

6 November 2014

Committee Secretary
Senate Legal and Constitutional Affairs Committee
Parliament House
CANBERRA ACT 2600
By email: legcon.sen@aph.gov.au

Dear Secretary,

We write to provide a submission to the Legal and Constitutional Affairs Legislation Committee for its inquiry into the provisions of the *Freedom of Information Amendment (New Arrangements) Bill 2014*. Given the short-time frame for the Committee's Inquiry report, we have provided a short submission for consideration.

The media organisations that are parties to this submission are AAP, ASTRA, Australian News Channel, Bauer Media, Commercial Radio Australia, Fairfax Media, Free TV, MEAA, News Corp Australia, The Newspaper Works and West Australian Newspapers (the Media Organisations).

We note that the announcement to defund the Office of the Australian Information Commission (OAIC) was announced as part of the Federal Budget in May this year, and will be implemented as of 31 December 2014.

While we support the streamlining of processes regarding freedom of information (FOI) functions generally, we are concerned that the parliamentary sitting timetable leaves little time to pass this legislation. We are also concerned that if the Bill does not pass, and the OAIC becomes defunct, Australians may be without a functioning appeal mechanism regarding FOI decisions for the first time since inception of the *Freedom of Information Act 1982* (the FOI Act).

Additionally, we would like to raise a number of issues for the consideration of the Committee.

Requirement for internal FOI review should be replaced by option to go direct to AAT appeal

A key issue arising from the Bill is the requirement that an applicant seek an internal review of a decision before a right of appeal to the Administrative Appeals tribunal (AAT) arises, except in the case of decisions made by the Minister or the head of an agency.

As detailed in a submission by AAP, ASTRA, Commercial Radio Australia, Fairfax Media, Free TV Australia, MEAA, News, Sky News and WAN to the previous Government's Hawke Review – a review of the operation of freedom of information laws (the FOI Act and the *Australian Information Act 2010*) – the lack of a direct right of appeal to the AAT effectively places the department or agency in the position of judge and jury, and is contrary to the processes of natural justice.

Data included in the OAIC Annual Report of 2013-2014 advises that 54.8 per cent of internal appeals result in agencies reaffirming the original decision. The experience of the Media Organisations and their journalists suggests that in the case of politically sensitive documents, an agency is far more likely to reaffirm its original decision upon internal review.

The Media Organisations believe that applicants should have a direct right of appeal to the AAT following a decision to refuse an FOI request by an agency.

For ease of reference, attached to this correspondence is the submission to the Hawke Review of freedom of information laws referenced above.

Review of Commonwealth FOI laws required

We note that the Government is yet to provide a response to the Hawke Report into Commonwealth FOI laws. While the Media Organisations do not support many recommendations from the Hawke Report, we strongly support the proposal for a comprehensive review of the FOI Act and its operations. We believe that such a review should be conducted by a broadly-based expert panel, including media representatives, and should be announced in early 2015.

We suggest that the Committee support this recommendation as there are a number of problems with the current FOI regime. For example:

- There are almost routine delays past the 30 day time frame for decision making on requests from media organisations, making it difficult for the media to use FOI to report on government in a timely fashion. Typically, the media investigates politically-sensitive issues that require prompt responses from government agencies, and those government agencies often delay decisions for months;
- Agencies often advise journalists that an FOI request has been refused in accordance with Section 24AA because the work would involve a substantial and unreasonable diversion of agency resources. This aspect of the FOI Act needs urgent reform as agencies appear to be failing to consider the importance of the public interest and the real value to efficient government from early exposure of policy and program failures through FOI compared to the administrative cost of processing requests; and
- Another issue requiring urgent reform is the use of disclosure logs that act as a significant deterrent to media organisations investing in FOI investigations, to the detriment of an informed public and open and transparent government.

The Media Organisations look forward to the Committee's consideration of these matters.

