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Office of the Australian Information Commissioner

Review of freedom of information legislation

Submission to the Hawke Review

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Executive summary

When the *Freedom of Information Act 1982* (FOI Act) was enacted, the terms 'FOI' and 'open government' meant much the same thing: public access to government–held documents. However, with significant recent developments in government information policy — culminating in the Australian Government's *Declaration of Open Government* and the establishment of the Office of the Australian Information Commissioner (OAIC) — 'open government' has many new connotations.

Foremost are associations with information technology and the possibilities of use and reuse of government information outside the public sector. This was a central theme for the 2009 report of the Government 2.0 Taskforce which noted that: 'Internationally and nationally, there is a growing recognition of the extent to which [public sector information] is a resource that should be managed like any other valuable resource — that is, to optimise its economic and social value.'[1] Flowing from greater information openness are issues of open licensing, discoverability and machine–readability to enable data reuse. According to the Taskforce, government could further foster openness by adopting Web 2.0 technologies to enhance collaboration and break down barriers between government and the community.

Amid this change, the FOI Act continues to be the legislative anchor for open government in Australia. The 2010 reforms sought to bring the Act up to date and embed new policy settings emphasising proactive publication of government information and openness as the default. We believe the reforms have enlivened open government in Australia and made essential changes to the focus of FOI — from a reactive to a proactive model of information access, and towards a pro–disclosure culture in public administration.

There are, however, many ways the FOI Act can be readily improved. Some of the proposals in this submission recommend the amendment of particular provisions of the FOI Act and *Australian Information Commissioner Act 2010* (AIC Act), while other proposals are that the FOI Act be based on updated thinking or principles. The OAIC would welcome the opportunity to engage in further debate as to the ideal legislative model for public access and open government in Australia.

Among the changes that we believe would improve the FOI framework and assist its smooth operation are:

- amending IC review provisions to give the OAIC greater flexibility to resolve review matters quickly, including through use of alternative dispute resolution (Part C);
- streamlining extension of time provisions to make them less complex and resource–intensive to comply with (Part C);
- encouraging agencies to establish administrative access schemes (Part F);

[1] Government 2.0 Taskforce (2009), *Engage: Getting on with Government 2.0*, p 40, at www.finance.gov.au/publications/gov20taskforcereport/index.html.

- implementing the recommendations made in the Information Commissioner's 2012 *Review of Charges under the* Freedom of Information Act 1982 (Charges Review, discussed in Part F);[2] and
- introducing a 40–hour processing ceiling for access requests to augment the practical refusal provisions in the Act (Part G).

An outline of our recommendations and suggestions for improvement is provided below.

There are a number of issues with the FOI Act and AIC Act of a technical nature that we have outlined in an appendix to this submission. These hinder the smooth functioning of the FOI regime and create regulatory complexity for agencies. Much of this complexity stems from thirty years of incremental additions to the FOI Act culminating in the substantial 2010 amendments. Rather than replacing the old FOI Act, the 2010 amendments were woven into the original structure. This has resulted in a piece of legislation that is unwieldy, confusing and, at times, difficult to interpret. On important issues such as calculating the FOI processing period, granting extensions of time and consulting third parties, the OAIC has spent countless hours working out what the Act means in order both to clarify our compliance oversight role and to provide reliable guidance to agencies struggling with the same issues.

This review is an opportunity to consider key challenges for maintaining a relevant and meaningful framework for access to government information in an era when the way information is recorded and shared is rapidly changing. Consideration should be given to whether and how the existing focus of the FOI Act on 'documents' could be shifted to 'information'. This is not as easy as replacing 'document' with 'information' in the Act and further thought needs to be given to the implications of any such change (see Part A). Consideration should also be given to whether the *Privacy Act 1988* should be the primary avenue for individuals to access and amend their own personal information (again, see Part A). Further thought could also be given to the continuing challenge of integrating the variety of open government mechanisms to enable them to interact effectively and easily. In our view, embedding a strong administrative access framework to complement formal FOI access rights is part of the solution.

The OAIC is carrying forward the open government agenda. With the introduction of the 2010 reforms it was timely to introduce two independent statutory officers — the Australian Information Commissioner and the Freedom of Information Commissioner — to play a leadership role in securing the FOI principles and objectives. The OAIC is, in essence, an information champion, with a comprehensive range of powers and functions to promote open government, protect information rights and advance information policy.

In our view, the combination of FOI, privacy and information policy has proven to be an effective and sensible basis for an integrated scheme for information management and policy. Effective management of government information helps to protect personal

[2] OAIC (2012), *Review of charges under the* Freedom of Information Act 1982, www.oaic.gov.au/publications/reports/2012_Charges_review_report_FINAL.html.

information, make the FOI process more efficient and facilitate the wider release of government information where privacy, security and other relevant concerns allow.

A strong theme in the OAIC's information policy work has been to support cultural change in government to embed the three principles in the 2010 *Declaration of Open Government*: 'informing', 'engaging' and 'participating'. Two OAIC publications that reflect that emphasis in our work are the Issues Paper, *Towards an Australian Government Information Policy* published in November 2010 and the *Principles on open public sector information* published in May 2012. A survey of 178 Australian Government agencies that we undertook in April 2012 found a high level of engagement with the Principles.

The key driver for more open government will always be Government leadership in making this a policy premise for all government agencies. This message was clearly conveyed to agencies and the community in 2009–10 in the *Declaration of Open Government*; the FOI Act reforms; the establishment of the OAIC; the *Blueprint for Reform of Australian Government Administration*; and the report of the Government 2.0 Taskforce, *Engage: Getting on with Government 2.0*.

A great deal has been done across government in the last two years to embed those reforms in government practice. However, there has not since been the same explicit promotion of open government reform and cultural change by Government as occurred in 2009–10. We believe that explicit support would be valuable and timely in continuing the watershed reforms. An ideal context in which to move forward would be the adoption by Government of a national plan that restated the Government's commitment to open government, identified the key agencies with responsibility in this area and their relationship to each other, and selected key projects to be undertaken across government. We have included some preliminary ideas in this submission, and we look forward to working with the Review and the Australian Government in developing this proposal.

Recommendations

The OAIC recommends that the Review or, where appropriate, the Government:

Part A: The impact of 2009 and 2010 reforms to freedom of information laws

1. Establish a national action plan to further develop and embed the open government agenda and the Government's commitment to cultural change, and to explain the role and relationship of Australian Government agencies with responsibility for information policy and practice (see paragraphs 22–29, 67 and 83–84).
2. Consider whether the FOI Act should shift to a request framework based on information rather than documents, noting the associated practical difficulties. Interim or alternative measures could involve taking up the recommendation below to encourage administrative access to information by allowing agencies a short period to discuss a request with an applicant before the FOI period formally commences, or expanding the scope of agency Information Publication Scheme obligations (see paragraphs 30–39).
3. Remove Part V of the FOI Act, so that the Privacy Act provides the sole mechanism for amendment requests. The current privacy complaint resolution process, and the availability of a determination power when necessary, provide an adequate mechanism for OAIC review of agency decisions. The Privacy Act also has the advantage of providing a mechanism for the creation of binding privacy codes. A code may be appropriate for the access and correction activities of specific agencies (see paragraphs 40–46).

Part B: The effectiveness of the Office of the Australian Information Commissioner

4. Merge the Information Advisory Committee and Privacy Advisory Committee, noting the differences in scope between the membership requirements of the two committees (see paragraphs 68–69).
5. Exempt the OAIC from the additional efficiency dividend in 2012–13 and any similar future measures in the same way as the Administrative Appeals Tribunal (AAT) and other tribunals have been (see paragraphs 76–78).

Part C: The effectiveness of the two–tier system of merits review of decisions to refuse access to documents and related matters

Information Commissioner review

6. Remove the prohibition in the AIC Act on delegation of the IC review decision–making power under s 55K of the FOI Act (see paragraph 89).
7. Authorise the Commissioner to remit a matter to an agency or minister for reconsideration (see paragraph 90).

8. Broaden the grounds on which the Information Commissioner can decide not to undertake a review (see appendix entry on s 54W(a) of the FOI Act).
9. Provide a clearer mandate and powers for the Information Commissioner to resolve IC review applications by agreement between the parties to a review (see paragraphs 91–112).
10. Resolve the complexity and uncertainty in FOI Act provisions on third party review rights (see paragraphs 113–117).
11. Clarify the application of secrecy provisions in other legislation to IC reviews (see paragraphs 118–119).

FOI complaint investigation

12. Remove the barrier to delegation of Information Commissioner complaint handling powers (see paragraph 120).
13. Broaden the grounds on which the Information Commissioner can decide not to investigate a complaint (see paragraph 120).

Extensions of time

14. Revise the current extension of time provisions to make clear that agencies and ministers have an obligation to continue processing a request until either a decision has been made or an IC review is commenced (at which point the agency or minister is still able to make a decision more favourable to the FOI applicant at any time until an IC review decision is made) (see paragraphs 121–131).
15. Remove the requirement in s 15AA to notify the OAIC of extensions of time by agreement and otherwise limit the OAIC's role in approving extensions of time to situations where an FOI applicant has sought IC review or lodged a complaint about delay in processing a request (see paragraphs 121–131).

Two–tier external review

16. Make AAT review of decisions under the FOI Act only available on a point of law against review decisions made by a Commissioner, for review of an IC review decision made by a delegate of the Information Commissioner (see recommendation 6 above), or for review of a decision under s 54W(b) that the interests of the administration of justice make it desirable that the decision be considered by the AAT (in which case, no application fee to the AAT should be required) (see paragraphs 132–137).

Part D: The reformulation of exemptions in the FOI Act, including the application of the new public interest test

17. Apply a time–limited exemption to certain types of exempt documents, as discussed in the OAIC's October 2012 submission to the *Inquiry into the Freedom of Information Amendment (Parliamentary Budget Office) Bill 2012* (see paragraphs 148–153).

18. Reduce the use of the FOI process for legal discovery by means such as introducing a 40–hour cap on processing time (see Part F recommendations below) or by adopting the Queensland model where access may be refused if the document can be accessed under another Act or arrangements made by an agency, whether or not access is subject to a fee or charge (see paragraphs 154–155).

Part E: The appropriateness of the range of agencies covered, either in part or in whole, by the FOI Act

19. Consider the appropriateness of the continuing exemption of intelligence agencies from the FOI Act, noting the approaches taken in other jurisdictions and the existence of exemptions that can be applied on a document–by–document basis (see paragraphs 159–161).
20. Consider whether criteria are needed by which the functions of agencies can be assessed for inclusion in Schedule 2 (see paragraph 162–165).
21. Introduce a partial exemption from the FOI Act for the OAIC in respect of the OAIC's merits review and complaint functions (see paragraphs 166–169).
22. Consider applying the IPS provisions in Part II of the Act to agencies that are otherwise currently exempt from the operation of the Act (see paragraphs 170–172).

Part F: The role of fees and charges on FOI, taking into account the recommendations of the Information Commissioner's review of the current charging regime

23. Adopt recommendations 1–3 and 5–9 of the Charges Review or otherwise address the technical issues described in this submission affecting the smooth running of the existing FOI charges framework (see paragraphs 173–182 and also recommendation 25 below which addresses Charges Review recommendation 4 about managing large and complex requests).
24. Consider whether agencies and ministers should be allowed a seven day consultation period after receiving a request, but before the FOI processing period starts, to discuss with applicants the most efficient way of processing the request (whether that is as a formal access request under the FOI Act or through other means) (see paragraphs 183–187).

Part G: The desirability of minimising the regulatory and administrative burden, including costs, on government agencies

25. Amend the FOI Act so that an agency may refuse to process a request if, after having assisted the applicant to clarify the scope of the request, the processing time would be in excess of 40 hours. The existing practical refusal provisions should remain for large and complex requests that would not take 40 hours to process but would nonetheless substantially and unreasonably

divert the agency's resources, or would take more than 40 hours but the agency decides not to invoke the 40–hour cap (see paragraphs 196–208).

26. Amend the FOI Act to permit agencies to decline to handle a repeat or vexatious request or requests that are an abuse of process, without impacting on the applicant's ability to make other requests or remake the request that was not accepted (see paragraphs 209–215).
27. Consider whether action needs to be taken in regard to the timing of disclosure log publication and issues potentially affecting use of the Act by applicants with a special interest in being granted access to documents prior to publication on an agency or ministerial disclosure log (see paragraphs 221–224).
28. Consider whether a balance needs to be struck between disclosure obligations and online accessibility requirements in cases where a document that must be published under the FOI Act was not created for the purposes of publication and it would be resource–intensive to optimise or create an alternative version of the document's content for publication (see paragraphs 225–231).
29. Consider issues involving the interaction of the FOI Act and the 'first publication rule' under s 177 of the *Copyright Act 1968*, and the potential impact that publication of third party material under the FOI Act may have on a copyright owner's revenue or market (see paragraphs 232–236).

Appendix: Table of issues with current legislative provisions

30. Resolve the technical issues identified in the FOI Act and AIC Act as appropriate.

Structure of this submission

Our submission has been structured to correspond to the Review's terms of reference.

- **Part A: The impact of 2009 and 2010 reforms to freedom of information laws** discusses the broad early success of the reforms in advancing open government as reflected in agency performance in key FOI activities. It also raises broader issues for consideration and public debate such as whether the existing focus of the Act on 'documents' needs to be changed to a focus on 'information' and how best to integrate different mechanisms for accessing government information.
- **Part B: The effectiveness of the Office of the Australian Information Commissioner** discusses the key achievements of the OAIC since commencement, key challenges and areas for future development.
- **Part C: The effectiveness of the new two–tier system of merits review of decisions to refuse access to documents and related matters** discusses issues affecting the effectiveness of the OAIC's FOI regulatory role (other than resourcing) and whether the current system of two levels of external merits review should remain or be revised.
- **Part D: The reformulation of exemptions in the FOI Act, including the application of the new public interest test** suggests that, as existing exemptions appropriately protect sensitive government information, there should be no broadening of exemptions as this would counteract the movement in government towards a pro–disclosure culture.
- **Part E: The appropriateness of the range of agencies covered, either in part or in whole, by the FOI Act** discusses the appropriateness of existing exemptions for agencies and suggests that agencies should only be excluded from the operation of the FOI Act in exceptional circumstances. Sensitive government information should be protected by exemptions for specific documents rather than full exemptions for agencies.
- **Part F: The role of fees and charges on FOI, taking into account the recommendations of the Information Commissioner's review of the current charging regime** gives an outline of key recommendations made in the Charges Review, including suggestions for encouraging administrative access and introduction of clearer charge waiver provisions.
- **Part G: The desirability of minimising the regulatory and administrative burden, including costs, on government agencies** recommends the introduction of a 40–hour processing ceiling for access requests to help agencies better deal with large and complex requests.
- **Appendix: Table of issues with current legislative provisions** sets out technical issues with the FOI Act and the AIC Act, and suggests ways of addressing those issues.

Part A: The impact of 2009 and 2010 reforms to freedom of information laws

Have the reforms been successful?

1. Critical elements of the AIC Act and the *Freedom of Information Amendment (Reform) Act 2010* include:

- **Presumption of openness**
  There is a new presumption of openness and of maximum disclosure. Information requested under the FOI Act or otherwise should be provided unless there is an overriding reason not to do so. Whether requested information is covered by an FOI exemption is only one issue to be considered. The presumption of openness is embodied in the new objects clause in the FOI Act and in the new public interest balancing test that applies to many exemptions.
- **Proactive publication of information**
  Agencies should proactively publish as much information as practicable on their websites. The new Information Publication Scheme (IPS) expands the range of information an agency is required to publish, and invites agencies to publish additional information that will be of public interest. This is often described as the 'push' model of FOI disclosure, as contrasted with the traditional FOI model that largely relies on agencies reacting to information requests (the 'pull' model).
- **Easier, cheaper requests**
  It is easier for members of the public to make FOI requests. The request procedure is simpler, and there are reduced charges, a stronger pressure on agencies to observe the processing time limits, and assistance given by the OAIC.
- **Focused and accessible oversight**
  The FOI review process is intended to be inexpensive and informal, so that it is easier for a person to question or challenge an FOI decision by an agency or minister. New complaint and review procedures based in the OAIC implement this objective.
- **Leadership on open government**
  Two independent statutory officers in the OAIC — the Australian Information Commissioner and the Freedom of Information Commissioner — play a leadership role in securing FOI principles and objectives across government.
- **Integration of privacy, FOI and information policy**
  FOI, privacy and information policy are integrated in a single office: the OAIC. This reflects the importance attached to effective information management in government, and reinforces the responsibility of agencies to pay close attention to information issues. The aggregation of information functions in the OAIC enables a larger office to play a strategic role in aiding the development of consistent information policy in government, monitoring information management and record–keeping in agencies, and providing advice and assistance to agencies, private sector organisations and the public.

2. Broadly speaking, we consider the FOI reforms to have been constructive and necessary. However, measuring their practical success is difficult, particularly given the short period of their operation and the challenge of gathering hard evidence of cultural change. Generally we have found that access to information issues now have greater prominence in government. There is a marked increase in FOI requests for policy–related material, an upswing in applicants challenging access refusals through the OAIC's independent complaint and review processes, and more media reporting based on documents obtained by FOI requests. A clear message for agencies is that information disclosure issues are important not only when access requests are received, but when documents and records are created. Disclosure by design is becoming a necessary practice.

3. Some aspects of agency performance since the reforms raise concerns, including the large number of requests being processed out of time, the increasing cost to agencies of processing requests and the potential for requests of a few to impede the efficient and effective operation of FOI for others. Delay in processing requests is the issue most frequently raised in complaints to the OAIC. Poor communication with applicants is another common problem, particularly where agencies fail to engage with applicants to refine the scope of large or complex requests. In this submission we make a number of suggestions to address these problems such as allowing consultation between applicants and agencies before the start of the statutory processing period (see Part F) and introducing a 40–hour processing ceiling to augment the (underused) practical refusal provisions (see Part G).

Post–reform FOI request and review activity and related matters

4. The OAIC's 2010–11 and 2011–12 annual reports provide detailed statistics about agency performance in processing FOI requests and IC review activity since the introduction of the reforms.[3] Discussion and recommendations about these matters are also contained throughout this submission. Key impacts are described below.

Total FOI requests and requests for non–personal information are increasing

5. The total number of FOI requests has increased by 14.7% since 2009–10, the last full reporting year before the reforms. Request numbers rose by 9.3% in 2010–11 (during the first four months of which the pre–reform Act applied) and 4.9% in 2011–12.

6. There has been a decline in the proportion of requests for personal information since the reforms, with these requests decreasing from 87.2% of all requests in 2009–10 to 82.6% in 2010–11 and 80.7% in 2011–12. The accompanying increase in the proportion of requests for information other than personal information is notable in that these requests are generally more complex or require consideration at a more senior agency level.

[3] Statistics about FOI activity from 1982–83 to 2010–11 were published in a series of FOI annual reports by the Attorney–General's Department, the Department of the Prime Minister and Cabinet and the OAIC. The OAIC published the 2011–12 statistics as part of the broader OAIC annual report for that year.

The decrease in requests granted in full or in part has continued

7. The reforms have not halted the decrease in the proportion of FOI requests granted in full or in part since 2008–09. 93.9% of requests were granted in full or in part in 2008–09, 92.5% in 2009–10, 90.6% in 2010–11 and 88.4% in 2011–12. The proportion of requests granted in full decreased from 71% in 2008–09 to 63.8% in 2009–10, 60.9% in 2010–11 and 59.1% in 2011–12. This decrease has applied to requests for personal as well as other information although, as noted above, the proportion of requests for personal information has also decreased since the 2010 reforms.

Request processing and finalisation timeframes have improved overall

8. The number of FOI requests upon which an agency or minister had not made a decision by the end of the financial year decreased by 14.9% in 2011–12, after an increase of 52% in 2010–11.

9. The number of requests determined (that is, where access was granted in full or in part, or refused) rose by 9% in 2011–12, with an 11% increase in requests finalised (that is, determined, withdrawn or transferred).

10. 88.5% of requests in 2011–12 were processed within the applicable statutory timeframe, compared to 84.2% of requests processed from 1 November 2010 to 30 June 2011.

