI Act should be repealed. Paragraph 10.22 refers to the advice of some agencies that the requirement is resource intensive and the Review concludes that there is no need for the section: Australian Law Reform Commission Report No 70 and Administrative Review Council Report No 40, *Open government; a review of the federal Freedom of Information Act 1982*, Canberra 1996, p. 136

71 *Submission 14*, Attorney-General's Department, p. 5

72 *Submission 14*, Attorney-General's Department, p. 5

73 *Submission 5A*, Australian Law Reform Commission, p. 3

74 *Submission 16*, Mr Ron Fraser, pp. 26-17

3.51 In summary, the Attorney-General's Department advised that current section 41 balances the right of access to one's own personal information against the possibility of harm that could result to an applicant by the release of that information. That is, it is intended to apply in 'special circumstances of apprehended harm'. The Department asserted that if the discretion to exempt documents in these circumstances is extended to cover other types of personal information, there is a danger that the section might be used in other cases, thereby operating as 'an additional constraint on the disclosure of documents containing personal information'.⁷⁵

Committee's comments

3.52 The Committee supports the changes to limit the exemption status of documents affecting personal privacy. These changes are consistent with the recommendations in the *Open Government* report (recommendations 59, 61, 63, and 64). The Committee has chosen to do so, notwithstanding that it does not support the changes to the exemption categories in relation to other kinds of official and government-held information. This reflects the Committee's view that different considerations apply to the release of information affecting personal privacy than apply to other kinds of information.

Legal professional privilege

3.53 The Bill modifies section 42, which deals with exemptions for documents based on legal professional privilege, so that exemptions will only apply in cases in which the information concerned was created for the *sole* purpose of seeking or providing legal advice or for use in legal proceedings.

3.54 All of the evidence was critical of this amendment because the sole purpose approach is at odds with the dominant purpose test applied at common law. The High Court decision in *Esso Australia Resources Ltd v Commissioner of Taxation* [1999] HCA 67 is authority for the proposition that the dominant purpose test should be applied when determining whether legal professional privilege attaches to particular information.⁷⁶ The Law Council of Australia described the proposed sole purpose test as 'stricter' than the common law test which currently applies in relation to legal professional privilege' and predicted that this would have far reaching consequences:

A stricter test for legal professional privilege would mean that more documents would be subject to release. This could be expected to put a government department at a disadvantage in litigation in comparison with a private litigant. Because a stricter test for legal professional privilege (in respect of government documents) would apply in FOI than would apply in court proceedings, the amendment could be expected to generate additional FOI applications, as private litigants would attempt to use FOI applications to gain broader access to government documents.

75 *Submission 14*, Attorney-General's Department, p. 5

76 *Submission 3*, The Law Society of South Australia, p. 2. The Attorney-General's Department confirmed that the sole purpose test is inconsistent with the common law test enunciated in *Esso Australia Resources Ltd v Commissioner of Taxation: Submission 14*, Attorney-General's Department, p. 5 and see similar comment in *Submission 15*, Mr Chris Finn, Law School, University of Adelaide, pp. 6-7

...On balance, the Law Council does not believe that it is appropriate to treat parties differently in relation to legal professional privilege as is proposed by the amendment. The Law Council recommends that item 44 of the Schedule [changes to section 42] should be deleted.⁷⁷

3.55 The ALRC told the Committee that the ALRC and the ARC had recommended that section 42 be redrafted to reflect the common law position at that time which was the sole purpose test.⁷⁸ The ALRC agrees that the common law position has now shifted to the dominant purpose test which reflects the *Evidence Act 1995* (Cth) and that it would be prudent to amend section 42(1) to remove any doubt as to which test is to be applied.⁷⁹

3.56 The Committee agrees that item 44 in the Bill (subsection 42(1)) should be amended to clarify that the test to be applied in relation to exemptions based on legal privilege is the dominant purpose test.

Removal of exemption status from certain agencies and documents in schedule 2 of the FOI Act

3.57 The Attorney-General's Department opposed the amendment to Division 1 of Part II of Schedule 2 of the FOI Act to remove the exemption status from documents of certain agencies. In particular, the Department was concerned about the removal of the exemption status from documents of the Defence Signals Directorate and the Defence Intelligence Organisation. Although the Department acknowledged that there would still be provision for those organisations to make a case to the Attorney-General for exempt status, the Department considers that the amendment is inappropriate:

Both these agencies are intelligence agencies and should be treated consistently with other intelligence agencies.⁸⁰

3.58 The Department asserted that the amendment does not accurately reflect recommendation 75 in the *Open Government* report because recommendation 74 states that the 'intelligence agencies' should remain in Part I of Schedule 2, that is, retain their exempt status.⁸¹ The ALRC, however, asserted that the Bill (in particular item 111 which proposes to remove the exempt status from the documents of those two agencies) does accurately reflect the *Open Government* report. This is because paragraph 11.14 of that report asserts that documents of those organisations would retain their exempt status under section 33 of the

77 *Submission 10*, Law Council of Australia, pp 1-2. This view was supported by Mr Ron Fraser who told the Committee that the sole purpose test is more conducive than the dominant purpose test to the achievement of the objects of the FOI Act (to facilitate the disclosure of as much government-held information as possible). It would, however, be problematic if information unable to be obtained at common law or under the Evidence Act, were available under the FOI Act: *Submission 16*, Mr Ron Fraser, p. 28

78 Australian Law Reform Commission Report No 70 and Administrative Review Council Report No 40, *Open government; a review of the federal Freedom of Information Act 1982*, Canberra 1996, pp. 137-138

79 *Submission 5A*, Australian Law Reform Commission, p. 4

80 *Submission 14*, Attorney-General's Department, p. 6

81 *Submission 14*, Attorney-General's Department, p. 6

FOI Act (section 33 deals with documents affecting national security, defence, or international relations).⁸²

3.59 It was also argued that the retention of the exemption status of certain agencies in Part II of Schedule 2 in relation to their competitive commercial activities would complement the proposal in item 45 of the Bill to extend the exemption under section 43 (documents relating to business affairs) to activities of agencies of a commercially competitive nature.⁸³

3.60 The Committee supports the view expressed by the Attorney-General's Department that the exemptions in respect of the Defence Signals Directorate and the Defence Intelligence Organisation should remain in Schedule 2 of the FOI Act.

Repeal of conclusive certificates

3.61 The Bill proposes to repeal conclusive certificates in relation to certain categories of exempt documents, namely internal working documents under section 36 and documents affecting relations with the States under section 33A. The Department noted that the existing arrangement under section 36 enables the Minister with relevant portfolio responsibility to make the final decision about whether disclosure of internal working documents would or would not be in the public interest. The removal of the conclusive certificate provision would result in the courts making that decision. The Department contends that the Minister is more likely to know what the outcome of the disclosure will be and to properly assess the disclosure in terms of the impact on the public interest.⁸⁴

3.62 The proposal for amendment, however, received widespread support from inquiry participants. Mr Ron Fraser, for example, advised that he supported the repeal of all conclusive certificates because they are unnecessary for the protection of genuinely sensitive information,⁸⁵ make it impossible for the AAT to properly assess public interest claims,⁸⁶ and

82 *Submission 5A*, Australian Law Reform Commission, p. 4. In its supplementary submission, the Attorney-Generals Department stated that: '... subject to consultation with interested agencies, it would be preferable if the Defence Intelligence Organisation and the Defence Signals Directorate were added to Part 1 of Schedule 2 so that they are deemed not to be prescribed authorities for the purposes of the FOI Act. This measure would ensure consistency with the other three intelligence agencies which are in Part 1 of Schedule 2. It would also be consistent with the statement in recommendation 74 of the *Open Government* report that intelligence agencies should remain in Part 1 of Schedule 2': *Submission 14A*, Attorney-General's Department, p. 5

83 *Submission 16*, Mr Ron Fraser, p. 29

84 *Submission 14A*, Attorney-General's Department, p. 3. The Department also pointed out that subsection 58(5) of the *Freedom of Information Act 1982* provides for review by the AAT on whether there are sufficient grounds for the issue of a certificate under subsection 36(3). This constitutes a form of external scrutiny on the exercise of the Minister's decision. If the AAT finds that there were insufficient grounds, the Minister must either revoke the certificate or notify the FOI applicant and table in Parliament a statement of reasons for not revoking the certificate. According to the decision in *Tanner v Shergold* (10 October 1999, V64 of 1999, unreported) a court may also review the Minister's decision to issue a conclusive certificate under subsections 33A(2) and 36(3). The High Court has yet to hear the application for special leave to appeal to the High Court in relation to this decision

85 Mr Fraser contended that there is no justification for the certificates to remain for Cabinet documents and documents affecting defence, security or international relations because the AAT and the Federal Court protect that kind of information: *Submission 16*, Mr Ron Fraser, p. 31

unduly complicate the AAT's processes. In his view, if certificates are to be retained for Cabinet, defence, security and international relations documents, a time limit should be applied (and two years is appropriate).⁸⁷ Mr Snell also supported the repeal of all conclusive certificates commenting that, based on state experience in various jurisdictions they 'weigh the gain too much in favour of the government and the agencies applying those certificates'. The process is not accountable enough, is not transparent and, in the majority of cases, conclusive certificates are unnecessary.⁸⁸

3.63 The Committee, however, notes that the FOI Commissioner must include in the annual report an assessment of the use of conclusive certificates by agencies. In addition, the Commissioner must identify any cases where a Minister has failed to revoke a conclusive certificate despite a finding by the AAT that there are no reasonable grounds for the exemption claim (proposed paragraph 66R(2)(e)).

Committee's comments

3.64 The Committee refers to its comments above in paragraph 3.36, that repeal of the exemption categories is premature given that longer-term legislative change may be necessary. In relation to most of the other proposed changes to Part IV of the FOI Act (Exemptions) outlined above, the same comments apply. The Committee is confirmed in this course given that the Bill provides for the establishment of an FOI Commissioner to be responsible for the proper oversight of the administration of the FOI Act (a proposal which the Committee endorses). The Committee is confident that with proper oversight, the existing exemption and conclusive certificate regime can continue pending legislative change with longer-term vision. The Committee believes that the new expectation for significant and meaningful oversight by an FOI Commissioner, combined with an emphasis on the pro-disclosure nature of the FOI Act, will result in agencies giving greater effect to the original intention of the FOI regime.

