Putting public interest at the heart of FOI:

Submission in response to the Commonwealth Government's exposure draft of the Freedom of Information Amendment (Reform) Bill 2009 and the Information Commissioner Bill 2009

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1. Introduction

1.1 The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (**PIAC**) is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights;
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only, broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from the NSW Government Department of Water and Energy for its work on utilities, and from Allens Arthur Robinson for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

1.2 PIAC's expertise on freedom of information legislation

PIAC has a long-standing interest in the operation of the *Freedom of Information Act 1982* (Cth) (**the FOI Act**). For over fifteen years, PIAC has utilised freedom of information legislation on behalf of clients. PIAC has undertaken a number of test cases under freedom of information legislation including *Searle Pty Ltd v PIAC* (1992) 102 ALR 163 and *Re Organon (Australia) Pty Ltd and Department of Community Services and Health* (1987) 13 ALD 588 (***Re Organon***).

PIAC has written papers and contributed to debates about freedom of information legislation including making submissions to the Australian Law Reform Commission in respect of its inquiry into the FOI Act in March and July 1995[1], and more recently making a submission to the NSW Ombudsman in respect of his review of the *Freedom of Information Act 1989* (NSW).[2]

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[1] Australian Law Reform Commission, *Open government: a review of the federal* Freedom of Information Act 1982, *Report No 77* (1995) (**ALRC Report 77**). See also, Kate Harrison, *Access to government using the* Freedom of Information Act (1983) PIAC; PIAC and Council of Social Services of NSW, *Freedom of Information: Community Information Program* (1988); Chris Shanahan, *Confidence and Confidentiality: Freedom of Information – Public and Private Right* (1992) PIAC; Fiona McMullin, *Public interest issues in exemption claims under the Commonwealth Freedom of Information Act: experiences of the Public Interest Advocacy Centre 1984-1994* (1994) PIAC; Bill McManus, *Australian Law Reform Commission – Review of the* Freedom of Information Act 1982 *(Cth): Submission in response to Discussion Paper No 59* (1995) PIAC; PIAC, *Australian Law Reform Commission Inquiry into the* Freedom of

2. Freedom of Information Amendment (Reform) Bill 2009

2.1 General comments

The FOI Act was first enacted in 1982. There have been no major reforms to this legislation since its enactment almost thirty years ago.

In 1996, the Australian Law Reform Commission (**ALRC**) and the Administrative Review Council (**ARC**) jointly carried out a comprehensive review of the operation of the FOI Act. In the final report, *Open Government: A Review of the Federal* Freedom of Information Act 1982 (**ALRC Report 77**), the ALRC and ARC concluded:

> [T]here are a number of deficiencies in the current FOI system… The following are the more important of these deficiencies:
>
> - 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 1988* (Cth), and the potential conflicts they give rise to, have not been adequately addressed.[3]

Until the Federal Government's recent release of these draft Bills and the Freedom of Information (Removal of Conclusive Certificates) Bill 2008, the recommendations made in ALRC Report 77 in 1995 had remained almost entirely unrealised. The Commonwealth Ombudsman[4], the ACT Auditor-General[5] and most recently by the NSW Ombudsman[6] have also all raised concerns about the effectiveness of existing freedom of information legislation.

Information Act 1982 *(Cwth): Submission in response to issues paper 12 'Freedom of Information'* (1995); PIAC, *Submission on the Freedom of Information (Removal of Conclusive Certificates and Other Measures) Bill 2008* (2009).

2 NSW Ombudsman, *Opening up government: Review of the* Freedom of Information Act 1989, *Special Report to Parliament* (2009). Lizzie Simpson, Ee-von Lok and Claire O'Moore, *Freeing up information: response to the NSW Ombudsman's Review of Freedom of Information Law in NSW* (2008) Public Interest Advocacy Centre <http://www.piac.asn.au/publications/pubs/sub2008111_20081117.html> at 19 May 2009.

3 ALRC, above n1, [2.12].

4 See, for example, Commonwealth Ombudsman, *'Needs to Know' Own Motion Investigation into the Administration of the Freedom of Information Act 1982 by Commonwealth agencies*, Investigation Report 03/1999 (1999). See also Commonwealth Ombudsman, *Scrutinising Government. Administration of the* Freedom of Information Act 1982 *by Australian Government Agencies*, *Investigation Report 02/2006* (2006).

5 ACT Auditor-General's Office, *Administration of the Freedom of Information Act 1989*, *Performance Audit Report 07/16* (2008).

6 NSW Ombudsman, *'Opening up Government. Review of the* Freedom of Information Act 1989', *a special report to Parliament under s. 31 of the* Ombudsman Act 1974 (2009).

PIAC wishes to congratulate the Government on its exposure draft Freedom of Information Reform Bill (**the FOIR Bill**) and the Information Commissioner Bill (**the IC Bill**), which implement many of the recommendations made in the ALRC Report 77. The draft Bills have also incorporated many of the intelligent and pragmatic recommendations made by the Queensland Independent Review Panel in its 2008 report.[7]

Some of the key reforms put forward in the draft Bills are:

- amendment of the objects provision of the FOI Act to clearly set out the rationale or purpose behind the legislation;
- creation of Information Publication Schemes that would open up significant amounts of government information to the public;
- amendment of the Cabinet exemption so that it applies to documents that were created for the dominant purpose of being submitted to Cabinet;
- introduction of a single public interest test that applies to all 'conditionally exempt documents' and including a non-exhaustive list of public interest factors that favour disclosure;
- amendment to consultation requirements in relation to business affairs and personal information that mean that agencies are only required to consult third parties when it appears that the other party may reasonably wish to contend that an exemption applies; and
- creation of a new independent statutory office of the Information Commissioner.

The draft Bills also simplify both the language and structure of the FOI Act and incorporate a number of changes aimed at bringing it into line with technological developments such as the increased use of e-mails and computer systems to store and create government information.

However, in a number of areas, PIAC is concerned that the Government's reforms do not go far enough, and at times, fall short of the recommendations made in ALRC Report 77—which the Government had previously indicated would form the basis of its reforms.[8] For example, while the FOIR Bill repeals some exemptions, it does not trim the excessive number and breadth of existing exemptions and also retains an almost entirely untouched Schedule 2 of the FOI Act. PIAC believes that leaving these exemptions and exclusions in their current form leaves the door open for agencies to rely too heavily on exemptions when responding to FOI requests.

In addition, PIAC notes that in relation to two key aspects of the FOI Act, namely, access to and amendment of one's own personal information and the imposition of processing charges for FOI requests, the Government has refused to introduce any significant changes, instead leaving these issues to be dealt with as part of 'future reviews'. This is notwithstanding the fact that these issues were dealt with in ALRC Report 77 along with the other areas of the FOI Act that the Government has dealt with as part of the current reforms. PIAC can see no justification for leaving these aspects out of the current reforms and considers that this may also undermine the 'sea change' that the reforms are intended to create.

Furthermore, PIAC is disappointed by the Government's move to exclude from the FOI Act all 'intelligence agency' documents and certain Department of Defence documents that are not currently excluded. PIAC

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7 Freedom of Information Independent Review Panel, *The Right to Information: Reviewing Queensland's Freedom of Information Act* (2008).

8 See, for example, The Hon Senator John Faulkner, 'Open and Transparent Government – the Way Forward' (Speech delivered at the Australia's Right to Know, Freedom of Speech Conference, Sydney, 24 March 2009) <http://www.australiasrighttoknow.com.au/image/RTK%20SPEECH_Senator%20Faulkner.pdf> at 20 April 2009.

believes that these exclusions are not warranted and contrary to the spirit of the reforms. PIAC hopes that further consideration will be given to these issues and the other specific issues raised in this submission before the Government introduces the FOIR and IC Bill into Commonwealth Parliament later this year.

Finally, PIAC wishes to emphasise that the Government must not only get the words of the freedom of information legislation right, but ensure that the prevailing attitude of agencies and Ministers towards publishing and providing information is redressed.

PIAC does not, in this submission, seek to deal with every amendment contained in the draft Bills but instead discusses the main issues that PIAC believes are essential to the success of the reforms. PIAC also uses this submission to focus on those areas where it believes that the proposed reforms need further consideration and amendment.

3. Changing the culture

In PIAC's experience, the single most significant factor that influences an applicant's experience of making an FOI request to government is the attitude of the agency.

