4 November 2014

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600
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Dear Sir/Madam,

Inquiry into the Freedom of Information Amendment (New Arrangements) Bill 2014

I write with reference to the current Senate Inquiry into Freedom of Information Amendment (New Arrangements) Bill 2014.

This Bill implements the changes that are required to existing laws, including the Freedom of Information Act 1982 (the FOI Act), in order to implement the proposed abolition of OAIC. My submission focusses on the underlying basis for the Bill rather than of the specific measures that it contains to implement them. I would strongly argue that the abolition of the OAIC is a highly retrograde step from the perspective of both freedom of information and information management more generally.

Implications for the operation of the FOI Act

The abolition of the OAIC raises three key issues:

- it substantially increases the cost of independent review;
- it removes the advantages of having specialists in FOI dealing with review and FOI complaint handling; and
- it removes from the regime an important oversight, educational and championship function.

Increased cost of external review

It is generally acknowledged that an optimal review mechanism needs to be affordable to those who wish to utilise it. [1] As the Committee would be aware, review by the OAIC is free of charge, whereas an application for review by the Commonwealth AAT will incur a filing fee of $816, potentially putting it beyond the reach of many applicants in a context where there is high level of demonstrated demand for external review.[2]

[1] Laura Neuman, "Enforcement Models: Content and Context", Access to Information Working Paper Series, International Bank for Reconstruction and Development/ World Bank, Washington, 2009, p 2, accessed at http://www-wds.worldbank.org/servlet/WDSContentServer/IW3P/IB/2009/04/03/000333038_20090403034251/Rendered/PDF/479910WBWP0Enf10Box338877B01PUBLIC1.pdf

[2] The OAIC Quarterly Statistics 2013-14 as at 31 March 2014 show that at a total of 507 applications were received for 2012/13: see http://www.oaic.gov.au/images/documents/OAIC_statistics_1_January_to_31_March_2014.pdf

This matters because the genuine availability of an independent review mechanism is fundamental both to the effective operation of the legislation and public confidence in it. As pointed out by a former Executive Director of the Connecticut Freedom of Information Commission, "even a law which is very liberal in its drafting will be "essentially useless" if it lacks practical means for enforcing it."[3] Compliance is fundamental to the effectiveness of any FOI law and measures that affect compliance can make as much difference to how well it works as other aspects of the architecture of the legislation.[4] Agencies need to know that their decisions are readily subject to independent oversight if they are to continue to take their FOI obligations seriously.

The need for specialist body

There is a strong argument for a having a specialist review body to handle both FOI review and FOI complaints functions. This promotes greater efficiency and, as pointed out by Neuman, is important because of the complexity of FOI laws, including the "delicate public interest balancing tests" that they embody.[5]

In the case of the OAIC, the value of this specialist function can be seen in the close nexus between the detailed and very useful guidelines it has prepared and the decisions of the Commissioner. Arguably this can serve an important normative function for agencies, thereby promoting better compliance with the guidelines.

The need for a champion

Monitoring compliance and active promotion both have a critical role to play given that the success of FOI requires fundamental cultural change and because a culture of transparency is fundamentally difficult to maintain in the face of governments' natural aversion to detailed scrutiny of their affairs.

In an article that reviewed the operation of the FOI Act on its 25th Anniversary,[6] I commented that:

> [E]vidence of poor attitudes by some agencies to FoI which was noted with concern in the Senate Committee's report[7] are reflective of the absence of any body which plays an active role in publicising its existence, monitoring compliance with its provisions and initiating actions to remedy factors which are found to inhibit its effective operation. The Information Law Branch of the Attorney-General's Department is currently responsible for the general

[3] Mitchell W Pearlman, *Piercing the Veil of Secrecy: Lessons in the Fight for Freedom of Information*, 1st ed. (New Britain, CT: LawFirst Publishing/Connecticut Bar Association, 2010), 130 cited in Sarah Holsen and Martial Pasquier. "Insight on Oversight: The Role of Information Commissioners in the Implementation of Access to Information Policies" (2012) 2 Journal of Information Policy 214, 222 at fn26.

