



## **NSWCCL SUBMISSION**

### **SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE**

### **INQUIRY INTO THE OPERATION OF COMMONWEALTH FREEDOM OF INFORMATION (FOI) LAWS**

**5 June 2023**

**NSWCCL**

## **Acknowledgement of Country**

In the spirit of reconciliation, the NSW Council for Civil Liberties acknowledges the Traditional Custodians of Country throughout Australia and their connections to land, sea and community. We pay our respect to their Elders past and present and extend that respect to all First Nations peoples across Australia. We recognise that sovereignty was never ceded.

## **About NSW Council for Civil Liberties**

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts, attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

CCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

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The NSW Council for Civil Liberties (**NSWCCL**) welcomes the opportunity to make a submission to the Senate Legal and Constitutional Affairs Committee in regard to its inquiry into the operation of Commonwealth Freedom of Information (**FOI**) laws (the **Inquiry**).

## 1 Introduction

1.1 The NSWCCL submits that the following seven steps should be undertaken to improve the operation of Australia's FOI laws as a matter of urgency:

- (a) A permanent replacement for the outgoing FOI Commissioner, Leo Hardiman PSM KC, must be appointed as soon as possible and measures implemented to ensure that the FOI Commissioner can properly fulfil their role;
- (b) the Government must allocate additional resources to the Office of the Australian Information Commissioner (**OAIC**) specifically for the organisation to effectively fulfil its mandate under the *Freedom of Information Act 1982* (Cth) (the **FOI Act**) including the prompt completion of Part VII Information Commissioner Reviews (**IC Reviews**);
- (c) IC Review applicants should be allowed to elect to bypass the OAIC and bring their review request directly to the Australian Administrative Tribunal (**AAT**) (or its replacement), either at the start of the review process or if the OAIC takes—or at any point expects to take—more than 90 days to complete its review. Further, any filing fee for a IC Review or appeal to be heard by the AAT should be nominal and refundable in the event that an application is wholly or partially successful;
- (d) the OAIC must be empowered under the FOI Act to:
  - (i) set a ratio of FOI officers to FOI applications and mandate minimum staff numbers within government departments;
  - (ii) conduct investigations into government departments that fail to meet their disclosure duties under the FOI Act; and
  - (iii) impose disciplinary sanctions on departmental officers who repeatedly make decisions subsequently determined to be contrary to the requirements of the FOI Act, as well as for persons who direct or influence them to make such decisions;
- (e) the definition of "official document of a Minister" in section 4(1) of the FOI Act should be amended so that it includes documents of former ministers while they were in office;
- (f) the public interest test must apply as an additional criterion to a greater number of exemptions under Part IV of the FOI Act; and
- (g) the definition of "Cabinet" under section 4 of the FOI Act should be refined to prevent an improperly broad class of documents being captured by the exemption under section 34 of the FOI Act (the **Cabinet Documents Exemption**).

1.2 This submission will address each element of the Terms of Reference of the Inquiry in turn.

## 2 The resignation of the Commonwealth Freedom of Information Commissioner and the resulting impacts

- 2.1 NSWCCCL submits that a permanent replacement for the Mr Hardiman as FOI Commissioner must be appointed as a matter of urgency.
- 2.2 When Mr Hardiman was appointed to the position in March 2021, he became the first permanent FOI commissioner in nearly eight years after the Abbott government tried to abolish the office and subsequent governments ignored calls to fill the role. That just 12 months later Mr Hardiman has tendered his resignation, citing an inability to reduce the immense backlog of IC Reviews with the powers and resources bestowed to him,<sup>1</sup> speaks volumes as to the severity of the issues that plague the effective operation of the Commonwealth's FOI laws.
- 2.3 For these reasons, and the specific issues with the Commonwealth's FOI laws cited below, NSWCCCL submits that Australia's FOI regime, in its current condition, can ill afford to languish without direction or leadership as it did for the eight years prior to the appointment of Mr Hardiman. A permanent FOI Commissioner must be installed as soon as possible. NSWCCCL is supportive of the fact that the Government has recently put out an expression of interest for this role.
- 2.4 Further, measures should be implemented to ensure that the FOI Commissioner can properly fulfil their role, including the provision of adequate resources (discussed below in section 3).