3.65 The Committee, however, supports the changes to limit the exemption status of documents affecting personal privacy. The Committee believes that different considerations apply to the release of information affecting personal privacy than applies to other kinds of information. The Committee has considered issues pertaining to personal privacy at length in other inquiries, including the inquiry into the Provisions of the Privacy Amendment (Private Sector) Bill 2000, tabled October 2000, and the inquiry conducted in 1998-1999 that culminated in a report entitled *Privacy and the Private Sector - Inquiry into Privacy Issues, including the Privacy Amendment Bill 1998*. The Committee also recommends that item 44 (subsection 42(1)) should be amended to clarify that the test to be applied in relation to exemptions based on legal privilege is the dominant purpose test.

86 According to Mr Fraser, the existence of a certificate for deliberative process documents (section 36) removes the AAT's balancing process on the question of the public interest and this gives an unfair advantage to government for non-disclosure: *Submission 16*, Mr Ron Fraser, p. 31

87 *Submission 16*, Mr Ron Fraser, p. 31

88 *Transcript of evidence*, 5 March 2001, p. 3

Amendment and Annotation of personal records

3.66 Paragraphs 2.24 and 2.25 set out the proposed amendments to Part V of the FOI Act which deal with the amendment and annotation of personal records. Briefly, in certain circumstances, a person can apply to have an official or agency document which contains personal information that is incomplete, incorrect, out of date or misleading amended or annotated (section 48). The Bill seeks to remove the current qualification that the person must have lawfully accessed the document and adds irrelevance as a ground for amendment or annotation of that records. Further, the Bill alters the amendment process of those personal records by including the criterion of reasonableness. This means that where an agency or Minister is satisfied that such personal information is incorrect or, having regard to the purpose for which it is used, out of date, incomplete, misleading or irrelevant, the Minister or agency must take reasonable steps to amend it.

3.67 TCLS submitted that irrelevance is an appropriate inclusion in section 48(a). TCLS informed the Committee that in its experience, applicants who have accessed documents only to find that irrelevant information is included, have asked TCLS whether it is possible to have the same amended.⁸⁹ Similarly, Mr Fraser supported the new wording of section 48(a):

At present a person is not able to get an amendment under Part V on the grounds of irrelevance, and the Privacy Commissioner's office is inclined to view all IPP 7 matters as best left to be dealt with under the FOI Act, even though there is no provision in the latter for amendment on the ground of personal information held by a government agency being irrelevant to the purposes of collection or potential use.⁹⁰

3.68 Mr Fraser cautioned, however, that the amendment might lead to more demands for deletion of information or destruction or removal of documents. In Mr Fraser's view, there need to be guidelines to govern such action.⁹¹

Committee's comments

3.69 The Committee supports most of the changes proposed in the Bill to Part V of the FOI Act (amendment and annotation of personal records). The Committee considers it important that people are assisted in identifying errors and misleading and irrelevant information that might occur on their personal records. The Committee, however, does not support the removal of the requirement that the person seeking to amend the personal record must have lawfully accessed the document.

Proposed arrangements for review of FOI decisions

3.70 The current arrangements for review of FOI decisions are set in paragraphs 2.26-2.31.

3.71 The Bill retains the current review structure but makes some important changes:

89 *Submission 2*, Townsville Community Legal Service, p. 4

90 *Submission 16*, Mr Ron Fraser, p. 32

91 *Submission 16*, Mr Ron Fraser, p. 32

- The Bill removes the prerequisite for internal review before an applicant may proceed to external review (although this option will remain) (item 58).
- The Bill amends section 64 so that section 37 of the AAT Act⁹² applies in relation to reviews about exempt documents. The effect is that agencies will be required to lodge a document that it claims to be exempt at an earlier stage than currently required.⁹³
- The Bill amends section 58⁹⁴ so that the AAT can grant access to a document containing exempt material under section 43 (documents relating to business affairs etc) if, after consulting with the Auditor-General, the AAT believes the public interest justifies it. This public interest override does not apply to other classes of exempt documents (items 64 and 65);
- Under new subsection 66L(2), any person authorised to make decisions under the FOI Act must take into account when doing so, any guidelines issued by the FOI Commissioner and provide a copy of those guidelines to the applicant. A similar requirement applies to the AAT when making decisions (item 95); and
- The Bill broadens the circumstances where the AAT can recommend that the Commonwealth pay an applicant's costs. The AAT will be able to do so where, after an application is lodged for review by the AAT, the relevant agency issues a certificate in relation to the document or claims a new ground for refusing access which fails to satisfy the AAT (item 93).

Internal review not a pre-requisite for AAT review

3.72 Concerns have been raised about certain aspects of the internal review mechanism for FOI decisions. The Ombudsman's *Needs to Know* report noted that some larger agencies have established specialist FOI units where it is not uncommon for an officer to review a decision on an FOI request to refuse access made by another officer in the same unit. This, it was suggested, might create a perception that such reviews are not completely impartial and objective. An additional concern with this approach is that it limits the opportunity for quality control by the agency in relation to the FOI decision-making processes. It was also found that on occasions, the initial FOI decision-maker had been required to prepare the draft decision for the internal review decision-maker.⁹⁵

92 Section 37 of the *Administrative Appeals Tribunal Act 1975* provides that decision-makers are required to lodge all relevant documents (and other things) within 28 days of being notified of the application for AAT review

93 The AAT, however, can require production of exempt documents for inspection by the AAT but this generally occurs at a later stage of the proceedings when it is needed to determine whether it is an 'exempt' document. Note: New subsection 64(7) requires that where exempt documents have been produced under section 64, the Tribunal must, after inspecting the document, return it without disclosing it to any other persons other than Tribunal members or staff

94 Section 58 of the *Freedom of Information Act 1982* provides that the AAT does not have the power to grant access to an exempt document

95 Commonwealth Ombudsman, 'Needs to know' Own Motion Investigation into the administration of the *Freedom of Information Act 1982* in Commonwealth Agencies, Canberra, 1999, p. 21

3.73 In the *Open Government* report, the ALRC and the ARC advised that internal review is and will remain the preferred option for many applicants irrespective of it being a prerequisite for review to the AAT. This is because it tends to be a quick and accessible form of merits review. The ALRC and the ARC advised, however, that internal review can be a barrier to external review in cases that require an external and independent decision. In those cases, there is some concern about the costs and delays involved in the internal review mechanism. In conclusion, the report recommended that internal review should not be a prerequisite to AAT review of an FOI decision.⁹⁶

3.74 Evidence to the Committee was divided on the amendment. The Law Council of Australia opposed this amendment claiming that it would not assist the development of a culture of effective internal review. The Law Council argued that permitting applicants to choose between internal review and AAT review will probably cause cases to be dealt with by the AAT which could and should be dealt with by internal review. The consequence would be a less efficient use of resources than the current arrangements. In the Law Council's view there are more appropriate ways to address deficiencies in the internal review mechanism:

Improving the quality of internal review should be addressed directly through administrative measures. If this cannot be achieved, consideration could be given to removing internal review altogether. The Law Council does not presently support this. Permitting an applicant to choose whether to have internal review or AAT review is unsatisfactory. For this reason the Law Council recommends that item 58 of the Schedule [s 58(2)] should be deleted.⁹⁷

3.75 The Australian Capital Territory Bar Association, however, took a different view.

In contrast to the Law Council of Australia but in agreement with ALRC/ARC recommendation 83, the ACT Bar Association supports the ability of an applicant to elect to go straight to the Administrative Appeals Tribunal. In many instances, it will be important to an applicant to obtain documents in the shortest time period. The removal of one layer of review will assist in this respect.⁹⁸

Committee's comments

3.76 The Committee does not support the proposal to remove internal review as a prerequisite for external review. The Committee is of the view that it is preferable that the internal review systems and processes of agencies be audited to facilitate reform to ensure that applicants have access to competent and efficient internal review.

96 Australian Law Reform Commission Report No 70 and Administrative Review Council Report No 40, *Open government: a review of the federal Freedom of Information Act 1982*, Canberra 1996, p. 170. See also comments in *Submission 16*, Mr Ron Fraser, p. 34

97 *Submission 10*, Law Council of Australia, p. 2

98 *Submission 11*, The Australian Capital Territory Bar Association, p. 2

Proposed amendments to AAT processes in reviewing FOI decisions

3.77 The AAT is the only external review body that can make decisions (rather than recommendations) on original FOI decisions. The review mechanism by the AAT, then, occupies a significant position in the review structure.

Production of exempt documents: Amendment to section 64

3.78 The Committee notes that the proposed amendment to section 64 is consistent with recommendation 85 of the *Open Government* report. According to that Review, section 64, in its current form, results in the AAT not having access to the very documents that are the subject of the dispute until a late stage in the proceedings. This ‘reduces the potential for settling a dispute before the hearing because the AAT does not have access to the documents’ unless they are otherwise provided on a voluntary basis by the agency involved. In recommending that the section be amended, the Review commented:

The Review agrees that if the AAT were able, before a hearing, to require production of documents claimed to be exempt it would be more able to resolve matters early.⁹⁹

3.79 The Committee favours amendments that facilitate the early resolution of disputes.

No disclosure of exempt documents by AAT to third parties: New subsection 64(7)

3.80 The ALRC/ARC Review also reported that there is confusion about the power of the AAT to disclose exempt documents to third parties such as an applicant’s lawyer. Subsection 64(1) provides that access to exempt documents produced by agencies is restricted to Tribunal members and staff but this has been the subject of judicial interpretation suggesting the restrictions do not apply to all exempt documents. The Review referred to the recent decision of the Federal Court *Day v Collector of Customs* (1995) 130 ALR 106 as authority for the proposition that the restrictions in section 64(1) only apply to documents obtained under that section but not to documents voluntarily provided by agencies.¹⁰⁰

3.81 Access by third parties such as legal representatives to exempt documents provided voluntarily by agencies is at the discretion of the AAT subject to undertakings about disclosure. The Review reported that many agencies in fact provide exempt documents on a voluntary basis to assist the AAT in resolving the dispute. In these circumstances, the Review recommended that section 64 be amended to clarify that the AAT is not to disclose documents that are claimed to be exempt to any person including the applicant’s legal representative, apart from Tribunal Members and staff.¹⁰¹ The Committee notes that proposed subsection 64(7) is consistent with the Review’s recommendations 85 and 86.