The practical refusal mechanism is complex and difficult to use

11. In 2011–12, agencies reported issuing 314 notices of intent under s 24AB to refuse a request because a practical refusal reason existed — that is, the work involved in processing the request would substantially and unreasonably divert the resources of the agency from other operations, or the request did not adequately identify the documents sought. 58% of requests subject to a s 24AB notice were subsequently processed following consultation with an applicant.

12. While the practical refusal mechanism is the most direct mechanism in the Act for managing complex and voluminous requests, it can be complex to use and requires the agency to issue a formal threat to refuse a request. The Information Commissioner identified the practical refusal mechanism as a potential area for reform in the Charges Review. For more detail, see Part F.

Applications for amendment of personal information have decreased

13. 3518 applications for amendment of personal records were made under s 48 of the FOI Act in 2011–12, a decrease of 5% compared to 2010–11. This continues a decline in amendment applications that began before the reforms. 99.2% of all amendment applications in 2011–12 were made to the Department of Immigration and Citizenship (DIAC), raising the question of whether new arrangements are needed for applications to amend specific categories of personal information held by DIAC, particularly electronic client records.

14. The matter of whether amendment of personal information should be removed from the FOI Act to be wholly regulated by the Privacy Act is discussed in this section below and in Part F.

Fewer requests are subject to charges

15. Agencies and ministers notified applicants of charges in respect of 1456 requests in 2010–11 and 1423 requests in 2011–12. This compares to a pre–reform figure of 4796 requests in 2009–10. Although a smaller amount of charges were notified after the reforms (with a 51.6% reduction from 2009–10 and 2011–12, not including fees levied under the pre–reform Act), a greater proportion of notified charges were collected from applicants compared to the pre–reform years.

16. The Information Commissioner's recommendations for reform of charges under the FOI Act are discussed in detail in Part F.

More reviews are being sought and finalised

17. Applications for internal review increased by 18.4% in 2011–12 compared to 2010–11. Agencies also reported making 15.3% more decisions on internal review compared to both 2010–11 and 2009–10. Confidence in the internal review mechanism and engagement between applicants and agencies about decisions under the FOI Act appears to be improving.

18. The OAIC has received more applications for external merits review of FOI decisions than when the function was performed only by the AAT. The OAIC received 456 requests for IC review in 2011–12, compared to 110 FOI decisions appealed to the AAT in 2009–10 (the last full year before the reforms). Our views on this matter are discussed in Part C.

19. The OAIC received 880 requests for IC review and finalised 485 or 55% of these requests from its commencement until 5 December 2012. There has been a marked improvement in the IC review finalisation rate since the end of the 2011–12 financial year. Discussion about sustaining and enhancing this improved performance is included at Part B.

Information Publication Scheme compliance has been largely positive

20. Although IPS provisions in Part II of the Act only came into effect in May 2011, initial indications are that they have made a greater volume of government information publicly available in a consistent, discoverable way on agency websites. 85% of agencies which responded to an OAIC survey of IPS compliance indicated that they published the required categories of information under Part II of the Act, with 94% publishing operational information to allow people to understand how decisions are made that affect members of the public.[4] However, issues remained including improper use of charges in some circumstances and failure to comply with web accessibility requirements when making information available under the IPS. The OAIC will work with agencies as part of its ongoing FOI compliance strategy to resolve these issues. The scope of the IPS provisions and web accessibility issues relevant to the IPS are discussed in Parts E and G respectively.

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[4] OAIC (2012), *Information Publication Scheme: Survey of Australian Government agencies — Compliance with IPS obligations*, p 2, www.oaic.gov.au/publications/reports/IPS%20Report%20August%202012.pdf.

Future directions for public access to government information

21. As the discussion above demonstrates, the 2009 and 2010 reforms of the FOI Act have played an important part in improving access to government information. We suggest that, following the reforms, there are several areas of opportunity to further enhance access to information arrangements. These opportunities include establishing a new whole–of–government strategy to build on the achievements of existing open government initiatives, recalibrating the FOI Act to better respond to requests for information and data, and a potential reconsideration of the interaction of the FOI Act and Privacy Act in terms of access and amendment of personal information.

The creation of the OAIC to provide leadership on open government reform

22. The reformed FOI Act establishes a legislative basis for open government through recognition in the objects clause that information held by government is to be managed for public purposes and is a national resource (s 3(3)). The objects clause also obliges agencies to provide access to information promptly and at the lowest reasonable cost (s 3(4)), and places no prohibition or restriction on releasing information outside the Act where an agency is able to do so (s 3A(2)).

23. The Government's July 2010 *Declaration of Open Government* committed to realising possibilities such as these by making government information more widely available for access and reuse to encourage greater public participation in policy development and service delivery processes.[5] The Declaration arose from the Government's response to the 2009 report of the Government 2.0 Taskforce, which agreed with the position of the Taskforce that government can drive social and economic innovation by making a broader range of government information available for reuse in new applications.[6]

24. The Declaration was accompanied by a whole–of–government work program coordinated by a cross–agency Government 2.0 Steering Group. The Steering Group was chaired by the Australian Government Information Management Office (AGIMO), a business group within the Department of Finance and Deregulation. Information–related outputs of the Steering Group included establishing open licensing as the default whole–of–government copyright arrangement, providing advice for agencies about publishing public sector information in a reusable form, and establishing the data.gov.au website (discussed below).[7] The OAIC participated in the Steering Group process and provided further support for the open government agenda through the release in May 2011 of the *Principles for open public sector information* (discussed in more detail in Part B). The Steering Group work program concluded in June 2012, with member agencies taking

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5 Australian Government (Department of Finance and Deregulation) (2010), *Declaration of Open Government,* www.finance.gov.au/e-government/strategy-and-governance/gov2/declaration-of-open-government.html.

6 Australian Government (Department of Finance and Deregulation) (2010), *Response to the Report of the Government 2.0 Taskforce*, www.finance.gov.au/publications/govresponse20report/index.html.

7 AGIMO (Department of Finance and Deregulation) (2012), *Progress on Government 2.0*, http://agimo.govspace.gov.au/progress-on-government-2-0/.

individual responsibility for finalising outstanding work program items and maintaining completed items on a business as usual basis.

25. Several initiatives at the whole–of–government level and from individual agencies are currently underway to increase the amount of government information published in line with the above policy commitments and guidance. For example, agencies can publish data through data.gov.au, which was launched by AGIMO in March 2011. Data.gov.au is the Australian counterpart to the US data.gov and UK data.gov.uk websites, each of which makes thousands of government datasets available. The Australian site currently contains more than 1000 dataset entries and showcases 18 new applications created from that data by members of the public. Other relevant whole–of–government projects include:

- The Digital Transition Policy administered by the National Archives of Australia (NAA), which is shifting all agencies towards a digital record–keeping and information management environment.[8] The OAIC engaged with NAA during the development of the Policy to ensure a consistent approach across government to information policy and management.
- The *Australian Public Service Information and Communications Technology Strategy 2012–15* released by AGIMO, which identifies priorities for government to use technology in new ways to deliver better services, and includes the release of public sector information as a strategic action.[9]
- The APS 200 location study administered by the Office of Spatial Policy and in which the OAIC participated (via the FOI Commissioner's membership of the APS 200 Location Study Project Steering Committee) to establish a whole–of–government location information framework. The framework will improve government decision–making by enabling a better understanding of what government activity occurs where.[10] Two other APS 200 projects have a similarly strong open data dimension: a project on Public Sector Innovation (2011),[11] which proposed greater information sharing to promote innovation within government and with industry; and a project on the Place of Science in Policy Development in the APS (2012),[12] which proposed an open access framework for sharing publicly funded research data, so as to facilitate data access, sharing and integration across the research and public sector.

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8 NAA (2012), *Digital Transition Policy*, http://naa.gov.au/records-management/digital-transition-policy/.

9 AGIMO (Department of Finance and Deregulation) (2012), *Australian Public Service Information and Communications Technology Strategy 2012–15,* www.finance.gov.au/e-government/strategy-and-governance/ict_strategy_2012_2015/index.htm.

10 Office of Spatial Policy (Department of Resources, Energy and Tourism) (2011), *APS 200 Location Project: Summary of Outcomes*, www.ret.gov.au/Department/Documents/osp/APS-200-Location-Project-summary-of-outcomes.pdf.

11 Department of Industry, Innovation, Science, Research and Tertiary Education (2010), *APS 200 Public Sector Innovation Project*, http://innovation.govspace.gov.au/2010/08/13/aps-200-public-sector-innovation-project/.

12 Department of Industry, Innovation, Science, Research and Tertiary Education (2012), *APS 200 Project: The Place of Science in Policy Development in the Public Service*, www.innovation.gov.au/Science/Pages/APS200ProjectScienceinPolicy.aspx.

- The cross–jurisdictional Australian Governments Open Access and Licensing Framework (AusGOAL), which provides licensing advice and support to facilitate the increased release of government information. From April 2012 the FOI Commissioner represented the Australian Government on the Cross Jurisdictional Chief Information Officers Committee sub–committee governing the project.

26. In addition to efforts at the whole–of–government level, several agencies have well–established processes for releasing large amounts of data and information online, with notable examples including the Australian Bureau of Statistics, the Bureau of Meteorology, Geoscience Australia and the National Library of Australia.

27. The value and future development of such projects could be enhanced through the development of a whole–of–government strategy. Other jurisdictions provide examples of such strategies. A domestic example is the May 2012 *NSW Government ICT Strategy 2012* and accompanying *Premier's Memorandum on Open Government*,[13] which committed to increasing online engagement and open access to information. Internationally, the May 2012 United States *Digital Government* strategy[14] and June 2012 United Kingdom *Open Data White Paper*[15] represent clear plans to drive adoption of open government and release of government information.

28. Another relevant international example is the multilateral Open Government Partnership (OGP).[16] The OGP launched in September 2011 with a stated commitment to the principles of open government. The eligibility criteria for OGP membership require a country to have fiscal transparency standards, access to information laws, rules for disclosures related to elected or senior public officials and openness to citizen engagement. As of December 2012, the OGP has 58 member countries, each of which is required to develop an 'action plan' containing specific open government commitments and regularly report on implementation progress. Although the Australian Government is yet to declare an intention to join the OGP, the focus of the OGP on online innovation suggests that Australian involvement could align to the commitments described above and other initiatives such as the National Broadband Network and Digital White Paper.

29. We suggest that, in the wake of the 2009 and 2010 FOI reforms and the conclusion of the Government 2.0 Steering Group process, consideration should be given to establishing an updated whole–of–government plan to further develop and embed the open government agenda. Given the work already accomplished to introduce the concept and principles of open government across agencies, one potential focus for a new work program would be to address specific implementation issues hindering the transition towards open access to information as a default position. Potential examples include

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13 NSW Government (2012), *NSW ICT Strategy*, www.services.nsw.gov.au/ict; NSW Department of Premier and Cabinet (2012), *M2012–10 Open Government,* www.dpc.nsw.gov.au/announcements/ministerial_memoranda/2012/m2012-10.

14 United States Government (2012), *Digital Government: Building a 21st Century Platform to Better Serve the American People*, www.whitehouse.gov/sites/default/files/omb/egov/digital-government/digital-government-strategy.pdf.

15 United Kingdom Government (2012), *Open Data White Paper: Unleashing the Potential*, www.cabinetoffice.gov.uk/sites/default/files/resources/CM8353_acc.pdf.

16 Open Government Partnership (2012), *Open Government Partnership*, www.opengovpartnership.org.

poor information management practices, low discoverability and usability of information, and difficulties with copyright and accessibility. Cooperation at a whole–of–government level to resolve such issues would progress the open government agenda and pro–disclosure goals of the FOI reforms by making it easier for agencies to publish greater volumes of government information online. Current OAIC work that could feed into a potential new open government strategy or work plan is discussed in Part B.

The current FOI focus on documents rather than information

30. The FOI Act is framed around requests for existing documents rather than information more generally. If the information sought is not held in an existing document (as defined in s 4), an agency or minister is not obliged to respond to the request by creating a new document, except in limited circumstances where the applicant seeks access in a different form (s 20) or where the information is stored in an agency computer system rather than in discrete form (s 17).[17]

31. Provisions such as these do not reflect current government practices for creating and managing information. New technologies allow for more efficient search, retrieval and collation of government information in various forms. Distribution of that information is also now possible at relatively low cost through online service portals and publication of data. This is in line with trends towards greater access to personal information on an administrative basis and the open government objective of more widespread release of government information for public access and reuse.

32. In light of these developments, the FOI Act right of access to 'documents' lessens the utility of the Act as a means of accessing government information. However, there are practical difficulties in recasting the Act to allow requests for information rather than documents and it may be that the Act would effectively need to be rewritten.

33. An example of one potential difficulty in adopting a request framework based on information rather than documents is the scope of any obligation to compile information from diverse sources or create a new document containing that information. This may not be an issue in responding to simple, straight–forward requests for information, and in terms of large or complex requests would in some respects be an extension of existing challenges involved in processing requests for documents. But it could nonetheless also add additional complexity to the processing of large requests, particularly where the information is not held in a form that can be easily provided to or compiled for an FOI applicant (a hypothetical example could be information about agency structure or performance that is held among diverse units within the organisation rather than in a centralised form).

34. Defining what constitutes 'information' for the purposes of the Act would be another consideration in shifting to an information request framework. In some cases, access to information legislation from other jurisdictions refers to 'information' but effectively operates in the same manner as a document–based framework. A question raised by a potential move to an information–based framework would be whether the Act should extend to information that is known to agency staff but not recorded in

[17] See also Collection Point Pty Ltd and Commissioner of Taxation [2011] AATA 909.

documentary form, similar to the model adopted in regard to the *Official Information Act 1982* (NZ) (OIA):

> The Ombudsmen consider that the definition of official information also includes knowledge of a particular fact or state of affairs held by officers in such organisations or Departments in their official capacity. The fact that such information has not yet been reduced to writing does not mean that it does not exist and is not 'held' for the purposes of the Act.[18]

35. The New Zealand Ombudsmen supported this aspect of the Act in a submission to the 2012 New Zealand Law Reform Commission review of the Act:

> It is important that unrecorded information continues to be covered [by the OIA] because otherwise agencies could circumvent the intent of the legislation by opting not to record information.[19]

36. The Commission agreed with the Ombudsmen's position. The New Zealand OIA has a successful operation, but adoption in Australia would be a marked shift from the structure and operation of the Commonwealth FOI Act.

37. Short of pursuing this level of restructuring or complete rewriting of the Act, the Review may wish to consider moves in other jurisdictions to implement or consider implementing data request provisions as part of right to information legislation. For example, the *Freedom of Information Act 2000* (UK) has been amended to provide a 'right to data': where an applicant requests access to an existing government dataset, agencies must provide the data in an electronic form that can be reused.[20] In November 2012, the UK Secretary of State for Justice released for consultation a draft code to be issued under the Act describing the type of datasets that can be requested, applicable licensing and formatting standards, and a scale of charges.[21]

38. The New Zealand Law Commission report mentioned above proposes an alternate method for using access to information legislation as a vehicle to drive broader release of government data. The Commission's report recommended a proactive disclosure framework for government information including data, suggesting that this would help the open government agenda 'ensure that it reaches its potential'.[22]

39. Other options could be considered by Australia to lessen the focus on 'document' access and to recognise the transformative impact of technology. One option proposed in Part F is to allow an agency a short period in which to discuss a request with an applicant

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18 Office of the Ombudsman (New Zealand) (2012), *How the official information legislation works*, p 7, www.ombudsman.parliament.nz/system/paperclip/document_files/document_files/460/original/part_1_how_the_official_information_legislation_works.pdf?1351218166.

19 New Zealand Law Commission (2012), *The Public's Right to Know: Review of the Official Information Legislation*, paragraphs 15.17–15.18, www.lawcom.govt.nz/sites/default/files/publications/2012/07/the_publics_right_to_know_nzlc_r125_2012.pdf.

20 See *Protections of Freedoms Act 2012* (UK), s 102.

21 See www.cabinetoffice.gov.uk/news/cabinet-office-launches-open-consultation-foi-data-release-guidelines .

22 New Zealand Law Commission (2012), paragraphs 12.44–12.51.

before the FOI processing period formally commences. During this period an agency could canvass with an applicant the option of providing information rather than existing documents. Another option is to expand the scope of the Information Scheme Publication obligations borne by agencies, to ensure the proactive publication of a greater range of information.

Access and amendment of personal information

40. Both the FOI Act and the Privacy Act enable individuals to obtain access to and amend their own personal information. The interaction and overlap between those Acts requires some attention.

41. As part of its proposed reforms to the FOI Act, the Australian Government announced in March 2009 a proposal to amend the Privacy Act to enact an enforceable right of access to, and correction of, an individual's own personal information, rather than maintain this right through the FOI Act.[23] Consistent with this approach, the Government in its response to the Australian Law Reform Commission report, *For Your Information: Australian Privacy Law and Practice* (ALRC 108), considered that the Privacy Act could provide a simple and user–friendly mechanism for individuals to access and correct their own personal information.[24]

42. This proposal was intended to make the Privacy Act the key Commonwealth law for the collection, handling, disclosure and accessing of personal information. The focus of the FOI Act would shift to access to documents other than an individual's own personal information.

43. In November 2012, the Australian Privacy Principles (APPs) were enacted into law. The APPs replace the two existing sets of principles in the Privacy Act and will take effect in March 2014. APPs 12 and 13 provide individuals with a clear right to access, and have corrected, personal information held about them by agencies. The Explanatory Memorandum to the Bill stated it was intended that the FOI Act should continue to be the primary legislative vehicle by which individuals can seek access to their personal information. Further, the Memorandum stated that 'the ALRC's recommendations which relate to including an enforceable right of access to, and correction of, an individual's own personal information in the Privacy Act (rather than maintaining the right through the FOI Act) will be considered at a later date'.[25]

44. The move towards a model where the Privacy Act is the primary legislative vehicle for individuals to access and amend their personal information will require careful consideration. In particular, consideration needs to be given to the process that will determine whether an application is to be handled under Privacy or FOI and whether this threshold issue can be dealt with administratively by agencies. It will also be necessary to consider whether the mechanism for review of agency access and amendment decisions

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23 Cabinet Secretary, Senator the Hon John Faulkner (2009), *Freedom of Information (FOI) Reform Companion Guide*, p 14, www.dpmc.gov.au/consultation/foi_reform/docs/companion_guide.pdf.

24 Australian Government (Department of the Prime Minister and Cabinet) (2009), *Enhancing National Privacy – Australian Government First Stage Response to the Australian Law Reform Commission Report 108*, p 64, www.dpmc.gov.au/privacy/alrc_docs/stage1_aus_govt_response.pdf.

25 Explanatory Memorandum, *Privacy Amendment (Enhancing Privacy Protection) Bill 2012*, p 86.

should align with those currently available under the Privacy Act, or under the FOI Act: both are different. The OAIC considers that the current complaint resolution process under the Privacy Act and the use of the determination power are adequate to effectively deal with access and amendment disputes concerning personal information.

45. Any decision to locate access and correction rights primarily in the Privacy Act should also consider the fact that government documents may include a mixture of personal and non–personal information, as well as personal information of other people. Accordingly, rights to access some personal information would need to be retained under the FOI Act.

46. If the current arrangements are maintained, technical issues affecting the operation of the existing amendment and annotation framework in Part V of the FOI Act should be addressed. The table of issues with current legislative provisions in the appendix details issues that arise for applicants seeking to exercise amendment rights.

Part B: The effectiveness of the Office of the Australian Information Commissioner

The OAIC: challenges and opportunities

47. The OAIC was established by the AIC Act and commenced operation on 1 November 2010.

48. The OAIC is an independent statutory agency headed by the Australian Information Commissioner. The Information Commissioner is supported by two other statutory officers: the Freedom of Information Commissioner and the Privacy Commissioner.

49. The former Office of the Privacy Commissioner (OPC) was integrated into the OAIC on 1 November 2010.

50. The OAIC brings together the functions of information policy and independent oversight of privacy protection and freedom of information (FOI) in one agency, to advance the development of consistent workable information policy across all Australian government agencies.