### 3 Delays in the review of FOI appeals

- 3.1 NSWCCCL submits that the Government must address the delays in the OAIC processing IC Reviews by:
  - (a) allocating additional resources to the OAIC specifically for the organisation to effectively fulfil its mandate under the FOI Act in respect of IC Reviews; and
  - (b) allowing IC Review applicants to elect to bypass the OAIC and go straight to the AAT (or its replacement), either at the start of the process or if the OAIC takes—or expects to take—more than 90 days. Any filing fee for an IC Review or appeal to be heard by the AAT should be nominal and refundable in the event that an application is wholly or partially successful.
- 3.2 Prompt access to government information is an essential feature of a representative democracy. Such access enables greater public participation in democratic institutions and enhances transparency and accountability in policy making. This is recognised in the objects of the FOI Act.<sup>2</sup>
- 3.3 Despite this, the existing FOI regime has been plagued by unreasonable delays. This has resulted in information provided pursuant to legitimate FOI requests becoming irrelevant or obsolete due to the passage of significant time (often years later). Some of these delays occur when FOI applications are being initially considered, or are subject to internal review, by government agencies (discussed further below in section 4). However, increasingly these delays

<sup>1</sup> LinkedIn, Leo Hardiman PSM KC Posts (accessed 17 April 2023) <<https://www.linkedin.com/in/leo-hardiman-psm-kc-78123a123/recent-activity/shares/>>; Luke Costin, 'FOI commissioner quits, citing lack of power and delays', *AFR* (online, 6 March 2023) <<https://www.afr.com/politics/federal/foi-commissioner-quits-citing-lack-of-power-and-delays-20230306-p5cpwj>>.

<sup>2</sup> See FOI Act, s 3:

...  
(2) *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.

...  
(3) *The Parliament also intends that functions and powers given by this Act are to be performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost.*

are resulting from the OAIC failing to process IC Reviews quickly.<sup>3</sup> This is despite the OAIC being statutorily required to conduct its IC Reviews in as timely a manner as possible.<sup>4</sup>

- 3.4 The OAIC's lack of resources is evidently a key reason for the increasing slowness in IC Reviews being processed. Australia's Information and Privacy Commissioner, Ms Angelene Falk, revealed at senate estimates in 2019 that a gap remained "... *between the volume of work coming into the office and the staff that's needed in order to process those matters*".<sup>5</sup> Ms Falk specifically requested at that time that the OAIC be allocated funding for 50 per cent more staff to manage the increasing volume of IC Review requests.<sup>6</sup> Ms Falk and the OAIC have continued to make requests for commensurate increases in resources to deal with its increasing IC Review workload.<sup>7</sup>
- 3.5 In former federal senator, Rex Patrick's, recent Federal Court appeal regarding the significant delays in the processing of a number of his FOI requests, Justice Wheelahan acknowledged the OAIC's "unquestionable shortage of resources".<sup>8</sup> For example, in October 2020, a Deputy Commissioner of the OAIC estimated that the FOI branch would require a total of 35 full time equivalent staff in the 2021-22 financial year and 28 full time equivalent staff in the 2022-23 financial year to manage the existing caseload of IC reviews on hand and the number of IC reviews expected to be received.<sup>9</sup> However, this estimate greatly underestimated the increases in IC Reviews that there would be subsequently.<sup>10</sup> As at 5 August 2022, the FOI branch only had the equivalent of 18 full time employees.<sup>11</sup>
- 3.6 While the NSWCCCL notes the Albanese Government's decision to increase the OAIC's funding in its most recent budget, none of the additional payments to the OAIC are designated for use in respect of the OAIC's FOI functions, let alone resolving its growing backlog of IC Reviews.<sup>12</sup> Since 1 July 2016, the OAIC has only received one FOI function specific funding allocation.<sup>13</sup> Additionally the OAIC's overall funding is still projected to nearly halve over the forward

