Coalition Senators' Dissenting Report

INTRODUCTION

The Coalition is committed to responsible and open government.

The *Freedom of Information Act 1982* was introduced by the Fraser Government as a vital measure to ensure that government is accountable and information is available to facilitate this.

Coalition Senators support many of the provisions of these bills, but have substantial concerns with one aspect of them.

This legislation introduces a substantial change in the onus of proof for appeals to the Administrative Appeals Tribunal. This change has the potential to diminish accountability and transparency, in stark contrast to the stated objectives of this legislation.

In effect, this change demands that applicants must show why secret government documents should not remain secret.

The change in the onus of proof will make it incredibly difficult for applicants to successfully appeal a decision by the Information Commissioner.

The majority report of the Committee recommends that this onus be removed altogether – this recommendation is also opposed by Coalition Senators.

Coalition Senators have further concerns regarding the changes to fees and charges under the proposed legislation. In particular, the possibility of discriminating between individual researchers vis-à-vis those deemed journalists and non-government organisations.

LABOR'S RECORD ON FREEDOM OF INFORMATION

The Rudd Government's position on freedom of information (FOI) has been heavy on rhetoric and short of action. Prior to the 2007 Federal Election, the Rudd Labor Opposition stated that:

> "A Rudd Labor Government will restore trust and integrity in the use of Commonwealth Government information, promoting a pro-disclosure culture and protecting the public interest through genuine reform."[1]

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[1] *Government information – Restoring trust and integrity*, Election 2007 Policy Document, October 2007.

Indeed, the Labor Party, when in Opposition, described its approach to making information more accessible to the general public with the colourful (if Orwellian) phrase "Operation Sunlight".

However, the *Freedom of Information Act 1982* Annual Report 2008-09 provides substantial evidence that the Rudd Government is keeping very tight control over the flow of information.

The report shows that there has been a significant increase in the number of FOI access requests that have been refused in the first full financial year (2008-09) of the Rudd Government.[2]

The number of FOI access requests refused increased from 1368, or 4.36 per cent of the total number of requests in 2007-08 to 1530 or 6.09 per cent in 2008-09. The 2008-09 figures represent an 11.8 per cent increase on the total number of refused FOI access requests over 2007-08. This comes despite a 19.8 per cent decrease in the total number of determined FOI access requests – a decrease from 31,367 to 25,139.

This is substantially more than the number of access requests that were refused in 2007-08, and in the last full financial year of the Howard Government. The increase in the number of refusals comes in spite of a substantial decline in the total number of FOI access requests that the Government received in 2008-09, compared to previous years.[3]

The cost of facilitating FOI requests has also increased substantially under the Labor Government.

From the last full financial year of the Howard Government, until the first full financial year of the Rudd Government, the cost of FOI increased from just under $25 million to over $30 million – an increase of 21.7 per cent.[4]

Given the increasing cost of facilitating FOI requests and the decline in the number of FOI access requests, there has been an extraordinary increase in the average cost per FOI request from 2006-07 to 2008-09. In 2006-07, the average cost per FOI request was $642.90 and in 2008-09 the cost per request was $1,101.50 – an increase of 71 per cent over two years.[5]

These facts contradict the government's purported commitment to 'promoting a pro-disclosure culture and protecting the public interest'.

The government's commitment to a pro-disclosure culture was put to the test last year, Mike Steketee reported in *The Australian* on 30 January 2010 of the behaviour of

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[2] *Freedom of Information Act 1982*, Annual Report 2008-09, p. 5.
[3] *Freedom of Information Act 1982*, Annual Report 2008-09, p. 2.
[4] *Freedom of Information Act 1982*, Annual Report 2008-09, p. 19.
[5] *Freedom of Information Act 1982*, Annual Report 2008-09, p. 2 and p. 19.

public servants in the Department of Climate Change, in their response to an FOI request from Dr Richard Denniss from the Australia Institute:

> "Even though the department rang Denniss to confirm that he wanted advice to the minister, and the department's lawyers said this was covered by the request, it was excluded on the instruction of departmental head Martin Parkinson and his deputy Blair Comley."
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> "Not easily deterred, Denniss fired in another request asking for documents prepared to help inform Wong and her advisers of the details, merits, limitations and criticisms of the ETS. The response: he may be able to get what he wants if he hands over $256,586.98, although, catch-22, if he proceeds with his request, the department may decide it involves an unreasonable diversion of resources."[6]

This example about a prominent public policy issue further illustrates that the Labor Government is not honouring its election commitment to creating a pro-disclosure culture and that Labor's rhetoric on FOI does not match the reality of continued denial of access to information.

