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Freedom of Information Amendment (New Arrangements) Bill 2014 (Cth)

This submission responds to the Committee's invitation of public comment on the *Freedom of Information Amendment (New Arrangements) Bill 2014* (Cth).

Summary

In summary the proposed legislation –

- is contrary to community expectations regarding the accountability of national government agencies and ministers
- is not justified on the basis of cost savings
- fails to address concerns regarding the performance of the Office of the Australian Information Commissioner
- will exacerbate existing problems regarding both freedom of information and privacy law
- undermines the trust required in current national security initiatives

The very short time allowed for consultation is deeply regrettable and inconsistent with the importance of the legislation.

Basis

This submission is made by Assistant Professor Bruce Baer Arnold. I teach privacy, secrecy, confidentiality and access (including FOI and archives) law at the University of Canberra. I have published widely on those areas, am the former General Editor of *Privacy Law Bulletin* (the leading privacy practitioner journal), am author of chapters in the LexisNexis Privacy & Confidentiality resource and have been recurrently cited in overseas and Australian legal journals, monographs and official reports. I am a member of OECD working parties on privacy and data protection. My research interests encompass regulatory failure in the health sector that can be effectively addressed through enhanced transparency.

The submission is independent of the University of Canberra. It does not present what would be reasonably construed as a conflict of interest.

The Bill in context

The Bill has been introduced in an environment marked by –

- growing community disengagement from and distrust in government (evident in low voter turnout at elections, low membership numbers of the major parties, increasing support for microparties)

- loss of expertise through ongoing reduction of public service numbers at the Commonwealth, state and territory levels of government
- politicisation of policy advice under governments over the past 30 years, with a shift from the tradition of 'independent fearless' advice by junior and senior officials
- questions about mismanagement and corruption at the Commonwealth, state and territory levels
- capture of policymakers and regulators by vested interests (with significant costs to the taxpayer, potential health or other harms to the wider community, and erosion of legitimacy regarding politicians and public administration)
- evident confusion among ministers and agency executives on questions such as metadata and criminalisation of legitimate reporting
- establishment of badly-drafted statutes and delegated legislation that are inconsistent with community expectations regarding civil liberties or that purport to legitimately fetter the judiciary through a reference to national security, terror or a war on crime
- inappropriately 'fast-track' consultation by parliamentary committees and government agencies regarding legislation and administrative practice that has a fundamental impact on the taxpayer, business and civil liberties.

In that environment two aspects of the *Freedom of Information Amendment (New Arrangements) Bill 2014* (Cth) are significant.

Summary Consultation is inappropriate

Firstly, the extremely short period for comment on that Bill and for the Committee's consideration of the Bill is contrary to community expectations regarding scrutiny, improvement or rejection of legislative proposals.

The fast-track consultation – reflecting late introduction of a Bill that has a weak justification in terms of better use of public funds, enhanced service by government agencies and respect for the principles that differentiate Australia from totalitarian states and terrorist groups – is consistent with the derisory consultation allowed for recent national security proposals.

Fast-tracking may be politically opportune. It may be administratively convenient. It is however contrary to what Australians expect of the Government and of the legislature. There is no existential threat requiring immediate passage of the Bill or summary consultation.

My understanding is the Committee has rejected at least one request from a leading civil society organisation for an extra day's time to provide input. That rejection is deplorable and privileges the Minister's timetable over appropriate consideration of a matter of public importance.

The proposed regime is unnecessary and will be counter-effective

The proposed legislation will increase rather than decrease the cost of public administration. It will reduce the accountability of Ministers, of public sector

executives and of ordinary officials. It will exacerbate the problems of inefficiency and legitimacy noted above. It should be rejected on that basis.

