THE LAW SOCIETY
OF NEW SOUTH WALES

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Dear Dr Popple,

FREEDOM OF INFORMATION AMENDMENT BILL 2025

Thank you for the opportunity to provide feedback to the Law Council to inform its submission to the Senate and Constitutional Affairs Legislation Committee in relation to its inquiry into the Freedom of Information Amendment Bill 2025 (Cth) (**Bill**). The Law Society's Public Law, Human Rights and Privacy and Data Law Committees contributed to this submission.

We understand that the Bill is intended to improve the operation of the Freedom of Information (**FOI**) framework, including by limiting the scope and size of individual FOI requests. It is widely documented that the current framework is characterised by delay, including on account of extensive processing times, both within Commonwealth agencies and at the Office of the Australian Information Commissioner (**OAIC**).[1]

We are concerned, however, that the Bill fails to address the core challenges facing the FOI regime, including with respect to its design, administration, delays, and funding. In addition, we suggest it includes several amendments which may have the effect of reducing transparency around Government decision-making and hindering scrutiny of matters in the public interest. Given the importance of the FOI regime for the effective operation of Australia's administrative law system and, more broadly, the integrity of our democratic institutions, we are concerned that the overall effect of the amendments may disincentivise genuine engagement with the FOI system.

We make the following comments on the Bill:

Schedule 1 – Objects of the *Freedom of Information Act 1982* (Cth) (FOI Act)

The Law Society opposes the changes to the objects of the FOI Act, including the proposed qualification at s 3(2):

[1] Centre for Public Integrity, *Delay and Decay: Australia's Freedom of Information Crisis* (Briefing Paper, August 2022): https://publicintegrity.org.au/wp-content/uploads/2022/09/FOI-Delay-and-DecayFinal.pdf. See also Centre for Public Integrity, *Freedom of information: Secrecy and Delay* (Final Report, July 2025) : https://publicintegrity.org.au/wp-content/uploads/2025/07/FOI-Secrecy-and-Delay-1.pdf.

> The Parliament intends, by these objects, to promote Australia's representative democracy by contributing towards the following:
>
> (a) increasing public participation in Government processes, with a view to promoting better-informed decision-making;
> (b) increasing scrutiny, discussion, comment and review of the Government's activities;
>
> **while, at the same time, providing safeguards to ensure the protection of essential private interests and the proper and effective operation of government** (emphasis added).

While safeguards to protect essential private interests are required, we suggest these do not form the essential underlying purpose of an FOI regime in a responsible and representative democratic system of government. In our view, this language serves to dilute the focus of public participation and scrutiny of government activities, which are core tenets of the regime.

We are further concerned that this qualification may discourage the making of FOI requests and entrench a culture within the public sector marked by an overreliance on the exemptions contained in the FOI Act. It may also impede the efficient administration of the FOI framework by introducing uncertainties around the application of the public interest balancing exercise.[2]

In our view, relevant public and private interests are sufficiently protected by the existing exemption and consultation mechanism within the FOI framework. In the interests of transparency and accountability, we consider the original objects should be retained without qualification. Further, a purposive approach, requiring consideration of those objects when making decisions under the FOI Act, should be expressly required, to further promote a genuine FOI culture.

Schedule 2 – Anonymous Requests

The Law Society does not support the requirement that an FOI request cannot be made anonymously or under a pseudonym, and that a person must declare when making an FOI request on behalf of a third party. As the application of the exemptions under the FOI Act is generally judged against disclosure to the "world at large", unless the request is for information relating to the applicant's own affairs, it is arguable that this provision is unnecessary. For example, a disclosure might be contrary to Australia's national security interests and would therefore qualify for an exemption, regardless of the identity of the applicant. A further concern is that requiring all applicants to reveal their personal details may raise concerns for whistleblowers, who may fear reprisals if those details are revealed.

