



Australian Government

Australian Law Reform Commission

**Professor Rosalind Croucher
President**

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



20 January 2010

Dear Secretary

Australian Law Reform Commission submission to Senate Standing Committee on Finance and Public Administration inquiry into the Freedom of Information Amendment (Reform) Bill 2009 (Cth) and the Information Commissioner Bill 2009 (Cth)

The Australian Law Reform Commission (ALRC) makes the following submission to the Senate Standing Committee on Finance and Public Administration inquiry into the draft Freedom of Information Amendment (Reform) Bill 2009 (Cth) and the Information Commissioner Bill 2009 (Cth).

The ALRC made a submission to the Department of the Prime Minister and Cabinet on the draft Freedom of Information Amendment (Reform) Bill 2009 (Cth) and the Information Commissioner Bill 2009 (Cth) (available online at <http://www.alrc.gov.au/submissions/ALRCsubs/2009/1805.html>). The ALRC welcomes the opportunity to contribute to the Committee's inquiry into the two Bills currently before Parliament. This submission draws on the ALRC's submission on the draft Bills and the ALRC's experience from its major inquiries into:

- the Freedom of Information Act 1982 (Cth) (with the Administrative Review Council (ARC)), which culminated in the final report *Open Government: A Review of the Federal Freedom of Information Act 1982*, ALRC Report 77 (1995) (available online at <http://www.alrc.gov.au/inquiries/title/alrc77/index.htm>);
- the *Archives Act 1983* (Cth), which concluded with the release of the report *Australia's Federal Record: A Review of Archives Act 1983*, ALRC Report 85 (1998) (available online at <http://www.alrc.gov.au/inquiries/title/alrc85/index.htm>); and
- the *Privacy Act 1988* (Cth), which resulted in the release of the final report *For Your Information: Australian Privacy Law and Practice*, ALRC Report 108 (2008) (available online at <http://www.alrc.gov.au/inquiries/title/alrc108/index.html>);
- federal secrecy laws (report forthcoming).¹

¹ See discussion below.

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The ALRC supports the great bulk of the provisions of the Freedom of Information Amendment (Reform) Bill and the Information Commissioner Bill. In the ALRC's view, these amendments represent a very positive step toward open and accountable government, and substantially implement the recommendations of ALRC Report 77.

The ALRC also acknowledges other Australian Government initiatives in this area, in particular, the *Freedom of Information (Removal of Conclusive Certificates and Other Measures) Act 2009* (Cth). The ALRC notes that this Act goes beyond many of the recommendations in ALRC Report 77 by removing all conclusive certificates in the *Freedom of Information Act 1982* (Cth) (FOI Act), and welcomes it as the Act reflects an extension of the spirit of open government outlined in the ALRC and ARC's report.

The ALRC also notes that the Government has announced that it will implement a number of ALRC Report 108 recommendations relevant to provisions of the FOI Act and the Information Commissioner Bill—including recommendations governing access to, and correction of, documents containing personal information, as well as those defining the powers and functions of the Privacy Commissioner.²

Implementation of ALRC Report 77 recommendations

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

- the insertion of a new Objects Clause that explains clearly the underlying rationale for the FOI Act and its significance for the proper working of representative democracy (implementing Recommendations 1–5 of ALRC Report 77);
- the establishment of a dedicated Freedom of Information Commissioner. The ALRC recommended the establishment of such a statutory office in ALRC Report 77,³ and affirmed that view in ALRC Report 108;⁴
- the expansion of the information publication scheme outlined in the Freedom of Information Amendment (Reform) Bill. Although the ALRC did not recommend such a scheme in ALRC Report 77, it is broadly consistent with the pro-disclosure approach in that report. The ALRC assumes that the Information Commissioner and the FOI Commissioner will be responsible for oversight of these obligations under the Information Commissioner Bill;⁵
- the extension of the FOI Act to require agencies to take contractual measures to ensure that they have access to information relevant to the performance of Commonwealth contracts, where the information is created or held by contracted service providers or subcontractors delivering services for or on behalf of the Commonwealth (consistent with Recommendation 99 of ALRC Report 77);
- the abolition of application fees for access requests under Part III of the FOI Act, which is consistent with Recommendations 82, 88, 92 and 93 of ALRC Report 77;
- the reformulation of a public interest test weighted in favour of disclosure of documents—although the ALRC did not specifically recommend the formulation proposed by s 11A, many features of the reformulation are consistent with ALRC Report 77 recommendations, including Recommendations

² Australian Government, *Enhancing National Privacy Protection—Australian Government First Stage Response to the Australian Law Reform Commission Report 108 For Your Information: Australian Privacy Law and Practice* (2009) (available online at <http://www.dpvc.gov.au/privacy/alrc.cfm>).