51. The Commissioners of the OAIC share two broad functions:

- the FOI functions, set out in s 8 of the AIC Act — providing access to information held by the Australian Government in accordance with the FOI Act, and
- the privacy functions, set out in s 9 of the AIC Act — protecting the privacy of individuals in accordance with the Privacy Act and other legislation.

52. The Information Commissioner also has the information commissioner functions, set out in s 7 of the AIC Act. Those comprise strategic functions relating to information management by the Australian Government.

53. Taken together, these functions cast the OAIC in the roles of regulator, decision maker, adviser, researcher and educator. They require the OAIC to provide guidance and assistance to government, the private sector and the community, while monitoring and regulating compliance with the privacy and information laws that the OAIC administers. The combination of the OAIC's three functions represents a new model for promoting open government and for resolving disagreements between the public and agencies. The OAIC has a larger range of responsibilities than all of its Australian state and territory counterparts and most of its overseas counterparts.

54. The OAIC's FOI and information policy responsibilities and activities include complaint investigation, IC reviews, managing extensions of time, audits, surveys, publication of guidelines and fact sheets, an advisory committee, the Information Contact Officers Network (ICON), discussion groups, training sessions, regular presentations to forums in and outside government and general promotion of open government.

55. In our view, the combination of these functions provides a logical basis for an integrated scheme for information management and policy. Most FOI requests received by government agencies are for personal records (comprising 87.3% of all requests from 2000–01 to 2011–12), and the most common issue in FOI review applications received by

the OAIC is the personal privacy exemption in the FOI Act. The need for proper management of personal information, balanced against the benefits to government and the community of a more liberal approach to information publication and sharing, is a core principle reflected in the OAIC's engagement with agencies and the public.

56. The OAIC's integrated functions provide an ideal context for protecting personal information, while balancing privacy interests against other considerations concerning information management, access and sharing.

57. The OAIC has also taken an active role in providing advice to government, agencies and the general public about the operation of the FOI Act. The OAIC's advice on these matters has reflected our statutory independence, providing sound, practical input for the consideration of government and Parliament in making decisions about the operation and future direction of the FOI Act. A prominent example is the Charges Review report provided to the Attorney–General in February 2012, which made a series of recommendations for reform of the Act's charges provisions (discussed at Parts F and G). The OAIC has also provided FOI–related submissions to relevant government and parliamentary inquiries, and provided advice to government and agencies about the application of the Act to the Parliamentary departments and the Parliamentary Budget Office.

58. Since its commencement, the OAIC has developed and released a range of publications to inform agencies and the public about the administration of the FOI Act, including:

- the *Guidelines under s 93A of the* Freedom of Information Act 1982, which provide agencies with formal plain language guidance about the Information Commissioner's interpretation of the Act
- a series of Agency Resources about best practice administration of specific provisions of the FOI Act
- a *Guide to the Freedom of Information Act 1982*, designed to communicate the main provisions and principles of the Act to a wide audience, both inside and outside government
- plain language fact sheets and frequently asked questions for both agencies and the general public to provide a brief, clear explanation about the operation of the FOI Act and the role of the OAIC
- annual reports and FOI statistics reporting on actions of agencies and ministers under the FOI Act and the work of the OAIC.

59. The above guidance material has influenced agency FOI administration and assisted the public to understand and exercise their rights under the Act. From its establishment until the end of 2011–12, the OAIC also provided assistance to agencies and the public in response to over 2,500 enquiries specifically relating to FOI. In 2010–11, the OAIC also provided training to over 300 staff from 80 agencies about the FOI reforms. These forms of assistance have reduced the time and resources needed for agencies to develop their own internal FOI guidelines and procedures and promoted understanding and acceptance of the reforms.

60. The OAIC has also undertaken various compliance activities in respect of agency FOI activity. In September 2012, the OAIC commenced an own motion investigation under s 69 of the FOI Act into DIAC's handling of complex and sensitive FOI requests.[26] The OMI was launched in response to six complaints and nine applications for IC review arising from the conduct of DIAC in processing 27 separate non–personal FOI requests from 10 individuals. Compliance with statutory timeframes was an issue in each request, and the investigation report subsequently made a series of recommendations to improve DIAC's FOI processing in these and other areas. DIAC accepted the recommendations.

61. The OAIC has also launched an IPS compliance review program that involves working with agencies to evaluate their performance in respect to the information publication requirements in Part II of the FOI Act. The program involves a self–assessment checklist for agencies to evaluate their own IPS performance, two OAIC surveys of agency IPS entries (with the first conducted in May 2012 and the second to be conducted before 2016) and OAIC desktop reviews of agency IPS entries before 2016 (with feedback provided to individual agencies). The intention is that the program will build on existing OAIC guidance by improving individual agency compliance and identifying any systemic issues inhibiting best practice performance.

62. The OAIC has undertaken these and other FOI functions while also carrying out a full privacy and information policy workload. In terms of privacy in 2011–12, the OAIC:

- responded to over 10,000 enquiries about privacy and protection of personal information
- received 1357 privacy complaints in 2011–12 (an 11% increase compared to 2010–11)
- opened 59 privacy own motion investigations
- received 56 voluntary data breach notifications
- conducted three audits under memorandums of understanding, and
- received 285 media enquiries, a 28% increase mostly related to privacy issues.

63. This occurred at a time when the OAIC also received new powers to regulate the handling of personal information under the *Personal Property Securities Act 2009* and the *Personally Controlled Electronic Health Records Act 2012* and was heavily involved in reforms to the Privacy Act. The OAIC is currently undertaking a substantial work program to prepare the required guidance materials, legislative instruments and operational procedures to reflect the Privacy Act reforms. This work is necessary to ensure that the OAIC can exercise its new powers effectively and that sufficient information and support is available to agencies, organisations and the public about the new arrangements.

64. Significant amendments to the Privacy Act passed by the Parliament in December 2012 will further broaden the regulatory role of the OAIC in the area of privacy. This will involve, for example, the ability of the OAIC to conduct private sector audits, wider code

[26] OAIC (2012), *Processing of non–routine FOI requests by the Department of Immigration and Citizenship: Report of an own motion investigation*, www.oaic.gov.au/publications/reports/immigration_processing_non-routine_FOI_sep2012.html.

making powers across the private and public sector and enhanced enforcement powers for responding to large data breach incidents. Enforceable undertakings and access to civil penalties will fundamentally change the nature of the OAIC's regulatory role. Additional complexity for the OAIC's privacy work program arises from the reformed cross–border disclosure principle which will necessitate close regional and international engagement with counterpart organisations in other jurisdictions.

65. In terms of information policy, the OAIC has worked with agencies to encourage a consistent approach and commitment across government to making public sector information available as widely as possible while respecting privacy, security and legal protections. An important part of this work was the May 2011 release of the Information Commissioner's *Principles on open public sector information* (the Principles). The Principles recommend that agencies enhance the economic and social value of public sector information by releasing it in discoverable and usable forms under open licensing conditions. They were released as part of a core vision for government information management in Australia, and start with the premise taken from the objects of the FOI Act that public sector information is a national resource that should be available for community access and use. The OAIC believes that the Principles and its other associated information policy work have contributed to a cultural shift within government towards the attitude that public sector information and publicly funded information should be made available wherever possible.

66. In November 2011, the OAIC hosted an information policy conference in Canberra that was attended by over 270 delegates from Commonwealth and state agencies, the media, industry and the community. The conference brought together leaders in the information policy field together for the first time, and attendance was in such demand that potential delegates had to be turned away due to lack of space. Feedback was positive, and included support for the value of continued OAIC leadership in this area to realise a whole–of–government approach to open government. Other OAIC information policy work included publishing an issues paper about the value of public sector information in Australia and carrying out a survey of public sector information management practices; supporting the Information Advisory Committee (IAC);[27] and participating in whole–of–government initiatives and work programs such as the Government 2.0 Steering Group, the Digital Transition Policy, the APS 200 location project and AusGOAL (all of which are discussed in Part A).

67. The OAIC is currently developing a report addressing the findings of the aforementioned agency information management survey and making recommendations about future whole–of–government direction in this area. We anticipate that a particular focus of the upcoming report will be on specific issues identified by agencies as barriers to the greater release of government information. These issues include maintaining discoverable and usable information holdings, ensuring robust information asset management processes, and other matters including web accessibility and open licensing. As mentioned in Part A, adopting a collaborative and coordinated whole–of–government approach to address issues such as these could provide the basis for a new open

[27] The IAC is established under Part 4 of the AIC Act and assists and advises the Information Commissioner in promoting sound information policy and practice across government.

government work plan to further the Government's policy commitments in this area. This approach could serve the dual benefit of satisfying Australia's reporting obligations in the event that the Government decides to participate in the Open Government Partnership.

68. As with the privacy function, undertaking the information policy function has also involved resourcing challenges. Specifically, the cost of administering the IAC has been unexpectedly high. The committee comprises 13 members in addition to the Information Commissioner (including three Australian Government employees and 10 external members). The external members, most of whom reside some distance from Canberra, are entitled under the AIC Act and Remuneration Tribunal determination to business class travel to IAC meetings and travelling allowance. It is planned to hold three IAC face–to–face meetings each year in Canberra and one in Sydney; this could cost over $50,000 each year if all members attend meetings and access business class travel. The cost of such meetings is drawn from the OAIC's budget allocation.

69. IAC members at the first IAC meeting in December 2011 attributed the success of the meeting to the opportunity for free–ranging discussion over several hours between people with differing expertise who had not previously worked together as a committee. The Information Commissioner believes this consideration is still valid. To this end, in the interest of finding other efficiencies in the running of the IAC, the table of legislative issues at Attachment A recommends that the IAC be merged with the Privacy Advisory Committee (PAC) established under Part VII of the Privacy Act. This would allow scope for the OAIC to realise administrative savings in running both committees. However, we also note the differences between the existing IAC and PAC provisions. Consideration would need to be given to the composition of any joint committee to ensure fair representation of privacy and information policy interests as well as both the private and public sectors.

70. The OAIC's information policy and privacy functions, while bringing resourcing issues of their own, have also complemented the FOI functions at a practical level. As mentioned above, requests for personal information and use of the personal privacy exemption factor heavily into overall FOI request and IC review activity. The inclusion of privacy and FOI in one agency has enabled the OAIC to develop a more comprehensive understanding of these issues; it has also enabled the Privacy Commissioner to make decisions in a number of privacy–related IC reviews. The common pro–disclosure aspects of the FOI and information policy functions have led to the development of cohesive advice about how agencies should administer their FOI obligations in a way that maximises the amount of government information available for public access and reuse.

Establishment of the OAIC: initial staffing and budget allocation

71. Despite the advantages of integrating the three functions of the OAIC into a single office, this workload should be considered in the context of staffing levels and a funding model that have not matched the forecasts prior to the OAIC's establishment.

72. Realisation of effective open government leadership and oversight in future requires appropriate investment and resourcing. The effective operation of the OAIC can assist in promoting an efficient and effective system to achieve open government objectives and the protection of personal information.

OAIC staffing and funding levels and the impact of the efficiency dividend

73. The OAIC was structured around the former OPC. Initial planning anticipated than an average staffing level (ASL) of 68 OPC staff would be joined by an additional 32 staff for the FOI and information policy functions, for a combined ASL of 100. As shown in figures from subsequent annual reports and portfolio budget statements, these projections corresponded to neither final OPC staffing levels nor subsequent OAIC staffing growth.

74. The OPC had an ASL of 60 at the end of 2009–10.[28] By the end of 2010–11, the OAIC had an ASL of 75.26. This was projected to rise to 81 in the 2011–12 budget; the actual 2011–12 ASL figure was 79.87. The 2012–13 portfolio budget statement forecast an ASL of 79; as of December 2012 the OAIC has 77.85 full–time equivalent (FTE) staff, not counting another 14.65 FTE positions funded under memoranda of understanding with other agencies to undertake specific privacy work.

75. In summary, the OAIC has approximately 20 more staff than did the OPC when the OAIC was established. With these 20 extra staff, the OAIC has to undertake both an expanded privacy function and the new workload of the FOI and information policy functions. These staffing pressures are unlikely to ease given the current budget forecasts of a decrease of revenue from government for the OAIC from $11,020,000 in 2011–12 to a projected $10,801,000 in 2012–13 and $10,727,000 in 2013–14.[29] This has resulted in the need to move a number of staff resources from the privacy function to allow the OAIC to undertake its other functions.

76. Other resourcing challenges arise from the Government's additional efficiency dividend of 2.5% in the 2012–13 financial year, on top of the existing efficiency dividend of 1.5%. In announcing the additional efficiency dividend, the Minister for Finance and Deregulation stated that five tribunals would be exempt from the measure, including the AAT.[30]

77. One of the reasons for the establishment of the OAIC was to take principal responsibility for external merit review of FOI decisions, which to that point had been conducted by the AAT. Consequently, applicants can no longer directly appeal to the AAT from a primary FOI decision without first seeking IC review. The new arrangements have led to a 75.6% reduction in FOI decisions appealed to the AAT between 2010–11 and 2011–12. We believe that, in light of the OAIC's role in the FOI merit review system, a similar consideration should be applied to the OAIC as to the AAT and other tribunals exempt from the additional efficiency dividend.

78. The Minister's announcement also stated that agencies would be expected to find savings in areas including use of consultants, domestic and international travel,

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[28] OPC (2010), *Office of the Privacy Commissioner Annual Report 2009–10*, p 85; OAIC (2011), *Office of the Australian Information Commissioner Annual Report 2010–11*, p 58.

[29] Attorney–General's Department, *Attorney–General's Portfolio 2012–13 Portfolio Budget Statement*, p 412, www.ag.gov.au/Publications/Budgets/Documents/Attorney-General%20s%20portfolio%20PBS%202012-13%20full%20book.PDF.

[30] Minister for Finance and Deregulation (2011), *Driving Efficiency Savings within Government*, www.financeminister.gov.au/media/2011/mr_pw25311.html.

hospitality and entertainment, and media and advertising expenditure. The OAIC's expenditure on these areas constituted just over 3% of all expenses in 2010–11. Given that staff costs constituted 70% of the OAIC's budget in 2011–12, the OAIC will only be able to absorb the additional efficiency dividend by reducing staff numbers.

79. The impact of a staff reduction on the exercise of the OAIC's FOI functions is uncertain, particularly given that the potential caseload was unclear when the OAIC commenced and future patterns are still difficult to predict. Between 1 November 2010 and 5 December 2012, the OAIC finalised:

- 485 or 55% of 886 applications for IC review
- 224 or 76% of 295 FOI complaints
- 4276 or 99.6% of 4295 extension of time requests

80. The OAIC's program deliverables call for 80% of IC reviews to be finalised within six months and 80% of FOI complaints within twelve months.[31] In 2011–12, the OAIC's performance against these targets stood at 88.1% of FOI complaints finalised within twelve months and 32.8% of IC reviews finalised within six months.

81. The OAIC finalised 29 requests for IC review in 2010–11, 253 in 2011–12 and 203 between 1 July 2012 and 5 December 2012. IC review processing time has improved since May 2012, when an SES officer was seconded from the Attorney–General's Department (AGD) to undertake a management review of OAIC handling of FOI complaints and reviews. Following the introduction of new processes for handling and processing IC reviews and further secondment and assignment of non–ongoing staff to these functions, the finalisation rate has risen to 39.14 IC reviews per month since May 2012; the rate since November 2010 is 19.12.[32] Given that the OAIC is not funded to retain the non–ongoing staff who made the improved IC review finalisation rate viable, it is not likely that this performance can be sustained over time without additional resources and changes to the system of IC review in the Act.

82. This submission contains a number of recommendations to amend technical deficiencies in the Act to introduce more efficient IC review arrangements. The submission also identifies a number of technical issues and potential improvements relating to the Act's extension of time provisions, which are difficult and time–consuming for both agencies and the OAIC to administer, often to little benefit. These recommendations would reduce the administrative burden on both agencies and the OAIC in finalising IC reviews and administering extension of time requests, and should subsequently lead to a sustainable improvement in the performance of the OAIC as well as an FOI system that is faster and more efficient overall. See in particular the discussion of IC review and extensions of time in Part C and the table of issues with current legislative provisions in the appendix.

83. There are many Australian Government agencies with a role in promoting open government, information policy and better information management. They include the OAIC, supported by the Information Advisory Committee; the Attorney–General's

[31] Refer to Chapter Two of the OAIC Annual Report 2011–12.
[32] As at 29 November 2012.

Department with portfolio responsibility for freedom of information, privacy, the OAIC, intellectual property and information security; the Department of Industry, Innovation, Science, Research and Tertiary Education in relation to promoting greater information sharing to support innovation in government and the community; AGIMO in relation to information and communications technology and implementing the Gov 2.0 proposals; the NAA in relation to records management and the digital transition policy; the Australian Bureau of Statistics in relation to promoting statistical standards and data use and reuse; and the Defence Signals Directorate in relation to information security policies.

84. The OAIC works with all those agencies during the year. However, with the exception of the Attorney–General's Department as the portfolio department for the OAIC, there is no formal arrangement with other agencies. We believe there would a distinct advantage in explaining the role and the relationship of those and other agencies in a national action plan endorsed by the Australian Government. This would be a further positive step in advancing the watershed open government and information management reforms that occurred in 2009–10.

Part C: The effectiveness of the new two–tier system of merits review of decisions to refuse access to documents and related matters

Increased take up of external review — refinements needed to optimise the efficiency and effectiveness

85. Before the commencement of the OAIC, the AAT was the only avenue for external merit review of decisions of agencies and ministers on FOI requests. 110 applications for review of FOI decisions were lodged with the AAT in 2009–10 and 83 in 2010–11.[33] For FOI requests made on or after 1 November 2010, applicants seeking external review must apply to the OAIC in the first instance. In the first two years of the OAIC's operations the number of applications for external review increased significantly; 176 applications for IC review were made in 2010–11, increasing to 456 in 2011–12.[34] The rate of applications for IC review is continuing to increase; the 237 applications received in the first five months suggest that the number of applications for the current year will be in the order of 550–600. While some of this increase could be due to the increased number of FOI requests received by ministers and agencies (an increase of almost 15% from 2009–10 to 2011–12), the more influential factors are that a person can make a free application for IC review, and legal representation is not required.

86. While the volume of IC review applications is a sign of the effectiveness of the FOI reforms in allowing a greater number of people to seek independent review of government FOI decisions, the OAIC has been struggling to respond to the high level of demand in a timely way.[35] In addition to the budget constraints affecting the office (discussed in Part B above), the operation of the FOI Act and AIC Act has also created barriers to the effective and timely resolution of review applications. Part of the challenge facing the OAIC is that it has a broad range of FOI functions, including external merit review, FOI complaint and own motion investigations, processing extension of time requests, and reviewing compliance with the IPS. While much has been achieved, the OAIC has found it difficult to manage the volume of cases, particularly in resolving IC review applications in a timely manner.

87. The level of resourcing is a significant factor but not the only one. Legislative provisions create areas of complexity and uncertainty which impact adversely on the effectiveness and efficiency of the OAIC's regulatory functions. These issues and suggestions for improvement are discussed below for each function. The table of issues with current legislative provisions in the appendix also details where the provisions arise in the current version of the FOI Act and proposed changes.

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33 AAT (2010), *AAT Annual Report 2009–10,* Appendix 3, page 132; AAT (2011), *AAT Annual Report 2010–11*, Appendix 3, page 131.

34 OAIC Annual Report 2010–11, p 12; OAIC Annual Report 2011–12, p 94.

35 OAIC Annual Report 2011–12, p 94.

Information Commissioner review — legislative impediments to effective resolution

88. Changes to the Information Commissioner's functions and powers in five areas would greatly enhance the effectiveness and efficiency of the IC review function to operate promptly and accessibly at the lowest cost to government. Five such changes would be:

- permit delegation of the IC review decision–making power
- authorise the Commissioner to remit a matter to an agency or minister for reconsideration
- provide clearer mandate and powers to resolve IC review applications by agreement between the parties to a review
- resolve complexity and uncertainty in provisions on third party review rights
- clarify application of secrecy provisions in other legislation to IC reviews.

