

## australian network of environmental defender's offices

Submission to the Senate inquiry into the  
*Freedom of Information Amendment (Reform)  
Bill 2009* and the *Information Commissioner  
Bill 2009*

28 January 2010

The Australian Network of Environmental Defender's Offices (ANEDO) consists of nine independently constituted and managed community environmental law centres located in each State and Territory of Australia.

Each EDO is dedicated to protecting the environment in the public interest. EDOs provide legal representation and advice, take an active role in environmental law reform and policy formulation, and offer a significant education program designed to facilitate public participation in environmental decision making.

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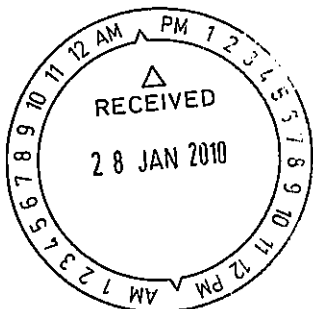
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## Executive Summary

The *Freedom of Information Act 1982* has been described as a contentious instrument that “encapsulates the key tension in representative democracy between the right of individual voters and the public at large to be informed about the workings of government set against the Executive’s claims for confidentiality in those areas where it is required for the effective conduct of government business.”<sup>1</sup> ANEDO submits that despite these tensions the Act must ensure that access to information held by the Government is provided except in limited and clearly defined circumstances. This will ensure that the objects of the Act, and the expectations of the community of an open and transparent government, are met.

The Australian Network of Environmental Defender's Offices (ANEDO) welcomes the opportunity to provide comment to the Senate Standing Committee on Finance and Administration Inquiry into the *Freedom of Information Amendment (Reform) Bill 2009 (FOI Bill)* and the *Information Commissioner Bill 2009 (IC Bill)*.<sup>2</sup> ANEDO is a network of community legal centres with over 20 years experience specialising in public interest environmental and planning law.

The provision of government information to the community plays an integral role in facilitating access to justice which is a key priority area for ANEDO. We therefore welcome the current reform process and are largely supportive of the changes proposed as they will assist in the creation of a pro-disclosure culture. However, we make suggestions on how to further improve the legislative regime below.

ANEDO lodged a submission on the proposed legislation to the Department of Premier and Cabinet in May 2009. This submission largely reiterates the comments and recommendations made there.

That submission is available at: <http://www.edo.org.au/policy/090522foi.pdf>

Tasmania, Queensland and NSW have also undergone recent reviews of their respective FOI regimes, with the EDO offices in all three states tendering submissions.<sup>3</sup> This submission will also draw on the recommendations made in those submissions.

We provide comment on the two bills under the following headings:

- Objects;
- Fees and Charges;

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<sup>1</sup> NSW Parliamentary Library Research Service, *Freedom of Information – Issues and Recent Developments in NSW*. Available at:

[http://www.parliament.nsw.gov.au/prod/parlament/publications.nsf/0/1572d6956a794b4eca2572ea0004439a/\\$FILE/FOIFINAL&INDEX.pdf](http://www.parliament.nsw.gov.au/prod/parlament/publications.nsf/0/1572d6956a794b4eca2572ea0004439a/$FILE/FOIFINAL&INDEX.pdf).

<sup>2</sup> We note that this is the second stage of the Government implementing reforms to the *Freedom of Information Act 1982 (FOI Act)* and welcome the first stage of the review which abolished the power to issue conclusive certificates in the *FOI Act* and *Archives Act 1983*.

<sup>3</sup> Tasmanian EDO Submission to the State FOI Review. Available at:

[http://www.edo.org.au/edotas/pdf/foi\\_review\\_0902.pdf](http://www.edo.org.au/edotas/pdf/foi_review_0902.pdf). Environmental Defenders Office (QLD) INC. and Environmental Defender’s Office of Northern Queensland INC submission on the Right to Information Bill 2009(QLD). Available at: <http://www.edo.org.au/edoqld/edoqld/new/Submission-DraftNewFOILaws.pdf>; and NSW EDO Submission to the NSW Ombudsman on the *Freedom of Information Act 1989*. Available at: [http://www.edo.org.au/edonsw/site/pdf/subs08/081112\\_foi.pdf](http://www.edo.org.au/edonsw/site/pdf/subs08/081112_foi.pdf).