99 Australian Law Reform Commission Report No 70 and Administrative Review Council Report No 40 *Open government: a review of the federal Freedom of Information Act 1982*, Canberra 1996, p. 174. See also: *Submission 16*, Mr Ron Fraser, p. 33

100 *Submission 16*, Mr Ron Fraser, p. 34: Mr Fraser asserted that the amendments to section 64 are designed to overcome the decision in *Day v Collector of Customs* (1995) 38 ALD 264

101 Australian Law Reform Commission Report No 70 and Administrative Review Council Report No 40, *Open government: a review of the federal Freedom of Information Act 1982*, Canberra 1996, pp. 175-176

3.82 The Attorney-General's Department, however, informed the Committee that these recommendations were already in the process of being implemented as part of the arrangements for the new Administrative Review Tribunal. The Bills to establish that Tribunal, however, were rejected by the Parliament.

3.83 The Committee is concerned that access to any exempt documents (provided voluntarily or otherwise to the AAT) should be restricted to Tribunal Members and staff. The Committee notes that the Department's only objection was that the proposal was already being implemented in other Bills. Those Bills having been rejected by the Senate, and the Department having offered no other objection, it seems to the Committee that the amendment should be supported in this Bill.

AAT to grant access to exempt documents (public interest override): New subsection 58(2A)

3.84 The Committee received conflicting views in relation to the proposal to empower the AAT to grant access to documents exempt under section 43 (documents relating to business affairs) where the public interest justifies such access. The Law Council of Australia, although not expressly against the proposal, noted that the public interest override was not recommended in the *Open Government* report.¹⁰² Mr Chris Finn, Law School, University of Adelaide, however, submitted that the proposed amendment in the Bill improves on the option for reform recommended in that report. Mr Finn argued that a public interest override is essential to an effective FOI Act. Many categories of documents in the FOI Act are subject to an absolute exemption from disclosure, including business affairs documents in section 43, which means that the public interest in preserving that commercial information overrides the need for democratic accountability. Mr Finn argued that the availability of a public interest override mechanism will preserve the integrity of that information while still allowing disclosure in cases involving fraud, gross incompetence and corruption. In Mr Finn's view:

The proposed s58(2A) is modelled upon a similar mechanism found in s50(4) of the Victorian FOI Act (1982). That mechanism is only one of its kind in any of the Australian jurisdictions, and is highly regarded by commentators on FOI legislation. It is seen as one of the key reasons why the Victorian Act is arguably the most effective FOI legislation in Australia, precisely because it does allow 'public interest' disclosure of material which is prima facie exempt, albeit only when that public interest is sufficiently grave.¹⁰³

3.85 It is important to note, Mr Finn informed the Committee, that the public interest is not entrusted to departmental or agency officials in the first instance. The public interest override can only be applied by the AAT conducting a review of an FOI decision thus ensuring that appropriate levels of caution are exercised in reviewing decisions not to release otherwise exempt material.

3.86 Mr Finn concluded, however, that the Bill is nevertheless inadequate because those documents subject to the public interest override might be withheld on the basis that they are exempt under other provisions of the FOI Act. Mr Finn claimed that much of the material that qualifies for exemption under section 43 also qualifies for exemption under section 45, which covers information supplied to government in confidence. In those circumstances, the

102 *Submission 10*, Law Council of Australia, p. 3

103 *Submission 15*, Mr Chris Finn, Law School, University of Adelaide, p. 3

release of that information would be blocked by the application of section 45. Mr Finn submitted that the public interest override should be extended to all categories of exempt documents given that release would only be ordered where the public interest was sufficiently cogent to warrant it. Alternatively, a public interest release mechanism could be formulated to apply to all exemptions (other than those relating to defence, national and internal security). Mr Finn stated:

In particular, Cabinet documents should be subject to public interest override. Whilst the circumstances in which the public interest would indeed require such release are rare, and difficult to specify in advance, it is a function of democratic governance that even the peak of the Executive arm of government be ultimately accountable.¹⁰⁴

Committee's comments

3.87 The Committee notes that, as mentioned above, the *Open Government* report does not recommend the public interest over-ride concept. The Review did consider, however, whether section 43 itself should be made subject to an express public interest test. The Review concluded that it should not be subject to such a test. The Review stated:

These exemptions protect valuable commercial information that in many cases the Commonwealth has obtained free of charge and in the public interest. It is essential to ensure that this information continues to be available to the government and that its value is not compromised by that availability.¹⁰⁵

3.88 This being the case, the Committee is not prepared to support item 64 and 65 in the Bill which would have the effect of enabling the AAT to apply a public interest over-ride test in relation to the same material without further information. Although the Committee is aware of complaints generally that claims of commercial-in-confidence are misused, there is insufficient evidence available to the Committee on this particular proposal to justify recommending such a change.

An FOI Commissioner

3.89 One of the most significant changes proposed in the Bill is the establishment of the office of FOI Commissioner. The terms and conditions of the Commissioner's appointment and the functions and powers of the Commissioner are set out in paragraphs 2.32-2.40. In essence, the Bill seeks to establish an FOI Commissioner who would be responsible for overseeing the administration of the FOI Act, including:

- monitoring implementation of FOI Act and compliance by agencies;
- preparing guidelines to assist agencies;¹⁰⁶

104 *Submission 15*, Mr Chris Finn, Law School, Adelaide University, pp. 4-5

105 Australian Law Reform Commission Report No 70 and Administrative Review Council Report No 40, *Open government: a review of the federal Freedom of Information Act 1982*, Canberra 1996, p. 141

106 The preparation of guidelines is one of the most significant functions conferred on the FOI Commissioner. Section 66K specifically requires the FOI Commissioner to make guidelines about (amongst other things) access to an applicant's personal information, amendment of an applicant's

- providing assistance and advice to Ministers, agencies and applicants;
- promoting an understanding of the FOI Act;
- determining charges; and
- coordinating FOI policy and implementation with relevant bodies.

3.90 The source of funding for the new position is not immediately apparent although the *Open Government* report states that the cost could be minimised by using some existing FOI staff from the Attorney-General's Department, co-locating the FOI commissioner with an existing authority and contracting out or sharing of corporate support.¹⁰⁷

3.91 Responsibility for overseeing certain aspects of FOI Act has been vested in the Commonwealth Ombudsman and the Attorney-General. As noted in 1.7, the Commonwealth Ombudsman has historically had a statutory role in the freedom of information regime although under the current arrangements, that role has been limited to the investigation of complaints.¹⁰⁸ The ombudsman may investigate complaints about matters such as the refusal or partial refusal of an FOI request, fees and charges, delays by agencies and the adequacy or clarity of reasons for decisions.¹⁰⁹ The Ombudsman's FOI investigations are concerned with administrative and procedural issues, rather than with substantive decisions.¹¹⁰ This contrasts with comparable Commonwealth legislation such as the Sex Discrimination Act and the Privacy Act where the statutory positions have been established with responsibility for Commonwealth-wide oversight and advocacy.

3.92 The Attorney-General also has statutory responsibilities in relation to FOI. Under section 93(1) of the FOI Act, the Attorney-General is required to report annually to Parliament on the operation of the FOI Act¹¹¹ and government agencies are required to furnish the Attorney-General with substantial statistical information needed for the report.¹¹²

personal information and the application of the public interest test for the purposes of the Act. Section 66L deals with the status of those guidelines

107 Australian Law Reform Commission Report No 70 and Administrative Review Council Report No 40, *Open government: a review of the federal Freedom of Information Act 1982*, Canberra 1996, p. 78

108 In the year following its enactment, the FOI Act was amended to give the Ombudsman a substantial role in monitoring the administration of the FOI Act. Under that amendment, the Ombudsman was to monitor and publicise the FOI Act and assist FOI applicants in reviews before the Administrative Appeals Tribunal. As noted in footnote 11, section 27 of the *Freedom of Information Amendment Act 1983* inserted a new Part VA into the FOI Act 1982 giving the Ombudsman responsibility for monitoring freedom of information processes. In 1991, the Ombudsman's role was later confined to the investigation of complaints in relation to the performance of agencies in discharging their responsibilities under the FOI Act. The Ombudsman's role was reduced because the Ombudsman's office was not adequately resourced to undertake the wider role

109 *Submission 17*, Commonwealth Ombudsman, p. 2: Consistent with the Commonwealth Ombudsman's established practice, he does not become involved in complaints about FOI requests until an applicant has exhausted internal and, in some cases, AAT review.

110 *Submission 17*, Commonwealth Ombudsman, p. 3

111 *Freedom of Information Act 1982*, subsection 93(1)

112 That information includes: the number of FOI requests, the number of decisions made to defer and refuse access, particulars of officers delegated the authority to make decisions about FOI requests, the number of applications for both internal and AAT review of departmental decisions about FOI,

The report must identify the guidelines, if any, issued during the year by the Attorney-General or by a responsible Minister with which agencies are required to comply¹¹³ as well as describe the efforts of Departments to assist agencies in complying with their obligations.¹¹⁴ Although the reporting requirements were amended in 1983 and again in 1991, the requirements have remained substantially the same.¹¹⁵

Concerns with the current arrangements

3.93 The main concern with the current arrangements is that there is no individual or organisation with responsibility for overseeing the FOI Act, and that this omission has seriously weakened the Act's effectiveness. In the *Open Government* report, the ALRC and the ARC asserted that a number of deficiencies in the current FOI legislative arrangements indicated a need for more effective administration of the FOI Act. They concluded that FOI processes would be enhanced by the existence of an independent person/monitor to oversee the administration of it. The ALRC and the ARC commented that:

There is no person or organisation who has general responsibility for overseeing the administration of the FOI Act. Nor is there any authority which monitors the way agencies administer the Act, identifies and addresses difficult or problematic issues and provides assistance and advice to the public on FOI.¹¹⁶

3.94 Some of the deficiencies in the FOI arrangements that the ALRC and the ARC contended could be effectively remedied by the existence of an FOI Commissioner included:

- a decline in understanding within government agencies of the FOI Act;
- minimising of disclosure by inappropriate use of exemption provisions;
- poor record keeping practices within agencies;
- the levying of unreasonable charges to restrict access to information;
- confusion among the general public about how to access information; and
- a low profile for FOI in the general community and within agencies.