As The Hon Senator Faulkner noted in his speech, 'Open and Transparent Government – the Way Forward', at Australia's Right to Know (**RTK**) Freedom of Speech Conference:

> There has been a wide-spread and not unjustified perception that, at least in practice, the culture of FOI at a Federal level in Australia has been that the Act sets out minimum requirements: that decision-makers determine in favour of disclosure only where forced to and that, too often, FOI applications are viewed as a contest between applicant and agency.[9]

Similarly, Dr Benjamin Worthy has commented:

> The central problem of the Australian FOI Act, highlighted by successive investigations, is the imposition of FOI upon a 'reluctant public sector with an established practice of secrecy. Many of the problems the Australian FOI Act has experienced stem from this flaw and it is the continued existence of this secretive culture that is undermining the effectiveness of the legislation. The attempt to accommodate an FOI scheme onto a traditional 'closed' Westminster system has led to resistance aimed at preventing disclosure. This has manifested itself in numerous ways. Although the effects of such a culture are by their nature difficult to discern, the effect of this 'culture of secrecy' can be observed in the misuse of exemptions, operation of the veto and delay in processing requests. [10]

Without wishing to downplay the amendments contained in the FOIR and IC Bills, these legislative reforms are unlikely to have a significant impact on the problems that most applicants experience in using the freedom of information legislation *unless* the attitudes of many agencies and their staff to government information are challenged and a new culture of openness and accountability is nurtured and enforced.

In his speech at the RTK Conference, Senator Faulkner indicated that changes to the prevailing government culture of secrecy would come primarily from the creation of an Office of the Information Commissioner and the new proposed information schemes. PIAC agrees that both of these reforms should assist in altering the existing attitudes within government to disclosure of information. PIAC also strongly supports Senator Faulkner's promise to take steps outside the legislative process including sending a letter to departmental secretaries emphasising the importance of promoting FOI within their departments.

However, in addition to these measures, PIAC suggests that consideration be given to the following proposals:

- Improving the collection and reporting of accurate and comprehensive information about each agency's performance in respect of freedom of information legislation. This could also include giving annual report cards highlighting good as well as bad performers.
- Encouraging better training and accreditation for freedom of information officers and practitioners.
- Reviewing and reforming all other federal legislation and public sector policy and guidelines which prohibit public servants releasing certain types of information, to ensure that they do not undermine the freedom of information legislation. This would include sections 70 and 79 of the *Crimes Act 1914*

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9 Ibid.

10 Dr Benjamin Worthy, 'Freedom of Information. Lessons from Australia' (2007) 32(4) *Alternative Law Journal* 229, 239.

(Cth), which makes it a criminal offence for Commonwealth officers to disclose government information.[11]

- Alternatively, amending sections 91 and 92 of the FOI Act to specifically refer to these provisions to make it clear that the Crimes Act provisions do not apply to any disclosure under the FOI Act in response to a Part III access request.
- Incorporating compliance with the freedom of information legislation into the performance agreements of all senior officers.[12]
- Considering increasing the resources, training and senior staff allocated to records management and processing FOI requests within agencies.
- Introducing an offence provision similar to section 110 of the *Freedom of Information Act 1992* (WA), which makes it an offence to 'conceal, destroy or dispose of a document or part of a document … for the purpose of preventing an agency being able to give access to that document'.

11 ALRC, above n1, [4.25] and Recommendations 12 and 13. See also, Mark Polden, *Lifting the veil of secrecy: response to ALRC Issues Paper 34: Review of Secrecy Laws* (2009) PIAC [4-5] <http://www.piac.asn.au/publications/pubs/sub2009030_20090309.html> at 19 May 2009.

12 ALRC, above n1, Recommendation 8.

4. Objects and rationale of the FOI Act

PIAC strongly supports the proposed changes to the objects of the FOI Act, which clearly set out the rationale and purpose behind freedom of information legislation. In addition to the reasons for the FOI Act, which will be set out in new subsection 3(2), PIAC suggests that there should also be reference to the fact that freedom of information legislation increases the accountability of the Executive branch of government. This addition to the list of reasons behind the FOI Act is consistent with the recommendations made in ALRC Report 77.[13]

Furthermore, there is increasing recognition that freedom of information is a fundamental human right. For example, Abid Hussain, the UN Special Rapporteur on Freedom of Opinion and Expression, said in his 1995 report to the UN Commission on Human Rights:

> Freedom will be bereft of all effectiveness if the people have no access to information. Access to information is basic to the democratic way of life. The tendency to withhold information from the people at large is therefore to be strongly checked.[14]

The prevailing view is that the freedom to seek information is part of the right to freedom of expression guaranteed by Article 19(2) of the *International Covenant on Civil and Political Rights*.[15] PIAC suggests that the objects of the FOI Act should be further amended to recognise that access to information is an essential part of the right to freedom of expression.

Recommendation:

1. *That subsection 3(2) of the* Freedom of Information Act 1982 *(Cth) be amended to include the following clauses after (b):*

   '(c) increasing the accountability of the Executive; and

   (d) recognition that the freedom to access government information is a fundamental human right'.

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13 ALRC, above n1, Recommendation 1.

14 Abid Hussain, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, UN Doc E/CN.4/1995/40 (1995) at 35, cited in Toby Mendel, 'Freedom of Information as an Internationally Protected Human Right' <http://www.article19.org/pdfs/publications/foi-as-an-international-right.pdf> at 13 May 2009.

15 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), ratified by Australia on 13 August 1980.

5. Opening up government information

5.1 Information publication schemes

PIAC supports the introduction of provisions requiring each agency to create an information publication scheme. The proposed Information Publication Schemes are a significant improvement on the current Statement of Affairs as it is envisaged that these publication schemes will be more comprehensive and accessible via Department and agency's websites. PIAC believes that the involvement of the proposed new Information Commissioner (**the IC**) in establishing, monitoring and reviewing information publication schemes is an important step towards making government information readily accessible to the public without individuals being required to make access requests under Part III of the Act.

However, there are a number of issues that PIAC is concerned about in respect of the proposed publication schemes.

PIAC notes that proposed subsection 8D(4) of the FOI Act provides that an agency or department may impose a charge for information available via information publication schemes. PIAC refers to the comments below about the question of imposing any charges in respect of the FOI Act and submits that the same issues apply with even greater force to information available via publication schemes and submits that this proposed subsection should be deleted.

PIAC emphasises the importance of agencies ensuring that they do not discriminate against people with a disability in the provision of documents under the FOI Act, including documents available via an agency or department's information publication scheme, and submits that agencies must make their best endeavours to provide information in a form that is accessible to the person. For example, the agency should ensure that where electronic information is provided to a person who is vision impaired, it is in a format that is readable by the person.[16] While accepting that this could be provided for, either pursuant to subsection 2 of proposed section 8D, or the IC's guidelines on publication schemes, PIAC submits that consideration be given to amending subsection 8D(2) so that it specifically provides that information publication schemes are accessible. PIAC notes that this is a requirement under Article 21 of the UN *Convention on the Rights of Persons with Disabilities*.[17]

> Article 21 - Freedom of expression and opinion, and access to information
>
> States Parties shall take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice, as defined in article 2 of the present Convention, including by:
>
> a) Providing information intended for the general public to persons with disabilities in accessible formats and technologies appropriate to different kinds of disabilities in a timely manner and without additional cost;

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16 See, for example, the European Blind Union's website at <http://www.euroblind.org/fichiersGB/policy.htm> on how to make information accessible to people with vision impairments. Please note, however, the person should be asked what format is suitable for them rather than relying on general advice of this sort.

17 *Convention on the Rights of Persons with Disabilities*, opened for signature 31 March 2007, Doc.A/61/611 (entered into force 3 May 2008), ratified by Australia on 17 July 2008.

b) Accepting and facilitating the use of sign languages, Braille, augmentative and alternative communication, and all other accessible means, modes and formats of communication of their choice by persons with disabilities in official interactions;
...

Finally, PIAC is concerned that information publication schemes should be reviewed regularly to ensure that they are accurate, comprehensive and up-to-date and believes that a review every five years is not sufficient. PIAC submits that the proposed section 9 should be amended so that information publication schemes are reviewed every two years.

Recommendations:

2. *That the reference to charges in proposed subsection 8D(4) of the FOI Act be deleted.*
3. *That proposed subsection 8D(2) of the FOI Act be amended to make it clear that agencies and Ministers must use every endeavour to publish the information in a way that is accessible to all members of the public.*
4. *That all references to 'five years' in proposed section 9 of the FOI Act be replaced with 'two years'.*

5.2 Publication of information in accessed documents

PIAC maintains that, for the reasons set out below in relation to charges and fees, there should not be charges for accessing documents via section 11C of the Act.

Similarly, the comments made above in relation to the issue of ensuring that publication schemes are published or provided in accessible formats apply equally to the publication of accessed documents and PIAC submits that proposed subsection 11C(2) should be amended to make this a mandatory rule.

Also, as set out below, PIAC submits that all provisions dealing with requests for access to, or amendment of one's own personal information should be transferred to the *Privacy Act 1988* (Cth) (**the Privacy Act**). This would render proposed paragraph 11C(1)(c) obsolete. If, however, Part V is retained, then proposed paragraph 11(C)(1)(c) should be amended to refer to *that* person consistently with paragraphs (a) and (b) of that subsection.