- Public Interest Test;
- Exemptions;
- Information Publication Scheme;
- Time Periods;
- Internal Review; and
- Deemed Refusal
- Information Commissioner Bill 2009
- Information Officers

Our key comments and recommendations are summarised below.

*Freedom of Information Amendment (Reform) Bill 2009*

- The proposed objects clause is supported as it requires agencies to publish information and recognises that the powers and functions of the Act are to be performed to facilitate and promote public access to information promptly and at the lowest reasonable cost;
- The proposal to abolish all application fees made under Part III is supported;
- The re-formulation of the public-interest test in favour of disclosure is strongly supported;
- The introduction of guiding principles for the public interest test including the 'factors favouring access' and 'irrelevant factors' is supported;
- The requirement for all government agencies to develop an Information Publication Scheme (IPS) is supported;
- Each agency's Information Publication Scheme should be reviewed every two years instead of the proposed 5 year period in the Bill;
- The proposal to require the exemptions for personal privacy, business affairs, national economy, and research to be subject to the public interest test is supported;
- All cabinet documents should be subject to the public interest test;
- ANEDO supports the amendments made to the *Archives Act 1983* which reduces the open access period for most records from 30 years to 20 years and Cabinet notebooks from 50 years to 30 years;
- The *FOI Bill* should be amended to incorporate a provision for expedited information requests;
- The Bill should be amended to require the Information Commissioner to consider the objects of the Act and the principle that information be disclosed 'promptly, and at the lowest reasonable cost' when determining whether to grant an agency a time extension beyond 30 days;
- The *FOI Bill* should be amended to allow external review without an internal review in special circumstances;
- The deemed default position of refusal should be removed from the *FOI Bill*; and
- A trigger mechanism should be introduced which automatically requires an internal review to take place following the expiration of the reply period.

*Information Commissioner Bill 2009*

- The introduction of an Information Commissioner and associated positions is strongly supported;

- Clause 9(b) of the *IC Bill 2009*, which sets out the functions to be carried out by the Information Commissioner, requires further clarification to clearly identify what privacy and freedom of information functions that the Commissioner will exercise under other legislation;
- The Information Commissioners as well as the Freedom of Information and Privacy Commissioners, should exercise their discretion consistently with the objects of the Act;
- The *IC Bill* should be amended to require the Privacy Commissioner to have similar qualifications to the Freedom on Information Commissioner; and
- The *IC Bill* should be amended to stipulate that the Privacy Commissioner is not permitted to carry out the freedom of information functions and vice versa. This would remove any ambiguity around which commissioner possesses a certain duty or power under the Act and maintains a demarcation between the freedom of information and privacy functions.

## **1. Freedom of Information (Reform) Bill 2009**

### **Objects**

ANEDO strongly supports the amended objects clause in the *FOI Bill*. The amended objects clause requires agencies to actively publish information they hold and to provide a right of access to these documents. This is more specific than the general right to information under the current Act.<sup>4</sup> In addition, the amendments make it clear that the Government has introduced these objects with the purpose of promoting representative democracy through:

- (a) increasing public participation in Government processes, with a view to promoting better-informed decision-making; and
- (b) increasing scrutiny, discussion, comment and review of the Government's activities.<sup>5</sup>

Moreover, ANEDO is supportive of the explicit recognition that “information held by the Government is to be managed for public purposes, and is a national resource” and that Parliament intends that the powers and functions of the Act are to be performed to “facilitate and promote public access to information, promptly and at the lowest reasonable cost”.<sup>6</sup>

### **Fees and Charges**

ANEDO supports the proposed reforms to fees and charges under the Act.<sup>7</sup> As EDO (NSW) previously submitted in relation to the application fee:

<sup>4</sup> *FOI Act 1982* section 3(1)(b).