³ *Open Government: A Review of the Federal Freedom of Information Act 1982*, ALRC Report 77 (1996), Ch 6 and Recs 18–27.

⁴ *For Your Information: Australian Privacy Law and Practice*, ALRC Report 108 (2008), [15.106].

⁵ *Open Government: A Review of the Federal Freedom of Information Act 1982*, ALRC Report 77 (1996), Rec 30.

6, 38 and 39;

- the amendment of the Cabinet documents exemption to ensure that it only covers documents at the core of the Cabinet process. The reformulation implements recommendations 46–48 of ALRC Report 77. The ALRC notes, however, that the amendments to s 34 use the term ‘officially published’ and ‘officially disclosed’. In the ALRC’s view these terms should be defined as recommended in ALRC Report 77;⁶
- the amendment of the internal working documents exemption to relate to deliberative processes. The ALRC strongly supports the reformulation and notes that these amendments are broadly consistent with the ALRC recommendations in ALRC Report 77, in particular Recommendations 51–52;
- the repeal of exemptions for Executive Council documents, documents arising out of companies and securities legislation and documents relating to the conduct of an agency of industrial relations. The ALRC recommended the repeal of each of these in ALRC Report 77;⁷ and
- the amendment of the exemption provision for documents subject to legal professional privilege so that the exemption cannot be claimed in circumstances where the privilege has been waived (consistent with Recommendation 67 of ALRC Report 77).

However, a number of ALRC Report 77 recommendations have not been incorporated into the Freedom of Information Amendment (Reform) Bill and the Information Commissioner Bill 2009 (Cth).⁸

This submission focuses on ALRC Report 77 recommendations requiring legislative amendment. However, the ALRC would also like to highlight that ALRC Report 77 made a large number of recommendations relating to government practice and the administration of the FOI Act. In the ALRC’s view, the implementation of these recommendations is also essential to ensure that the public sector is committed to open government, and that the objects of the FOI Act are realised. The ALRC commends the Australian Government on the steps already taken in this regard and looks forward to further progress.⁹

The Information Commissioner

The ALRC supports the establishment of an Office of the Information Commissioner, headed by an Information Commissioner and supported by the Privacy Commissioner and a Freedom of Information Commissioner. However, some particular issues are set out below.

Section 9 of the Information Commission Bill set out the functions and powers of the Privacy Commissioner. The definition is intended to capture all privacy-related functions currently undertaken by this office. In ALRC Report 108, the ALRC made a large number of recommendations relating to the functions and powers of the Office of the Privacy Commissioner.¹⁰ The ALRC understands that the Australian Government will address these recommendations in the second stage of its response to ALRC Report 108.¹¹

It should be noted that in ALRC Report 77, the ALRC and ARC expressed the view that there is a need to ensure that the principles of openness and privacy each have a clearly identifiable and unambiguous advocate.¹² The ALRC considered this proposal again in its recent review of the *Privacy Act*. In

⁶ Ibid, Rec 49.

⁷ Ibid, Recs 50, 57, 72.

⁸ For example, Ibid, Recs, 28, 52, 61 and 83.

⁹ For example, in 2008, the Senator the Hon John Faulkner, as Cabinet Secretary, wrote to heads of agencies requiring them to make it clear to their freedom of information officers that the starting point for considering freedom of information requests should be a presumption in favour of giving access to documents.

¹⁰ See *For Your Information: Australian Privacy Law and Practice*, ALRC Report 108 (2008), Part F.

¹¹ Australian Government, *Enhancing National Privacy Protection—Australian Government First Stage Response to the Australian Law Reform Commission Report 108 For Your Information: Australian Privacy Law and Practice* (2009) (available online at <http://www.dpimc.gov.au/privacy/alrc.cfm>).

¹² *Open Government: A Review of the Federal Freedom of Information Act 1982*, ALRC Report 77 (1996), [6.29].

