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Open and Transparent Government – the Way Forward
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First let me acknowledge the traditional owners of this land, and pay my respects to their elders past and present.

Parliamentary colleagues, distinguished guests, ladies and gentlemen, there was once a time when it was a serious offence to report what Parliamentarians said in the chamber.

The justification for this seventeenth century prohibition was that it allowed parliamentarians to speak their mind and exercise their judgement without fear of the censure of the public. You see, anxiety about politicians bending with the wind of public opinion is as old as politics itself.

Democracy has at its heart a tension between ideas of responsible government and the disincentives for members of a government – who live and die by public opinion – to make unpopular decisions.

We still expect our parliament and our government to make decisions in the public interest, rather than their own political interests, but we no longer accept that the possibility of punishment at the polls for a necessary but unpopular decision gives a government the right to evade scrutiny.

The secrecy of Parliamentary proceedings at the birth of the Westminster system is long gone. But the idea that the best way to protect responsible government is by keeping information about that government as confidential as possible has been very slow to die.

The slow growth of the idea that government accountability extends beyond answering to electors on polling day has gradually changed the way Australian governments treat government information. With that has come a recognition that the best safeguard against ill-informed public judgement is not concealment but information. As Abraham Lincoln said: "Let the people know the facts, and the country will be safe."

There is a growing acceptance that the right of the people to know whether a government's deeds match its words, to know what information the government holds about them, and to know the information that underlies debate and informs decision-making, is fundamental to democracy.

This has not lifted from Australian governments their responsibilities to safeguard confidentiality, privacy and security. But it has required them to evaluate and define those responsibilities in the democratic arena. Questions of both openness, and confidentiality, have to be treated as different aspects of the same over-riding obligation to act in the public interest. Some of those requirements of confidentiality are clear cut.

No government broadcasts the activities of its intelligence services, the contents of sensitive diplomatic negotiations, or the precise location of troops, for example. And no government should. But our democracy, drawing as it does so strongly on the heritage of Westminster, has inherited a historical tendency to weight the protective features of confidentiality more heavily than the positive aspects of disclosure.

And ladies and gentlemen, this has been an underlying tension in the development of Freedom of Information laws in Australia.

Both in practice, and as a symbol, 'freedom of information' represents the pinnacle of citizens' right to know: a legal requirement for government to release information.

But FOI policy at a Federal level in Australia has not always lived up to such expectations.

The introduction of FOI legislation in Australia in the early 1980s was an important first step in recognising the public interest inherent in openness about government information.

However, twenty-seven years later it is clear that FOI at a Federal level has, in Rhys Stubbs' words, worked "around the assumption of closed representative government, forming a barricade that distinguishes what the public can and cannot access."¹

There has been a wide-spread and not unjustified perception that, at least in practice, the culture of FOI at a Federal level in Australia has been that the Act sets out minimum requirements: that decision-makers determine in favour of disclosure only where forced to and that, too often, FOI applications are viewed as a contest between applicant and agency.²

This is far less prevalent in the majority of FOI requests, those which involve personal information. However, the kind of requests which you, ladies and gentlemen of the press, most often make – for information concerning policy decisions or government action – are the ones most often subject to resistance, delay and refusal.

Yet this kind of information is, more often than not, material which the Australian public have both the right and the need to know – material that enhances and strengthens Australia's democracy through increased public participation in Government processes, better informed decision making, and increased scrutiny and discussion of government activity.

¹ Stubbs op cit p 671

² Stubbs op cit p 673

Labor took a number of commitments to the last election on the subject of Freedom of Information, set out in Labor's election policy, Government information: restoring trust and integrity.

That policy document encompassed changes to make access easier, and processes more transparent - legislative and procedural reforms to improve the operation of FOI. But we also recognised an underlying challenge to create a pro-disclosure culture within government and the public service around the release of, and access to, government information. A challenge to change the culture of FOI from one of resistance to one of disclosure, to a recognition that the public interest can often mandate disclosure, rather than being a factor weighed only as a reason to refuse.

This is not an easy task. I'm sure no-one here will be surprised to hear that FOI reforms are not universally supported by public servants. It is proper for me today to acknowledge those concerns. I know they are genuinely held. I know that some in the Australian Public Service feel that FOI reforms may inhibit their ability to provide frank and fearless advice.

But I believe that the tradition of frank and fearless advice is more robust than that. I believe that our public servants will work professionally within the new FOI framework as they do within other accountability mechanisms.

Ladies and gentlemen, last November, the Government introduced legislation to fulfil the first of our commitments – a bill to remove the power to issue conclusive certificates in the FOI Act (and the Archives Act 1983).³

As you know, the FOI Act has been fundamentally unchanged for 27 years. Reforming it is neither simple, nor easy, but it is a task this Government is committed to.