<sup>5</sup> *FOI (Reform) Bill 2009* clause 3(2)

<sup>6</sup> *Ibid.*

<sup>7</sup> Tasmanian EDO Submission to the State FOI. Review available at: [http://www.edo.org.au/edotas/pdf/foi\\_review\\_0902.pdf](http://www.edo.org.au/edotas/pdf/foi_review_0902.pdf); Environmental Defenders Office (QLD) INC. and Environmental Defender's Office of Northern Queensland INC submission on the Right to Information Bill 2009(QLD). Available at: <http://www.edo.org.au/edoqld/edoqld/new/Submission-DraftNewFOILaws.pdf>; and NSW EDO Submission to the NSW Ombudsman on the *Freedom of Information Act 1989*. Available at: [http://www.edo.org.au/edonsw/site/pdf/subs08/081112\\_foi.pdf](http://www.edo.org.au/edonsw/site/pdf/subs08/081112_foi.pdf).

*...this fee should be removed. In addition to making the FOI system accessible to all, the removal of the fee would also be important symbolically. It would signify to both agencies and the public that access to public information is a fundamental democratic right, and 'not a utility, such as electricity or water, which can be charged according to the amount used by individual citizens.'*<sup>8</sup>

ANEDO therefore strongly supports the proposed amendment to abolish all application fees made under Part III.<sup>9</sup> We also support the Government's policy position outlined in the Companion Guide:

*Applicants who seek access to their own personal information will not pay any charges. For all other applications (other than those applications made by journalists and not-for-profit community groups) the first hour of decision making time will be free of charge. For applications made by journalists and not-for-profit community groups the first five hours of the decision making time will be free of charge.*<sup>10</sup>

If the proposed amendments outlined in the Companion Guide are passed, it would demonstrate a significant effort by the Government to reduce the costs associated with FOI requests. Given their importance, ANEDO therefore submits that these intended changes to the *Freedom of Information (Fees and Charges) Regulation* should be made available for public comment.

#### **Public Interest Test**

In addressing the QLD FOI reforms, the EDO (QLD) submission stated that "public interest considerations must be given a greater role in determining whether information is released under the Act."<sup>11</sup> Specifically the submission stated that the public interest test should:

*balance the harm that may be caused by release of the exempt information against the public interest in disclosure. Unless the harm caused would outweigh the public benefit, the information should be released.*<sup>12</sup>

Similarly, EDO (Tas) in its submission stated that it "would strongly support the listing of factors relevant to deciding whether the public interest favours release of a document,"<sup>13</sup> with the EDO (QLD) submission also stating that it "would encourage guidelines to be produced outlining the various issues to be considered when weighting

<sup>8</sup> Electoral and Administrative Review Commission, *Report on Freedom of Information*, December 1990, p183.

<sup>9</sup> Proposed repeal of Subsection 29(1) and 30A of the *FOI Act 1982*.

<sup>10</sup> Freedom of Information (FOI) Reform Companion Guide. Available at: [http://www.pmc.gov.au/consultation/foi\\_reform/docs/Companion\\_Guide.pdf](http://www.pmc.gov.au/consultation/foi_reform/docs/Companion_Guide.pdf).

<sup>11</sup> Environmental Defenders Office (QLD) INC. and Environmental Defender's Office of Northern Queensland INC submission on the Right to Information Bill 2009(QLD). Available at: <http://www.edo.org.au/edoqld/edoqld/new/Submission-DraftNewFOILaws.pdf>.

<sup>12</sup> Environmental Defenders Office (QLD) INC. and Environmental Defender's Office of Northern Queensland INC submission on the Right to Information Bill 2009(QLD). Available at: <http://www.edo.org.au/edoqld/edoqld/new/Submission-DraftNewFOILaws.pdf>.