REVERSAL OF THE ONUS OF PROOF FOR APPEALS TO THE AAT

The Government's bills propose a substantive change to the onus of proof for AAT appeals by FOI applicants that will diminish accountability. This clearly undermines the Government's commitment to creating a 'pro-disclosure culture'.

The current legislation *Freedom of Information Act 1982* states, in relation to the onus of proof under section 61:

> Subject to subsection (2), in proceedings under this Part, the agency or Minister to which or to whom the request was made has the onus of establishing that a decision given in respect of the request was justified or that the Tribunal should give a decision adverse to the applicant.

The proposed legislation repeals this section and replaces it with:

In proceedings under this Part, the person who applied to the Tribunal has the onus of establishing that:

(a) a decision given in respect of the relevant request or application is not justified; or
(b) the Tribunal should give a decision adverse to a party to the proceeding.

Astonishingly, the Government attempted to pass this change off as a "minor change",[7] which was relegated to the section dealing with trivial and technical

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[6] Steketee, Mike. "Labours in the ministry of truth", *The Australian*, 30 January 2010. Retrieved 1 March 2010: http://www.theaustralian.com.au/news/opinion/labours-in-the-ministry-of-truth/story-e6frg6zo-1225824638788

[7] Summary of main changes between the exposure draft and introduce FOI reform Bills, Department of Prime Minister and Cabinet, November 2009, p. 7.

amendments in the comparative table produced by the Department (which, it should also be noted, was not provided to the Committee until specifically requested).

The sincerity of the Rudd Government's commitment to freedom of information may be gauged from the fact that it actually sought to conceal, by burying it among the miscellany of technical amendments and passing it off as a minor change, a provision which, as we will see from the evidence of experienced expert witnesses, will "undermine" the entire scheme of the *Freedom of Information Act* and make successful applications for the review of refusals "impossible."

In contrast, Coalition Senators believe that this is not a minor change, and creates a barrier to accessing government information. Associate Professor Moira Paterson agreed with Senator Ryan that the changes to the onus of proof, would be a 'retrograde step':

> **Senator RYAN**—Would reversing the onus of proof be a 'retrograde' step, a term I think you used earlier in your verbal submission?
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> **Prof. Paterson**—Yes, I think it would be. How serious that turns out to be really depends on to what extent applicants need to go on to the AAT. But if you are going to have an AAT review and you are going to reverse the onus, then you are going to make it very difficult for applicants to make use of that.[8]

In practice, the applicant will have to justify to the Administrative Appeals Tribunal why secret documents should not remain secret. Applicants will only be able to make their case for access in the most general way, while the government will have complete access to the information and are in a substantially stronger position than the applicant to defend their denial of access.

Coalition Senators believe that the change in the onus of proof from the Minister or agency to the applicant will place an insurmountable barrier to government information that will make the FOI applicant quest for information virtually impossible.

Ms Philippa Lynch, First Assistant Secretary Government Division, Department of the Prime Minister and Cabinet, outlined the reasoning behind the change to onus of proof:

> **Ms Lynch**—I can explain to you a little the reasons why that provision was put in the bill. The issue behind that is that at present, if you appeal from a decision of an agency, you appeal straight to the AAT, and you are appealing from the agency's decision, so the agency bears the onus of defending its position. With the interposition of the Information

[8] *Hansard*, Finance and Public Administration Legislation Committee, Reference: Freedom of Information Amendment (Reform) Bill 2009, 15 February 2010, p. 2.

