

STANDING COMMITTEE ON JUSTICE AND
COMMUNITY SAFETY

The Freedom of Information Act 1989

MARCH 2011

Report 5

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Resolution of appointment

On 9 December 2008 the Legislative Assembly appointed a Standing Committee on Justice and Community Safety to perform the duties of a scrutiny of bills and subordinate legislation committee and examine matters related to community and individual rights, consumer rights, courts, police and emergency services, corrections including a prison, governance and industrial relations, administrative law, civil liberties and human rights, censorship, company law, law and order, criminal law, consumer affairs and regulatory services.¹

Terms of reference

On 2 April 2009 the ACT Legislative Assembly agreed to the following terms of reference:²

That this Assembly refers the *Freedom of Information Act 1989* (FOI Act) to the Standing Committee on Justice and Community Safety for inquiry and report to the Assembly under the following terms of reference:

(1) The Committee shall have regard to the following:

- (a) that access to information is an essential right of every person. Under the Territory's *Human Rights Act 2004*, freedom to seek, receive and impart information and ideas is part of the right of freedom of expression;
- (b) that access to government information is fundamental to openness, transparency and accountability in government, but that disclosure of particular information may have a prejudicial effect on private or public interests;
- (c) that the *Freedom of Information Act 1989* (the Act) seeks to achieve a balance between these competing interests. However, the FOI Act is now 20 years old and there have been significant changes in that time in the way Government creates, holds and stores information. It is timely to review the Act and its operation;
- (d) that the Act is modelled on the Commonwealth *Freedom of Information Act 1982*, which is currently under review and reform by the Commonwealth Government. To consider the implications of changes in the Commonwealth on the Territory's FOI regime;
- (e) that open and transparent government is the goal of freedom of information legislation. That it is timely to reassess this goal by

¹ Legislative Assembly for the ACT, *Minutes of Proceedings No 2*, 9 December 2008, pp 12–15.

² *Minutes of Proceedings No 16*, 2 April 2009, pp 185–7.

seeking to improve accessibly to government documents and reduce the time and costs involved in accessing government information; and

(f) that considerable work has been undertaken by the Queensland FOI Independent Review Panel which is of potential applicability to ACT legislation.

(2) The Committee shall examine the purposes and principles of freedom of information and the development of thinking on access to information since the introduction of the FOI Act:

(a) bearing in mind any privacy or confidentiality concerns, the extent to which decision documents and other documents released under FOI should be made widely publicly available, including in electronic form; and

(b) the extent to which the default status of all Government documents should be that they are publicly accessible, unless there are valid and compelling reasons why they should remain exempt from release or inspection.

(3) The Committee shall examine whether the FOI Act satisfies those purposes and principles as well as current thinking, in particular having regard to the:

(a) objects of the FOI Act;

(b) appropriateness of provisions exempting classes of documents from the Act;

(c) exemption provisions in Part 4 of the FOI Act;

(d) effectiveness of processes under the FOI Act (including application and review processes) and ways in which those processes can be streamlined and made more efficient and user-friendly; and

(e) timeliness and costs of the provision of freedom of information in the ACT having regard to the need to achieve a balance between facilitating legitimate and timely access to government documents and ensuring proper and efficient government administration, in particular having regard to:

(i) the appropriateness of the existing fees regime;

(ii) the appropriateness and efficacy of current time limit provisions contained in the Act; and

(iii) dealing with voluminous and/or vexatious requests.

(4) In identifying ways to improve and modernise the ACT's Freedom of Information Act, the Committee shall consider:

(a) relevant existing and proposed Commonwealth, State and Territory laws and practices;

(b) other recent reviews of freedom of information legislation, nationally and internationally;

- (c) the operation of the freedom of information regime in an evolving technological environment;
 - (d) specific issues relating to access by individuals to personal information, including the interaction between freedom of information laws and the protection of privacy interests;
 - (e) the interaction of the FOI Act with other mechanisms for accessing information held by government;
 - (f) balancing the public interest in access to information with the requirement for confidentiality for deliberative processes for Ministers;
 - (g) balancing the public interest in access to information with any requirement for confidentiality for other decision makers;
 - (h) law and practice in other jurisdictions where government held information including cabinet documents are more readily available; and
 - (i) the benefits and terms of appointment of an independent Information Commissioner for the ACT, including whether such a commissioner should report directly to the Assembly.
- (5) Any other relevant matter.

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RECOMMENDATIONS

RECOMMENDATION 1

4.16 The Committee recommends that the ACT Government introduce into the Legislative Assembly Bills to repeal the current FOI Act 1989 and to replace it with a revised FOI Act. The new FOI legislation should adopt as far as possible the key features of the current Commonwealth FOI Act 1982, including in particular the amendments of 1 November 2010. The exception to this principle of consistency should be arrangements for cabinet documents where, under Recommendation No.13, the new ACT legislation should follow the example of the *New Zealand Official Information Act 1982*.

RECOMMENDATION 2

4.17 The Committee recommends that the ACT Government introduce an appropriate model so that this legislation can incorporate future amendments which reflect amendments of the Commonwealth Act, subject to the will of the ACT Legislative Assembly, so that the ACT Act as far as possible maintains consistency with that of the Commonwealth.

RECOMMENDATION 3

4.18 The Committee recommends that, in framing the new FOI legislation, the ACT Government adopt contemporary Australian practice in relation to FOI such that:

- there is a presumption of release of government information unless there are public interest grounds for withholding it in particular instances;
- government adopt a 'push' model, publishing public sector information as a matter of routine, at nil charge; and
- within this model, FOI operates an avenue of 'last resort', as part of a larger framework within which public sector information is made widely available.

RECOMMENDATION 4

4.19 The Committee recommends that, in framing the new FOI legislation, the ACT Government amend the objects clause of the Act so that it provides for a single public interest test to show whether documents should be released.

RECOMMENDATION 5

4.20 The Committee recommends that, in framing the new FOI legislation,

the ACT Government amend its objects clause so that it clearly states the context and purpose of the legislation.

RECOMMENDATION 6

4.21 The Committee recommends that, in framing the new legislation, the ACT Government re-words references to ‘public interest’ in the Act so that such clauses consistently provide for release unless there is a public interest in keeping information in-confidence.

RECOMMENDATION 7

4.22 The Committee recommends that, in framing the new legislation, the ACT Government provides an account of relevant and irrelevant factors in determining public interest, to be placed within the legislation.

RECOMMENDATION 8

4.27 The Committee recommends that, in line with practice in the Commonwealth and that of selected other state and territory jurisdictions, and as would be consistent with the implications of the new legislation, government departments use EDRMS and web technologies to publish the information for which they are responsible as a matter of routine, freely and at no-cost.

RECOMMENDATION 9

4.28 The Committee recommends that the ACT Government, in framing the new legislation, require the publication of online manifests—that is: structured lists, of information held by government agencies—to facilitate public access.

RECOMMENDATION 10

4.29 The Committee recommends that, in framing the new legislation, the ACT Government require its agencies to provide online disclosure registers with respect to requests for documents. Under this arrangement, documents released under FOI would be published online within a set period of original disclosure. Where documents are withheld, those decisions and their basis should be detailed on the disclosure register, including decisions made under the *Territory Records Act 2002*.

RECOMMENDATION 11

4.30 The Committee recommends that the ACT Legislative Assembly creates new privacy legislation for the ACT, in place of the Commonwealth *Privacy Act 1988* currently in force. This ACT Privacy Act should create a new position of ACT Privacy Commissioner, situated in the ACT, to administer the

Act.

RECOMMENDATION 12

4.34 The Committee recommends that, in framing the new legislation, the ACT Government provides that requests for information by private persons regarding information about their own affairs be managed under Privacy legislation, by the ACT Privacy Commissioner; and that necessary changes are made to Privacy mechanisms in the ACT to allow this to occur.

RECOMMENDATION 13

4.44 The Committee recommends that the ACT Government introduce into the Legislative Assembly amendments to the *Freedom of Information Act 1989* and the *Territory Records Act 2002* such that the amended Acts rely on 'purposive' rather than 'categorical' criteria, and provide a clear basis, upon which cabinet documents may be released or made exempt from release under the provisions of the Acts.

RECOMMENDATION 14

4.45 The Committee recommends that in framing the new Freedom of Information legislation all other exemptions be re-cast so that they are subject to a single consistent public interest test that is subject to merits review.

RECOMMENDATION 15

4.46 The Committee recommends in framing the new legislation, the ACT Government remove all provisions for conclusive certificates, and creates a legislative mechanism such that conclusive certificates issued in the past be removed as documents, to which they have been applied, are requested under the new process.

RECOMMENDATION 16

4.47 The Committee recommends that, in framing the new legislation, the ACT Government create a charges regime which reinforces a citizen's right to information rather than discouraging requests.

RECOMMENDATION 17

4.49 The Committee recommends the ACT Government, in framing the new legislation, in particular ensure that exemptions on grounds that release may reveal the decision-making processes of government agencies no longer apply in the ACT.

RECOMMENDATION 18

4.50 The Committee recommends, in framing the new legislation, the ACT

Government add the Office of the Auditor-General to the list of exempt agencies (that is, 'prescribed authorities').

RECOMMENDATION 19

4.61 The Committee recommends that an office be created in the ACT, integrating the functions of Ombudsman, Privacy Commissioner and FOI Commissioner, thus replacing services provided by the Commonwealth and creating a new leadership role for FOI in the ACT.

1 INTRODUCTION

Background

- 1.1 On 2 April 2009 in the Legislative Assembly Mrs Dunne MLA proposed Terms of Reference for an inquiry by the Standing Committee on Justice and Community Safety into the ACT's *Freedom of Information Act 1989*.³ Amendments were then proposed by the Attorney-General Mr Corbell MLA on behalf of the Labor Party,⁴ and Mr Rattenbury on behalf of the Greens.⁵ The amendments were agreed to, as was the motion, as amended.⁶
- 1.2 As Mr Corbell noted, the contributions of Labor and the Greens to the motion reflected an agreement between the two parties following the ACT election in 2008. He also noted that the final form of the Terms of Reference, as agreed to, joined two issues: a review of the Act and an inquiry into whether there should be an independent Information Commissioner in the ACT.⁷

Conduct of the Inquiry

- 1.3 The Standing Committee made a Call for Submissions in September 2009 and received six. It held a public hearing with the Attorney-General and his officers on 1 September 2010,⁸ and received briefings from the Australian Information Commissioner and Australian Privacy Commissioner on 25 October 2010, and the Queensland Information Commissioner on 29 October 2010, amounting to 7 witnesses in all.⁹

³ Mrs Dunne MLA, *Assembly Debates*, 2 April 2009, pp.1754-56.

⁴ Mr Corbell MLA, *Assembly Debates*, 2 April 2009, pp.1756-59.

⁵ Mr Corbell MLA, *Assembly Debates*, 2 April 2009, pp.1759-60.

⁶ *Assembly Debates*, 2 April 2009, p.1760.

⁷ Mr Corbell MLA, *Assembly Debates*, 2 April 2009, p.1760.

⁸ Standing Committee on Justice and Community Safety, *Transcript of Evidence*, 1 September 2010, available at <http://www.hansard.act.gov.au/hansard/2009/comms/justice18.pdf>.

⁹ Standing Committee on Justice and Community Safety, *Transcript of Evidence*, 25 October 2010, available at <http://www.hansard.act.gov.au/hansard/2009/comms/justice20.pdf> and *Transcript of*

- 1.4 In addition, an extensive literature search was undertaken to establish current approaches to FOI and to inform the Committee's deliberations.

Structure of the report

- 1.5 Each section of this report into the *Freedom of Information Act 1989* addresses a term of reference for the inquiry, with the exception of introductions to each chapter; this present section; and sub-headings at the level below the present one, which have been provided for the sake of clarity. For all other sections, numbered headings correspond with each element of the inquiry's Terms of Reference.
- 1.6 This approach has been adopted in the face of challenges in responding to the complex Terms of Reference for the inquiry. Many of the terms overlap, and for this reason cross-references are provided from one section to another.
- 1.7 The report draws on a combination of evidence tendered to the inquiry and secondary sources. It references secondary sources in Chapter 1, and to a lesser extent Chapter 2, in combination with material from submissions and hearings for the inquiry. It then goes on, in Chapters 3 and 4, to focus more on evidence tendered to the inquiry.

What is Freedom of Information?

- 1.8 'Freedom of Information' (FOI) refers to legislation and associated mechanisms which provide access to public sector information. In 1982 the Commonwealth passed a Freedom of Information Bill, creating the *Freedom of Information Act 1982*. This, a Senate Committee report observed, 'was the first time any country with a Westminster style of government had moved to incorporate the elements of freedom of information into its legislative framework'. This, the report observed, 'reflected the recognition that the capacity of citizens to access official information ... is consistent with the

concept of open and transparent government and fundamental to the notion of democracy'.¹⁰

The Freedom of Information Act 1989

- 1.9 The Freedom of Information Act first applied in the ACT as an ordinance of the Commonwealth Parliament and became ACT statute with the advent of self-government in 1989.¹¹ It was at that time identical to the Commonwealth Freedom of Information Act 1982. Since then the two Acts, ACT and Commonwealth, have undergone a number of amendments. In spite of some changes in common, they have diverged considerably.¹²
- 1.10 A significant development in this parting of ways has been the advent of recent changes to Commonwealth legislation (including the FOI Act), which create an Office of the Australian Information Commissioner. In this, a new position of Australian Freedom of Information Commissioner and the Australian Privacy Commissioner work under the direction of the Information Commissioner.¹³
- 1.11 In this new arrangement FOI functions lie within a broader framework that embraces a 'pro-disclosure' stance on government information. Within this, FOI is seen as 'an avenue of last resort', rather than the primary means to gain access to government information.¹⁴
- 1.12 There have been a number of other events that have drawn attention to Freedom of Information in the ACT. An Auditor-General's performance audit report into FOI was released in 2008, which suggested that while Government departments in the ACT were aware of their obligations under FOI, decision-making, fees and charges and other elements of FOI practice varied

¹⁰ Senate Legal and Constitutional Legislation Committee, *Inquiry into the Freedom of Information Amendment (Open Government) Bill 2000*, p.2.

¹¹ Under s.34 of the *Australian Capital Territory (Self-Government) Act 1988*.

¹² Such ordinances were made into ACT Acts under s.34 of the *Australian Capital Territory (Self-Government) Act 1988* when it came into force. See ACT Government, Submission No.4, p.7.

¹³ As of 1 November 2010. See Standing Committee on Justice and Community Safety, *Transcript*, Monday 25 October 2010, pp.1-2.

¹⁴ Australian Press Council, Submission no. 1, p.2. These changes are discussed in-detail in sections 1(c) and (d), paragraphs 1.39 ff. and 1.61 ff.

considerably from department to department.¹⁵ This is discussed in further detail in sections 3(d) and (e), which are at paragraphs 3.59 and following and 3.68 and following.¹⁶

- 1.13 Some political issues of note have also brought a focus to FOI, including but not limited to, schools closures announced by the ACT government in 2006.¹⁷
- 1.14 There have also been significant events in other Australian jurisdictions, which have seen a trend of development toward a more open stance on public sector information. Their influence is evident in arrangements now adopted by the Commonwealth.
- 1.15 The foundations of these developments lie in a series of reviews of Freedom of Information. Of these, the Australian Law Reform Commission report *Open Government* (1995) was an early and important one, which identified critical differences between the original intent of the Commonwealth Act and the way it was being administered. It is considered in detail in section 1(d) below (see paragraph 1.58 and following).
- 1.16 Over time, *Open Government* became one of a series of reports which identified short-comings in Freedom of Information regimes, both in the states—as did the 2008 Solomon report on FOI in Queensland—and in the Commonwealth.¹⁸
- 1.17 For the Commonwealth, these included reports by the Ombudsman,¹⁹ and other reports released by the Commonwealth government which identified key aspects to be addressed if public sector information were to become more accessible. These included requirements for effective information management

¹⁵ ACT Auditor-General's Office, (2008), *Performance Audit Report: Administration of the Freedom of Information Act 1989*,
<<http://www.audit.act.gov.au/auditreports/reports2008/Report%205%20of%202008%20-%20FOI.pdf>>, viewed 20/08/2010.

¹⁶ See paragraph 3.59 ff. and paragraph 3.68 ff.

¹⁷ For more detail see Flynn Primary School Parents and Citizens Association, Submission No.3.

¹⁸ FOI Independent Review Panel, (2008), *The Right to Information: Reviewing Queensland's Freedom of Information Act* (Solomon Report), State of Queensland,
<http://www.foireview.qld.gov.au/documents_for_download/FOI-review-report-10062008.pdf>, viewed 29/07/2010.

¹⁹ R.N. McLeod, (1999), *'Needs to Know': Own motion investigation into the administration of the Freedom of Information Act 1982 in Commonwealth agencies*, Commonwealth Ombudsman,
<http://www.ombudsman.gov.au/files/investigation_1999_03.pdf>, viewed 28/09/2010.

by the public sector and the use of online collaborative tools.²⁰

- 1.18 This process, overall, resulted in changes in legislation in a number of Australian states and territories, and also in significant amendments to the Commonwealth Act, first to remove 'conclusive certificates' from the FOI regime, and then the 2009-10 amendments indicated above.
- 1.19 In the ACT, too, there have been developments regarding government information, which can be charted in various amending Acts since the *Freedom of Information Act 1989* came into force. The larger picture also includes the *Public Interest Disclosure Act 1994*; the *Territory Records Act 2002*; and the *Human Rights Act 2004*.²¹ All of these have a significant influence on the ability of ACT residents to access government information.
- 1.20 There were also developments outside of the government sector. Among these was the release of the report of the Independent Audit into the State of Free Speech in Australia, *Australia's Right to Know* (2007). This expressed concern about FOI, amongst other matters related to free speech and freedom of the press, which prefigured subsequent reform in federal legislation.²²

The nature of FOI requests

- 1.21 Two types of information are subject to FOI requests. In 1995 the Australian Law Reform Commission's *Open Government* report noted that the 'majority' of FOI requests—as high as 90%—were made in relation to personal information, while those 'relating to policy development and general

²⁰ Reinecke, I., (2009), *Information Policy and E-governance in the Australian Government*, Department of the Prime Minister and Cabinet, <http://www.dpmc.gov.au/publications/information_policy/docs/information_policy_e-governance.pdf>, viewed 10/08/2010; Government 2.0 Taskforce, (2009), *Engage: Getting on with Government 2.0*, <<http://www.finance.gov.au/publications/gov20taskforcereport/doc/Government20TaskforceReport.pdf>>, viewed 25/08/2010.

²¹ The release of Cabinet documents was originally provided for under the *Executive Documents Release Act 2001*. This Act was repealed on 26 October 2010, and matters under its administration were placed in the *Territory Records Act 2002*. These amendments came into force on 1 January 2001.

²² Moss, I., (2007), *Report of the Independent Audit into the State of Free Speech in Australia: Australia's Right To Know*. <<http://www.smh.com.au/pdf/foIreport5.pdf>>, viewed 14/02/2011.

government decision making' represented 'a small minority'.²³ That this is a persistent pattern was shown by a 2009 Senate Committee report, which noted that 85% of FOI requests in Australia were for personal information 'either about the applicant themselves or other persons'.²⁴

- 1.22 *Open Government* identified the rights and protections active in both types of FOI request. It noted, in relation to personal information, that access 'to one's own personal information not only promotes government accountability but also enables individuals to protect their privacy'.²⁵ However it also suggested that requests regarding policy development and government decisions were likely to provide 'the real test of whether the Act is serving its purpose of keeping the government accountable and facilitating participation in government'.²⁶

Committee comment

- 1.23 The Committee is aware of significant differences between the Freedom of Information regime in the ACT, as it now stands, and a more liberal consensus developing across other Australian jurisdictions, including the Commonwealth. This difference is particularly evident following the most recent amendments to the Commonwealth Act. In the Committee's view, all of this warrants a change of arrangements in the ACT.
- 1.24 The Committee notes that, to a large extent, many of these developments reflect broad changes in technology. The advent of inexpensive ways of publishing online; increased access to information for little or no cost; combined with the increasingly widespread use of Electronic Data and Record Management Systems (EDRMS) have modified both the public's expectations of the level of public sector information that will be accessible online.
- 1.25 In the Committee's view, it is reasonable for the community to have higher

²³ Australian Law Reform Commission, *Open Government: A Review of the federal "Freedom of Information Act 1982"*, Report No 77, 1995, Australian Law Reform Commission, Canberra (ALRC 77), p.17. Also available at: <<http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC77.pdf>>.