Delegable decision–making power

89. Section 25 of the AIC Act prohibits the delegation of the IC review decision–making power. This means that IC review decisions can only be made by the Information Commissioner, FOI Commissioner and Privacy Commissioner. With the extensive range of functions performed by the OAIC requiring Commissioner involvement, there is a clear need for the IC review function to be delegable to other senior officers, such as an Assistant Commissioner. This would offer a significant improvement to the effectiveness of the OAIC, and would be similar to the position under the Queensland *Right to Information Act 2009* (RTI Act). The type of cases made by a delegated decision maker would be specified in any instrument of delegation.

Remittal power required

90. Unlike the AAT, the Information Commissioner has no power to remit a decision to an agency for reconsideration. This has been problematic for cases involving deemed refusals or processing very large requests. It is not practical or desirable for the OAIC to be, effectively, the original decision maker in IC review cases. In cases where an agency has engaged with processing large requests but has not completed them, the OAIC can be placed in a situation without an effective solution.[36] We propose that a power to remit be added to the list of options available under s 55K of the FOI Act.[37] The remittal power should include a power to make binding directions as to how the decision should be made. Those decisions could be reviewed by the AAT if an agency or minister disagreed with the imposition.

[36] In one case, for example, an agency was processing a request involving some 80,000 folios. The applicant sought review of the entire request. Had the agency not been willing to finalise processing, it is doubtful the OAIC could process a request of this size.

[37] Refer to the appendix.

Clearer mandate and support for alternative dispute resolution and conciliation

91. Australian Government policy encourages agencies to use alternative dispute resolution (ADR) as a means to resolve legal disputes informally, with adjudicative determination of disputes to be used only as 'a last resort'.[38]

92. Three main advantages of the resolution of FOI disputes by agreement, compared to adjudicative determination, are:

- Informal resolution is generally quicker and more affordable than adjudication. It also has the potential to be more informal, with less focus on the law and more attention paid to the interests of the parties.
- An outcome reached through compromise and agreement can be more flexible than what is possible through an adjudicated decision. For example, an agency might agree to provide an interview to a journalist FOI applicant rather than formally considering for release many pages of documents relevant to his or her FOI request. This would provide the journalist with an answer to his or her questions, while saving agency decision–making time.
- The process of reaching an outcome through negotiation and compromise can promote dialogue and understanding between the parties. This can prevent future disputes from emerging or create a dialogue between parties that reduces the need for more FOI requests to be lodged.

93. In recognition of these benefits, the OAIC attempts to encourage the resolution of matters informally by way of agreement between the parties where possible. However, the OAIC has encountered significant legislative barriers to the effective informal resolution of reviews in Part VII of the FOI Act.

94. Section 55 of the FOI Act confers a wide discretion on the Information Commissioner to decide how to conduct IC reviews. Section 55(4)(a) requires that IC reviews be conducted with as little formality and technicality as possible, which is consistent with the widely acknowledged benefits of ADR. Section 55(2)(b) states that the Information Commissioner **may** '*use any technique that the Information Commissioner considers appropriate to facilitate an agreed resolution of matters at issue in the IC review (for example by using techniques that are used in alternative dispute resolution processes)*.'

95. While s 55 allows the Information Commissioner to attempt resolution through alternative dispute resolution (ADR), it is not aligned with the Government's general approach that ADR should be the first and preferred alternative to the adjudicative determination of disputes.

96. Some agencies are hesitant to recognise that informal resolution by agreement is a legitimate way to finalise an IC review. They take a view that in IC review they are limited to considering only whether to release documents subject to the FOI request, and

[38] See, for example, Attorney–General the Hon Robert McLelland, 'Speech to the Multi–Door Court House Symposium' (Speech delivered at Old Parliament House, Canberra, 27 July 2009); NADRAC, *The Resolve to Resolve — Embracing ADR to Improve Access to Justice in the Federal Jurisdiction* (Commonwealth of Australia, 2009), 1. See also *Legal Services Directions 2005* [5.1].

are unwilling to cooperate with the OAIC's approach to seeking to reach a mutually acceptable resolution. A stronger legislative basis in the Act to use ADR (such as conciliation, case appraisals, and possibly mediation) in external reviews may help to address this issue.

Difficulty implementing settlement of IC reviews under Act

97. A significant issue is the lack of a clear basis for finalising reviews informally by agreement.

98. The most obvious mechanism to finalise matters by agreement in Part VII of the Act is s 55F (Procedure in IC review — review parties reach agreement). However, that provision is limited to agreement as to the 'terms of a decision on IC review' that would be 'within the powers of the Information Commissioner'. This wording limits the utility of s 55F because, for example, it is not within the power of the Information Commissioner to require that an agency create a new document, yet this could otherwise be part of an agreement reached between the parties to an IC review.

99. Section 55F provides a number of steps that must be taken before a review can be finalised by agreement. In summary, if all review parties (including third parties, of which there may be many) can reach an agreement (ss 55F(1)(a) and (b)) that is reduced to writing and signed (s 55F(1)(c)) and that the Commissioner determines is within his powers (s 55F(1)(d)), the Commissioner may make a decision in accordance with those terms without completing the review (s 55F(2)). It is the OAIC's view that this finalises the IC review. However, the reference in the heading of s 55F as relating to procedure, and its location within Division 6 (Procedure in IC review) of Part VII, makes this less clear. It is located in a different division from the other provisions that can result in a review being finalised (for example, ss 54W, and 55K). On one interpretation, an agreement under s 55F would need to be implemented by way of a decision of the Information Commissioner made and published under s 55K. It would be desirable for s 55F (or any replacement informal resolution provision) to make it clear that an agreed outcome finalises the review.

100. The lack of an effective means to implement a conciliated agreement is far from satisfactory. Applicants are hesitant to agree to withdraw their application on a promise by the agency to take a particular step, when it is unclear how this promise could be enforced. Agencies are hesitant to carry out their side of the bargain before the applicant withdraws, because once the agency has done what it agreed to do, there is nothing to prevent the applicant from demanding that the review continue.

101. The practical requirements of s 55F impede effective early resolution. It may be difficult for parties to agree to a precise expression of the terms of their agreement in writing. Further, requiring all parties to sign a written agreement adds a degree of complexity, given that IC review parties can be anywhere in Australia, and sometimes even located overseas. As noted above, an agreement must be within the Information Commissioner's powers, which rules out many creative solutions to resolve disputes.

102. Because of these difficulties, the majority of matters that are resolved by agreement are finalised through s 54R (IC review applications — withdrawal) rather than s 55F. This is reflected in OAIC statistics: of the 423 applications for external review finalised to 30 June 2012, only three were finalised under s 55F. The majority of matters

that were finalised by agreement were finalised by the applicant withdrawing their application once the agency provided access to the documents subject to the agreement — 152 of the 423 matters were finalised by withdrawal.[39] While this is a significant proportion, more cases should ideally be able to be resolved by agreement between the parties — both for the efficiency of OAIC processing and the satisfaction of parties to the reviews.

Options — conciliation in IC reviews

103. We consider that the objects of the FOI Act will be served by robust use of ADR processes. It would also support efforts to reduce the administrative burden on agencies and potentially support practice improvement. Accordingly, an expectation for ADR to be considered in review cases, and a mechanism for finalising cases by agreement should be included in a dedicated division of the Act.

104. An example of a streamlined and effective ADR provision is s 90 of the Queensland RTI Act, which provides:

> **90 Early resolution encouraged**
>
> (1) If an external review application is made to the information commissioner, the commissioner must —
>
> (a) identify opportunities and processes for early resolution of the external review application, including mediation; and
>
> (b) promote settlement of the external review application.
>
> …

105. This provision, rather than merely *allowing* the Information Commissioner to use ADR techniques where appropriate, puts the onus on the Information Commissioner to attempt to resolve disputes informally where possible. A similar provision exists in s 46PF of the *Human Rights and Equal Opportunity Act 1986*, which requires the President to inquire and attempt to conciliate complaints.

106. A strong statutory mandate to use ADR processes would provide assurance to agencies that the informal resolution of IC reviews is a legitimate means of achieving the objects of the Act.

107. A statutory obligation to resolve matters informally would open the way for this office to use 'case appraisals' or 'preliminary views' as a legitimate form of ADR (conciliation). Conciliation is a form of dispute resolution where an impartial third party (in this case, officers employed by the Information Commissioner) have an advisory but not a determinative role. Conciliation is a form of mediation used by public agencies to administer rights granted under legislation.

[39] Not all of the withdrawals followed an agreement. The OAIC has only recently started counting such withdrawals to be able to report on these resolutions of IC review.

108. Section 90 of the RTI Act also provides a model for a clear informal resolution closure provision as an alternative to the uncertainty that arises from s 55F of the FOI Act:

> **90 Early resolution encouraged** …
>
> (4) If an external review is resolved informally —
>
> (a) the commissioner must give each participant in the external review notice that the external review is complete; and
>
> (b) the external review is taken to be complete at the date of the notice mentioned in paragraph (a).

109. In this model, where parties reach an agreement the Information Commissioner can resolve a matter by issuing a notice under s 90. This power is delegated to the Assistant Commissioner level. Whether the agreement is recorded in writing, or reached during an in–person or telephone conference or conciliation, the Information Commissioner has the power to record that agreement in a notice which also finalises the review. This streamlined closure power allows for more effective informal resolution.

110. In the interests of clarity, it may also be beneficial to state in s 55K that, if a matter is resolved informally, a written decision by the Information Commissioner is not required.

111. We encourage the review to consider recommending the adoption of these two elements of s 90 of the RTI Act, that is, a strong mandate for the Information Commissioner to conduct ADR (possibly a requirement that informal resolution be attempted in all matters), and a streamlined mechanism to finalise matters where agreement is reached.

112. While removing these legislative impediments would go some way to facilitating informal resolution in IC reviews, this could be further enhanced by providing dedicated resources to the OAIC to resolve matters informally. For example, the Queensland OIC has established a dedicated Early Resolution and Assessment team consisting of one Assistant Commissioner and three review officers, which attempts informal resolution of all applications for external review as a first step. The Queensland OIC finalises a large proportion of reviews informally and with high reported rates of agency and applicant satisfaction.[40] Current OAIC resources would not support the creation of a separate and dedicated early resolution and assessment team as in Queensland.

Resolve complexity and uncertainty regarding third party review rights

113. The provisions of the FOI Act relating to third party review rights are complex and technical and can impede efficient resolution of IC reviews.

114. The parties to an IC review are set out in s 55A. This provides that an affected third party (if any) is required to be notified of the IC review application and is a party to the review. An obligation is placed on the respondent agency or minister to notify an affected third party (as defined under s 53C) if an application for review is made of an

[40] In 2011–12, of the 457 reviews finalised by the Queensland OIC, 88% were resolved informally, with a 71% applicant and 98% agency satisfaction rate: Office of the Information Commissioner (Queensland), *Annual Report 2011–12*.

access refusal decision. The definition of an affected third party is in Part VI (dealing with internal review) and is unclear. It derives from the provisions for formal consultation under ss 26A, 26AA, 27 and 27A. The wording in s 53C differs between provisions where consultation *is required* with a State or the Commonwealth or a State regarding Norfolk Island Affairs and those where ss 27 or 27A *apply* in relation to business documents or documents affecting personal privacy.

115. The consultation provisions operate differently. Where consultation is undertaken on documents that may be conditionally exempt under s 47B as affecting Commonwealth–State relations, the consulted party must be given notice of any decision to give access to the document(s) and on opportunity for review allowed before access is given. Unlike the consultation provisions relating to business documents and personal privacy, this occurs even if the consulted party has not made submissions in support of the exemption contention.

116. The provisions prescribing who the parties are to a proceeding are different for reviews by the AAT (s 60) and the IC (s 55A). In an AAT review, the person who made the request or application, in respect of which the decision was made, is automatically a party to the review. This differs from the IC review process where that person will not automatically be a party to a review of an access grant decision (to be involved they must apply to the Information Commissioner to be joined as a party). A similar but reverse inconsistency arises in relation to third parties. An affected third party is not a party to an AAT review of an access refusal decision, although they can be made a party under s 30(1A) of the *Administrative Appeals Tribunal Act 1975*. By contrast, an affected third party is automatically party to an IC review of an access refusal decision.

117. Overall, we consider the provisions for third party review rights are unduly complex and a hindrance to effective processing and resolution of external reviews. The Queensland RTI Act provides an example of much simpler and more effective provisions that could be adopted in the FOI Act. Under this approach, only the applicant for external review and the respondent are automatically parties to the review, while others affected by the reviewable decision can apply to be made parties. In addition to being simpler to understand, such an approach can also be beneficial for resolution of external reviews by agreement. For example, the applicant may be willing to narrow the scope of contested documents to exclude the documents or parts of documents affecting third parties or to accept other information related to their access request. If multiple parties are automatically involved in the review, it can be a significant impediment to reaching such an agreement.

Issues with the operation of secrecy provisions

118. The OAIC has encountered obstacles to obtaining documents from some agencies due to the operation of secrecy provisions in legislation administered by the agencies. While we consider that the OAIC's information gathering powers extend to obtaining documents subject to secrecy provisions, it would be desirable to put the matter beyond doubt. We consider that the FOI Act should expressly provide that the Information Commissioner (or AAT for AAT reviews) can require production of any exempt documents notwithstanding a secrecy provision in another act, unless there is an expressly worded provision in that Act to prevent this.

119. A further issue with the operation of review of documents subject to secrecy provisions arises from the operation of s 55L and judicial authority from Branson J in *Illawarra Retirement Trust v Secretary, Department of Health and Ageing* (2005) 143 FCR 461. As discussed in *A and Department of Health and Ageing*,[41] the Information Commissioner is prevented from exercising the powers and discretions of the original decision maker that could be used to authorise the release of documents covered by a secrecy provision. We recommend that the FOI Act should be revised to make it clear that external reviews operate according to the usual principles that the Information Commissioner or AAT should be able to exercise the full range of powers and discretions open to the original decision maker, including the application of exceptions to secrecy provisions.

Investigation of FOI complaints — insufficient flexibility and discretion

120. Investigation of complaints about FOI processing was previously a role performed by the Commonwealth Ombudsman. While the number of FOI complaints the OAIC received since commencing (126 in 2011–12) is almost as many as the Ombudsman (137 in 2009–10), the OAIC's complaints deal only with FOI administration and not the merits of FOI decisions (which are now dealt with in IC reviews). Unlike the Commonwealth Ombudsman, the Information Commissioner cannot delegate the powers relating to complaint investigation, including a decision not to investigate. Further, the criteria for decisions on complaint investigations,[42] including the discretion not to investigate, are significantly narrower. While the volume of FOI complaints is not high, these limitations mean that the OAIC's complaint investigations necessarily involve a higher level of oversight and pose an obstacle to declining to investigate baseless or trivial complaints. The table of issues with current legislative provisions in the appendix includes proposals for resolving both of these concerns by:

- removing the prohibition on delegation of complaint handling powers, and
- broadening the grounds for exercising the discretion not to investigate a complaint to be similar to those in the *Ombudsman Act 1976*.[43]

Processing notifications and requests for further processing time — need for review of this function

121. The FOI Act sets out timeframes within which agencies and ministers must process FOI requests. If a decision on a request is not made within the statutory timeframe, the agency or minister is deemed to have made a decision refusing the request and the FOI applicant can apply for IC review of the decision.

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41 [2011] AICmr 4, [27–32].

42 Section 25 of the AIC Act lists non–delegable functions and powers including ss 73 and 86 of the FOI Act.

43 Section 6 of the *Ombudsman Act 1976* provides the Ombudsman with the discretion not to investigate certain complaints, including where the Ombudsman is of the opinion that investigation or further investigation is not warranted having regard to all the circumstances (s 6(b)(iii)).

122. Before the 2010 reforms, a general deeming provision was in place to enable an application for review to be made to the AAT when a decision had not been received by the applicant within the statutory processing period.[44] This was a rare occurrence, and in most cases agencies or ministers continued to process requests outside of the statutory time period.

123. The 2010 reforms placed tighter controls around FOI processing delays. Agencies are no longer able to impose a charge if a decision is not reached within the statutory timeframe. There are steps agencies can take to obtain time to process requests outside the standard 30 day processing period. Extra time is available for consultation with affected third parties. Further, an applicant can agree in writing to extend the timeframe for a further 30 days. The Information Commissioner must be notified of any such agreement (s 15AA).

124. The Information Commissioner also has powers to extend the period of time for agencies to deal with requests:

- that are complex or voluminous (s 15AB), or
- where there was a deemed decision to refuse a request for documents (s 15AC), to amend or annotate a personal record (s 51DA), or to deal with an application for internal review (s 15AC).

125. The Information Commissioner can also grant an extension of time to apply for IC review of an access refusal or access grant decision (s 54T).

126. The OAIC endeavours to respond to extension of time requests from agencies within five working days. This is being achieved in most cases and is aided by good communication by agencies with the OAIC and applicants. However, the resources involved in this role for both the OAIC and agencies are significant. In the two years from 1 November 2010, the OAIC dealt with over 4000 notifications and requests.

127. The bulk of these cases are notifications from agencies of extensions of time agreed to by applicants (66% in 2011–12 and 77% in 2010–11). The value of requiring agencies to notify the OAIC is questionable. The requirement for the FOI requestor to agree in writing also imposes a further administrative burden on agencies that does not appear to be justified by the small risk of disagreement that an extension was agreed to. This could be easily mitigated by agencies confirming verbal agreements by email to requestors.

128. We also question whether the resources involved in agencies applying to the OAIC for further time and the OAIC processing those extension requests is warranted. While it may be appropriate to allow agencies further time to process complex or voluminous FOI requests, a better approach could be for agencies to have the option to extend the period of time on such a basis, according to specified factors. This would not be dissimilar to the power currently exercised by agencies to extend time to facilitate consultation with third parties. The OAIC could still have a role in reviewing the appropriateness of agency processing times under its complaint handling role. In the case of requests for further

[44] Section 56 of the *Freedom of Information Act 1982* prior to the *Freedom of Information Amendment (Reform) Act 2010*.

time to process deemed decisions, the value of granting further time when an applicant has not sought review of the deemed decision is questionable.

129. In addition to the volume of work created by the extension of time provisions, the provisions themselves are complex and, in places, unclear. They have given rise to confusion and concern about whether an agency is allowed to continue processing requests out–of–time without an extension from the OAIC. We have sought to clarify that this is not the case and that agencies have a continuing obligation to process a request. However, the operation of deeming provisions creates confusion about whether an agency is empowered to make a decision on access if the agency has not been granted an extension by the OAIC or has failed to make a decision within an extension granted by OAIC. The OAIC is also put in a difficult position when considering applications for further time to make actual decisions on cases where a deemed decision has occurred. It is not clear whether a decision to allow or refuse further time should reflect primarily that it is in the best interests of the applicant for the request to be resolved by the agency; or alternatively whether a decision sends a normative message that the OAIC condones the lengthy processing time.

130. Arguably the value of deeming provisions is to ensure that an FOI applicant has a mechanism to pursue the timely resolution of their request and to create a disincentive to agencies to finalise requests out of time. The mechanism for agencies to apply for further time to process requests after a deemed decision has occurred should be reserved for the situation where the FOI applicant has sought review of the deemed decision or made a complaint about delay. In such cases, the matter comes under the oversight of the OAIC, which could investigate the delay, review the deemed decision, or remit the matter to the agency to process the request based on directions from the OAIC.

131. We recommend that the OAIC's role in allowing extensions of processing time be limited to situations where the applicant has brought the matter under the OAIC's supervision. The current provisions should be revised to put it beyond doubt than the agency or minister has a continuing obligation to process a request under the FOI Act until an actual decision is made or an IC review is commenced. Once an IC review is commenced, it remains open to the agency or minister to make a decision more favourable to the FOI requestor at any time until an IC review decision is made. More detailed discussion of the issue and our proposed approach related to these provisions is in the table of issues with current legislative provisions in the appendix.

Two–tier external review

132. The FOI Act currently permits three levels of merit review: internal review by the agency; external review (IC review) by the OAIC; and external review by the AAT. This has significant cost implications for the government as well as being a system that may be considered to be inconsistent with the Parliament's intention 'that functions and powers given by the Act are to be performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest cost' (s 3(4)).