Recommendations:

5. *That the reference to charges in proposed section 11C of the FOI Act be deleted.*
6. *That proposed section 11C of the FOI Act be amended to make it clear that the agency or Minister must use every endeavour to ensure this information is published in a way that is accessible to all members of the public.*
7. *That proposed paragraph 11C(1)(c) of the FOI Act be deleted or amended to refer to 'that person'.*

6. Reforms to Part III of the FOI Act – getting the balance right between access and exemptions

6.1 Public interest test for all exemptions

The fundamental feature of freedom of information legislation is the provision of a right of access to government information. For example, ALRC Report 77 notes that '[w]hat distinguishes the approach to disclosure of government information in the FOI Act from approaches taken prior to its enactment is its focus on the public interest.'[18]

However, this focus has been obfuscated. For example, Benjamin Worthy has suggested that the FOI Act 'contains wide exemptions that significantly undermine the ability of the legislation to promote openness'.[19] Instead the approach to FOI requests has typically been to focus on whether any exemptions apply and this has almost entirely overshadowed considerations of the public interest in disclosure of government information. As Mr Barry Jones anticipated in his comments about the FOI Bill in 1981:

> But the legislation when it came was a profound disappointment… The long-awaited Freedom of Information Bill should be more accurately described as a 'Public Service Preservation from Disclosure' Bill… The tragedy is that the comparative breadth of the first paragraph of clause 3 is really cut back very considerably by the broad exemptions and exceptions created by paragraph (b).[20]

Schedule 3 of the FOIR Bill seeks to address this problem in a number of different ways. Firstly, it creates a new section 11A to the FOI Act, which provides that access is to be given to information unless the document is either (i) exempt; or (ii) conditionally exempt and it is contrary to the public interest to release the document. Thus it introduces a public interest test into the Act and increases the number of exemptions that are subject to this test from four to eight. Secondly, proposed section 11B to the FOI Act specifies a number of relevant (and irrelevant) public interest factors that should be considered when making a decision whether or not to provide access to information under Part III of the Act and gives the IC the power to issue further guidelines about the public interest. The FOIR Bill also repeals the exemptions for Executive Council documents, documents arising out of companies and securities legislation or relating to the conduct of an agency of industrial relations.

It has been suggested that some exemptions should not be subject to the public interest test because of the public interest in the confidentiality of these documents including documents relating to Cabinet discussions and matters of national security. However, PIAC is of the firm view that *all* exemptions should be subject to a public interest test to enable consideration of the specific circumstances of each case. For example, some documents may genuinely be of a sensitive nature when they are created, such as a document containing information about a current criminal investigation, hence it would not be in the public interest to release them at that time. Yet the sensitivity of those documents may decrease as time passes, in which case they should be available for potential disclosure to the public at the appropriate time.

Furthermore, PIAC maintains that classes of documents or agencies should not be excluded from the provisions of the Act merely because they are more likely to create sensitive documents in the course of their duties as a result of the nature of their organisation or a particular aspect of their work. As set out

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18 ALRC, above n1, 95.

19 Worthy, above n10, 229.

20 Commonwealth, *Parliamentary Debates*, House of Representatives, 19 August 1981, 32-421 (Barry Jones).

below under application of the Act, PIAC submits that Schedule 2 should be repealed and, to the extent that existing exemptions do not cover the documents excluded under this schedule, new exemptions should be added to the Act which are also subject to the public interest test.

Recommendation:

8. That sections 33, 34, 37, 38, 42, 45, 46 and 47A of the FOI Act be subject to the public interest test.

6.2 Public interest factors

In PIAC's experience under the current Act, agencies and departments in considering FOI requests have spent too much energy considering exemptions and other reasons against disclosure rather than adequately considering public interest factors in favour of disclosure. PIAC believes that the list as currently set out in the proposed section 11B goes some way towards creating a stronger pro-disclosure culture within government.

In addition to the factors set out in new section 11B, PIAC suggests that consideration be given to adding the following factors that favour disclosure:

- disclosure of the information could reasonably be expected to reveal environmental or health risks or measures relating to public health and safety;
- disclosure of the information could reasonably be expected to allow or assist inquiry into possible deficiencies in the conduct of or administration of a public agency or by public officials;
- disclosure of the information could reasonably be expected to evidence or be likely to identify that an agency has, or its staff have, engaged in illegal, unlawful, inappropriate, unfair or the like conduct, or have acted maliciously or in bad faith;
- disclosure of the information could reasonably be expected to reveal the reasoning and other useful contextual information behind government decisions that have affected or could have a significant effect on people;
- disclosure of the information could reasonably be expected to contribute to innovation and the facilitation of research.

Furthermore, PIAC is of the view that the Office of the Information Commissioner should issue supplementary guidelines providing a more detailed explanation of the principles and weighing-up exercise, which should form the basis of a determination under Part III of the Act. Otherwise there is a risk that the factors set out in the proposed section 11B could end up being treated as the only legitimate public interest factors that should be taken into account when considering an FOI request notwithstanding that the legislation expressly states that the list is not intended to be exhaustive.

Recommendations:

9. That proposed section 11B of the FOI Act be amended to list the following additional factors in favour of disclosure:

- *disclosure of the information could reasonably be expected to reveal environmental or health risks or measures relating to public health and safety;*
- *disclosure of the information could reasonably be expected to allow or assist inquiry into possible deficiencies in the conduct of or administration of a public agency or by public officials;*
- *disclosure of the information could reasonably be expected to evidence or be likely to identify that an agency has, or its staff have, engaged in illegal, unlawful, inappropriate, unfair or the like conduct, or have acted maliciously or in bad faith;*

- *disclosure of the information could reasonably be expected to reveal the reasoning and other useful contextual information behind government decisions which have affected or could have a significant effect on people;*
- *disclosure of the information could reasonably be expected to contribute to innovation and the facilitation of research.*

10. *That the Information Commissioner, as a matter of priority, issue supplementary guidelines about the 'public interest test' that provide a more detailed explanation of the principles and weighing-up exercise that should form the basis of a determination under Part III of the Act.*

7. Specific exemptions

7.1 National security, defence or international relations exemption

PIAC submits that section 33 of the FOI Act should contain a public interest test, given the breadth of material that can be exempted under this provision. For example, PIAC was involved in the case of *ATA v Pfizer/ Commonwealth v Hittich* (1994) 53 FCR 152 in which the applicants sought access to information on the safety and efficacy of the anti-inflammatory drug Felden. The Australia Government had received this information from health authorities in the United States of America. The Australian Government was refusing disclosure pursuant to section 33 on the basis that it could damage international relations and endanger the future supply of confidential information. PIAC argued that in considering the application of section 33 of the FOI Act to this information, regard should have been given to the significant public interest in the Australian public being aware of safety and efficacy information about the drugs so that patients could make properly informed decisions about the use of this drug in their treatment. The Full Federal Court concluded that there was no public interest component in this section and upheld the Department's decision to refuse access to most of the information. PIAC submits that this case highlights the importance of incorporating a public interest component into this provision in order to prevent similar decisions in the future.

PIAC also submits that the phrase 'would, or could reasonably be expected to' should be amended to read 'would, or would reasonably be expected to' to ensure that it is at least limited to those cases that would or would probably result in damage being caused to international relations, security or defence.

Recommendations:

11. *That section 33 of the FOI Act be amended to make it subject to the public interest test.*
12. *That the phrase 'would, or could reasonably be expected to' in section 33 of the FOI Act be amended to read 'would, or would reasonably be expected to'.*

7.2 Cabinet documents exemption

PIAC supports the amendment to the Cabinet documents exemption, which makes it clear that this exemption only protects documents that were brought into existence for the dominant purpose of being submitted to Cabinet.

However, PIAC maintains that the Cabinet documents exemption should be subject to the public interest test. While PIAC accepts that it is extremely unlikely that the public interest in releasing documents that are properly characterised as 'Cabinet documents' is likely to outweigh the public interest in those documents remaining confidential, it is more consistent with the objectives of the FOI Act that this exemption contain a public interest test. Also, there may be some cases in which a significant period of time has elapsed between the creation of the document and the FOI request and it may be that the sensitivities surrounding the disclosure of the document have dissipated with intervening events such as a change of government, or the publication by Cabinet members of their memoirs or other reports. In those types of cases it is foreseeable that the public interest would be better served by disclosing the original documents. Therefore PIAC maintains that the Cabinet documents exemption should be subject to a public interest test.