The ALRC and the ARC concluded that an FOI Commissioner would have a positive effect on these aspects of FOI:

particulars of charges collected relating to FOI and changes in administrative procedures occasioned by the need to comply with the Act – *Freedom of Information Act 1982*, paragraph 93(3)(a)

113 *Freedom of Information Act 1982*, subsection 93(3)(b)

114 *Freedom of Information Act 1982*, subsection 93(3)(c)

115 Section 93 was amended by the *Freedom of Information Amendment Act 1983* so that the Attorney-General's reports must be prepared by 31 October rather than by 31 June each year. The amending Act also repealed paragraph 93(3)(a)(viii) - that the report contain the number of questions referred each year to the Document Review Tribunal about exempt documents (the provisions in the 1982 Act establishing that Tribunal were also repealed in the 1983 Act by section 41). The 1991 amendment merely made a consequential change to reflect the fact that FOI requests are now made under section 15 of the Act whereas previously it was section 19 (*Freedom of Information Amendment Act 1991*, section 45)

116 Australian Law Reform Commission Report No 70 and Administrative Review Council Report No 40, *Open government: a review of the federal Freedom of Information Act 1982*, Canberra 1996, p. 61

3.95 Similarly, the Ombudsman reported finding ‘widespread problems in the recording of FOI decisions and probable misuse of exemptions to the disclosure of information under the legislation’¹¹⁷ as well as in other aspects of FOI legislation including the disclosure of personal information, authorisations, FOI training and records management. The *Needs to Know* report supported the conclusions in the *Open Government* report, particularly in respect of making an agency responsible for the ongoing day to day monitoring of agency performance in FOI administration.¹¹⁸ The Ombudsman noted the Attorney-General’s efforts to meet the responsibilities imposed by the FOI Act, by publishing FOI Guidelines, holding FOI practitioner forums and issuing FOI Memoranda and FOI Decision Summaries. As the latter of those initiatives have now ceased, however, the Ombudsman asserted that there is a ‘growing void’ in the currency of FOI information available to departments.¹¹⁹

3.96 Most of the evidence received by the Committee supported the establishment of an FOI Commissioner to ‘watchdog’¹²⁰ FOI processes. The Commonwealth Ombudsman submitted there are strong arguments in favour of ‘a public face’ for FOI – ‘someone who can contribute in an independent way to official and public debate about information disclosure issues’.¹²¹ The ALRC submitted that the improvement of the administration of the FOI Act ‘hinges’ on providing a single agency with responsibility for FOI¹²² and the Law Council of Australia also supports the establishment of such a position.¹²³

3.97 The Committee was told that one of the benefits of such a proposal is a guarantee of consistency and best practice across all Commonwealth agencies subject to the FOI Act.¹²⁴

117 ‘For example, in one such case a senior officer applied an exemption on a departmental publication on the basis of ‘commercial interest’ under section 43(1)(c) of the Act. The senior officer did not provide any reasons for his decision and the applicant sought internal review. The publication was subsequently disclosed on review. However, what was not disclosed was that the publication was listed on the Department’s section 9 as a document publicly available for inspection or purchase and therefore available without recourse to the FOI Act’: Commonwealth Ombudsman, ‘*Needs to know*’ Own Motion Investigation into the administration of the *Freedom of Information Act 1982* in Commonwealth Agencies, Canberra, 1999, pp. 15-16

118 Commonwealth Ombudsman, ‘*Needs to know*’ Own Motion Investigation into the administration of the *Freedom of Information Act 1982* in Commonwealth Agencies, Canberra, 1999, pp. 1-2. The conclusion of the *Needs to Know* Report is that the culture of resistance or indifference to disclosure found amongst Commonwealth agencies is unlikely to be overcome while there is no entity charged with responsibility for overseeing and monitoring the administration of the FOI: *Submission 17*, Commonwealth Ombudsman, p. 6

119 Commonwealth Ombudsman, ‘*Needs to know*’ Own Motion Investigation into the administration of the *Freedom of Information Act 1982* in Commonwealth Agencies, Canberra, 1999, pp. 6-7. *Submission 17*, Commonwealth Ombudsman, p. 9

120 *Submission 12*, Ms Marie Wharton, p. 1; *Submission 1*, Anti-Discrimination Commission (Qld), p. 1

121 *Submission 17*, Commonwealth Ombudsman, p. 9

122 *Submission 5*, The Australian Law Reform Commission, p. 4

123 *Submission 10*, Law Council of Australia, p. 3

124 *Submission 16*, Mr Ron Fraser, pp. 10-11: Mr Fraser asserted that the FOI Commissioner would assume the functions relevant to that end such as annual reporting and collection of statistics, issuing of guidelines, training of staff and possibly the chairing of FOI Practitioner Forums (currently performed without charge by the AGS) and other functions envisaged by the *Open Government* Report.

3.98 Other submitters who supported the proposal in principle claimed that the proposed powers and functions of the FOI Commissioner should be extended to provide for more active intervention in the progress of cases similar to that model which operates in South Australia and New Zealand.¹²⁵ Other inquiry participants extolled the virtues of the Information Commissioner models in Canada, Ireland, Western Australia and Queensland.¹²⁶

Reporting role of the Attorney-General

3.99 As outlined above, the Attorney-General has a reporting role under section 93 of the FOI Act and the Commonwealth Ombudsman has power to investigate certain complaints about FOI. The information available to the Committee, however, is that the kind of reporting required of the Attorney-General does not satisfy the need for proper oversight of the administration of the FOI Act. The ALRC and the ARC contended in the *Open Government* report that:

Although the Act is overseen to some extent by the Attorney-General's Department and the Ombudsman, the mechanisms provided are fragmented and the Attorney-General's Department is not sufficiently independent of the Executive.¹²⁷

3.100 They described the Attorney-General's Department's annual FOI report as 'a compilation of information provided voluntarily by agencies rather than the result of independent audit or consideration of agencies' FOI practice'. In their view, the material in the reports do not enable a comparison of agency performance on FOI or an assessment to be made of what constitutes best practice, probably due to the fact that the Department cannot compel agencies to provide that sort of information.¹²⁸

3.101 Of concern to the Committee, was the advice of the Commonwealth Ombudsman during the inquiry that:

The enthusiasm and leadership which formerly characterised the Attorney-General's Department's performance in this role appears to have declined, possibly as a result of competing pressures and priorities. In addition, there are inherent difficulties in an entity which is clearly identified as an agency of the Commonwealth Government assuming the role of championing FOI in particular, and open government generally. This tension becomes all the more acute when it is recognised that the Department's responsibilities include advising and assisting government agencies involved in decision-making under the Act.¹²⁹

125 *Submission 7*, Communications Law Centre of Victoria University, p. 2

126 *Transcript of evidence*, 5 March 2001, p. 3; *Submission 16*, Mr Ron Fraser, p. 37

127 Australian Law Reform Commission Report No 70 and Administrative Review Council Report No 40, *Open government: a review of the federal Freedom of Information Act 1982*, Canberra 1996, p. 61

128 Australian Law Reform Commission Report No 70 and Administrative Review Council Report No 40, *Open government: a review of the federal Freedom of Information Act 1982*, Canberra 1996, p. 64

129 *Submission 17*, Commonwealth Ombudsman, p. 11

Funding and location of the FOI Commissioner function

3.102 The Committee was told that, given the number of government agencies and the number and scope of FOI requests, the success of the proposed FOI Commissioner would depend upon the provision of adequate funding.¹³⁰ It was estimated to the Committee that the cost of establishing such a body would be between \$1-2 million although these costs could be minimised by either co-location with the Ombudsman or by conferring the function on the Ombudsman (discussed below).¹³¹

3.103 The majority in the *Open Government* report did not support the proposal to confer the function on the Ombudsman because ‘the role proposed for the FOI Commissioner is different from that of the Ombudsman in several respects, the most significant of which is that the former does not involve individual complaint resolution’.¹³² In addition, it was claimed that the FOI Commissioner needs to be independent of the policy making process to be able to objectively criticise defective policy. The Review also considered the options of conferring the functions on other existing officers but rejected all of them.¹³³ The conclusion reached in the *Open Government* report, however, was that financial savings could be achieved as well as consumer convenience if the FOI Commissioner were co-located with the Ombudsman.¹³⁴

3.104 The ALRC summarised its current position in relation to the location of the FOI Commissioner function, taking into account recent publications by the Commonwealth Ombudsman:¹³⁵

In its most recent report, *Managing Justice*, the ALRC was very alive to concerns about establishing new, small agencies, and thus sought wherever possible to recommend the use or adaptation of existing bodies to undertake new, but necessary, functions. The establishment of an Information and Privacy Commissioner, or resourcing the Commonwealth Ombudsman to undertake FOI oversight functions, would be preferable to ignoring the need for allocating responsibility for FOI in an independent agency.¹³⁶

130 *Submission 3*, The Law Society of South Australia, p. 2

131 *Submission 16*, Mr Ron Fraser, p. 11

132 Australian Law Reform Commission Report No 70 and Administrative Review Council Report No 40 *Open government: a review of the federal Freedom of Information Act 1982*, Canberra 1996, p. 76 paragraph 6.29

133 Australian Law Reform Commission Report No 70 and Administrative Review Council Report No 40 *Open government: a review of the federal Freedom of Information Act 1982*, Canberra 1996, p. 76 paragraph 6.29

134 Australian Law Reform Commission Report No 70 and Administrative Review Council Report No 40 *Open government: a review of the federal Freedom of Information Act 1982*, Canberra 1996, p. 78, paragraph 6.30

135 Commonwealth Ombudsman, ‘Needs to know’ Own Motion Investigation into the administration of the *Freedom of Information Act 1982* in Commonwealth Agencies, Canberra, 1999 and R McLeod, *Freedom of Information – an Ombudsman’s perspective*, Paper, Annual Public Law Weekend, Centre for International and Public Law, Australian National University, Canberra, 10 & 11 November 2000

