THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: PuLC:CBvk220523

22 May 2023

Dr James Popple
Chief Executive Officer
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By email: nathan.macdonald@lawcouncil.asn.au

Dear Dr Popple,

Inquiry into the operation of the Commonwealth Freedom of Information laws

Thank you for the opportunity to provide input for a Law Council submission to the inquiry into the operation of Commonwealth Freedom of Information (**FOI**) laws. The Law Society's submission is informed by its Public Law Committee.

Background

We have previously submitted that the transparency afforded by the FOI scheme is critical to the effective operation of the administrative law system, and more broadly to the integrity of our democratic institutions. We attach those submissions made in 2021 for your information and reiterate the comments made in respect of the FOI scheme.

Systemic issues undermine the functionality of the FOI scheme. The under-resourcing of both the Office of the Australian Information Commissioner (**OAIC**), as well as for agencies to address FOI requests in a way consistent with the objects of the *Freedom of Information Act 1982* (Cth) (**FOI Act**), are well-documented. The Centre for Public Integrity contends that the OAIC's data in respect of claims granted or refused in full suggests that there may be a trend away from disclosure. The Law Society understands that, since 2011-12, the proportion of claims granted in full has fallen by over 30 per cent. This has been accompanied by a 50 per cent increase in the proportion of claims refused in full.[1]

More recent figures from the OAIC's *Annual Report 2021-22* show that the OAIC set aside 35 per cent of the decisions it reviewed that year,[2] suggesting the quality of decisions remains a significant concern. Our members note that the limited resources of agencies, particularly smaller agencies, to properly consider and make decisions on FOI requests, together with under-resourcing of the OAIC, can adversely affect the quality of decision-making. The OAIC is currently not able to provide the education, training and guidance to support agencies to

[1] Centre for Public Integrity, "Delay and Decay: Australia's Freedom of Information Crisis," August 2022, Briefing Paper, 11, online: https://publicintegrity.org.au/wp-content/uploads/2022/09/FOI-Delay-and-Decay-Final.pdf, 10

[2] Office of the Australian Information Commissioner, *Annual Report 2021-22* (Report, 28 September 2022) 44.

build a culture of disclosure. We understand anecdotally that, due to these factors, agencies may adopt an approach to FOI requests that tends to favour refusal of requests.

Further, the Centre for Public Integrity points to recent high-profile Administrative Appeals Tribunal (**AAT**) decisions[3] which demonstrate incorrect reliance on the exemptions. The Commonwealth Auditor-General observed that the number of exemptions being claimed by all entities across the Commonwealth had increased by 68.4 per cent between 2012 and 2017,[4] with the use of the 'National Security' exemption (s 33 of the FOI Act) climbing by almost 250 per cent, and the use of the 'Certain Operations' exemption (s 47E of the FOI Act) climbing by almost 320 per cent.[5]

Delays, at both initial agency request stage and Information Commissioner review stages, have not improved. Our members report that if applications are contested, delays of three to five years are not uncommon. One recent example of Information Commissioner review highlights problems with the review process. An FOI request was made on 13 June 2018. It was broad in its terms but by August 2018 the request had been modified and one responsive document had been identified. Access was refused. That refusal was confirmed on internal review on 19 September 2018. The applicant applied for Information Commissioner review on 18 October 2018. Four and a half years later, on 12 May 2023, the applicant was told that the original decision was confirmed. Ironically this application was for 'the most recent draft plan for the Government's response to the demise of the Queen'. Putting to one side the merits of the application, there are legitimate concerns over the unacceptable delay to the finalisation of the decision-making process. Such delays render the transparency objective of the FOI laws ineffective (ss 3(2)(b) of the FOI Act), and undermine public confidence in the law and in the processes of democracy and representative government.

The Centre for Public Integrity states that:

> Despite demand [for FOI requests] changing little, the speed with which FOI requests have been resolved has been falling. Section 15(5)(b) of the FOI Act requires that requests should be resolved 'as soon as practicable', but 'no later than the end of the period of 30 days after the day on which the request is received'.[6] This statutory timeline has been increasingly ignored. For example, in 2011-12, 1.3 per cent of FOI requests were over 90 days late; by 2020-21, this figure ballooned to 12.4 per cent. Over this same period, the total proportion of decisions made outside the statutory period had increased from 11.5 per cent to 22.5 per cent: 2016-17 was particularly noticeable, with almost half of FOI requests being resolved outside of the statutory timeframe.[7]

Given that the effect of delay is non-disclosure during the period of review, the Law Society's view is that the FOI system requires significant readjustment.