Alternatively, PIAC believes that the Cabinet document exemption should be subject to a ten-year limit. As the Independent Review Panel commented:

> The Cabinet 'oyster' will be well and truly shucked after 10 years as a result of the publication of political memoirs, media reports and work by historians. The need to protect Cabinet confidentiality and Cabinet's collective responsibility to Parliament ceases to have any force. It could be argued that strictly speaking Cabinet's accountability ceases with every new parliamentary election – Cabinet can only be responsible to the Parliament in which it holds office as the government.[21]

Including a ten-year limit in the Cabinet document exemptions is consistent with most other states including Victoria[22], Western Australia[23] and Tasmania.[24]

PIAC also submits that the Department of Prime Minister and Cabinet should consider adopting a policy of proactive disclosure in relation to Cabinet documents, similar to that put forward by the Independent Review Panel in its 2008 report.[25]

Recommendations:

13. *That section 34 of the FOI Act be made subject to a public interest test.*
14. *That section 34 of the FOI Act be amended by inserting a new subsection (7): 'Subsections (1)(2) and (3) shall cease to apply to a document brought into existence when a period of ten years has elapsed since the last day of the year in which the document came into existence'.*
15. *That the Department of Prime Minister and Cabinet adopt a policy of proactive disclosure in relation to Cabinet documents.*

7.3 Law enforcement and public safety exemption

PIAC notes that it was acknowledged in ALRC Report 77 that at least some documents relating to law enforcement, such as documents revealing that the scope of a law enforcement investigation has been exceeded, should be subject to the public interest test.[26] However, PIAC believes that excising these particular types of law enforcement documents from the general exemption provided by section 37 of the FOI Act would be cumbersome and instead suggests that this exemption should be subject to the public interest test.

Recommendation:

16. *That section 37 of the FOI Act should be subject to the public interest test.*

7.4 Secrecy provisions exemption

PIAC supports the recommendation of the ALRC Report 77 that section 38 of the FOI Act be repealed on the basis that this information is already covered by other exemptions in the FOI Act; or, alternatively, that at the very least, Schedule 3 be amended so that it becomes the definitive list of all secrecy provisions to which the FOI Act is subject.[27] If section 38 of the FOI Act is retained, PIAC submits that it should also be subject to the public interest test.

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21 Independent Review Panel, above n7, 117.
22 *Freedom of Information Act 1992* (Vic) s 28.
23 *Freedom of Information Act 1992* (WA) Sch 1, cl 1(4).
24 *Freedom of Information Act 1991* (Tas) s 24.
25 Independent Review Panel, above n1, 120-22 and Recommendation 34.
26 ALRC, above n1, [9.23].
27 Ibid [11.3]. See also, Polden, above n11,19-20.

Recommendation:

17. That section 37 of the FOI Act should be subject to the public interest test.

18. That section 38 of the FOI Act be repealed. Alternatively, that section 38 be subject to the public interest test and Schedule 3 amended so that it contains the entire list to which section 38 applies.

7.5 Commonwealth and state relations - conditional exemption

PIAC suggests that the Commonwealth and State relations exemption should be amended to limit it to those cases where disclosure 'would, or would reasonably be expected to' cause damage to Commonwealth state relations or divulge confidential information. This amendment should also apply to paragraph 33(1)(a) of the FOI Act, and the proposed section 47E, subsections 47B(a), and 47J(1), and paragraph 47G(1)(c) of the FOI Act.

Recommendation:

19. That the phrase 'would, or could reasonably be expected to' in paragraph 33(1)(a) of the FOI Act, and the proposed section 47E, subsections 47B(a), and 47J(1), and paragraph 47G(1)(c) of the FOI Act be amended to read: 'would, or would reasonably be expected to'.

7.6 Operations of agencies - conditional exemption

PIAC notes that proposed subsection 47E(1)(d) is far more general than subsections (a)-(c) and (e), and may be used by agencies as a 'stand-by' exemption.

PIAC submits that this subsection is too broad and should be repealed. The information that is generally protected by relying on this subsection will mostly be covered by other exemptions, including proposed section 47C (deliberative processes).

Recommendation:

20. That proposed subsection 47E(1)(d) of the FOI Act be removed.

7.7 Business affairs - conditional exemption

PIAC submits that many of the phrases in this exemption including 'trade secrets' and 'unreasonable and adversely affects business affairs' are unpredictable and problematic. For example it is still not clear whether information about the safety of products amounts to a trade secret (contrast decision of the Administrative Appeals Tribunal in *Re Organon* with the decision of the full Federal Court in *Searle Australia Pty Ltd v PIAC* (1992) 102 ALR 163). Consideration should be given to tightening the language and meaning of proposed paragraphs 47G(1)(a)-(c) or to the IC providing guidelines as to what is meant by these subsections.

PIAC also submits that proposed paragraph 47G(1)(c) be amended to include the commercial activities of government agencies as this would, at least in part, remove the justification for Part II of Schedule 2 of the FOI Act.

Recommendations:

21. That the language and meaning of proposed paragraphs 47G(1)(a)-(c) should be tightened. Alternatively, that the IC should issue guidelines clarifying what is covered by this conditional exemption.

22. That proposed section 47G of the FOI Act be amended to expressly cover the commercial activities of government agencies.

7.8 National economy - conditional exemption

PIAC is of the view that section 44 (proposed section 47J) of the FOI Act should be repealed, as there are other exemptions that would provide equivalent protection for the types of documents that could currently be covered by this exemption. This is consistent with the conclusion reached in ALRC Report 77, which considered that this exemption was 'superfluous and should be repealed'.[28]

Recommendation:

23. That proposed section 47J of the FOI Act be deleted.

7.9 Research documents - conditional exemption

PIAC agrees with the recommendation contained in ALRC Report 77 that this exemption be repealed on the basis that it is already covered by other provisions of the FOI Act.[29]

Recommendation:

24. That proposed section 47H of the FOI Act be deleted.

28 ALRC, above n1, [9.28].

29 Ibid [11.4].

8. Application of the Act – exclusions and extensions

8.1 Exempt agencies and documents

There appears to be a lack of any common characteristic or justification for the current agencies and documents listed in Schedule 2 of the FOI Act.

Agencies should not be automatically exempt from the provisions of the FOI Act merely because they are more likely to create sensitive documents in the course of their duties as a result of the nature of their organisation.

PIAC submits that the majority of agencies named in Schedule 2 could rely on the other exemptions in the FOI Act where they hold truly sensitive documents that it would be contrary to the public interest to disclose. To the extent that the existing exemptions do not cover these documents, new exemptions could be created within the body of the FOI Act and made subject to the public interest test.

Recommendation:

25. That the Government undertakes an immediate review of the continued use of Schedule 2 of the FOI Act. All agencies should be required to justify their continued exclusion from the FOI Act in relation to the functions/documents listed in the schedule. Agencies should have to positively show that the existing exemptions, including a proposed change to section 47G, are not sufficient to protect the documents currently covered by Schedule 2 of the FOI Act. The Government should seek input from FOI consumer groups in response to those agency submissions.

8.2 Intelligence agency documents

PIAC opposes the proposed exclusion of all 'intelligence agency' documents from the scope of FOI Act, regardless of whether or not access would cause, or could reasonably be expected to cause, any damage to Australia's security or defence interests. Furthermore, this exclusion would mean that documents that reveal conduct by intelligence agencies that lack or exceed lawful authority, or even information that has already been reported could not be disclosed under the FOI Act.

This is contrary to the spirit of both the freedom of information legislation itself and the Government's election promise to 'restore trust and integrity in the use of Australian government information, and to promote greater openness and transparency'.

Furthermore, there are numerous examples, such as the Clarke Inquiry into Dr Haneef's case[30], which highlight the importance of Australia's security agencies being subject to the FOI Act. The proposed exclusion will effectively create a black hole around the work and operations of the Australian intelligence agencies.

PIAC believes that this proposed exclusion is not only risky but also unnecessary: paragraphs 33(1)(a) and (b) of the FOI Act already provide sufficient protection against disclosure of intelligence agency documents in those cases where disclosure may pose a genuine risk to security or national interest if released.

30 Clarke Inquiry, *Report of the Clarke Inquiry into the case of Dr Mohammed Haneef* (2008).

PIAC also has similar concerns about the proposed amendments to exclude Department of Defence 'operational intelligence' documents by adding them to the list of excluded documents set out in Part II, Division 1, Schedule 2 of the FOI Act.

Recommendations:

26. That subsection 7(2A) be deleted from the proposals set out in the FOIR Bill.

27. That the proposed amendment to Schedule 2 in relation to 'operational intelligence documents' be deleted from the FOIR Bill.

8.3 Contracted service providers

PIAC believes that private organisations supplying essential public services (such as water, energy, telecommunications, transport infrastructure) should be subject to the Act precisely because they provide essential services to the community that would otherwise be carried out or delivered by government.

Subject to the comments below about the phrase 'contract for services', PIAC supports the proposal to impose requirements on an agency or Minister to take contractual measures to ensure that an agency or Minister 'receives' all documents specified in proposed subsection 6C(3). This provision means that an individual can still access these documents as they are treated as documents of the agency pursuant to section 4 of the FOI Act.

However, the limitation with this proposal is that if an agency has taken all reasonable steps to receive a document from a contractor, but has not actually received the document in question, it can refuse a request and an individual is effectively stopped from accessing the document under the freedom of information legislation. PIAC therefore suggests that the Government should consider extending the application of the Act to apply directly to contracted service providers that are providing essential government services to maximise the right of access to government information, irrespective of whether it is an agency document or a document of a contracted service provider.