If the requirement is to be maintained, we suggest that a mechanism be established whereby a person can apply to the Commonwealth Ombudsman to make an FOI request on their behalf, without revealing the person's personal affairs. In order to deter vexatious requests, the legislation could provide that the Ombudsman would need to be satisfied that the request was in the public interest, including where the request is an appropriate

[2] See the recent decision of the UK Supreme Court in *Department for Business and Trade v The Information Commissioner* [2025] UKSC 27.

avenue for the legitimate pursuit by the applicant of their legal rights and interests, before proceeding to lodge it with the appropriate agency.

If the Government is concerned by an increasing incidence of AI-bot generated requests, we suggest that this should be remedied through an IT solution in a way that does not remove rights from legitimate potential applicants who wish to remain anonymous.

Schedule 3 – Discretionary 40-hour processing cap for FOI requests

The Bill introduces a discretionary processing cap which permits an agency or Minister to issue a practical refusal reason in relation to a request for a document if the work involved in processing the request would exceed 40 hours, or any greater number of hours prescribed by regulation. In deciding whether the cap is reached, the Agency may take into account the matters specified in s 24AA(2), including:

> …
> (a) identifying, locating or collating the documents within the filing system of the agency, or the office of the Minister;
> (b) deciding whether to grant, refuse or defer access to a document to which the request relates, or to grant access to an edited copy of such a document, including resources that would have to be used for:
> (i) examining the document; or
> (ii) consulting with any person or body in relation to the request;
> (c) making a copy, or an edited copy, of the document;
> (d) notifying any interim or final decision on the request.

In the view of some of our members, a processing cap could encourage more discipline around the framing of applications. However, we note that it is predicated on the assumption that an applicant is able to identify with a high level of precision the information that they are seeking and is sufficiently skilled to frame their request. This may put certain applicants, particularly vulnerable individuals, at a disadvantage.

While we acknowledge that the cap is discretionary, it is possible that complex matters in the public interest will be more frequently met with a practical refusal. If the 40-hour cap is imposed, we therefore suggest that time spent on certain aspects of considering an FOI application should be excluded, in particular time that is dedicated to considering the public interest aspects of the request. This could help to preserve the objects of the FOI Act, including public participation in and increased scrutiny of government processes.

If a broad-brush approach such as the 40-hour processing cap is to be imposed, agencies should be encouraged and trained to engage with applicants at an early stage to assist them to narrow and better target their application. Without this cultural change, it is possible that some FOI officers would adopt an adversarial mindset and heavily rely on practical refusals. We note, for example, that required consultation with affected third parties before the granting of access can be time-consuming. Where appropriate, FOI officers could assist applicants in excluding that material to reduce the administrative burden arising from the request.

Schedule 6 - Application fees for FOI requests

The Bill amends the FOI Act to allow for an application fee to be specified in the Regulations for FOI requests, internal reviews and Information Commissioner reviews.

On balance, we consider it would be reasonable in many circumstances for applicants to make some contribution to the costs of processing FOI applications, given these can be time-consuming and costly. Further, an application fee may discourage unmeritorious or vexatious applications. We note this is the approach for state-based information access regimes such as the *Government Information (Public Access) Act 2009* (NSW) (**GIPA**).[3]

We support the conclusions reached in the 2013 Review of the FOI Act and *Australian Information Commissioner Act 2010* (Cth) (**Hawke Review**) as regards the roles of fees and changes set out as follows:

> Fees and charges should not be used to discourage applicants from exercising their rights under FOI, nor as a mechanism to seek full costs recovery or to generate revenue for agencies. Nevertheless, it is appropriate for users to make some contribution to the costs of processing applications as in many cases the costs of processing individual requests can be substantive. Costs should be set at an appropriate level to reflect the type of information sought and the resources of the applicant.[4]

In our view, any application fee should be set at a level that has regard to these matters.

We also note that the waiver of fees is to be addressed through the Regulations.[5] However, the Government has not provided any information on the considerations to be taken into account in allowing for a waiver or any details on the process to apply. While the opportunity to apply for a fee waiver may in theory assist applicants and potential applicants facing economic hardship, the absence of clear grounds for the waiving of fees could represent a further hurdle for an applicant to overcome, and may even increase the administrative burden on the processing agency.