<sup>3</sup> On 13 February of this year, Ms Angelene Falk, the Australian Information and Privacy Commissioner, noted to the Senate Legal and Constitutional Affairs Legislation Committee that the OAIC had 2,010 outstanding IC Reviews on hand. Just 12 months prior, that figure was at 1,500. Of that 2,010 outstanding IC Reviews, 47 were from 2018, 238 were from 2019, 329 of them were from 2020, 464 were 2021, there were 808 from 2022 and 124 were from 2023 - see Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Estimates* (13 February 2023) 138–139. While the OAIC finalised 37% more IC reviews between 2021-22 compared to 2020-21, the OAIC received 63% more applications for IC Reviews of FOI decisions over the same period. The average time to finalise a IC review during the same period was 6.3 months – see OAIC, *Annual report 2021–22* (Report, 28 September 2022) 14.

<sup>4</sup> FOI Act s 55(4)(c).

<sup>5</sup> Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Estimates* (22 October 2019) 126.

<sup>6</sup> *Ibid*, 121.

<sup>7</sup> Recent FOI disclosures by the OAIC have shown Ms Falk has warned the Attorney-General Mark Dreyfus at least eight times in meetings and letters since May last year of the "significant funding pressure" placed on the OAIC, saying it could not keep up with the incoming work. Deputy commissioner Elizabeth Hampton has described the situation as a "funding cliff" and that the "most critical" issue is in regards FOI resources – see Sarah Brasford Canales, 'OAIC heading for 'funding cliff' months before FOI commissioner resigned' *The Canberra Times* (online, 1 May 2023) <<https://www.canberratimes.com.au/story/8153439/privacy-foi-watchdog-on-funding-cliff-despite-repeated-cries-for-help/>>. See also Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Estimates* (13 February 2023) 137; Christopher Knaus, 'FOI commissioner complained of being ignored and 'limited' staff before resigning, tense emails reveal' *The Guardian* (online, 12 May 2023) <<https://www.theguardian.com/australia-news/2023/may/12/foi-commissioner-complained-of-being-ignored-and-limited-staff-before-resigning-tense-emails-reveal>>.

<sup>8</sup> Justice Wheelahan stated that "the causes of the lengthy delays were common and the combined force of the [OAIC's] evidence pointed to an unquestionable shortage of resources". See *Patrick v Australian Information Commissioner (No 2)* [2023] FCA 530, [66]. See also paragraphs [132]-[133] and [145].

<sup>9</sup> *Patrick v Australian Information Commissioner (No 2)* [2023] FCA 530, [91].

<sup>10</sup> This estimation was based on an assumption that the number of IC Reviews would continue to increase by 15% each year on the number received in the 2019-20 financial year. However, this assumption was inaccurate, as the number of reviews in 2021-22 was approximately 60% more than the number received in the previous financial year. See *Patrick v Australian Information Commissioner (No 2)* [2023] FCA 530, [91].

<sup>11</sup> *Patrick v Australian Information Commissioner (No 2)* [2023] FCA 530, [66].

<sup>12</sup> OAIC, *OAIC welcomes additional budget funding* (Web Page, 09 May 2023), <<https://www.oaic.gov.au/newsroom/oaic-welcomes-additional-budget-funding>>.

<sup>13</sup> Since 1 July 2016, the only specific funding allocated to the OAIC for its FOI functions was \$3.9 million over four years and ongoing (approximately \$1 million per year), which was allocated in the 2021-22 Budget for the appointment of an FOI Commissioner, one staff member at SES 1 level, which is a role that is part of the Office's executive, and two support staff. See *Patrick v Australian Information Commissioner (No 2)* [2023] FCA 530, [90].

estimates.<sup>14</sup> This represents a wasted opportunity to provide the OAIC the resources it needs to fulfill its mandate in respect of the FOI Act, and in particular its obligation to complete IC Reviews promptly. NSWCCCL submits that this must be rectified at the next budget by the Government providing additional funding specifically to support the OAIC's FOI functions.