> Commissioner as a new review opportunity for people, if an agency or applicant wishes to appeal from the Information Commissioner's decision to the AAT, they are actually appealing the Information Commissioner's decision, not the department's decision. So the provision in relation to the onus of proof was included because it would not be appropriate for the Information Commissioner to be a party in the AAT, having to defend their position.[9]

Mr Mark Robinson, who appeared on behalf of the Law Council of Australia, is one of Australia's most experienced Freedom of Information practitioners, having appeared in hundreds of applications, both for and against governments, in the course of 17 years, having sat as a judicial officer hearing applications under the New South Wales *Freedom of Information Act*, and in fact having been the draftsman of the NSW Act. He said in response to the Department of Prime Minister and Cabinet's argument for the change that:

> **Mr Robinson**—It is an irrelevant assertion. I say this because the applicant does not normally know what document it is that he or she is seeking, and he or she does not normally know what it contains. They may think they do but they may be wrong. And how can an applicant meaningfully assist the tribunal by presenting his or her case first and by bearing the onus of proving something? You only have to think about it logically, I submit. As an applicant I can stand up and say: 'I put an FOI application in. I don't have to tell you why I did it, because that's irrelevant. I don't have to tell you who I am, because that's irrelevant. I don't have to tell you what I'm going to do with the document when I get it, because that's often irrelevant—and I want the document.' And I sit down. Now, how is that possibly going to discharge the onus of proof? It puts an applicant in an impossible position, both practically and as a matter of fairness, and as a matter of law. On one view of it, that onus could never be discharged, ever.[10]

Mr Robinson went on to offer the following observations:

> **Senator BRANDIS**— … I put it to you, was that where a refusal of an FOI application is before the tribunal it is the government which knows what is in the document and which has the monopoly of knowledge. In those circumstances … it is almost impossible to imagine how an applicant could succeed if he bears the onus of proof since he has no means of knowing what is in the document.
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> **Mr Robinson**—What are they going to say?
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> **Senator BRANDIS**—Do you agree with that proposition that I have just put to you?

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[9] *Hansard*, Finance and Public Administration Legislation Committee, Reference: Freedom of Information Amendment (Reform) Bill 2009, 5 February 2010, p. 13.

[10] *Ibid.* p. 19.

Mr Robinson—Absolutely, if they are self represented then they will talk. They will make submission after submission after submission about what they think the document will be, and if they do not want know what it is then about what it should be. All of that will of course waste the tribunal's time.

Senator BRANDIS—Yes.

Mr Robinson—An applicant who has a legal representative hopefully would not do that and ordinarily would not do that. It is a recipe for disaster in the sense that it is giving them a platform and giving them a burden and telling them to discharge an onus that in ordinary circumstances they cannot.

Senator BRANDIS—If I may say so, with respect, I think that is absolutely right. You would be aware, Mr Robinson, as a lawyer, that in fact the very set of circumstances in which you find reversals of onus in statutes is where one party has the monopoly of knowledge of the relevant facts so that it is appropriate that it bear the onus of supporting its decision rather than the party which is information deprived seeking to discharge an onus.

Mr Robinson—I would accept that, but, more fundamentally, in this case the FOI legislation makes it clear that the identity of an applicant is not relevant; and the reason an applicant wants the material is not relevant. The wording of the legislation is 'every Australian has a right'. The wording of the new objects clause in section 3 is 'to give to the Australian community access to information by Commonwealth publishing' but also by providing a right of access to the documents and combined with subsection 4 of section 3 of the new objects clause 'the parliament intends that the functions and powers given by the act to be performed and exercised as far as possible—and here is the important part—to facilitate and promote public access to information promptly and at the lowest reasonable cost'.

Senator BRANDIS—That is the objects clause. What effect will the proposed new section 61 have on that?

Mr Robinson—It will not facilitate and promote the flow of public access to information. How can you put an applicant up and say, 'Prove the case against the Commonwealth,' when you do not know the case against the Commonwealth; or, 'Prove why we should release the document,' when they do not know what the document is. Often a brief bullet point or a cryptic statement of reasons from the Commonwealth is the only document they have to comment on let alone attack. You can only make submissions on those things. You cannot discharge an onus of proof by adducing evidence; you can only make oral submissions. You cannot put on evidence to fight reasoning, let alone brief, cryptic or incomplete reasoning. It is only when a matter gets to the AAT or possibly, hopefully, before the information commissioner under this new system, that the Commonwealth reasons will become more expensive because the information commissioner will have, hopefully, extracted more detailed reasoning out of them. Only then will things be a little more clear.

