



Submission by the Commonwealth Ombudsman

**FREEDOM OF INFORMATION AMENDMENT
(NEW ARRANGEMENTS) BILL 2014**

Submission by the Commonwealth Ombudsman, Colin Neave

November 2014

Introduction and summary

On 30 October 2014, the Senate referred the Freedom of Information Amendment (New Arrangements) Bill 2014 (the Bill) to the Senate Legal and Constitutional Affairs Legislation Committee. The Committee has invited submissions on the Bill.

The Bill contains amendments to various Acts so as to:

- abolish the Office of the Australian Information Commissioner
- disperse certain functions relating to freedom of information (FOI) matters to the Administrative Appeals Tribunal, the Attorney-General's Department and the Commonwealth Ombudsman, and
- provide for the Australian Privacy Commissioner to be an independent statutory office holder within the Australian Human Rights Commission.

The Bill provides that all substantive amendments are to commence on 1 January 2015.

Background

The Commonwealth Ombudsman safeguards the community in its dealings with Australian Government agencies by:

- correcting administrative deficiencies through independent review of complaints about Australian Government administrative action
- fostering good public administration that is accountable, lawful, fair, transparent and responsive
- assisting people to resolve complaints about government administrative action
- developing policies and principles for accountability, and
- reviewing statutory compliance by law enforcement agencies with record keeping requirements applying to telephone interception, electronic surveillance and like powers.

Prior to 1 November 2010, when the substantive provisions of the *Australian Information Commissioner Act 2010* commenced, the Ombudsman's office investigated actions undertaken by other Australian Government agencies in relation to their handling of freedom of information (FOI) requests. However, since that date, the Ombudsman's FOI complaint handling function has largely given way to that of the Australian Information Commissioner. Although the Ombudsman could still investigate FOI complaints, the Ombudsman and the Australian Information Commissioner acknowledged through a memorandum of understanding that the investigation of such complaints was now primarily the responsibility of the Office of the Australian Information Commissioner.

Response to Terms of Reference

FOI complaints handling function to be performed by the Commonwealth Ombudsman

As noted above, the Ombudsman's office previously received and handled complaints made about Australian Government agencies in relation to their handling of FOI requests.

The effect of the amendments made by Schedule 1 of the Bill is to substantially restore the pre 1 November 2010 position so as to make the Ombudsman's office the sole independent oversight body responsible for FOI complaint handling.

The Ombudsman's office stands ready to undertake this role, noting that the Australian Information Commissioner's 2013-14 Annual Report indicated that 77 FOI complaints were received in 2013-14 compared to 148 complaints the previous year. As with other complaints, FOI complaints will be handled by the Commonwealth Ombudsman in accordance with the *Ombudsman Act 1976*.

Transfer of privacy complaints to the Australian Privacy Commissioner

Section 6C of the Ombudsman Act sets out the procedures that are to be followed where the Ombudsman receives a complaint about FOI or privacy and the Ombudsman considers that the complaint would be better dealt with, or has already been dealt with, by the Australian Information Commissioner. As part of that procedure, the Ombudsman must consult with the Australian Information Commissioner prior to any transfer taking place.

As the Office of the Australian Information Commissioner is being abolished, such that any FOI complaints will now be handled by the Ombudsman's office and any privacy complaints by the Australian Privacy Commissioner, consequential amendments are proposed to be made by Part 2 of Schedule 3 of the Bill to set out procedures that are to be followed where the Ombudsman receives a complaint about privacy and the Ombudsman considers that the complaint would be better dealt with, or has already been dealt with, by the Australian Privacy Commissioner. The proposed amendments would maintain the status quo of requiring the Ombudsman to first consult with the Australian Privacy Commissioner before initiating transfer of any privacy complaint.

The Ombudsman queries the need for any mandatory consultation given that it would seem sensible to have a streamlined procedure enabling transfer any complaints about privacy to the Australian Privacy Commissioner given their expertise in privacy matters. It is worth noting that there was no such mandatory consultation requirement in the Ombudsman Act in relation to privacy complaints prior to the amendments introduced by the 2010 FOI reforms.¹

Prior to the 2010 FOI reforms, each of the transfer provisions contained in s 6 of the Ombudsman Act – including a provision that dealt with transfer of complaints to the Privacy Commissioner - were similar in that if the Ombudsman formed the opinion that another specialist body had already dealt with the complaint, or was better placed to handle the complaint, then the Ombudsman could transfer the complaint to that other body, subject to him providing the other body with information or

¹ See s 6(4A) as in force immediately before 1 November 2010.

documents held by the Ombudsman and providing written notification of the transfer to the complainant.

Repeal of vexatious applicant provisions

The repeal of Division 1 of Part VIII of the FOI Act will remove the ability of Australian Government agencies to apply for a vexatious applicant declaration. Whilst such declarations have been sparingly made by the Australian Information Commissioner, their existence is a disincentive to applicants whose conduct may be characterised as persistent or querulant. It should be noted that the vexatious applicant provisions were introduced as part of the 2010 FOI reform package as a counter balance to the range of pro disclosure steps instigated by the reforms. These included, along with the introduction of conditional exemptions requiring the application of a public interest test to many of the exemptions available under the Act, the abolition of application fees on all applications, and processing fees for applications relating to an applicant's own personal information, as well as the removal of the requirement for an address within Australia.

The Ombudsman notes that legislative reform that incorporates recommendations from the 2013 Hawke Review², such as a provision that will enable an agency to decline to handle a repeat or vexatious request³, would provide a solution to this problem.

However the Ombudsman is concerned from the viewpoint of good public administration, that unless or until such reforms are implemented, the proposed amendments may have the unanticipated and undesirable effect of causing an increased administrative burden on agencies, leading to them having to divert disproportionate resources to the processing of requests from a small group of applicants with no apparent value to them or the community.

² Review of the *Freedom of Information Act 1987* and *Australian Information Commissioner Act 2010*, July 2013

³ See Recommendation 32