3.7 In addition, the Government must allow IC Review applicants to elect to have their matter heard by the AAT (or the body which may replace the AAT in the near future) either at the commencement of an IC Review, or subsequently, if the OAIC takes—or at any point expects to take—more than 90 days to complete the relevant IC Review. Not only would this lead to a reduction of the OAIC's current backlog of IC Review matters, but would also reduce the OAIC's workload in this regard. This reform is particularly important in the context of the OAIC's inadequate financial resources discussed above.

3.8 NSWCCCL also submits that where IC Reviews reach the AAT (or equivalent institution), any filing fee for an IC Review or appeal to be heard by the AAT should be nominal and refundable in the event that an application is wholly or partially successful. At present, these filing fees serve as a tax on public interest journalism and Australian citizens' right to know about the activities of the government they elected.

#### **4 Resourcing for responding to FOI applications and reviews**

4.1 NSWCCCL submits that the OAIC must be statutorily empowered to:

- (a) set a ratio of FOI officers to FOI requests and mandate minimum staff numbers within government departments;
- (b) conduct investigations into government departments that fail to meet their disclosure duties under the FOI Act; and
- (c) impose disciplinary sanctions on departmental officers who repeatedly make decisions subsequently determined to be contrary to the requirements of the FOI Act, as well as for persons who direct or influence them to make such decisions.

4.2 In addition to delays in FOI requests being processed due to the OAIC's lack of resources to conduct IC Reviews discussed above in section 3, delays are also being caused due to government agencies allocating insufficient resources to resolve FOI requests promptly at first instance.

4.3 Agencies are required to take all reasonable steps to provide an applicant with a decision on a FOI request as soon as practicable, but in any case no later than within the 30 days after receiving the request.<sup>15</sup> Despite this, just 70% of FOI requests were resolved within this statutory time period in 2021-22, a decrease from 85% in 2017-2018.<sup>16</sup> This 70% figure is not an aberration either. In 2016-2017 almost *half* of all FOI requests were resolved outside of the 30

<sup>14</sup> The OAIC's funding is projected to decline from \$46.5 million in FY23-24 to \$ 24.7 million in FY 26-27. See OAIC, *Portfolio Budget Statements: Budget 2023-24*, 13.

<sup>15</sup> FOI Act s 15.

<sup>16</sup> In respect of the Department of Home Affairs and the Department of Prime Minister & Cabinet, this figure was just 45% and 26% respectively – see OAIC, *Annual report 2021–22* (Report, 28 September 2022) 146. It should also be noted that these figures, reported by the OAIC in its Annual Reports, do not capture the number of FOI requests on which no decision is made. In 2021-22, 9,202 FOI applications received no decision across all agencies - The Australian Institute, *Nothing to see here: Australia's broken freedom of information system* (Report, March 2023) 10. The amount of FOI decisions made over 90 days beyond the statutory time limit has also increased considerably in recent years. In 2021-21, 19 per cent of FOI requests were over 90 days late, while it was 12 per cent in 2020-21, 10 per cent in 2019-20, and 2 per cent in 2018-19 – see OAIC, *Annual report 2021–22* (Report, 28 September 2022) 147; The Centre for Public Integrity, *Delay and Decay: Australia's Freedom of Information Crisis* (Report, August 2022) 5.

day statutory time frame.<sup>17</sup> The Home Affairs Department has been particularly egregious in this respect. Between July 2022 to April 2023, the average number of days that department took to respond to an FOI request (not including those subject to internal review) was 38.9 days in respect of non-personal requests and 177.2 days in respect of personal requests.<sup>18</sup>