²⁴ Standing Committee on Finance and Public Administration, *Freedom of Information (Removal of Conclusive Certificates and Other Measures) Bill 2008* [2009], p.7.

²⁵ *Open Government*, p.13.

²⁶ *Open Government*, p.17.

expectations, now, about what will be publicly available out of the wider pool of public sector information. Freedom of Information, as such, forms an important part of this picture but not the entirety. We are in the midst of broad changes on how public sector information is generated, maintained and accessed. Within the context of these changes, it is of critical importance that the residents of the ACT have similar — and certainly not less — access to public sector information compared with the residents of other Australian jurisdictions.

1(a) The right to information

- 1.26 The Terms of Reference for this inquiry propose that ACT residents' right to government information is established by virtue of s 16 of the ACT Human Rights Act 2004, suggesting that access to information is inherent to the Act's guarantee of a right to 'freedom of expression'.²⁷
- 1.27 Other foundations for rights to government information are also considered here. In its submission to the inquiry, the Australian Press Council suggests that an implied right to access to government information is also inherent in s 17 of the Human Rights Act 2004, conferring the 'right of every citizen to take part in the conduct of public affairs'.²⁸
- 1.28 The Commonwealth legal framework also provides foundations for a concept of 'right' to public sector information. This includes law arising from the so-called 'free speech cases' where the High Court determined that:

... freedom of public discussion of government (including the institutions and agencies of government) is not merely a desirable political privilege, but inherent in the idea of a representative democracy [and that] ... the Constitution contains an implied freedom of political speech and communications.²⁹

²⁷ The ACT *Human Rights Act 2004* at s 16 reads 'Freedom of expression: (1) Everyone has the right to hold opinions without interference; (2) Everyone has the right to freedom of expression. This right includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of borders, whether orally, in writing or in print, by way of art, or in another way chosen by him or her'.

²⁸ Australian Press Council, Submission No.1, p.4.

²⁹ *Open Government*, p.13.

- 1.29 This is seen as a support for the idea that access to information is inherent to representative democracy:

Australia is a representative democracy. The Constitution gives the people ultimate control over the government, exercised through the election of the members of Parliament. The effective operation of representative democracy depends on the people being able to scrutinise, discuss and contribute to government decision making. To do this, they need information.³⁰

- 1.30 Further arguments as to the place of FOI within representative democracy are considered in Chapter 4 of this report.

1(b) Public interest

- 1.31 *Open Government* noted that ‘the general philosophy of the FOI Act [was] that information should be disclosed unless harm will result from disclosure’.³¹ It also observed that:

Before the FOI Act, the disclosure of government-held information outside legal proceedings was entirely at the discretion of the government. This focus on the public interest as the key determinant of disclosure of government information is evidenced by the incorporation of a public interest test in most exemption provisions. In others exemption provisions the public interest component is implicit. Public interest tests allow all considerations relevant to a particular request to be balanced. They are therefore an important and necessary feature of the Act, even though it can at times be difficult to perform this balancing exercise.³²

- 1.32 The Commonwealth and ACT FOI Acts both contain a clause to the effect that

³⁰ *Open Government*, p.12. The ALRC went on to observe that while ‘the High Court did not go so far as to suggest that a right of access to government information is constitutionally guaranteed, the view of the Court indirectly supports FOI objectives’. It also noted that ‘Australia’s accession to the International Covenant on Civil and Political Rights (ICCPR)’ may also have a bearing on interpretations of rights to government information under FOI.

³¹ *Open Government*, p.127.

³² *Open Government*, p.95.

the ‘provisions of this Act’:

shall be interpreted so as to further the objects set out in subsection (1) and to ensure that discretions conferred by this Act are exercised as far as possible to facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of information.³³

1.33 However the framing of the original objects clause in the Commonwealth Act made this more complex, as it stated that the Act created:

a general right of access to information in documentary form in the possession of Ministers, departments and public authorities, *limited only by exceptions and exemptions necessary* for the protection of essential public interests and the private and business affairs of persons in respect of whom information is collected and held by departments and public authorities (emphasis added).³⁴

1.34 This was replicated in the ACT Act.

Impact of limitations appearing in the objects clause

1.35 This wording gave rise to the view in the Courts that there was no ‘leaning’ in the Commonwealth Act toward disclosure. Each case was to be taken on its merits, with a balance to be established between public interest in disclosure and the ability of government to continue to hold information in-confidence in each instance.³⁵ According to a number of observers, this has worked against the full expression of the objects of the Acts as outlined above, allowing government agencies to apply a conservative, ‘anti-disclosure’, interpretation of their obligations.³⁶

Advent of the simplified public interest test

1.36 The trend of more recent Australian legislation has been to address this by

³³ s 3(2) of Commonwealth *Freedom of Information Act* 1982 and s 2 of ACT *Freedom of Information Act* 1989.

³⁴ s 3(1)(b) of Commonwealth *Freedom of Information Act* 1982(as at 21 September 2010) and s 2(1)(b) of ACT *Freedom of Information Act* 1989.

³⁵ Re News Corporation Ltd v National Companies and Securities Commission [1984] FCA 36, quoted in ACT Government, Submission No.4, pp.9-10.

³⁶ See for example ALRC 77, submissions quoted at pp.16, 35.

applying a simplified criterion, reliant on a single public interest test, which poses a question in each instance as to whether there is a greater public interest in making information available or maintaining confidentiality.³⁷ The intention is to create statute that leans in favour of disclosure.

- 1.37 The most recent amendments to the Commonwealth Act, which come into force on 1 November 2010, reflect this approach. The amendments also introduce explicit guidance within the Act on criteria that should or should not be considered relevant in assessing public interest in a particular case, further clarifying the intent—and means of applying—the Act.³⁸

Committee comment

- 1.38 The Committee notes developments in Commonwealth and other legislation concerning the public interest as it applies to FOI, and considers that similar changes should be made in the ACT. The Committee considers that in the absence of such measures, the access to public sector information enjoyed by residents of the ACT will be significantly inferior to that conferred by Commonwealth and Queensland legislation, among others. These matters are discussed in greater detail below in sections 2 and 3(a), at paragraphs 2.1 and following, and 3.3 and following.

1(c) The ACT FOI Act - 20 years on

Part 1: Amendments to the ACT FOI Act

- 1.39 The ACT FOI Act has been significantly amended three times since it came into force in 1989.

Amendments in 1996

- 1.40 In 1996 the Act was amended to 'automatically bring Territory owned corporations and their subsidiaries within the coverage of the Principal Act, to

³⁷ ACT Government, Submission No.4, p.16.

³⁸ See s 11B Public interest exemptions—factors in Note 3 to the Freedom of Information Act 1982, 'amendments commence immediately after 1 November 2010'.

provide increased review rights in relation to fees and charges decisions and to alter the annual reporting requirements to reflect changed administrative responsibilities'.³⁹ The Committee notes that policing matters are not subject to the Act.

- 1.41 In 1997 and 1998 two identically-worded, but ultimately unsuccessful, bills sought to amend the FOI Act to provide for 'increased access to government held information by members of the public' through provisions which sought to: make the application process easier; reduce costs; reduce time periods for compliance; make exemptions to the Act subject to a public interest test; reduce veto powers by ministers; and increase awareness of the public's 'legal right of access to government-held information'. Both bills lapsed and had no further bearing on the Act.⁴⁰

Amendments in 2006/07

- 1.42 Amendments introduced in 2006, and passed in 2007, changed the Act to provide:
- for a consultation process prior to the release of personal information, and to provide for an exemption where disclosure of information could prejudice the security of the Australian Capital Territory.⁴¹
- 1.43 The amendments also changed the FOI Act 'to ensure that all work involved in a Freedom of Information ... request is taken into account in a determination whether to refuse a request on the grounds that the request involves an unreasonable diversion of resources'.⁴²

³⁹ *Freedom of Information (Amendment) Bill 1996, Explanatory Memorandum*, p.2. The Bill was passed on 26 June 1996. See the Bill History, <http://www.legislation.act.gov.au/b/db_14415/default.asp>, viewed 21/09/2010.

⁴⁰ *Freedom of Information (Amendment) Bill 1997, Explanatory Memorandum*, p.2., <http://www.legislation.act.gov.au/b/db_14019/default.asp> viewed 21/09/2010; *Freedom of Information (Amendment) Bill 1998, Explanatory Memorandum*, p.2, <http://www.legislation.act.gov.au/b/db_13222/default.asp>, viewed 21/09/2010. The bills lapsed on 21 February 1998 and 20 October 2001 respectively.

⁴¹ *Freedom of Information Amendment Bill 2006, Explanatory Memorandum*, p.2, <http://www.legislation.act.gov.au/b/db_27246/20061123-30691/pdf/db_27246.pdf>, viewed 21/09/2010.

⁴² *Freedom of Information Amendment Bill 2006, Explanatory Memorandum*, p.2, <http://www.legislation.act.gov.au/b/db_27246/default.asp>, viewed 21/09/2010. The Bill was passed on 13 March 2007.

Amendments in 2008/09

- 1.44 Finally, in 2008 a Private Member's Bill, on being passed, amended the Act to:
 remove the use of conclusive certificates as a means for ministers or their
 "principal officer" delegates to exempt internal working documents or
 documents relating to Commonwealth/State relations and for chief
 executives to exempt executive documents from the FOI process.⁴³
- 1.45 Conclusive certificates had put refusals to allow requests beyond appeal. This
 bill to some degree paralleled similar Commonwealth amendments introduced
 and passed later in the same year.⁴⁴

Part 2: Change of context

- 1.46 This section responds to second part of Term of Reference 1(c), which notes
 that there have been 'significant changes in the time [since the ACT Act
 became law] in the way Government creates, holds and stores information.'
- 1.47 The most important of these have arisen from the increasing use and ubiquity
 of the internet, and the rise of Electronic Data and Records Management
 Systems (EDRMS) for enterprise—and therefore government—management of
 documents. These two technologies, and a new appreciation of the value of
 information, have resulted in higher different expectations regarding the
 availability of public sector information.
- 1.48 Since the Act came into force and since 1995 in particular entities have arisen,
 such as internet search engine providers, which generate revenue-streams by
 providing access to, indexing and packaging information. However, as early as
 1995 the ALRC was already stating a position which seemed to anticipate these
 developments:

The information holdings of the government are a national resource.

⁴³ *Freedom of Information Amendment Bill 2008, Explanatory Memorandum*,
 <http://www.legislation.act.gov.au/b/db_33715/20081210-38334/pdf/db_33715.pdf>, p.2, viewed
 21/09/2010.

⁴⁴ *Freedom of Information Amendment Bill 2008, Explanatory
 Memorandum*, <http://www.legislation.act.gov.au/b/db_33715/default.asp>, p.2, viewed 21/09/2010.
 The bill was passed in the ACT Legislative Assembly on 11 February 2009 and notified 18 February
 2009.

Neither the particular Government of the day nor public officials collect or create information for their own benefit. They do so purely for public purposes. Government and officials are, in a sense, ‘trustees’ of that information for the Australian people.⁴⁵

Emergence of a more open consensus

- 1.49 A more recent source—a 2008 UN survey by Mendel—shows that this attitude has become pervasive, and is in fact now the dominant stance on public sector information:

The dominant trend in all countries is to make more and more information available on a proactive basis, particularly online, whether or not this is required under a right to information law.⁴⁶

- 1.50 Moreover, Mendel argued that this approach can:

promote a number of efficiencies for the public sector, as well as better service provision, both as reflected tendencies to move to ever more significant forms of e-government. Given the relative ease and low cost of proactive publication over the Internet, it only makes sense that this should be promoted, among other things because it serves as a means to reduce the number of (relatively costly) requests ...⁴⁷

- 1.51 This is consistent with the stance adopted by the 2008 Solomon review, which recommended that the Queensland Government: ‘move ... to a more useful, contemporary, internationally practised, ICT enabled publication of EDRMS metadata with search capability’, to which ideally, ‘online access would be through a single entry point’.⁴⁸

- 1.52 This signalled a shift in approach from the mindset characterised under the

⁴⁵ *Open Government*, p.33.

⁴⁶ Mendel, T., *Freedom of Information: A Comparative Legal Survey*, 2nd ed., UNESCO, January 2008, p. 147, quoted in FOI Independent Review Panel, *The Right to Information: Reviewing Queensland's Freedom of Information Act* (Solomon Report). 2008, State of Queensland, p.18, <http://www.foireview.qld.gov.au/documents_for_download/FOI-review-report-10062008.pdf>, viewed 29/07/2010.

⁴⁷ Mendel, T., *Freedom of Information: A Comparative Legal Survey*, 2nd ed., UNESCO, January 2008, p.147, quoted in Solomon report, p.18.

⁴⁸ Solomon report, p.29.

former FOI scheme. A 2008 Queensland parliamentary committee report crystallised this change:

... publication of government-held information should be established practice. Almost all information, 'the grist of government processes', should be available generally, without charge, without the need for a written application and without the need to resort to an application under the Freedom of Information Act. Accordingly, rather than wholly discretionary 'administrative access schemes' information should be made available via government policies regarding 'publication'. Delivery of information in this way should be evaluated and improved on a continual basis.⁴⁹

Value creation under the new consensus

- 1.53 In line with new insights into the value of information, contemporary reviews lay emphasis not only on the 'rights' aspect of access to public sector information but also propose that value—both social and economic—can be generated where public sector information is free, both in terms of cost and in its free availability for re-use. *Engage*, the 2009 report of the *Government 2.0* review, stated that:

Information collected by or for the public sector is a national resource which should be managed for public purposes. That means that we should reverse the current presumption that it is secret unless there are good reasons for release and presume instead that it should be freely available for anyone to use and transform unless there are compelling privacy, confidentiality or security considerations which require otherwise.⁵⁰

- 1.54 Moreover, the report suggested that:

Once public sector information is liberated as a key national asset, possibilities—foreseeable and otherwise—are unlocked through the

⁴⁹ Queensland Parliamentary Legal, Constitutional and Administrative Review Committee (LCARC), *The Accessibility of Administrative Justice*, Report No. 64, p. 38, quoted in Solomon report, p.20.

⁵⁰ Government 2.0 Taskforce. *Engage: Getting on with Government 2.0*, 2009, p.x, <<http://www.finance.gov.au/publications/gov20taskforcereport/doc/Government20TaskforceReport.pdf>>, viewed 25/08/2010.

invention, creativity and hard work of citizens, business and community organisations. Open public sector information is thus an invitation to the public to engage, innovate and create new public value.⁵¹

- 1.55 Above all, the report proposed the potential for a more open regime on public sector information to ‘unlock the immense economic and social value of information and other content held by governments to serve as a precompetitive platform for innovation’.⁵²
- 1.56 Proponents of this view cite economic modelling which suggests that costs generated by making public sector information more readily available over the internet are outweighed by ‘the increased corporate and individual taxes on additional economic activity’. They argue that ‘“[f]ree” information flow is better at priming the pump of economic activity’: that is, that there are greater economic benefits in providing public sector information at no-cost over the internet than there would be in charging for it.’⁵³
- 1.57 In fact, Australia has been a pioneer in this area. It introduced ‘the first substantial programs in the world in which government data which had previously been sold was made available without charge’, notably in its no-cost release of data sets from the Australian Bureau of Statistics and Geoscience Australia.⁵⁴
- 1.58 These developments characterise the significant contextual changes that have occurred around Freedom of Information legislation, which reflect increased public expectations regarding access to information, and improved ways of

⁵¹ *Report of the Government 2.0 Taskforce*, p.iii.

⁵² *Report of the Government 2.0 Taskforce*, p.xii.

⁵³ ‘The United States makes complete weather data available to anyone at the cost of reproduction ... European countries, by contrast, typically claim government copyright over weather data and often require the payment of substantial fees. Which approach is better? ... The US weather risk management industry, for example, is ten times bigger than the European one, employing more people, producing more valuable products, generating more social wealth. Another study estimates that Europe invests €9.5bn in weather data and gets approximately €68bn back in economic value — in everything from more efficient farming and construction decisions, to better holiday planning — a seven-fold multiplier. The United States, by contrast invests twice as much — €19bn — but gets back a return of €750bn, a 39-fold multiplier. Other studies suggest similar patterns in areas ranging from geospatial data to traffic patterns and agriculture. ‘Free’ information flow is better at priming the pump of economic activity.’ James Boyle quoted in *Report of the Government 2.0 Taskforce*, p.45.

⁵⁴ *Report of the Government 2.0 Taskforce*, p.xii.

managing information to support higher levels of access. Both have resulted in very different attitudes on what is considered a reasonable level of access to public sector information.

- 1.59 Increasing the exposure of public sector information was always the intention of Freedom of Information legislation. It is clear that this has not often been the result. Now however, different expectations and a more open model have resulted in a quite different context for freedom of information legislation, both in the Commonwealth and in the ACT.

Committee comment

- 1.60 In the Committee's view the value-adding made possible by a more open regime on public sector information would be a significant benefit to the ACT. In an information age such as this, these are important avenues through which to support job creation and increase economic activity in general.

1(d) Reform of the Commonwealth Act

- 1.61 The Commonwealth *Freedom of Information Act* has been reviewed and amended a number of times since it came into force in 1982.

Reviews

Advent of the original Act

- 1.62 A 2009 Senate committee report noted that the original 1982 FOI Act 'produced a key change in the emphasis of the law' by:
- creating a right of access;
 - not requiring a person to establish any special interest or 'need to know' before he or she is entitled to seek or be granted access; and
 - setting out the circumstances in which access can be denied as a matter of discretion.⁵⁵

⁵⁵ Submission by the Department of Prime Minister and Cabinet, quoted in Standing Committee on Finance and Public Administration, *Freedom of Information (Removal of Conclusive Certificates and Other Measures) Bill 2008* [2009], p.9.

1.63 Seen in a wider context, the Act was part of 'significant legislative initiatives directed at reforming government processes so as to improve citizens' access to government information and to establish a system of review of administrative decisions'. This saw the introduction of other legislation in the same vein, including the Ombudsman's Act 1976, the Administrative Appeals Tribunal Act 1975, the Privacy Act and the Administrative Decisions (Judicial Review) Act.⁵⁶

1.64 It was noted, however, that the original intentions of the Act had not been fulfilled. In the time since its enactment there had been:

concerns that the FOI Act's central objective of improving access to official information [had] been obstructed by the very framework set up under the Act and that the reforms [had] encountered an enduring culture of resistance from within the public sector.⁵⁷

Open Government

1.65 Concerns on whether the Act had lived up to its intentions had already been expressed in the 1995 report of the Australian Law Reform Commission, *Open Government*. The report observed that while FOI legislation had had a 'marked impact on the culture of the public sector', its effects were not 'entirely positive':

A number of people, many of them dissatisfied users of the Act, consider that a more accurate title for the Act would be Freedom From Information. There is a perception in certain quarters that the Act is not achieving its objectives.⁵⁸

1.66 As the 2009 Senate Committee report later suggested, there was a general sense that there was more that 'needed to be done to give full effect to the right to access government-held information'.⁵⁹

⁵⁶ Senate Legal and Constitutional Legislation Committee, *Inquiry into the Freedom of Information Amendment (Open Government) Bill 2000*, p.2.

⁵⁷ Senate Legal and Constitutional Legislation Committee, *Inquiry into the Freedom of Information Amendment (Open Government) Bill 2000*, p.2.

⁵⁸ *Open Government*, pp.15-16.

⁵⁹ Senate Legal and Constitutional Legislation Committee, *Inquiry into the Freedom of Information Amendment (Open Government) Bill 2000*, p.2.