[4] See Alistair Roberts, *Limited Access: Assessing the Health of Canada's Freedom of Information Laws* , Freedom of Information Research Project, School of Policy Studies, Queens University, April 1998, accessed at: http://www.newspaperscanada.ca/system/files/APRIL%201998%20-%20Limited%20Access%20Assessing%20the%20Health%20of%20Canada%27s%20Freedom%20of%20Information%20laws.pdf.

[5] Ibid.

[6] Moira Paterson, "Transparency in the Modern State: Happy birthday FOI! Or commiserations?" (2004) 29 *Alternative Law Journal* 10, 13.

[7] Senate Standing Committee on Legal and Constitutional Affairs, *Freedom of Information Act 1982* (1987) [3.140].

> administration of the FoI Act, but the measures taken by it to assist agencies and members of the public are relatively modest.[8]

There are many reasons why governments and public servants have a natural disinclination towards transparency, some more valid than others. Even where there is nothing specific to hide, it is generally more comfortable to function outside the torchlight of transparency. It follows therefore that FOI legislation needs active championship and enforcement. Breaking down such attitudes requires more than the enactment of pro-disclosure law; what is needed is a regulator that can both champion the cause of transparency and monitor and enforce active compliance with the spirit of the Act.[9]

The joint ALRC and ARC Open Government therefore recommended the establishment of an FOI Commissioner to monitor and improve the administration of the FOI Act and to provide assistance, advice and education to applicants and agencies. As explained by the Senate Legal and Constitutional Legislation Committee what was required was "a 'public face''—someone who can contribute to official and public debate about information disclosure and who can ensure that agencies pay more than grudging lip service to FOI".[10]

Abolishing the OAIC and the Office of the FOI Commissioner essentially restores the status quo that existed prior to 2010 when the oversight function for the FOI Act to the Attorney-General's Department. While the Attorney-General's Department played a valuable role in establishing the FOI regime back in 1982 and provided some early oversight of it, that function progressively diminished over time.

Broader implications

The abolition of the OAIC also negates the objectives of laying "new, stronger foundations for privacy protection and improvement in the broader management of government information".[11]

The FOI and Privacy Acts both have in common that they regulate information handling by public authorities.[12] Moreover, while their underlying rationales of transparency and privacy protection seem to be inherently contradictory, a factor that is commonly overlooked is that they share a common role in protecting against abuse of power. In addition, they both have private, as well as public, dimensions and also human rights dimensions. They also have a number of important intersections and commonalities. One example is the disclosure of "personal information" under the FOI Act which is regulated via the privacy exemption in the FOI Act rather than the APPs in the Privacy Act. At the same time both provide avenues for individuals to access and apply for amendment of their own personal information.

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[8] See Commonwealth Attorney-General *Annual Report for 2000/01*, Chapter 4.

[9] ALRC/ARC, *Open Government: A Review of the Federal Freedom of Information Act 1982*, ALRC Report No 77/ ARC Report No 40 (1995), Chapt 6.

[10] Senate Legal and Constitutional Committee, *Report of the Inquiry into the Freedom of Information Amendment (Open Government) Bill 2000 (Cth)* (05 April 2001) [6.29].

[11] See Information Commissioner Bill 2009, Second Reading Speech, House of Representative Debates, 26 November 2009, accessed at http://www.openaustralia.org/debates/?id=2009-11-26.12.1.

[12] The Privacy Act, however, differs in that also extends to private sector organisations.

The close interrelationship between privacy and FOI laws suggests that there is logic in providing common mechanisms for their administration and enforcement. The arguments for combining the two regimes include the advantages of shared expertise and its potential to reduce institutional conflict, the potential to reduce the incidence of wrongful uses of privacy claims to resist disclosures of information and the monetary advantages of avoiding unnecessary duplications of functions.[13] In other words, bringing the two regimes together serves to "enhance oversight and allow for consistent information policy across government".[14]

While most countries still contain separate review and oversight mechanisms for each regime, a significant number have chosen to combine them. Countries that have adopted this approach at the national level include the UK, Germany, Switzerland and Slovenia (at the national level) and Australia, Canada and Germany at the state level.