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[3] In *Patrick v Secretary, Department of PMC (Freedom of Information)* [2021] AATA 2719 the AAT overturned a decision to withhold Auditor-General report on national security grounds which found that Commonwealth had not achieved value for money in defence procurement.
In *Patrick v Secretary, Department of PMC* [2020] AATA 4964 the AAT overturned a decision to exempt National Cabinet documents under 'Cabinet' exception contained in s 23 of the FOI Act.
In August 2022, after three years of delay, the OAIC ruled that an Australian Federal Police letter detailing potential 'improper conduct overseas' by former MP George Christensen was not exempt on national security grounds.

[4] Note 1, 12.

[5] Ibid citing Australian National Audit Office, *Administration of the Freedom of Information Act 1982* (Report, 19 September 2017), 7.

[6] Section 15(5)(b) of the FOI Act.

[7] Note 1, 5.

Suggested changes to the FOI system

The OAIC should be properly resourced, particularly so that it can assist agencies to build a culture of disclosure that "increases recognition that information held by the Government is to be managed for public purposes, and is a national resource" (s 3(3) of the FOI Act). The OAIC should have the capacity to address systemic issues through, among other measures, education, training and monitoring.

Government and agencies should be properly supported to carry out their obligations lawfully under the FOI Act. Consideration might be given to better support first instance decision makers within each agency, including by locating them within, or closely adjacent to, and reporting to, the inhouse legal function. In addition, while statutory timeframes should be enforced more effectively, consideration should be given to expanding the scope for agencies to extend the statutory timeframe in limited circumstances, where necessary, to achieve better decisions at first instance. Conversely, it should also be emphasised that an administrative access scheme[8] exists, and agencies should consider releasing information without the need for a formal process under the FOI Act. Consideration should be given to assisting agencies to implement the administrative access scheme more extensively, so that more information is captured, or more guidance is provided to agencies on when information can be provided through that scheme.

Further, when documents are released, the final step of an FOI request process should be that they are made publicly available via the department or agency's disclosure log (with necessary redactions including personal information), with an appropriate and effective search function to make the documents publicly accessible. In our view, there is merit in making this a statutory requirement, rather than retaining the choice between direct disclosure and making the documents available on application.

More significantly, we suggest that it would be timely to consider whether the Information Commissioner's review function should be located elsewhere, such as within a separate division in the new review body that will replace the AAT.

Prior to 2010, FOI reviews were heard directly by the AAT, without first requiring review by the Information Commissioner. In our view, there are potential benefits, both in terms of independence and efficiencies, to be gained by returning to this approach. Of course, our suggestion presumes that the new review body is adequately resourced (including in respect of member expertise) and that it is significantly more efficient and functional than the current AAT. It also presumes that, given the serious nature of the OAIC's under-resourcing, losing the review function should not exclude the OAIC from receiving any additional resourcing required to properly carry out its other functions.

Relocating the review function to the new review body ought to provide the OAIC additional capacity to focus on its systemic functions, which should continue to include the right to make submissions on any matter on foot at the new review body, and to receive the submissions of all parties (similar to the powers of the Information Commissioner in NSW). The examiner at the new review body should also have the power to seek the views of the Information Commissioner.

This would allow the Information Commissioner to pursue the statutory objectives via a different avenue, and to do so in a more strategic way. For example, we understand from our

[8] OAIC, *Administrative Access*, online: https://www.oaic.gov.au/freedom-of-information/freedom-of-information-guidance-for-government-agencies/proactive-publication-and-administrative-access/administrative-access.

members that, in NSW, the Information Commissioner has had a focus on matters involving whether an adequate search was carried out, and matters involving refusals to deal.