The changes needed to bring the Act up-to-date have to be considered and measured. We have taken the time necessary to get this right. The time to talk to experts – including the media and academics – and to government agencies, to make sure our legislation will be informed by the very latest thinking.

Today I can announce that the Government is releasing exposure drafts of our FOI reform legislation that will fulfill the rest of our election commitments and will deliver the first substantial overhaul of the federal Freedom of Information regime since the Act's inception in 1982.

These reforms will recognise the importance to Australia's democracy of, as the proposed new objects of the Act state, "increasing public participation in Government processes, leading to better informed decision making; increasing scrutiny, discussion, comment and review of the Government's activities" and increasing "recognition that information held by the Government is to be managed for public purposes, and is a national resource".

³ Introduced 26 November 2008

These reforms will change the law, but they will also demonstrate the government's commitment to culture change, a shift from the culture of secrecy we saw under the last Government to one of openness and transparency.

Although the modernisation of the FOI Act contained in this draft legislation is extensive, there are two main components which go directly to the Government's goal of creating a pro-disclosure culture in the Australian Public Service.

They are the establishment of the independent statutory office of the Information Commissioner; and the proposed new Commonwealth Government publication scheme.

The Labor Party took to the last election a commitment for the establishment of an Office of the Information Commissioner – a whole-of-government clearinghouse for complaints, oversight, advice and reporting for freedom of information and privacy matters, bringing together the existing role of the Privacy Commissioner, a new Freedom of Information Commissioner, and the new Information Commissioner.

This draft legislation fulfils that election commitment.

The Office of the Information Commissioner, and the FOI Commissioner in particular, will drive cultural change in the Australian Public Service and in Government.

The Freedom of Information Commissioner will be, for the first time, an independent champion of FOI, charged with overseeing agencies' compliance with both the letter and the spirit of the legislation. At the same time the Office of the Information Commissioner will provide an independent high-level base from which cultural change can be driven throughout the public service - through training, education, advice, and feedback to agencies. The Commissioner will be charged with monitoring, investigating and reporting on agency compliance with the Act, reporting to the Minister on ways to improve the operation of the Act, and preparing guidelines on the operation of the FOI Act.

The FOI Commissioner will have the ability to conduct a full merits review of decisions by agencies and Ministers on access requests, and will - in the first instance - work with agencies and applicants using alternative dispute resolution in an attempt to resolve access disputes.

This review mechanism will provide a quick and easy process for the resolution of FOI disputes by an independent statutory officer. Importantly, where cases are not resolved through conciliation, and the Freedom of Information Commissioner makes a determination, this will almost always be a decision done 'on the papers' without a hearing. This should deliver much faster, and much cheaper, decisions.

We have also retained the possibility of subsequent merits review by the AAT. I'm sure it's not a surprise to any of you that there were divided views on the value of keeping the AAT as part of the review process.

On consideration, the Government came to the view that removing the AAT would result in the Freedom of Information Commissioner conducting full merits review hearings, leaving little time left over for their role as a 'champion' of Freedom of Information. It would also leave applicants in the position of having only one avenue of appeal from an Freedom of Information Commissioner decision – to the Federal Court, and then only on a matter of law.

On balance we decided that retaining the AAT also provides a safeguard for difficult or complex cases, keeping a merits review body with experience in contested hearings, and a developed jurisprudence in this area.

We believe that the new review structure will make Freedom of Information more accessible by making it less legalistic without removing any of the legal protections applicants currently enjoy. And an application for a merits review to the Freedom of Information Commissioner will be free of charge.

The Information Commissioner will also have responsibility to oversee and ensure compliance with a new Commonwealth Government publication scheme.

This publication scheme will require agencies to actively consider the types of information they have which can and should be made available to the public. It will not only encourage but mandate agencies to publish what they can lawfully publish – forcing a change of attitude to think about what they should be publishing rather than what they are obliged to. In other words, the publication scheme and the Information Commissioner's role in overseeing and ensuring compliance aims to bring a change in emphasis from agencies defining their publication of information by what is required, to a culture of openness where information ought to be made available unless it is against the public interest to do so.

Agencies will be required to prepare plans indicating how they will comply with the publication scheme, including the format in which information will be published.

We anticipate that the bulk of this material will be published on-line. When it comes to making information available, accessibility is an important consideration. Information that is 'public' but only available to those with the time and resources to search it out is effectively sequestered, in practice if not in law. The public sphere now includes the internet just as surely as it once included street-corner orators on soap-boxes.

The Information Commissioner will also issue guidelines in relation to the publication scheme which agencies must take into account in complying with the scheme. The Information Commissioner will be able to undertake an investigation of an agency's compliance with the scheme.

This is in line with the general shift in emphasis in the draft legislation, and with the cultural change the Government is determined to achieve.