133. In discussing the effectiveness of the AAT as a reviewer of FOI decisions, the *Open Government* report jointly prepared by the Australian Law Reform Commission and Administrative Review Council commented that 'All submissions agree that there should

only be one independent review body with power to making [sic] binding determinations following merits review'.[45]

134. The position in Queensland is that internal review is optional before an application for external review by the Information Commissioner. An appeal from the Information Commissioner to the Queensland Civil and Administrative Tribunal lies on a question of law.[46]

135. The Commonwealth system involving two levels of external merit review was not part of the original policy proposal the Labor party released in the lead–up to the 2007 election that led to the 2010 FOI reforms. Rather, the policy stated that the 'FOI Commissioner would replace the AAT in the FOI review process'.[47] It was also clear that internal review would be required before external review could be applied for.[48]

136. While the current system of IC review has only been in operation for two years, to date no decision has been overturned on appeal to the AAT. In some cases, the multiple review stages can be used by a third party to strategic advantage to oppose release. We know of one case where an affected third party, opposed to an agency's decision to release documents, has used every review stage available, while failing to provide any exemption contentions beyond those made in response to the original consultation. Even where the prospects of success are low, the strategy can appear to be to at least delay the release of documents.

137. We consider that the model of external review should be reconsidered so that:

- internal review would not be compulsory but, as recommended in the Information Commissioner's Charges Review report, should be encouraged by the imposition of a $100 fee for IC review applicants who do not seek internal review when it is available to them.
- review by the AAT would only be available:
    - on a point of law against IC review decisions made by a Commissioner (the alternative would be to confine appeals on a question of law to the Federal Court)
    - for review of an IC review decision made by a delegate of the Information Commissioner (this decision–making power is not currently delegable, but see paragraph 89)
    - for review of a decision under s 54W(b) that the interests of the administration of justice make it desirable that the decision be

[45] Australian Law Reform Commission and Administrative Review Council (1995), *Open Government: a review of the federal Freedom of Information Act 1982*, Australian Law Reform Commission Report No 77 and Administrative Review Council Report No 40, p 171 [13.8].

[46] RTI Act, s 119.

[47] The Hon Kevin Rudd MP and Senator the Hon Joe Ludwig (October 2007), *Government information: restoring trust and integrity in government information,* ALP Election policy document, p 7, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22library%2Fpartypol%2FEFRO6%22, accessed 28 November 2012.

[48] Ibid, p 7: 'An application rejected at the internal review stage would be externally reviewable upon application to the Office of the Information Commissioner at no additional cost.'

considered by the AAT — in such cases, no application fee should be required for the application to the AAT.

Part D: The reformulation of exemptions in the FOI Act, including the application of the new public interest test

The application of the new public interest test

138. The introduction, in 2010, of conditional exemptions that operate in conjunction with a public interest test has further embedded a presumption of openness in the FOI Act. This has been achieved via the operation of s 11B(3) which firmly grounds the test in promoting the objects of the Act and s 11B(4) which specifies factors that may not be taken into account when weighing public interest factors. The public interest test is appropriately weighted towards disclosure (see s 11A(5), which gives specific effect to the pro–disclosure paragraphs in the objects of the Act in s 3(4)).

139. The introduction of a single public interest test for conditional exemptions has also simplified the previously inconsistent tests in the Act. To the extent that there is uncertainty about how the new conditional exemption public interest test applies, this uncertainty will be addressed over time through IC review decisions and guidelines issued by the Information Commissioner under s 93A of the FOI Act. We do not believe there is a need so soon after the introduction of the new public interest test in the 2010 reforms to consider further amendment of the Act in this regard.

The requirement to ensure the legitimate protection of sensitive government documents including cabinet documents

140. Certain FOI exemptions will always be necessary for the protection of specified categories of government information. However, we recommend against any broadening of exemptions and consequent narrowing of access rights.

141. The existing exemptions in the FOI Act are adequate to provide protection for government information that legitimately warrants protection against disclosure under the FOI Act. To the extent that there are concerns within government about particular incidents of inappropriate disclosures under the FOI Act, we believe that this can be tied to the individual decision rather than any shortcoming in the FOI exemption provisions.

142. Furthermore, the movement in government is towards greater data openness. As noted in other parts of this submission, much energy in government in recent years has been devoted to harnessing the opportunities arising from open government, proactive information publication and fewer restrictions on reuse of public sector information.[49]

[49] See for example *Ahead of the Game: Blueprint for the Reform of Australian Government Administration*, (2010) Advisory Group on Reform of Australian Government Administration; *Engage: Getting on with Government 2.0,* (2009) Government 2.0 Taskforce; *Information Policy and e–governance in the Australian Government*, (2009) Dr Ian Reinecke (report commissioned by the Department of the Prime Minister and Cabinet) *Australia's Digital Economy: Future Directions*, (2009) Department of Broadband, Communications and the Digital Economy; *National Government Information Sharing Strategy*, (2009) Department of Finance and Deregulation; *Secrecy laws and open government in Australia*, (2009), Australian Law Reform Commission; *Venturous Australia: Building Strength in Innovation*, (2008) Department of Innovation, Industry, Science and Research; *Review of the Australian Government's use of Information and Communication Technology* (also known as 'The

(Many key open government principles are captured in the OAIC's *Principles on open public sector information*, published in 2011.) Initiatives in Australia occur against a backdrop of international engagement with and investment in open government.[50]

143. Since the enactment of the FOI Act thirty years ago, many types of documents that previously would have been withheld from publication are now published as a matter of standard practice. As normative information practices evolve and change, particular exemptions may be less frequently invoked or may be suitable for being made conditional on a public interest test. Other exemptions could usefully be subject to time limits on their operation. Introducing a time limit to some exemptions is discussed below, at paragraphs 148–153.

The necessity for the government to continue to obtain frank and fearless advice from agencies and from third parties who deal with government

144. We believe that existing exemptions in the FOI Act provide adequate protections to the provision of frank and fearless advice to government. The conditional exemption under s 47C (deliberative processes) protects opinions, advice or recommendations recorded by agencies and Ministers in the course of deliberative processes. Section 47E (certain operations of agencies) also conditionally exempts disclosure of documents where release would have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

145. Information provided to government by third parties is protected by conditional exemptions under ss 47F (personal privacy) and 47G (business information). In particular, section 47G(1)(b) conditionally exempts disclosure of business information which 'could reasonably be expected to prejudice the future supply of information to the Commonwealth, Norfolk Island or an agency'.

146. Sections 47C, 47E, 47F and 47G are all conditional exemptions meaning that access must be given unless it would be contrary to the public interest. Further information about these conditional exemptions is available in Part 6 of the Guidelines issued under s 93A of the FOI Act.

147. We also note the important ethical framework offered by the APS Values and Code of Conduct. In particular, the APS Values (which APS employees are required to uphold) state that 'the APS is responsive to the Government in providing frank, honest, comprehensive, accurate and timely advice and in implementing the Government's policies and programs'.[51] Under the APS Code of Conduct, employees must also 'maintain appropriate confidentiality about dealings that the employee has with any Minister or Minister's member of staff'.[52]

Gershon Review') (2008), Sir Peter Gershon (report commissioned by the Department of Finance and Deregulation).

50 See for example the Open Government Partnership, discussed in Parts A and B.

51 *Public Service Act 1999*, s 10(1)(f).

52 Ibid, s 13(6).

Applying a time–limit to the operation of some exemptions

148. In our recent submission to a Senate Committee Inquiry into the Freedom of Information Amendment (Parliamentary Budget Office) Bill 2012, we raised for consideration whether a time limitation should be placed on the operation of the Parliamentary Budget Office (PBO) exemption.[53] The policy rationale for the exemption is that Senators and Members of the House of Representatives should 'have access to independent and non–partisan budget analysis and policy costings over the entire course of the three–year electoral cycle'.[54] The Revised Explanatory Memorandum to the Bill states that the exemption of PBO documents from the FOI Act 'will ensure that the integrity of the PBO processes in these matters which are critical to the successful operation of the PBO will not be undermined' (paragraph 6).

149. That policy rationale is principally tied to the three–year electoral cycle of the House of Representatives. Following the election of a new Government, there is not the same rationale for exempting from public access documents that were more directly related to matters arising during the life of a former government. Certainly, it is difficult to see why PBO documents should retain their exempt status for twenty years. A more reasonable limitation may be that the PBO exemption continues only for a short period after the next general election (perhaps one year).

150. This approach is adopted for some exemption provisions in the RTI Act. A ten year limitation is placed on information that is brought into existence for the consideration of Cabinet, in the course of the State's budgetary processes, or to brief an incoming Minister about a department (Schedule 3, Items 2, 4). An eight–year limitation applies to information relating to a payment to a person under an investment incentive scheme (Schedule 3, Item 11).

151. The Committee did not take up the option of recommending a time limit on the operation of the exemption for PBO documents, noting (instead) that the issue may be considered further in the context of the FOI Act review.[55]

152. We believe that certain types of exempt documents should be subject to a time–limited exemption. This would promote a 'disclosure by design' approach to document creation. Without such a time limit, documents are restricted from release until the open access period in the *Archives Act 1983*. Under this arrangement, many exempt documents may be withheld for 20 years (the open access period currently set at 28 years is being progressively reduced to 20 years).

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53 OAIC (October 2012), Submission to the Senate Standing Committee on Legal and Constitutional Affairs*, Inquiry into the Freedom of Information Amendment (Parliamentary Budget Office) Bill 2012*, www.oaic.gov.au/publications/submissions/2012_10_Senate_Budget_office_sub.html.

54 Attorney–General the Hon Nicola Roxon MP (2012), *Freedom of Information Amendment (Parliamentary Budget Office) Bill 2012 Second Reading Speech*, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2F64910c49-3706-419c-93d6-134834c0ae37%2F0023%22.

55 Report of the Senate Standing Committee on Legal and Constitutional Affairs (12 November 2012), *Freedom of Information Amendment (Parliamentary Budget Office) Bill 2012 [Provisions]*, paragraph 2.13, www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/completed_inquiries/2010-13/freedom_of_information/report/index.htm.

153. We suggest that the review consider the introduction of time limits to the operation of exemptions in relation to certain document types. Such a mechanism could operate under s 12 of the FOI Act to prescribe documents that are not covered by the enforceable right of access under the FOI Act. After the elapse of a specified period of time an FOI request could be made for the documents, and normal exemption provisions would apply. In assessing this option, the review could consider the types of documents that would be appropriate for deferred access, taking into consideration similar mechanisms in other jurisdictions. Categories of documents the review may wish to consider in addition to PBO documents are incoming government briefs and parliamentary question time briefs.

Reducing the use of FOI process for legal discovery

154. During consultations carried out by the OAIC for the Charges Review, some agencies raised the concern that the FOI request process is being used as a less expensive alternative to discovery in civil litigation. In effect, an agency providing documents through FOI rather than discovery could be subsidising the litigation, in circumvention of the principles that would otherwise apply.

155. The recommendation made in the Charges Review regarding the introduction of a 40–hour processing limit would partly address that concern. A 40–hour limit would not deprive a party involved in or contemplating litigation from obtaining some relevant documents under FOI, but if extensive discovery was planned the party would have to rely on litigation procedures that are subject to court supervision and cost reimbursement rules.

156. Another possible option would be to adopt the model offered by the RTI Act. Section 53 of that Act states that access may be refused where 'the applicant can reasonably access the document under another Act, or under arrangements made by an agency, whether or not the access is subject to a fee or charge'. Yet another option would be to provide in the FOI Act that a party involved in litigation against an agency cannot make an FOI request for documents relating to issues in contention in the litigation until the conclusion of that litigation.

Part E: The appropriateness of the range of agencies covered, either in part or in whole, by the FOI Act

Minimising the number of agencies exempt from the FOI Act

157. Agencies should only be excluded from the operation of the FOI Act in exceptional circumstances.[56] The OAIC believes that the interests of open government and public sector accountability are best served by comprehensive coverage of public bodies under the Act. Sensitive government information should be protected by exemptions for specific documents rather than full exemptions for agencies.

158. Exemptions applied on a document–by–document basis allow a more nuanced approach to managing appropriate information disclosure. Moreover, ensuring comprehensive coverage of agencies under the FOI Act advances the stated objective of the FOI Act to increase scrutiny, discussion, comment and review of the Government's activities (s 3(2)(b)).

Application of the FOI Act to intelligence agencies

159. The continuing exemption of intelligence agencies from the operation of the FOI Act should be reconsidered. In other jurisdictions, including New Zealand and the United States, intelligence agencies are covered by FOI legislation. The New Zealand OIA covers the New Zealand Security Intelligence Service and contains specific exemptions for information that would be likely to prejudice the security or defence of New Zealand. Similarly, the Central Intelligence Agency and the Federal Bureau of Investigation must comply with the United States *Freedom of Information Act* which exempts information classified to protect national security and contains exclusions for three categories of law enforcement and national security records.

160. As noted above, exemptions applied on a document–by–document basis allow a more nuanced approach to managing appropriate information disclosure. Merit reviews conducted by the OAIC indicate that the full exemption applying to intelligence agencies can have unintended or undesired impacts, obstructing consideration of otherwise reasonable information requests. For example, a request made to AGD for a document relating to the activities of an inter–departmental committee (IDC) was refused on the basis that the IDC was chaired by the Australian Security Intelligence Organisation, despite the IDC being under the oversight of AGD's Protective Security Policy Committee.

161. The Review should consider whether Australian intelligence agencies should be subject to the operation of FOI legislation with information disclosure regulated by specific exemptions. We believe that ss 33, 37 and 45 of the FOI Act would provide appropriate protections for information held by intelligence agencies. In reviewing the exemption for intelligence agencies listed in Schedule 2, Part I, we suggest also reviewing

[56] The same view was put forward by the Australian Law Reform Commission (ALRC) in its 1995 review of FOI. See ALRC/ARC (1995) *Open government: A review of the federal Freedom of Information Act 1982*, ALRC 77 and ARC 40, paragraph 11.13.

the operation of exemptions in Part IV of the Act to ensure appropriate protection of sensitive intelligence and security information.

Application of the FOI Act to the commercial activities of agencies

162. Schedule 2, Part II of the FOI Act lists agencies exempt in respect of particular documents. Many of the agencies listed carry on commercial activities and partial exemptions are intended to balance the competing public interests of maintaining transparency of agency operations while ensuring competitiveness of agency commercial activities.

163. There is some inconsistency in the way that agencies' commercial interests are protected and the list does not appear to reflect the current operational basis of all agencies listed. Most listings in the schedule state that an agency is exempt 'in relation to documents in respect of its commercial activities.' However some agencies, such as the Australian Broadcasting Corporation and the Special Broadcasting Service Corporation are exempt in respect of their program material and datacasting content but have no exemption in relation to their commercial activities. The current rationale for the Attorney–General's Department having an exemption for documents related to its commercial activities but the broadcasting agencies not having such a general exemption is not apparent.

164. In its 1995 review of FOI, the ALRC recommended that s 43 (now s 47) be amended to make clear that it applies to documents that contain information about the competitive commercial activities of agencies.[57] Section 47 exempts documents disclosing trade secrets or commercially valuable information, so an amendment of this type would have the effect of removing some of the need for Schedule 2, Part II. In the ALRC's view, it was preferable that the competitive commercial activities of agencies be protected by section 47 than by a partial exclusion of the agency in the Act.[58]

165. The OAIC does not have a view on the approach proposed by the ALRC but suggests that the schedule be reviewed to clarify the rationale for inclusion of agencies in the list and to simplify the way that the Act protects the commercial interests of agencies. Such a review could usefully develop criteria by which the functions of agencies may be assessed for inclusion in Schedule 2.

Application of the FOI Act to documents held by OAIC relating to an IC review

166. As a 'prescribed authority', the OAIC is subject to the FOI Act, however in some other comparable jurisdictions Information Commissioners and other integrity agencies such as Ombudsman offices are not subject to access to information legislation. For example, in NSW an access application cannot be made to the Office of the Information Commissioner for documents that relate to its investigative, audit, complaint handling and reporting functions.[59] Information Commissioners in Queensland and Western

[57] ALRC 77, recommendation 68.
[58] ALRC 77, paragraph 10.30.
[59] See Schedule 2, Part 2 of the *Government Information (Public Access) Act 2009* (NSW)

Australia, along with their offices, are exempt in full from relevant access to information legislation.

167. In the absence of such an exemption, the Commonwealth FOI Act allows applicants to seek access to documents held by the OAIC related to an IC review matter, including the documents that are the subject of the review. Such a right of access has the potential to frustrate and delay the IC review mechanism by broadening the dispute to include the processes of the OAIC as well as the decision of the original agency.

168. The FOI and AIC Acts contain other mechanisms to ensure transparency and accountability in relation to OAIC processes. A decision on an IC review must include a statement of reasons that is given to the parties and is published (s 55K). Each review party is to be given a reasonable opportunity to present his or her case (s 55). IC review decisions can be appealed on the merits to the AAT. As to complaint investigations, a notice containing details of a Commissioner's findings must be provided to the agency and complainant at the completion of an investigation (s 86).

169. We suggest that consideration be given to the introduction of a partial exemption, modelled on the NSW approach, for documents regarding the OAIC's merit review and complaints functions.

Application of the IPS provisions to agencies not covered by the FOI Act

170. We consider that the IPS provisions have successfully encouraged the release of information about agency functions and governance in a consistent way across government, furthering the pro–disclosure principles of the post–reform FOI Act. The IPS serves a public benefit by requiring agencies to make information about their functions, services and administration broadly available, helping to encourage greater transparency and allow increased public understanding of how government makes decisions and administers programs.

171. The review may wish to consider whether the IPS provisions should be extended to agencies not covered by the FOI Act (those agencies named in Schedule 2, Part I). While there may be valid reasons to exclude these agencies from the access request provisions of the Act, it does not necessarily follow that they should also be excluded from the IPS requirements.

172. Much of the information that these agencies would be required to publish under the IPS is already in the public domain (via mechanisms including annual reports, existing corporate information on the agencies' websites and information about the agencies published on the Government Online Directory). In light of this, the main effect of extending Part II of the Act to these agencies would be to ensure that the information is publicly available in a consolidated, accessible form that is consistent with the IPS entries of other agencies. The provisions in ss 8C(1) and (2) would, of course, apply to ensure that no agency is required to publish under the IPS information exempt under the Act or where publication is restricted or prohibited by an enactment.

Part F: The role of fees and charges on FOI, taking into account the recommendations of the Information Commissioner's review of the current charging regime

Information Commissioner review of charges

173. In March 2012, the Information Commissioner released the Charges Review. The report makes nine recommendations for reform.

174. The OAIC website contains the full list of submissions to the review.[60] Submissions from applicants stressed the need to minimise cost barriers, and to ensure that the charging framework under the Act does not shift to a full cost recovery basis. Agencies, on the other hand, highlighted the need to simplify FOI charges, and that the scale of charges under the Act had not been altered since their introduction in 1986. A consistent theme in many of the agency submissions involved the useful role charges can play in initiating a discussion with applicants to reduce broad requests to a more manageable level.

175. The review put forward four principles to underpin a new FOI charging framework:

a) **Support of a democratic right:** Freedom of information supports transparent, accountable and responsive government. A substantial part of the cost should be borne by government.

b) **Lowest reasonable cost:** No one should be deterred from requesting government information because of costs, particularly personal information which should be provided free of charge. The scale of charges should be directed more at moderating unmanageable requests.

c) **Uncomplicated administration:** The charges framework should be clear and easy for agencies to administer and applicants to understand. The options open to an applicant to reduce the charges payable should be readily apparent.

d) **Free informal access as a primary avenue:** The legal right of access to documents is important, but should supplement other measures adopted by agencies to publish information and make it available upon request.

176. The recommendations are framed around those principles, and involve measures to:

- encourage administrative access schemes to facilitate free, fast and informal access to government information without requiring applicants to make use of the FOI Act to frame a request for a particular document
- reconfigure processing charges to simplify their operation and encourage manageable requests

[60] http://www.oaic.gov.au/news/consultations.html#charges_review.

