

# **Senate Select Committee on Superannuation and Financial Services**

## **Main Inquiry Reference (a)**

**Submission No. 141**

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## Submission on behalf of the Tasmanian Ombudsman to the Senate Select Committee on Superannuation and Financial Services

### “The Law Society of Tasmania and the Freedom of Information Act 1991”

My name is Anthony John Allingham and I am employed in the Office of the Tasmanian Ombudsman as a Senior Investigator. One of my functions is to carry out reviews, on behalf of the Ombudsman, under the *Freedom of Information Act 1991*.

The Ombudsman has the statutory duty of reviewing decisions of agencies in respect of applications for information under the Freedom of Information Act (the FOI Act).

The FOI Act gives persons a legally enforceable right to information held by agencies, as defined by the Act, except where the information is exempt information within the meaning of the Act.

An agency is defined by section 5 of the FOI Act as follows-

*"agency" means an Agency, within the meaning of the State Service Act 2000, or a prescribed authority, and includes the police force, as defined by section 5 of the Police Regulation Act 1898, and a council*

A prescribed authority is defined as follows-

**"prescribed authority"** means –

*(a) a body corporate established for a public purpose by or in accordance with an Act, other than a body corporate –*

*(i) formed for the purposes of the Tasmanian Government Insurance Office (Sale) Act 1993; or*

*(ii) formed under section 5 of the TT Line Arrangements Act 1993;*

*(b) an unincorporated body created by the Governor or a Minister; or*

*(c) any other body, whether incorporated or unincorporated, declared by the regulations to be a prescribed authority for the purposes of this Act, being –*

*(i) a body –*

*(a) which is supported directly or indirectly by government funds or other assistance; or*

*(b) over which the State is in a position to exercise control; or*

*(d) subject to subsection (3), the person holding or performing the duties of an office established by an Act; or*

*(e) the person holding, or performing the duties of, an appointment declared by the regulations to be an appointment the holder of which is a prescribed authority for the purposes of this Act, being an appointment made by –*

Amended at hearing 18/5/01

*(i) the Governor; or*

*(ii) a Minister –*

*otherwise than under an Act;*

Section 48 (3) of the FOI Act provides that a person who has applied for information under the Act may apply to the Ombudsman for a review of a decision that (inter alia) the person is not entitled to the information requested or that the information requested is exempt information.

In February 1999 a person by the name of Henderson (“the applicant”) applied to the Law Society of Tasmania seeking certain information pursuant to the provisions of the Freedom of Information Act. That information related to a former employee of the Law Society. The Executive Director of the Law Society wrote back to the applicant saying that the Society was not subject to the FOI Act because it was, he said-

*“neither an agency as defined by Section 3 of the Tasmanian State Service Act nor a prescribed authority, in that it is neither (i) established for a public purpose (see the Law Society Act 1962); nor (ii) so prescribed by any proclamation or regulation under the Freedom of Information Act (there are none) except to prescribe these.”*

Following that letter the applicant wrote to the Ombudsman requesting him to review the Society’s decision.

The Ombudsman then proceeded to review the Society’s decision, as conveyed to the applicant by the Executive Director. Much correspondence flowed between the Ombudsman, the Society and the applicant and on 30 June 2000 the Ombudsman made his determination pursuant to section 48 of the FOI Act. He concluded that the Society was subject to the FOI Act because, in his view, it fell within the definition of a “prescribed authority”. He concluded that the Society was a body corporate established by an Act, the Law Society Act 1962, and that it was established for a public purpose. In consequence the Ombudsman directed the Society to provide the applicant with the information sought.

The Ombudsman forwarded his decision to the Law Society and was subsequently advised by the applicant that the Society had not complied with the Ombudsman’s direction. Further correspondence makes it clear that to this day the Society has refused to provide the information to the applicant.

Following the decision relating to Henderson’s application the Ombudsman has received several more requests from persons who have unsuccessfully sought information from the Law Society under the FOI Act. At least three of those applications appear to relate to the investigation by the Law Society of Solicitors in connection with mortgage investments. In respect of each of those reviews the Ombudsman directed the Law Society to provide information and the applicants have advised of the Society’s refusal to comply with the direction. No steps have been taken by the Law Society, to the Ombudsman’s knowledge, to challenge the jurisdiction of the Ombudsman to make determine that the Society was subject to the FOI Act.

In the absence of a ruling by the Supreme Court of Tasmania the Ombudsman is of the firm opinion that the Law Society of Tasmania is subject to the provisions of the FOI Act and ought to comply with its provisions. The whole argument of the Society as to why it says it is not subject to the FOI Act appears to revolve around the question of whether or not the Society performs any public purpose. It is interesting to note that the Law Society, in its own web site holds itself out as performing a public service. In the section entitled "Who We Are" the Society says-

*"The Law Society of Tasmania has two major functions. The first function is that of regulator of the Legal Profession of the State of Tasmania. The Second function is to provide services to its members to assist in maintaining high standards of practice in the Tasmanian Legal Profession. The Main Service to the Public is to regulate the many activities of Lawyers, by providing prudential supervision and services to investigate and prosecute complaints against lawyers"*

That statement indicates that the Society has a purpose that can only be described as the performance of a public service.

The Ombudsman is of the view that the public interest requires the Law Society to comply with its obligations under the FOI Act in the way that similar bodies, such as the Medical Council of Tasmania, comply. If the Law Society is to hold itself out as a regulator of the legal profession, rather than simply a body to represent the legal profession in the manner of a trade union, then it is essential for it to conduct its affairs in an open manner and to make itself subject to public scrutiny. One of the ways it can do this is by accepting its responsibilities under the FOI Act. If it is not minded to do so then it ought to challenge the applicability of the Act to it.

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