> **Senator BRANDIS**—What impact does the proposed new section 61 have?
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> **Mr Robinson**—It will undermine it.
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> **Senator BRANDIS**—So what we see is declarations of intent in the objects clause saying one thing, but, when one drills into the details of the legislation, in this particular case the reversal of the onus of proof, the substance is at variance with the declaration of intent.
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> **Mr Robinson**—The most stark way to appreciate this is to accept that, in most FOI cases since the beginning of the FOI Act, in the AAT the Commonwealth goes first. The Commonwealth agency has presented its case first in every case I have been involved in and in almost every case that I am aware of. I think there may be one or two cases where it has been reversed in very unique circumstances. For example, third parties who want to preserve their trade secrets may sometimes come in. They are called reverse FOI applications by other people. The situation is different there, but in the ordinary FOI case of an FOI applicant wanting a document from the Commonwealth the Commonwealth goes first. This will change that.
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> **Senator BRANDIS**—Would you agree with my characterisation that the effect of section 61 is at variance with the declaration of intent in the objects clause?
>
> **Mr Robinson**—Yes

A number of other witnesses at the inquiry stated that the change in the onus of proof will make it virtually impossible for applicants to succeed. Mr Jack Herman, the Executive Secretary of the Australian Press Council also criticised the change in the onus of proof:

> **Mr Herman**—If, however, the Senate decided to have two levels of merit review, first by the information commissioner and then by the AAT, the council would suggest that the onus of proof in either merit review should rest with the officials who are contending that the information should not be released. The objects clause of the act makes it clear that the object of freedom of information is the release of information. Therefore, the onus to show that the information should not be released should always rest with the official trying to forestall release.[11]

Professor Spencer Zifcak, the Vice-President of Liberty Victoria also expressed his concern with the change to the onus of proof:

> **Senator RYAN**—I should add that that onus of proof is only reversed for appeals from the Information Commissioner to the AAT. But with all your expertise that would be an almost impossible onus to surmount given the information, as you mentioned, resides with the person or the agency or government.

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[11] *Hansard*, Finance and Public Administration Legislation Committee, Reference: Freedom of Information Amendment (Reform) Bill 2009, 15 February 2010, p. 21.

> **Prof. Zifcak**—I agree with that.[12]

Under the current legislation, Ministers and agencies have the onus of showing why secret government documents should remain secret. The proposed change to the onus of proof places a virtually impossible burden for applicants to show that secret government documents should not remain secret. There is a substantial asymmetry of information between the government and the applicant and the change in onus will place an insurmountable barrier to some FOI requests.

As Mr Robinson – who was more acquainted with FOI practice than any other witness – was at pains to stress, that asymmetry is the very reason why it is, from a functional point of view, necessary to reverse the onus. Since it is the applicant, who is not possessed of the information whose disclosure the government has refused, it is not possible for an applicant to mount a positive argument about material of which he is ex hypothesis ignorant.

These are the very circumstances – i.e. where one of the two adverse parties possesses a monopoly of information – that Parliament routinely casts the onus on that party to defend its position, since it is not, from an evidentiary point of view, practically possible for the other party to attack it.

COALITION SENATORS OPPOSE RECOMMENDATION 4 OF THE MAJORITY REPORT – THE PROPOSAL TO REMOVE OF THE ONUS OF PROOF FOR APPEALS TO THE AAT

Government Senators recommend, by Recommendation 4, that relevant sections of the *Bill* and of the *Freedom of Information Act* itself, "be amended to remove the concept of an onus of proof from the Act." The only rationale of this recommendation appears to be the following statement in para. 3.146:

> "The committee considers that the alteration of the onus of proof such that whichever party applies for review by the AAT bears the onus of proof is inappropriate, unnecessary and unfair to individuals. Accordingly, in order to make the FOI Act consistent with the lack of onus in the rest of the AAT's jurisdiction, the committee recommends that proposed section 61 be amended to remove the concept of onus of proof from the FOI Act entirely. The committee recommends that any other amendments required to give effect to the removal of the notion of onus from the FOI Act also be made."

That statement reveals a lamentable ignorance of the structure and functioning of the FOI Act. Under the terms of the existing s. 61(2), the onus "of establishing that a decision refusing the request [for access] is justified" lies upon "the party to the proceedings that opposes access being given to a document in accordance with a request". Consistency with the merits review procedures elsewhere in the *Administrative Appeals Tribunal Act*, which appears to be the only consideration resembling a rationale for the Government Senators' recommendation, ignores the fact

[12] *Ibid*, p. 36.

that, in a typical merits review, both parties will have access to the relevant facts, of which review is sought.