1.67 In *Open Government* the ALRC made the following specific criticisms of the FOI regime as it stood in 1995, that:

- 'There is no person or organisation responsible for overseeing the administration of the Act.
- The culture of some agencies is not as supportive of the philosophy of open government and FOI as the Review considers it should be.
- The conflict between the old 'secrecy regime' and the new culture of openness represented by the FOI Act has not been resolved.
- FOI requests can develop into legalistic, adversarial contests.
- The cost of using the Act can be prohibitive for some.
- The Act can be confusing for applicants and difficult to use.
- The exemption provisions are unclear, open to misuse by agencies and, because of their prominence, tend to overwhelm the purpose of the Act.
- Records management, which is fundamental to the effectiveness of the FOI Act, is not given sufficient prominence.
- Current review mechanisms could be improved.
- There are uncertainties about the application of the Act as government agencies are corporatised.
- The interactions between the FOI Act and the Privacy Act, and the potential conflicts they give rise to, have not been adequately addressed.'⁶⁰

1.68 More broadly, the ALRC stated that while the FOI Act set a 'minimal standard' for public access to government information (in s 14), this had been interpreted by public sector agencies as a (maximal) standard for compliance.⁶¹ The result was, as one contributor to the review stated, that 'with few exceptions the agencies of government have taken the Act as a guide to where they should dig their trenches and build their ramparts'.⁶²

⁶⁰ *Open Government*, pp.17-18.

⁶¹ Attorney-General's Dept FOI Annual Report 1982-83 AGPS Canberra 1983, 2, quoted in *Open Government*, p.15.

⁶² *Open Government*, p.35.

Objects clause

- 1.69 This situation was, according to the report, exacerbated by a lack of clarity in the objects clause of the Act (s 3), which appeared to qualify the intention of making public sector information more widely available by including, in the objects clause itself, limitations on access. This supported a less open interpretation by both government agencies — of their obligations under the Act — and, importantly, and by the courts when they were called upon to make judgements on matters administered under the Act.⁶³
- 1.70 Moreover, the ALRC argued that the objects clause did not say enough about the true purpose and significance of the Act, leading it to recommend, in its first recommendation of the report that:

The object clause of the FOI Act (s 3) should be amended to explain that the purpose of the Act is to provide a right of access which will

- enable people to participate in the policy, accountability and decision making processes of government
- open the government's activities to scrutiny, discussion, comment and review
- increase the accountability of the Executive
- and that Parliament's intention in providing that right is to underpin Australia's constitutionally guaranteed representative democracy.⁶⁴

Conclusive certificates

- 1.71 The report was also critical of the power of ministers to issue 'conclusive certificates' which, said the report, amounted to a 'ministerial veto'.⁶⁵ In relation to this, the ALRC observed that while the 'original justification for conclusive certificates was that the ultimate responsibility for decisions on particularly sensitive matters should lie with the relevant Minister', it could be argued that:

highly sensitive information, release of which would not harm the public

⁶³ *Open Government*, p.31.

⁶⁴ *Open Government*, p.32.

⁶⁵ *Open Government*, p.98.

interest but which would precipitate a public accountability debate, is exactly the sort of material to which the FOI Act is designed to give access because it involves responsibility at the very highest levels of government.⁶⁶

Measures beyond the Act

- 1.72 The report argued that while these were things that should be changed in law, there was more to be done. Amending the Act's objects clause alone would 'not, of itself, overcome any remaining culture of secrecy'. There should also be efforts to educate responsible officers correctly to discharge their responsibilities under the Act,⁶⁷ as part of broader 'cultural changes' that were needed if government departments were to fulfil the intention of the Act.⁶⁸
- 1.73 Finally, the ALRC suggested that 'an independent person' was needed 'to oversee the administration of the Act'. In its view, the Attorney-General's Department, which then held this responsibility, was 'not sufficiently independent of the Executive'. After considering a number of other possibilities, including vesting powers in a statutory office already created such as that of the Ombudsman,⁶⁹ the ALRC identified conflicts between existing and FOI responsibilities in each case. As a result, it recommended that a 'new statutory office of FOI Commissioner should be created' as an entirely separate entity to oversee the Act.⁷⁰

Amendments

- 1.74 Amendments to the Commonwealth FOI Act include those enacted in 1983, 1986, 1991, 2008 and 2009. These have raised or lowered fees and charges; simplified processes for requests, charges and exemptions; and altered exemptions under the Act. In general, these amendments either increased or decreased effective access to public sector information.

⁶⁶ *Open Government*, pp.98-99.

⁶⁷ *Open Government*, p.36.

⁶⁸ *Open Government*, pp.37-38.

⁶⁹ *Open Government*, pp.75-76.

⁷⁰ *Open Government*, pp.61-62, 63.

Amendments in 1983

- 1.75 In 1983 the Act was amended to increase access to public information by:
- providing a greater right of access to documents created before the enactment of the FOI Act;
 - transferring review functions under the Act to the AAT;
 - empowering the AAT to consider whether there are reasonable grounds for a claim that a document is exempt in cases where a conclusive certificate has been issued and to require the relevant Minister to consider whether to revoke a certificate if the AAT finds no reasonable grounds for its issue;
 - applying an overriding public interest test to the Commonwealth/State relations exemption (s 33A)¹⁴; [and]
 - requiring the time for compliance with requests to be reduced progressively from 60 days to 30 days.⁷¹

Amendments in 1986

- 1.76 In 1986 the Act was amended to increase fees and charges and provide a longer period for compliance with requests (45 days). In detail, the Freedom of Information Bill 1986 amended the Act and its Regulations to:
- introduce a \$30 application fee for an FOI request;
 - increase the charge for agency search and retrieval time to \$15 an hour;
 - introduce a charge of \$20 per hour for agency decision-making and consultation time;
 - introduce an application fee of \$40 for internal review requests;
 - provide that no fees or charges will be payable in respect of requests for access to personal income maintenance documents;
 - maintain the present 45 day time limit on answering requests from 1 December 1986;
 - strengthen provisions for refusal of requests on workload grounds;

⁷¹ *Open Government*, pp.21-22. See also Hon L.F. Bowen, *Freedom of Information Amendment Bill 1983 - Explanatory Memorandum*, 1983, Parliament of the Commonwealth of Australia, <<http://www.aph.gov.au/library/pubs/explanmem/docs/1983FOIAmdtBillEM.pdf>>, viewed 24/08/2010. The resulting Act was given assent on 4 November 1986.

- reduce the grounds for remission of charges;
- reduce the obligations on agencies to publish s.8 and s.9 statements and to provide statistics;
- make miscellaneous and consequential amendments.⁷²

Amendments in 1991

1.77 In raising fees and charges, the 1986 amendments can be considered to reduce, in effect, access to public sector information. Amendments in 1991 were more equivocal. In ‘simplifying’ and ‘clarifying’ procedures, these amendments could be seen as working toward a more liberal regime. However the ‘widening’ of s 24, giving even broader discretion on ‘substantial or unreasonable diversion’ of departmental resources—a clause seen as already open to wide interpretation by government agencies—worked in the other direction. The Explanatory Memorandum for the amending Act suggested that it would:

- simplify the procedure for making a request for access to documents;
- simplify the procedure for agencies to impose charges for access to documents;
- clarify the interpretation of provisions in the Act which exempt documents from public disclosure;
- widen section 24 of the Act allowing refusal of requests for access to documents if processing the requests would involve a substantial or unreasonable diversion of agency resources;
- clarify the operation of provisions permitting members of the public to seek the amendment of records containing personal information’ which is incomplete, incorrect, out of date or misleading; and
- clarify the operation of provisions allowing review by the Administrative Appeals Tribunal of decisions made by Government agencies on requests for access to documents.⁷³

⁷² Hon L.F. Bowen, *Freedom of Information Laws Amendment Bill 1986 - Explanatory Memorandum*, 1986, Parliament of the Commonwealth of Australia, p.1.
<<http://www.aph.gov.au/library/pubs/explanmem/docs/1986FreedomofInformationLawsAmdtBillEM.pdf>> viewed 24/08/2010.

⁷³ Hon. Michael Duffy, *Freedom of Information Amendment Bill 1991*, Parliament of the Commonwealth of Australia, p.1,
<<http://www.aph.gov.au/library/pubs/explanmem/docs/1991FreedomofInformationAmdtBillEM.pdf>>, viewed 24/08/2010. The resulting Act was assented to 27 September 1991.

Amendments in 2008

- 1.78 Amendments in 2008—by way of the *Freedom of Information (Removal of Conclusive Certificates and Other Measures) Bill*—removed the power of ministers to issue conclusive certificates under the Act. Conclusive certificates have been dealt with above. As stated in the Senate Committee report inquiring into the Bill, the ‘issue of a conclusive certificate effectively places a document outside the reach of formal FOI processes’. It also noted that where ‘such a certificate is issued, the Administrative Appeals Tribunal (AAT) cannot utilise its normal power to review the merits of the exemption claim and is limited to considering whether there exist reasonable grounds for the exemption claim under section 58’.⁷⁴
- 1.79 There was a perception—as there had been for the ACT Freedom of Information Act—that conclusive certificates left too much discretion in the hands of government. This was seen as particularly so since matters were then beyond appeal, let alone subject to a public interest test.⁷⁵
- 1.80 The Explanatory Memorandum to the Bill noted that the ‘proposal to repeal the power to issue conclusive certificates’ formed ‘part of the Government’s 2007 election commitments made in its policy statement, Government information: restoring trust and integrity’. The amendments extended the right of appeal, so that ‘the AAT may undertake full merits review of all exemption claims’.⁷⁶

⁷⁴ Standing Committee on Finance and Public Administration, *Freedom of Information (Removal of Conclusive Certificates and Other Measures) Bill 2008* [2009], p.12.

⁷⁵ The summary from the Bills Homepage for the amending Bill states that it amended ‘the Freedom of Information Act 1982, Archives Act 1983, Administrative Appeals Tribunal Act 1975 and Inspector-General of Intelligence and Security Act 1986 to: remove the power to issue conclusive certificates; revoke existing conclusive certificates if a new access request is received; implement measures to protect sensitive information in proceedings before the Administrative Appeals Tribunal; and make consequential amendments’. *Freedom of Information (Removal of Conclusive Certificates and Other Measures) Bill 2008* [2009] - Bills Homepage, 2009, Parliament of the Commonwealth of Australia, <<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fs702%22>>, viewed 24/08/2010.

⁷⁶ Explanatory Memorandum, *Freedom of Information (Removal of Conclusive Certificates and Other Measures) Bill 2008*, <<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fs702%22>>, viewed 24/08.2010.

Amendments in 2010

- 1.81 Also part of the platform outlined in the 2007 election campaign was a wider intention to liberalise the regime on public sector information, not only through the Freedom of Information regime itself, but through other measures. This followed the lead of the Queensland review of Freedom of Information (the Solomon review, see below), in that it proposed a default ‘pro-disclosure’ stance on the release of public sector information. Given the available mechanisms of online publication at minimal cost, the stated policy on public sector information was that it was in the public interest that information should be published as a matter of course (not just in response to FOI requests): unless there were public interest reasons in favour of it being held in-confidence.⁷⁷
- 1.82 Changes to put these policies into effect were made through the Freedom of Information Amendment (Reform) Bill 2010. The primary purpose of the Bill was to ‘make major reforms to the Freedom of Information Act 1982 (FOI Act) to promote a pro-disclosure culture across government and to build a stronger foundation for more openness in government’.⁷⁸
- 1.83 These measures created a new Office of the Information Commissioner, in which the Australian Privacy Commissioner and a new Freedom of Information Commissioner would operate under the aegis of an Australian Information Commissioner. Other important changes were to re-cast the objects clause of the Act (removing qualifications) so that it was balanced toward disclosure; extending the number of ‘conditional’ exemptions (that is, that were subject to the public interest test); providing guidelines in the body of the Act showing what should or should not be considered pertinent by decision-makers in considering whether to disclose information under the Act;

⁷⁷ Rudd, Kevin, and Joe Ludwig, *Government Information: Restoring Trust and Integrity*, 2007, Australian Labor Party, <http://parlinfo.aph.gov.au/parlInfo/download/library/partypol/EFRO6/upload_binary/efro62.pdf;fileType=application/pdf>, viewed 20/08/2010.

⁷⁸ Senator the Hon Joe Ludwig, *Freedom of Information Amendment (Reform) Bill 2009 - Explanatory Memorandum*, 2010, Parliament of the Commonwealth of Australia, p.1, <http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r4163_ems_bbb98d6a-e9c2-47aa-8bc143d33f383b2/upload_pdf/336873.pdf;fileType=application%2Fpdf#search=%22Freedom%20of%20Information%22>, viewed 24/08/2010.

and requiring government departments to publish statements as to what information they held and would regularly publish, among other things.⁷⁹

1(e) Accessibility, time and costs

- 1.84 The sources referenced in this chapter—*Open Government*; the Solomon report; various reports of parliamentary committees; and indeed the history of legislative amendment itself—all support the view that the aspirations which motivated the original Freedom of Information legislation, in the Commonwealth and the ACT, were not fully realised in practice.
- 1.85 Accessibility, time and costs can all form barriers to the access envisaged by the original legislation, if they are not favourable to the release of public sector information. While broader issues associated with accessibility are considered here, they are examined in greater detail in the body of the report, in section 3(e) below.

Cultural barriers

- 1.86 The third-party sources considered here (that is, which were not tendered to the Committee's inquiry) all register a strong sense of this. *Open Government*, for example, noted the impact of organisational culture on the administration of the Act, in particular in the discharge of obligations by government departments:
- The culture of an agency and the understanding and acceptance of the philosophy of FOI by individual officers can play a significant part in determining whether the Act achieves its objectives. A negative attitude, particularly on the part of senior management, can influence an agency's approach to FOI and seriously hinder the success of the Act in that agency.⁸⁰
- 1.87 These, it noted, were compelling reasons on which to clarify the public interest test and the objects clause of Freedom of Information legislation.

⁷⁹ Senator the Hon Joe Ludwig, *Freedom of Information Amendment (Reform) Bill 2009 - Explanatory Memorandum*, 2010, Parliament of the Commonwealth of Australia, p.1.

⁸⁰ *Open Government*, p.35.

The 'secrecy regime'

- 1.88 *Open Government* identified another significant barrier in the continuation of secrecy provisions. Observing that the “ ‘new open’ and the ‘old closed’ regimes have not been reconciled”, the report referred to a ‘major hindrance to achieving the open government promoted by the FOI Act’, in the ‘continued existence of what is often referred to as the ‘secrecy regime’:

This regime, which had its origins in the belief that it was in the public interest to keep the workings of government secret, prohibits the disclosure of information obtained in the course of an official’s duty, often regardless of the nature of the information or the effect its disclosure might have. The continuation of this regime alongside the FOI Act sends mixed messages to officers about what information they are authorised to disclose.⁸¹

Unintended consequence of privacy legislation

- 1.89 *Open Government* suggested that the subsequent passage of the Privacy Act ‘contributed to this confusion’ because:

For those who prefer the traditional closed culture to the new openness, [the Privacy Act] appeared to provide further justification for a secretive approach. However, this misinterprets the nature of privacy protection. A culture of secrecy undermines privacy protection. It prevents people getting access to their own personal information and amending inaccurate records. It permits poor recordkeeping. It protects government officials from being accountable for intruding on an individual’s privacy. Secrecy can be as detrimental to privacy as it is to open government. It is, therefore, as much in the interests of privacy as it is in the interests of open government to confine confidentiality to those situations where it is necessary, and not to allow it to nurture or perpetuate a culture of secrecy.⁸²

⁸¹ *Open Government*, pp.41-42.

⁸² *Open Government*, p.42.

1(f) The Solomon review: FOI in Queensland

- 1.90 It is clear from the reviews referenced so far in this chapter that the FOI framework in Australia been the subject of repeated assessments, and evaluations virtually from its inception in statute—in the Commonwealth, and in the states and territories. Many of the reforms introduced since the 2007 federal election are consistent with the findings and recommendations of the very influential *Open Government*. However, the report of the 2008 Solomon Review into freedom of information in Queensland crystallised much of more current thinking on FOI, and although it too took up many of the concerns of *Open Government*, it placed them within a new context furnished by the rise of web and document management technologies.

Formulation of the ‘push model’

- 1.91 While *Open Government* characterised the underlying message of s 14 of the Commonwealth FOI as being that government agencies should publish more than the minimum they are obliged to do under FOI, the Solomon report said it more clearly. It outlined a ‘push’ model for the disclosure of government information, where there is a presumption that information will be published unless a reason can be shown to the contrary, and it pointed to low cost electronic publishing as an enabling feature of current conditions.⁸³

Failure of the lead agency model

- 1.92 The push model was a response to what the Solomon report identified as the shortcomings of the FOI framework as it had emerged in-practice. The ‘current lead agency model has not worked’, stated the report, ‘and needs to be replaced with the Information Commissioner who is an active and shared resource across government, as the champion of FOI and responsible for helping agencies implement it’.⁸⁴
- 1.93 In this respect the report had come to similar conclusions to *Open Government*, which suggested that the capability of a government department (in that case

⁸³ See Solomon report, pp.4, 18, 27, 29, & 30.

⁸⁴ Solomon report, p.5.

the federal Attorney-General) to scrutinise the performance of other departments was compromised by a conflict of interest—since it was, itself, part of the executive arm of government.⁸⁵

A new picture of government information

1.94 The Solomon report was also consonant with *Open Government* when it stated that ‘government information is a core strategic asset’, which should be managed accordingly.⁸⁶ The report noted the lack of a ‘whole of government strategic information policy’ through which to do this.⁸⁷ Such a policy would, the report argued, address the whole ‘lifecycle of government information’ that would interconnect ‘strategically with other relevant public policies’.⁸⁸

1.95 This, the report suggested, would take place in the context of significant re-positioning of FOI within a broader pro-disclosure environment:

FOI’s place in the government information experience should be recast as the Act of last resort moving the existing “pull” model to a “push” model where government routinely and proactively releases government information without the need to make an FOI request.⁸⁹

1.96 This would, the report suggested, reduce the burden on the FOI process, which would become simply a facet of a broader program for the routine release of public sector information:

FOI as a last resort in a push model means that a broader information policy would support government information routinely and proactively disclosed by government without first needing a formal request for the information. This would leave the freedom of information law to manage a much smaller holding of government information representing that which is truly in contest in terms of contrary or competing public interests.⁹⁰

⁸⁵ See paragraph 1.73.

⁸⁶ Solomon report, p.14.

⁸⁷ Solomon report, p.14.

⁸⁸ Solomon report, p.4.

⁸⁹ Solomon report, p.4.

⁹⁰ Solomon report, p.17.

Value creation

- 1.97 The report also foreshadowed contemporary policy statements, such as those made in the report of the Government 2.0 panel, which propose significant possibilities for creating value where public sector information is made available for re-use:

As part of the new information policy paradigm that is required in promoting better FOI outcomes in terms of its legislative objects, a policy decision by Government accepting, even encouraging, reuse of public sector information (such as starting with the developing Government Information Licensing Framework) should help liberate the said reluctance that is experienced in the FOI domain with clean, electronic, manipulable releases of data and documents.⁹¹

- 1.98 It emphasised this again, more forcefully, adding this as a further dimension to the ‘traditional’ arguments, based on the exercise of democratic rights and responsibilities, used in favour of freedom of information:

Over and above the benefits in favour of enhanced openness and accountability in government and more broadly in participatory democracy... the principles in favour of a public policy shift in routinely publishing government information are many. The creative thought processes, skills, experience, time, budgets, interests and innovative effort of non-government players collaborate in often unpredictably positive ways delivering better social, economic, environmental and even government outcomes.⁹²

Elements of the ‘push’ model

- 1.99 Recommendation 3 of the report outlined how these imperatives would be expressed in practice, proposing that the ‘the following elements should form part of a more highly evolved “push” model’:
- publication schemes and proactive decision-making processes that routinely release information (including documents themselves or public editions

⁹¹ Solomon report, p.31.