ALRC Report 108, the ALRC stated that it did not recommend the establishment of a single body to administer the *Privacy Act* and the FOI Act because there was little support for such a change among stakeholders. In particular, some stakeholders expressed the view that the *Privacy Act* and the FOI Act have different focuses, and so should be administered by two different bodies.¹³

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

While the ALRC does not recommend a single regulator to administer the Privacy Act and the FOI Act, the ALRC notes that the Government's proposal for an Office of the Information Commissioner is not inconsistent with any of the ALRC's recommendations in this Report. In particular, the ALRC notes that the Government's policy maintains a separate focus for the Privacy Commissioner and a Freedom of Information Commissioner. The ALRC also notes the advantages of having the Privacy Commissioner and a Freedom of Information Commissioner co-located in a single office to deal with complaints about access, particularly when a document contains a mixture of personal and non-personal information.¹⁴

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

Privacy considerations

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

This requirement is subject to some exceptions under s 11C(1), including where the document contains: information relating to the personal information of the person; personal information relating to a member of that person's family; or information about business, commercial, financial or professional affairs. The ALRC noted, however, that these exceptions only protect the privacy of the person requesting access to the document. They do not protect the personal information or other sensitive information of third parties that may be included in the accessed document. The ALRC therefore welcomes the inclusion of the new s 8(2)(g) which provides that the requirement under s 11B(2) does not apply to access requests containing personal information about any individual, if it would be unreasonable to publish the information.

In ALRC Report 77, the ALRC and ARC sought to clarify the relationship between s 41 of the FOI Act (document affecting personal privacy) and the *Privacy Act*. It was recommended that the *Privacy Act* be amended to provide that a release of personal information under the FOI Act constitutes a release that was 'required or authorised by law' for the purpose of IPP 11, provided the consultation requirements in the FOI Act were complied with.¹⁵ It was thought that this would eliminate any possible confusion about the meaning of IPP 11 in so far as it relates to a release of information under the FOI Act.

Time limits

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

¹³ *For Your Information: Australian Privacy Law and Practice*, ALRC Report 108 (2008), [5.104]–[5.108].

¹⁴ *Ibid*, [5.108].

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

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

ALRC Report 77 suggested that it was reasonable to expect agencies to take advantage of technological developments to improve their freedom of information administration. However, there was a concern at that time that it might be premature to reduce the 30 day period immediately, since some agencies did not yet have the facilities to store all documents electronically. Instead, it was recommended that in three years the time limit should be reduced to 14 days.¹⁶

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

Fees

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

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

However, the ALRC and ARC also acknowledged that the fees and charges regime was unduly complicated, and often penalised applicants for the inefficient information management practices of agencies. Consequently, a new approach was recommended, specifying that charges only should be levied in respect of documents that are released.¹⁷

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

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

Parliamentary departments

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

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

¹⁶ *Open Government: A Review of the Federal Freedom of Information Act 1982* (ALRC 77, 1996), Rec 31.

¹⁷ *Ibid*, Rec 88.

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

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

Accordingly, the ALRC and ARC recommended that parliamentary departments be made subject to the FOI Act,¹⁸ and the ALRC continues to strongly support this recommendation.¹⁹

Schedule 2 agencies

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

The ALRC and ARC recommended that the intelligence agencies should remain in Schedule 2 Part I, but that all other agencies listed (other than Government Business Enterprises) should be required to demonstrate to the Attorney-General, within 12 months, that they merited exclusion from the operation of the Act.²⁰ The ALRC is not aware of such an exercise being undertaken to date.

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

- the exemptions in Schedule 2 Part II for documents relating to competitive commercial activities of agencies should be repealed. All other agencies listed in Schedule 2 Part II should be required to demonstrate to the Attorney-General that the documents specified warrant exclusion from the operation of the Act. If they do not do this within 12 months, those documents should be removed from Schedule 2 Part II;²¹ and
- Schedule 2 Part III should be repealed.²²

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

¹⁸ Ibid, Rec 73.

¹⁹ For example, see *For Your Information: Australian Privacy Law and Practice*, ALRC Report 108 (2008), Rec 41–3.

²⁰ Ibid, Rec 74.

²¹ Ibid, Rec 75.

²² Ibid, Rec 75.

Act for the purposes of its recent review of the *Privacy Act*, and made a number of relevant recommendations in Chapter 36 of ALRC Report 108.²³

Enforcement of law and protection of public safety exemption

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

A number of recommendations were made in ALRC Report 77 relating to this exemption. In particular, the ALRC and ARC considered that an express public interest test should be introduced into s 37, with respect only to particular kinds of law enforcement documents. A similar approach is used in the equivalent provision in state FOI legislation. For example, under *current* New South Wales legislation,²⁴ the following do *not* fall within the law enforcement exemption if, on balance, their disclosure would be in the public interest:

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

The ALRC and ARC considered that this approach would provide access to information without risking prejudice to law enforcement operations or public safety, recommending that s 37 should be amended to include a public interest test in respect of those categories of information.²⁵ The ALRC continues to support this balanced approach.

Secrecy provisions

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

Proposed s 29 of the Information Commissioner Bill amounts to a secrecy provision. It criminalises the unauthorised dealing with information acquired by a person in the course of performing functions or exercising powers conferred for the purposes of an information commissioner function, freedom of information function or privacy function.