Rejection is an opportunity for all parties to affirm a commitment to transparency in government, rather than to endorse what is convenient for a Minister or for senior officials, consultants and other service providers. Condemnation of the Bill is consistent with the benefits identified by a range of law enforcement bodies, by courts and international organisations (such as the Organisation for Economic Cooperation & Development and Transparency International) over the past 40 years in relation to transparency in public administration and respect for personal information. Endorsement by the Committee of a retrogressive accountability and privacy regime will place Australia further behind benchmarks such as Europe. It will reinforce the disengagement noted above.

Given the time available for consultation I will not provide a detailed costing. In commenting on the Bill I make two points. The first is that the claimed savings from the proposed legislation amount to an aggregate $10.2 million over four years. That figure is slightly more than money allocated in the May 2014 Budget to accommodation for the ballet school in Melbourne. It is disquieting that the Government considers that it is more important to spend money on tutus than on enhanced public administration.

The cost savings from the cut will be notional, rather than substantive. The proposed regime transfers costs to people with legitimate concerns, who will need to avail themselves of the AAT. That transfer is a barrier to justice. The regime will not eliminate complaints: queries will still need to be addressed, either by government agencies or by bodies such as the Commonwealth Ombudsman (which demonstrably has been underfunded) and the Privacy Commissioner (which as noted below has historically had substantial backlogs and a low level of responsiveness because of under-resourcing).

That 'penny wise, pound foolish' approach is evident in underfunding of the Independent National Security Legislation Monitor, the Australian Law Reform Commission and Inspector General for Intelligence & Security – indicative of shortsightedness on the part of both the current and preceding Governments.

Just as substantively, reduced transparency fosters administrative inefficiency and potential corruption. The cost of a major inquiry – benchmarks include those regarding Cornelia Rau, Jayant Patel, ADF sexual abuses and 'Pink Batts' – dwarf the savings attributed to the current Bill. The costs to the national economy from problems in health sector administration (including the $billion plus impact of failures by the Therapeutic Goods Administration) dwarf the money spent on FOI. Reduction of transparency in the public sector shifts rather than eliminates costs and is not 'solved' by reference to bodies such as the Australian National Audit Office, the Ombudsman or an ICAC agency.

The current and preceding Governments have recurrently emphasised a commitment to accountability and a respect for the dignity of all Australians. The Bill is contrary to that commitment and will, in my opinion, foster the cynicism about politicians that is evident in independent polling over the past two decades.

Abolition of the Office of the Australian Information Commissioner

The Bill seeks to give effect to the Government's announcement in May this year that it will abolish the Office of the Australian Information Commissioner (OAIC), an

entity with responsibility for the Freedom of Information Act and for the *Privacy Act 1988* (Cth). The Office's responsibilities will be dispersed.

That abolition and dispersal will not foster good government and will not underpin the human rights enshrined in international instruments to which Australia is a party; it should be condemned by the Committee.

The OAIC *is* properly subject to criticism. It has failed to meaningfully engage with civil society groups, has been unresponsive to legitimate criticisms, has been slow to act, has been unduly permissive to particular interests (ie has experienced regulatory capture) and until this year has failed to meaningfully articulate its expectations regarding the legislation. Its processing of requests has been slow and on occasion inappropriately legalistic. Much of that failure, which is of concern to legal professionals and the wider community, is attributable to substantive under-resourcing (in terms of staff numbers and expertise) rather than merely a problematical attitude on the part of its executives.

Abolition will **not**, however, result in a significant improvement in service. Dispersal will instead exacerbate a systemic problem.

Abolition sends a strong message to national government agencies (and to observers in Australia and overseas) that the Government's commitment to transparency is at best uncertain. Such signalling is already a problem, with indications over the past year that the Information Commissioner and his agency are 'out of the loop' in policy development and – importantly – prepared to use resource constraints as an excuse for a non-response to legitimate requests. The OAIC's reliance on the 'we don't have enough resources' excuse has told agencies that they in practice can fob off public interest requests, a rejection of transparency that is reinforced through imposition of charges and through a review mechanism that will now involve the costs associated with action at the Administrative Appeals Tribunal. There are similar concerns regarding practice in key agencies such as the Australian Federal Police (which has evaded its responsibility by transferring access requests to the Attorney-General's Department).