⁹² Solomon report, p.32.

thereof) at large, or to specific interest sectors, as enabled by a range of ICT features;

- disclosure logs that provide online access to information already released under freedom of information. (The Government of the day may also wish to add supplementary contextual information providing greater balance or depth to the issue(s));
- greater administrative release through the exercise of executive discretion in good faith and in the appropriate circumstances (with sufficient legal protection) rather than the current tendency to refer all requests for documents to be managed through the longer and more expensive FOI processing model; and
- administrative access schemes for appropriate information sets, such as Queensland Health (health records) and Queensland Police Service (criminal records).⁹³

Need for improved record management

1.100 Recommendation 4 addressed the underlying need for effective record-management, reflecting the importance laid on this in the body of the report, proposing:

- [that the] Public Records Information Standards (currently Nos. 31,40,41) should be accorded a significantly greater profile and priority in government requiring an increased monitoring and compliance effort, through-
- development of whole of government strategic information policy (Rec. 1) supported in governance terms by the collaborative efforts of the Information Commissioner, the Queensland State Archivist, and the Chief Information Officer, overseen by the Strategic Information and ICT CEO Committee, and reporting to the Parliamentary Legal, Constitutional and Administrative Review Committee through the Information Commissioner;
- sector-wide mandatory audit to assess the current standard of records management;

⁹³ Solomon report, p.19.

- deliver targeted capacity building strategies (informed by audit results) such as training and ICT solutions to compliance and systems issues; and
- periodic audits on an ongoing basis, to monitor and support continuous improvements in compliance, development of standards and guidelines, and responses to emerging ICT challenges.⁹⁴

1.101 A number of these proposals have been picked-up and expressed in current federal legislation, particularly in the 2009-10 amendments noted above. The Office of the Australian Information Commissioner is, according to policy statements, intended to champion best practice in these areas, thus enabling the wider availability, in practice, of public sector information, to accompany changes in statute.⁹⁵

‘Disjoint’ in record management practices

1.102 A further obstacle to realising the goals of Freedom of Information was also identified as crucial by the Solomon report, which found that there was ‘disjoint’ between ‘records management practices, priorities and workforce skills’, with respect to public sector information in Queensland, ‘versus the requirements of legislation, standards, guidelines and expectations of good governance’.⁹⁶

1.103 The report quoted a submission from the Queensland Ombudsman to this effect, suggesting that ‘one of the most significant problems in agencies’ was:

a lack of knowledge at all levels of the agency’s obligations with respect to the retention and disposal of documents, and the various standards and best practice guidelines relating to storing, archiving and retrieval of documents.⁹⁷

⁹⁴ Solomon report, p.35. This was also identified the ALRC, which noted that good recordkeeping and records management was ‘important for FOI, archives and privacy’, for without them: ‘the right of access provided by the Act is unenforceable in practice. Agencies will be unable to locate records efficiently (if at all) and records that ought be retained may be destroyed’. ALRC 77, p.51.

⁹⁵ See Rudd, Kevin, and Joe Ludwig. *Government Information: Restoring Trust and Integrity*, 2007, Australian Labor Party, <http://parlinfo.aph.gov.au/parlInfo/download/library/partypol/EFRO6/upload_binary/efro62.pdf;fileType=application/pdf>, viewed 20/08/2010.

⁹⁶ Solomon report, pp.22-23.

⁹⁷ Solomon report, p.24.

- 1.104 This, he suggested, was a critical obstacle to achieving the goals of FOI legislation.⁹⁸ The Solomon report went on to observe that it agreed with ‘this grim assessment of the state of play in records management’, stating that the ‘low profile and priority of the public records Information Standards and associated guidelines across government is a major concern for FOI’ and that significantly ‘better awareness and compliance with existing Standards and guidelines would deliver better outcomes for all players in FOI’.⁹⁹

Committee comment

- 1.105 This chapter has recounted aspects of amendments to the Freedom of Information Acts in both the federal and ACT jurisdictions, along with other significant developments.
- 1.106 In the Committee’s view, a number of important ideas have been introduced into the Australian discourse on freedom of information since the advent of the original Act. Discernable are patterns of initial optimism and cultural change as a result of the first Act, followed by growing awareness of a divergence between the evident purpose of the Act and its operation in practice. This has shown the persistent influence of an older stance that favoured holding public sector information in-confidence.

Influence of developments in technology

- 1.107 As noted in the body of this chapter, the Committee acknowledges the effects on this of the increasing pervasiveness of web and EDRMS technologies in changing public expectations of how, and how much, information should be accessible, and at what cost. As noted in the report of the Government 2.0 panel, not only are those expectations, substantially, that such information should be available at no-cost. There are also important reasons why this is an efficient cost structure for the delivery of this information, and that this, in turn promotes value-creation by third-parties.¹⁰⁰

⁹⁸ Solomon report, p.24.

⁹⁹ Solomon report, p.25.

¹⁰⁰ Government 2.0 Taskforce, p.40: ‘Generally speaking, where an asset already exists, the most economically efficient price to make it available to others is the marginal cost of doing so. In the age

Centrality of good information management practice

- 1.108 The Committee also notes the emerging consensus that effective information management practice is integral to the delivery, in practice, of effective access to public sector information. The Committee is mindful that this could be an important element in any future policies in this direction in the ACT, particularly if there were no standard model or software application with which to manage public sector information. In the Committee's view, this could have implications for future practice, for reasons that will be outlined further into the body of the report.

Position of the ACT relative to other jurisdictions

- 1.109 In the Committee's view, perhaps the most important thing to be taken from this selective review of the FOI framework in Australia is the position of the ACT in current practice.
- 1.110 In brief, the FOI environment in Australia, beyond the ACT, is now very different from the 'information on request' model prevalent in the early to middle years of FOI. It seems that a new way of seeing and doing FOI has arisen under which, as noted by the Solomon report, FOI makes up just part of a wider framework in which public sector information is routinely published, and for which FOI is now a measure of 'last resort'. Other Australian jurisdictions, including the Commonwealth, have made significant steps in this direction.
- 1.111 This leaves the ACT with an Act and current practices that, in essence, belong to the earlier 'request-driven' model of access to public sector information. In the Committee's view, residents of the ACT would have every reason to be concerned if they were to find that they had inferior access to public sector information compared with residents in other Australian jurisdictions.
- 1.112 This also raises the prospect of a change of perception on the ACT, which has prided itself on progressive legislative developments, including that providing

of the internet that marginal cost of distribution of PSI typically approaches zero. Thus in the absence of good reasons to the contrary, in the world of the internet, PSI should be free — that is distributed gratis, at zero price.'

for civil unions and, more enduringly, the *Human Rights Act 2004*.¹⁰¹

Implications

- 1.113 In the Committee's view, ACT residents should not have inferior rights and access to public sector information than residents of any other jurisdiction: in fact, they should have equal or better access. This is particularly so given the ACT's history of reform, a sense of natural justice, and the nature of the ACT constituency. Accordingly, in this report the Committee considers how that may be achieved; obstacles which may lie in the path of achieving this; and ways to overcome them.
- 1.114 At the core of the response to this challenge, adopted by this report in Chapter 4, are three recommendations through which the Committee proposes to align ACT statute on Freedom of Information with that of the Commonwealth. These recommend that:
- bills be introduced to the Assembly to repeal the current FOI Act and replace it with re-drafted legislation, taking into account recommendations made in Chapter 4 of this report;
 - an appropriate mechanism be introduced to ensure that the legislation is, subject to the will of the Legislative Assembly, able to maintain its currency in the face of future amendments of the Commonwealth legislation; and that
 - the ACT implement the 'push' model described in the legislation.
- 1.115 These, recommendations 1-3, are presented in Chapter 4 at paragraphs 4.16, 4.17, and 4.18, with a rationale, which is presented at paragraphs 4.8-4.15.

¹⁰¹ The ACT *Civil Unions Act 2006* was disallowed in 2006 by the Governor-General on the instructions of the Executive Council. For debate on this see Senate Hansard, Thursday, 15 June 2006, pp.12-53.

2 PURPOSES AND PRINCIPLES

Introduction

- 2.1 The first chapter of this report addressed the inquiry's Terms of Reference 1(a) to 1(f). This, the second chapter of the report, responds to Terms 2, 2(a) and 2(b).
- 2.2 The report has already touched on the purpose and underlying principles of FOI, noting the foundations for a 'rights' framework for FOI; the High Court's view that freedom of speech (and by implication access to information) were an 'implied freedom' under the Constitution. The report has considered the support FOI provides for transparency and accountability, both for public policy and administration, and for probity and accuracy in government management of personal information. It has also considered the emerging consensus view that public interest should in most cases be the sole determinant of whether information should be published or held in confidence. This reflects an increasing view that wider access to public sector information is most often in the public interest.
- 2.3 These matters are also considered in chapter 3, where objects clauses of the ACT and Commonwealth FOI Acts are discussed in greater detail, for it is in these clauses that the purposes and principles of FOI are established in statute.

Submissions on the purpose of FOI

- 2.4 Submitters to the inquiry stated their views on the purpose of FOI legislation. These reflect the rights framework for FOI identified in the previous chapter, and emerging consensus view on public information noted above. The Australian Press Council adopted this position in its submission to the inquiry when it noted that:

Information is an essential underpinning of democracy and access to information affects the ability of individuals to participate in and effectively scrutinise decision making that affects them. If the purpose of FOI is to promote open and accountable government within the

democratic system then this gives rise to some important principles that should be embodied in FOI legislation being that there is a public interest in ready access to information about government and that there should be a presumption in favour of disclosure of information. It also gives rise to the expectation that all information should be released as a matter of course, unless there is a strong countervailing public interest against disclosure.¹⁰²

- 2.5 The views of the Flynn Primary School Parents and Citizens Association were in agreement with this position, suggesting that ‘effective and useful’ FOI laws would ‘improve transparency and restore confidence in government’ by making information ‘openly available’ to the public on a range of policy areas. The Association suggested that in an ‘ideal world, this would improve the quality of such decisions, to the benefit of the public and the government of the day’.¹⁰³

Connections with *Open Government*

- 2.6 These views are consistent with those voiced in the *Open Government* report. There, they were placed in the context of rights and powers created by the Constitution:

Australia is a representative democracy. The Constitution gives the people ultimate control over the government, exercised through the election of the members of Parliament. The effective operation of representative democracy depends on the people being able to scrutinise, discuss and contribute to government decision making. To do this, they need information. While much material about government operations is provided voluntarily and legislation must be published, the FOI Act has an important role to play in enhancing the proper working of our representative democracy by giving individuals the right to demand that specific documents be disclosed. Such access to information permits the government to be assessed and enables people to participate more effectively in the policy and decision making processes of the

¹⁰² Australian Press Council, Submission No.1, p.4.

¹⁰³ Flynn Primary School Parents and Citizens Association, Submission No.3, p.6.

government.¹⁰⁴

Committee comment

- 2.7 These statements see the underlying purpose and significance of FOI from different positions, but they have much in common. Even short statements, however, such as that by the Commonwealth Ombudsman of the time (that ‘FOI has a symbolism that reaches far deeper into our concern as a society to enhance democracy and to ensure transparency and accountability’) underscore the sense of an essential bond between the effectiveness of democratic institutions and access to information.¹⁰⁵
- 2.8 Put simply, the widest practicable access to public sector information supports the key characteristics of the democratic system, which are valued most and which, when absent, arouse the most alarm:
- equality before the law;
 - justice being done and being seen to be done;
 - the separation of powers; and
 - the conduct of government decision-making beyond the influence of patronage and private interest.
- 2.9 Seen in this context, in the Committee’s view, FOI and associated mechanisms, such as recent moves toward a ‘pro-disclosure’ approach to public sector information, must be considered as integral and fundamental to the best aspects of Australia’s political system, in general, and that of the ACT, in particular.

2(a) Publishing documents released under FOI

- 2.10 Term 2(a) asks the Committee to consider whether documents released under FOI requests should be routinely published. Reportedly, this is done in US and

¹⁰⁴ *Open Government*, p.12.

¹⁰⁵ Quoted in Senate Standing Committee on Finance and Public Administration. *Freedom of Information (Removal of Conclusive Certificates and Other Measures) Bill 2008* [2009], p.6.

Mexican jurisdictions.¹⁰⁶ Recommendations for this approach in Australia have included suggestions for an embargo arrangement where the requestor is provided with materials which are then published online after a specified period.¹⁰⁷

- 2.11 As noted in Chapter 1, there are two main varieties of request under FOI legislation—requests relating to personal information and those relating to matters of public policy and administration—of which personal information requests make up about 85% in the federal jurisdiction. A presumption that requested materials should be published as a matter of course is clearly much more suitable to matters of public interest, as noted in the submission to the inquiry by the Flynn Primary School Parents and Citizens Association.¹⁰⁸

Committee comment

- 2.12 In the Committee's view, the underlying argument, for these requests on matters of public policy, would seem to be that if it is in the public interest for material to be made available to a requestor, it is also in the public interest that it be released more widely, particularly where the greater part of costs to government (for search, retrieval, decision-making) have already been incurred. As noted above, the cost of online publication can, for most purposes, be considered negligible.
- 2.13 The Committee notes the contemporary use of 'disclosure logs' in a number of jurisdictions as a way to publicise information that has been released following FOI requests. Disclosure logs are discussed elsewhere in this report at paragraphs 1.99 and 4.26, and footnote 107.

¹⁰⁶ Mendel, T., *Freedom of Information: A Comparative Legal Survey*, 2nd ed., UNESCO, January 2008, p. 128, quoted in Solomon report, p.21.

¹⁰⁷ See for example Office of the Information Commissioner (Queensland), 'Disclosure Logs', <<http://www.oic.qld.gov.au/files/RIIGuidelines/Guideline%20-%20Disclosure%20logs.pdf>>., viewed 29 November, 2010. An example of a disclosure log under this scheme is available at Department of Education and Training (Queensland), 'Right to Information', <<http://deta.qld.gov.au/right-to-information/disclosure-logs/2010.html>>, viewed 29 November, 2010.

¹⁰⁸ Flynn Primary School Parents and Citizens Association, Submission No.3, p.2.

2(b) Default status as ‘publicly accessible’

- 2.14 The introduction of this report considered recent approaches to FOI which see it as a sub-set of a wider ‘pro-disclosure’ stance on public sector information. As noted, within such a framework FOI becomes a measure of ‘last resort’, to be used where the wider publication scheme for public sector information fails to deliver documents relevant to the public interest.
- 2.15 Important instances of this view were the report of Solomon Review in Queensland, and recent changes to the Commonwealth FOI Act, which came into force on 1 November 2010, when the Office of the Australian Information Commissioner officially opened its doors.

Submissions on the ‘pro-disclosure stance’

- 2.16 A number of contributions to the inquiry recommended this approach. While much of its performance audit of FOI concentrated on practice rather than policy, the ACT Auditor-General in her submission to the inquiry advised the Committee that the audit:
- observed that many FOI requests are made when the applicants are not able to get access to the relevant information publicly, or when there was concern about the lack of transparency in government decisions or dealings with the community. In our view, it is possible that costs to Government could be reduced if more information on Government activities was available publicly, or on request, especially information on topics of current public interest.¹⁰⁹
- 2.17 In saying this, the Auditor General also noted that the Solomon report had ‘advocated public disclosure as an alternative to FOI in meeting the public’s right to know’.¹¹⁰
- 2.18 The Flynn Primary School Parents and Citizens Association advised the Committee that ‘the government should improve the wide release of the information used as a basis of government decisions, including online access

¹⁰⁹ Auditor-General, Submission No.2, p.3.

¹¹⁰ Auditor-General, Submission No.2, p.3.

and availability'. This, the Association suggested, 'would improve transparency and foster community participation and bypass many of the concerns around FOI'.¹¹¹

- 2.19 Dr Merrilyn Sernack addressed recent changes in Commonwealth FOI legislation, noted in Chapter 1, giving particular emphasis not only to publication schemes and disclosure protocols, but also—as have other sources considered in Chapter 1—to the importance of making public sector information available for re-use.¹¹² Dr Sernack also addressed significant changes in to the 'open access period' in the Archives Act, again liberalising conditions for access to public sector information.¹¹³
- 2.20 Dr Sernack also advised the Committee that there was a connection between these reforms and 'e-governance protocols'.¹¹⁴ This was also discussed in Chapter 1 of this report.
- 2.21 The Australian Press Council advised the Committee that, in its view, new approaches to public sector information (that is, the 'pro-disclosure' stance) put FOI in a different light. In these terms FOI was, as noted above, a measure of 'last resort', where items not released under a wider publication scheme could be requested, and further 'decisions' made as to their release.¹¹⁵

Benefits of moving to the new model

- 2.22 The Council advised the Committee that there would be a number of benefits if the ACT were to move in this direction. First such a regime, that 'favours automatic release of most information at low cost and in timely way would, the Council advised, lead to 'greater reliance' on government information, and a 'reduction [in] the current recourse to "leaks"'.¹¹⁶ It also proposed 'a statutory limit to the length of time that any information that has not been disclosed can be withheld from the public and providing that no information is withheld

¹¹¹ Flynn Primary School Parents and Citizens Association, Submission No.3, p.1.

¹¹² Dr M. Sernack, Submission no.5, p.3

¹¹³ Dr M. Sernack, Submission no.5, p. 2

¹¹⁴ Dr M. Sernack, Submission no.5, p.3.

¹¹⁵ Australian Press Council, Submission No.1, p.9.

¹¹⁶ Australian Press Council, Submission no. 1, p.10.

from release longer than 10 years from when it was created'.¹¹⁷

- 2.23 This approach would, the Council advised the Committee, create 'more accountable, transparent and open government'.¹¹⁸ It would also result in efficiencies because fewer staff would be involved in servicing the 'request' (that is, 'traditional' FOI) side of public access to government information.¹¹⁹
- 2.24 At the time of lodging its submission the Press Council suggested that no Australian state, territory or the federal jurisdiction had adopted what it called 'radical change' to FOI regimes. This was before the most recent amendments had been applied to the Commonwealth FOI Act. However, the Press Council had advised the Committee, an Act of the NSW Parliament had legislated for much broader public access online to local government records. This, the Press Council advised, had resulted in many of the improvements and efficiencies which it said would apply in the ACT if a similar regime were introduced, and had been implemented with few problems.¹²⁰
- 2.25 Accordingly, the Press Council recommended:
- Appointing an Information Commissioner to develop policy, guidelines and training across the public sector, to accept complaints, and to monitor implementation; and
 - Investigating options for providing direct on-line public access to the records system of each agency so that citizens are readily able to peruse documents that are identified for public access.¹²¹

Committee comment

- 2.26 In the Committee's view, from a policy perspective there are few objections that can reasonably be made to the emergent model of public sector information disclosure, which situates FOI as a sub-set, a measure of 'last-resort', within a wider pro-disclosure stance on public sector information. The

¹¹⁷ Australian Press Council, Submission No.1, p.8.

¹¹⁸ Australian Press Council, Submission No.1, p.10.

¹¹⁹ Australian Press Council, Submission no. 1, p.3.

¹²⁰ Australian Press Council, Submission no. 1, pp.9-10.

¹²¹ Australian Press Council, Submission no. 1, p.3.

majority of submissions to the inquiry expressed views strongly in favour of a pro-disclosure culture. The only submission that appears not to consider this option is that of the ACT Government. The Committee is persuaded that the model advanced by these submitters, seen in the context of recommendations by *Open Government* and Solomon reports, among others, is a practicable way to both increase transparency and reduce the load on FOI processes.

- 2.27 Moreover, it is clear from the third-party sources considered in Chapter 1 that this further change in culture around government-held information is necessary if the intentions of the original FOI Acts are to be fulfilled. The ‘first-wave’ of reform on FOI did not result in a culture as open as intended. Providing a means to request information has been important in initiating cultural change, but making the system wholly reliant on requests and decision-makers responding to requests, especially with an extensive list of widely interpretable exemptions, has not proved to be a means to achieve the goals of the legislation.
- 2.28 In the Committee’s view, adopting a presumption of disclosure, and reserving FOI mechanisms as a measure of last resort, is likely to help achieve those ends. It is important to consider what intervening steps may be necessary to move from current practices to a more open regime on public sector information in the ACT.

3 SATISFYING THOSE PURPOSES AND PRINCIPLES

Introduction

- 3.1 Chapter 2 of this report discussed the underlying purposes and principles of FOI legislation, particularly in the ACT and in the federal sphere. It also summarised the general tenor of submissions to the inquiry as being in favour of the pro-disclosure stance evident in the Solomon report and, more recently, in the newly-amended Commonwealth FOI Act. These sentiments and amendments have been broadly consistent with indications given in *Open Government*, the Solomon report in Queensland, and the report of the Government 2.0 panel, as discussed in Chapter 1.
- 3.2 In the Committee's view the purposes and principles of the ACT and Commonwealth Acts can be divided into: a first phase which implemented the original legislation in favour of openness; a phase of reaction, combined with incomplete implementation; and, more recently, a concerted effort to deliver on the intent of the original acts by widening the scope of accessibility to public sector information. In consideration of these developments, the next step is to consider the position of the ACT in comparison to these legislative innovations, firstly in terms of the formal statement of intent in the Act's objects clause.