The peculiarity of applications for review of refusals of access under the FOI Act is that, *ex hypothesi*, the party seeking review cannot know of the contents and substance of the document, the refusal of access to which is sought to be overturned. In those circumstances, as we have pointed out, there is an asymmetry of information – an asymmetry so absolute that, but for the provisions of s. 61(2), the unsuccessful applicant for access is literally helpless in bringing its review application. Since it cannot be made aware of the contents of the disputed document, how is it to advance arguments that the document should have been released? It is for these reasons that experienced practitioners before the hearing warned that removal of the reverse onus of proof would effectively destroy the scheme of the FOI Act.

The expedient recommended by Government Senators is no better. Just as surely as the Government amendment which they criticize, the Government Senators' proposal (Recommendation 4) would remove the mechanism of the reverse onus. The same mischief, which the Government Senators criticize as "inappropriate, unnecessary and unfair to individuals" would remain. It is only by retaining the *status quo* in s. 61(2) that an applicant for review is able to be ensured a reasonable opportunity to put forward his case.

Opposition Senators point out that the reversal of the onus in review proceedings before the AAT has been a feature of the FOI Act since its inception. Indeed, it was a feature each of the two Bills which were precursors of the existing *Act* – the *Freedom of Information Bill* 1978 and the *Freedom of Information Bill* 1981, where it appeared in substantially similar form in cll. 41 and 51 respectively.

The Explanatory Memorandum to the current Act explains the point which Opposition Senators are now making:

> "Clause 61 places the onus of establishing that a decision given in respect of a request was justified on the agency or Minister to whom the request was made. *This is because the applicant does not have access to the document concerned, and so it is not necessarily in a position to argue that the decision was wrong."* [13]

So clear was the understanding of the drafters of the current FOI Act and its predecessors that the reverse onus was essential, and so uncontroversial was it, that in the course of the 526-page report of the Senate Standing Committee on Constitutional and Legal Affairs into the *Freedom of Information Bill* 1978, tabled on 6 November 1979,[14] that the matter was not even adverted to.

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[13] *Freedom of Information Bill* 1981 Explanatory Memorandum Circulated by the Honourable Ian Viner M.P., n.d., p. 51.

[14] Parliamentary Paper 272/1979

For the reasons well understood by the framers of Australia's freedom of information laws, well understood by all of the expert practitioners who appears before the Committee, and which Opposition Senators have explained - but which seem to have escaped the comprehension of Government Senators - both the proposed amendment to s. 61, and the Government Senators' alternative proposal, would equally deal a mortal blow to freedom of information in Australia.

No amendment to s. 61 should be countenanced.

THE POTENTIAL FOR BUREAUCRATIC MANIPULATION AND RECALCITRANCE

It is clear that the substantive change to place the onus of proof on the applicant will make it extraordinary difficult for applicants to get the information they are looking for, there are a number of related concerns that were raised during the hearings.

In particular, there is the potential for departments and agencies to instigate time wasting strategies in order to delay the release of politically sensitive information beyond its use by date.

> **Mr Timmins**—My point is really that, under proposed section 60, an agency, an applicant or a third party may seek further review of an Information Commissioner decision simply on the basis that they assert that decision is wrong. I think this opens up the prospect of delaying tactics from an agency or a minister who is not happy with an Information Commissioner decision and seeking to delay disclosure by simply lodging an application with the AAT.[15]

A further concern was raised by Mr Mark Robinson of the Law Council of Australia, who said that as a consequence of the asymmetry of information between the applicant and the government, there is the potential for an endless cycle of applicant submissions.

> **Mr Robinson**—Absolutely, if they are self represented then they will talk. They will make submission after submission after submission about what they think the document will be, and if they do not want know what it is then about what it should be. All of that will of course waste the tribunal's time.[16]

While the Information Commissioner does have the capacity to declare a person to be a vexatious applicant for the purposes of the FOI Act,[17] the point raised by Mr

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[15] *Ibid*. p. 17.

[16] *Hansard*, Finance and Public Administration Legislation Committee, Reference: Freedom of Information Amendment (Reform) Bill 2009, 5 February 2010, p. 20.

