Freedom of Information Amendment Bill 2025

Submission to the Legal and Constitutional Affairs Legislation Committee

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Protecting and promoting justice, freedom and the rights of the individual.

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Who we are

The **Australian Lawyers Alliance (ALA)** is a national association of lawyers, academics and other professionals dedicated to protecting and promoting access to justice and equality before the law for all individuals.

Our members and staff advocate for reforms to legislation, regulations and statutory schemes to achieve fair outcomes for those who have been injured, abused or discriminated against, as well as for those seeking to appeal administrative decisions.

The ALA is represented in every state and territory in Australia. We estimate that our 1,500 members represent up to 200,000 people each year across Australia.

Our head office is located on the land of the Gadigal people of the Eora Nation. As a national organisation, the ALA acknowledges the Traditional Owners and Custodians of the lands on which our members and staff work as the First Peoples of this country.

More information about the ALA is available on our website.[1]

[1] www.lawyersalliance.com.au.

Introduction

1. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input to the Legal and Constitutional Affairs Legislation Committee (the Committee), on the *Freedom of Information Amendment Bill 2025* (The Bill).

2. The ALA is an association of lawyers, legal professionals and academics who are dedicated to the aim of advancing and defending the rights of individuals in Australia.

3. We are keen to work constructively with government to assist in the making of legislation in furtherance of those aims, for the benefit of all Australians.

4. Freedom of Information is a fundamental tenet of an open, functional and liberal democracy. It enables citizens to understand the workings of government and hold government to account.

5. Australia has a proud history with respect to freedom of information. It was among the first of the Westminster style of government to introduce the legislation, some 15 years before the United Kingdom.

6. At the time of the passing of the *Freedom of Information Act 1982,* then Attorney-General and Senator for Western Australia Peter Durack correctly observed, *"[c]omplete openness of government is not possible. For some purposes, confidentiality is essential. The Freedom of Information Bill seeks to achieve the appropriate balance between openness and secrecy*". We think that although some of the amendments proposed in the current Act are welcome, there are aspects of it which do not strike the balance referred to and require amendment.

7. Unnecessary secrecy in government leads to arrogance in governance and defective decision-making. A perception of excessive secrecy erodes public confidence in government, and government institutions. We agree with the Prime Minister's statement in August 2022 that "*the Australian people deserve accountability and transparency, not secrecy*".[2]

8. We acknowledge resourcing difficulties and a perception of an increase in vexatious and hostile requests from foreign actors and others but observe below that aspects of the Bill

[2] https://x.com/AlboMP/status/1559350601229602817

intended to deal with these issues will have an unwelcome chilling effect on the legislation's broad objects and move the balance too far away from openness towards secrecy. There are less chilling options available to deal with these problems.

9. At a time when trust in government is declining[3], we consider that legislation which increases the perception that government wishes to conduct its affairs in more secrecy will assist, rather than reduce, that decline.

10. Our experience is that since the introduction of freedom of information legislation in this and other countries, the culture of secrecy, perhaps understandably, has proven difficult to change. Changes to freedom of information legislation should have the purpose and effect of driving that culture away from secrecy and towards openness and transparency.

11. We think that changes to the legislation broadening the right of government to refuse access to information will erode trust in it, and drive more unauthorised leaking of government information from civil servants to journalists and non-governmental political parties in the belief that information they should have access to has been withheld.

12. We would welcome the opportunity of appearing before the Committee in person to assist the Committee in its deliberations with the object of improving the current Bill.

General Comments on the Bill

Application Fees

13. By Schedule 6 of the Bill, it is proposed to create a power in the Act to enable application fees to be levied for Freedom of Information requests, Internal Reviews, and Information Commissioner reviews.

14. The ALA does not support the introduction of the charging of fees to access government information.

15. Whilst we appreciate that there is administrative and other work involved in the processing of requests, we do not think that the cost of this work should be borne by the applicant.

[3] https://humanities.org.au/power-of-the-humanities/trust-government-data-edelman/

16. In particular, in the view of the ALA, Australians should not be charged for access to their personal information.

17. We observe that hostile foreign governments, big business and other well-resourced applicants will have no problems in meeting the $50 fees contemplated (but not yet published) and therefore such a fee will have no deterrent effect on these applications. However, they will significantly impair the ability of small media outlets, whistleblowers, academics and private citizens to obtain the information to which they would otherwise be entitled. Although a fee set at around $50 can appear nominal to a small media outlet, which may need to make tens or even hundreds of requests per year, these costs quickly become significant.