In addition, subsection 3(c) and the definition of 'provided' in section 4 of the FOI Act indicate that the requirements of the proposed section 6C will only be applied to contracts that provide these essential public services. PIAC recommends that section 6C be amended to make this clearer. Otherwise, there is a risk that this section could be applied to other contracts with bodies such as not-for-profit charitable organisations that carry out community service obligations, that are additional to the services provided by the Government.

Recommendations:

28. That the FOI Act be extended to apply to all private sector bodies that provide essential services to the community or fulfil functions that would otherwise be provided by government departments, Ministers or agencies.

29. That proposed section 6C of the FOI Act be amended to make it clear that it does not apply to all contracted service providers but is limited to those contracted service providers that provide services to other persons in connection with the performance of the functions, or the exercise of the powers, of the agency.

8.4 Application of the FOI Act to the Houses of Parliament

PIAC believes that all aspects of government should be covered by the FOI Act, subject to limited exemptions aimed at balancing the rights of the public to access government-held information against the need to protect legitimate government and public interests in certain documents remaining confidential.

PIAC notes that Houses of Parliament fall within the scope of freedom of information legislation in many other jurisdictions including the United Kingdom, Ireland and South Africa.

While it is sometimes suggested that if Members of Parliament were subject to the FOI Act they would not be able to do their job effectively nor represent their constituents, PIAC takes the view that the exemptions should be sufficient to meet those concerns. For example, material provided to Members of Parliament by their local constituents may fall within the existing exemptions including documents obtained in confidence (section 45) and personal privacy (proposed section 47F). There is an interrelated issue about the application of the FOI Act to MPs more broadly in that the phrase 'official documents of a Minister' does not include documents in the possession of a member that relate to electoral matters or local constituents issues (unless they also relate to the portfolio of a Minister). PIAC recommends that Part I of the FOI Act be amended so that the FOI Act also applies to MPs. PIAC notes that any concerns about personal information about constituents can be adequately dealt with through existing exemptions.

Recommendation:

30. That Part I of the FOI Act be amended so that the FOI Act applies to the Commonwealth Houses of Parliament and MPs.

9. Processing FOI requests – charges, extensions and other practical issues

9.1 Acknowledgement of FOI requests

PIAC believes that in addition to acknowledging receipt of requests, agencies should be required to include a Schedule of documents that would enable the applicant to have the opportunity to narrow their request.[31] This would establish a dialogue between the applicant and agency about the documents requested, and assist the process.

Recommendation:

31. The acknowledgement of an FOI request should include a schedule of the documents covered by the FOI request.

9.2 Extension to the time limits for processing requests

PIAC is concerned about the lack of procedural safeguards in relation to the proposals to allow for extensions to the time period for processing FOI requests. PIAC submits that sections 15AA and 15AB should also be amended to provide applicants with the same safeguards contained in proposed section 54T (in relation to extensions of time for IC review applications). These safeguards include a requirement that the applicant must be notified of an application for an extension to the period for processing a request and be given an opportunity to be heard if s/he opposes the application.

In particular, it appears that proposed section 15AB would allow an agency or Minister to ask the IC to extend the time limit for any reason even if the time limit has already expired and the request would otherwise be assumed to be a 'deemed refusal decision' (see proposed subsection 15AB(4)). PIAC is extremely concerned about this proposed section, as it has the potential to completely undermine an applicant's capacity to obtain documents in a timely manner and to prevent their request from dragging on indefinitely. PIAC strongly believes that an agency or Minister should not be able to seek an extension to the time limit once the time limit has expired. Furthermore, the reasons for extending time limits should be limited and specified in the FOI Act. By contrast, there appears to be no limit under section 15AB as to the reason why an agency may seek an extension to the time limit from the IC. At the very least, it should be made clearer in proposed subsection 15AB(9) that an agency should only be able to obtain one such extension to the time limit for processing requests. Furthermore, applicants should have the right to be notified of an application for an extension to the time limit under section 15AB and given a reasonable opportunity to be heard if they oppose an extension being granted.

In raising these concerns, PIAC emphasises that the value of documents sought under an FOI request could be rendered nugatory if extensive delays are experienced. Most people seeking information pursuant to the FOI Act require access to the documents sought quickly whether it be to protect their legal rights, protest against a government decision or publish information in a newspaper on a topic of current interest. As the Independent Review Panel commented:

> For some applicants seeking documents through FOI, it would be fair to say that access delayed, is access denied.[32]

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31 Independent Review Panel, above n7, 176-178.

32 Independent Review Panel, above n7, 170.

PIAC raises these questions about extensions in the context of a regime where delays in processing requests are often, from a user's perspective, one of the least satisfactory aspects of the process. For example, the Ombudsman in his annual report noted that 34% of all complaints made to the Ombudsman about the FOI Act were about delays in processing requests.[33] The solution is not simply to set up a system that allows agencies to extend the time limit, but rather to address the underlying problems including the allocation of resources, training of FOI officers, and the attitudes of agencies towards FOI requests, to ensure that requests are dealt with more expeditiously.

Recommendations:

32. That proposed section 15AA of the FOI Act be amended to provide applicants with the same safeguards contained in proposed section 54T.

33. That proposed section 15AB of the FOI Act be deleted from the proposals contained in the FOIR Bill. Or, alternatively that this proposed provision be amended to: (a) specify that an extension cannot be granted once the original time limit has expired; and (b) provide applicants with the same safeguards contained in proposed section 45T.

9.3 Practical refusal reasons

PIAC supports the introduction of the provisions relating to 'practical refusal reasons', and in particular the requirement that an agency must undergo a 'request consultation process' before they can refuse a request for practical reasons.

PIAC submits that in determining whether to refuse a request on the basis that a practical refusal reason exists, an agency or Minister should also be required to balance the practical refusal reasons against the public interest in disclosure of the information requested. For example, in the case of *Re SRB and SRC and Department of Health, Housing, Local Government and Community Services* (1994) 33 ALD 171, PIAC sought documentation about pituitary hormone treatments under the National Human Pituitary Hormone Programme. While the agency provided access to personal files, it refused access to some 600 policy files pursuant to section 24 of the FOI Act on the basis that providing those documents would be an unreasonable diversion of its resources. While PIAC argued before the Administrative Appeals Tribunal (AAT) that the agency should not have been able to issue such a blanket refusal where there was a clear public interest in the health and safety issues arising out of this information, the AAT concluded that the FOI Act was intended to concentrate on individual documents and rights and not on such far-ranging enquiries and therefore upheld the agency's decision to refuse access to these documents.

Recommendation:

34. That the FOI Act expressly provide that an agency or Minister must, when making a decision to refuse a request on the basis that a practical refusal reason exists, be required to balance the practical refusal reasons against the public interest in disclosure of the information requested.

9.4 Charges and fees

While PIAC supports the changes made to the fees and charges pursuant to the FOIR Bill, PIAC considers that the question of restructuring the way charges for processing requests are calculated should form part of this package of reforms. The FOIR should be amended so that the charges that an agency may impose in

[33] Commonwealth Ombudsman, *Annual Report 2007-8*, 114.

respect of a freedom of information request should be based on the amount of information provided rather than the time taken to process a request. This was the approach recommended in ALRC Report 77.[34]

Given that the amount of fees and charges collected by agencies represents a tiny amount of the cost of administering the freedom of information legislation, PIAC suggests that the argument that the imposition of these charges and fees is based on cost recovery is highly flawed. For example, in 2007-8, the total amount of fees and charged collected represented only 1.76% of the total costs of administering the FOI Act.[35]

The ALRC approach has a number of advantages. Firstly, it would be easier for an agency to calculate costs on this basis and would ensure that the calculation of costs was more transparent to, and understandable by, applicants. It would also improve the consistency of charging across different government agencies.

Moreover, PIAC is of the view that applicants should not be penalised if agencies do not have efficient record-management systems. If an agency's record-keeping systems are such that it takes hours to process even a simple freedom of information request, the applicant should not be made to pay for that time. Indeed, the approach proposed is likely to encourage agencies to reconsider and improve their existing records management system. Similarly, such an approach to costs would encourage applicants to narrow their search to only those documents that they are really interested in, and hence, are prepared to pay for. Conversely, such an approach may deter agencies from relying too heavily on exemptions, given that the effect of adopting this approach to charges would be that if agencies refused to grant access to documents they would not be able to impose any charges in relation to that decision.

This proposal is consistent with the recommendations made by the Independent Review Panel in its report in 2008[36], and reflects the criticisms of the ALRC in its review that '[r]ecords management, which is fundamental to the effectiveness of the FOI Act, is not given sufficient prominence'.[37]

Recommendation:

35. *That paragraph 94(2)(b) of the FOI Act be amended so that charges for processing a request are calculated on the basis of the documents received, not the time taken to consider a request or retrieve the information requested.*

34 ALRC, above n1, 187.
35 Department of Prime Minister and Cabinet, *FOI Annual Report 2007-8*, 13.
36 Independent Review Panel, above n7, Recommendations 61-71.
37 ALRC, above n3.