<sup>13</sup> EDO Tasmania Submission to the State FOI Review. Available at: [http://www.edo.org.au/edotas/pdf/foi\\_review\\_0902.pdf](http://www.edo.org.au/edotas/pdf/foi_review_0902.pdf).

the public interest.”<sup>14</sup> The EDO (NSW) submission suggested that the introduction of criteria into the legislation outlining how and when a public interest test is to be applied would greatly assist in the development of a more transparent and consistent application of the public interest test.<sup>15</sup>

These submissions identified a clear a need for increased clarity surrounding the application of the Public Interest Test which constitutes a key facet of the FOI regime. In light of this, ANEDO strongly welcomes the proposed re-formulation of the public-interest test proposed in the *FOI Bill* which is weighted in favour of disclosure. The proposed clause 11A(5) stipulates:

*The agency or Minister must give the person access to the document if it is conditionally exempt at a particular time unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest.*<sup>16</sup>

This single expression of the test replaces the multiple different existing formulations of the test which had lead to much confusion and fostered an environment of non-disclosure. ANEDO supports this rationalisation of the test as this will lead to more consistent decisions. Moreover, the amended test clearly establishes that access must be provided except in circumstances where access would be contrary to the public interest.

ANEDO also strongly supports the amendments that have introduced “factors favouring access”.<sup>17</sup> We welcome the inclusion of this list of factors that are design to assist with the application of the public interest test. These factors - which must be considered in applying the test - include whether release of information would promote the objects of the Act, inform debate on a matter of public importance and allow a person to access his or her own personal information. ANEDO also supports the list of ‘irrelevant factors’ which must not be taken into account in deciding the public interest test.<sup>18</sup> Agencies will not be able to take into account whether the release of information would cause embarrassment to the Government or that the author is of high seniority.

Having such guidance set out within the legislation will no doubt increase consistency in the application of the public interest test and will favour disclosure in the majority of circumstances.

## **Exemptions**

ANEDO submits that no category of documents should automatically be considered an exempt document under the *FOI Act*. ANEDO therefore welcomes the amendments that apply the public interest test (discussed above) to the exemption for personal privacy,<sup>19</sup> business affairs,<sup>20</sup> national economy,<sup>21</sup> and research.<sup>22</sup> As they are now subject

<sup>14</sup> Environmental Defenders Office (QLD) INC. and Environmental Defender’s Office of Northern Queensland INC submission on the Right to Information Bill 2009(QLD). Available at: <http://www.edo.org.au/edoqld/edoqld/new/Submission-DraftNewFOILaws.pdf>.

<sup>15</sup> EDO NSW Submission.

<sup>16</sup> *FOI (Reform) Bill 2009* clause 11A(5).

<sup>17</sup> *FOI (Reform) Bill 2009* clause 11B(3).

<sup>18</sup> *FOI (Reform) Bill 2009* clause 11B(4).

<sup>19</sup> *FOI (Reform) Bill 2009* clause 41.

<sup>20</sup> *FOI (Reform) Bill 2009* clause 43.

<sup>21</sup> *FOI (Reform) Bill 2009* clause 44.

<sup>22</sup> *FOI (Reform) Bill 2009* clause 43A.

to the public interest test, they are considered conditional exemptions which ANEDO supports.

Moreover, ANEDO believes that the amendments to the Cabinet exemption to ensure that only those documents that are “at the core of the cabinet process”<sup>23</sup> are within its scope is a positive step towards increasing transparency. However, although ANEDO considers this a positive step, we would ultimately call for the removal of the blanket Cabinet exemption and instead make these documents subject to the public interest test.<sup>24</sup>

### Information Publication Scheme

ANEDO supports the proposed requirement for all government agencies to develop an Information Publication Scheme (IPS) set out in Part II of the *FOI Bill*. The Bill sets out that every agency must develop an IPS which must set out the following information:

- a) *what information the agency proposes to publish...*
- b) *how, and to whom, the agency proposes to publish information...*<sup>25</sup>

ANEDO also supports the further requirements that every agency is to publish, amongst other information:

- b) *details of the structure of the agency's organisation;*
- c) *details of the functions of the agency, including its decision making powers;*
- g) *the information in documents to which the agency routinely gives access in response to requests under Part III; and*
- j) *the agency's operational information.*<sup>26</sup>

This information must be published on a website<sup>27</sup> with the detail of any charge for accessing the information published in the same way as the information.<sup>28</sup> ANEDO submits that these changes will encourage the development of an FOI regime that is both transparent and pro-disclosure. ANEDO therefore supports the development of the Information Publication Scheme. However we submit that the review period of each agency's scheme should be every two years as opposed to the 5 year period proposed in the Bill.<sup>29</sup> In addition we recommend that the Office of the Information Commissioner should release a template of overarching guidelines - that include mandatory criteria and information that must be released - which are applicable to all agencies.