Section 1 – The form of the Act

3(a) The objects clause of the ACT FOI Act

Current form of the objects clause

- 3.3 The objects clause of the ACT FOI Act (s 2) currently reads:
- (1) The object of this Act is to extend as far as possible the right of the Australian community and, in particular, the citizens of the Territory, to

access to information in the possession of the Territory by —

(a) making available to the public information about the operations of agencies and, in particular, ensuring that rules and practices affecting members of the public in their dealings with agencies are readily available to persons affected by those rules and practices; and

(b) creating a general right of access to information in documentary form in the possession of Ministers and agencies, limited only by exceptions and exemptions necessary for the protection of essential public interests and the private and business affairs of persons in respect of whom information is collected and held by agencies.

(2) The provisions of this Act shall be interpreted so as to further the objects set out in subsection (1) and to ensure that discretions conferred by this Act are exercised as far as possible to facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of information.¹²²

Significance of the current form of the objects clause

- 3.4 The significance of the form of the objects clause of the ACT Act was clarified by the ACT Government's submission to the inquiry. The submission suggested that the presence of both the 'right' to information and limits to that right in the clause resulted in a balance struck between the imperatives of openness and those of maintaining information in-confidence. This resulted in a need to balance these imperatives in decision-making. In the Government's view this was supported by an earlier Federal Court decision that found that the Act did not lean in favour of openness—or disclosure.¹²³

Submissions on the current objects clause

- 3.5 The Australian Press Council is critical of this form of words. In its submission

¹²² ACT FOI Act 1982, s 2.

¹²³ *Re News Corporation Ltd v National Companies and Securities Commission* [1984] FCA 36, cited in ACT Government, Submission No.4, pp.9-10.

to the inquiry, the Council put the view that there were a number of problems with the ACT Act's current objects clause. First, it made no indication of the wider intentions of the legislation:

The objects clause in the current Act makes no reference to the role of FOI in promoting open and accountable government or in enhancing the capacity of citizens to participate in public affairs or in promoting freedom of speech. Nor does it support the routine release of all information or create a presumption in favour of disclosure.¹²⁴

- 3.6 Second, the Council suggested, the scope of the Act is narrower than it might be, in terms of making public sector information accessible, because:

The current clause s 2(1)(a) limits information to people who are affected by it and s 2(1)(b) creates a general right of access, but this is restricted by exclusions and exemptions.¹²⁵

- 3.7 The Council indicated Acts in Tasmania and New South Wales which, in its view, represented a better form of FOI objects clause because it made the wider orientation and objectives of the Acts plain, and did not qualify them by inserting references to limitations to those objectives within the objects clause. This left a clearer picture of the true intent of the Act. The Council also noted that these Acts contained within them clear indications that public sector information should be managed on a pro-disclosure basis, with an FOI framework for information not routinely released.¹²⁶

- 3.8 The Council put forward the view that a better stance would be achieved by stating a broader premise, in the objects clause, in favour of openness; removing references to exclusions and exemptions from the objects clause altogether; including 'provisions that establish a presumption in favour of release'; and clarifying that FOI is a measure of last resort, within a wider framework of routine publication.¹²⁷

- 3.9 The Council suggested that it was in its view important to adopt a simplified

¹²⁴ Australian Press Council, Submission No.1, p.5.

¹²⁵ Australian Press Council, Submission No.1, p.5.

¹²⁶ Australian Press Council, Submission No.1, p.5.

¹²⁷ Australian Press Council, Submission No.1, p.8.

public interest test in the Act, similar to that in NSW legislation. This entailed a process by which, 'where there is a public interest reason favouring the non-release of information this public interest reason must be balanced against the public interests in its release'.¹²⁸

Committee comment

- 3.10 The Committee notes that the tenor of proposals by the Press Council is reflected in amendments to the Commonwealth Act, which came into force on 1 November 2010. As noted in Chapter 1, these amendments do in fact remove references to exclusions and exemptions in the objects clause of the federal Act. They also considerably strengthen the wording, in that clause, as to the purposes of the Act in terms of greater accessibility to information held by government. The amendments also, among other things, establish an obligation on government departments to routinely publish the information for which they are responsible and, in other legislation, create the statutory office of the Australian Information Commissioner.
- 3.11 These matters are the subject of Recommendations 4 and 5, paragraphs 4.19 and 4.20, in Chapter 4 of this report.

Consensus approach

- 3.12 In the Committee's view these developments in the federal sphere, together with those in other Australian jurisdictions, represent a contemporary consensus approach to improve accessibility to public sector information.
- 3.13 This consensus includes, as does the Commonwealth Act:
- a clearer statement of the purpose of the Act;
 - the removal of qualifications (that is, limitations) on that purpose from the objects clause;
 - clear directives to government agencies to publish routinely their information; and
 - a simplified public interest test which asks whether the release or

¹²⁸ Australian Press Council, Submission No.1, p.8.

withholding of information serves the public interest better in a particular instance.

- 3.14 It is clear from matters considered in this chapter that the form of the objects clause and public interest tests are closely-related, and must each be addressed, together, to achieve a more open legislative regime.
- 3.15 The consensus approach also makes more kinds of exemption subject to the public interest test. All of these are responses to problems identified as far back as *Open Government*, and to the change in expectations brought by the advent of online publishing systems.
- 3.16 In the Committee's view, the ACT FOI Act, as it currently stands, reflects an earlier stage in the development of FOI in Australia. It would require considerable amendment to bring it into line with the emergent current practice. Ways to effect this change are considered in detail in Chapter 4.

3(b) Exemptions for certain classes of documents

- 3.17 Under the ACT FOI Act 1989 some classes of documents are considered exempt from the FOI process. There are two kinds: 'exemptions', which are unqualified and are not exposed to FOI requests, and what may be termed 'public interest conditional exemptions', which are nominally exempt, but which remain subject to a public interest test.¹²⁹
- 3.18 In its submission, the ACT Government advised the Committee that in its view 'it is not always appropriate for the ACT Government to release every document that it holds', and stated that the present form of the FOI Act reflects this.¹³⁰ Its view was that in order 'to protect ... essential public interests and the private and business affairs of individuals, the FOI Act exempts or excepts

¹²⁹ For a comment on this distinction in Commonwealth legislation, see Senator the Hon Joe Ludwig, 'Freedom of Information Amendment (Reform) Bill 2009 - Explanatory Memorandum', 2010, Parliament of the Commonwealth of Australia, pp.1-2, <http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r4163_ems_bbb98d6a-e9c2-47aa-8bc1-a43d33f383b2/upload_pdf/336873.pdf;fileType=application%2Fpdf#search=%22Freedom%20of%20Information%22>, viewed 24/08/2010.

¹³⁰ ACT Government, Submission No.4, p.10.

from release certain classes of documents', namely:

- lists of housing assistance properties (s 6A);
- documents older than 20 years, subject to conditions (s 6B); 12
- documents that are already open to public access (s 11(1));
- the Cabinet notebook (s 11(2));
- documents of the Commonwealth that existed before 1977 (s 11(3));
- documents that are exempt under the Freedom of Information Act 1982 (Cwlth) (s 33);
- executive documents (s 35);
- documents affecting enforcement of the law and protection of public safety (s 37);
- documents affecting national security, defence or international relations (s 37A);
- documents to which secrecy provisions apply (s 38);
- documents affecting personal privacy (s 41);
- documents subject to legal professional privilege (s 42);
- documents relating to business affairs (s 43);
- documents containing material that was obtained in confidence (s 45);
- documents the disclosure of which would be contempt of the ACT Legislative Assembly or another Australian Parliament, or a court, tribunal or royal commission (s 46);
- certain documents arising out of companies and securities legislation (s 47); and
- electoral rolls (s 47A).¹³¹

Committee comment

- 3.19 In relation to the list of current 'unqualified' exemptions under the Act, the Committee notes the difference between this aspect of the ACT FOI regime and those adopted in such jurisdictions as Queensland and the

¹³¹ ACT Government, Submission No.4, p.10.

Commonwealth, where there has been a significant shift in favour of making exemptions subject to a public interest test. This underscores the difference between present ACT legislation and what this report has referred to as the ‘emergent consensus’ of current best-practice on FOI in Australia.

3(c) Exemption provisions in Part 4 of the FOI Act

- 3.20 The ACT Government also advised the Committee that that the ‘FOI Act further exempts five classes of documents, except where it is in the public interest to release the documents’:
- documents affecting relations with either the Commonwealth or another State or Territory of Australia (s 34);
 - internal working documents (s 36);
 - documents affecting the financial or property interests of the Territory (s 9);
 - documents concerning certain operations of government agencies 13 (s 40); and
 - documents affecting the economy of the Territory (s 44).¹³²
- 3.21 Regarding the decision-making process for these last five classes of documents (which may be subject to FOI if satisfied under a public interest test), the ACT Government put the view that:
- The public interest test used to determine the release of the above five classes of documents is a weighting exercise. The decision maker must assess the public interest in its proper context and look at any competing interests of the community and government in the release of documents.¹³³
- 3.22 The ACT Government, however, noted that the Act does not currently ‘provide a definition of public interest’. This, it advised the Committee was better than a specific definition in that it allowed ‘for change over time and to give decision makers the flexibility of determining the contemporary public interest’. The Government noted, without further comment, the

¹³² ACT Government, Submission No.4, p.11.

¹³³ ACT Government, Submission No.4, p.11.

recommendation of the Solomon Review report 'that a list of relevant factors be included in Queensland's then FOI Act in order to reduce the discordant application of the public interest test between decision makers'.¹³⁴

The Cabinet exemption

- 3.23 A special class of exemption concerns Cabinet or 'Executive' documents: that is, documents prepared to support Cabinet in its deliberations. The ACT Government advised the Committee that:

the FOI Act contains two provisions through which documents related to the deliberations of Cabinet are exempt from disclosure; namely, section 11(2), excluding the release of the Cabinet notebook, and section 35, exempting the release of executive documents.¹³⁵

- 3.24 This, in the Government's view, was 'vital for the functioning of the Westminster system of government within the ACT'. It suggested that 'the exemption from release of Cabinet documents [should] be retained within the FOI Act' because:

It is an accepted convention of Westminster government that the deliberations of, and discussion within, Cabinet are absolutely confidential: Bradley Selway refers to this confidentiality as a 'constitutional necessity'. In order to maintain this confidentiality, executive documents necessarily cannot be released under the FOI Act.¹³⁶

- 3.25 Implicit in this view is that the dual doctrines of cabinet confidentiality and cabinet solidarity allow cabinet to speak with one voice, and to accept collective responsibility for all decision-making. Further, in the Government's view:

This confidentiality encourages open discussion in the Cabinet room and aids Cabinet ministers in coming to consensus on a point of discussion. Of this, the ACT's Cabinet Handbook notes: The convention of collective responsibility [of Cabinet ministers] is underpinned by strict

¹³⁴ ACT Government, Submission No.4, p.11.

¹³⁵ ACT Government, Submission No.4, p.12.

¹³⁶ ACT Government, Submission No.4, p.12.

confidentiality surrounding Cabinet papers and discussions in the Cabinet Room. Absolute confidentiality allows ministers to discuss proposals frankly while they are developing a collective position.¹³⁷

3.26 On another occasion, the Attorney-General Mr Corbell spoke in favour of these arrangements in the Legislative Assembly. In debate over the Freedom of Information Amendment Bill 2008 and Freedom of Information Amendment Bill 2008 (no.2). Mr Corbell argued that protection from FOI was necessary for cabinet documents, including cabinet notebooks (that is, minutes of cabinet meetings), and briefings to ministers, so that ministers can engage in a free exchange of views in cabinet, and so that they may be briefed effectively by public servants. These public servants would, Mr Corbell argued, be less robust in their advice to ministers in the event that their briefs were subject to FOI.¹³⁸

3.27 However the ACT Government suggested that these arrangements were qualified by the provisions of the *Executive Documents Release Act 2001* which required 'the release of most Cabinet documents 10 years after their submission to the ACT Executive'.¹³⁹ The Government also noted that:

In recent years, several Westminster jurisdictions have introduced a 'push model' for the release of documents, whereby the members of Cabinet decide after each meeting which of the documents from that meeting will be immediately released.¹⁴⁰

3.28 In particular the ACT Government indicated practices in New Zealand, Wales, Queensland and the Commonwealth as being of note in this regard. In view of possible changes to arrangements in the Commonwealth, the ACT Government advised the Committee that:

The ACT Government will similarly consider amendments to the Territory's FOI scheme to promote the proactive release of government

¹³⁷ ACT Government, Submission No.4, p.12.

¹³⁸ Legislative Assembly for the ACT, Hansard 11 February 2009, p.620..These matters are now administered under the amended *Territory Records Act 2002*- The *Executive Documents Release Act 2001* was repealed on 26 October 2010 and the Territory Records Act was subsequently amended to provide for those matters previously administered under the *Executive Documents Release Act 2001*.

¹³⁹ ACT Government, Submission No.4, p.13.

¹⁴⁰ ACT Government, Submission No.4, p.13.

information, including the greater release of Cabinet information, if the amendments proposed to the Commonwealth's FOI scheme pass Parliament and are implemented by the Australian Government.¹⁴¹

- 3.29 Since the time of submission, the Commonwealth FOI legislation has been amended in this way. Relevant amendments came into force on 1 November 2010.¹⁴²

Submitters' views on exemptions

- 3.30 Most other contributions to the inquiry, apart from that of the ACT Government, advocated a more open regime for exemptions than that provided in the current Act.

- 3.31 The Australian Press Council advised the Committee that, in general:

If the purpose of FOI is to enhance democracy and participation of citizens in the democratic process, then exemptions should be minimised and only apply where there is some countervailing public interest that is likely to be harmed by the release of information.¹⁴³

- 3.32 As a result, the Council suggested that all exemptions under the Act should be subject to a public interest test:

The Act should be amended clearly to identify the public interests that are likely to be harmed under each class of document so that there is no automatic presumption against release simply based on classification or description of a document. For each request, a decision should be made on whether to release a document based on an assessment process in which the public interest in a document's release is balanced against any countervailing public interest against disclosure.¹⁴⁴

- 3.33 More broadly, the Council proposed adopting a more open regime for

¹⁴¹ ACT Government, Submission No.4, p.13.

¹⁴² See amendments introduced by the Freedom of Information Amendment (Reform) Bill 2010, including s 7A and s 8A-F, <http://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r4163_aspassed/toc_pdf/09253b01.pdf;fileType=application%2Fpdf>, viewed 29 November 2010.

¹⁴³ Australian Press Council, Submission No.1, p.5.

¹⁴⁴ Australian Press Council, Submission No.1, p.5.

currently exempt documents, based on the following recommendations:

- 'Drafting the legislation so that no information is excluded from disclosure simply because of its class. This would require that Part 4, 'Exempt Documents', be rewritten to specify that consideration be given to both the public interests in releasing documents in each class of information and the harms that may be prevented by restricting release. Each particular piece of information is then able to be assessed by a process of balancing public interests;
- Requiring that, where the public interest test is applied and access declined, the decision-maker sets a timeframe for when the information is likely to be reviewed for release;
- Including a statutory limit to the length of time that any information that has not been disclosed can be withheld from the public and providing that no information is withheld from release longer than 10 years from when it was created.'¹⁴⁵

Cabinet documents

- 3.34 With respect to executive (that is, cabinet) documents, the Council suggested, 'the current Act adopts an approach common across Australia'. It was critical of this approach, for in an 'accountable and participatory democracy, such documents are likely to be of great interest to voters, and to the media'. As such, the Council suggested, these 'should be documents that are appropriate for routine release'.¹⁴⁶
- 3.35 Allowing for the importance of the doctrine of cabinet confidentiality and collective responsibility, the Council's view was that the best approach was the one adopted in New Zealand, where decisions are made after each cabinet meeting, by cabinet, about which documents to release. As a result of this process, suggested the Council, cabinet documents were considered on the basis of cabinet considering 'each document and the consequences of its

¹⁴⁵ Australian Press Council, Submission No.1, p.8.

¹⁴⁶ Australian Press Council, Submission No.1, p.5.

release' rather than ... simply because it belongs to a class of documents'.¹⁴⁷

- 3.36 The Flynn Primary School Parents and Citizens Association was also in favour of wider access to cabinet documents:

Other than direct Cabinet documents—such as direct records of Cabinet meetings—there is a question about the need to withhold deliberative documents that could reveal the deliberations of Cabinet. If information is used by Cabinet to make a decision that affects the public, why shouldn't the public be able to access the same information? If early policy options are investigated, why shouldn't the public know what those options are and why they were adopted or tossed aside? Concerns about disrupting agency processes are easily overcome by releasing the documents soon after Cabinet has made its decision.

- 3.37 The Association concluded that:

It might be in the political interests of a government that these documents are never released, but it would almost certainly be in the public's interest—and better access to this type of information would contribute to a higher standard of debate.¹⁴⁸

- 3.38 The Association suggested that the existing cabinet exemption should be modified so that, as recommended in the Solomon review, 'the cabinet-in-confidence exemption could expire when a decision is made or, at least, at the end of each term of government'. The Association's view was that information relating to contentious cabinet decisions should be released more quickly in the ACT: the community should not 'have to wait until 2016 to see the Costello Review, given its key role in school closures and a host of other deleterious budget initiatives'.¹⁴⁹

- 3.39 More broadly, the Association advised:

The scope for withholding documents from release is currently far too broad and open to abuse by governments seeking to keep documents out

¹⁴⁷ Australian Press Council, Submission No.1, p.5. [*However see Corbell speech in Chamber, p.619, 11 February 2009*].

¹⁴⁸ Flynn Primary School Parents and Citizens Association, Submission No.3, p.4.

¹⁴⁹ Flynn Primary School Parents and Citizens Association, Submission No.3, p.4.

of the public domain just because they are politically embarrassing. This intentional suppression of information does nothing to reassure the public that contentious decisions are being made in the public interest.¹⁵⁰

Business affairs

- 3.40 The Press Council also proposed changes to exemptions as they apply to ‘business affairs’. It suggested that ‘in order to ensure accountability for the allocation and use of public funds, the Act needs to be clear that citizens have a right to information from any government business enterprise or government-owned corporation’:

The right to access information should also extend to private sector organisations in respect to the project costs, administration and performance for any government project being undertaken under contract so as to ensure accountability for the expenditure of public funds. This is particularly relevant given that much of the activity of government is now conducted outside the budget sector by private contractors.¹⁵¹

Exemptions excluding ‘certain public organisations’

- 3.41 The ACT Government advised the Committee of another category of exemptions, which ‘exclude certain public organisations (or ‘prescribed authorities’) from the operation of the Act’. These organisations were:
- territory-owned corporations (and their subsidiaries), in relation to their competitive commercial activities, which specifically includes ACTTAB Limited;
 - all agencies with respect to documents that are health records;
 - the Human Rights Commission, in relation to complaints made under the Health Records (Privacy and Access) Act 1997 (ACT);
 - the ACT Civil and Administrative Tribunal, including its presidential and non-presidential members and registry;

¹⁵⁰ Flynn Primary School Parents and Citizens Association, Submission No.3, p.2.

¹⁵¹ Australian Press Council, Submission No.1, p.6.

- the ACT Government Solicitor (ACTGS), in relation to documents held in its role as a legal practitioner; and
- the Department of Justice and Community Safety (JACS), in relation to documents of ACTGS acting as legal practitioner.¹⁵²

Responses by submitters

- 3.42 Some of these exemptions have been subject to comment in submissions. Information on the operation of territory-owned corporations, for example, was the subject of a specific proposal by the Australian Press Council, cited above, 'that citizens [should] have a right to information from any government business enterprise or government-owned corporation' because their operation is integral to public funds.¹⁵³
- 3.43 Exemptions for some other types of prescribed authorities are less controversial. No submitters to the inquiry proposed changes to arrangements which make the ACT Government Solicitor and JACS exempt from FOI in insofar as they perform a role as legal practitioners. These exemptions are also consistent with clauses under the Act (s 42) which protect legal professional privilege.
- 3.44 In a similar vein, there are arguments that it is necessary to close-off the possibility of FOI requests to certain statutory authorities. Conceivably, access to their information could be used to frustrate their integrity functions. The Auditor-General, in her submission to the inquiry, told the Committee that this kind of protection should be extended to her office for just this reason: open access to the Auditor-General's documentation could compromise the effectiveness of her office in acquitting its integrity function. There were, the Auditor-General told the Committee, other protections afforded her office with respect to FOI, but an explicit statement in FOI statute would make this clearer and put it beyond legal contest.¹⁵⁴

¹⁵² ACT Government, Submission No.4, p.11.

