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Ministry of Justice

## Feedback on Open Government Partnership Fourth National Action Plan Commitment 7 – improving scrutiny of OIA exemptions

### 1 Introduction

- 1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to provide feedback on the Ministry of Justice’s *Open Government Partnership Fourth National Action Plan Commitment 7 – improving scrutiny of OIA exemptions* discussion paper (**Discussion Paper**).
- 1.2 This submission has been prepared with input from the Law Society’s Public Law Committee, and Human Rights and Privacy Committee.<sup>1</sup>

### 2 General comments

- 2.1 We understand the Discussion Paper was prepared for the purpose of undertaking targeted engagement with select stakeholders who were involved in the development of New Zealand’s Fourth National Action Plan (**Action Plan**), and Commitment 7 in that Action Plan (which is to strengthen the scrutiny of legislative clauses that propose to override the disclosure requirements of the Official Information Act 1982 (**OIA**)).
- 2.2 We encourage the Ministry to always undertake wider public consultation on work relating to the OIA and the Action Plan, in order to improve transparency, and to ensure the public, and other interested stakeholders, have the opportunity to provide feedback. Wider public engagement, and transparency around this work is particularly important, given that:
  - (a) a sub-objective of Commitment 7 is to increase transparency,<sup>2</sup>
  - (b) transparency is one of the three Open Government Partnership values, alongside citizen participation and public accountability,<sup>3</sup> and
  - (c) it relates to the potential ouster of the OIA, a part of New Zealand’s constitutional framework.<sup>4</sup>

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<sup>1</sup> More information about these committees can be found on the Law Society’s website: <https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/>.

<sup>2</sup> Discussion Paper at [9].

<sup>3</sup> See: <https://www.opengovpartnership.org/glossary/transparency/>.

<sup>4</sup> *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385 at 391.

2.3 It is appropriate for any work relating to Commitment 7 to be undertaken in a manner consistent with these values and objectives. Furthermore, whilst other stakeholders and the wider public may not have had any feedback on the development of the Action Plan, they may nevertheless wish to provide feedback on more discrete aspects of the Action Plan.

### 3 Options to improve scrutiny mechanisms

3.1 The Ministry has sought feedback on nine proposed options for improving scrutiny mechanisms (question a), as well as any other mechanisms which could be updated to include reference to the OIA and potential exemptions (question b).

3.2 We agree all nine options outlined in the Discussion Paper will help improve scrutiny mechanisms. Once these options are implemented, we encourage the Ministry to work with relevant stakeholders to draw the updated resources to the attention of those involved in drafting and scrutinising legislation.

3.3 We have also discussed some additional or alternative options which could help improve scrutiny of OIA exemption clauses below.

#### Scrutiny of OIA exemption clauses during Bill of Rights vet

3.4 The Ministry of Justice scrutinises proposed bills and advises the Attorney-General of any inconsistencies with the New Zealand Bill of Rights Act 1990 (**Bill of Rights**).<sup>5</sup>

3.5 When preparing this advice, the Ministry could consider whether a proposed bill will limit the right to seek and receive information of any kind in any form (a right protected by section 14 of the Bill of Rights). That right may be subject only to reasonable limits which are prescribed by law, and can be demonstrably justified in a free and democratic society.<sup>6</sup>

3.6 Where a proposed bill seeks to override the disclosure requirements in the OIA, it may limit the public's ability, and their right to seek and receive certain information. The Ombudsman has taken a similar view, noting that:<sup>7</sup>

“[T]he OIA is one of the vehicles by which New Zealanders may exercise their fundamental freedom to seek and receive information, as enshrined in section 14 of the New Zealand Bill of Rights Act 1990. It follows that the application of the OIA, as a constitutional measure which reflects fundamental freedoms, should only be curtailed where there is clear justification.”

3.7 On this basis, in appropriate cases, the Ministry's advice to the Attorney-General could consider whether a proposed OIA exemption clause places *any* limits on the section 14 right to seek and receive information, and whether or not those limits are justified.

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<sup>5</sup> If a bill contains an inconsistent provision, the Attorney-General must then notify the House of Representatives what that provision is, and how it appears to be inconsistent with the Bill of Rights (see Bill of Rights, s 7, and Standing Orders of the House of Representatives 2023, SO 269(1)).

<sup>6</sup> Bill of Rights, s 5.

<sup>7</sup> See Office of the Ombudsman *Guidance on when to engage the Ombudsman in law reform proposals* (2022) at [9], also cited in the Discussion Paper, at page 8.