[17] Freedom of Information Amendment (Reform) Bill 2009, Explanatory Memorandum, 2008-09, p. 2.

Timmins suggests that the public servants and Ministers could frustrate the FOI process – in contrast to the stated objectives of the legislation.

FEES AND CHARGES

In his second reading speech on the Freedom of Information Amendment (Reform) Bill 2009, the Parliamentary Secretary to the Prime Minister, the Hon Anthony Byrne MP said, that *"The First five hours of decision-making time for application from journalists and not-for-profit organisations will be free, and for all other applications the first hour of decision-making time will be free."* [18]

Some of the changes to fees and charges will be made through changes to regulations. Additionally, the Information Commissioner will be tasked with reviewing all charges within 12 months of their appointment. Mr Peter Timmins raised expressed some concerns relating to the special concession for journalists and not-for-profits.

> **Mr Timmins**—But I have suggested that one hour free for John and Mary Citizen, which is what it amounts to, and five hours free for anyone an agency reasonably believes to be a journalist or anyone an agency reasonably believes to be a non-profit organisation are both unsatisfactory. There is no definition of journalists, and of course it is very hard to define. In my submission I suggested that individuals, community or similar groups who individually or on behalf of others seek access to documents for the purpose of participating in government processes, or the purpose of scrutiny and review of government activities that impact on members of the public generally, or in a particular instance, should get some special concession if we are going to maintain this idea of special concession for charges under the act.[19]

Coalition Senators have concerns that someone who is making a third party application for government documents will not be treated in the same way as a journalist or an applicant associated with a not-for-profit organisation.

In effect, ordinary Australian citizens will be treated in a different manner to those from selected organisations or occupations. This will undermine independent research and scrutiny by individuals, purely on the basis of a lack of association with favoured organisations.

A further issue raised by the Australian Press Council was that the structure of fees and charges proposed in the legislation will "encourage administrative inefficiency":

> "If there is no search fee nor a decision-making fee, then agencies have an incentive to make production and assessment of information efficient,

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[18] Byrne, Anthony. "Freedom of Information Amendment (Reform) Bill 2009", Second Reading Speech, 26 November 2009.

[19] *Hansard*, Finance and Public Administration Legislation Committee, Reference: Freedom of Information Amendment (Reform) Bill 2009, 15 February 2010, p. 18.

> whereas fees applied on the basis of time simply encourage administrative inefficiency."[20]

JURISDICTION SHOPPING

The Privacy Advisory Committee (PAC) raised issues relating to 'Commissioner shopping'. If all three Commissioners: the Privacy Commissioner, the Information Commissioner and the FOI Commissioner; have the same powers over information and privacy, there is the potential for different interpretations of the legislation and inconsistent rulings by the different commissioners.[21]

A further issue raised by Ms Philippa Lynch from the Department of Prime Minister and Cabinet was the issue of 'forum shopping' between the Information Commissioner and the Ombudsman.

> **Ms Lynch**—I heard a little bit of that evidence before we came up. There is always some potential for there to be some degree of forum shopping and overlapping of jurisdictions, and I think the Ombudsman mentioned this morning that he will be subject to Information Commissioner investigation in cases and vice versa.[22]

Thus there are at least two layers of bureaucracy where some degree of 'forum shopping' or 'Commissioner shopping' could take place – between the Information Commissioner and the Ombudsman, and between the Information Commissioner, the FOI Commissioner and the Privacy Commissioner.

As a consequence of the overlapping jurisdictions relating to government information, there is a potential for conflicting or inconsistent decisions regarding the release of information, increased paper shuffling between the Commissioners and unnecessary bureaucracy, and the corresponding inefficiency and delays. As the PAC states:

> "…we also believe this tri-part "sharing" of functionality in a practical setting will rely on extraordinarily close working relationships between all three information officers. The potential for duplication of effort, inconsistency in application and confusion around role responsibility is significant."[23]

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[20] Disney, Julian. "Australian Press Council submission to the Senate Standing Committee on Finance and Public Administration on its Inquiry into the *Freedom* of *Information Amendment (Reform) Bill* 2009 and *Information Commissioner Bill* 2009", Australian Press Council.