- reduce the current range of access charges to a more manageable level, including no processing charge for personal information requests
- impose FOI processing and charges ceilings — a maximum processing charge of $50 on requests processed within 10 hours, a maximum processing charge of $950 for all requests, and a discretionary ceiling of 40 hours processing time, beyond which an agency or minister could refuse to process an FOI request following consultation with the applicant (for further information about the 40–hour ceiling, see paragraphs 196–208)
- simplify the current charging reduction and waiver provisions under the Act
- encourage applicants to seek internal review by an agency as a first resort rather than review by the Information Commissioner when seeking review of an FOI access decision
- introduce a new approach to reducing charges in cases where a decision has not been provided within the required timeframes
- introduce indexation of charges under the Act
- introduce new timeframes for responding to charging notices.

177. Some key recommendations are discussed further below. If the recommendations made in the Charges Review are not taken up, technical issues affecting the smooth running of the existing charging framework should be addressed. These issues are outlined in the table in the appendix.

Facilitating administrative release of information

178. In the Charges Review report, the Information Commissioner made a number of recommendations aimed at encouraging agencies to set up administrative access schemes. Administrative access refers to release of government information, in response to a specific request, outside the formal process set out in the FOI Act.

179. Establishing an administrative access scheme offers benefits to agencies and members of the public seeking information and documents. Some advantages of an administrative access scheme include:

- it advances the objects of the FOI Act and is a natural manifestation of open government
- it encourages flexibility and engagement with the public
- it takes advantage of advances in technology that facilitate fast and easy collation, integration and distribution of information
- it can offer a lead–in to the FOI process, allowing the public to engage with agencies and refine the scope of the documents they are after before pursuing a formal FOI request
- it reflects the broader movement in public administration towards greater emphasis on dialogue and negotiation between agencies and the public rather than automatic deferral to formal legal processes (such as the FOI request process)

- it potentially offers cost benefits and quicker processing times (for example, less time spent on formal FOI notice requirements; and information requests handled by the customer liaison section of the agency rather than a specialist FOI unit).

180. In the Charges Review report, the Information Commissioner recommended that a $50 application fee apply where an applicant chooses not to proceed initially under an administrative access scheme notified on an agency's website. While requests for personal information do not otherwise attract an FOI processing charge, the effectiveness of this recommendation would be undermined if it did not also apply to personal information requests. Indeed, administrative access schemes are especially suited to personal information requests.

181. Where an applicant is dissatisfied with the agency's response to an administrative access request, the report recommended that they be entitled to make an FOI request without paying an application fee. The request could be made either upon receipt of the agency's response, or after 30 days if no agency response was received. The applicant would be responsible for establishing at the time of making the FOI request that it was similar in nature to an earlier request made under the administrative scheme notified on an agency's website.

182. It would be open to an agency upon receiving an administrative access request to direct the applicant to the FOI Act. This may be appropriate, for example, where third party consultation is required, the request is for a substantial number of specified documents, or the agency wishes to bring the request explicitly under the statutory protections in ss 90 and 92 of the FOI Act. The $50 application fee should not apply to these requests.

Managing avenues for information access and processing timeframes

183. In this submission we suggest that the Privacy Act should be the primary avenue for personal information requests for access and amendment (see paragraphs 40–45) and that greater emphasis be placed on processing requests under administrative access schemes (paragraphs 178–182).

184. To enable agencies to clarify the terms of access requests and correctly direct them to the most suitable access channel, we suggest that agencies be allowed a short period during which they may discuss a request with the applicant before the FOI processing period starts. This would ensure requests are processed efficiently, meet the needs of the applicant and are, at the outset, processed under the most suitable access arrangement (whether that is an administrative access scheme or the formal FOI process). It may also address situations where agencies miss processing deadlines having devoted a large amount of the allotted time to clarifying the scope of a request.

185. An initial consultation period along these lines would be intended to play a different role to the request consultation process under s 24AB, which only applies to a request that an agency has begun to process but intends to refuse on practical refusal grounds. The practical refusal mechanism is discussed further in paragraphs 196–208.

186. Technically early consultation between applicant and agencies is already partly possible under the operation of ss 15(2) and 15(3). Where a request does not meet the requirements set out under s 15(2), an agency is required to help the applicant make one

that does (s 15(3)). A request will not meet the requirements under s 15(2) if it is not sufficiently specific as to enable the agency reasonably to identify the documents the applicant wants to access. In these circumstances, the processing timeframe will not start until the applicant has clarified their request with the help of the agency.

187. We suggest that a short time limit be applied to this initial consultation period. Currently, if the request does not meet the requirements in s 15(2), the agency must take 'reasonable steps' to assist the applicant but there is no timeframe for those reasonable steps. Formal processing timeframes do not start until the request meets the terms of s 15(2). The Review may wish to consider the length of time of a consultation period. We suggest seven days is likely to be reasonable. Further, we suggest the initial consultation period also allow agencies to discuss with applicants alternative modes of access that are more suitable for their request (such as via administrative access schemes or under the Privacy Act).

Grounds for waiver of a charge and options for the public interest test

188. There remains some confusion about the different public interest tests applying to conditional exemptions and the reduction of charges. Currently, s 29(5)(b) states that one of the grounds for reduction or waiver of a charge is 'whether the giving of access to the document in question is in the general public interest or in the interest of a substantial section of the public'.

189. The difficulty arises from the fact that the underlying philosophy of the FOI Act since 2010 is that all disclosure is in the public interest. Government information, as the Act declares, 'is a national resource' that 'is to be managed for public purposes' (s 3(3)). Moreover, the introduction of a disclosure log mechanism (s 11C) means that much information released in response to FOI requests is made available to the public generally.

190. A more appropriate waiver standard would be that adopted in s 66 of the NSW GIPA Act, namely, whether disclosure would have 'special benefit to the public'.[61] Under this standard, the release of a document under the FOI Act and its publication in a disclosure log, though in the public interest, might not necessarily bring 'special' benefit to the public.

191. This standard is also a more appropriate frame of reference for examining the relationship between documents released through an FOI request and other government information already on the public record. For example, if an agency in developing a policy proposal has published an issues paper, submissions and final report, it may be harder to establish that a special public benefit attaches to an FOI request seeking emails between staff at an early stage of the policy development process. That is not to say that those internal communications should not be publicly available under the FOI Act, but rather that an applicant with a special interest in those documents may be required to contribute to the cost to the agency of making them available.

[61] See Charges Review recommendation 5.1.

Part G: The desirability of minimising the regulatory and administrative burden, including costs, on government agencies

Minimising regulatory burden while protecting democratic right of access

192. More can be done to enhance the smooth operation of the FOI Act and reduce administrative hurdles for agencies. For example, implementation of recommendations made in the Charges Review (see Part F) including introducing a ceiling of 40 hours' processing time and simplifying processing charges would help to streamline a number of agency FOI activities. Another example taken from this submission is the complexity of the Act's third party review rights provisions, which impact on agency efficiency as well as the IC review process (as described in Part C). Addressing other technical issues with the FOI Act (outlined in the appendix) would also reduce regulatory complexity.

193. The costs to agencies of complying with the FOI Act can be significant (see graph below), but these costs must be understood in relation to the 'unquantifiable social (and political) benefits derived from the right of access under the Act'.[62] As pointed out in the Charges Review, FOI is an essential part of democratic government in Australia. Providing information to the public upon request supports transparent, accountable and responsive government, and should be treated as a core business function of each government agency.

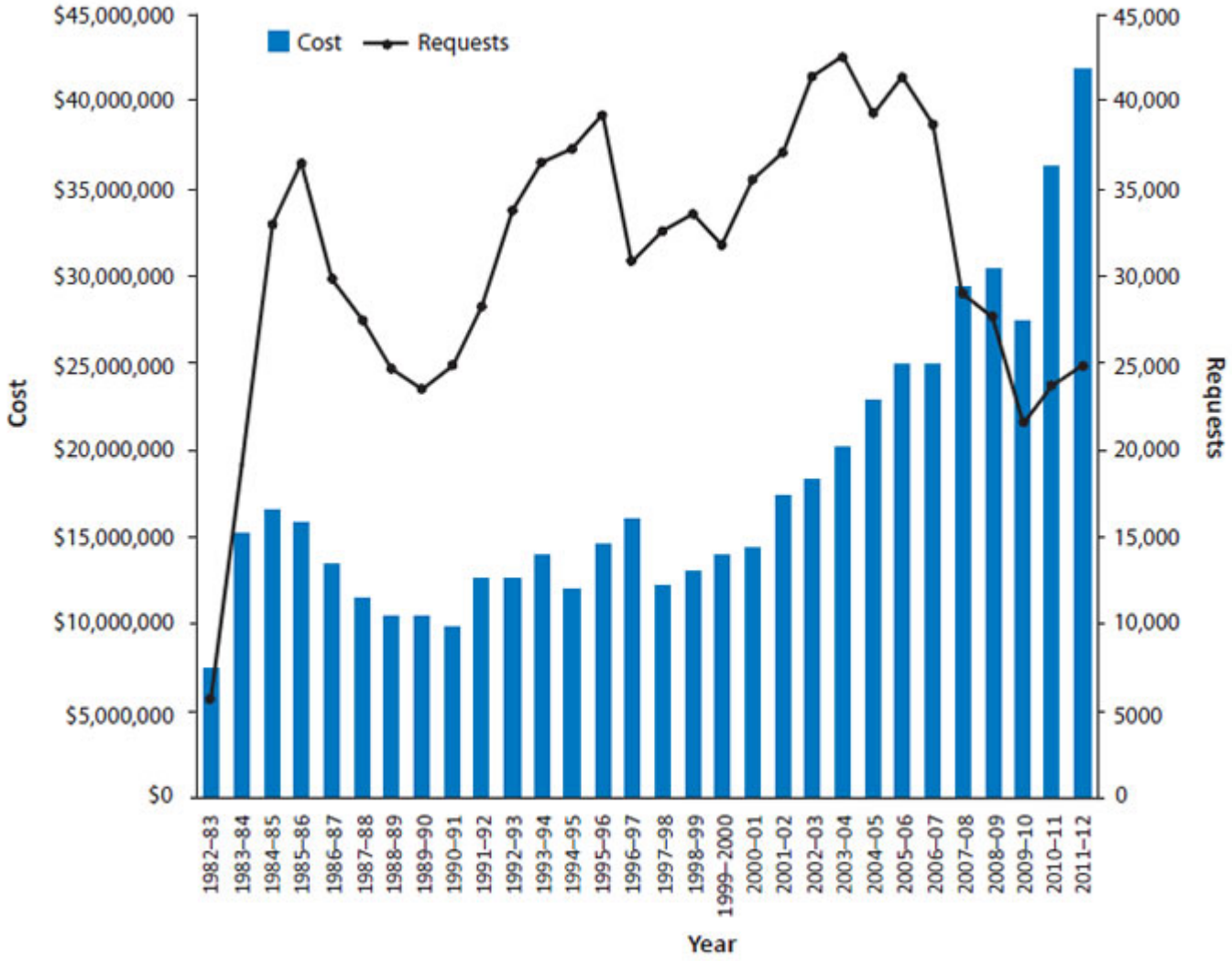
Impact of FOI on agency resources

194. To assess the impact on agency resources of their compliance with the FOI Act, agencies are required to estimate the staff–hours spent on FOI matters and the non–labour costs directly attributable to FOI, such as training and legal costs. Agencies submit these estimates annually. Experience shows that agencies rarely keep exact records of hours spent by officers on FOI matters and other non–labour costs incurred. Agency estimates may also include FOI processing work undertaken on behalf of a minister's office.

195. The total reported cost attributable to the FOI Act in 2011–12 was $41.719 million, an increase of $5.401 million (or 14.9%) on the previous year's total cost of $36.318 million. This increase occurred despite (as discussed above) an increase of only 4.9% in the number of FOI requests received, and a decrease of 5.0% in the number of amendment applications received. Total yearly FOI costs figures since the commencement of the FOI Act are shown in the graph below.

[62] Senate Standing Committee on Legal and Constitutional Affairs (1987), *Freedom of Information Act 1982: A Report on the Operation and Administration of the Freedom of Information Legislation*, paragraph 19.5.

FOI costs in relation to request numbers



Managing large and complex requests

196. It is generally accepted that government agencies should not bear an unlimited obligation to provide access under the FOI Act to all non–exempt information a person requests. Particularly in an age where agencies digitally record more information, requests that are not specific or targeted may encompass an unreasonably large number of documents, including multiple copies of the same document, documents that are uninformative or documents overtaken by developments that are noted in later documents. To prevent an unmanageable administrative burden, there must be limits on the exercise of the FOI right of access to documents. There are two principal mechanisms in the FOI Act for imposing such a limit: the practical refusal mechanism in ss 24 and 24AA; and the power to impose charges.

197. The practical refusal mechanism is the most direct mechanism for controlling complex and voluminous requests. Section 24 provides that an agency or minister may refuse a request if satisfied that 'a practical refusal exists'. This is defined in s 24AA(1) as

work which 'would substantially and unreasonably divert the resources of the agency from its other operations'.[63] Before relying on a practical refusal reason to decline to process a request, an agency must follow a consultation process with the applicant so that the applicant has the option of revising the request (s 24AB). This includes giving the applicant an opportunity to consult with a contact person and providing any information that would assist the applicant to revise the request so that the practical refusal reason no longer exists.

198. In applying the practical refusal mechanism, agencies can also treat multiple requests for the same documents, or documents relating to substantially the same subject matter, as a single request (s 24(2)).

199. A view expressed by some agencies during the Charges Review was that the power to impose charges is in practice the more important mechanism for consulting with applicants about revising and narrowing the scope of voluminous requests. The reason is that the practical refusal criterion — 'substantially and unreasonably divert … resources' from other operations — is an indeterminate standard that relies on answers to other imprecise questions. What resources of an agency should be taken into account? Is it harder for a large agency to rely on this mechanism because it has more resources, even though it also has more operations, and may receive more FOI requests? What value should be placed on FOI processing compared to other operations in terms of resource allocation? When is a diversion of resources substantial and unreasonable?

200. A straightforward answer to those questions has not been provided in AAT decisions, other than to suggest that the test is strictly applied and that a high threshold must be crossed to establish that a request would cause a substantial and unreasonable diversion of agency resources.[64]

201. Some agencies regard the charging power as the more straightforward and practical mechanism to enter discussion with applicants about the scope of requests. The discussion is result–oriented because the applicant will almost invariably be keen to reduce the potential cost. A discussion around charges, based on an hourly estimate of processing time, can assist an applicant to better understand the scope of their request, the resources required to process it, and the options for framing the request in a different manner.

202. However, some submissions to the Charges Review were critical of the charges power being used in this way. Section 24AB requires, on its face at least, a more structured consultation process than s 29 on notifying an estimated charge. There is also a danger that a high estimated charge can be a device used by an agency to deter an applicant from proceeding with an FOI request.

203. In his Charges Review report, the Information Commissioner recommended a new approach to dealing with complex and voluminous requests designed to provide greater

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[63] The provision is expressed differently as it applies to ministers, viz, 'substantially and unreasonably interfere with the performance of the minister's functions': s 24AA(1)(ii).

[64] For example, *Re Shewcroft and Australian Broadcasting Corporation* (1985) 2 AAR 496; *Re Swiss Aluminium Australia Ltd and Department of Trade* (1986) 10 ALD 96; *Re SRB and Department of Health, Housing, Local Government and Community Services* (1994) 19 AAR 178; and *Re Langer and Telstra Corporation Ltd* (2002) 68 ALD 762.

certainty for agencies and applicants. The proposal was that an agency or minister should not be required to process a request that is estimated to take more than 40 hours of processing time.[65] The maximum charge that an applicant could therefore be required to pay (under the combined proposals in the Charges Review) is $950 (plus any costs for providing access), comprising $50 for the first 10 hours, and $30 per hour for the next 30 hours. An applicant could also apply for a waiver of all or part of that amount.

204. Forty hours is a reasonable period to allocate to processing an individual FOI request, constituting roughly one week of a staff member's time. An agency would be required to assist an applicant to frame a request so that it could be managed within that limit. Consultation with an applicant about the estimate of time and options for narrowing the scope of the request should also be required.

205. The Information Commissioner suggested that this power be framed in discretionary terms, so that it would be open to an agency to administer a request that will take longer than 40 hours, and to impose the hourly processing charge of $30 per hour for additional hours. The agency's decision that a request would take more 40 hours to process would be an IC reviewable decision, but not the exercise of the discretion to refuse to process a request beyond the limit of 40 hours.

206. An advantage of a power framed in this way is that it would introduce greater certainty and predictability into FOI processing. It also balances an applicant's right to be given access at the lowest reasonable cost against an agency's interest in containing the administrative burden of FOI processing.

207. The idea of a ceiling or limit on processing time is adopted in the Scottish and United Kingdom statutes. The Information Commissioner also noted that, in a careful analysis of the cases, the NSW Administrative Decisions Tribunal in *Cianfrano v Premier's Department* (2006) NSWADT 137[66] had regard to a period of 40 hours as a reasonable presumptive period for examining whether a request imposed a substantial and unreasonable burden upon an agency.

208. The imposition of a 40 hour ceiling on processing time would not altogether replace the need for the practical refusal mechanism in ss 24 and 24AA. There may be instances in which it would be open to an agency or minister to initiate the practical refusal process in respect of a request that would take less than 40 hours to process — for example, a request for documents of a specialist nature that can be administered only by a minister or senior officer with significant competing demands on their time. Equally, in respect of a request that may take more than 40 hours to process, an agency may prefer to initiate a practical refusal discussion with the applicant about the scope of the request rather than impose a 40–hour ceiling on processing. However, as noted in the table of issues with current legislative provisions in the appendix, there are technical issues with the practical refusal mechanism that could be amended to improve the operation of this provision. An example would be to repeal s 24AA(1)(b) to remove the current overlap between the requirements of a valid request in s 15(2) and the definition of a practical refusal reason in s 24AA. Removing this overlap would make clear that the

[65] See Charges Review recommendation 4.1.
[66] This case is currently subject to appeal.

practical refusal mechanism can only be used once an applicant has provided the information reasonably necessary to identify the documents sought.

Managing repeat or vexatious requests

209. A related issue is that of managing repeated requests for the same documents or requests that are otherwise vexatious. Although agencies and ministers can apply to the Information Commissioner to declare a person a vexatious applicant under Part VIII, Division 1, this is not a decision that the Information Commissioner would take lightly due to its practical effect in preventing the person from exercising important legal rights under the FOI Act. No vexatious applicant declarations have been made of as December 2012.

210. The vexatious applicant provisions apply to requests for documents and amendment or annotation of personal records and applications for internal review and IC review (each of which is defined as an 'access action' under s 89L(2)). The provisions also introduce the concept of 'an abuse of process', defined in s 89L(4) as including, but not limited to:

- harassing or intimidating an individual or agency employee
- unreasonably interfering with an agency's operations
- seeking to use the FOI Act to circumvent access restrictions imposed by a court.

211. Part 12 of the FOI Guidelines also notes that a series of FOI applications made with the intention of annoying or harassing agency staff could be classified as vexatious.[67] The Guidelines go on to state that it is also relevant in considering an abuse of process whether an applicant has made repeated requests for documents which have been provided earlier or to which access has been refused.

212. Section 89L(1) allows the Information Commissioner to issue a vexatious applicant declaration only where the person is engaging in a particular or repeated access action involving an abuse of process, or where a particular access action would be 'manifestly unreasonable'. An alternate approach would be to provide agencies with the ability to refuse to process a particular request on the grounds that it is repeated or vexatious. This is the approach taken in s 20 of the *Right to Information Act 2009* (Tas):

> **20. Repeat or vexatious applications may be refused**
>
> If an application for an assessed disclosure of information is made by an applicant for access to information which —
>
> (a) in the opinion of the public authority or a Minister, is the same or similar to information sought under a previous application to a public authority or Minister and the application does not, on its face, disclose any reasonable basis for again seeking access to the same or similar information; or

[67] FOI Guidelines [12.4], citing *Ford v Child Support Registrar [2009] FCA 328*.

(b) is an application which, in the opinion of the public authority or Minister, is vexatious or remains lacking in definition after negotiation entered into under section 13(7) —

the public authority or Minister may refuse the application on the basis that it is a repeat or vexatious application.