10. Access to, and amendment of, one's own personal information

PIAC's position is that access to, and amendment of, one's own personal information should be dealt with under the *Privacy Act 1988* (Cth) (**the Privacy Act**) and not under freedom of information legislation. The starting point for dealing with this issue should be the different objectives of privacy and freedom of information legislation. While the Privacy Act is concerned with protecting an individual's right to privacy and the integrity of personal information held by government, including having their personal information protected by government, the FOI Act is intended to ensure government accountability by allowing citizens to access government information.

One objection sometimes raised to this proposal is the problem of dealing with a 'mixed request' for personal and non-personal information. However, PIAC notes that there is already a precedent in the FOI Act for treating one request as two separate requests (see subsection 16(3A) of the FOI Act).[38] PIAC submits that there is no logical reason why this 'splitting' of a mixed request cannot equally be applied to requests that are 'mixed' in the sense of being partly pursuant to the Privacy Act and partly pursuant to the FOI Act.

In the companion guide to the draft FOIR and IC Bills, the Government indicated that it intends to hold a further consultation about the question of whether access to, and amendment of, one's own personal information should only be dealt with under privacy legislation or whether the current situation should be retained. However, PIAC does not see any reason why fundamental reform to Part V of the FOI Act should be left to some future indeterminate date and maintains that all reforms to the FOI Act, including transferring all requests to access or amend one's own personal information to the privacy regime, should be dealt with as part of the current tranche of reforms to the FOI Act.

Recommendation:

36. That Part V of the FOI Act should be repealed and the Privacy Act should be amended to ensure that its provisions relating to to, and correction of, personal information held by an agency provide for at least all of the same rights of access and correction as those in the current Part V of the FOI Act.

[38] Under the proposed reforms to charging, the Government is already contemplating splitting requests for personal or non-personal information for the purposes of imposing processing charges. Implicit in this proposal is a recognition that a 'mixed request' will be dealt with as two separate requests.

11. The creation of the independent office of the Information Commissioner

PIAC strongly supports the creation of an independent statutory office of the Information Commissioner (**the IC office**). PIAC agrees that the IC should administer the FOI Act and the Privacy Act, as well as being responsible for the overarching information policy of government.

The IC office would be able to fulfill a number of essential functions including monitoring, reporting, providing education, advice and guidance to both agencies and the community about the Act. The IC office could also act as an advocate for a whole-of-government approach to information policy and opening up government information to the public. In PIAC's view, the role of the IC office will be an essential part of changing the existing culture of secrecy within many government agencies.

11.1 The Office of the Information Commissioner

The FOIR and IC Bills envisage the Information Commissioner playing a vital role in the proposed reforms as:

> … an independent champion of FOI, charged with overseeing agencies' compliance with both the letter and the spirit of the legislation. At the same time the Office of the Information Commissioner will provide an independent high-level base from which cultural change can be driven throughout the public service – through training education, advice and feedback to agencies. The Commissioner will be charged with monitoring, investigation and reporting on agency compliance with the Act.[39]

In order to operate effectively, PIAC suggests that the Commissioner's appointment should be subject to review by an independent Parliamentary Committee rather than the Minister. This Committee should not only be responsible for overseeing the work of the office, but also for approving funding to ensure that the IC office has adequate resources to fulfill its statutory functions and remain a truly independent watchdog and advocate.

Further, to reflect the scope of the role and retain within the senior position a focus on privacy, PIAC submits that the proposed title of the position be changed to 'Information and Privacy Commissioner'.

Recommendation:

37. *That the office of the Information Commissioner be overseen by an Independent Parliamentary Committee responsible for appointment of the Information Commissioner, the FOI Commissioner and the Privacy Commissioner, and the approval of funding for the statutory office.*
38. *That the title of the office be 'Information and Privacy Commissioner'.*

11.2 The functions of the Information Commissioner

PIAC generally supports the functions of the IC as set out in Part 2, Division 2 of the IC Bill, subject to the comments made below regarding the proposed review functions under Part VII of the Act (see comments below on review mechanisms).

Additionally, PIAC suggests that consideration be given to inserting a provision into Part 2, Division 2 of the IC Bill that expressly states that in performing the freedom of information functions set out in clause 10 of

[39] Senator John Faulkner, above n8.

the IC Bill, the Information Commissioner (or Freedom of Information Commissioner) should exercise the functions having regard to the object of the FOI Act.

Recommendation:

39. That clause 10 of the IC Bill be amended to expressly provide that the Information Commissioner (or Freedom of Information Commissioner) should exercise the functions set out in that clause, having regard to the objects of the FOI Act.

11.3 Cross-over between the privacy, FOI and information commissioners

PIAC is concerned about the ability of the Privacy, FOI and Information Commissioners to exercise each other's power pursuant to clauses 13, 14(2) and 15(2) of the IC Bill. While the ability for each commissioner to delegate his/her functions to another commissioner has a pragmatic appeal to it, PIAC is of the view that it may undermine the value of having different commissioners with distinct roles in relation to government information policy. In particular, PIAC believes that the benefit of having a separate FOI Commissioner and Privacy Commissioner within the one office is to allow for each to act as advocates for the privacy and freedom of information regimes. This could be lost if each of these commissioners can exercise the other's functions. PIAC submits that the comments made in ALRC Report 77 about the problems of having a single commissioner are equally apt to the proposal that each commissioner could delegate his/her powers to the other commissioners. As the ALRC has also said:

> There is a need to ensure that the principles of openness and privacy each have a clearly identifiable and unambiguous advocate. The balance between FOI and privacy can sometimes be a fine one and it may be difficult for an individual not to develop, or be perceived to have developed, a stronger allegiance to one over the other which could lead to accusations of bias in favour or either openness or privacy.[40]

A further problem with this proposal is the risk that rather than having three separate commissioners, there could end up only being one or two commissioners for significant periods of time, further undermining their role as advocates for the different regimes. This has already occurred in respect of the separate Commissioners of the Australian Human Rights Commission and has had the effect of reducing the focus on specific equality issues.

Recommendation:

40. That clauses 13-15 of the IC Bill be amended so that commissioners are not able to perform each other's functions.

11.4 Annual FOI reports of all agencies

Although the IC Bill states that the IC is to provide the Minister and Parliament with an annual report about the operation of freedom of information legislation, PIAC submits that all agencies should be required to report annually to the IC on their implementation of the FOI Act and these reports should be available to the public in accessible form (either via each agency's website or the IC office's website).

The IC should also issue guidelines that specify how agencies should comply with these reporting requirements to ensure that statistics and reports provided give a clear and comprehensive picture of an agency's implementation of the FOI Act. The IC should be able to provide annual report cards, based upon agencies' reports and other evidence such as investigations by the IC on how well each agency is

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40 *Freedom of Information (Open Government) Bill (2000)* (2002) Australian Law Reform Commission <http://www.alrc.gov.au/submissions/ALRCsubs/2000/1130.htm> at 11 May 2009.

complying with the requirements of the FOI Act. This would allow the IC to highlight best practices as well as agencies that were performing poorly under the freedom of information legislation.

Recommendation:

41. *That in addition to the IC's annual report on the FOI Act, each agency should be required to report annually to the Information Commissioner on their implementation of the FOI Act and these reports should be publicly available.*

12. Review mechanisms

12.1 Internal reviews

In PIAC's experience, most agencies tend to err on the side of 'caution' in making the first decision in the knowledge that another, usually more senior person within the agency will review the decision. Furthermore on some occasions internal review simply becomes a 'rubber stamping' exercise. This is reflected in the FOI statistics for 2007-8, which indicated that 44% of internal review decisions, affirmed the original decision (although some concession was made in 48% of cases).[41]

PIAC agrees with the Independent Review Panel, which recommended that the internal review be retained but as an optional stage of review:

> It seems desirable that there should be some flexibility in the system to take account of the particular circumstances of the applicant or application. There will be some cases, for example for example where the sufficiency of the search is in issue, where internal review would be highly desirable. There are others, for example if there is a legal issue in dispute, where there may be little to be gained from internal review… In terms of agency culture, if it is possible for an applicant to go straight to external review, this may make the agency more conscious of the desirability of getting the initial decisions right.[42]

PIAC notes that the ALRC Report 77 included similar recommendation in relation to internal reviews.[43] PIAC therefore submits that while internal reviews should be retained as part of the review mechanisms available to applicants, they should be made optional allowing applicants the choice to proceed directly to external review.

Recommendation:

42. That internal reviews be made optional, at the choice of the applicant, under the FOI Act.

However, if internal reviews *are* retained as the compulsory first step in the review process, PIAC suggests that greater emphasis be placed on improving education and training FOI decision-makers, Ministers and other senior officials. There is a need to clearly reinforce the importance and positive benefits of the freedom of information legislation to encourage decision-makers to make less conservative and more rigorous decisions.