18. Other measures to reduce the sheer number of applications that the government receives could achieve the government's aim without placing barriers on legitimate requests. For example, AI-driven requests could be dealt with a process known as 'CAPTCHA' security on online portals.

19. Other comparable jurisdictions, such as the United Kingdom, France, Denmark and Spain, charge no fees for access to information. Canada charges a nominal amount, currently $5.[4] In our view, any fee imposed should be nominal in nature, with exemptions for low-income earners.

20. The substantial number of requests received by government could be reduced by adopting some of the recommendations produced by the Legal and Constitutional Affairs committee in this report on this area[5], including proactive disclosure of information that might otherwise be the subject of FOI requests.

21. The administrative burden could also be reduced by the abolition of the internal review process entirely, and the reallocation of those resources to the primary decision maker.

[4] https://assets.publishing.service.gov.uk/media/5a7f615140f0b62305b86cb5/FOI_International_Comparisons.pdf

[5] https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/RB000101/toc_pdf/TheoperationofCommonwealthFreedomofInformation(FOI)laws.pdf

Legislative Protection for Whistleblower Anonymity and Pseudonymity

22. By Part 5 of Schedule 2, the Bill proposes to amend section 15 of the FOI Act to restrict anonymous and pseudonymous requests, requiring the applicant to provide their full name or the name of the person they are making the request on behalf of.

23. The ALA does not support this amendment. There are legitimate reasons for an applicant to wish to obtain information anonymously. For example, whistleblowers, particularly those in the public sector, intending to make public interest disclosures (PID) based on information gathered from an FOI request, may have concerns for their ongoing employment. Political staffers from non-governmental parties may also wish to remain anonymous, to ensure that their applications are treated without regard to party-political considerations.

24. Furthermore, maintaining the legislative protection for whistleblower anonymity and pseudonymity shifts attention from who is reporting to what is being reported, mitigating the risk for internal (workplace) and external (media) bias, ensuring the focus remains on the substance of the disclosure. The ALA considers that if information is properly disclosable via a valid freedom of information request, then the identity of the particular applicant is irrelevant.

25. *Part 5 of Schedule 2* also seeks to create a new section 19 of the FOI Act whereby the Minister or their delegate may give the applicant a written notice requesting Proof of Identity if they are not satisfied with the information of identity provided by the applicant.

26. The ALA does not support this amendment. This provision grants the Minister or one of their delegates the arbitrary power to accept or reject FOI requests based on their subjective identity requirements. We observe that community legal centres, aboriginal legal centres and other community-based organisations routinely make FOI applications on their clients' behalf. The identity requirement may significantly increase the administrative burden on those organisations.

Cabinet Immunity

27. By *Part 2* of *Schedule 7*, the Bill proposes to amend section 34 of the FOI Act to change the exemption test for Cabinet documents from the existing 'dominant purpose' test to a much broader 'substantial purpose' test.

28. The ALA does not support this amendment. In our view, such an amendment will significantly widen the category of documents that may be withheld under the Cabinet exemption, undermining core principles of transparency and accountability and further eroding public trust in the FOI process.

29. Ministers are bound by collective responsibility, and Cabinet confidentiality exists to preserve Cabinet solidarity and ensure members can freely exchange views, even sharply differing ones, without undermining confidence in government.

30. In the absence of threats to collective responsibility or Cabinet solidarity, there is no basis to invoke 'Cabinet-in-confidence' protections. Crucially, Cabinet confidentiality does not extend to departmental or ministerial submissions, which reflect the views of officials rather than ministers themselves.

31. Currently, a document is exempt as a Cabinet submission only if it was prepared for the "*dominant purpose*" of Cabinet consideration. Under the current proposals, documents would be exempt where *"a substantial purpose"* was preparing it for Cabinet, even if other purposes predominated.

32. The amended scope of the Cabinet exemption would expand from core submissions to encompass any advice or analysis related to Cabinet business. In practical terms, this could include an agency brief on a potential policy, or even consultant reports commissioned for Cabinet - materials that are disclosed under current FOI once their dominant purpose is shown not to be of Cabinet consideration. This provision will have the effect of reducing access to substantial numbers of documents, narrowing the public scrutiny of government; it is therefore a disproportionate means of achieving its stated aim.