The combination of the oversight bodies for FOI and privacy has not been without controversy, in part due to fears that this may lead to a dilution of one or other of them. However, the first annual report of the OAIC commented that its early experience bore out the wisdom of establishing an integrated scheme:

> The larger proportion of FOI requests received by government agencies are for personal records; and the most common issue in FOI review applications received by the OAIC is the personal privacy exemption in the FOI Act. Much of the policy work undertaken by the OAIC stresses 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.[15]

The abolition of the OAIC would remove these synergies.

It would also destroy an important and unique feature of the current regime, its specific focus on information management. As explained in an early discussion paper by the OAIC, "[t]he Information Commissioner, as the head of the OAIC, has an additional discrete function which goes beyond FOI and privacy to giving strategic advice to the Australian Government on information management generally".[16]

The Information Commissioner reports to the Attorney-General on matters relating to Australian Government information management policy and practice, including FOI and privacy, and has been assisted in relation to this function by an Information Advisory Committee that includes officers from key agencies as well as non-governmental members with suitable qualifications or experience.

There is a clear logic in combining information management with FOI and privacy management. Records management is important to the creation and maintenance of information which supports

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[13] David Banisar, *The Right to Information and Privacy: Balancing Rights and Managing Conflicts,* World Bank Working Paper (2010) 25, http://wbi.worldbank.org/wbi/Data/wbi/wbicms/files/drupal-acquia/wbi/Right%20to%20Information%20and%20Privacy.pdf viewed 22 March 2013.
[14] OAIC, *Towards an Australian Government Information Policy, Issues Paper 1: Protecting information rights - advancing information policy* (November 2010) p 22.
[15] OAIC, *Annual Report 2010-2011* (2011) p 2-3.
[16] OAIC, n 59, p 22.

access to information under the FOI Act.[17] Similarly, compliance with the APPs in the Privacy Act requires good records management to protect against misuse or loss of personal information, as well as to facilitate the exercise of rights of access to an applicant's personal information policy.

It is also arguable that integrated policy management has important role to play in addressing the issues that arise where there are potential conflicts between the underlying rationales for FOI and privacy. This has been previously noted in the US context where it has been argued that:

> Only a comprehensive information policy establishing clear and consistent guidelines for agencies and appropriate mechanisms for implementing them-i.e., an Office of Information Policy - would increase the practical feasibility of reconciling both rights of privacy and access, as well as promote agencies' compliance and accountability for their information practices.[18]

The inadequate justification for return to the status quo ante

There have been two key arguments used to justify the proposed measures: they will save $10 million over four years; and they will contribute to further savings of $20 million over four years by simplifying, streamlining and improving efficiency and effectiveness in the conduct of merit reviews. I do not propose to comment on the accuracy of these predictions although the estimates on which they are based arguably require further investigation by those who are better qualified to do this.

I would, however, draw the Committee's attention to the fact that any monetary savings need to be balanced against the many important benefits of having an effective FOI law and the extent to which these are likely to be diminished by the proposed changes. Public access to information is now widely accepted as a human right and has an important role to play in making more transparent the activities of governments, thereby enhancing the operation of our democratic system of government and making the government more directly accountable to the people. It also has an important role to play in improving governance, deterring corruption and stimulating the information market by making available information for exploitation in a private sector led market in information. I would also query whether the estimated savings resulting from this initiative include an allowance for the increased cost to agencies of re-introducing a system of internal review (which will be a compulsory precondition to the exercise of a right of appeal to the AAT for most applicants).

The changes to the process for FOI review has been further justified on the basis that:

> The complex and multilevel merits review system for FOI matters has contributed to significant processing delays. Simplifying and streamlining FOI review processes by transferring these functions from the OAIC to the AAT will improve administrative efficiencies and reduce the burden on FOI applicants.[19]

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[17] Rick Snell and Sabina Peter, "Information Flows: The real art of Information Management and. Freedom of Information" (2007) 35 *Archives and Manuscripts*, 55, 68.