The new review body should have the power to refer matters that indicate any systemic issues or wrongdoing to the Information Commissioner. The Information Commissioner, in considering these matters, would then be in the position to make recommendations for any policy and practice reform required and to better focus training and resources on problem areas. The Information Commissioner might also then have capacity to monitor whether the agencies in question have adequately implemented the new review body's decisions, and to focus, and publicly report on, on any repeated or deliberate non-compliance.

Further, if the appeal function is referred to the new review body, the Information Commissioner may have further capacity to carry out mediations. An early dispute resolution approach may assist parties to determine with greater precision what information is actually sought, and therefore assist with earlier resolution. It may assist agencies to undertake proactive disclosure with greater confidence.

We suggest that the new division of the new review body tasked with examining FOI reviews should operate under more flexible rules than other divisions, and that members are empowered to determine the level of formality required. We suggest that the member should in the usual course make decisions on the papers, unless either a party applies for a hearing or the member considers it desirable in the circumstances. In the event that no hearing is required the usual application fees to the new review body should be waived.

Thank you for the opportunity to make comments. Questions at first instance may be directed to Vicky Kuek, Head of Social Justice and Public Law Reform, on (02) 9926 0354 or victoria.kuek@lawsociety.com.au.

Yours sincerely,

Cassandra Banks
President

Encl.

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Our ref: PuLC:JWvk171121

17 November 2021

Mr Michael Tidball
Chief Executive Officer
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By email: nathan.macdonald@lawcouncil.asn.au

Dear Mr Tidball,

Inquiry into the performance and integrity of Australia's administrative review system

Thank you for the opportunity to contribute to the Law Council's submission to the inquiry into the performance and integrity of Australia's administrative review system. The Law Society's submission addresses each of the terms of reference, and is informed by its Public Law Committee.

We suggest that the current administrative law system is not functioning optimally, and this is primarily due to the lack of political commitment to the integrity of the system. For example, the recent failings in respect of the Government's Online Compliance Intervention scheme, popularly known as the "Robodebt" scheme, occurred despite the existence of the *Automated Decision-Making Better Practice Guide* prepared by the Office of the Australian Information Commissioner (**OAIC**), the Attorney-General's Department, and the Office of the Commonwealth Ombudsman. This example also illustrates, among other things, the lack of impact relevant Administrative Appeals Tribunal (**AAT**) decisions had on rectifying the issues identified in the administrative decision-making process,[1] and the clear need for the reinstatement of an effective mechanism for oversight and continuous improvement of the administrative law system, that is, the Administrative Review Council (**ARC**).

The Law Society commends to the Law Council the article prepared by a member of our Public Law Committee, J Boughey, 'A call for ongoing political commitment to the administrative law project' (2021) 28(4) *Australian Journal of Administrative Law* (forthcoming) ("**Boughey article**"). A copy of this article is attached and this submission draws from that article.

The administrative law system is intended to provide a web of accountability which:

- protects individuals against unfair and arbitrary use of public power;
- is needed to legitimise and ensure public confidence in government; and
- enables informed participation in democratic processes.

[1] T Carney, 'Robo-debt illegality: The seven veils of failed guarantees of the rule of law?' (2019) 44(1) *Alternative Law Journal*, 4-10 at 6-7.

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The main pillars of the suite of reforms which took place in the late 1970s to early 1980s as a result of the Report of the Commonwealth Administrative Review Committee[2] chaired by Sir John Kerr, are the establishment of the AAT, the Commonwealth Ombudsman and the ARC, and the enactment of the *Administrative Decisions (Judicial Review) Act 1977* (Cth). The *Freedom of Information Act 1982* (Cth) (**FOI Act**) followed later, underpinned by the same goals of government transparency and accountability.

We note that these transformative reforms were only possible because they enjoyed high levels of bipartisan political support and commitment. In our view, political commitment to maintaining the performance and integrity of the administrative law system has declined significantly since that time. As Boughey notes[3] the need for a well-functioning administrative law system is just as crucial today. Modern legislation is longer and more complex; government relies extensively on "soft law"; automated administrative decision making is increasingly prevalent and government has increasingly used the private and community sectors to exercise administrative functions and deliver services. Taken together, the potential for significant accountability deficits is clear.