136 *Submission 5*, Australian Law Reform Commission, p. 4

3.105 Professor David Weisbrot, President of the ALRC, remains committed to the view that there should be one officer with primary responsibility for FOI. Professor Weisbrot recognises, however, that given the cost implications of establishing an independent statutory office, the function could be subsumed within the Commonwealth Ombudsman's office (or within the federal Privacy Commissioner's office). According to Professor Weisbrot, the Ombudsman's office has substantial infrastructure and accessibility.¹³⁷ The Committee however, notes that the Ombudsman's office has historically had resources problems in overseeing FOI and clearly those resources issues would need to be considered.¹³⁸

3.106 The Commonwealth Ombudsman was of the view that the functions of an FOI Commissioner should be placed within an existing entity such as his own. It was submitted that small and specialised agencies can find competing for resources difficult, become limited geographically, find managing resources in terms of irregular flow problematic, are susceptible to a perception that their independence has been compromised and be unable to maintain a sufficiently high public profile. Conferring the functions on the Commonwealth Ombudsman, on the other hand, would overcome many of these problems, as well as avoid a situation where the responsibilities of the different authorities become unclear.¹³⁹ In addition, the FOI Commissioner's work would complement the work already undertaken in investigating complaints about FOI¹⁴⁰ and there would be obvious cost-savings. In terms of cost, the Committee was told that a specialist FOI unit within the Ombudsman's office would require an initial budget of about \$600,000.¹⁴¹

3.107 On the other hand, the Committee was advised that there are important advantages in having a separate office for the FOI Commissioner:

- When functions are added to existing offices, they are often not accompanied by adequate or increased funding. This would result in a downgrading of the FOI function as it would be one function among many;
- A separate FOI Commissioner's office would improve the visibility of the FOI Commissioner which would raise the profile of FOI; and
- A separate office would give credence to the Government's stated commitment to the principles of open, accountable and democratic government.¹⁴²

137 *Transcript of evidence*, 5 March 2001, p. 23

138 *Submission 5*, Australian Law Reform Commission, p. 4. The ALRC noted the recent success in some Canadian provinces of combining the functions of Information Commissioner and Privacy Commissioner

139 *Submission 17*, Commonwealth Ombudsman, pp. 9-10

140 *Transcript of evidence*, 5 March 2001, p. 11. Currently, the Commonwealth Ombudsman receives between 250-260 complaints per year in relation to FOI including fees and charges type complaints: *Transcript of evidence*, 5 March 2001, p. 14

141 *Transcript of evidence*, 5 March 2001, p. 12. Note: The figure was provided on the understanding that costings have not actually been done (in terms of work load and human resources needed) and was merely based on the approximate operating cost of \$100,000 per head for a unit comprising six employees

142 *Submission 15*, Mr Chris Finn, Law School, University of Adelaide, p. 2

The Department's view

3.108 The Attorney-General's Department did not comment directly on the proposal to establish an FOI Commissioner but focussed on particular aspects of the FOI Commissioner's Office.¹⁴³ In relation to the FOI Commissioner's annual reporting requirement under proposed section 66R, the Department predicted that, if the Bill is enacted in its present form, the FOI Act will become 'confusing and unworkable in relation to the reporting process'. The Department highlighted the following drafting issues:

- the language is ambiguous, merely providing that the FOI Commissioner's report is to include 'statistics from each agency on the administration of the Act' without any guidance as to what these statistics are and whether they differ from those statistics already collected for the purposes of reporting under section 93;
- it is unclear as to whether the new reporting requirement in section 66R is to co-exist with or replace the reporting requirement under section 93; and
- the reference in Clause 66R of the Bill to the *Commonwealth Authorities and Companies Act 1997* may not be appropriate because the FOI Commissioner, as established under section 66A of the Bill would not be an authority for the purposes of that Act.¹⁴⁴

3.109 The Attorney-General's Department referred the Committee to some of the measures it has taken to streamline and improve the collection of statistics from agencies for annual reporting. The Department has:

- developed an Internet system so agencies can enter their own FOI statistics;
- asked agencies to distinguish between requests for personal information and requests for other information in the provision of statistics for annual reports; and
- instigated 'stock-takes' to list agencies and Ministers subject to the FOI Act.¹⁴⁵

3.110 As set out above, the functions of the FOI Commissioner include providing information and advice to applicants in relation to FOI matters and promoting an understanding of the Act in the Commonwealth public sector and the community in general. The Committee notes the advice of the Attorney-General's Department that it has developed

143 The Attorney-General's Department made some introductory comments including that the submission does not comment on aspects of the Bill that are under active consideration by the Government: *Submission 14*, Attorney-General's Department, p. 1

144 *Submission 14*, Attorney-General's Department, p. 2. The Department contended that it would be more appropriate for the Commissioner to be prescribed in the Financial Management and Accountability Regulations, like the Privacy Commissioner

145 *Submission 14*, Attorney-General's Department, pp. 2-3. Senator McKiernan asserted, however, that the initiative for developing the new Internet System for recording FOI statistics came from the Commonwealth Ombudsman's *Needs to Know* report: *Transcript of evidence*, 5 March 2001, p. 19. But note the Department's response that: 'The Department developed its Internet-hosted system for the collection of FOI statistics from agencies as an initiative to streamline the process of statistical collection, not in response to the Ombudsman's report. The Department commenced work on this initiative in 1998 and it was first used at around the time of the release of the Ombudsman's report in June 1999': *Submission 14A*, Attorney-General's Department, p. 1

an FOI Home Page at <http://www.law.gov.au/foi> which contains a range of information and reference materials for both agencies and the public.¹⁴⁶

3.111 The Attorney-General's Department also commented that the setting of photocopying and transcribing charges (under proposed amended section 94) is not an appropriate function for a specialist FOI Commissioner.¹⁴⁷ The ALRC, however, responded that the FOI Commissioner should have this power due to the potential for such charges to impede access to information.¹⁴⁸

3.112 The Department also doubted that the proposal that the FOI Commissioner publicise section 66¹⁴⁹ would achieve the intended result because section 66 is invoked at the discretion of the AAT and not at the discretion of an agency or the FOI Commissioner.¹⁵⁰

Committee's comments

3.113 The Committee accepts the evidence that the oversight of the administration of the FOI Act and compliance by Commonwealth agencies would be enhanced by the establishment of an FOI Commissioner or by conferring all those functions associated with overseeing FOI on a single office. Centralisation of those functions would enhance accountability as well as optimise the opportunity for community and agency education about FOI.

3.114 On balance, the Committee believes that these functions should be conferred on the Commonwealth Ombudsman but that a specialised unit within that office should be established to support the performance of them. This option takes into account the evidence given to the Committee about the problems that confront small, statutory agencies established to perform specialised functions. By comparison, the Commonwealth Ombudsman's office has the substantial infrastructure to support the establishment of such a unit and it would be a matter of expanding an already existing role (that is, the complaints mechanism). The Committee understands the problems historically encountered by that office in overseeing FOI and urges that appropriate funding and resources be directed to the development of such a unit.

3.115 The Committee has also taken into account the fact that the statistical collection by the Attorney-General's Department has been enhanced in recent years. The ALRC advised the Committee that duplication of statistical collection would not be an efficient use of resources. The Committee also notes the drafting advice of the Department in relation to the reporting requirement of the Attorney-General and that proposed to be performed by the FOI

146 *Submission 14*, Attorney-General's Department, p. 3: The Homepage contains the FOI Act and Regulations, information on how to make an FOI request, research aids, FOI Memoranda and summaries of past AAT Decisions, FOI Annual Reports, and links to other Internet sites. In 2000, Memorandum 98 was issued, containing revised guidelines on the exemptions under the FOI Act and is also available

147 *Submission 14*, Attorney-General's Department, p. 6

148 *Submission 5A*, Australian Law Reform Commission, p. 4: The ALRC noted that the reasons for this recommendation are set out in paragraphs 14.14-14.20 of the *Open Government* report

149 That is, that the AAT may recommend that the Commonwealth pay an FOI applicant's costs in certain circumstances

150 *Submission 14*, Attorney-General's Department, p. 7

Commissioner under clause 66R of the Bill.¹⁵¹ To this end, the Committee accepts the ALRC's advice that a satisfactory solution would be to transfer the administrative function of the statistical collection by the Department to the FOI Commissioner's office (the specialised unit located in the Commonwealth Ombudsman's office) but in the same manner as statistics are currently collected by the Attorney-General's Department. In addition, there should be no duplication of reporting. The reporting requirement should be the function of the FOI Commissioner. To achieve these ends, the ALRC suggested, and the Committee accepts, that section 93 of the FOI Act (the Attorney-General's reporting requirement) should be repealed after clause 66R of the Bill has been amended to:

- provide that the FOI Commissioner (Ombudsman) will report annually to the Parliament, through the Attorney-General, in relation to the areas set out in clause 66R(2) and that report must be tabled by the Attorney-General within 15 sitting days;
- incorporate the specific requirements of statistical reporting currently addressed under subsections 93(3)-(3A) of the FOI Act; and
- insert a requirement for agencies to furnish information to the FOI Commissioner, similar to that currently contained in subsection 93(2) of the FOI Act, in order to support this function.¹⁵²

Time Limits

3.116 The FOI Act prescribes time limits for the processing of FOI requests. During the relatively short history of the FOI Act those time limits have been amended twice. The time limit for processing a standard request, for example, was 60 days under the 1982 Act. This was later reduced to 45 days in 1984 and further again to the current 30 days in 1986 (section 15(5)(b)). The Bill seeks to reduce that time limit further by reducing it to 14 days (item 12).