33. This is a distinct shift from the direction of past reforms. In 2010, Senator Faulkner's review of the FOI Act was intended to shift the entrenched parliamentary attitudes and promote a 'pro-disclosure' culture.[6] Cabinet exemptions were restricted to documents created 'for the dominant purpose' of Cabinet deliberation, automatic exemptions for attachments or pure factual material were removed, and a public-interest test was preserved.

[6] https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2FR4163%22;querytype=;rec=0

34. Similarly, Allan Hawke's 2013 review endorsed a culture of openness, noting that only a tiny fraction of FOI requests were for deliberative or Cabinet material under tight conditions.[7]

35. The proposed test in the Bill lowers the bar for claiming documents are 'Cabinet in-confidence', effectively broadening the exemption, which, in the ALA's respectful submission, is a regressive change.

36. Recent experience shows that overly broad Cabinet exemptions directly impede accountability. The Robodebt Royal Commission found that s 34 had repeatedly been invoked to shield critical information, and that ministerial responsibility for Robodebt's creation could not be fully examined without the extraordinary powers of a Royal Commission.[8] Even this, in the Commission's own words, *"limited the Commission's ability to reveal the entirety of the documentation concerning how the original proposal which became Robodebt, was passed and what was put to Cabinet thereafter."*[9] Commissioner Holmes recommended the repeal of the Cabinet exemption, emphasising that senior officials' duty to provide frank advice should depend on the content and context of their communications, rather than continuing with the 'blanket approach' to confidentiality of Cabinet documents.

37. International experience demonstrates that curtailed Cabinet transparency is unnecessary for effective government. In New Zealand, Cabinet papers are routinely released within weeks under Ombudsman oversight to ensure that advice remains candid, and even the Robodebt Commission pointed to New Zealand's *"wide acceptance"* of publishing Cabinet documents as a model.[10]

38. **The ALA's position is that, at a minimum, the Committee must retain the current 'dominant purpose' threshold for Cabinet documents.**

[7] Australian Law Reform Commission, *Review of the Freedom of Information Act 1982 and the Australian Information Commissioner Act 2010 report* (2 August 2013), 44
[8] Royal Commission into the Robodebt Scheme, Final Report (2023), 656
[9] Ibid, 656
[10] https://www.themandarin.com.au/299152-foi-amendment-bill-not-what-john-faulkner-allan-hawke-wanted/

Public Interest Test

39. By *Part 7 of Schedule 3*, the Bill proposes amendments to the public interest test to be applied to documents that are conditionally exempt under section 47C of the Act, on the basis that they concern the deliberative processes of Government.

40. Instances where disclosure may be refused include where it would, or could reasonably be expected to, prejudice "frank and timely discussion", "frank and timely advice", or the "orderly and effective" conduct of government decision-making.

41. The ALA does not support these changes. In our view, the test imposed is too broad and provides agencies with potential reasons for refusal of documents which should properly be disclosed.

42. The High Court of Australia has consistently emphasised the importance of openness in public administration. Mason J in *Commonwealth v John Fairfax & Sons Ltd* (1980) stated*:*

    "It is unacceptable in our democratic society that there should be a restraint on the publication of information relating to government when the only *vice of that information is that it enables the public to discuss, review and criticise government action."*[11]

43. Importantly, his Honour also made clear that "*unless disclosure is likely to injure the public interest, it will not be protected.*"[12] This has uniformly been regarded as the cornerstone of the public-interest test as applied in Australia.

44. Similarly, McHugh J in *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* [1988] emphasised that the protection of government information must be justified by reference to the *public* interest, not private or speculative concerns, and requires a demonstrable link between disclosure and actual harm.[13]

45. The FOI Act already contains a carefully balanced conditional exemption for deliberative processes. That exemption recognises the need to protect some internal policy discussions, but it requires a genuine, evidence-based demonstration that disclosure would be contrary to, or "*injure*", the public interest.

[11] *Commonwealth v Fairfax* (1980) 147 CLR 39, 52.
[12] Ibid, 52
[13] *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* [1988] HCA 25 165 CLR.

46. The proposed amendments would shift this balance. The ALA considers phrases such as 'frank and timely' advice or 'orderly and effective' decision-making are too broad, vague and promote a culture of secrecy. There is no guidance on what threshold of prejudice is required, nor any quantitative test for 'timely' or 'orderly'. In practice, this could enable agencies to resist disclosure by invoking an unsubstantiated 'chilling effect' on internal advice.