213. There are two advantages to such an approach compared to the existing vexatious applicant provision in the Commonwealth FOI Act. The first advantage is that it could provide agencies with the opportunity to promptly and efficiently manage at their own initiative an individual request that would fall under the definition of an abuse of process under the current vexatious applicant provisions. Such a power would be consistent with the objects of the Act by allowing agencies to respond promptly to requests (as per s 3(4)) without having to devote resources to repeated or vexatious requests where it would be unreasonable to do so. The second advantage is that it would only apply to a particular request or series of repeated requests without impacting on the applicant's right to make other requests or to reframe the request classified by an agency as vexatious.

214. A repeat or vexatious request provision would provide agencies with a discretion when processing requests similar in some respects to the Information Commissioner's discretion not to undertake or continue an IC review on the grounds that it is frivolous, vexatious, misconceived, lacking in substance or not made in good faith (s 54W(a)). This discretion has been of use in the IC review process, having been applied in 42 of the 253 IC reviews finalised in 2011–12.

215. An agency decision that a request was repeated or vexatious could be subject to IC review. Agencies would have to proceed with processing a request where the decision that the request was repeat or vexatious is set aside at IC review, although exemptions and considerations such as the 40–hour cap on processing time could still apply.

The role proactive publication can play in minimising FOI compliance costs

216. In other parts of this submission, we have discussed the importance of reforms to the FOI Act that have sought to shift the focus of information access from a largely reactive model to a proactive one.

217. 2011–12 was the first year for which agencies were required to provide information about the costs of meeting their obligations under the IPS, which commenced on 1 May 2011. As reported in the OAIC's annual report, the total reported cost attributable to compliance with the IPS in 2011–12 was $3.798 million.[68] This is a relatively small figure when considered in relation to the cost to agencies of processing FOI access requests (in 2011–12, $41.719 million).

218. In addition to the IPS, agencies must now also publish information that has been released in response to each FOI access request in a disclosure log (s 11C).

219. It is still too early to determine the exact impact the introduction of the IPS and disclosure log provisions will have on agency compliance costs. However, we believe that

[68] Note that some agencies did not report any cost of their IPS compliance separate from their costs of complying with the FOI Act. This may be because those agencies were unable to disaggregate those costs.

the IPS and disclosure log mechanisms provide agencies an opportunity to lower the rate of FOI access requests and thus to decrease costs to agencies. There is a strong argument in favour of greater proactive disclosure not only in advancing the aims of open government but in terms of cost savings.

220. More could be done to enhance the cost benefits to agencies through addressing specific publication issues in the areas of accessibility and copyright. The timing of mandatory publication requirements has also been of concern to agencies and applicants. These issues are discussed below.

Issues inhibiting increased proactive publication

Timing of disclosure log publication

221. Section 11C(6) requires agencies and ministers to publish information contained in documents provided to FOI applicants on a disclosure log within ten working days. This applies unless the information is excepted from the disclosure log requirements under s 11C(1), for example, if it is personal information or information about the business, commercial, financial or professional affairs of any person, if it would be unreasonable to publish the information. Agencies and ministers have the discretion to publish the information at any time within the ten day period.

222. The disclosure log provisions play an important role in moving the focus of the FOI Act from exclusive individual access to information to a pro–disclosure, equal public access model. Nonetheless, the OAIC has received feedback from media and other organisations that the disclosure log requirements, particularly where publication occurs before the applicant has had time to examine the released material, may have a chilling effect on these entities' use of the Act to seek information from government.[69]

223. After bringing this matter to the attention of the IAC in May 2012,[70] the OAIC subsequently amended the FOI Guidelines in June 2012 to provide advice about matters agencies and ministers may wish to consider if adopting a practice of 'same day publication' (that is, where information is published on the disclosure log within 24 hours of when it is provided to the FOI applicant). The Guidelines' advice on this matter for agencies and ministers includes:

- An FOI applicant may have a special interest in being granted access prior to publication on the disclosure log. The applicant may have a unique interest in the documents, or have expended time and money on the FOI request, and may want an opportunity to consider the contents of the documents before they enter general public circulation via the disclosure log. This is particularly the case if the documents are large in number or contain complex information.
- A practice of same day publication, if widely adopted or practised across government, may discourage journalists from using the FOI Act. This may

[69] For examples, refer to submissions from media outlets received in response to the OAIC's March 2011 *FOI Disclosure Logs Discussion Paper* at www.oaic.gov.au/news/consultations.html#foi_disclosure_log.

[70] OAIC (2012), *Joint Information Advisory Committee and Privacy Advisory Committee minutes, 3 May 2012*, www.oaic.gov.au/publications/reports/committees/iac_may_2012.html.

work against the objects of the FOI Act by discouraging FOI requests from a particular section of the community who are experienced in accessing government information and making it available to the community.

- The FOI Act works more smoothly and effectively if there is cooperation and trust between agencies and FOI applicants as to the time of publication. This is more likely if agencies and ministers are prepared to discuss and agree on the date of publication with FOI applicants. There is an associated risk that disputes about the timing of publication will impair future relations between an agency or minister and an FOI applicant, either in FOI matters or more generally.
- The FOI applicant should be told in advance of the proposed date of publication on the disclosure log. The agency or minister should ensure that the applicant receives the documents on that day by means other than publication on the disclosure log (unless the applicant agrees to that method of access).
- In a case of same day publication the agency or minister should consider reducing or waiving any charges they may otherwise have imposed under s 29. The reason for so doing is that the applicant will not have been given any different or greater access than the community.[71]

224. The OAIC has not received any further formal complaints since this update to the Guidelines and we do not have a view on whether the Act should be amended to address these matters. We do, however, note the approach of the *Government Information (Public Access) Act 2009* (NSW), which requires a full waiver of charges if an agency makes information publicly available either before or within three working days after providing access to an applicant (s 66(2)).

Accessibility of online published content

225. Section 24 of the *Disability Discrimination Act 1992* (DDA) provides that is unlawful for a person who provides services to do so in a manner that discriminates against a person with a disability. Web publication of information by government agencies would be regarded as a service covered by the Act and, consequently, should not be done in a discriminatory manner (s 4, definition of 'services'). Discrimination includes treating a person 'less favourably than … a person with the disability in circumstances that are not materially different' (s 5(1)). An example in an online context would be publishing documents that cannot be understood by people relying on assistive technologies to browse the internet, and are thus considered inaccessible.

226. In addition to the DDA, the Government's *Web Accessibility National Transition Strategy* (NTS) requires all agencies to ensure that by 2014 content on government

[71] FOI Guidelines [14.26].

websites complies with the Web Content Accessibility Guidelines 2.0 (WCAG 2.0) issued by the Worldwide Web Consortium.[72]

227. Agency feedback to the OAIC suggests that the main pro–disclosure aspects of the FOI Act impacted by accessibility requirements are the IPS (Part II) and the disclosure log (s 11C), which require the online publication of certain categories of information. Publishing this information in an accessible form may require significant expenditure of time and resources.

228. The Australian Human Rights Commission's *World Wide Web Access: Disability Discrimination Act Advisory Notes* and the NTS both state that accessibility optimisation is best undertaken at the earliest possible stage when preparing content for online publication.[73] However, the scope of the IPS and disclosure log provisions includes documents that may not have been created for the purpose of publication. The disclosure log requirements in particular may encompass documents held only in ageing, obscure or complex electronic formats, or documents never held in electronic form such as older documents, hand–written documents and documents originating from third parties. Such documents may require significant time and resources to prepare for accessible online publication. Some documents may also require redaction to remove material that is exempt under the FOI Act before release, potentially creating additional accessibility challenges.[74]

229. Both the IPS and disclosure log provisions of the FOI Act allow for agencies (and in the case of the disclosure log, ministers) to provide details about how the public can access the information, rather than make the information directly available for download (ss 8D(3)(c) and 11C(3)(c)). We take the view that the former approach represents a barrier to increasing the availability of government information to the public more generally. However, we are concerned that practical difficulties in making information that must be published under the IPS or disclosure log WCAG 2.0–conformant may encourage agencies to make it available only on request. Such an outcome would discourage the wider release of government information and would not reflect the pro–disclosure objects of the FOI Act.

230. There is a degree of overlap between the information agencies must publish under the IPS and the categories of information on agency websites that the NTS recommends should always be WCAG 2.0–conformant. The recommended NTS categories include:

- contact details
- information about the organisation, including its role, legislation, administered functions, structure, key personnel and services

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72 AGIMO (Department of Finance and Deregulation) (2010), *Web Accessibility National Transition Strategy*, www.finance.gov.au/publications/wcag-2-implementation/index.html.

73 AHRC (2010), *World Wide Web Access: Disability Discrimination Act Advisory Notes*, http://humanrights.gov.au/disability_rights/standards/www_3/www_3.html, p 5; NTS, p 16.

74 The OAIC published advice for agencies about applying electronic redaction techniques to documents released under the FOI Act in March 2012. This advice, available at www.oaic.gov.au/publications/agency_resources/redaction_and_FOI.html, also refers to the accessibility implications of electronic redaction.

- current information that will help citizens to understand their responsibilities, obligations, rights and entitlements (benefits, etc.) in relation to government assistance
- current public notices, warnings and advice.[75]

231. Insofar as the NTS recommendation and the IPS requirements coincide, we agree that this information should be made accessible as a priority. Consideration may need to be given to striking a balance between accessibility and FOI in other circumstances. This is particularly true in cases where a document that must be published was not created for the purposes of publication, and it would be resource–intensive to optimise the document for accessibility or create an alternative accessible version of the document's content.

Copyright and freedom of information

232. We note two issues of concern regarding copyright and the publication of material originating from third parties that is released by agencies or ministers under the FOI Act.

233. The first issue is that, under s 177 of the *Copyright Act 1968*, the Crown owns copyright in any work first published in Australia by, or under the direction or control of, the Commonwealth. This applies unless the person who would otherwise own the copyright and the Commonwealth agree to a different arrangement (s 179 of the Copyright Act). The Copyright Law Review Committee recommended that these provisions be repealed.[76]

234. Because the FOI Act applies to documents in an agency's or minister's possession (definitions of 'document of an agency' and 'official document of a Minister', s 4(1)), the agency or minister may be the first to publish in a disclosure log on their website unpublished material that a member of the public or organisation has sent to them, resulting in an unintended acquisition of copyright. There may be some concern that the Commonwealth could be perceived as facilitating a breach of a third party's copyright by members of the public if it puts that material on a website, notwithstanding any accompanying warnings to the public about use and reuse. This concern could be addressed by amending the FOI Act or Copyright Act to exclude material that must be published under the FOI Act from the operation of s 177 of the Copyright Act.

235. The second issue about copyright and FOI relates to the effect that Commonwealth publication on a website of previously published third party material may have on the copyright owner's revenue or market. Potential options to address this concern include amendments to the IPS and disclosure log provisions or a determination from the Information Commissioner (under ss 8(3) and 11C(2)) to exempt information from the IPS and disclosure log requirements where publication on a website would be unreasonable, such as if the document is an artistic work or publication would clearly impact on the copyright owner's revenue or market. Such measures could be taken in

[75] NTS, p 15.

[76] Copyright Law Review Committee (2005), *Crown copyright*, recommendation 1, pp xi–xii, www.ag.gov.au/Documents/CLRC%20Crown%20Copyright%20Report%20-%20Full%20Report.pdf.

conjunction with the potential amendment discussed above relating to the operation of s 177 of the Copyright Act.

236. The FOI Commissioner provided further detail about these matters in a submission to the ALRC's *Copyright and the Digital Economy* inquiry in November 2012.[77]

[77] OAIC (2012), *Submission to the ALRC Copyright and the Digital Economy Inquiry,* www.oaic.gov.au/publications/submissions/2012_11_alrc_copyright_digital_economy_sub.html.

Appendix: Table of issues with current legislative provisions

Freedom of Information Act 1982

FOI Act Part	FOI Act section	Issue description	Recommended action
Part I — Preliminary	4(1)	Should Parliamentary departments remain covered by the FOI Act as prescribed authorities? They are covered now (except for the Parliamentary Budget Office), but it was thought for years that they weren't: see *OAIC Annual Report 2011–12*, p 111. The ALRC/ ARC *Open Government* report also recommended that Parliamentary departments should be subject to the FOI Act. Note that access to information laws in both New Zealand and the United Kingdom apply to Parliamentary departments.	No change: the FOI Act should continue to apply to the Parliamentary Departments, other than the Parliamentary Budget Office. Consideration should be given to the possible need for a similar exemption for research/advice to Members of Parliament provided by the Parliamentary Library.

FOI Act Part	FOI Act section	Issue description	Recommended action
Part I — Preliminary	4(1)	The definition of 'document of a Minister or official document of the Minister' provides that 'a Minister shall be deemed to be in possession of a document that has passed from his or her possession if he or she is entitled to access to the document and the document is not a document of an agency'. Under section 52(2) of the *Archives Act 1983*, special access may be available to former Governors–General, ministers and secretaries who want to refresh their memories of records they personally dealt with while in office. This raises the issue of whether there is an entitlement under the FOI Act for the public to request access to such a document on the grounds that is an official document of a minister.	The definition of 'document of a Minister or official document of the Minister' should be amended to clarify that special access arrangement applying to documents of a former minister (for example, to facilitate preparation of a minister's memoirs or autobiography), would not bring those documents under the FOI Act.
Part III — Access to documents	11B(4)(c)	Section 11B(5) provides that one irrelevant factor (when deciding whether access to the document would, on balance, be contrary to the public interest) is that 'the author of the document was (or is) of high seniority in the agency to which the request for access to the document was made'. Consideration of this factor should not be restricted to circumstances where the author of the document was (or is) in the same agency as that to which the FOI request was made; it should apply to authors in all agencies.	Section 11B(5) should be amended to provide that the high seniority of the author is irrelevant regardless of the author's agency.

FOI Act Part	FOI Act section	Issue description	Recommended action
Part III — Access to documents	11C(4)	Section 11C(5) implies that both agencies and ministers can impose charges for making information available on the disclosure log in some circumstances. But s 11C(4) gives agencies only (not ministers) the power to impose such charges.	Section 11C(4) should be amended so as to apply to ministers.
Part III — Access to documents	12(1)	Section 12 excludes, from documents that can be accessed under Part III of the Act, documents open to public access where a fee is charged but not where access is freely available.	Section 12(1) should be amended to exclude, from documents that can be accessed under Part III of the Act, documents that are publicly accessible without charge.

FOI Act Part	FOI Act section	Issue description	Recommended action
Part III — Access to documents	15(2)(b), 24AA (1)(b)	There is ambiguity about when a valid request has been received due to an overlap between the requirements of a valid request in s 15 and the definition of a practical refusal reason in s 24AA. If a 'request' does not meet the formal requirements of s 15(2), an agency must take reasonable steps to assist the person to make a request that complies with the Act (s 15(3)). This includes where the documents cannot reasonably be identified (s 15(2)(b)). However, s 24AA provides that a practical refusal reason exists (and therefore consultation is required) if (inter alia) a request does not satisfy the requirement in s 15(2)(b). This suggests that a request can reach the practical refusal stage even if it is not a valid request (because the documents cannot reasonably be identified) which, in turn, causes confusion about whether the statutory time period has started.	Section 24AA(1)(b) should be removed to make it clear that the processing of an FOI request only starts when the request satisfies the requirements in s 15(2)(b): that is, when the FOI applicant has provided the information reasonably necessary to identify the documents sought.

FOI Act Part	FOI Act section	Issue description	Recommended action
Part III — Access to documents	15(4)	Where a request complies with the form requirements of s 15(2), a decision must be made on the request or it must be transferred to another agency in accordance with s 16. However, s 15(4) causes confusion. Where a request has been misdirected, s 15(4) requires the receiving agency to assist applicants to redirect the request to the appropriate agency, while s 16 gives the receiving agency the discretion to transfer the request to that other agency. Section 15(4) could be construed as requiring agencies to first assist the applicant to redirect such a request before deciding whether to transfer the request itself.	Section 15(4) should be repealed.
Part III — Access to documents	15(5)	The statutory time period for processing requests is in calendar days. There is no provision for agency shutdown periods or public holidays.	A different method for calculating timeframes should be implemented. For example, the Act could be amended to provide for a processing period specified in business days. (The *Acts Interpretation Act 1901* defines 'business day' in s 2B.) For example, 20 business days would be slightly less than the currently specified 30 calendar days. The Queensland RTI Act specifies a processing period of 25 business days.

FOI Act Part	FOI Act section	Issue description	Recommended action
Part III — Access to documents	All notice provisions and extension of time provisions	The notice provisions and 'stop–the–clock' provisions are inconsistently implemented. At various points during the processing of a request, the Act provides different triggers for the statutory time period to start or stop. Examples include that an agency must take reasonable steps to notify the applicant before the clock stops; that the clock stops when notice is given to the applicant; and that the clock starts the day after a request is received. Furthermore, the extension of time provisions are inconsistently drafted. For example, s 15AA provides for the extension of 'the period referred to in paragraph 15(5)(b) for dealing with a request, or that period as extended' under two (but not all) of the extension provisions. However, s 15(8) provides for the extension of 'the period referred to in paragraph 15(5)(b)' but not that period as extended.	The notice provisions and 'stop–the–clock' provisions in the Act should be consistently implemented. The extension of time provisions should be redrafted to make it clear that extensions are cumulative: the time that is extended is the initial period as extended (if applicable).
Part III — Access to documents	15AA	Extensions of time must be agreed to in writing even if the applicant has indicated agreement in another way. The OAIC must also be notified of any such extension. Both of these requirements are an unnecessary regulatory burden on agencies.	The requirement that agreement to extend time must be in writing should be removed. The requirement to notify the OAIC should also be removed.

FOI Act Part	FOI Act section	Issue description	Recommended action
Part III — Access to documents	15AB	On a narrow interpretation, the Information Commissioner cannot impose conditions when extending time under s 15AB (because there is no express power to do so, as there is in s 15AC).	Section 15AB (or s 15AC) should be amended to remove doubt that the Information Commissioner can impose conditions when extending time.
Part III — Access to documents	15AC, 51DA	The operation of the deemed refusal provisions is unclear and does not encourage action to process requests not finalised within the statutory time period. The provisions create a high volume of work for little value, providing agencies with no reason to apply for further time to process a request and few consequences for not complying with the statutory time period.	Sections 15AC and 51DA should be amended so that they operate only when an application is made for IC review of a deemed decision, and can be used as part of the OAIC's active management of the review.
Part III — Access to documents	15AC(5), 51DA(4), 54D(4)	Under ss 15AC or 51DA, the Information Commissioner may allow further time for the decision maker to deal with a request when deemed refusal has occurred. However, there is no legislative requirement for either the Information Commissioner or the decision maker to give the applicant notice of any extension. Although this can be dealt with administratively, it may be beneficial to insert a notification requirement.	A notification requirement should be inserted into ss 15AC and 51DA.

FOI Act Part	FOI Act section	Issue description	Recommended action
Part III — Access to documents	22	When making an edited copy of a document under s 22, agencies often annotate that copy to explain the exemption ground for each deletion. The Guidelines (at [8.39]) recommend that edited documents be annotated in this way, but it is not a requirement of s 22.	Section 22 should be amended to require that the decision maker annotate the document where text has been deleted with the grounds for the decision, so that the reason for each deletion is clear to the applicant.
Part III — Access to documents	22(4)	Section 22(4) says that s 26 does not apply to a decision to 'refuse access to the whole document' unless the applicant requests a s 26 notice. This is ambiguous. From the context (s 22 is about providing access to edited copies) it is probably intended to refer to a decision to provide an edited copy which gives access to some of the document, though not the whole document. But it could also refer to a decision to give access to none of the document.	Section 22(4) should be amended to make it clear that s 26 does not apply to a decision to provide an edited copy which gives access to some of the document, unless the applicant requests a s 26 notice.
Part III — Access to documents	25(2)	Section 25(2)(b) deems a decision made under s 25 (a decision to give notice neither confirming nor denying the existence of a document) to be an access refusal decision 'for the purposes of Part VI' (which is about internal review). It should be for the purposes of both internal review and IC review.	Section 25(2)(b) should be amended by adding a reference to Part VII (Review by Information Commissioner).