The ALRC also notes that the Freedom of Information Amendment Bill does not repeal s 38 of the FOI Act as recommended in ALRC Report 77²⁶ or s 33(3) of the *Archives Act* (which provides special protection for

²³ *For Your Information: Australian Privacy Law and Practice*, ALRC Report 108 (2008), Ch 36 and Recs 36–1 to 36–4. The ALRC understands that the Australian Government will address these recommendations in the second stage of its response to ALRC Report 108.

²⁴ *Freedom of Information Act 1989* (NSW) sch 1. A different approach is taken in the *Government Information (Public Access) Act 2009* (NSW), which is yet to commence.

²⁵ *Open Government: A Review of the Federal Freedom of Information Act 1982*, ALRC Report 77 (1996), Rec 55.

²⁶ *Ibid*, Rec 70.

personal or business affairs relating to taxation laws) as recommended in *Australia's Federal Record: A Review of Archives Act 1983*, ALRC Report 85 (1998).²⁷

The ALRC, notes, however, that both these provisions were considered in the ALRC's recently completed secrecy review. The ALRC released an Issues Paper, *Review of Secrecy Laws* (ALRC IP 34) in December 2008; and a Discussion Paper, *Review of Secrecy Laws* (ALRC DP 74) in June 2009. The ALRC has completed its final report for this inquiry, and delivered it to the Attorney-General by the revised delivery date of 11 December 2009. The ALRC is unable to discuss its final recommendations for reform in this area as the report is yet to be tabled in Parliament.²⁸ However, the ALRC would note that the inquiry did consider the interaction between secrecy provisions and the FOI Act in detail. The inquiry also considered relevant provisions under the *Archives Act*.

Archives Act 1983 (Cth)

As noted above, the ALRC made a number of recommendations in ALRC Report 77 aimed at ensuring that the public sector is committed to open government, and that the aims of the FOI Act are met. One of these recommendations was that the *Archives Act* should be amended to require an agency head to ensure the creation of such records as are necessary to document adequately government functions, policies, decisions, procedures and transactions and to ensure that records in the possession of the agency are appropriately maintained and accessible.²⁹ The ALRC and ARC expressed the view that education and training will be important to give effect to such a requirement, but considered that a clear statement of obligation would provide a solid foundation for the establishment and promotion of good recordkeeping practices. In the ALRC and ARC's view, the obligation would best be imposed on agency heads, not officers directly, as this was more in keeping with current management practices in the public service.³⁰ The ALRC notes, however, that the Freedom of Information Amendment (Reform) Bill does not implement this recommendation.

However, the Freedom of Information Amendment (Reform) Bill 2009 does amend the *Archives Act* to bring forward the open access period for most records from 30 to 20 years, and for Cabinet notebooks from 50 years to 30 years. This is consistent with the ALRC's recommendation in ALRC Report 85, 1998.³¹

The Committee may wish to consider the large number of recommendations in relation to the *Archives Act* in ALRC Report 85. The Freedom of Information Amendment (Reform) Bill amendments relating to s 33(1)(b) of the *Archives Act* (the exemption relating to information or matter communicated in confidence by or on behalf of a foreign government) are consistent with ALRC Report 85;³² and ALRC notes that the *Archives Amendment Act 2008* (Cth) implemented a number of the report's recommendations. However, many recommendations in ALRC Report 85 remain to be considered for implementation.³³

Some of these recommendations relate to the FOI Act. For example, the ALRC recommended that the FOI Act should contain a right of privileged access for former Governors-General, ministers, departmental secretaries and other specified senior officials to Commonwealth records relating to their respective terms in office for the purposes of refreshing their memories or preparing biographical works. This right would apply only in relation to records which are not yet in the open period.³⁴

²⁷ *Australia's Federal Record: A Review of Archives Act 1983*, ALRC Report 85 (1998), Rec 171.

²⁸ The report is due to be tabled in Parliament by 15 March 2010.

²⁹ *Open Government: A Review of the Federal Freedom of Information Act 1982*, ALRC Report 77 (1996), Rec 15.

³⁰ *Ibid*, [5.12].

³¹ *Ibid*, Rec 171.

³² *Ibid*, Rec 157.

³³ As noted above, some of these issues were considered in the ALRC's review of secrecy laws.

³⁴ *Ibid*, Rec 138.

The ALRC also recommended that both archives legislation and the FOI Act should include an exemption category relating to information that, under Indigenous tradition, is confidential or subject to particular restrictions on disclosure.³⁵

Yours sincerely,

A handwritten signature in cursive script, appearing to read "Rosalind Cawthron".

³⁵ Ibid, Recs 164 and 165.