47. Pursuant to existing FOI legislation, an agency may only refuse disclosure if it can be shown that release would be contrary to the public interest by causing demonstrable prejudice. The Bill, in effect, reverses this principle by introducing a presumption against disclosure whenever release could be argued to be detrimental to internal decision-making, without requiring evidence of actual harm. This inversion is inconsistent with the FOI Act's inherent pro-disclosure purpose.

48. It is suggested that these changes would 'address barriers' to public servants giving frank and fearless advice by clarifying what constitutes 'a deliberative document'. The implicit proposition seems to be that public servants are not currently giving frank and fearless advice. We have seen no evidence that FOI has impaired the quality of public service advice. As referred previously, the 2013 Hawke review and subsequent practice show that only a tiny fraction of FOI requests concern internal discussions.[14] As Commissioner Holmes found in the Robodebt inquiry, the failure of officials to provide frank warnings was due to cultural and structural pressures, not the FOI framework.[15]

49. **The ALA considers that the existing framework, appropriately interpreted with its existing public-interest considerations, provides sufficient protection for genuinely sensitive deliberations, and the changes suggested pursuant to this part of the Bill will have the necessary effect of reducing disclosure, and the public scrutiny of government.**

[14] Australian Law Reform Commission, *Review of the Freedom of Information Act 1982 and the Australian Information Commissioner Act 2010 report* (2 August 2013), 44

[15] Darren O'Donovan, '*Commissioner Holmes' Revolution? Robodebt, Transparency and Record Creation*' (11 September 2023) <https://www.auspublaw.org/blog/2023/9/commissioner-holmes-revolution-robodebt-transparency-and-record-creation/>

Processing Caps

50. By Part 2 of Schedule 3, the Bill proposes to insert section 53A of the FOI Act, which would allow an agency to refuse to give access to a document where a "practical refusal reason" exists. This includes a new processing cap, where the total number of hours of work required to deal with a request exceeds 40 hours.

51. The proposed amendment represents a significant erosion of the right to access information. Access to information should not be limited to what can be located in under 40 hours. The public interest requires that the most difficult, complex and time-consuming requests remain within the reach of the FOI Act.

52. In practice, complex requests are often those most likely to reveal matters of genuine public importance. Imposing a rigid cap based on hours of work reflects only the complexity of the matter, or the amount of government data involved; it has no correlation with the importance of accessing such data.

53. Persons requesting information should not be penalised simply because their matter involves a long history of interaction with government or arises from a complex issue. These are often the very circumstances where transparency is most critical. Imposing a processing cap that disadvantages applicants in such situations would, in our view, unfairly limit access and undermine the accountability function of the FOI Act.

54. In our view, if such arbitrary time measures may have had the effect of preventing or impeding disclosures such as:

    a. The immigration detention compensation claims, which exposed systemic failures in government decision making with regard to unlawful detention;

    b. *Robodebt* investigations and the unlawful targeting of vulnerable Australians with respect to fictitious Centrelink debts; and

    c. The investigations into alleged war crimes perpetrated by Australian Special Forces and other deployed in Afghanistan.

55. These investigations and legal claims were assisted in no small part because of the FOI framework promoting transparency and accountability. A proposed arbitrary 40-hour limit could, in our view, impede such important disclosures and investigations.

56. The measure is particularly harmful to civil society organisations, academics, and investigative journalists, whose work involves the scrutiny of government conduct. Naturally, their work often requires requests that traverse multiple files, agencies, and years of records, which may amount to work over 40 hours.

57. An obvious flaw in this system is with respect to how the proposed 40-hour ceiling would be calculated. The Bill does not make clear whether the cap applies to a single decision-maker's processing time, or whether it is cumulative across multiple public servants. In practice, the ceiling could be reached quickly, where a decision is reviewed at multiple levels within an agency, or where consultation with the Minister or third parties is required. Without clear guidance and external scrutiny, applicants would have no way of verifying whether an agency's estimate is genuine and reasonable.

58. Further, the proposed cap risks creating perverse incentives. Agencies may be encouraged to adopt inefficient or obstructive search practices to inflate time estimates, thereby defeating the intention of access rights. The absence of meaningful external review of such estimates compounds this unacceptable risk.