FOI Act Part	FOI Act section	Issue description	Recommended action
Part III — Access to documents	26, 54N(1)(b)	An application for IC review must include a copy of a notice of decision issued under s 26 (see s 54N(1)(b)). However, in some circumstances there is no requirement under the Act for the decision maker to have provided the IC review applicant with a s 26 notice: for example, in the case of third party applicants or applicants seeking review of a charges decision.	The Act should be amended to require notices of decision to be given in all of the circumstances set out in the FOI Guidelines [8.69].
Part III — Access to documents	27A(1)	The expression 'legal personal representative' is used in ss 27A(1)(b), 53C(1), 91(1C) and 91(2A). A more commonly used term, such as 'representative' (as used in the AAT Act) should be used.	The expression 'legal personal representative' should be replaced with 'representative' throughout the Act.
Part III — Access to documents	29	There is uncertainty about whether or not unpaid charges under the FOI Act are a debt owing to the Commonwealth for the purposes of the *Financial Management and Accountability Act 1997*. Agencies have expressed concern to the OAIC about their obligations in cases where applicants have made repeated requests under the Act and refused to pay applicable charges.	Section 29, or the Charges Regulations, should be amended to make it clear that the charge authorised is not a debt owing to the Commonwealth.

FOI Act Part	FOI Act section	Issue description	Recommended action
Part III — Access to documents	29	The FOI Act does not set a time limit for an applicant to respond after the applicant has contested a charge and the agency has carried out an internal review. If the applicant fails to pay the new/reaffirmed charge or cannot be contacted, the request could be on hand indefinitely.	The Act should set a 30–day timeframe for an applicant to either pay a charge, seek review of the charge, or withdraw their request. If the applicant does not do so within the timeframe, the request should be taken to be withdrawn.
Part III — Access to documents	29, 26, 31, 54N	Section 54N requires that an IC review application must include a s 26 notice (reasons and other particulars of a decision). However, the requirements of s 26 do not correspond to the notice required to be given for a charges decision (by ss 29(1) or (8)).	The Act should be amended to clarify what constitutes a notice for the purposes of an IC reviewable charges decision.
Part III — Access to documents	29(5)	The two stage test to reduce or waive a charge requires agencies and ministers to consider both whether payment of the charge would cause financial hardship and whether giving access to the document in question is in the public interest. This raises two issues: firstly, that there is no standard for deciding what percentage reduction should apply to any reduction or waiver, and secondly that the reformed FOI Act is built on the underlying philosophy that all disclosure is in the public interest.	Refer to Charges Review recommendation 5 about introducing a scale for waiver and reduction decisions and replacing the public interest test with a test about whether access would be of special benefit to the public.
Part IV — Exempt documents	34(6)	Section 34(6) is largely redundant given the operation of s 34(3).	Paragraphs (a) and (b), and the reference to s 34(3) should be removed from s 34(6).

FOI Act Part	FOI Act section	Issue description	Recommended action
Part IV — Exempt documents	38(1A)	Section 38(1A) provides that a person's right of access is not affected merely because the document is an exempt document because of a secrecy provision in another enactment where disclosure to that person is not prohibited by that enactment or any other enactment. The obvious intention of s 38(1A) — to give certain people access to documents that cannot be accessed by others — would have been more simply achieved if s 38(1A) had provided that a document is not exempt if its disclosure to the person who has requested it is not prohibited. (This simpler approach is used in s 47F in relation to documents containing personal information.) Because of the way s 38(1A) is drafted, even if there is no prohibition on the disclosure of a particular document to a particular person: (1) if that person requests access to that document, a minister or an agency is not required to disclose it to that person (s 11A(4)); (2) if that person seeks IC review of a decision to refuse them access to that document, the Information Commissioner does not have the power to decide that the document should be disclosed to that person (s 55L); and (3) if that person seeks review by the Tribunal of an IC review decision to	Section 38(1A) should be amended to relate to s 38(1) in the same way that s 47F(3) relates to s 47F(1): that is, s 38(1A) should provide that a document is not exempt under s 38(1) if its disclosure to the person who has requested it is not prohibited by the enactment concerned or any other enactment.

FOI Act Part	FOI Act section	Issue description	Recommended action
		refuse them access to that document, the Tribunal does not have the power to decide that the document should be disclosed to that person (s 58(2)). These consequences do not sit comfortably with the obvious intention of s 38(1A) that a person can be granted access to a document that cannot be accessed by others, if there is no prohibition on the disclosure of that document to that person. (See 'A' and Department of Health and Ageing [2011] AICmr 4, [13]–[16].)	
Part IV — Exempt documents	47F(5)	Sections 47F(4) to (7) provide for access to be given to the applicant through a qualified person nominated by the applicant. The nominated qualified person must carry on the same occupation as the qualified person who provided the information in the document. This means, for example, if a document contains information provided by a psychologist, only a psychologist — and not a psychiatrist or a GP — can be nominated as the qualified person through whom the applicant is given access to the document.	Section 47F(5)(a) should be amended to allow for a qualified person to be nominated who carries out any of the occupations listed in s 47F(7), and not just the same occupation as the person who provided the information in the document. This would be consistent with the Privacy Act, which provides for alternative access through the use of a 'mutually agreed intermediary' (NPP 6.3 and APP 12.6).

FOI Act Part	FOI Act section	Issue description	Recommended action
Part V — Amendment and annotation of personal records	48	Part V applies to documents of an agency and official documents of ministers. Some documents of agencies are not controlled by those agencies: for example, documents in national information sharing systems such as CrimTrac and MySchool. There is also no scope for amendment applications to be transferred to the State or Territory agency from where the document originated.	(If the proposal to remove Part V is not adopted) s 48 should be amended to make it clear that only records controlled by an Australian Government agency or minister can be amended.
Part V — Amendment and annotation of personal records	48	Part V (amendment and annotation of personal records) applies only to documents to which access has already been lawfully provided. By contrast, 'lawful access' is not a requirement for exercising correction rights under the Privacy Act.	(If the proposal to remove Part V is not adopted) Part V should be amended to give a person the right to request the amendment of personal information in an agency's possession regardless of whether that person has already been lawfully provided with access to the document. The prerequisite should be only that the person has a lawful right of access to the document.
Part V — Amendment and annotation of personal records	49(c), 51A(d)	An application for amendment of records under s 49 (and for annotation under s 51A) requires the applicant to specify an address in Australia to which notices can be sent. This address requirement was removed for general FOI requests by the 2010 amendments. The FOI guidelines encourage agencies to be generous in their enforcement of this requirement (see [7.20]).	(If the proposal to remove Part V is not adopted) the requirement to 'specify an address in Australia to which a notice under this Part may be sent to the applicant' should be replaced with a requirement to 'give details of how notices under this Act may be sent to the applicant (for example, by providing an electronic address to which notices may be sent by electronic communication)' (as in ss 15(2)(c) and 54N(1)(a)).

FOI Act Part	FOI Act section	Issue description	Recommended action
Part V — Amendment and annotation of personal records	49(d), 51A(e)	Sections 49(d) and 51A(e) do not allow applications to be sent by email and make reference to s 15(2)(d), which has been repealed.	(If the proposal to remove Part V is not adopted) ss 49(d) and 51A(e) should be amended to allow amendment applications to be made by email. The erroneous references to s 15(2)(d) should be removed.
Part VI — Internal review of decisions	53A, 53B, 53C	Part VI includes definitions in ss 53A, 53B and 53C that are not particular to internal review. This creates readability issues, and raises questions about the operation of some provisions in relation to Part VII (Review by Information Commissioner). For example, s 15AC(3) provides that a decision to refuse access is deemed to have been made if no decision is made within a certain time of a request. The definition of 'access refusal decision' in s 53A includes a decision refusing to give access in accordance with a request. But s 54E provides that Part VI (which includes s 53A) does not apply to deemed decisions. So, on one view, a deemed decision is not an access refusal decision, which means that it cannot be the subject of internal review (as was intended) or of IC review (which was probably not intended).	The Act should be amended by moving the definitions in ss 53A, 53B and 53C into the list of definitions with application throughout the Act in s 4. The non–availability of internal review for deemed decisions should be provided for in a way that does not raise doubt about the availability of IC review for deemed decisions.

FOI Act Part	FOI Act section	Issue description	Recommended action
Part VI — Internal review of decisions	54C (and 26)	Section 54C(4) extends the notice requirements of s 26 to an internal review decision. However, a s 26 notice is in some ways unsuited to internally reviewed charges decisions. While a s 26 notice provides notification of an agency decision to provide access to some documents or to not provide access to documents, a notice following an internally reviewed charges decision requires an applicant to either pay a deposit or withdraw the request. It would be better if the notice of an internally reviewed charges decision specified the action required from the applicant for their request to proceed (for example, payment of a deposit) and a timeframe after which the request is taken to have been withdrawn if they take no action.	The Act should be amended to ensure that the notice requirements relating to an internal review of a charges decision are appropriate for that type of decision.
Part VII — Review by Information Commissioner	26A(4), 26AA(4), 27(7), 27A(6)	Following an access grant decision, an FOI applicant cannot be provided with access to documents until the third party's review rights have run out. The only practical way for agencies to determine if this is the case is to contact the OAIC after 30 days to confirm that the third party has not applied for IC review. This creates an administrative burden for agencies and the OAIC.	The Act should be amended to require an affected third party to notify the agency when they make an application for IC review.

FOI Act Part	FOI Act section	Issue description	Recommended action
Part VII — Review by Information Commissioner	54L, 54M	Where internal review of an access refusal decision results in an access grant decision, an affected third party has no access to IC review. This is because s 54M, which allows affected third parties to apply for IC review, applies only to access grant decisions and decisions made on internal review of access grant decisions; it does not apply to decisions made on internal review of access refusal decisions.	The Act should be amended to simplify ss 54L and 54M: an FOI applicant should be able to apply for IC review of an access refusal decision at first instance, or on internal review; an affected third party should be able to apply for IC review of an access grant decision at first instance, or on internal review.
Part VII — Review by Information Commissioner	54P	Some of the notice provisions in the Act are impractical and inconsistent. For example, s 54P provides that, if an agency or minister refuses access where a third party consultation requirement applies and the FOI applicant subsequently applies for IC review of the access refusal decision, the agency or minister must notify the third party of the application. There is no equivalent provision for notifying FOI applicants where a third party seeks IC review of an access grant decision.	The Act should be amended to make all of the notice provisions practical and consistent.

FOI Act Part	FOI Act section	Issue description	Recommended action
Part VII — Review by Information Commissioner	54T(6)	Section 54T(6) contains an apparent drafting error: it requires the Information Commissioner to give parties an opportunity to present their cases before making a determination under 54T(1) to grant an application for an extension of time to apply for IC review. But the provision under which the Commissioner makes a determination to grant an extension is s 54T(2); s 54T(1) allows a person to make an application for that extension of time.	Section 54T(6) should be amended by replacing the reference to subsection (1) with a reference to subsection (2).
Part VII — Review by Information Commissioner	54W(a)	The discretion not to undertake an IC review does not clearly include matters where the AAT has already made, or is in the process of making, a decision.	Section 54W(a) should be amended by adding an additional ground not to undertake an IC review: where the AAT is dealing with, or has dealt with, the matter.
Part VII — Review by Information Commissioner	54W(b)	The OAIC should have the power to refer matters to the AAT rather than simply deciding not to undertake a review (under s 54W(b)). This should operate so that the applicant is not required to pay an application fee to the AAT.	Section 57A should be amended to allow an IC review to be transferred to the AAT, at the discretion of the Information Commissioner, without an application fee being payable.

FOI Act Part	FOI Act section	Issue description	Recommended action
Part VII — Review by Information Commissioner	54Y	Section 54Y deals with cases where an applicant applies for IC review of a deemed decision and an agency or minister subsequently makes a decision on the request: the IC review application must then be dealt with as an application for review of the second decision, known as the 'actual decision' (s 54Y(2)). While the heading of s 54Y refers to decisions made after IC review has commenced, the section itself refers to a review application being made rather than one that has already commenced, meaning that the operation of the provision is unclear. It is also unclear how s 54Y interacts with s 55G, which applies during IC review and only allows an agency or minister to make a revised decision more favourable to an FOI applicant.	Section 54Y should be amended to clarify that it applies in the period after an application for IC review has been made but before an IC review has commenced. Once an IC review has commenced (as indicated by the notification of the parties to the review) it is open to an agency or minister to make a revised decision under s 55G, or resolve the matter by agreement with the applicant under s 55F.
Part VII — Review by Information Commissioner	54Z	There is no requirement to notify any parties to an IC review about that review until the Information Commissioner decides to undertake the review.	The Act should be amended to require the parties to be notified when an application for review is made, and for that notification to explain that others may apply to be joined as parties.

FOI Act Part	FOI Act section	Issue description	Recommended action
Part VII — Review by Information Commissioner	55A, 60	There is an inconsistency between the provisions determining who is a party to IC and AAT proceedings. For example, an FOI applicant has to apply to be a party to an IC review of an access grant decision, but is automatically a party to an AAT appeal about the same matter. By contrast, an affected third party is automatically a party to IC review of an access refusal decision but has to apply to be joined to an AAT appeal. In addition, the definition of 'affected third party' is confusing and complex. This creates practical difficulties in determining who is party to a review and the subsequent notice requirements, with affected provisions including ss 53C, 55A(1)(c) and 54P. The OAIC has published a discussion paper on this issue, detailing the complexities.	The Act should be amended to simplify, and make consistent, the provisions determining who is a party to an IC review and an AAT appeal. One approach would be that taken in s 89 of the Queensland RTI Act: only the applicant and the respondent are automatically parties; others affected by the reviewable decision can apply to the OAIC to be a party to the proceedings.

FOI Act Part	FOI Act section	Issue description	Recommended action
Part VII — Review by Information Commissioner	55D(1)	The explanatory memorandum to the amending legislation, at p 33, says that the onus provision in s 55D was intended to reproduce in Part VII the effect of s 61 of the pre–reform Act, which applied to 'proceedings under this Part' (that Part then related to AAT review). However, the reference to 'a request or application under section 48', in s 55D(1), is unclear: is it a reference to amendment requests made under s 48, or to access requests (made under s 15) as well as amendment requests?	Section 55D(1) should be amended to make it clear that s 55D applies to access requests (made under s 15) and amendment requests (made under s 48).
Part VII — Review by Information Commissioner	55F	The Information Commissioner's power to give effect to an agreement is limited to agreements consistent with the Commissioner's powers. This limits the scope for the use of effective alternative dispute resolution or conciliation as part of the IC review process.	Section 55F(1)(d) should be amended to require that 'the Information Commissioner is satisfied that a decision in those terms would be consistent with the objects of the Act'.
Part VII — Review by Information Commissioner	55F, 55K	It is unclear whether the IC can give effect to an agreement under s 55F without needing to also issue a decision under s 55K.	The Act should be amended to make it clear that giving effect to an agreement under s 55F finalises the IC review application, without the need for a separate decision under s 55K.

FOI Act Part	FOI Act section	Issue description	Recommended action
Part VII — Review by Information Commissioner	55U	The heading of s 55U refers to the 'production of national security and cabinet documents', and the reference in s 55U(1) to ss 33 and 34 notes that those sections are about 'national security documents' and 'cabinet documents' (respectively). But s 33 is about documents affecting national security, defence or international relations. It is not clear whether s 55U is intended to refer to any document exempt under s 33 or only to documents whose disclosure would cause damage to the security of the Commonwealth (s 33(1)(a)(i)).	Section 55U should be amended to make it clear that it applies to documents claimed to be exempt under s 33(1)(a)(i) and s 34: that is, national security and cabinet documents, but not documents affecting defence or international relations.
Part VII — Review by Information Commissioner	55R, 55T, 55U	The interaction between ss 55R, 55T and 55U is unclear. It appears that ss 55T(2) and 55U(3) provide a freestanding power to compel production of documents distinct from that in s 55R. (The explanatory memorandum to the amending legislation, at p 35, says that this power is complementary to s 55R.) Section 55R also includes an offence provision that ss 55T and 55U do not, but lacks the requirement to return exempt documents contained in those sections.	The Act should be amended to clarify the interaction between ss 55R, 55T and 55U. For example, if s 55R notices are intended to be issued before the power in s 55T(2) is exercised, the words 'under s 55R' should be inserted in s 55T(4) and 55U(2).

FOI Act Part	FOI Act section	Issue description	Recommended action
Part VII — Review by Information Commissioner	55T	The requirement for the return of exempt documents in s 55T(3) should only apply to documents received in physical form, not by email. The requirement to return the document to the person within the agency who produced it also proves to be impractical in many cases.	Section 55U(3) should be amended to require the Information Commissioner to return any physical documents to the agency or minister who produced them.
Part VII — Review by Information Commissioner	55Z(2)	It is not clear whether s 55Z (Information gathering powers — protection from liability) applies to criminal penalties: s 55Z(2)(a) refers to civil proceedings; s 55Z(2)(b) does not.	Section 55Z should be amended to make it clear that the protection from liability extends to criminal liability.
Part VIIB — Investigations and complaints	54N	Section 6C of the *Ombudsman Act 1976* allows complaints to the Ombudsman to become complaints to the OAIC. Sometimes, a complaint to the Ombudsman is best treated as if it were an application for IC review (see, for example, *Doney and Department of Finance and Deregulation* [2012] AICmr 25).	The Ombudsman Act (and, perhaps, the FOI Act) should be amended to clarify that the Information Commissioner can treat a complaint transferred from the Ombudsman as if it were an application for IC review, rather than a complaint to the Information Commissioner, when that would be appropriate.

FOI Act Part	FOI Act section	Issue description	Recommended action
Part VIIB — Investigations and complaints	73(c), 73(d)	It is not clear whether a respondent agency is 'another body' for the purposes of s 73(c). By contrast, s 73(d) expressly refers to the respondent agency. This is particularly relevant where a complainant comes to the OAIC without having first complained to the respondent agency. (The Guidelines (at [11.5]) express the view that 'another body' in s 73(c) includes the respondent agency.)	Section 73(c) should be amended to clarify that the reference to 'another body' includes the respondent agency.
Schedule I — Courts and tribunals exempt in respect of non–administrative matters	Schedule 1	Schedule 1 lists three 'courts and tribunals exempt in respect of non–administrative matters': the Australian Industrial Relations Commission, Australian Fair Pay Commission and the Industrial Registrar and Deputy Industrial Registrars. Due to changes to other legislation, this listing no longer reflects the names of these agencies.	Schedule 1 should be amended to replace references to the Australian Industrial Relations Commission, Australian Fair Pay Commission and the Industrial Registrar and Deputy Industrial Registrars as appropriate.

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AIC Act Part	AIC Act section	Issue description	Recommended change
Part 2 — Office of the Australian Information Commissioner	9	The *Personally Controlled Electronic Health Records Act 2012* confers functions on the Privacy Commissioner but the AIC Act was not amended to reflect this extension.	An additional item should be inserted in the table set out in s 9(2): *Personally Controlled Electronic Health Records Act 2012* Division 4.
Part 2 — Office of the Australian Information Commissioner	11, 12	There is need for clarification about delegation of Commissioner powers and the interaction of ss 11 and 12. These provisions allows for the delegation of powers to staff that cannot be performed by the Privacy or FOI Commissioners without the approval of the Information Commissioner.	Clarify the interaction of section 12(4) and 11(4).
Part 5 — Miscellaneous	29	Section 29 contains an unclear, potentially superfluous provision relating to the use of information acquired for a lawful purpose. Specifically, s 29(2)(b) provides that the prohibition on disclosure in s 29(1) does not apply if a person 'acquires' the information for any other lawful purpose. However, s 29(1) only applies to information acquired in the course of performing functions or exercising powers under the AIC Act.	Section 29(2)(b) should be removed.

AIC Act Part	AIC Act section	Issue description	Recommended change
Part 5 — Miscellaneous	31	The 'freedom of information matters' specified in s 31 do not refer to the IPS or disclosure log requirements under the FOI Act.	The IPS and disclosure log requirements should be added to the 'freedom of information functions' specified in s 31.