- 4.4 Agencies have openly admitted to the OAIC that a key reason for the increase in delays in processing FOI applications is a lack of FOI staff.<sup>19</sup> To ensure this excuse cannot be capitalised upon by agencies in order to hamper the prompt processing of FOI requests, NSWCCCL submits that the OAIC be granted the powers to compel agencies to set a ratio of FOI officers to FOI requests, and that minimum staff numbers be mandated within departments. This solution has been previously advocated for by the Centre for Public Integrity.<sup>20</sup>
- 4.5 Additionally, there is considerable evidence suggesting that the delays highlighted above are the product of systemic cultural issues in the way government agencies carry out their obligations under the FOI Act. This evidence includes:
- (a) Government agencies are increasingly refusing to provide information, or to provide only partial responses with heavy redactions. Over the last six years there has been a trend of increased refusals, increased partial information responses, and a corresponding decrease in full disclosure.<sup>21</sup>
  - (b) While the FOI Act provides for time extensions in certain limited circumstances,<sup>22</sup> some government agencies appear to apply such time extensions as part of standard practice.<sup>23</sup> For example, 42% of FOI requests decided by the Department of Home Affairs in 2021-22 were more than 90 days after the statutory 30 days had expired.<sup>24</sup>
  - (c) The Centre for Public Integrity and the Australia Institute have identified many recent examples of abuses of the exemptions regime in the FOI Act.<sup>25</sup> For example, 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.<sup>26</sup> Further, the AAT overturned a decision to withhold an Auditor-General report on national security grounds, the Auditor-General report found that the Commonwealth had not achieved value for money in defence procurement.<sup>27</sup>
- 4.6 To root out these cultural issues, the OAIC must be given the power to investigate agencies that fail to meet their disclosure duties under the FOI Act. This power should be paired with the capacity to impose disciplinary sanctions on departmental officers who repeatedly make decisions subsequently determined to be contrary to the requirements of the FOI Act, as well as for persons who direct or influence them to make such decisions. The flagrant disregard for the

<sup>17</sup> The Centre for Public Integrity, *Delay and Decay: Australia's Freedom of Information Crisis* (Report, August 2022) 5.

<sup>18</sup> Home Affairs Portfolio, *Senate Question: Question No. 2075* (2023).

<sup>19</sup> Factors for the delays in processing FOI requests identified by agencies last financial year include high staff turnover, difficulty recruiting staff (particularly experienced FOI practitioners), and the onboarding and training of new FOI staff who may be in other geographical locations. See - OAIC, *Annual report 2021-22* (Report, 28 September 2022) 146.

<sup>20</sup> The Centre for Public Integrity, *Delay and Decay: Australia's Freedom of Information Crisis* (Report, August 2022) 1.

<sup>21</sup> The proportion of FOI requests granted in full in 2021-22 was 39% (down from 55% in 2016-17); while the proportion of FOI requests partially granted increased to 42% (up from 34% in 2016-17); and the number of refusals increased to 19%, up from 10% in 2016-17: OAIC, *Annual report 2021-22* (Report, 28 September 2022) 55; OAIC, *Annual report 2016-17* (Report, 14 September 2017) 166.

<sup>22</sup> Eg, in cases involving complex requests or requiring third party consultation: FOI Act ss 15(6) -15(8), 15AA and 15AB.

<sup>23</sup> Grata Fund, *FOI Litigation Hit List: Challenging Government Secrecy in The Courts* (Report, August 2021) 12 -13.

<sup>24</sup> OAIC, *Annual report 2021-22* (Report, 28 September 2022) 148, 152.

<sup>25</sup> The Centre for Public Integrity, *Delay and Decay: Australia's Freedom of Information Crisis* (Report, August 2022) 11; The Australian Institute, *Nothing to see here: Australia's broken freedom of information system* (Report, March 2023) 3.

<sup>26</sup> Jonathan Kearsley and Australian Federal Police (*Freedom of information*) [2022] AICmr 55.

<sup>27</sup> *Patrick v Secretary, Department of Prime Minister and Cabinet (Freedom of Information)* [2020] AATA 4964.

FOI Act's statutory time limit by agencies discussed above cannot be expected to change without the regulatory body charged with safeguarding the FOI Act being given the ability to uncover and punish behaviour contrary to the provisions of that act.

- 4.7 Federal legislators can find guidance from the offence provisions under the *Government Information (Public Access) Act 2009* (NSW) (the **GIPA Act**). The GIPA Act seeks to encourage government agencies to proactively release government information and imposes arrangements to safeguard against vulnerabilities that may arise under devolved decision making models. For instance, the GIPA Act creates five offences, which in summary serve two regulatory purposes:
- (a) an enforcement function to impose penalties upon persons contravening the requirements of the GIPA Act; and
  - (b) a persuasive / educative function to deter persons from committing contraventions.<sup>28</sup>

## 5 The Creation of a statutory time frame for completion of reviews

- 5.1 As set out at paragraph 3.7, NSWCCCL proposes that instead of a statutory time frame for completion of IC Reviews, IC Review applicants should be empowered to have their matter heard by the AAT (or the body which may replace the AAT in the near future) either at the commencement of an IC Review, or subsequently, if the OAIC takes - or at any point expects to take - more than 90 days to complete the relevant IC Review.