3.117 Other time limits amended by the Bill include:

- agencies to acknowledge receipt of FOI requests within 7 (not 14) days (item 11);
- if an agency has not notified an employee of the outcome of a request, made in accordance with that agency's procedures, to access personnel records within 14 days (not 30 days), the employee can request access under the FOI Act (item 13);
- an agency or Minister must notify an applicant seeking remission of fees of the decision in relation to that request no later than 14 (not 30) days after the request has been made (items 23 and 24); and

151 See paragraph 3.116 of this report

152 *Submission 5A*, Australian Law Reform Commission, p. 2. The Committee notes the advice of the Attorney-General's Department in relation to the ALRC's proposal that the FOI Commissioner should report through the Attorney-General on the operation of the Act. The Department emphasised that its 'principal concern with the core of clause of 66R of the Bill was to ensure that there not be an annual report on the FOI Act prepared by two different bodies': *Submission 14A*, Attorney-General's Department, p. 5

- an agency or Minister must notify an applicant of the decision in relation to a request to have personal records amended within 14 (not 30) days of the request being received by the agency or Minister (item 53).¹⁵³

Issues raised in relation to time limits

3.118 Both the *Open Government* report and the *Needs to Know* report suggested that existing time limits for agency responses to requests were too long. The *Open Government* report argued that recent developments in information technology and records management should facilitate faster retrieval of information than was previously possible and that the FOI Act should be amended accordingly to shorten the time allowed by agencies to process requests. The Ombudsman noted that in 1996-97, 76% of requests were responded to within the 30 day limit, with little change in the percentage over the preceding five years.¹⁵⁴

3.119 Acknowledging that there are deficiencies in some agencies record keeping systems, the ALRC/ARC in the *Open Government* report suggested that reductions to the time limit for processing should be delayed for three years. This would give agencies time to make the necessary improvements to record management. At the end of the three year period, processing times for standard requests should be reduced from 30 to 14 days, with corresponding reductions to other time limits.¹⁵⁵ Similarly, the Ombudsman recommended that there should be no change to the 30 day limit until agencies are in a position to comply with a shorter time limit.¹⁵⁶ Mr Snell told the Committee that:

... trying to do it overnight is unrealistic and is bound to cause a reaction from government agencies and managers who do not have the resources to institute an overnight change. It would be much better to stagger it over a number of years and reduce the time line down. In thinking about the time limits, I try to draw the Committee's attention to the fact that these time limits were constructed pre-word processing, pre-networking desktop computers, pre-email and a number of other things. The idea of public sector management when these time limits were brought in is far out of date when compared with what is in existence now.¹⁵⁷

3.120 Most witnesses welcomed the proposed changes to improve the periods of time for the processing of applications claiming that the existing time limits are unnecessarily long and delays inhibit the effectiveness of FOI.¹⁵⁸

153 There are also consequential time limit amendments proposed to paragraph 56(1)(b) and paragraph 56(1A)(b) reflecting the changes proposed to the time limits in paragraph 15(5)(b) (item 62) and subsection 51D(1)

154 Commonwealth Ombudsman, '*Needs to know*' Own Motion Investigation into the administration of the *Freedom of Information Act 1982* in Commonwealth Agencies, Canberra, 1999, p. 25

155 Australian Law Reform Commission Report No 70 and Administrative Review Council Report No 40, *Open government: a review of the federal Freedom of Information Act 1982*, Canberra 1996, p. 84

156 Commonwealth Ombudsman, '*Needs to know*' Own Motion Investigation into the administration of the *Freedom of Information Act 1982* in Commonwealth Agencies, Canberra, 1999, p. 26

157 *Transcript of evidence*, 5 March 2001, p. 3

158 See for example, *Submission 1*, Anti-Discrimination Commission (Qld), p. 2; *Submission 2*, Townsville Community Legal Service, p. 4; *Submission 6*, Electronic Frontiers Australia Inc., p 5, *Submission 7*, Communications Law Centre, Melbourne University, p. 4

3.121 Professor David Weisbrot told the Committee that in his experience as dean of law and vice-chancellor at a university, he frequently received FOI requests and there were none that he could not meet in 14 days. He said:

I am not saying that those requests are typical of those that are received by some departments in which there may be requests for much more complicated information, but I would say that, as a routine matter of the sort where an individual is seeking personal information and so on, I would be surprised if those requests could not be met in 14 days.

3.122 The ALRC confirmed its commitment to the views expressed in the *Open Government* report, that the standard time frame for processing FOI requests should be 14 days and suggested that agencies should be able to negotiate extensions of time where appropriate in difficult cases.¹⁵⁹

3.123 Not all of the evidence on this issue supported the time reductions proposed in the Bill. Opposition related to a perception that agencies would be unable to comply with the new requirements.

There is no disagreement with the sentiment behind this change. The ACT Bar Association urges that when these new time frames commence in three years time, their effectiveness be closely monitored. In many cases there simply must be great difficulty complying with such time frames. If a 14 day statutory requirement becomes regularly breached because it is impossible to comply with it, it may result in a more casual attitude to compliance with times frames in all cases and with other provisions of the Act.¹⁶⁰

3.124 Similarly, Mr Ron Fraser told the Committee that he doubted that it was possible for agencies to process FOI requests, as a general rule, within the 14 day time frame proposed by the Bill and that it would not be prudent to set up a time frame destined to fail:

It would do so largely because of the problems of dealing with large volumes of requests, low numbers of FOI staffing, the difficulty of locating some kinds of material, the problems of consultations internally or with other government agencies, the requirement to provide schedules and statements of reasons for refusals which can take a considerable amount of time, and doubtless many other reasons. In order to attain swifter turnarounds, it would be appropriate to set up a study in some of the worst-performing agencies in this respect, and attempt to analyse the reasons for delay and how they could be overcome. It might then be possible to consider reducing the normal time limits.¹⁶¹

Committee's comments

3.125 The Committee notes the advice of the Attorney-General's Department that this amendment has its genesis in the expectation that technology and improved records management will enable a shorter response to FOI requests. While the Department agrees

159 *Submission 5A*, Australian Law Reform Commission, p. 5A

160 *Submission 11*, The Australian Capital Territory Bar Association, p. 2

161 *Submission 16*, Mr Ron Fraser, p. 46

generally, that shorter response times are desirable, it argues that 14 days is an unrealistic period in which to expect all agencies to process all FOI requests. The Department stated:

Search and retrieval is only one aspect of processing an FOI request. Once the relevant records have been retrieved, the decision-maker of an agency still has to go through each document, line by line, to determine the relevance of documents to the request and to decide whether to seek any available exemptions. This process is time consuming, even for relatively simple requests where there are few documents. Where requests are complex and involve a large volume of documents, there is little likelihood that an agency could complete examination of documents is not amenable to automation.¹⁶²

The recommendation does not take into account its impact on agencies' other functions. Many agencies have a number of competing work priorities and it would not be expected that they would be in a position to process every FOI request within 14 days.¹⁶³

3.126 Taking into account the reservations of the the Attorney-General's Department, the Committee is of the view that a 21 day time limit should apply for the processing of FOI requests (that is, making and advising the applicant of a decision on the FOI request). The Committee believes that a 21 day time limit strikes the appropriate balance between the advances to technology that have been made that improve efficiency and the competing work priorities of agencies.

3.127 The Committee accepts the concerns about the opportunity for delays by agencies in actually providing the access to documents once it has approved access. The Committee therefore recommends that the Bill be amended to provide a maximum time frame for the provision of information to which access is granted.

Charges and fees

3.128 As set out in paragraph 2.14, the Bill makes various changes to the costs and charges associated with FOI. Under the Bill, charges are only to be imposed in respect of released documents as opposed to the current situation where charges are also imposed in relation to making an FOI request. Those charges must be set in accordance with a scale of fees set out by the FOI Commissioner. Agencies will have a general discretion to waive or reduce charges and a general discretion to remit fees. In addition, the FOI Commissioner will set photocopying and transcribing charges, fees for internal review are abolished, access to an applicant's personal information is to be free of charge, and fees are not to apply to supervision of inspection of documents accessed under FOI.

Issues raised in relation to proposed charges and remission of fees provisions

3.129 A key recommendation of the *Open Government* report is that fees and charges should not be inconsistent with the objects of the FOI Act. That report recommended that a scale of fees and charges should be determined by an FOI Commissioner and that access to

162 *Submission 14*, Attorney-General's Department, p. 3

163 *Submission 14*, Attorney-General's Department, p. 4. See also *Submission 14A*, Attorney-General's Department, p. 5

an applicant's personal information should be free of charge.¹⁶⁴ The Committee notes that the Bill implements these recommendations. Mr Chris Finn, Law School, University of Adelaide, strongly supports the rationalisation of charges.¹⁶⁵ Mr Finn submitted that, if enacted, the proposed amendments will significantly enhance the practical efficacy of the FOI Act and referred in particular to the impact that the amendments would have on 'public interest' requests for access to documents:

These are frequently the most voluminous and currently may attract prohibitive fees, thereby defeating the purpose of the legislation. It is important that the need to minimise government resource expenditure is not elevated above the need to allow and indeed facilitate public accountability. However, it is suggested that the development of IT technology may allow some creative approaches to information access to be taken ...¹⁶⁶

3.130 The kinds of 'creative approaches' Mr Finn referred to included developments in the area of electronic access. For example, Mr Finn submitted that it might soon be technically feasible to allow electronic access to many agency records at little or no charge. Mr Finn suggested that, in readiness for this kind of transformation, agencies should classify all documents as either being 'prima facie' publicly available or exempt. Those documents that are prima facie accessible could be accessed on agencies' web sites. Those documents that are prima facie exempt documents could be listed so as to assist access seekers in identifying the documents sought if that exempt status is to be contested.¹⁶⁷

3.131 Mr Ron Fraser asserted that:

The total amount of fees and charges collected is usually in the vicinity of 4% or less of the estimated total costs of FOI (in 1998-99 it was 3.42% and in 1999-2000 was 3.1%). Any attempt to increase the fees and charges above the 1986 level would, on the present bases for calculation of charges, only have the effect of further discouraging requests for access to policy documents and other non-personal information.

My own opinion is that the charges imposed and collected are hardly worth the effort in revenue terms, but have a disproportionate effect on discouraging requests. They are by no means the only reason for the small number of requests outside the area of the applicant's personal information, but they do play a significant part. ...