Ladies and gentlemen, the draft legislation released for comment today will also streamline and clarify the exemptions regime.

As recommended in the ALRC/ARC's 1996 Open Government Report exemptions for Executive Council documents, documents arising out of companies and securities legislation, and documents relating to the conduct of an agency of industrial relations will be repealed.

At the same time as reducing the number of exemptions from eighteen to sixteen, we are doubling the number of exemptions subject to a public interest test, from four to eight. Exemptions for personal privacy, business affairs, the national economy, and research will all, under these proposals, be subject to the public interest test.

And it will be one public interest test.

The draft legislation divides exemptions into those which are subject to a public interest test (called conditional exemptions) and those that are not, and then applies a single simple, strong and clear test to all conditional exemptions, which requires an agency to give access to a document unless giving that access would at the time, "on balance, be contrary to the public interest".

Importantly, the legislation includes the following non-exhaustive public interest factors to be weighed in favour of disclosure, if that disclosure would:

- promote the objects of the FOI Act;
- inform debate on matters of public importance;
- promote effective oversight of public expenditure;
- or allow a person to access their own personal information.

And the draft legislation removes inappropriate reasons to refuse disclosure, stating that decision-makers may not take into account factors such as:

- that access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in, the Government;
- that access could result in the applicant misinterpreting or misunderstanding the document;
- that the author of the document is, or was, of high seniority in the agency;
- or that access could result in confusion or unnecessary debate.

In addition, although the Cabinet exemption remains, to protect the clear public interest in an open and unfettered policy debate between Ministers, the scope of this exemption will be clarified, to ensure it only applies to those documents which were created for the dominant purpose of being submitted to Cabinet.

As you will appreciate this is a very substantial change and will mean that documents are not exempt simply because they are attached to a Cabinet submission, or happens to make an appearance in the Cabinet room.

At the same time the Cabinet exemption will be clarified so that documents that are part of the core Cabinet process, such as briefing notes on Cabinet submissions, currently not covered by the Cabinet exemption but routinely withheld by FOI decision-makers, will be brought clearly and transparently within the Cabinet exemption.

However, under our proposed reforms, that same Cabinet exemption will now last not nearly as long.

The Government proposes to amend the Archives Act 1983 to reduce the closed access period for all Government records including official records of Cabinet (except for Cabinet notebooks) from 30 years to 20 years.

And the closed access period for Cabinet notebooks will be reduced from 50 to 30 years.

As you will all no doubt appreciate these two measures represent real milestones.

The access is to be phased in over a 10 year period, with the first multi-year release commencing on 1 January 2011.

Given the accelerating speed of change in our society, the Government believes that Australians should not have to wait thirty years for access to these documents. While it is not in the public interest for Cabinet discussions to be conducted in a spirit of self-censorship or second guessing, twenty years protection is more than adequate to ensure Cabinet decisions are not distorted by immediate electoral concerns.

We propose to extend the Act to cover documents held by service providers contracted to the Government which relate to the provision of services to Government or the provision of services for and on behalf of Government. Agencies will be required to ensure that they can obtain access to those documents under the terms of their contracts with the service providers.

In addition, in recognition of the importance of disclosure to enable proper debate on matters of importance to the community, the Government will also provide the Australian Law Reform Commission with a reference to consider whether FOI should be extended to, or another disclosure regime provided for, the private sector.

The ALRC and the Administrative Review Council considered this issue in their 1996 Report, "Open Government". The Government considers it is timely to re-examine this issue in the context of the general reforms to freedom of information and developments on disclosure regimes in both public and private spheres. Terms of reference for this review will be finalised by ministers later in the year.

There are a range of other changes in the draft legislation, but the final one I wish to highlight today is the removal of fees for making an FOI application. Fees can be a real impediment to FOI applications, as a disincentive to both making an application and to following through on large and complex requests.

This draft legislation proposes that no application fee will apply to FOI applications, or for a review application to the Information Commissioner. There will be no cost consequences of going to the Information Commissioner.

The first hour of decision making time on FOI requests will be free, and there will be zero charges for applications for a person's own personal information. For not-for-profit organisations and journalists, the charge-free decision making period will be the first five hours. In addition, the Government will task the Information Commissioner to review all costs and charges associated with Freedom of Information applications, and report within twelve months of the establishment of the office. One aspect of this review will be whether the Information Commissioner should have the power to examine the reasonableness of fees and charges in particular cases.

One longstanding criticism of FOI is that agencies are too slow in processing FOI applications and that on occasion they use delays to frustrate applications. To address this, the Government proposes that where applications are not dealt with within the statutory time frame, unless extended with the agreement of the Information Commissioner, then they will be processed free of charge.

Ladies and gentlemen, I began by talking about the twin responsibilities Government bears – of openness and of confidentiality.

