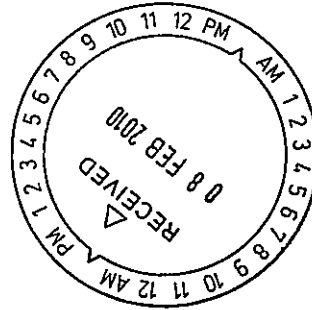




# ADMINISTRATIVE REVIEW COUNCIL

10/2882

The Secretary  
Senate Standing Committee  
on Finance and Public Administration  
PO Box 6100  
Parliament House  
Canberra ACT 2600



5 February 2010

Dear Secretary

## **Administrative Review Council submission to Inquiry into the Freedom of Information Amendment Bill (Reform) Bill 2009 and Information Commissioner Bill 2009**

The Administrative Review Council makes the following submission to the Committee to be considered as part of its inquiry into the Freedom of Information Amendment Bill (Reform) Bill 2009 and Information Commissioner Bill 2009. We note that, due to the intervention of the Christmas period, not all members were able to participate in the discussions which led to this submission.

The statutory function of the Administrative Review Council is to review the effectiveness of the Australian administrative law system. Laws which provide rights of access to government-held documents are part of that system. Other key parts include merits review of statutory decisions by independent tribunals, judicial review of the actions of Commonwealth officers and of the lawfulness of most statutory administrative decisions, the right to reasons for most decisions that can be reviewed under the *Administrative Decisions (Judicial Review) Act 1977* and the investigation by the Ombudsman of complaints about government maladministration.

In 1995 the Council and the Australian Law Reform Commission co-authored the Report 'Open Government: a review of the federal *Freedom of Information Act 1982*'. The Council supports the views expressed in the submission of the ALRC to this inquiry and agrees with the ALRC's analysis of the bills and commentary on the extent to which they implement recommendations made in that report.

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Professor Rosalind Croucher  
Professor John McMillan AO  
Andrew Metcalfe  
Roger Wilkins AO  
Melissa Perry

Justice Garry Downes AM  
Professor Robin Creyke  
Linda Pearson  
Brigadier Bill Rolfe AO (Rtd)

The Council broadly supports the reform of the FOI Act as contained in the Bills. However the Council wishes to make some comments about the role of the Information Commissioner in the review of administrative decisions as provided for in the Freedom of Information Amendment (Reform) Bill 2009.

The Council is aware of the Government's Strategic Framework for Access to Justice in the Federal Civil Justice System which was launched by the Attorney-General on 23 September 2009. Access to justice principles as set out in that Strategic Framework—accessibility, appropriateness, equity, efficiency and effectiveness—provide a basis for assessing administrative review processes.

The Council notes that four levels of review of decisions about access to documents are available including:

- optional internal review by an agency
- mandatory external merits review by the Information Commissioner prior to any review by the Administrative Appeals Tribunal
- AAT review of a decision of the Information Commissioner (available to all affected by the decision including applicants, third parties and agencies), and
- judicial review of decisions by the Federal Court, and appeals on questions of law by applicants, agencies and the Information Commissioner.

The Council is concerned that multiple layers of review have potential to slow the process and lead to litigation fatigue. The inclusion of mandatory review by the Information Commissioner is an additional layer of review which is not currently part of the review process (although internal review will become optional rather than mandatory as at present).

Clearly the aim of review by the Information Commissioner is to provide for expert external assessment of applications at an early stage in the review process with a resulting reduction in applications to the AAT or a narrowing of issues for consideration by the AAT.

The success of the review scheme in achieving this aim will depend upon the effectiveness of the Information Commissioner in dealing with cases promptly and expertly, so that the overall timeframe of the review process does not increase. The Commissioner will have a limited discretion not to undertake review of cases, including where it is more desirable that a case be reviewed by the AAT, or the review application is frivolous, vexatious, misconceived or not made in good faith (s 54W). In the interests of ensuring efficiency and equity, the Information Commissioner should develop guidelines for exercising that discretion.

The Council suggests that the review of the Act to be conducted two years after commencement should pay close attention to the efficiency of the review process, including the length of time matters are taking to be resolved and the role played by the Information Commissioner. The workload of agencies in dealing with FOI requests arising from the proposed amendments is another matter that will necessarily arise in the review of the Act.

In addition, the Council supports the recommendation in the Ombudsman's submission to this inquiry that the Information Commissioner be called the Australian Information Commissioner, to distinguish the role from similar positions in other jurisdictions and to provide appropriate recognition of the role at an international level.

Yours sincerely

John McMillan  
Ex officio member