Administrative Appeals Tribunal

The AAT is a centrepiece of the administrative law system. In this regard, the Law Society notes that the Government has yet to respond to the *Report on the Statutory Review of the Tribunals Amalgamation Act 2015* ("Callinan Report"). This report was completed in December 2018 and tabled in July 2019, and recommends measures that continue to be pressing and relevant, including to this inquiry's terms of reference. We strongly urge the Law Council to continue to advocate that the Government provide a comprehensive response to the Callinan Report.[4]

For the AAT to effectively perform its functions, it must be independent and perceived to be independent. However, in our view, its independence has been seriously undermined via a combination of political appointments, lengthy delays/backlogs, and the Government ignoring its decisions.

The AAT needs a merit-based, transparent appointment process. The Law Society supports an appointment process that includes public advertisement, clear and relevant selection criteria, and an independent selection process.

Further, experienced members recommended by the President for reappointment should be reappointed. Merit-based appointments will assist with delays/quality of decisions and will also better allow members to exercise their statutory function without fear of jeopardising future appointments (that is, for making decisions adverse to government). Logan J's comments (then acting President) in *Singh (Migration)* [2017] AATA 850,[5] while made under different

[2] Commonwealth Administrative Review Committee, Report (Parliamentary Paper No 144/1971, August 1971).
[3] Boughey article, 13.
[4] The Law Society notes that while it generally supports all of the recommended measures in the Callinan Report, it reserves its position on measure 24, in respect of the retention and utilisation of the Immigration Assessment Authority (**IAA**). The Law Society would have concerns if the IAA model was applied to other divisions of the AAT as a means of responding to the backlog of cases.
[5] For example, see Logan J's comments at [18]:

> That does not mean that Tribunal decisions are immune from criticism. It does mean that, in respect of such individual decisions, Tribunal members speak via their reasons and otherwise not at all. It would be subversive of the very independence from the partisan or political that is a feature of the Tribunal were it otherwise. Further, any member who allowed himself or herself to be persuaded as to an outcome by partisan or political rhetoric by a Minister, any other administrator or the popular press would be unworthy of the trust and confidence placed in him or her by His Excellency the Governor-General and untrue to the

circumstances, highlights the vulnerability of non-judicial AAT members and, in our view, reinforces the importance of appointments/reappointments being made in a transparent and merit-based approach.

Additionally, the Callinan Report notes a number of submissions that raise the issue of fees, particularly those associated with seeking review of a migration decision. While no recommended measures were suggested in that context, given a central principle of the administrative law system is to protect individuals against unfair or arbitrary use of public power, we suggest that the Law Council raise again the need for review of the Migration & Refugee Division fees, and the reinstatement of a hardship waiver for applicants. Our members inform us that the fee associated with seeking review of a migration decision (other than a bridging visa that has resulted in the person being detained or a decision in relation to a protection visa) has increased to $3000 (from $1764). It is possible to have this fee reduced by 50% if the review applicant can demonstrate that payment is likely to cause 'severe financial hardship'. However, in the experience of our members, this increase (even with the fee reduction) has proven to be prohibitively expensive, with many no longer being able to seek review.

Administrative Review Council

Government powers and functions are not static and as noted previously, how Government exercises its administrative functions and delivers services constantly evolves. Ongoing monitoring and responses are needed so that the system can adapt to new challenges in administration. We note that among its other functions, this was a critical role that the ARC played before it was effectively abolished (in fact, but not in law) by removing its funding, and having its functions transferred to the Attorney-General's Department.

Part V of the *Administrative Appeals Tribunal Act 1975* (Cth) (**AAT Act**) confers upon the ARC a range of functions and connected powers. It mandates that the ARC "keep the Commonwealth administrative law system under review, monitor developments and recommend to the Attorney-General improvements that might be made to the system. This notion of continuous review and improvement reflects administrative law's normative goals to generally enhance government decision-making."[6]

Bedford's analysis of the ARC's legislative functions and powers under the AAT Act addresses the question of the importance of the ARC, and bears setting out in detail. She notes that section 51:

> … details another eight distinct functions for the ARC. Importantly, it is required to ascertain and keep under review the classes of administrative decisions which are not subject to review by a court, tribunal, or other body. This aspect of its functions is crucial as the ARC's oversight role encompasses the identification of gaps in Australia's government accountability framework. Likewise, under its legislation, the ARC has a rolling responsibility to facilitate the training of administrative decision-makers.
>
> Constant oversight of the review processes for government decisions by both courts and tribunals also features prominently in the ARC's functions, with a particular focus on improving the law and practice relating to judicial review. In respect of tribunals, the ARC is

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oath or affirmation of office which must be taken before exercising the Tribunal's jurisdiction.[9] For those members who do not enjoy the same security of tenure as judges, that may call at times for singular moral courage and depth of character.