¹⁵³ Australian Press Council, Submission No.1, p.6.

¹⁵⁴ Auditor-General, Submission No.2, pp.3-5.

Committee comment

- 3.45 In the Committee's view there are a number of significant points that have been raised in evidence to the inquiry on exemptions and exclusions.

Public interest definitions

- 3.46 While the ACT Government contends that the absence of definitions for public interest in the ACT FOI Act 1989 allows for flexibility, this is not consistent with the approach taken in other jurisdictions with respect to FOI, notably the Commonwealth and Queensland, where criteria to be taken into account (and those *not* to be taken into account) have been included in the relevant Acts. The absence of guiding principles in the ACT Act allows for wider discretion by government departments, and wide discretion of this kind has been seen as a significant contributor to the difference between the original intention of FOI legislation and its outcomes in practice.¹⁵⁵

Cabinet documents

- 3.47 The Committee notes the view expressed by the ACT Government that cabinet as an institution, and responsible government in general, relies on the confidentiality of cabinet documents, including cabinet notebooks and briefings.
- 3.48 This traditional view holds that if these are held in confidence, it supports our system of representative government and, indeed, ministers and governments being held accountable in the Legislative Assembly. The Committee also notes that the latest Commonwealth amendments maintain the confidentiality of cabinet documents, as does current Queensland legislation, which extends exemptions in this regard.¹⁵⁶
- 3.49 In the Committee's view, these are modest gestures toward openness in government. It notes the contrasting approach in New Zealand under the

¹⁵⁵ 'The exemption provisions are unclear, open to misuse by agencies and, because of their prominence, tend to overwhelm the purpose of the Act', *Open Government*, p.18.

¹⁵⁶ See *Queensland Right to Information Act 2009*, s 48 and Schedule 3 parts 1-4. The Act provides that Cabinet may resolve to publish documents (Schedule 3, part 2 (2)(b)), but also stipulates, by category, cabinet documents exempt from release for 10 years.

Official Information Act 1982. The Act does not list any categorical exemptions for cabinet documents and, in fact, does not use the word ‘cabinet’ at all. All grounds for refusing to disclose documents under the Act are purposive (that is, on the basis of whether release would be contrary to the public interest) rather than categorical (that is, exempting certain kinds or classes or document). This, which is the approach currently taken in s 35 of the *Freedom of Information Act 1989* (in combination with s 31 of the *Territory Records Act 2002*), has been the more common approach in Australian legislation.¹⁵⁷

- 3.50 The Committee proposes that the ACT adopt a similar approach to that taken in New Zealand, whereby references to ‘categories’ of exempt documents are removed from the Act, to be replaced by valid public-interest considerations. This would have a significant effect on cabinet documents, among other things.
- 3.51 For documents that remain confidential under these new criteria the Committee considers that these should be released as a matter of course after a reasonable period of time. Currently, under the *Territory Records Act 2002*, such a period ranges from 10 to 15 years with respect to cabinet documents, or for a period between the minimum and less than the maximum (15 years) for which the principal officer or department must provide a valid rationale.¹⁵⁸
- 3.52 Similar provisions could apply under the changes of legislation recommended by the Committee, but in its view a reduction in statutory time-frames would be highly desirable, in that it would further support public confidence in the openness and accountability of government.

Exemptions to be subject to public interest test

- 3.53 The Committee agrees with the broad proposition that as many exemptions as possible should be subject to a public interest test, clearly stated in legislation.

¹⁵⁷ The *Official Information Act 1982* (NZ). Despite this purposive approach, s 9 of the Act does provide bases for refusal to disclose documents where it would be contrary to the maintenance of ‘constitutional conventions for the time being which protect’ ... ‘the confidentiality of advice tendered by Ministers of the Crown and officials’ (s 9(2)(f)(iv)); and in 9(2)(g)(i), where it would be contrary to the maintenance of ‘the effective conduct of public affairs through ... the free and frank expression of opinions by or between or to Ministers of the Crown or members of an organisation or officers and employees of any department or organisation in the course of their duty’.

¹⁵⁸ See *Territory Records Act 2002* s 31G(4)(a).

In the Committee's view there is a particular instance where this should not be so: proscribed authorities. In this case, it is clear that allowing access to information—held by the Auditor-General's Office, for example—would weaken, not strengthen, accountability and the wider integrity framework in government. The Committee also agrees that the Auditor-General's Office and similar statutory authorities should be explicitly listed in the Act as proscribed authorities, to clarify their standing with respect to the Act.

- 3.54 In relation to this last point, the Committee notes that for each of the five current exemptions that are subject to a public interest text in the Act (sections 34, 36, 39, 40, and 44), the role of the public interest is phrased differently. In some sections (36, 44) and—importantly—the objects clause of the Act itself, public interest is used as a limit: that is, as a reason for denying access, while in others (34, 39, and 40) it is used as a reason for granting access. In the Committee's view conditions for access to information under the Act could be liberalised, and made clearer and more consistent, if these references were changed so that they were all phrased as criteria for granting access to information.
- 3.55 The negative use of 'public interest' in the objects clause is particular cause for concern, in view of the potential importance of objects clauses both in guiding the actions of government agencies when responding to FOI requests and where cases under the Act are brought before the Courts. Among other things, the current framing of the objects clause signals that the ACT Act is significantly out-of-step with other jurisdictions. Changing it must be a high priority for any re-modelling of the Act.
- 3.56 Given the current linkage between the Act and the Commonwealth Act (by virtue of s 33, 'Documents exempt under Commonwealth Act', under which requests for material exempt under the Commonwealth Act are referred to the administering Commonwealth agency) it is doubtful whether there need to be exemptions for national security, and s 34, which concerns documents 'affecting relations between Commonwealth and States'. The Government may wish to make a decision as to whether s 34 should be retained, but if it is, sections of the ACT Act that duplicate provisions of the Commonwealth could be removed in the interests of clarity, on the principle that redundant provisions invariably confuse the administration of Acts. A broad principle

should be that exemptions are as simple, clear and consistent as possible, in order to achieve a successful balance between openness in the public interest and retention in-confidence in the public interest.

Relationship to Commonwealth Act

- 3.57 Section 33 of the current FOI Act is problematic in the sense that it suggests that the FOI regime in the ACT, with respect to exemptions, must necessarily be less liberal, to the extent that the ACT Act varies from that of the Commonwealth—since it applies ACT exemptions *and* those of the Commonwealth Act.
- 3.58 As for a number of aspects of this inquiry, this raises fundamental questions about the relationship of the ACT FOI regime with the Commonwealth regime. In particular it raises the question of the extent to which the ACT maintains a full FOI framework of its own, providing the necessary leadership (which will in the Commonwealth be provided by the Office of the Information Commissioner), or whether the FOI framework in the ACT would better be provided by the Commonwealth. These fundamental questions are considered further in Chapter 4 of this report.

Section 2 – The administration of the Act

3(d) Effectiveness of processes under the FOI Act

- 3.59 In its submission, the ACT Government advised the Committee that the administration of processes under the FOI Act had originally been, from 1989-1995, administered from a central point in government. This was at that time the ACT Attorney-General's Department. From 1995, as a result of 'a substantial increase in FOI requests received by the Attorney-General's Department', responsibility for administration of the FOI Act 'was devolved to individual line agencies within the ACT Government'. The Government suggested that this 'devolution reflects the fact that the FOI Act clearly identifies individual agency heads and ministers as responsible for decision making in relation to FOI requests'.¹⁵⁹

¹⁵⁹ ACT Government, Submission No.4, p.30.

3.60 In 2008 the ACT Auditor-General's Office tabled a performance audit report on FOI in the ACT. This examined administrative performance under the FOI Act in the Chief Minister's Department, the Department of Education and Training, and the Department of Territory and Municipal Services. The Committee later received a submission to the present inquiry from the Auditor-General which referred to the Audit Report.¹⁶⁰

3.61 In the submission, the Auditor-General advised the Committee that the audited agencies 'had a good understanding of the requirements of the FOI legislation and had put in place a number of policies and procedures to support administration of the Act'. However in practice 'agencies did not always fully discharge their responsibilities under the Act' in that:

- the quality of FOI decision-making varied within agencies, and across agencies and there were inadequate mechanisms to monitor and report on the performance of agencies in delivering FOI services;
- the reasons to exempt certain documents were not always fully explained as required in decision notices;
- search procedures did not provide assurance that all relevant documents were identified and located; and
- consultation with third parties regarding release of information was inadequate.¹⁶¹

3.62 In her concluding remarks the Auditor-General stated that:

My recent audit of administration of the FOI Act showed that although there is a reasonable understanding of the legislation, and adequate policies and procedures, application of the Act is still problematic. Agencies can do more to improve its administration.¹⁶²

3.63 Moreover, the Auditor-General's audit report noted that the:

administration of the FOI Act in the Territory appears to be falling

¹⁶⁰ ACT Auditor-General's Office, (2008), *Performance Audit Report: Administration of the Freedom of Information Act 1989*,
<<http://www.audit.act.gov.au/auditreports/reports2008/Report%205%20of%202008%20-%20FOI.pdf>>, viewed 20/08/2010.

¹⁶¹ Auditor-General, Submission No.2, pp.1-2.

¹⁶² Auditor-General, Submission No.2, p.5.

behind that in other jurisdictions, particularly in light of recent and current reviews. For example, we observed that the FOI annual reports produced by lead agencies of the Australian Government, and a number of state jurisdictions, provide more comprehensive information on the operation of the respective FOI legislation than that available in the ACT through Annual Reports or the Annual FOI Report.¹⁶³

- 3.64 The report suggested that other jurisdictions provided greater, more centralised focus and leadership on FOI, which supported both government agencies and the public in their administration and use of FOI:

We ... observed that whole-of-government FOI websites were common in other jurisdictions, and were used to support agencies in complying with the legislation, as well as to make available information such as FOI training material; guidelines; decision summaries and links to FOI annual reports. In addition, these websites are a key focal point for the provision of general information for the public. The ACT does not provide a similar resource.¹⁶⁴

- 3.65 But this was not matched in FOI administration in the ACT:

We noted that support given to administering agencies was comprehensive and centralised in some jurisdictions, but in the ACT, JACS had not been pro-active in issuing general FOI guidance material. Nor did JACS routinely monitor FOI administration across agencies, including administrative and judicial trends and developments.¹⁶⁵

- 3.66 As a consequence, 'ACT Government agencies tended to rely on information available from the Australian Government's Department of Prime Minister and Cabinet. The Auditor-General also noted that 'in some sense, this is not unreasonable, given the similarity—at the time of audit—in the Territory and Commonwealth legislation'.¹⁶⁶

¹⁶³ Auditor-General, Submission No.23, p.2.

¹⁶⁴ Auditor-General, Submission No.23, p.2.

¹⁶⁵ Auditor-General, Submission No.23, p.2.

¹⁶⁶ Auditor-General, Submission No.23, p.2.

Committee comment

- 3.67 In the Committee's view, the Auditor-General's remarks on the effectiveness of FOI processes in the ACT show a sub-standard level of performance in this area. While the Auditor-General's report employs measured language, it portrays an administrative environment marked by inconsistencies of approach between different government agencies. It also shows that reporting standards are inferior to other government agencies, in the federal sphere, to which they may readily be compared.

3(e) Timeliness and costs of FOI in the ACT

3(e)(i) The appropriateness of the existing fees regime

- 3.68 In its submission to the inquiry, the ACT Government advised the Committee that, at the time of writing, fees for FOI requests were as follows:

Application fee	nil
Search/retrieval of documents	\$15.00 per hour
Examination / consultation / decision making	\$20.00 per hour
Inspection of documents	\$6.25 per half hour
Photocopying of documents	\$0.20 per page, after 200 pages ¹⁶⁷

- 3.69 These charges, stipulated under regulations to the Act, were broadly consistent with the fees schedule for Commonwealth FOI requests except for a different system for per-page charging for photocopying: the Commonwealth charges \$0.10 per page, while the ACT charges \$0.20, but only after 200 pages.¹⁶⁸
- 3.70 Since that time, a new fees determination by the Attorney-General (notified 24 June 2010) has set higher fees for FOI requests. Under this determination, charges are:

¹⁶⁷ ACT Government, Submission No.4, p.26.

¹⁶⁸ Freedom of Information (Fees and Charges) Regulations - made under the Freedom of Information Act 1982, Schedule Part 1, < http://www.austlii.edu.au/au/legis/cth/consol_reg/foiacr432/sch1.html>, viewed 22/09/2010.

- \$22.30 per hour for ‘the time spent by the relevant agency or Minister in searching for or retrieving a document (other than a document in relation to which a charge is applicable under item (2))’
- \$29.75 per hour for ‘the time spent by the relevant agency or Minister in deciding whether to grant, refuse or defer access to a document or to grant access to a document with deletions (including the time spent in examining a document, consulting with any person or body, making a copy with deletions or notifying any interim or final decision on the request)’;
- \$18.60 per hour for ‘supervising inspection of a document’; and
- \$0.30 per page, ‘payable where access is given to a document by way of electronic scanning or photocopy’.¹⁶⁹

3.71 The ACT Government’s submission of the time also advised the Committee of additional conditions surrounding fees for FOI requests, notably that:

Clause 2(3) of the FOI Fees Determination states that no processing charges are payable for the first 10 hours of an agency’s work on processing an FOI application. This is complicated by the fact that clause 2(3) of the FOI Fees Determination requires that in calculating the time spent processing an FOI request, time in respect of examination, consultation and decision making on the release of a document shall be counted first and time spent in searching and retrieving a document shall be counted second. Further, if an agency charges processing fees for an FOI request, it may not also charge search fees for the same request.¹⁷⁰

3.72 The Flynn Primary School Parents and Citizens Association advised the Committee that in its view the ACT FOI system worked well on privacy and fees, in that:

With a few exceptions, the ACT Government has taken a sensible and generous approach in not charging application of processing fees for FOI requests. The government should be commended on both points.¹⁷¹

3.73 However it was clear from evidence tendered to the inquiry that this was not

¹⁶⁹ Attorney General (Fees) Determination 2010, Disallowable instrument DI2010-107, Schedule 2, p.44.

¹⁷⁰ ACT Government, Submission No.4, p.27.

¹⁷¹ Flynn Primary School Parents and Citizens Association, Submission No.3, p.1.

the policy of the ACT Government, but was an *ad hoc* arrangement that had developed in government departments. The ACT Government commented on ‘confusion’ in government departments in this area. It advised the Committee that:

The Freedom of Information (Fees and Charges) Determination 1995 (FOI Fees Determination) - is often considered confusing, both by ACT Government FOI practitioners and by FOI applicants. The ACT Auditor General has described the FOI Fees Determination as ‘outdated’.¹⁷²

3.74 And that:

confusion surrounding the FOI Fees Determination is highlighted by comments from the Auditor-General in her report on the administration of the FOI Act, where she refers to a misconception among FOI officers that the ACT Government has a policy of not charging processing fees for FOI requests.¹⁷³

3.75 In relation to this issue, the Government advised that it supported partial cost-recovery and a standard FOI fee regime across ACT Government departments, and that it had gone to some lengths to clarify to departments the fees and charges that should apply.¹⁷⁴

3.76 In particular the Government indicated that it had directed public servants to charge fees more consistently, according to statute—in contrast to the practice, commented upon by the Auditor-General, of routinely waiving fees in cases not provided for under the Act.¹⁷⁵ The Government also noted that the Auditor-General had recommended an update of the fees schedule under s80 of the Act (as outlined above), and that JACS should ‘develop a whole-of-government charge policy and guidelines’ for FOI charges.¹⁷⁶

3.77 Further, the Government advised that it would:

seek to develop an FOI fee structure that will simplify access for citizens

¹⁷² ACT Government, Submission No.4, p.25.

¹⁷³ ACT Government, Submission No.4, p.25.

¹⁷⁴ ACT Government, Submission No.4, p.26.

¹⁷⁵ Auditor-General, Submission No.2, p.3.

¹⁷⁶ ACT Government, Submission No.4, p.29.

to documents under the FOI Act, while also acknowledging that the ACT taxpayer should not be burdened with the entire cost of processing an FOI applicant's request, particularly in cases where that applicant would make a commercial gain from the release of a document.¹⁷⁷

- 3.78 The Auditor-General in her submission advised that 'audit report estimated the total cost of providing FOI services in 2006-07 would be in the range of \$4.5 million to \$5.0 million, based on the average costs per application of all applications received by the ACT Government that year'. In spite of this:

agencies did not measure the cost of administering FOI requests nor specifically track staff and other costs associated with handling FOI requests. Cost information assists the development of policy for fees for FOI services, and the management of resources of agencies.¹⁷⁸

- 3.79 The Auditor-General also advised that the 'significant costs' the ACT Government incurred 'in providing FOI services in accordance with the legislation' could be ameliorated by adopting another approach to access to public sector information:

many FOI requests are made when the applicants are not able to get access to the relevant information publicly, or when there was concern about the lack of transparency in government decisions or dealings with the community. In our view, it is possible that costs to Government could be reduced if more information on Government activities was available publicly, or on request, especially information on topics of current public interest.¹⁷⁹

- 3.80 The Auditor-General also noted that the Solomon review had advocated this approach, in which 'public disclosure' was 'an alternative to FOI in meeting the public's right to know'.¹⁸⁰

- 3.81 In its submission to the inquiry, the Australian Press Council advised that a study it had conducted showed that 'procedural obstacles deterred use of FOI

¹⁷⁷ ACT Government, Submission No.4, p.29.

¹⁷⁸ Auditor-General, Submission No.2, p.3.

¹⁷⁹ Auditor-General, Submission No.2, p.3.

¹⁸⁰ Auditor-General, Submission No.2, p.3.

regimes', and that these obstacles included costs as well as delays and 'the degree of specificity that was required in order for a request to be accepted'.

3.82 The Council advised that in other jurisdictions large FOI charges had had the effect of discouraging Australian journalists from using FOI frameworks. This made journalists more reliant on 'leaks', which they found 'expedient' in view of the barrier represented by high FOI charges. The Council also suggested, in another part of its submission, that leaks were a more disruptive way of obtaining information, and that an effective combination of routine release and accessible FOI mechanisms—including reasonable cost—was a more constructive, less disruptive, way for the media to obtain information about government.¹⁸¹

3.83 The Council advised the Committee that, should 'the ACT government make provision for any search or decision-making fees', then:

the approach recommended by the Solomon Review of Queensland legislation should be considered. It recommends no charge for personal information and that for other information the fee be determined by the number of pages supplied to an applicant rather than on an estimate of time taken to supply the information.¹⁸²

3.84 If adopted, the Council advised the Committee, this approach 'would ensure consistency in charging by all agencies, and provide an incentive to improve the efficiency of information retrieval'.¹⁸³

3.85 The Council suggested that other jurisdictions were moving toward low fees and charges for FOI requests. Under the Tasmanian Right to Information Act, for example, there was:

no provision for fees for searching or for decision-making. Further the application fee can be waived for applicants who are impecunious, or who are members of parliament applying in connection with their duties or who are applicants who are able to show that they intend to use the

¹⁸¹ Australian Press Council, Submission no. 1, pp.6, 10.

¹⁸² Australian Press Council, Submission No.1, p.6.