Charging for decision-making time often means in practice that an applicant is required to pay more the less he or she gets. Abolishing it might have the effect of prompting agencies, or the government as a whole, to explore ways in which the decision making process could be shortened without the loss of quality, ...¹⁶⁸

164 *Submission 5*, Australian Law Reform Commission, p. 1; Australian Law Reform Commission Report No 70 and Administrative Review Council Report No 40 *Open government: a review of the federal Freedom of Information Act 1982*, Canberra 1996, recommendation 90

165 See also *Submission 1*, Anti-Discrimination Commission (Qld), p. 2

166 *Submission 15*, Mr Chris Finn, Law School, University of Adelaide, p. 5

167 *Submission 15*, Mr Chris Finn, Law School, University of Adelaide, p. 6

168 *Submission 16*, Mr Ron Fraser, p. 43

3.132 Mr Rick Snell told the Committee that he believes that the current fee structure militates against the use of FOI because even those who are relatively well-off can ill afford to spend money on applications to obtain information that at the end of the day are ‘wild punt[s] that may or may not produce some useful information’.¹⁶⁹ Mr Snell asserted that the fee regime is one of the main reasons why journalists do not pursue information through FOI channels at the Commonwealth level and why the media are ‘one of the major weaknesses in th[e] FOI constituency’:

I think part of that is the fact that the game is an unfair game played now at the Commonwealth level. In the early days, Jack Waterford could work on the assumption that there would be positive interpretations of the act, that the exemptions would only be applied in limited circumstances and that a lot of information would come out In the 17 years since then, journalists who attempt to play the FOI game, especially at a national level, do not have much hope. The fee regime is a killer.¹⁷⁰

3.133 The Committee was told that about eighty per cent of FOI requests are for personal information, most of which are without charge. In addition, some other charges are waived. However, where there are requests for blocks of information or where requests are made by lawyers, the media and other similar organisations, the costs can be prohibitive.¹⁷¹ Mr Snell, for example, told the Committee:

Ross Coulthart wrote an article in the *FOI Review* about a Department of Defence request that he put in which came to a fee estimation of \$110,000. Under the regulations – paying for 25 per cent – he had to come up with \$3,000 just to keep in the game. He managed to appeal that down, but those types of very large ballpark figures are enough to scare most people off in the process. If they are cynical about it, they do not think that they will get the information they were seeking in the first place and that is going to take them an excessive time to achieve.¹⁷²

3.134 The Attorney-General’s Department raised issues in respect of some of the proposals in relation to the setting of charges and fees associated with FOI:

- as noted above, the Department does not consider that the function of setting photocopying and transcription fees is an appropriate one for the Commissioner.¹⁷³ Note the ALRC’s response at paragraph 3.111 that such charges can be used to impede access to information;
- the Department does not consider it appropriate that the Bill should attempt to amend the regulation to remove the \$40.00 charge payable for internal review. Rather, the Department states that the regulation should be amended by the

169 *Transcript of evidence*, 5 March 2001, p. 3

170 *Transcript of evidence*, 5 March 2001, p. 5

171 *Transcript of evidence*, 5 March 2001, p. 24

172 *Transcript of evidence*, 5 March 2001, p. 5

173 *Submission 14A*, Attorney-General’s Department, p. 5. The Department stated that: ‘it is not customary for charges applying to whole of government operational services to be set by regulations’

Governor-General-in-Council in the usual and accepted way.¹⁷⁴ The ALRC responded by noting that the Department's opposition to item 126 is based on technical reasons - that it is not good legislative drafting practice to repeal a regulation by amendment to legislation. The ALRC advised that the objection does not go to the substance of the recommendation.¹⁷⁵

- legislative amendment in relation to the remission of fees or non-imposition or reduction of charges because the Department has issued guidelines in respect of these matters and will examine the need to update those guidelines.¹⁷⁶ The ALRC responded by advising that the guideline on remission of fees referred to by the Department was developed in 1992 and not been changed since.¹⁷⁷ Despite these guidelines, the ALRC/ARC saw fit to recommend amendment to clarify that agencies have a general discretion to remit fees and to waive or reduce charges.¹⁷⁸

Committee's comments

3.135 The Committee has taken into account the matters raised by the Attorney-General's Department and the response to those matters provided by the ALRC. On balance, the Committee's view is that the amendments are required and that the matters raised by the Department have been adequately addressed by the ALRC.

Conclusion

3.136 In essence the Committee endorses many of the amendments to the FOI Act contained in the Bill. As will be apparent from the recommendations below, the Committee supports those amendments which:

- promote the pro-disclosure interpretation of the FOI Act;
- seek to ensure that those provisions which allow for access to be refused on the ground that the FOI request is too resource-intensive are not misused;
- facilitate the amendment and annotation of personal records;
- establishes an FOI Commissioner (though the Committee recommends that the role be conferred on the Commonwealth Ombudsman) to oversight the

174 *Submission 14*, Attorney-General's Department, p. 6. In its supplementary submission, the Department reiterated its view that the 'amendment of regulations by legislation is not the normal drafting practice': *Submission 14A*, Attorney-General's Department, p. 6

175 *Submission 5A*, Australian Law Reform Commission, p. 4

176 *Submission 14*, Attorney-General's Department, p. 6

177 The Department stated that: '... although the New Memorandum No. 29 on Fees and Charges was issued in October 1992, the material within that Memorandum relating to remission of fees and non-imposition or reduction of charges remains useful to both agencies and members of the public. However, in its submission, the Department undertook to examine the need to update the Memorandum': *Submission 14A*, Attorney-General's Department, p. 6

178 *Submission 5A*, Australian Law Reform Commission, p. 4. The ALRC remains committed to the views expressed in paragraphs 14.24-14.25 of the *Open Government* report

administration of the FOI Act with substantial and significant powers and functions;

- enhances the review mechanisms available under the FOI Act;
- reduces time limits for processing of FOI requests with the FOI Act by agencies; and
- abolishes, minimises and provides oversight of, fees and charges associated with FOI.

3.137 In its consideration of the Bill as currently drafted, the Committee did not support many of the proposed changes to the exemption regime. The Committee is of the view that the alternative models for exemption regimes should be examined more closely before legislative action is taken in this regard. In the meantime, improving the accountability of agencies via the FOI Commissioner will overcome many of the concerns expressed about the current exemption regime. The Committee, however, has adopted this report on the basis that Senator Murray will move to amend the Bill so as to remove the provisions from the Bill affecting the exemption regime which the Committee did not support. Those provisions are items 27 to 42, 45 to 49 and 74 to 76. Senator Murray reserves the right to introduce these items in a subsequent Bill. The provisions of the Bill which Senator Murray will remove from the Bill and which the Committee did not support were items 27 to 42 and 45 to 49 proposing changes to Part IV of the FOI Act (Exemptions) (paragraphs 3.36 and 3.64) and items 74 to 76 (removing the exempt status from certain agencies and documents from Schedule 2 of the FOI Act) (paragraph 3.60).

3.138 The Committee does not support item 6 - the proposal to insert new subsection 4(5A) to provide that, when determining whether a disclosure of a document would be contrary to the public interest, it is irrelevant that the disclosure may embarrass the Government (paragraph 3.14). The Committee adopts this report, however, on the basis that Senator Murray will amend the Bill to have item 6 removed. Senator Murray reserves the right to introduce this item in a subsequent Bill.

3.139 The Committee also does not support items 64 and 65 (that the AAT be empowered to apply a public interest over-ride test to documents exempt under section 43 of the FOI Act - that is, documents relating to business affairs) (paragraph 3.87). The Committee adopts this report, however, on the basis that Senator Murray will move to have items 64 and 65 removed from the Bill. Again, Senator Murray reserves the right to introduce these items in a subsequent Bill.

3.140 The Committee is concerned, however, about evidence that suggests that some agencies have a poor attitude to FOI. The existence of a culture in any government agency that is indifferent to or trivialises FOI in any way is unacceptable. The Committee is committed to ensuring that any element of resistance in agencies to the principles of FOI should be addressed through education strategies. The Committee recommends, therefore, that consideration be given to enhancing FOI understanding and cooperation in agencies through the development of appropriate education strategies.

Recommendations

1. That the Bill proceed subject to the following changes:
 - (a) That item 43 which amends section 41 of the FOI Act (Documents affecting personal privacy) be amended so that the requirement that a person must have lawfully accessed the document to qualify to have personal records amended, be retained in the FOI Act (paragraph 3.69);
 - (b) That item 44 of the Bill be amended to remove any doubt that the test to be applied in relation to exemptions based on legal professional privilege is the dominant purpose test (paragraphs 3.56 and 3.65);
 - (c) That item 58 (which proposes to remove the prerequisite for internal review before an applicant may proceed to external review) be deleted. The Committee recommends instead that the internal review systems and processes of agencies be audited to facilitate reform to ensure that applicants have access to competent and efficient internal review (paragraph 3.76);
 - (d) That the functions to be conferred on the FOI Commissioner under the Bill (in item 95) be conferred on the Commonwealth Ombudsman and that a specialised unit be established within that office for the purpose of supporting the Commonwealth Ombudsman in that role (paragraph 3.114);
 - (e) That adequate funding and resources be directed to the Commonwealth Ombudsman's office for the purpose of establishing the FOI unit and enabling the Commonwealth Ombudsman (in his role as FOI Commissioner) to properly oversee the administration of the FOI Act (paragraph 3.114);
 - (f) Clause 66R of the Bill (in item 95) should be amended to:
 - provide that the FOI Commissioner (Ombudsman) will report annually to the Parliament, through the Attorney-General, in relation to the areas set out in clause 66R(2) and that report must be tabled by the Attorney-General within 15 sitting days;
 - incorporate the specific requirements of statistical reporting currently addressed under subsections 93(3)-(3A) of the FOI Act; and
 - insert a requirement for agencies to furnish information to the FOI Commissioner, similar to that currently contained in subsection 93(2) of the FOI Act, in order to support this function (paragraph 3.115);
 - (j) That item 12 be amended so that the time limit for processing FOI requests will be reduced to 21 days (paragraph 3.126);
 - (k) That the Bill be amended to provide a maximum time frame for the provision of information to which access is granted (paragraph 3.127);
2. To complement the changes to clause 66R above, section 93 of the FOI Act should be repealed (paragraph 3.115).