## 6 Other related matters

- 6.1 In addition to the issues specifically called out by the Terms of Reference of this enquiry, NSWCCCL submits that the following issues must also be addressed promptly to enable the effective operation of the Commonwealth's FOI laws:
- (a) closing the former minister's documents loophole;
  - (b) applying a single overarching public interest test to a greater number of exemptions in the FOI Act; and
  - (c) refining the Cabinet Documents Exemption.

### Closing the former minister's documents loophole

- 6.2 NSWCCCL submits that the definition of an 'official document of a Minister' in section 4(1) of the FOI Act must be amended so that it includes documents of former ministers made while they were in office.
- 6.3 An "official document of a Minister" is defined in section 4(1) of the FOI Act as a document that is "in possession of the Minister... in his or her capacity as a Minister".<sup>29</sup> The Information Commissioner has, in three instances, construed section 4(1) narrowly to mean that the FOI Act does not apply to documents of former ministers.<sup>30</sup>
- 6.4 NSWCCCL considers that this interpretation by the Information Commissioner is inconsistent with the objectives of open government, which the FOI Act is intended to facilitate. This interpretation

<sup>28</sup> *Government Information (Public Access) Act 2009* (NSW) ss 116 -120.

<sup>29</sup> FOI Act s 4(1).

<sup>30</sup> *Rex Patrick and Attorney-General (Freedom of information)* [2023] AICmr 9; *Thomas and Prime Minister* [2014] AICmr 18; *Philip Morris Ltd and Treasurer* [2013] AICmr 88.



provides loopholes for scandal-plagued ministers to avoid scrutiny.<sup>31</sup> Ministers routinely resign, or switch portfolios and former ministers are not incentivised to make documents available to their successors.

- 6.5 The deletion of FOI requests relating to Christian Porter's 'blind trust' by the Department of Industry, Science, Energy and Resources highlights how this loophole enables ministers to avoid scrutiny.<sup>32</sup> Rex Patrick stated that: "*Attorney General Porter confirmed he had the Sports Rorts letter I requested under FOI but refused to let me have it. I appealed his decision to the Information Commissioner, but when Senator Cash took over... the letter was declared no longer in the possession of Attorney-General Cash.*"<sup>33</sup>
- 6.6 Section 4(1) of the FOI Act should be amended to expressly include documents of a former minister within the ambit of an 'official document of a Minister'. The resignation or reassignment of a minister is significant, particularly when there is a suggestion of impropriety. The public should have an available avenue to access information about a former minister's affairs, provided the request relates to information in connection with the exercise of their functions as a minister.

#### The public interest test should apply to a greater number of exemptions in the FOI Act

- 6.7 NSWCCCL submits that the public interest test which currently applies to exemptions under Division 3 of Part IV of the FOI Act (the **Public Interest Test**) must apply to a greater number of exemptions in Part IV of the FOI Act.
- 6.8 The problem with some of the absolute exemptions set out in Division 2, Part IV of the FOI Act is that even when they are clearly expressed, they tend to be interpreted with ever-increasing scope. This much is demonstrated by the trend of increased refusals by agencies and ministers discussed in section 4. This is also consistent with the Grata Fund's finding, from its experiences and discussions with various stakeholders, that many of the exemptions are commonly overused without substantiation.<sup>34</sup>
- 6.9 Incorporating the overarching public interest test to a greater number of exemptions in the FOI Act would foster a rethinking by government agencies about the tension between the public interest in disclosure and the concerns that are reflected in the exemptions.
- 6.10 In particular, NSWCCCL submits it is crucial that exemptions under section 33, section 34, section 37, section 38, section 45, section 45A, section 47 and section 47A should be subject to the Public Interest test. Documents contained in these exemptions include information that is essential for the public to scrutinise government agencies and to hold them accountable. For example, Cabinet Documents can include information used to decide what income tax to charge, how to intercept refugee boats, how to care for mentally ill defence personnel, whether to fund public or private schools or how much politicians are spending in allowances. The blanket policy of refusing access to all documents prepared for the "dominant purpose" of