ANEDO also supports the amendments made to the *Archives Act 1983*, which stipulates that the open access period for most records have been altered from 30 years to 20 years, and that Cabinet notebooks have been reduced from 50 to 30 years.

<sup>23</sup> Freedom of Information (FOI) Reform Companion Guide. Available at:

[http://www.pmc.gov.au/consultation/foi\\_reform/docs/Companion\\_Guide.pdf](http://www.pmc.gov.au/consultation/foi_reform/docs/Companion_Guide.pdf)

<sup>24</sup> Environmental Defenders Office (QLD) INC. and Environmental Defender's Office of Northern Queensland INC submission on the Right to Information Bill 2009(QLD). Available at:

<http://www.edo.org.au/edoqld/edoqld/new/Submission-DraftNewFOILaws.pdf>

<sup>25</sup> *FOI (Reform) Bill 2009* clause 8(1)(a-b).

<sup>26</sup> *FOI (Reform) Bill 2009* clause 8(2).

<sup>27</sup> *FOI (Reform) Bill 2009* clause 8D(3).

<sup>28</sup> *FOI (Reform) Bill 2009* clause 8D(4).

<sup>29</sup> *FOI (Reform) Bill 2009* clause 9(1)(b).

## Time Periods

EDO offices have reported issues surrounding the failure by agencies to comply with the statutory time frames in their respective jurisdictions.<sup>30</sup>

The changes proposed by the *FOI Bill* require that an agency may “apply to the Information Commissioner for an extension” beyond the 30 day period<sup>31</sup> for “complex or voluminous requests.”<sup>32</sup> ANEDO acknowledges the fact that some requests may require additional time. We also recognise that adequate resourcing of agencies must accompany these reforms to ensure that the changes being proposed can be carried out in accordance with the objects of the legislation. However we submit that the Bill should be amended to ensure that when making the decision the Information Commissioner must consider the objects of the Act and the principle that information must be disclosed “promptly, and at the lowest reasonable cost.”<sup>33</sup>

Furthermore, ANEDO submits that the *FOI Act* should be amended to incorporate a provision for expedited information requests. As the Solomon Report states:

*For some applicants seeking documents through FoI, it would be fair to say that access delayed, is access refused.*

Expedited determinations could be made available in specific or exceptional circumstances such as where there are strict litigation deadlines.<sup>34</sup>

## Internal Review

EDO (Tas) has raised the concern that “while internal review is appropriate in many cases, it can provide an unwarranted additional hurdle where information is required quickly.”<sup>35</sup> Furthermore EDO (NSW) has submitted that the NSW FOI legislation should be “amended to make internal reviews optional, not as a mandatory prerequisite to obtaining an external review” in recognition of the fact that this prerequisite places an unfair burden on applicants and the majority of decisions are upheld (68%).

In light of the above, ANEDO submits that the *FOI Bill* should be amended to allow, in special circumstances (such as where there is antipathy between the applicant and the

<sup>30</sup> For example, EDO (NSW) has historically encountered difficulties accessing information under the Commonwealth FOI regime. In 2007 EDO NSW acted for WWF-Australia in the Administrative Appeal Tribunal against the Department of Agriculture, Fisheries and Forestry (DAFF) in relation to a Freedom of Information matter. WWF-Australia was appealing the decision of the Australian Bureau of Agricultural and Resource Economics (ABARE) to refuse access to the responses of a number of farmers to questionnaires used by ABARE to obtain information and views about land clearing in NSW. ABARE is a division of DAFF. In May 2007, the NSW Farmers Association joined the proceedings. After negotiations between WWF-Australia and ABARE in early 2008, ABARE provided aggregated information about the underlying survey results to WWF-Australia. WWF-Australia was satisfied with the provision of this information and therefore discontinued the application on 4 April 2008. This applicant had to undertake an 11-month period and forego significant costs to access information to which they were rightly entitled.