¹⁸³ Australian Press Council, Submission No.1, p.6.

information for a purpose that is of general public interest or benefit.¹⁸⁴

- 3.86 The Council also advised of fees regimes in Queensland and New South Wales that offered lower-cost alternatives to applicants than that of the ACT. The Council advised the Committee that technological changes had made significant differences in the cost of responding to FOI requests. This should be reflected in both the costs to government and the charges for applicants under FOI:

Current costs for information retrieval should be considerably lower to agencies than would [have] been the case when the first wave of FOI legislation was introduced into Australian jurisdictions in the 1980s due the use of electronic data management systems (EDMS) that make searching and retrieval of information much faster and less complicated. Indeed the use of EDMS provides opportunities for agencies to provide direct on line access to the public. This will become increasingly easy if staff is trained to enter a code that would indicate whether a document can be disclosed routinely or requires assessment at the same time that the document is entered into the EDMS.¹⁸⁵

- 3.87 The Council proposed that this regime could be used to drive efficiencies in information handling:

If there is only an application fee then agencies have an incentive to make production and assessment of information efficient, whereas fees applied on the basis of time simply encourage administrative inefficiency.¹⁸⁶

- 3.88 Moreover, these changes had implications for time-frames for responding to requests. In the Council's view, these must be 'shortened as far as is practicable' since there was 'little justification for the current timeframes, or for delays for information that is stored in EDMS'.¹⁸⁷

¹⁸⁴ Australian Press Council, Submission No.1, p.7.

¹⁸⁵ Australian Press Council, Submission No.1, p.7.

¹⁸⁶ Australian Press Council, Submission No.1, p.7.

¹⁸⁷ Australian Press Council, Submission No.1, p.7.

3(e)(ii) Current time limit provisions

- 3.89 Section 18 of the Act sets out time limits for initial and substantive responses to FOI requests. Applicants must have an initial response as soon as possible, and not later than 14 days after the receipt of the request. Substantive responses (agreeing or not agreeing to the request) must be given to the applicant within 30 days. Under s 18(4) the period ‘must be extended’ a further thirty days ‘if the agency or Minister to whom the request was made determines, in writing, that the requirements of section 26, 27 or 27A [relating to review of decisions] make it appropriate to extend the period.’¹⁸⁸
- 3.90 The ACT Government advised that ‘in reality, the 30 day statutory timeframe is often unrealistic and unattainable’, giving the example of the Department of Disability, Housing and Community Services which ‘often receives FOI requests from its clients seeking access to their personal information, which can run to over 10,000 pages’.¹⁸⁹
- 3.91 The ACT Auditor-General advised that her audit ‘noted that all agencies generally complied with statutory timeframes for acknowledging FOI requests and advising applicants on their access decisions’. However, what was provided within that timeframe was inadequate: ‘agencies did not provide applicants with adequate decision notices, particularly the reasons for refusing access to requested documents’ and there was ‘insufficient evidence on FOI request files of the reasons for the decision’.¹⁹⁰
- 3.92 Moreover, in the Auditor-General’s view, search processes ‘did not provide assurance that a thorough search for all relevant documents had been conducted’, and were not sufficiently well-documented. In relation to this, the Auditor-General noted that FOI relied on effective document-management, and that the agencies considered in the audit report were all ‘aware of deficiencies in their recordkeeping systems’.¹⁹¹
- 3.93 However, some other submissions to the inquiry provided examples of FOI

¹⁸⁸ ACT *Freedom of Information Act 1989*, s 18.

¹⁸⁹ ACT Government, Submission No.4, p.8.

¹⁹⁰ Auditor-General, Submission No.2, p3.

¹⁹¹ Auditor-General, Submission No.2, p3.

processes where time-lines for response were considered unreasonable. Dr Marilyn Sernack advised the Committee that in the matter of *Falk and ACT Health* [2005], '[e]gregious decision making by an agency' had caused 'an administrative review applicant unnecessary delay and unnecessary costs'.¹⁹²

- 3.94 Civil Liberties Australia (CLA) advised the Committee of similar instances in connection with information held by ACT police relevant to public debate on testing for drug driving. It advised that in connection with one of its own FOI requests 'there was a delay of some 10 weeks between the request and release of information under the FoI Act' because:

ACT Policing handled the request in a 'serial' fashion in that it determined whether the exemption sought by CLA for fees and charges would be granted before then considering the request. This approach has the effect of delaying any processing of a FoI request for many weeks and, in the minds of the Agency, the 'clock' only started after the determination was made; this is contrary to the guidelines issued by the Department of Prime Minister and Cabinet on processing procedures. Effectively a 30 day process was extended to 75 days.¹⁹³

- 3.95 Civil Liberties went on to comment on the effects of this delay, suggesting that the:

process followed by ACT Policing effectively ensured that any information released would be well past the point when the matter had any topical value in a debate/discussion within the community and when the matter was beyond media interest.¹⁹⁴

- 3.96 This, Civil Liberties advised, undermined what would otherwise have been an opportunity for a more thorough-going public debate on drug driving. Civil Liberties suggested that a similar process had occurred in connection with a public discussion process initiated by JACS on 'Reforms to Court Jurisdiction, Committal Process and the Election for Judge Alone Trials'. A discussion paper was released, and a call for submissions. According to Civil Liberties

¹⁹² Dr Marilyn Sernack, Submission no.5, p.4, referring to *Falk and ACT Health* [2005] ACTAAT 22 (21 September 2005).

¹⁹³ Civil Liberties Australia, Submission No.6, p.7.

¹⁹⁴ Civil Liberties Australia, Submission No.6, p.7.

although JACS 'had sought permission to make each submission made public' in its call for submissions it 'chose not to publish any' of the submissions.¹⁹⁵

3.97 Consequently, Civil Liberties said, it had made an FOI request for the submissions and subsequent papers on 7 November 2008, to which JACS did not respond during the statutory period. Civil Liberties stated that, after communication with JACS, missed deadlines, and a subsequent partial release of documents, it referred the matter to the Ombudsman, and 'JACS finally advised of the review outcome on 9 June 2009'. Civil Liberties advised that these delays were significant because they coincided with 'the ongoing active consideration by Government of a range of legislative amendments or new legislation directly related to the issues raised in the public discussion paper'.¹⁹⁶

3.98 Civil Liberties advised that in its view:

The approach of JACS, *prima facie*, appeared to be aimed at frustrating the ability of stakeholders to be aware of comments and views held by others on matters of significance to the community; a stifling of any informed debate. The response to the FoI request clearly was shoddy, unprofessional and untimely. This matter was resolved, albeit, unsatisfactorily some twelve months after submissions were lodged on the discussion paper.¹⁹⁷

3(e)(iii) Voluminous and/or vexatious requests

3.99 Contributors to the inquiry made limited observations about voluminous and vexatious requests.

3.100 The Australia Press Council advised the Committee that what appeared to be vexatious requests could be part of a legitimate process. There could, according to the Council, 'be legitimate reasons for repeat requests':

For example a researcher or an investigative journalist may have found out some information on the basis of an initial request and then become

¹⁹⁵ Civil Liberties Australia, Submission No.6, pp.7-8.

¹⁹⁶ Civil Liberties Australia, Submission No.6, p.8.

¹⁹⁷ Civil Liberties Australia, Submission No.6, p.8.

aware that there is likely to be further information of relevance to a line of inquiry.¹⁹⁸

- 3.101 As a result '[m]easures should not restrict what appears to be repeat requests that may be made in the interests of thoroughness'.¹⁹⁹
- 3.102 On a closely-related matter, the Council suggested that there should be changes to the Act to remove 'the capacity for an agency or a Minister to decline access to information on the grounds that compliance would "substantially and unreasonably" divert resources from the offices other operations' as provided for in s16(2) of the Act.
- 3.103 This, in the Council's view, was 'an out' which provided 'an incentive to not improve the efficiency of records management systems and processes'. If, on the other hand, this provision were removed agencies would be motivated to 'improve systems so that information is readily able to be retrieved for the agency's own purposes as well as for public access'.²⁰⁰
- 3.104 The Council also advised that a pro-disclosure stance on public sector information had implications for voluminous requests. Under a regime where the majority of government information was published as a matter of course, staff time would be freed up 'to provide assistance to applicants on how to refine their requests', thus reducing the quantum of documents to be provided.²⁰¹
- 3.105 The Flynn Primary School Parents and Citizens Association suggested that voluminous requests can work for or against the spirit of FOI. Its view was that provision of high volumes of information in response to FOI requests can be used to frustrate effective access to government information, and this added to arguments for the publication of government information online:

It will come as no surprise to this committee that one recent issue relating to Flynn P&C is the 2006 school closures. As part of that process, about 20,000 pages of documents were listed as part of various FOI requests

¹⁹⁸ Australian Press Council, Submission No.1, p.7.

¹⁹⁹ Australian Press Council, Submission No.1, p.7.

²⁰⁰ Australian Press Council, Submission No.1, p.8.

²⁰¹ Australian Press Council, Submission no. 1, p.3.

made by three other parties (with duplicate requests being in addition to this). The number of dead trees from this alone justifies publishing public-interest FOI releases onto the Internet.²⁰²

- 3.106 The Association also suggested that fulfilment of voluminous requests could be used by government as a demonstration of good-faith which, in fact, masked poor information quality.²⁰³ This too would appear to support arguments in favour of online publication in a searchable format.

Committee comment

Objects clause

- 3.107 In the Committee's view, although the operation of the FOI Act is in many ways complex, and involves careful balancing between competing imperatives, there are a few simple things that need to be done. It is clear from the review of the Act's objects clause that its current phrasing is less useful than it might be in providing a clear sense of purpose and context for the Act, and in guiding the Act's interpretation by both the public service and, potentially, judicial decisions. In its current form it is also well behind current thinking on FOI Acts objects clauses, evident in the Queensland and amended Commonwealth Acts.
- 3.108 This is a cognate matter with the status of 'public interest' in the current Act. The Committee notes that 'public interest' appears in the objects clause of the ACT FOI Act only in the guise of a limiting factor—that is, as a reason for refusing FOI requests. In other clauses in the Act, public interest is invoked variously as a positive principle—favouring or facilitating the release of information—or a negative one.
- 3.109 This adds to confusion about the orientation of the Act, and it should be changed so that public interest is applied in a more consistent way throughout the Act, to reflect the direction set-out in a new, clearer, objects clause favouring public interest as the sole determinant for the release or withholding of information.

²⁰² Flynn Primary School Parents and Citizens Association, Submission No.3, p.4.

²⁰³ Flynn Primary School Parents and Citizens Association, Submission No.3, p.4.

Exemptions

- 3.110 A related matter is that the ACT Act has maintained broad-ranging classes of exemptions that in other jurisdictions have been considered too broad, and too open to interpretation. It has been the view that this form of exemption has had a large part to play in providing government departments, if they so wish, with the means to resist the original intent of FOI legislation.²⁰⁴
- 3.111 As noted, this has been a feature of the operation of FOI Acts until the recent wave of reforms in state, territory and the commonwealth jurisdiction. In the Committee's view it appears advisable, if the ACT FOI Act is to perform as it was intended, that exemptions are curbed. The means to do this in other jurisdictions has been to make the majority of exemptions subject to a simplified public interest test, and to provide explicit guidance in the Act for decision-making on FOI requests.

Cabinet confidentiality

- 3.112 In the Committee's view, it remains necessary in our form of government to retain cabinet confidentiality in good standing. Collective responsibility is too integral a part of our system of government to allow free and open access to the working documents of cabinet. So long as governments are effectively held to account in parliament and other public settings—including by the integrity arm of government—then this should not constitute a compromise of government accountability.
- 3.113 To balance this retention of documents in-confidence there should be a consistent pattern of release of cabinet documents. As noted in the body of the report, this is provided for under current ACT legislation, but the Committee has concerns about the discretion available to government in varying the period after which documents become available. This needs to be addressed if the community are to have faith that there is a reasonable level of openness and accountability in government in the ACT.

²⁰⁴ 'It is my sad conclusion ... that with few exceptions the agencies of government have taken the Act as a guide to where they should dig their trenches and build their ramparts', *Open Government*, p.35.

Other decision-makers

- 3.114 For other decision-makers, it is the Committee's view that more openness regarding policy, decisions and matters of daily administration is in fact warranted. The current ACT FOI Act provides that documents should be exempt from the Act because they may show the workings of government departments, but there is an inherent contradiction between this and the original objectives of the Act.
- 3.115 An acceptable outcome would be for this provision to be removed from the Act, and for public servants to provide advice and information to Ministers or other officers in a form that is suited to its eventual scrutiny by an interested and engaged public. In the Committee's view, this will have the positive effect of encouraging impartial advice to the highest possible standard of public administration.

Effectiveness of processes

- 3.116 Regarding the effectiveness of processes under the Act, the Committee is of the view that there are opportunities for improvement. The Government has acknowledged that the structure for fees and charges under the Act is overly-complex, and that this may affect the willingness and ability of government agencies to consistently charge for FOI requests.
- 3.117 The Committee notes that some submissions have asserted long time-lines for FOI requests.²⁰⁵ In view of this there would be merit in efforts to improve on this, including a simplified schedule of fees which removed all but a nominal application fee, and removed decision-making and searching charges altogether.
- 3.118 The Committee is persuaded by those views, considered in the inquiry, which propose that under a 'push' model, these decisions should be applied at the time of document creation. Effective searching and sound document management practices will be encouraged if the burden of cost is borne by the government agency involved, rather than the requesters of documents.

²⁰⁵ See Civil Liberties Australia, Submission No.6, p.8.

- 3.119 Overall, the Committee believes that the inconsistencies and inadequate reporting identified in the Auditor-General's report are symptoms of an FOI regime in need of renovation and reform. The exact shape of a proposed program of reform is outlined in the recommendations made in this report, starting at paragraph 4.16.

Voluminous and vexatious requests

- 3.120 As noted at the end of the chapter, routine release through online publication also offers some remedies for problems with voluminous requests. The Committee also notes provisions for the management of vexatious requests in the current Commonwealth Act, introduced by the most recent amending Act, where consistently problematic requesters can be flagged as 'vexatious' by the Freedom of Information Commissioner.²⁰⁶ Both this model and the views of the Press Council should be considered in relation to vexatious requests.

Single point of access

- 3.121 A further matter for concern, in the view of the Committee, lies in the current decentralisation of FOI in the ACT. The recommendations of the Auditor-General's report outlined a number of mechanisms through which FOI processes in the ACT could be better coordinated, better guided and held to account more effectively. Many of these implied a higher degree of centralisation for FOI.
- 3.122 The Committee notes that the Government responses to the recommendations of the Audit Report all tend toward resisting this implicit and overarching recommendation of the Auditor-General's report: that FOI in the ACT needs a champion in government, a single point of access for the public, and a centralised information stream through which to gauge the health of the system across government. In the Committee's view, FOI in the ACT will not operate effectively so long as the decentralised model is maintained in its current state. A lead function must be taken-up for FOI, beyond the realm of existing government departments, in order for FOI to function in the spirit in

²⁰⁶ See ss 89K, 89L, 89M and 89N of the amended *Freedom of Information Act 1989*, available at <http://www.austlii.edu.au/au/legis/cth/consol_act/foia1982222.txt/cgi-bin/download.cgi/download/au/legis/cth/consol_act/foia1982222.rtf>, viewed 30 November 2010.

which it was intended.

- 3.123 In the Committee's view, this function would be performed most appropriately by a Freedom of Information Commissioner, along the lines described by the recently-amended Commonwealth FOI Act 1982 and the Commonwealth Information Commissioner Act 2010.

4 WAYS TO IMPROVE THE ACT'S FOI ACT

Introduction

- 4.1 The first, second and third chapters of this report have considered aspects of the FOI framework in Australia in some detail, most particularly as they apply to the ACT and Commonwealth jurisdictions. This chapter puts forward recommendations which respond to the Committee findings.
- 4.2 At the same time, the Committee notes that the recent report of the ACT public service review, *Governing the City-State* (the 'Hawke review') has made a number of recommendations that touch on FOI. Among other things, the Hawke review recommends that:
- 'the Government move to adopt a more proactive model of release of information held by the ACTPS (along the lines of the Commonwealth's scheme) to support broader policy debate in the community, subject to appropriate and necessary restrictions, including in relation to Executive Privilege, security, and personal privacy'.²⁰⁷
- 4.3 In particular, the Hawke review recommends that the ACT government should:
- 'develop approaches to proactively publishing more of the information held by the ACTPS, including Cabinet material';
 - 'establish a Chief Information Officer within the proposed Chief Minister's Department'; and that
 - 'All FOI Act decisions made by the ACTPS be published on a central website immediately after they are provided to applicants (with personal information deleted)'.²⁰⁸

²⁰⁷ *Governing the City State*,
http://www.actpsreview.act.gov.au/_data/assets/pdf_file/0004/188329/Governing_the_City_State.pdf, p.91, viewed 8/03/2011.

²⁰⁸ *Governing the City State*, p.94.

- 4.4 The Committee notes that these recommendations are consistent with a number of the recommendations made in the present report.
- 4.5 The following recommendations are framed with a view to making the FOI regime in the ACT consistent with the 'emerging consensus' on public sector information in Australia discussed in the following paragraphs. In some instances, these recommendations seek to go beyond this consensus, in line with the tradition of legislative innovation that has emerged in the ACT since the advent of self-government.
- 4.6 The Committee acknowledges that a number of the recommendations have budgetary implications. However, it takes the view that openness in government is a very significant contributor to the health of democratic political systems such as that in force in the ACT. It also notes that some further expenses, if the report recommendations were to be put into practice, would be off-set by a reduction in fees-for-service currently paid to Commonwealth agencies, to provide Ombudsman and Privacy Commissioner functions for the ACT. The most recent available information shows that these payments currently amount to more than \$1.1 million per annum.²⁰⁹

4(a & b) Relevant laws, practices and reviews of FOI legislation

- 4.7 The report has considered reviews of FOI, including *Open Government*, the Solomon report, and reports by Senate Committees, in addition to the report of the Government 2.0 panel. It has considered the legal foundations of the ACT FOI Act 1989 in the Commonwealth FOI Act 1982; in s 16 and s 17 of the ACT Human Rights Act 2004; and imputed rights from Constitution. It has also

²⁰⁹ 'In 2009–10, the ACT Government paid an unaudited total of \$998,435 (including GST) to the Ombudsman's office for the provision of ACT Ombudsman services', *ACT Ombudsman Annual Report 2009 – 2010*, p.6; 'The Office has had a Memorandum of Understanding with the ACT Government since 1 July 2000. The current Memorandum has been signed for the period 1 July 2008–30 June 2011. Under the Memorandum, the Office provides a number of privacy services to the ACT Government including: handling privacy complaints and enquiries about ACT Government agencies; providing policy advice; carrying out audits; providing privacy training on request; facilitating a Privacy Contact Officers network. In 2009–10, the Office received \$104 343 for the provision of these services.' *The Operation of the Privacy Act Annual Report 1 July 2009 – 30 June 2010*, Office of the Privacy Commissioner, pp.80-81.

recounted the process of amendment which brought the ACT FOI Act 1989 and the Commonwealth FOI Act 1982, each, to their present form.

The emerging consensus

- 4.8 In the Committee's view, this shows the strong emerging consensus in Australia on how access to public sector information—and FOI frameworks as a sub-set of this area—should operate. This was proposed by *Open Government*, and taken up by the Solomon Review—and other reviews—and expressed in statute: first in Australian states and territories and then, most recently, in the Commonwealth.
- 4.9 In the Committee's view, the heart of this consensus could be situated, at least for the sake of illustration, in the Commonwealth and Queensland jurisdictions. Both conducted influential reviews of FOI legislation (*Open Government* and the Solomon report) and subsequently passed legislation to put the recommendations of these reports into practice: the Commonwealth Freedom of Information (Reform) Act 2009 and the Queensland Right to Information Act 2009, and associated legislation.²¹⁰
- 4.10 These two processes of review and reform exemplify key elements of the emerging consensus, including:
- The adoption of a 'push' model, in which there is a clear presumption of disclosure of public sector information by government departments, via online publication, unless it should be contrary to the public interest;
 - Within this, FOI operates as an 'avenue of last resort', to provide means to request and, if necessary, appeal in relation to information not subject to routine release;
 - Re-casting of the objects clause of relevant Acts so that there is a clear statement of the purpose of the Acts, without exemptions being situated in the objects clause, thus creating a 'leaning' toward disclosure; and

²¹⁰ Freedom of Information Amendment (Reform) Act 2010, available at <http://www.austlii.edu.au/au/legis/cth/num_act/foiaa2010371/> , viewed 29 November 2010; Queensland Right to Information Act 2009, available at <<http://www.legislation.qld.gov.au/LEGISLTN/ACTS/2009/09AC013.pdf>>, viewed 29 November 2010.