[6] Narelle Bedford, 'The Kerr Report's vision for the Administrative Review Council and the (sad) modern reality' on AUSPUBLAW (21 May 2021) https://auspublaw.org/2021/05/the-kerr-reports-vision-for-the-administrative-review-council/.

> tasked with advising government on the composition and jurisdiction of the Administrative Appeals Tribunal ('AAT').
>
> Other matters covered in Part V include obligations to table any reports in both Houses of Parliament within 15 days, produce an Annual Report every financial year, and promote knowledge about the Commonwealth administrative law system. The Attorney-General is given power to make directions and referrals of topics for inquiry and report by the ARC. Therefore, the purview of the ARC under the *AAT Act* is broad, proactive, and multi-faceted.[7]

These functions would be more effectively carried out by dedicated agency, and having them absorbed into the general functions of the Attorney General's Department leaves a gap in accountability and denies the administrative law system a mechanism for continuous improvement.

The Law Society strongly supports measure 26 in the Callinan Report, that "[t]he ARC should be reinstated and constituted in accordance with Part V of the AAT Act." At [1.27], the Callinan Report notes:

> The *AAT Act* clearly assumes the existence of the ARC. It is the duty of the Executive under s 61 of the Constitution to execute and maintain the laws of the Commonwealth. Whether a "transfer" of the functions and powers conferred on the ARC by s 51 of the AAT Act is legally possible or not, it is in my view contrary to the intention and spirit of that Act that any section of any department of government might have a role of overseeing or inquiring into the work of the AAT, that is the reviewer of decisions made by officials of many other departments of government.

We support Bedford's view that as governments and governing become more complex, and the nature of decision making evolves, the need for an over-arching body with a longer term view, and drawing from a cross-section of experts, is even more critical today.

Freedom of information

While the FOI Act was not a part of the original suite of reforms, the transparency afforded by the FOI scheme is critical to the effective operation of the administrative law system, and more broadly to the integrity of our democratic institutions.

We refer the Law Council to the attached article, in which Boughey sets out evidence of the deterioration of government transparency, under the FOI Act and more broadly. The agency data set out at page 10 "reveals a general trend over the past 20 years of requests to access non-personal information being refused more often and granted in full less often." Boughey argues that: "The fact the OAIC and AAT overturn more than 50% of refusal decisions lends support to the impression that agencies are over-using exemptions" citing the *Annual Report 2019-20* of the OAIC.[8]

The Abbott Government attempted to abolish the OAIC in 2014. The Freedom of Information (New Arrangements) Bill 2014 lapsed in the Senate in 2016, but the OAIC was instead stripped of most of its FOI funding, thereby severely limiting its ability to perform its strategic FOI functions.[9] This has resulted in a backlog of reviews and widespread delays at the first instance decision stage. Boughey notes that, "In some instances, delays have the same effect of refusing access; for example when a minister resigns before a decision has been made."[10] Our members inform us that the delay between an application and a decision by the Information Commissioner (if review steps are taken) can be well in excess of a year. In our

[7] Note 6.
[8] Office of the Australian Information Commissioner, *Annual Report 2019-20* (Report, 15 October 2020) 155, 158.
[9] Boughey article, 10-11.
[10] Boughey article, 11.

view, this is clearly an unacceptable situation for a system that is intended to ensure access to information.

The Law Society submits that funding must be restored to the OAIC. There is clearly a need for an effective, quick and independent umpire for information requests.

Thank you for the opportunity to provide comments. Questions at first instance may be directed to Vicky Kuek, Principal Policy Lawyer, at victoria.kuek@lawsociety.com.au or (02) 9926 0354.

Yours sincerely,

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