12.2 Information Commissioner reviews

The FOIR and IC Bills propose that the IC will undertake reviews of access refusal decisions and access grant decisions. The IC review will sit between internal reviews and AAT reviews. According to the companion guide, '[t]he [IC] review is designed to be quicker and less formal, with most matters being determined on the papers, without hearings'. The intention behind the introduction of external reviews by the Information Commissioners is to enable an external review that is faster, cheaper and more accessible than the AAT.[44]

PIAC acknowledges that IC reviews may have these advantages and that giving the IC determinative powers pursuant to proposed Part VII of the FOI Act would avoid the problem of the IC's becoming a 'toothless tiger'.

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41 Department of Prime Minister and Cabinet, above n35, 15.
42 Independent Review Panel, above n7, 238.
43 ALRC, above n1, [13.6].
44 Senator Faulkner, above n8.

However, PIAC believes that there are also risks associated with this approach. One problem with the proposal is that it may create a perceived conflict of interest with the IC's other functions, particularly its role in as 'the central point of contact for the public on government information handling matters'[45], and in monitoring the operation of the FOI Act. For example, under paragraphs 34(1)(f) and (g) of the IC Bill, the IC will be reporting each year to the Minister and Parliament on the number of applications and their particulars, and the number of complaints and their outcomes. This means it will effectively be auditing its own decisions.

Furthermore, many cases under the FOI Act raise complex issues of statutory interpretation and it is more appropriate that these be decided by the AAT.

Another issue is the risk that instead of IC reviews fulfilling the objectives of being a more informal and speedy mechanism of review, they become the opposite: another bureaucratic layer that individuals have to go through in order to access government information. PIAC believes this is currently the case with the Office of the Privacy Commissioner, whose review role is comparable to that of the proposed IC. Unlike the AAT, which has established case-management procedures that ensure that cases are dealt with in a timely manner, there are no such safeguards in relation to complaints to the Privacy Commissioner. In PIAC's experience, the lack of statutory timeframes that apply to privacy complaints is extremely problematic and undermines the advantages of this review mechanism. For example, PIAC is currently acting for a client who made a privacy complaint to the Privacy Commissioner in 2005. This matter is still being 'conciliated' by the Privacy Commissioner. The delays in resolving the complaint have had a significantly detrimental impact on the client. The fact that this complaint has been going on for four years raises serious questions about the efficacy and expediency of this form of review.

On balance, PIAC is of the view the IC should not be given determinative review powers.

However, if the Government remains committed to the IC having an external review function, PIAC submits that additional safeguards need to be built into this layer of the FOI review process.

In particular, PIAC submits that the requirement that IC reviews be conducted 'as timely as possible' is too vague (see proposed paragraph 55(4)(c)). There are a number of better alternatives to this provision.

Firstly, specific time periods could be built into IC reviews. For example, the Independent Review Panel has suggested that the Queensland freedom of information legislation should specify that there are 20 working days for an IC mediation, 20 working days are then allowed for the parties to make additional submissions if they fail to reach an agreement during mediation and a further 40 working days for the IC to reach a decision about an external review.[46]

Alternatively, there could be a provision allowing the applicant to treat an IC review as a 'deemed refusal' after 60 days and be allowed to progress to the AAT for a decision.

Finally, the FOI Act could require the IC to establish and publish case-management procedures consistent with those adopted by the AAT or Federal Court to ensure that matters are properly dealt with in a timely manner.

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45 Australian Government, *Freedom of Information (FOI) Reform. Companion Guide to Exposure Drafts* (2009) 7.

46 Independent Review Panel, above n7, 250-53.

PIAC's preference is for the first of these options but believes that all of these options are a considerable improvement on the general exhortation of proposed paragraph 55(4)(c).

Another amendment that PIAC suggests to the proposed IC reviews is that, if both parties request a public hearing of an IC review pursuant to section 55B, the IC should be obliged to agree to this request. This would reinforce the message that the IC reviews mechanism is a 'user-friendly' avenue of complaint rather than simply another bureaucratic hurdle for users of the freedom of information legislation.

Recommendations:

43. *That the Information Commissioner should not be given a determinative review function.*
44. *Alternatively, that proposed Part VII, Division 6 of the FOI Act be amended to introduce time frames in relation to Information Commissioner reviews*
45. *That proposed section 55B be amended so that if all parties agree to an application for a public hearing then the Information Commissioner is required to hold one.*

12.3 Administrative Appeals Tribunal reviews

PIAC submits that current AAT application fees of $682 may be a deterrent to applicants seeking a review of an agency's decision about an FOI request. PIAC notes that it is intended that section 66 ('Tribunal may make recommendation that costs be available in certain circumstances') will be retained in the FOI Act, but also notes the ALRC Report 77 recommendations on this point:

> This provision is rarely used. The Review considers that it should be employed more widely and that its existence should be publicised by the FOI Commissioner.[47]

Recommendation:

46. *That the FOI Commissioner publicise the existence of section 66 of the FOI Act which empowers the AAT to recommend to the responsible Minister that an applicant's costs be paid by the Commonwealth where he or she is successful or substantially successful.*

12.4 Representative complaints

The FOIR Bill does not provide for representative complaints made on behalf of a group of people who have a complaint against the same agency arising out of a common issue of law or fact.[48] The absence of explicit provisions for representative complaints places the FOI legislation at odds with other Commonwealth administrative laws (*cf* section 38 of the Privacy Act and section 46PB of the *Human Rights and Equal Opportunities Commission Act 1986* (Cth)). PIAC is of the view that there may be a number of benefits in allowing representative FOI complaints, including enabling reviews to consider systemic issues rather than just individual cases and often more efficiently dealing with a number of complaints at once rather than as separate complaints. As the ALRC noted:

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47 ALRC, above n1, [14.28] See also Recommendation 95.

48 Compare with proposed subsection 55A(2), which provides that a person 'whose interests are affected' by an 'IC reviewable decision' may apply in writing to the Information Commissioner to become a party to review proceedings. Similarly reviews to the AAT may be made by 'any other person whose interests are affected by the decision' to applying in writing to the Tribunal to be made a party to proceedings (see subsection 30(1A) of the AAT Act and proposed paragraph 60(3)(e) of the FOI Act).

> The main objective of a procedure enabling proceedings to be brought on behalf of a group of persons affected by a multiple wrong is to secure a single decision on issues common to all and to reduce the cost of determining all related issues arising from the wrongdoing.[49]

PIAC submits that the FOIR Bill should include a provision similar to that of the current privacy and human rights legislation enabling representative review applications to be made to the Information Commissioner and the AAT. Further, consideration needs to be given to ensure that the Federal Court has the capacity to accept such matters on appeal as the current arrangements limit proceedings to class actions, which are different in nature to representative proceedings.

Recommendation:

47. That the proposed Parts VII and VIIA of the FOI Act be amended to allow for review applications to be made as representative complaints and that amendments be made as necessary to the Federal Court Act and Rules to enable matters to proceed as representative complaints on appeal.

12.5 Information Commissioner investigations

PIAC strongly supports the proposal under Part VIIB to give the Information Commissioner the power to carry out investigations into actions taken by agencies in the performance of their functions or powers under the FOI Act. In order to maximise the value of these investigations to review systemic problems, PIAC submits that there should be scope for not-for-profit organisations to make complaints under this part of the FOI Act. However, PIAC is concerned that the phrase 'sufficient interest in the subject matter' in subsection (f) of new section 73 could be interpreted as a reference to the test of standing at common law thereby barring organisations making a representative complaint.[50] PIAC cannot see any justification for this limitation on part VIIB investigations, which are quite distinct from the review complaints process. Thus, PIAC submits that subsection (f) should be deleted.

Recommendation:

48. That proposed paragraph 73(1)(f) of the FOI Act be deleted.

12.6 Vexatious Applicant Declarations

Although PIAC accepts that agencies should be able to refuse requests that are only meant to harass or intimidate staff or unreasonably interfere with the operations of an agency, PIAC is concerned that the power to stop applicants making any FOI requests or other applications under the FOI Act if they are declared 'vexatious' could be open to abuse. One important protection already provided for in the FOIR Bill is that these applications can only be made by the IC.

However, PIAC is of the view that it would be more consistent with the ethos of the Act, if the focus were to be on preventing vexatious requests rather than vexatious applicants along the lines of the UK approach.[51]

Recommendation:

49. That proposed Part VIII, Division 1 of the FOI Act (Vexatious Applicants) be amended to provide that the IC can declare requests to be 'vexatious requests' rather than empowering the IC to declare applicants to be 'vexatious applicants'.

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49 Australian Law Reform Commission, *Grouped Proceedings in the Federal Court: Report No 46* (1988).

50 See, *Right to Life Association (NSW) v Secretary, Department of Human Services and Health* (1994) 56 FCR 50, per Lockhart J.

51 *Freedom of Information Act 2000* (UK) sub-s 14(1).