<sup>31</sup> *FOI Act 1982* Section 15(5)(b).

<sup>32</sup> *FOI (Reform) Bill 2009* clause 15AA.

<sup>33</sup> *FOI (Reform) Bill 2009* clause 3(4).

<sup>34</sup> An example that the EDO often encounters concerns the 28 day period within which a merits appeal must be initiated to the Land and Environment Court.

<sup>35</sup> EDO Tasmania Submission to the State FOI Review. Available at: [http://www.edo.org.au/edotas/pdf/foi\\_review\\_0902.pdf](http://www.edo.org.au/edotas/pdf/foi_review_0902.pdf).



agency holding the information requested) external review be undertaken without the prerequisite of an internal review.<sup>36</sup>

## **Deemed Refusal**

Clause 15AB of the *FOI Bill* addresses the situation where a decision has not been made by the relevant agency or Minister. The Bill proposes that if after the initial decision period<sup>37</sup> the applicant has not received notice of a decision, then “the principal officer of the agency or the Minister is taken to have made a decision personally refusing to give access to the document on the last day of the initial decision period.”<sup>38</sup> ANEDO submits that making this option available to agencies does not “promote a pro-disclosure culture across the Government” nor does it build “a stronger foundation for more openness in government.”<sup>39</sup>

ANEDO therefore submits that the deemed refusal provision should be removed from the Bill, as it contributes to a culture where the default position is one of withholding (as opposed to disclosing) information. If an applicant has been refused the information requested the applicant should be contacted and informed of the decision, and should be made aware of their rights of appeal under the legislation to have the decision reviewed. This would assist in keeping the applicant informed throughout the application process, as well as encouraging transparency and accountability. ANEDO also recommends the implementation of a trigger mechanism which automatically requires an internal review to take place following the expiration of the reply period.

## **2. Information Commissioner Bill 2009**

EDO (NSW) recently recommended the introduction of an Information Commissioner in response to a “lack of monitoring, auditing and centralised consideration of lessons for good administration”<sup>40,41</sup> EDO NSW’s key recommendations were:

- That an independent statutory position of Information Commissioner be created whose role would include determinative powers, compliance and monitoring, as well as the authority to implement proposed sanctions; and
- That the legislation require all NSW agencies to provide annual reports to the Information Commissioner, containing information such as the number of FOI applications received as well as those granted full disclosure and those refused.

ANEDO strongly supports these recommendations and therefore welcomes the introduction of a Commonwealth Information Commissioner role and associated positions. The *Information Commissioner Bill 2009 (IC Bill)* establishes the Office of the Information Commissioner headed by the Information Commissioner, with the Freedom

<sup>36</sup> *Ibid.*

<sup>37</sup> The initial decision period is specified as 30 days, FOI (Reform) Bill 2009 Section 15AB(2).

<sup>38</sup> FOI (Reform) Bill 2009 clause 15AB(3)(a).

<sup>39</sup> Freedom of Information (FOI) Reform Companion Guide. Available at: [http://www.pmc.gov.au/consultation/foi\\_reform/docs/Companion\\_Guide.pdf](http://www.pmc.gov.au/consultation/foi_reform/docs/Companion_Guide.pdf).

<sup>40</sup> Kirby, M. 1997, *Freedom of Information: The Seven Deadly Sins*, British Section of the International Commission of Jurists, Fortieth Anniversary Lecture Series, London. Available at: [http://www.hcourt.gov.au/speeches/kirbyj/kirbyj\\_justice.htm](http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_justice.htm).