[18] David O'Brien, "Privacy and the Right of Access: Purposes and Paradoxes of Information Control" (1978) 30 *Administrative Law Review* 45, 91.

19 Attorney-General's Department, "Streamlined arrangements for external merits review" 13 May 2014 accessed at http://www.ag.gov.au/Publications/Budgets/Budget2014-15/Pages/Streamlined-arrangements-for-external-merits-review.aspx.

While it is true that FOI review under the current arrangements has been characterised by long delays, it should be acknowledged that the OAIC was not initially funded adequately to implement the vast ranges of measures that were required of it during its initial years of operations (when it prepared very extensive and useful sets of guidelines not only in relation to FOI but also in relation to the new APPs and credit reporting provisions in the Privacy Act and was also responsible for the implementation of a new and extensive publication regime). In addition, a range of other matters have contributed to delays (for example, the reduction in the costs of obtaining access and the arguable abuse of FOI by certain applicants engaged in litigation with government agencies). These could more usefully have been addressed via other measures of the type canvassed in the Hawke review.

It is also difficult to see how making FOI review more expensive and less accessible will "reduce the burden on FOI applicants". In reality the burden will increase and the "efficiencies" referred to will follow from the fact that review will become too expensive for most dissatisfied applicants to pursue.

It should also be noted that the proposed abolition of the OAIC runs in the face of a findings by the government-commissioned Hawke review which concluded that that the 2010 reforms were working well and commented in respect of the new regime that:

> It has engaged more senior people in the process and triggered a cultural change across the Australian Public Service, although there is still some way to go on this aspect. Further effort, driven from the top, will be required to embed a practice where compliance with the FOI Act is not simply perceived as a legal obligation, but becomes an essential part of open and transparent government.[20]

It further commented that the establishment of the OAIC had been "a very valuable and positive development in oversight and promotion of the FOI Act".[21]

The abolition of the FOI Commissioner also runs in the face of developments in most states and also in many overseas countries. Recent international studies suggest a global trend towards either Information Commissioners or Information Commission. In 2006 an international review of FOI laws noted that there was a" growing trend is to create an independent Information Commission" and that that 22 countries had created such bodies.[22] More recently, a study by Holsen and Pasquier found that: "Of the roughly 90 countries that had passed an ATI law by 2011, approximately one-third had given enforcement responsibility to an information commission or commissioner.[223]

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20 *Review of the Freedom of Information Act 1982 and Australian Information Commissioner Act 2010*, 2013, i, accessed at http://www.ag.gov.au/consultations/pages/reviewoffoilaws.aspx.
21 Ibid, 24.
[22] David Banisar, Freedom of Information Around the World 2006; A Global Survey of Access to Information Laws, Privacy International, 2006,23, accessed at http://www.right2info.org/resources/publications/publications/publications_banisar_freedom-of-information-around-the-world.-a-global-survey-of-access-to-government-information-laws
23 Holsen and Pasquier, op cit, 222, citing Roger Vleugels; Access Info Europe and Centre for Law and Democracy; Open Society Justice Initiative.

Countries that have such bodies include the UK, Scotland, Canada, Ireland, France, Germany, Hungary, Iceland, India, Macedonia, Mexico, Portugal, Switzerland, Slovenia and Serbia.[24]

Conclusion

The creation of the OAIC was an innovative development that not only provided a much needed independent oversight mechanism for FOI but also addressed a longstanding need to find a better way to address the close interrelationships between FOI, privacy and information management. Its abolition has not been adequately justified and, to the extent that it involves the abolition also of the FOI Commissioner oversight and review mechanisms is arguably both potentially harmful to the effectiveness of the FOI Act and at odds with developments elsewhere.

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24 See Holsen and Pasquier, op cit; David Banisar, op cit.