We suggest that there are certain categories of FOI requests, for example those made for the purpose of challenging a decision under the *Migration Act 1958* (Cth), which should be exempt from fees as a matter of course. This should be provided for in the FOI Act, in addition to the proposed exception for documents containing personal information about the applicant as proposed in s 93C(3).

Schedule 7 – Operation of the Cabinet Exemption

The Law Society opposes the changes to the Cabinet exemptions which, we consider, are antithetical to principles of transparency.

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[3] *Government Information (Public Access) Act 2009* (NSW) s 41(1)(c).
[4] Allan Hawke, Attorney-General's Department, *Review of the Freedom of Information Act 1982 and Australian Information Commissioner Act 2010* (Report, 2 August 2013) 70: https://www.ag.gov.au/sites/default/files/2020-03/FOI%20report.pdf.
[5] See Schedule 6 of the Bill, with proposed insertion of s 93C(2)(c).

The Bill proposes that the 'dominant purpose' test be replaced with a 'substantial purpose' test.[6] In our view, this amounts to a significant dilution of the test and cannot be supported.[7] Further, the proposed changes would extend protection from disclosure to a document to the extent it 'summarises, describes or refers to the contents of a document to which subsection 34(1) applies'. We note that 'refers to' is a broad, relational term which could mean that any reference to the contents of a Cabinet document, however small, could suffice to make it exempt from disclosure.

The definition of the term 'consider' proposed in the Bill is another concern.[8] It includes 'discuss, deliberate, note and decide'. In our view, the fact that a matter is included in a Cabinet agenda for noting as opposed to deliberation and debate should not be a satisfactory basis for an exemption from disclosure.

We suggest that the practical effect of these amendments will be to exclude more documents in the public interest from disclosure under the FOI regime, under the cloak of cabinet confidentiality. This is of particular concern given the Robodebt Royal Commissioner recommended that s 34 of the FOI Act should be repealed.[9] It was also the view of the Commissioner that an amendment to s 34 should 'make clear that confidentiality should only be maintained over any Cabinet documents or parts of Cabinet documents where it is reasonably justified for an identifiable public interest reason'. [10] We also note the recommendation that the Commonwealth Cabinet Handbook should be amended so that the description of a document as a Cabinet document is no longer itself justification for maintaining the confidentiality of the document, and suggest that this recommendation is in effect reflected in the Bill.[11]

Schedule 7 – Deliberative Processes Exemption

The Bill amends the public interest exemption factors in s 11B as they relate to the deliberative processes exemption in s 47C. The proposed amendments to s 11B are as follows:

> (3A) If the document is conditionally exempt under section 47C (deliberative processes), factors that are against giving access to the document in the public interest include whether giving access to the document would, or could reasonably be expected to, have any of the following effects (whether in a particular case or generally):
> (a) prejudice the frank or timely discussion of matters or exchange of opinions between participants in deliberative processes of government for the purposes of consultation or deliberation in the course of, or for the purposes of, those processes;
> (b) prejudice the frank or timely provision of advice to or by an agency or Minister, or the consideration of that advice after it is provided;
> (c) prejudice the orderly and effective conduct of a government decision-making process.

[6] Freedom of Information Amendment Bill 2025 (Cth) s 34(1)(a) and (c).
[7] Other analogous tests, such as in the context of legal professional privilege, have strengthened. See 'sole purpose' test versus 'dominant purpose' test in *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49.
[8] Freedom of Information Amendment Bill 2025 (Cth) s 34(6).
[9] *Royal Commission into the Robodebt Scheme* (Final Report, 7 July 2025) 656-657: https://robodebt.royalcommission.gov.au/system/files/2023-09/rrc-accessible-full-report.PDF.
[10] Ibid., 657.
[11] Freedom of Information Amendment Bill 2025 (Cth) s 34(7).