<sup>41</sup> NSW EDO Submission to the NSW Ombudsman on the *Freedom of Information Act 1989*. Available at: [http://www.edo.org.au/edonsw/site/pdf/subs08/081112\\_foi.pdf](http://www.edo.org.au/edonsw/site/pdf/subs08/081112_foi.pdf).

of Information Commissioner and the Privacy Commissioner making up the other two information officers. The *FOI Bill* proposes that the Information Commissioner functions include the power to make own motion investigations into agency compliance under the *FOI Act*. The Information Commissioner is also given all powers necessary to oversee the:

- a) *information commissioner functions;*
- b) *freedom of information functions;*
- c) *privacy functions.*<sup>42</sup>

These amendments assist in identifying a central authority with the power to do all things necessary or convenient to carry out the three functions outlined above which ANEDO supports.

However, ANEDO submits that clause 9(b) of the *IC Bill* that sets out the functions to be carried out by the Information Commissioner, requires further clarification. If the intention of the clause is to ensure that the responsibilities of the Information Commissioner include not only the functions proposed by the Bill, but also “any other function conferred by another Act (or instrument under another Act)” then this should be more clearly identified. ANEDO proposes that clause 9(b) of the Bill be rewritten to read:

*any other freedom of information function or privacy function conferred by another Act (or an instrument under another Act).*

The current wording is ambiguous regarding whether or not the Information Commissioner will be responsible for a freedom of information function or a privacy function conferred by another Act.

## **Information Officers**

In addition to the Information Commissioner, the *IC Bill* also establishes the positions of the Freedom of Information Commissioner and the Privacy Commissioner within the Office of the Information Commissioner. One of the major points that have been raised throughout the EDO responses to the NSW, QLD and Tasmanian FOI amendment processes has been a call for increased accountability. ANEDO therefore strongly supports the establishment of both the Freedom of Information Commissioner as well as the Privacy Commissioner.

However, ANEDO submits that the discretion afforded to the Information Commissioner, FOI Commissioner and Privacy Commissioner is excessive. The *IC Bill* states that the FOI Commissioner is to “perform the function, or the exercise of the power, upon his or her own opinion, belief or state of mind.”<sup>43</sup> Furthermore the Privacy Commissioner, when exercising his or her functions “must perform the function upon his or her own opinion, belief or state of mind.”<sup>44</sup> Although these powers exist in relation to the powers in other legislation, ANEDO submits that such unfettered discretion does not contribute to consistency, accountability or transparency as the rationale for decision

<sup>42</sup> *IC Bill* clause 13(1)(a-c).

<sup>43</sup> *FOI (Reform) Bill 2009* clause 14(5).

<sup>44</sup> *FOI (Reform) Bill 2009* clause 15(5).

making is not clearly apparent. As such ANEDO recommends that any Commissioners exercise their discretion in accordance with the objects of the Act.

ANEDO has further concerns regarding the qualifications of the Freedom of Information Commissioner and the Privacy Commissioner and the overlap of powers between them. The Bill specifies that:

*a person may only be appointed as the Freedom of Information Commissioner if he or she has obtained a degree from a university, or an education qualification of a similar standing, after studies in the field of law*<sup>45</sup>

As the *IC Bill* sets out this specific criterion for the Freedom of Information Commissioner, it is unclear why the Privacy Commissioner, who has to carry out similar functions, does not need the same qualifications:

*The Privacy Commissioner may also perform the freedom of information functions (whether or not the Privacy Commissioner holds the qualifications mentioned in 17(3)).*<sup>46</sup>

Given this disparity, ANEDO submits that the Privacy Commissioner should possess similar qualifications to the Freedom on Information Commissioner.

Finally, all measures must be taken to ensure that the Commonwealth FOI reforms enable the various powers to be carried out in a consistent manner. ANEDO therefore submits that the *IC Bill* should be amended to stipulate that the Privacy Commissioner is not permitted to carry out the freedom of information functions and vice versa.<sup>47</sup> This would remove any ambiguity around which Commissioner possesses a certain duty or power under the Act and maintains a demarcation between the freedom of information and privacy functions.

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<sup>45</sup> *IC Bill* clause 17(3).

<sup>46</sup> *IC Bill* clause 15(2).

<sup>47</sup> *IC Bill* clause 10.