<sup>31</sup> See also, The Australian Institute, *Nothing to see here: Australia's broken freedom of information system* (Report, March 2023) 14; Grata Fund, *FOI Litigation Hit List: Challenging Government Secrecy in The Courts* (Report, August 2021) 20; New South Wales Council for Civil Liberties, *Letter to Hon. Michaelia Cash Re: Support for Senator Rex Patrick's challenge to FOI laws* (Letter, 12 November 2021).

<sup>32</sup> See New South Wales Council for Civil Liberties, *Letter to Hon. Michaelia Cash Re: Support for Senator Rex Patrick's challenge to FOI laws* (Letter, 12 November 2021); Grata Fund, 'Major loophole in ministerial reshuffles to be challenged in Federal Court' (Media Release, 29 March 2023) <[https://www.gratafund.org.au/foi\\_porter\\_sportsrorts](https://www.gratafund.org.au/foi_porter_sportsrorts)>.

<sup>33</sup> Grata Fund, 'Major loophole in ministerial reshuffles to be challenged in Federal Court' (Media Release, 29 March 2023) <[https://www.gratafund.org.au/foi\\_porter\\_sportsrorts](https://www.gratafund.org.au/foi_porter_sportsrorts)>.

<sup>34</sup> Grata Fund, *FOI Litigation Hit List: Challenging Government Secrecy in The Courts* (Report, August 2021) 5 and 11-12.

Cabinet discussions creates a grave risk that government agencies will use this exemption to hide controversial or unpopular views from the public.

### Refining the Cabinet Documents Exemption

- 6.11 NSWCCCL submits that the definition of “Cabinet” under section 4 of FOI Act should be refined to prevent an improperly broad class of documents being captured by the Cabinet Documents Exemption.
- 6.12 The Cabinet Documents Exemption is now applied to documents of the National Cabinet,<sup>35</sup> despite the fact that it includes all state premiers and chief ministers, who are members of nine different parliaments and are not responsible to the Prime Minister. On 29 May 2020, then Prime Minister Scott Morrison announced that the National Cabinet would permanently replace the Council of Australian Governments, which was subject to FOIs.
- 6.13 The AAT overturned a decision to exempt National Cabinet documents under Cabinet Documents Exception.<sup>36</sup> However, successive Governments have continued to use the Cabinet Documents Exception for National Cabinet documents on the basis that tribunal cases are decided on their own merits and do not establish precedents.<sup>37</sup> The Grata Fund has also noted that the exemption has been used for documents submitted to bodies that report to committees that report to Cabinet.<sup>38</sup>
- 6.14 These interpretations of "Cabinet" are clearly not in line with the intention of Parliament when the FOI Act was first enacted. The definition should be amended to resolve these perverse applications of the Cabinet Documents Exemption

We trust that this submission assists the Committee in its work and would be pleased to offer further assistance if it would be of use.

Yours sincerely,

**Josh Pallas**  
**President**  
**NSW Council for Civil Liberties**

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<sup>35</sup> The national cabinet was created on 16 March 2020 initially to respond to the COVID-19 pandemic.

<sup>36</sup> *Patrick v Secretary, Department of Prime Minister and Cabinet (Freedom of Information)* [2021] AATA 2719.

<sup>37</sup> Paul Karp, 'Anthony Albanese backflips on national cabinet secrecy and refuses to say why', *The Guardian* (online, 17 June 2022) <<https://www.theguardian.com/australia-news/2022/jun/17/anthony-albanese-backflips-on-national-cabinet-secrecy-and-refuses-to-say-why>>.

<sup>38</sup> Grata Fund, *FOI Litigation Hit List: Challenging Government Secrecy in The Courts* (Report, August 2021) 18.