3. The Committee recommends that consideration be given to enhancing FOI understanding and cooperation in agencies through the development of appropriate education strategies (paragraph 3.140).
4. The Committee does not support item 6 - the proposal to insert new subsection 4(5A) to provide that, when determining whether a disclosure of a document would be contrary to the public interest, it is irrelevant that the disclosure may embarrass the Government (paragraph 3.14). The Committee adopts this report, however, on the basis that Senator Murray will amend the Bill to have item 6 removed. Senator Murray reserves the right to introduce this item in a subsequent Bill (paragraph 3.138).
5. The Committee does not support the proposed changes to the exemption regime contained in the Bill as it is currently drafted. The proposed changes the Committee does not support are those contained in items 27 to 42 and 45 to 49 proposing changes to Part IV of the FOI Act (Exemptions) (paragraphs 3.36 and 3.64) and items 74 to 76 removing the exempt status from certain agencies and documents from Schedule 2 of the FOI Act (paragraph 3.60). The Committee, however, has adopted this report on the basis that Senator Murray will move to amend the Bill so as to remove items 27 to 42, 45 to 49, 74 to 76 from the Bill. Senator Murray reserves the right to introduce these items in a subsequent Bill (paragraph 3.137).
6. The Committee also does not support items 64 and 65 (that the AAT be empowered to apply a public interest over-ride test to documents exempt under section 43 of the FOI Act - that is, documents relating to business affairs) (paragraph 3.87). The Committee has adopted this report, however, on the basis that Senator Murray will move to have items 64 and 65 removed from the Bill. Again, Senator Murray reserves the right to introduce these items in a subsequent Bill (paragraph 3.139).

Senator M. Payne, Chair
April 2001

Senator A. Murray, Participating Member
April 2001

APPENDIX 1

ORGANISATIONS THAT PROVIDED THE COMMITTEE WITH SUBMISSIONS

Organisation	Sub No.
Anti-Discrimination Commission (Qld)	1
Townsville Community Legal Service Inc.	2
The Law Society of South Australia	3
Mr Julian Knight	4
The Australian Law Reform Commission	5
The Australian Law Reform Commission	5A
Electronic Frontiers Australia Inc.	6
Communications Law Centre	7
Mr Brendan Mills	8
Centre for Public Administration, The University of Queensland	9
Law Council of Australia	10
The Australian Capital Territory Bar Association	11
Ms Marie Wharton	12
Administrative Review Council	13
Attorney-General's Department	14
Attorney-General's Department	14A
Mr Chris Finn	15
Mr Ron Fraser	16
Commonwealth Ombudsman	17
Department of Defence	18

APPENDIX 2

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

Public Hearing, Monday 5 March 2001 (Canberra)

Mr Rick Snell (Private Capacity)

Ms Catherine McPherson, Acting Deputy Ombudsman, Office of the Commonwealth Ombudsman

Mr Frederick Bluck, Director, Policy, Office of the Commonwealth Ombudsman

Mr Allan Overton, (Legal), Office of the Commonwealth Ombudsman

Ms Helen Daniels, Assistant Secretary, Information Law Branch, Information and Security Law Division, Attorney-General's Department

Mr James Claremont, Senior Legal Officer, Attorney-General's Department

Mr Christopher Gallagher, Principal Legal Officer, Attorney-General's Department

Mr Peter Ford, First Assistant Secretary, Information and Security Law Division, Attorney-General's Department

Ms Lani Blackman, Policy and Secretariat, Australian Law Reform Commission

Professor David Weisbrot, President, Australian Law Reform Commission

ADDITIONAL COMMENTS OF LABOR SENATORS

The Bill amends the *Freedom of Information Act 1982* and associated regulations to give effect to recommendations made by the *Open Government* report of the Australian Law Reform Commission and the Administrative Review Council in December 1995, and the *Need to Know* report prepared by the Commonwealth Ombudsman in June 1999.

In particular, the Bill:

- amends the Objects of the Act to promote a pro-disclosure interpretation;
- increases the scope of documents which can be accessed under the Act;
- tightens timeframes for compliance with the Act by government;
- modifies the procedures which apply when requests are refused;
- tightens the exemption provisions;
- provides greater opportunities for people to amend personal records;
- removes the prerequisite for internal review before an applicant can proceed to the AAT;
- boosts the powers of the AAT to require production of exempt documents;
- empowers the AAT to grant access to business documents if justified in the public interest;
- establishes an independent office of the FOI Commissioner to oversee and monitor the Act.

Australia's freedom of information legislation has long been in need of an overhaul. It was with this in mind that Labor Attorney-General, Duncan Kerr, asked the Australian Law Reform Commission and the Administrative Review Council in July 1994 to report on the operation of the legislation and to recommend improvements.

It is an indictment on the present government that, not only has it failed to respond at all to the *Open Government* report, but there have been no signs whatsoever that freedom of information reform is something which the government has any interest in pursuing. It is a welcome development that this inquiry has forced the government to focus on the issue – perhaps for the first time since the Howard government came to office in 1996.

The Committee has recommended that the Bill proceed, subject to a number of significant changes. In some cases, those changes are minor, in others they are of considerable significance. Labor Senators are, however, of the view that there are a number of changes to the Bill recommended by the majority of the Committee, which Labor Senators are unable to support.

The Majority of the Committee has recommended that item 6 of the Bill be deleted. Item 6 proposed to insert new subsection 4(5A) to provide that, when determining whether a disclosure of a document would be contrary to the public interest, it is irrelevant that the disclosure may embarrass the Government.

The change, which the Bill seeks to make, is consistent with decisions of the Federal Court that, when determining whether a disclosure of a document would be contrary to the public interest, it is irrelevant that the disclosure may embarrass the government. There is no good reason for the rejection of this approach.

The majority has recommended that items 27 to 42 and 45 to 49 proposing changes to Part IV of the FOI Act (Exemptions) be deleted. This recommendation has the effect of rejecting almost all changes to the exemption regime, which the *Open Government* report – and many witnesses before the inquiry – criticised as weighted too heavily against those seeking access to information. In many instances, the majority appears to have discounted proposals to particular exemptions without giving sufficient weight to the total evidence or to the complete recommendations of the *Open Government* report.

In Labor Senators' view, there are a number of changes made by the Bill which should enjoy the support of the Committee, including:

- Item 35 – which tightens the exemption for internal working documents by ensuring that it does not apply to purely statistical information;

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- Items 34 and 28 – which repeal Ministerial “conclusive certificates” in relation to internal working documents and documents affecting relations with States – removing what has been described as the Minister’s “get out of jail free card” and empowering the AAT or the Federal Court to make the decision whether release of documents falling into those categories would be in the public interest;
 - Items 74-76 – which remove the exempt status from certain agencies and documents in Schedule 2 of the FOI Act – as the ALRC noted, documents of organisations such as DSD and DIO would retain exempt status under section 33 of the Act which deals with documents affecting national security, defence or international relations

The Bill would empower the AAT to grant access to documents exempt under section 43 (documents relating to business affairs) where the public interest justifies such access.

This change was not recommended in the *Open Government* report, which stated that, the exemption “protect[s] valuable commercial information that in many cases the Commonwealth has obtained free of charge and in the public interest. It is essential to ensure that this information continues to be available to the government and that its value is not compromised by that availability.”

While Labor Senators do not now adopt the amendment sought by the Bill, it is clear that there is considerable concern that the trend towards outsourcing of government work has made it increasingly difficult to hold governments accountable and appropriate action is essential.

For this reason, Labor announced in November 2000 that it will boost the powers of the Auditor-General and the Ombudsman to ensure greater public accountability of those entities, which perform work under contract to a government agency.

An incoming Labor Government will adopt the following framework of public accountability:

1. Every agency will be required to maintain a register of all its contracts and the current Government Gazette Publishing system website will be revamped to ensure the timely publication of all contracts on the Internet

2. Where any agency enters into a contract which is wholly secret, this fact and the reasons for secrecy must be reported in its annual report
3. Where any agency enters into a contract part of which is secret, the agency's chief executive officer must publish a certificate specifying the provisions which have been kept secret and providing reasons for the secrecy
4. These certificates will be forwarded to the Department of Finance and Administration, which must provide details of all new certificates to the Joint Committee on Public Accounts on a monthly basis, and report these details to Parliament every six months
5. If a parliamentary committee is conducting an inquiry into a particular contract then it should be able to access the contract. If part of that contract is commercial-in-confidence and an agency declines to provide it, then an in-camera hearing may be called where the agency will have to demonstrate why the contract must remain confidential. Failing this, the committee may request the Auditor-General to examine the contract.
6. The Auditor-General's powers of entry and search will be extended to cover government contractors.
7. The Ombudsman's jurisdiction will be extended to cover government contractors.

This will ensure that genuine public accountability can be maintained in the face of ever-increasing contracting out of government activities.

Finally, the majority has recommended that the functions to be conferred on the FOI Commissioner under the Bill (in item 95) be conferred on the Commonwealth Ombudsman and that a specialised unit be established within that office for the purpose of supporting the Commonwealth Ombudsman in that role.

Labor Senators support the independent oversight of the freedom of information legislation by an independent and properly resourced Commissioner with sole responsibility for freedom of information matters, and are of the view that such an arrangement would be considerably more beneficial than the current arrangements which places responsibility in each department and provides a reporting role to the Attorney-General. The creation and empowering of an independent officer responsible for FOI matters – whether that office is located within the Office of the Commonwealth Ombudsman or within another appropriate

Commonwealth body – will do much to enhance the profile of freedom of information as a key government responsibility.

Labor Senators note that Senator Murray has now indicated that he will withdraw item 6, items 27 to 42, 45 to 49, items 64 and 65, items 74 to 76 of the Bill as those items did not win the support of the majority of the Committee. To the extent that Labor Senators have expressed their support for the reforms, which are included in some of those items of the Bill, it is disappointing to note that Senator Murray has signalled that the bill will be amended to remove those items in the bill prior to their consideration by the Parliament.

Finally, Labor Senators wish to note an additional report which has bearing on the issue of internal agency review, including internal review in relation to requests under the FOI Act. The report of the Administrative Review Council, *Internal Review of Agency Decision Making (Report No. 44)* examines issues in relation to the internal review of decisions by Commonwealth agencies. Although the report was completed in November 2000, it was tabled by the Attorney-General on 28 March 2001, too late to allow consideration of the matters raised in it by the Committee.

While Labor Senators have not had the opportunity to fully digest the contents of that report, it does make a number of useful observations about the internal review process and considers the advantages and disadvantages of internal review. A proper consideration of whether the exhaustion of avenues of internal review should be a prerequisite to eligibility for external review in freedom of information matters (as recommended by the majority of the Committee) should have regard to the observations of that report.

Senator B Cooney

Member, Legal and Constitutional Legislation Committee

Senator J Ludwig

Participating Member, Legal and Constitutional Legislation Committee