As the Report of the Independent Audit into the State of Free Speech in Australia, commissioned by the very organisation that arranged today's conference, 'Australia's Right to Know', states: "Decisions to refuse access to documents about some aspects of government operations may be soundly based on exemptions in the Act designed to protect national security, investigations, and sensitive information about high-level economic, financial and other national interests. Information about other individuals and commercial interests should also be protected in certain circumstances. The obligation of a government agency in refusing access to these types of documents is to fully explain the reasons for the decision and justify the decision based on specific provisions of the legislation".

Ladies and gentlemen, our draft legislation meets that test.

Intelligence agencies and their documents are already wholly excluded from the operation of the FOI Act. That exclusion is maintained, and in some areas clarified, such as to cover extracts from such documents.

The Defence Department will be excluded for documents in respect of its collection, reporting and analysis of operational intelligence and special access programs under which a foreign government provides restricted access to technologies.

I make no apology for these exclusions.

There is a strong, in my view an undeniable, public interest argument why this information ought to be protected. National security is a fundamental responsibility of Government.

Classified national security information must be protected by the government in the national interest. This is right, it is vital, and it is not going to change.

I just want to make it very clear, so everyone understands, what information the Government believes we have a responsibility to keep out of the public area. These are clear – and limited – exceptions to the general principle of disclosure.

And, ladies and gentlemen, outside these clear and limited exceptions, the Government does not share the view that responsible government can only be carried out if the public's right to know is stringently curtailed. But given the deep-seated roots of this view in Australia's tradition of government, it was not a great surprise that in our consultations with many of you we heard time and time again that your biggest problem with FOI is not the Act but the need for cultural change.

This legislation sends a message about cultural change – but I will also be taking specific steps outside the legislative process, including by sending a personal letter to secretaries of departments and agency heads highlighting the intention and purpose of the exposure draft legislation and making it clear the Government looks forward to their assistance in promoting FOI within their respective departments and agencies.

Ladies and gentlemen, we do not see this package of proposed reforms as a final step or a concluded process. Emerging technologies continue to change the way governments use, and citizens access, information. New patterns of democratic engagement require new ways to inform debate and decision-making. Legislation, regulation, and policy must keep up, or they will end up strangling access rather than enabling it.

In addition, the Government has given a commitment to again review the operation of the FOI Act after these reforms are bedded down.

We no longer, ladies and gentlemen, live in a world of letters and filing cabinets. Email and the internet has accelerated the exchange of information and opinion, and greatly increased the expectation of immediate access. In this environment, barriers to convenience effectively become barriers to access for many Australians.

To address this issue, the new Information Commissioner will have the responsibility of advising and reporting on the Government's policy and practices when it comes to Government-held information.

A great deal of information gathered, used and stored by government is theoretically available – such as meteorological data; housing data; health statistics, electoral data – but it is often only used within departments – not shared across government, let alone with the public.

When the Office of the Information Commissioner is established, a Government Advisory Committee will assist the Commissioner to advise the Government on whole of Government management of information.

Ladies and gentlemen, the road from the secret debates of the Long Parliament to the question of what government information ought to be published on the internet as a matter of course, has been neither short nor straight. At different times along the way, politicians, journalists, media proprietors, lawyers, academics and citizen advocates have been allies, opponents, or grudging fellow-travellers. The different responsibilities – and different imperatives – of those with a personal, political or professional interest in government openness and Freedom of Information inevitably leads to different opinions, sometimes widely divergent ones.

You have heard mine. I have no doubt that as the discussions of this draft legislation progress, I will hear yours.

I suspect that some in this room wish the Government's reforms tipped further in the direction of an informational free-for-all. And I know that there are some outside this room who would prefer a return to the days of silence, censorship, and surreptitious 'scofflaw' pamphlets.

But easy extremes do not serve the public interest, that first and foremost responsibility of government. I have the obligation – and not one I take lightly – to find not just the point of equilibrium, but the right answer. It is my belief this draft legislation does that – that it meets the democratic requirements that the Government be open and transparent in its activities without contravening the responsibility of the Government to keep confidential information out of the public arena.

Your views may differ. We are releasing this legislation as an exposure draft precisely in order to get the benefit of hearing your opinions and the opinions of the many other people with an abiding interest in this area who are not here today, before putting the Bill before the Parliament.

Because, ladies and gentlemen, of all the many things that belong firmly on the public side of the line, one is definitely the debate on where that boundary ought to be drawn.

Such a debate – such public participation in Government processes, such increased scrutiny, discussion, comment and review – is indeed the aim of our draft legislation and our reforms. And I believe that when the legislation comes before the Parliament it will give us all a reformed FOI Act that will open the doors to many more such informed discussions and engagements with public policy, until, I hope, they become an unremarkable – a precious, but routine – part of our democracy.