These amendments appear in part designed to codify the 'Howard criteria' identified by Justice Davies in *Re Howard and the Treasurer* [1985] AATA 100. We are concerned that the proposed factors, particularly 11B(3A)(c), which includes prejudice to the orderly and effective conduct of a government decision-making process, is overly broad and ambiguous.[12] We therefore suggest that the proposed amendments to the public interest in s 11B, as they relate to the deliberative processes exemption in s 47C, should be redrafted with a focus on tangible harm.

The need for reform of the FOI regime beyond the Bill

The Law Society considers that the amendments introduced by the Bill will not address many of the identified problems facing the FOI regime. In particular, we draw attention to the systemic and cultural issues raised as part of the 2023 inquiry by the Legal and Constitutional Affairs Committee into the operation of Commonwealth FOI laws. These included a particular focus on the under-resourcing of the OAIC, in light of changes to the volume and nature of FOI applications and delays in finalising FOI applications and reviews.[13]

While under-resourcing has been addressed in part through increases in funding and staffing at the OAIC, we note that, in the experience of our members, delays remain a significant barrier at the review stage. This is reflected in a recent report of the Centre for Public Integrity, which found that the time taken by the OAIC to process internal review applications had risen to 15.5 months in 2023–24.[14] As noted in that report:

> This delay is disastrous for transparency and democracy. By the time a review is completed, the documents in question have often lost their political and public relevance—blunting the FOI regime's democratic function.[15]

In our view, this could be addressed in part by amending s 55K(4)(a) of the FOI Act so that a complete statement of reasons is not required in all cases. Rather, the Information Commissioner could be entitled to produce a short form of reasons, for example, which would only be required to address in detail any divergence in reasoning from the decision at the internal review stage.

Cultural change is required within agencies to ensure that FOI officers are aware of the objectives of the FOI regime, and that their role is to support them.[16] Officers should be encouraged to assist the applicant to narrow their request. Further, there should be a statutory means by which the agency can create a document to provide the information sought by the applicant as opposed to spending time locating and reviewing multiple documents: see, for example, s 75 of the GIPA Act, which is set out as follows:

> **75 Providing access by creating new record**
> (1) An agency is not prevented from providing access in response to an access application to government information held by the agency by making and providing access to a new record of that information.

[12] Note commentary by the Queensland Information Commissioner in *Eccelston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60, [107]-[108].
[13] Legal and Constitutional Affairs References Committee, Parliament of Australia, *The operation of Commonwealth Freedom of Information (FOI) laws* (Final Report, December 2023) 60.
[14] The Centre for Public Integrity, *Freedom of information: Secrecy and Delay* (Final Report, July 2025) 7.
[15] Ibid.
[16] Office of the Victorian Information Commissioner, *The culture of implementing Freedom of Information in Australia* (Final Report, 18 June 2024) <Australia-Linkage-Council-Research-Project-FOI-Culture-study-Final-report.pdf>.

(2) An agency's obligation to provide access to government information in response to an access application does not require the agency to do any of the following—
(a) make a new record of information held by the agency,
(b) update or verify information held by the agency,
(c) create new information, or produce a new record of information, by deduction, inference or calculation from information held by the agency or by any other use or application of information held by the agency.

The Government may wish to consider the establishment of alternative access schemes, such as that which already exists under s 15A of FOI Act in relation to the personnel records of staff. Similarly, greater consideration could be given to agency-specific arrangements or "off ramps" to provide public documents outside of the FOI framework. We note that further consultation would be required on such schemes, which would require strict review protocols, coupled with detailed explanations of materials that could be accessed 'as a matter of course' and those which would be withheld.

These protocols could potentially assist in reducing the volume and breadth of FOI applications, as well as creating clear principles for providing access regarding common types or classes of documents. The establishment of such access rules or principles are, arguably, in line with s 8A of the FOI Act and requirements for agencies to publish 'operational information'.

Thank you for the opportunity to comment. Questions at first instance may be directed to Sophie Bathurst, Senior Policy Lawyer, at (02) 9926 0285 or Sophie.Bathurst@lawsociety.com.au.

Yours sincerely,

Jennifer Ball

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