59. Crucially, the proposed cap is inconsistent with the objects of the FOI Act (s 3), which are to promote Australia's representative democracy by increasing public participation in government processes and enhancing the accountability of ministers and agencies. Restricting access through an arbitrary processing ceiling directly undermines these foundational principles.

60. We respectfully submit that other solutions should be utilised rather than an arbitrary processing limit. As we have mentioned, consideration should be given to deploying resources currently allocated to internal review processes to frontline freedom of information work, which in our view could provide efficiencies.

Systemic Failures Ignored

61. In our view the Bill does not address the real and pressing problems with Australia's FOI system: chronic delays, persistent under-resourcing, significant backlogs, and inconsistent oversight by the Office of the Australian Information Commissioner (OAIC). These systemic issues have eroded confidence in the FOI regime and left applicants facing uncertainty and excessive wait times that defeat the very purpose of a timely right of access. In our view, aspects of this Bill worsen these problems.

62. Recent data underscores the scale of the problem. OAIC statistics reveal that in 2024, 91 per cent of FOI refusals issued by the Albanese Government were overturned on review.[16] Such a high rate of reversal is compelling evidence of systemic misuse of exemptions and poor-quality decision-making. Instead of supporting transparent and consistent administration of the law, the current framework encourages agencies to overapply exemptions, knowing that applicants must endure lengthy review processes to secure access.

Recommendations

63. In light of the concerns stated, the ALA recommends that the Committee:

a. **Retain the current cabinet confidentiality exemptions.** The ALA opposes any expansion of Cabinet exemptions in the FOI Act. Our view is that the current test strikes the right balance between open disclosure and protection afforded to the executive in its sensitive decision-making deliberations. An expansion to this exemption will inevitably tip the balance too far towards secrecy and lack of accountability;

b. **Introduce a 30-day limit on Cabinet exemptions.** Cabinet document exemptions should lapse after 30 days unless another valid exemption applies. This would prevent the current "blanket secrecy" approach from impeding accountability and strike a balance between protecting deliberative processes and maintaining public access to information;

c. **Introduce a modest application fee with targeted exemptions.** A nominal fee may help deter frivolous or tactical requests. However, exemptions should be built in for applicants represented by legal practitioners and for vulnerable groups, including those on government benefits, to ensure that access to justice and accountability is not compromised.

d. **Reject bans on anonymous requests and expansion of Cabinet exemptions.**

i. Proposals to ban anonymous FOI requests or further expand Cabinet secrecy should be rejected. Anonymous requests play an important role in

[16] https://www.theaustralian.com.au/nation/lawyers-slam-foi-reform-over-cabinet-transparency-fears/news-story/7737cba7b13011d0ecb966220834c6df?btr=a72357bebf4dce498baf6fc692424033

facilitating access for journalists, whistle-blowers, and community advocates who may otherwise face reprisals.

ii. In the alternative, the Bill should:

1. set out clear, objective proof-of-identity requirements, and

2. distinguish between "vexatious" and "anonymous" requests, which are not mutually inclusive.

e. **Implement additional reforms recommended by the 2023 Senate FOI report.**[17]

These include:

i. increasing the use of proactive disclosure by agencies, to reduce reliance on formal FOI processes;

ii. providing for the direct release of personal information to individuals, outside the FOI regime, to reduce administrative burdens; and

iii. requiring the OIAC to develop streamlined guidance and conduct training for agencies on handling vexatious applicant declarations and considering legislative amendments where necessary to improve efficiency.[18]

64. Reduce automated and vexatious requests by implementing systems such as 'CAPTCHA' to ensure that requests are human generated.

65. Re-allocate resources from the internal review system to frontline decision makers to increase efficiency of response.

Conclusion

66. The ALA welcomes the opportunity to provide our views on this important legislation. It has positive aims. However, in our view some of the measures proposed to achieve those aims will have the effect of reducing legitimate access to information by Australians - this

[17] Senate Legal and Constitutional Affairs References Committee, *The Operation of Commonwealth Freedom of Information (FOI) Laws* (Report, December 2023)
[18] Ibid, [5.61] (Recommendation 15)

undermines our social democracy, impairs good decision making and reduces trust in government.

67. We have suggested some measures that might help to achieve the Bill's aims, without those unintended effects.

68. The ALA is available to provide further assistance to the Committee on the issues raised in this submission.

Ian Murray

President

Australian Lawyers Alliance