- Clarification within the Acts of the meaning of ‘public interest’ and the provision of what is termed a ‘simplified public interest test’, which give explicit indications as to the grounds on which decision-makers should release or withhold public sector information.

How to align ACT legislation with the consensus approach

- 4.11 To bring the ACT into alignment with these developments the most pressing need is to change the present FOI Act in the ACT. In the Committee’s view there are a number of ways to do this. The ACT could:
- Conduct a comprehensive re-drafting of the FOI Act 1989 to bring the ACT into alignment with the emerging consensus represented by the Commonwealth and Queensland legislative regimes;
 - Introduce Bills in the Assembly which deliver a comprehensive package of amendments to achieve consistency with the emerging consensus;
 - Make the ACT subject to Commonwealth statute in this area; or
 - Introduce Bills in the Assembly which, along similar lines to the original Act, ‘import’ the current Commonwealth Act (and related legislation), and make whatever changes are necessary for the practical application of the Act in the ACT. An example is that the Federal and ACT Executive are known by different names, and the ACT Act would need to arrange for the correct identification of the ACT Executive.
- 4.12 In the Committee’s view, the most efficient method of updating the legislation, which would best support the status and authority of the ACT Legislative Assembly, is the first option. This would provide the highest degree of harmony with other jurisdictions (notably, the Commonwealth), while maintaining in the clearest possible way the plenary powers of the Assembly.
- 4.13 The Committee takes the view that the third and fourth options listed here are entirely contrary to the status of the ACT as an Australian jurisdiction, separate and distinct, and should not be pursued. In the Committee’s view any changes to FOI legislation or administrative arrangements should enhance the ACT’s emerging status as a fully-fledged Australian jurisdiction within the Australian federation.
- 4.14 The history of the present ACT FOI Act, and its divergence from the

Commonwealth Act, shows that some mechanism is needed for the review and possible amendment of legislation that has been adapted from the Commonwealth. A suitable method would be for the Attorney-General to maintain a watching-brief on amendments in Commonwealth legislation, and introduce Bills which afford the Legislative Assembly the opportunity to amend ACT statute so that consistency with the Commonwealth is preserved, subject to the will of the Assembly.

- 4.15 These arrangements would provide a higher level of consistency between the ACT and the Commonwealth in the future. They would provide a better basis for statutory office-holders in the ACT who are obliged to administer the FOI Act. They would also provide a better foundation for the provision of the services of Commonwealth statutory office-holders, operating subject to Memoranda of Understanding, if the ACT Government were to determine that the establishment of an ACT Information Commissioner lay beyond the resources of the ACT.

Revision of the ACT FOI Act

RECOMMENDATION 1

- 4.16 **The Committee recommends that the ACT Government introduce into the Legislative Assembly Bills to repeal the current FOI Act 1989 and to replace it with a revised FOI Act. The new FOI legislation should adopt as far as possible the key features of the current Commonwealth FOI Act 1982, including in particular the amendments of 1 November 2010. The exception to this principle of consistency should be arrangements for cabinet documents where, under Recommendation No.13, the new ACT legislation should follow the example of the *New Zealand Official Information Act 1982*.**

RECOMMENDATION 2

- 4.17 **The Committee recommends that the ACT Government introduce an appropriate model so that this legislation can incorporate future amendments which reflect amendments of the Commonwealth Act, subject to the will of the ACT Legislative Assembly, so that the ACT Act as far as possible maintains consistency with that of the Commonwealth.**

Implement ‘push’ model

RECOMMENDATION 3

- 4.18 The Committee recommends that, in framing the new FOI legislation, the ACT Government adopt contemporary Australian practice in relation to FOI such that:
- there is a presumption of release of government information unless there are public interest grounds for withholding it in particular instances;
 - government adopt a ‘push’ model, publishing public sector information as a matter of routine, at nil charge; and
 - within this model, FOI operates an avenue of ‘last resort’, as part of a larger framework within which public sector information is made widely available.

Objects clause

RECOMMENDATION 4

- 4.19 The Committee recommends that, in framing the new FOI legislation, the ACT Government amend the objects clause of the Act so that it provides for a single public interest test to show whether documents should be released.

RECOMMENDATION 5

- 4.20 The Committee recommends that, in framing the new FOI legislation, the ACT Government amend its objects clause so that it clearly states the context and purpose of the legislation.

Simplified public interest test

RECOMMENDATION 6

- 4.21 The Committee recommends that, in framing the new legislation, the ACT Government re-words references to ‘public interest’ in the Act so that such clauses consistently provide for release unless there is a public interest in keeping information in-confidence.

Directions for public interest considerations

RECOMMENDATION 7

- 4.22 The Committee recommends that, in framing the new legislation, the ACT Government provides an account of relevant and irrelevant factors in determining public interest, to be placed within the legislation.

4(c) Operation of the FOI regime in an evolving technological environment

- 4.23 This report has noted the significant changes in technological context for FOI since the advent of the 1982 Commonwealth FOI Act and the 1989 ACT FOI Act. The Committee notes 1995 as the watershed year in which the internet started to achieve critical mass, attracting both users and providers of content and services.

Influence of online publishing tools

- 4.24 This report has noted the implications of two aspects of ICT technology yoked together: internet publishing and EDRMS (Electronic Document and Records Management Systems). To this should be added a third: web services, which allow documents to be searched and served on the basis of database systems which are 'web aware'. This is the basic complement of tools which has allowed the publication and management of documents over the web 'at minimal cost', as indicated by the Government 2.0 report.²¹¹

Influence of online tools reflected in legislation

- 4.25 The availability and low cost of this technology has, in the Committee's view, been reflected in new sections of Commonwealth legislation which require government departments to publish information suitable for release online, together with manifests (referred to as 'schedules') of the information for which they are responsible. This is likely to result in a higher standard of

²¹¹ *Report of the Government 2.0 Taskforce*, p.40.

access to public sector information, and a higher expectation, on the part of the public, as to what constitutes a reasonable level of access.

- 4.26 A further component of this element of public sector information practice is the use of disclosure logs. As indicated in the body of the report, this practice makes it a matter of routine that documents released in the public interest (rather than personal information) is made available when a certain period of time has elapsed since its original release to an FOI requester.

RECOMMENDATION 8

- 4.27 **The Committee recommends that, in line with practice in the Commonwealth and that of selected other state and territory jurisdictions, and as would be consistent with the implications of the new legislation, government departments use EDRMS and web technologies to publish the information for which they are responsible as a matter of routine, freely and at no-cost.**

RECOMMENDATION 9

- 4.28 **The Committee recommends that the ACT Government, in framing the new legislation, require the publication of online manifests—that is: structured lists, of information held by government agencies—to facilitate public access.**

RECOMMENDATION 10

- 4.29 **The Committee recommends that, in framing the new legislation, the ACT Government require its agencies to provide online disclosure registers with respect to requests for documents. Under this arrangement, documents released under FOI would be published online within a set period of original disclosure. Where documents are withheld, those decisions and their basis should be detailed on the disclosure register, including decisions made under the *Territory Records Act 2002*.**

RECOMMENDATION 11

- 4.30 **The Committee recommends that the ACT Legislative Assembly creates new privacy legislation for the ACT, in place of the Commonwealth *Privacy Act 1988* currently in force. This ACT Privacy**

Act should create a new position of ACT Privacy Commissioner, situated in the ACT, to administer the Act.

4(d) Access to personal information, interaction between FOI laws and privacy

- 4.31 From the Committee's assessment of the broader conditions for FOI in Australia—in the ACT and elsewhere—it is clear that there have been problems with the sheer volume of material to be managed, combined with the intricacy, at times, of the request process.
- 4.32 The Committee notes with interest the ways in which the field as a whole has been parcelled-up in other jurisdictions in order to make the FOI component more manageable. The report has already touched upon the re-casting of the wider picture on access to public sector information through the presumption of disclosure, in which FOI becomes an 'avenue of last resort'.
- 4.33 Similarly, in the federal jurisdiction, personal information, as the component of FOI requests which is most voluminous and usually less problematic, has been re-allocated out of the scope of FOI processes and put under the purview of the Privacy Act. This means that the burden of activity formerly carried by FOI processes is now divided with two other fields: routine disclosure and privacy. Appeals regarding personal information are now to be considered by the Privacy Commissioner.²¹²

RECOMMENDATION 12

- 4.34 **The Committee recommends that, in framing the new legislation, the ACT Government provides that requests for information by private persons regarding information about their own affairs be managed under Privacy legislation, by the ACT Privacy Commissioner; and that necessary changes are made to Privacy mechanisms in the ACT to allow this to occur.**

²¹² See Standing Committee on Justice and Community Safety, *Transcript*, October 25 2010, Professor MacMillan, pp.24-5, and Mr Pilgrim, p.28.

4(e) Interaction of the FOI Act with other means to access information

- 4.35 This matter is addressed in the above recommendations regarding a push model for public sector information, the use of EDRMS and web technologies for publication, and interactions between privacy and FOI legislation and supports.

4(f) Balancing public interest in access with confidentiality for Ministers

- 4.36 It is the Committee's firm view that non-controversial cabinet documents should be published, on-line, as a matter of course.
- 4.37 As noted in paragraphs 3.35 and 3.49 ff, the Committee favours the approach to cabinet documents adopted in New Zealand under its *Official Information Act 1982*. Under this process, there is both routine release of cabinet documents and provisions to protect 'constitutional conventions' which provide for a measure of confidentiality regarding some cabinet documents at some stages of the cycle of cabinet business.
- 4.38 The Committee takes the view that the so-called 'purposive' approach to characterising documents for release or being withheld is clearly superior to the 'categorical' approach employed in the current FOI. This is discussed in paragraphs 3.49 and 3.50 of this report, and these arguments form the basis for Recommendation 13 at paragraph 4.44 of this report.
- 4.39 In the Committee's view, adopting this approach would provide a better basis upon which to strike an appropriate balance between the public interest in having cabinet documents released for the public's information and its interest in so-called 'good government' (under which measures of confidentiality are protected for cabinet documents in New Zealand).
- 4.40 The Committee also notes that the experience in New Zealand has given rise to the perception that current so-called 'good government' provisions are complex to interpret and administer in-practice. If adopted in the ACT, a form of words would need to be carefully chosen, and appropriate training for

officers administering the Act, to avoid these difficulties.²¹³

- 4.41 In its recent discussion paper, the Law Commission of New Zealand proposed the following form of words, which would combine and replace the current sections 9(2)(f) and (g) of the New Zealand *Official Information Act 1982*:

The withholding of the information is necessary to maintain the effective conduct of public affairs by protecting:

- (i) collective and individual ministerial responsibility;
- (ii) the political neutrality of officials;
- (iii) negotiations and the free and frank expression of opinion between the parties that form the government;
- (iv) the free and frank expression of opinions and provision of advice by or between Ministers of the Crown or members of an organisation or officers and employees of any department or organisation in the course of their duty, where the making available of the information would be likely to prejudice the free and frank expression of similar opinion or the provision of advice in the future;
- (v) the ability of Ministers properly to consider advice tendered before a decision is made;
- (vi) Ministers, members of organisations, officers and employees of any department or organisation from improper pressure or harassment.
- (vii) the confidentiality of communications by or with or about the Sovereign or her representative.²¹⁴

- 4.42 In the Committee's view, this form of words, adapted to ACT statute, could form the basis for a better and more accurate characterisation of documents that need to be held in-confidence than is currently the case for the ACT. This

²¹³ These matters are addressed in the Law Commission of New Zealand's discussion paper, *The Public's Right to Know A review of the Official Information Act 1982 and Parts 1–6 of the Local Government Official Information and Meetings Act 1987*, http://www.lawcom.govt.nz/sites/default/files/publications/2010/09/publics_right_to_know_280910_0.pdf, viewed 8/03/2011, Chapter 4, pp.53-63. They are also discussed in-detail in Nicola White, *Free and Frank: making the Official Information Act 1982 work better*, Institute of Policy Studies, Wellington, 2007, including cabinet documents in particular at pp.154, 161, 177, 220, 231, 261, 265-6, 273, 284-5.

²¹⁴ *The Public's Right to Know*, p.62.

would provide a better balance between the need for openness and confidentiality for cabinet papers which, after all, pertain to matters that should be of the highest degree of interest for a public properly engaged with matters of governance.

- 4.43 If such changes could be made, in the Committee's view, it could make a significant contribution to the health of the political system in the ACT, both in terms of transparency and in terms of the public's confidence in, and readiness to engage with, that system.

RECOMMENDATION 13

- 4.44 The Committee recommends that the ACT Government introduce into the Legislative Assembly amendments to the *Freedom of Information Act 1989* and the *Territory Records Act 2002* such that the amended Acts rely on 'purposive' rather than 'categorical' criteria, and provide a clear basis, upon which cabinet documents may be released or made exempt from release under the provisions of the Acts.

RECOMMENDATION 14

- 4.45 The Committee recommends that in framing the new Freedom of Information legislation all other exemptions be re-cast so that they are subject to a single consistent public interest test that is subject to merits review.

RECOMMENDATION 15

- 4.46 The Committee recommends in framing the new legislation, the ACT Government remove all provisions for conclusive certificates, and creates a legislative mechanism such that conclusive certificates issued in the past be removed as documents, to which they have been applied, are requested under the new process.

RECOMMENDATION 16

- 4.47 The Committee recommends that, in framing the new legislation, the ACT Government create a charges regime which reinforces a citizen's right to information rather than discouraging requests.

4(g) Balancing public interest in access for other decision makers

- 4.48 The Committee finds that it proves necessary to change provisions for exemptions under the Freedom of Information Act 1989. As noted elsewhere, most exemptions should be removed or limited. However there should be an exemption added to the Act to protect the operations of the Auditor General with respect to inquiries and investigations. This is discussed in-detail in paragraph 3.44 of this report.

RECOMMENDATION 17

- 4.49 **The Committee recommends the ACT Government, in framing the new legislation, in particular ensure that exemptions on grounds that release may reveal the decision-making processes of government agencies no longer apply in the ACT.**

RECOMMENDATION 18

- 4.50 **The Committee recommends, in framing the new legislation, the ACT Government add the Office of the Auditor-General to the list of exempt agencies (that is, 'prescribed authorities').**

4(h) Other jurisdictions where government information is readily available

- 4.51 The emerging consensus in Australia favours regular release of non-sensitive cabinet papers and routine release, after a set period of years, of all cabinet papers, with some exceptions.²¹⁵ However the Committee envisages a more open arrangement for the ACT, modelled on that adopted in New Zealand, in which government information is readily available. Under such an arrangement, documents, including cabinet documents, would be considered suitable for release unless the provisions of a future Act, stipulating when it

²¹⁵ The ACT *Territory Records Act 2002*, at s 31G(2)(b)(ii) provides that some documents may not be released at all, subject to the *Freedom of Information Act 1989*, s 41 (Documents affecting personal privacy).

would be contrary to the public interest to release certain documents, were brought into play.

4(i) An independent Information Commissioner for the ACT

- 4.52 In the Committee's view it is clear from information tendered to the Committee, and third-party sources that leadership for the FOI process, in any jurisdiction, should to come from outside of administrative departments. Statutory officers are in a unique position to champion a more open approach to government information.
- 4.53 The question of how to achieve this in the ACT is a challenging one. There are two avenues open: one is to purchase services from the Commonwealth, as the ACT presently does for Privacy and the ACT Ombudsman through memoranda of understanding. The alternative is to create a new element in the integrity arm of government in the ACT to take the lead on FOI.
- 4.54 In the Committee's view, the highest imperative is to provide an FOI framework for the ACT that is at the very least equivalent to that of other Australian jurisdictions, and this is presently not the case.
- 4.55 The Government has consistently stated that it is concerned that changes to FOI in the ACT should not represent too much of a burden to the public purse.
- 4.56 In his briefing to the Committee, the Australian Information Commissioner Professor John MacMillan told the Committee that a possible solution for the ACT was for it to repatriate the functions of ACT Ombudsman and Privacy Commissioner and constitute a new small office with additional responsibility for Freedom of Information.²¹⁶
- 4.57 Professor MacMillan said that an original rationale for the ACT's purchase of Ombudsman services from the Commonwealth there was at that stage an insufficient level of activity for a separate ACT Ombudsman. However there was an opportunity now to add these functions together so as to achieve a sufficient level of activity to make a separate ACT office practicable.²¹⁷

²¹⁶ Standing Committee on Justice and Community Safety, *Transcript*, 25 October 2010, p.17.

²¹⁷ Standing Committee on Justice and Community Safety, *Transcript*, 25 October 2010, p.17.

- 4.58 The Australian Privacy Commissioner Mr Timothy Pilgrim also noted significant changes in the administration of Privacy in the Commonwealth. Under new arrangements, 'own information' requests will be administered under the Privacy Act rather than the FOI Act. Mr Pilgrim suggested that these changes added to the sense of Professor MacMillan's proposal for a small integrated office in the ACT in which were integrated responsibilities for Ombudsman, Privacy and FOI functions.
- 4.59 This is the Committee's preferred model for the reform of FOI in the ACT. Such an office should also champion best-practice in records and information management, as is currently done by the Australian Information Commissioner.
- 4.60 The Committee is mindful that this will have significant budgetary implications. However in the Committee's view bringing these functions into the ACT is integral to its continued development as a jurisdiction in its own right.²¹⁸

RECOMMENDATION 19

- 4.61 **The Committee recommends that an office be created in the ACT, integrating the functions of Ombudsman, Privacy Commissioner and FOI Commissioner, thus replacing services provided by the Commonwealth and creating a new leadership role for FOI in the ACT.**
- 4.62 It is the Committee's view that implementing these changes will bring the ACT into line with current practice on FOI in Australia. It will also make FOI law and practice in the ACT consistent with that in the Commonwealth jurisdiction.

²¹⁸ The statutory office of the ACT Ombudsman is, currently, vested in the Commonwealth Ombudsman. Similarly, Privacy in the ACT is governed under the Commonwealth Privacy Act 1988 and is administered by the Australian Privacy Commissioner. In both cases these services are arranged by Memoranda of Understanding between the ACT Government and the statutory officer-holders. The Commonwealth Privacy Act 1988, as at 1994, applies in the ACT by virtue of the *Australian Capital Territory Government Service (Consequential Provisions) Act 1994*. See s 23 'Modifications of the Privacy Act 1988' and Schedule 3, 'Modifications of the Privacy Act 1988', <[http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/D504B12DDE0E4D85CA256F71004F3586/\\$file/ACTGSCP94.pdf](http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/D504B12DDE0E4D85CA256F71004F3586/$file/ACTGSCP94.pdf)>, viewed 30 November 2010.

- 4.63 In addition to the considerable practical and administrative advantages, this has significant implications for the health and transparency of the political system in the ACT. It will better support the participation and confidence of ACT residents in public life. Their engagement with the processes of government will, in turn, ensure the continuation of a tradition of fair, honest and equitable government in the ACT.

Vicki Dunne MLA

Chair

4th April 2011

APPENDIX A: List of submissions

The submissions received and authorised for publication:

No.	Author
1	Australian Press Council
2	ACT Auditor-General's Office
3	Flynn Primary School Parents and Citizens Association Inc
4	ACT Government
5	Dr Merrilyn Sernack
6	Civil Liberties Australia

APPENDIX B: List of witnesses

Date	Name	Title	Organisation
1/09/2010	Mr Simon Corbell	Attorney General	ACT Government
1/09/2010	Ms Kathy Leigh	Chief Executive Officer	Department of Justice and Community Safety
1/09/2010	Ms Julie Field	Executive Director, Director, Legislation and Policy Branch,	Department of Justice and Community Safety
1/09/2010	Mr David Ferguson	Senior Legal Policy Officer, Civil Law Group, Legislation and Policy Branch	Department of Justice and Community Safety
25/10/2010	Professor John McMillan	Commonwealth Information Commissioner Designate	Office of the Australian Information Commissioner
25/10/2010	Mr Timothy Pilgrim	Commonwealth Privacy Commissioner	Office of the Australian Privacy Commissioner
29/10/2010	Ms Julie Kinross	Queensland Information Commissioner	Office of the Information Commissioner, Queensland