- 3.8 It is unclear whether the inclusion of an OIA exemption clause in a bill is presently seen to trigger such an analysis.<sup>8</sup> If it is not, we encourage the Ministry to assess whether the current guidance and processes for preparing advice to the Attorney-General require revision, in order to provide for such a trigger.
- 3.9 It may in any case be worthwhile considering a short, additional step that would apply in all cases of a proposed exemption clause. Where a bill includes an OIA exemption clause, and even where the Ministry considers it unlikely the clause places an unjustified limit on the right to seek and receive information, it could prepare a supplementary report, which:
- (a) Identifies the exemption clause;
  - (b) Outlines the Ministry's views around whether the clause places any limits on the right to seek and receive information, and whether those limits are reasonable and justified; and
  - (c) Details any consultations about that clause with relevant stakeholders, including the Ombudsman.
- 3.10 This information would therefore be prepared in respect of every bill which contains an OIA exemption clause (or in fact, any form of limitation on the application of the OIA).
- 3.11 We acknowledge that this adds an additional process, however we do not envisage it would be a lengthy or resource intensive undertaking. In return, it would:
- (a) Recognise the constitutional status of the OIA and the significance of proposals to limit its application;
  - (b) Provide an additional layer of scrutiny of exemption clauses, and provide the Ministry further, procedural reassurance that all Bill of Rights issues have been considered;
  - (c) Enhance public visibility and awareness of proposed exemption clauses, and public understanding of how those clauses override the requirements under the OIA; and
  - (d) Improve the public's understanding of how proposed new legislation limits their right to seek and receive information.

#### 4 Information about existing provisions which override the OIA

- 4.1 The Ministry has sought feedback on how easy it is for submitters to access information about exemptions to the OIA (question c). We understand the Ministry does not hold a list of all exemption clauses, and we are not aware of an easily accessible and up-to-date list being available to the public. In addition, it is difficult to carry out internet searches for guidance about exemptions to the OIA, as such search results typically relate to the withholding grounds contained in the OIA, rather than exemptions to the OIA itself.

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<sup>8</sup> We have observed that the Bill of Rights advice prepared by the Ministry does not always consider *all* relevant clauses which limit the application of the OIA – see, for example, the Ministry's advice to the Attorney-General about the Commerce Amendment Bill (which did not consider whether cl 32 of the Bill limits s 14 of the Bill of Rights), and the Ministry's advice on the Reserve Bank of New Zealand Bill (which did not consider the potential impacts of clauses 266, 268 and 269).

Therefore, we do not believe it is easy to access information about exemptions to the OIA.

- 4.2 It would therefore be helpful for the Ministry to identify and maintain a list of enactments which override the disclosure requirements in the OIA.<sup>9</sup> This list could include information about:
- (a) The specific legislative provisions which override the disclosure requirements in the OIA,<sup>10</sup> and how they fit within the exemption categories identified by the Ministry;
  - (b) Whether, and to what extent, those provisions have impacted the public's ability to freely access official information (which is one of the objectives of the OIA);<sup>11</sup> and
  - (c) Whether there was consideration of the impacts of those provisions on section 14 of the Bill of Rights when the provisions were being drafted and where information on that consideration may be found.
- 4.3 We believe it is appropriate for the Ministry to develop and maintain this list, as the Ministry is the lead agency for this work,<sup>12</sup> and is likely better-placed to make the list available to the public. Once this list is developed, we recommend reviewing the various exemption provisions on the list to determine if they ought to be amended in order to ensure better consistency with the OIA and the Bill of Rights.

## 5 Understanding the driver for exemption clauses

- 5.1 The OIA is intended to operate as a comprehensive harm-based scheme, capable of protecting specified interests unless the countervailing public interest in disclosure outweighs that prospective harm. It does not take a class-based approach to the protection of official information.<sup>13</sup>
- 5.2 The continued use of statutory exemptions detracts from the legislative scheme of the OIA and its harm-based approach. In effect, it had introduced a series of class-based exemptions. It is not clear what harms those exemptions seek to protect against, and whether in fact those harms are not already protected by the OIA. We suggest it would be beneficial for the Ministry of Justice to identify the motivations for existing exemptions, consider whether those motivations indicate a wider concern about the OIA. The Ministry could then also consider what further guidance could be provided under the mechanisms identified in the paper.

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<sup>9</sup> We acknowledge the Appendix of the Discussion Paper contains some of this information, but that information only relates to *"eleven pieces of legislation ... selected from a list provided by the NZ Council for Civil Liberties in [a] submission during development of the NAP4"*.

<sup>10</sup> The Action Plan notes, at page 28, that there are now *"more than 85 clauses in legislation that override the presumption of availability of official information found in section 5 of the Official Information Act 1982. More than 20 have been added as a result of legislation introduced since 2019."*

<sup>11</sup> Explanatory Note of the Official Information Bill.

<sup>12</sup> Discussion Paper at [7].

<sup>13</sup> See Te Aka Matua o te Ture | Law Commission *The Public's Right to Know: Review of the Official Information Legislation* (NZLC R125, 2012) at 2.4-2.7.

## 6 Next steps

- 6.1 We would be happy to answer any questions, or discuss this feedback with the Ministry. Please feel free to get in touch via the Law Society's Senior Law Reform & Advocacy Advisor, Nilu Ariyaratne ([Nilu.Ariyaratne@lawsociety.org.nz](mailto:Nilu.Ariyaratne@lawsociety.org.nz)).

Nāku noa, nā

A handwritten signature in black ink that reads "David Campbell". The signature is written in a cursive style with a large initial 'D'.

David Campbell  
**Vice-President**