information Consultants Pty Ltd

Submission to the Legal and Constitutional Affairs Legislation Committee Re: Freedom of Information Amendment (New Arrangements) Bill 2014

The short timeframe for submissions does not allow enough time for a detailed submission, however I would like to make the following comments.

External Review models in FOI

I have worked in Freedom of Information (FOI) since late 1981, preparing for the implementation of FOI into the Federal government. For the first few years, external review was through the AAT, with no lodgement fee. When fees were introduced in 1986, the number of external review applications plummeted, and it soon became apparent that only the corporate entities, or wealthy individuals, could pursue their rights to an external review of an FOI decision.

This also affected the nature of the cases determined by the tribunal – relatively few cases involved individuals, or personal matters such as privacy and confidentiality. The differences became even more apparent with the implementation of the Information Commissioner model of external review in Queensland in 1992, then in Western Australia. This model delivered everything that the AAT model had promised in the late 1970s: accessible, affordable review. A relatively larger number of reviews were dealt with, and a much wider range of issues were addressed in these review decisions.

I also worked closely with the implementation in Ireland (1998) and the UK (2005) of their Information Commissioner models of external review. In both cases, they drew on the Australian state experience (amongst others) in their practices and guidelines, and on the case-law in their early days. Worldwide, the Information Commissioner model is acknowledged as the preferred method of dealing with external reviews of FOI matters.

Over 30 years, I have worked with virtually every model of external review in several jurisdictions, both as an applicant and assisting the respondent agencies. An Information Commissioner model enables the specialist review body to develop deep expertise in FOI; traditionally Information Commissioners have always had a more consistent approach in their decision making. (All jurisdictions with the Tribunal model have problems with internal consistency in their approach to FOI exemptions – AAT, ADT, VCAT). The Commissioner model offers the advantages for applicants of accessible, affordable justice; they do not

need legal representation, and there are few if any of the formalities of Tribunals. Commissioners, like Ombudsmen, have a wide range of flexible methods to achieve a result, including investigation, mediation, negotiation and shuttle-diplomacy.

Current Issues with the OAIC

The OAIC has been performing many valuable roles in the context of the Act, including publishing guidelines, education and awareness, information policy, as well as the more visible review and complaint role. By and large, it has performed these roles very well, and they were all under-performed, or not performed, prior to its establishment.

However, in its review role, the OAIC has suffered from a predictable flood of external review requests, leading to a backlog, like its counterparts in almost every other jurisdiction which has used the IC model (Queensland, WA, UK and Ireland to name a few). The resulting delays have led to further complaints and criticism from applicants and the media. In part the answer lies in adequate resourcing, and this should be assessed properly before any decision that the only solution is to abolish it. However, other options such as a fee (less than the $861 for the AAT) for external review would undoubtedly reduce the volume of review requests, and the impact of this option should also be considered.

There is an issue to be resolved in terms of the overlap between the role of the OAIC and the role of the AAT in external review. This was briefly touched on in the Hawke Review of FOI, however options to resolve it have not been properly evaluated.

In my submission to the Hawke Review, I recommended that the OAIC's decisions be appellable to the AAT (or perhaps the Federal Court) only on points of law. This would be parallel to the situation in Queensland, which is regarded as a best-practice jurisdiction in its external review case-law. Part of the success of the Queensland model is, in my view, due to the fact that agencies take its decisions more seriously as they are binding, and final, except for appeal on points of law. This model would give greater authority to the OAIC and its decisions and therefore more consistency in interpretation of the Act. The OAIC has all the advantages of a specialist tribunal in developing a consistent body of case-law. While certain members of the AAT have developed tremendous expertise in FOI, over its history it has had some markedly inconsistent approaches, interpretations and decisions, which makes it harder for practitioners to be confident, efficient and effective in their own decision-making.

I also recommended that appeals from the OAIC on a point of law should be heard by the AAT, rather than the Federal Court as the costs and formalities of the Federal Court are greater than those of the AAT. However, to have the only avenue of external review revert to the AAT at first instance, will have a significant detrimental effect on the availability of review for all but the most well-heeled applicants. In turn, this will have a negative effect on the

development of FOI case-law, and reduce opportunities for identifying deficiencies and areas for improvement of the legislation itself. The net effect will be highly detrimental for the Australian public.

Conclusion

For many years, since its introduction in the early 1980s, the Australian federal administrative review package, including FOI, was regarded as world's best, and the Commonwealth government as a leader in transparency and accountability. Over the intervening years, the federal legislation fell from its pre-eminent position, with a resultant reduction in accountability and openness.

The 2010 reforms were long overdue, but nonetheless welcome. Although piecemeal, the changes had a positive impact on the effectiveness of FOI at a federal level. A vital part of those changes was the introduction of the OAIC, a champion of information rights, and the return to affordable and accessible review for ordinary Australians.

Inadequate resourcing and some procedural problems have led to delays, and it seems that the proposed solution is to throw the baby out with the bathwater, rather than undertake a thorough review to assess the best solution.

This proposal to abolish the Office of the Australian Information Commissioner is retrograde, and highly prejudicial to the interests of the Australian people in having an open and accountable government. I strongly urge the Committee to reject the Bill.

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Note about the author:

I have been working in the field of FOI since late 1981. Initially I was involved in the implementation of FOI in the Commonwealth government, then in NSW, Queensland, and the Northern Territory. I have also worked on implementing FOI in Ireland, the United Kingdom, Cayman Islands and China.

Since leaving the public service in 1993 I have been an FOI practitioner, consultant and trainer in several jurisdictions in Australia and overseas. I have also been involved in the reform processes in Queensland, NSW and the Commonwealth over the past five years, in making submissions, and conducting training for staff. I have trained literally thousands of staff in FOI, mostly conducting intensive one and two-day courses for decision-makers. I have also made thousands of decisions as a delegate in several agencies. Through my website I assist members of the public in FOI matters and I have made many FOI requests.

I have been the Director of Information Consultants Pty Ltd since 1998. I was appointed an Honorary Senior Research Fellow with the Constitution Unit at University College London in 2003. In 2006 I co-authored a book on "FOI: Balancing the Public Interest" (2nd edition, published by UCL London). I consider that my experience as both an applicant and an agency decision-maker over 30 years has given me a balanced perspective in assessing FOI issues.