[21] Privacy Advisory Committee, "Comments on Information Commissioner Bill 2009", Submission to the Senate Finance and Public Administration References Legislation Committee, Freedom of Information Amendment (Reform) Bill 2009.

[22] *Hansard*, Finance and Public Administration Legislation Committee, Reference: Freedom of Information Amendment (Reform) Bill 2009, 5 February 2010, p. 12.

[23] Privacy Advisory Committee, "Comments on Information Commissioner Bill 2009", Submission to the Senate Finance and Public Administration References Legislation Committee, Freedom of Information Amendment (Reform) Bill 2009.

This point is confirmed by the Commonwealth Ombudsman, Professor John McMillan, who said in his submission to the inquiry that:

> "The combined impact of the proposed changes will be a greater workload for agencies in providing access to information, formally and informally. Dealing with access requests is likely to be a larger agency function than at present."[24]

The Ombudsman also expressed concern that the number of FOI requests could increase creating administrative bottlenecks and time delays. More time could be spent on resolving disputes, rather than processing requests. Prof. McMillan said:

> "Our experience is that when delays become entrenched in FOI, it can take considerable time and resources for them to be resolved."[25]

PRIVACY CONCERNS

Both the Australian Privacy Foundation and the Cyberspace Law and Policy Centre (CLPC) expressed reservations about the universal application of the public interest test to all government information.

Their particular concern is that departments and agencies could misapply the public interest test to "information which has traditionally been freely available, or to information which under the new regime should be made freely available."[26]

The CLPC acknowledges that the application of the public interest test applies to formal requests under section 11A, however the CLPC notes that there is a need for explanatory and guidance material from the Information Commissioner that would "head off" any misunderstanding.

The CLPC is concerned that the public interest test allows departments and agencies some discretion to apply "strict 'gatekeeper' processes to all decisions to public or otherwise proactively

The CLPC also outlined its concerns regarding the application of privacy provisions:

> "In my view, and I suspect the view of most privacy regulators and experts, the proposed change would weight the scales too heavily against privacy – personal information would have to pass the double test to qualify for withholding. Firstly its disclosure would have to be 'unreasonable' and then 'contrary to the public interest'. It is difficult to see why a disclosure

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[24] McMillan, John. "Submission by the Commonwealth Ombudsman", Senate Finance and Public Administration Legislation Committee, Freedom of Information Amendment (Reform) Bill 2009 and Information Commissioner Bill 2009, January 2010.

[25] Ibid.

[26] Waters, Nigel. "Commonwealth FOI amendments shouldn't miss the opportunity for real reform", Submission on the Freedom of Information Amendment (Reform) Bill 2009 and Information Commissioner Bill 2009 to the Senate and Finance Public Administration Committee, Cyberspace Law & Policy Centre, January 2010, p. 5.

> of personal information could be 'unreasonable' and yet in the public interest."[27]

The CLPC also expressed grave concerns with the fact that commercial interests receive greater protection than personal information. Of concern to the CLPC was that there could be a substantial increase in the number of FOI requests that are refused on the basis that commercially valuable information 'could reasonably be expected to be, destroyed or diminished if the information were disclosed'. The CLPC believes that the threat of diminished value of commercial information due to exposure could lead to more FOI access requests being refused despite meeting the public interest test.

RECOMMENDATIONS

Coalition Senators are strongly opposed to the burden of the onus of proof for appeals to the AAT lying with the applicant. The Government has not provided sufficient grounds for this drastic step, which would represent the first known occasion where the onus of proof has been so reversed in relation to Freedom of Information regimes.

Coalition Senators recommend that onus of proof for appeals from the Information Commissioner to the AAT should remain with Government – it must establish why a document or information should not be released. The bills should be amended to reflect this.

Accordingly, Coalition Senators oppose both the bill in its current form and the proposal at recommendation 4 of the majority report of the Committee.

Coalition Senators are also opposed to the potential for discrimination by the government between individuals and those deemed to be journalists or non-government organisations through the application of different cost regimes.

As there is no definition of 'journalist' outlined in the bill, and given the increasing fragmentation of media and evolving technology, Coalition Senators believe the government should ensure that no such discrimination based on costs occurs if these bills are enacted.

Senator Scott Ryan
Deputy Chair

Senator the Hon George Brandis SC

[27] Ibid. p. 6.