13. Conclusion

It is widely accepted that the promise of this country's freedom of information legislation to open up government information to the public still has not been properly realised in the (almost) thirty years since the introduction of the FOI Act in 1982. In part this is because the fundamental principle informing the legislation has been forgotten or overlooked: that it is actually in the public interest for government information to be readily available to its citizens. Too many agencies have for too long instead focused only on exemptions, disclosures and delays when dealing with FOI requests.

The Federal Government's exposure draft bills are a significant challenge to the status quo and PIAC strongly supports the bulk of their content. However, in a number of areas as outlined in this submission, PIAC has argued that the Government's reforms are inadequate in seeking to redress the balance between opening up government information and ensuring that sensitive government documents are not improperly disclosed. Indeed, there are some instances where the draft Bills appear to close down the disclosure of government information rather than open it up to the public. PIAC urges the Government to be bold in its reforms to ensure that the promise of freedom of information legislation is finally realised in Australia.

14. Summary of Recommendations

1. *That subsection 3(2) of the* Freedom of Information Act 1982 *(Cth) be amended to include the following clauses after (b):*

   '(c) increasing the accountability of the Executive; and

   (d) recognition that the freedom to access government information is a fundamental human right'.
2. *That the reference to charges in proposed subsection 8D(4) of the FOI Act be deleted.*
3. *That proposed subsection 8D(2) of the FOI Act be amended to make it clear that agencies and Ministers must use every endeavour to publish the information in a way that is accessible to all members of the public.*
4. *That all references to 'five years' in proposed section 9 of the FOI Act be replaced with 'two years'.*
5. *That the reference to charges in proposed section 11C of the FOI Act be deleted.*
6. *That proposed section 11C of the FOI Act be amended to make it clear that the agency or Minister must use every endeavour to ensure this information is published in a way that is accessible to all members of the public.*
7. *That proposed paragraph 11C(1)(c) of the FOI Act be deleted or amended to refer to 'that person'.*
8. *That sections 33, 34, 37, 38, 42, 45, 46 and 47A of the FOI Act be subject to the public interest test.*
9. *That proposed section 11B of the FOI Act be amended to list the following additional factors in favour of disclosure:*

   - *disclosure of the information could reasonably be expected to reveal environmental or health risks or measures relating to public health and safety;*
   - *disclosure of the information could reasonably be expected to allow or assist inquiry into possible deficiencies in the conduct of or administration of a public agency or by public officials;*
   - *disclosure of the information could reasonably be expected to evidence or be likely to identify that an agency has, or its staff have, engaged in illegal, unlawful, inappropriate, unfair or the like conduct, or have acted maliciously or in bad faith;*

- *disclosure of the information could reasonably be expected to reveal the reasoning and other useful contextual information behind government decisions which have affected or could have a significant effect on people;*
- *disclosure of the information could reasonably be expected to contribute to innovation and the facilitation of research.*

10. *That the Information Commissioner, as a matter of priority, issue supplementary guidelines about the 'public interest test' that provide a more detailed explanation of the principles and weighing-up exercise that should form the basis of a determination under Part III of the Act.*
11. *That section 33 of the FOI Act be amended to make it subject to the public interest test.*
12. *That the phrase 'would, or could reasonably be expected to' in section 33 of the FOI Act be amended to read 'would, or would reasonably be expected to'.*
13. *That section 34 of the FOI Act be made subject to a public interest test.*
14. *That section 34 of the FOI Act be amended by inserting a new subsection (7): 'Subsections (1)(2) and (3) shall cease to apply to a document brought into existence when a period of ten years has elapsed since the last day of the year in which the document came into existence'.*
15. *That the Department of Prime Minister and Cabinet adopt a policy of proactive disclosure in relation to Cabinet documents.*
16. *That section 37 of the FOI Act should be subject to the public interest test.*
17. *That section 37 of the FOI Act should be subject to the public interest test.*
18. *That section 38 of the FOI Act be repealed. Alternatively, that section 38 be subject to the public interest test and Schedule 3 amended so that it contains the entire list to which section 38 applies.*
19. *That the phrase 'would, or could reasonably be expected to' in paragraph 33(1)(a) of the FOI Act, and the proposed section 47E, subsections 47B(a), and 47J(1), and paragraph 47G(1)(c) of the FOI Act be amended to read: 'would, or would reasonably be expected to'.*
20. *That proposed subsection 47E(1)(d) of the FOI Act be removed.*
21. *That the language and meaning of proposed paragraphs 47G(1)(a)-(c) should be tightened. Alternatively, that the IC should issue guidelines clarifying what is covered by this conditional exemption.*
22. *That proposed section 47G of the FOI Act be amended to expressly cover the commercial activities of government agencies.*
23. *That proposed section 47J of the FOI Act be deleted.*
24. *That proposed section 47H of the FOI Act be deleted.*
25. *That the Government undertakes an immediate review of the continued use of Schedule 2 of the FOI Act. All agencies should be required to justify their continued exclusion from the FOI Act in relation to the functions/documents listed in the schedule. Agencies should have to positively show that the existing exemptions, including a proposed change to section 47G, are not sufficient to protect the documents currently covered by Schedule 2 of the FOI Act. The Government should seek input from FOI consumer groups in response to those agency submissions.*
26. *That subsection 7(2A) be deleted from the proposals set out in the FOIR Bill.*
27. *That the proposed amendment to Schedule 2 in relation to 'operational intelligence documents' be deleted from the FOIR Bill.*
28. *That the FOI Act be extended to apply to all private sector bodies that provide essential services to the community or fulfil functions that would otherwise be provided by government departments, Ministers or agencies.*

29. *That proposed section 6C of the FOI Act be amended to make it clear that it does not apply to all contracted service providers but is limited to those contracted service providers that provide services to other persons in connection with the performance of the functions, or the exercise of the powers, of the agency.*
30. *That Part I of the FOI Act be amended so that the FOI Act applies to the Commonwealth Houses of Parliament and MPs.*
31. *The acknowledgement of an FOI request should include a schedule of the documents covered by the FOI request.*
32. *That proposed section 15AA of the FOI Act be amended to provide applicants with the same safeguards contained in proposed section 54T.*
33. *That proposed section 15AB of the FOI Act be deleted from the proposals contained in the FOIR Bill. Or, alternatively that this proposed provision be amended to: (a) specify that an extension cannot be granted once the original time limit has expired; and (b) provide applicants with the same safeguards contained in proposed section 45T.*
34. *That the FOI Act expressly provide that an agency or Minister must, when making a decision to refuse a request on the basis that a practical refusal reason exists, be required to balance the practical refusal reasons against the public interest in disclosure of the information requested.*
35. *That paragraph 94(2)(b) of the FOI Act be amended so that charges for processing a request are calculated on the basis of the documents received, not the time taken to consider a request or retrieve the information requested.*
36. *That Part V of the FOI Act should be repealed and the Privacy Act should be amended to ensure that its provisions relating to to, and correction of, personal information held by an agency provide for at least all of the same rights of access and correction as those in the current Part V of the FOI Act.*
37. *That the office of the Information Commissioner be overseen by an Independent Parliamentary Committee responsible for appointment of the Information Commissioner, the FOI Commissioner and the Privacy Commissioner, and the approval of funding for the statutory office.*
38. *That the title of the office be 'Information and Privacy Commissioner'.*
39. *That clause 10 of the IC Bill be amended to expressly provide that the Information Commissioner (or Freedom of Information Commissioner) should exercise the functions set out in that clause, having regard to the objects of the FOI Act.*
40. *That clauses 13-15 of the IC Bill be amended so that commissioners are not able to perform each other's functions.*
41. *That in addition to the Information Commissioner's annual report on the FOI Act, each agency should be required to report annually to the Information Commissioner on their implementation of the FOI Act and these reports should be publicly available.*
42. *That internal reviews be made optional, at the choice of the applicant, under the FOI Act.*
43. *That the Information Commissioner should not be given a determinative review function.*
44. *Alternatively, that proposed Part VII, Division 6 of the FOI Act be amended to introduce time frames in relation to Information Commissioner reviews*
45. *That proposed section 55B be amended so that if all parties agree to an application for a public hearing then the Information Commissioner is required to hold one.*
46. *That the FOI Commissioner publicise the existence of section 66 of the FOI Act which empowers the AAT to recommend to the responsible Minister that an applicant's costs be paid by the Commonwealth where he or she is successful or substantially successful.*

47. *That the proposed Parts VII and VIIA of the FOI Act be amended to allow for review applications to be made as representative complaints and that amendments be made as necessary to the Federal Court Act and Rules to enable matters to proceed as representative complaints on appeal.*

48. *That proposed paragraph 73(1)(f) of the FOI Act be deleted.*

49. *That proposed Part VIII, Division 1 of the FOI Act (Vexatious Applicants) be amended to provide that the IC can declare requests to be 'vexatious requests' rather than empowering the IC to declare applicants to be 'vexatious applicants'.*