The Government has indicated that any concerns will be addressed by changes regarding the Attorney-General's Department and the Commonwealth Ombudsman. As yet there has been no indication that appropriate resourcing will be provided to the Ombudsman (a body that is under-resourced, as evident in its reports and measures such as backlogs, and is apparently gaining additional responsibilities under national security legislation). There is no indication that executives within the Attorney-General's department will demonstrate a sustained and vigorous enthusiasm for transparency. To adopt the words of one of my students, we shouldn't expect the gravediggers of transparency to embrace the spirit of FOI – the spirit that is embodied in the Objects of the FOI Act – now that the Attorney-General and Department of Immigration & Border Protection have embraced a 'freedom from accountability' ethic.

Rather than abolishing the OAIC the Government should be establishing an independent, expert and vigorous national Information Commissioner. Such a body should report to Parliament, using the Auditor-General model, and accordingly be more inclined to offer the independent advice and scrutiny that may be contrary to the agenda of a particular Attorney-General. It should be sufficiently resourced to undertake its responsibilities on a timely and comprehensive basis. Those responsibilities are identifiable in the Objects of the current FOI Act. They are consistent with good government, ie a public administration that offers true value for

money (rather than merely shifts costs) and fosters accountability through oversight by both the Fourth Estate and ordinary Australians, irrespective of whether the latter have a personal grievance or are concerned with broader public policy.

The Government should also be strengthening the Information Publication regime, a key aspect of FOI but one that has been implemented on an idiosyncratic and at times subversive basis by different agencies. Consistent and timely publication of information about FOI requests and of documentation provided in response to those requests is a key function of the FOI regime. Publication does cost money, a cost that is legitimately borne by the government. In a liberal democratic state it is the same sort of cost as the funding of courts, tribunals and parliament – all mechanisms for justice and accountability rather than profit centres that bring joy to the hearts of gnomes working for the Treasurer.

The Australian Privacy Commissioner

The Australian community, the legal profession, business and legislators (for example the Victorian Parliament's Law Reform Committee) have recurrently and strongly indicated that respect for privacy is a fundamental value. That respect is one thing that differentiates Australia from totalitarian states such as North Korea and Syria, and from terrorist groups such as ISIS. It is not something that can or should be abandoned on the basis of rhetoric about a 'hundred years war on terror' or a supposed existential threat the Australian state or the profit margins of corporations whose commitment to best practice is belied by the sort of systemic problems that saw closure of *News of the World*.

Disregard for privacy through ongoing (and often clearly unnecessary) national security legislation – George Williams AO for example recently noted that an enactment was passed every six and half weeks for several years after 9/11, arguably because of a 'need to be seen to be doing something' – is of substantive concern.

So is the ongoing weakness of overall Australian privacy law, evident in

- inconsistencies and omissions across the Australian jurisdictions,
- a failure by the current and preceding Governments to embrace recurrent cogent recommendations by a range of law reform bodies to enshrine a statutory cause of action regarding serious invasions of privacy (aka the 'privacy tort')
- confusion among Government ministers and officials about concepts such as metadata
- disagreement among those ministers and officials about interpretation of statutory provisions that potentially criminalise legitimate reporting and that are contrary to a significant body of jurisprudence over the past 40 years

In that environment we need an empowered, expert, independent and vigorous privacy agency … one that has the authority, resources and will to promote respect for privacy in the public and private sectors through action, example, advice (for example that saves agencies from the problems evident in the UK government's sale of whole-of-population health data) and community education.

The transfer of the Privacy Commissioner from the OAIC to the Human Rights Commission threatens to establish a privacy potemkin village, an agency that has neither the desire nor capability to foster a best practice national privacy regime. The

transfer is likely to exacerbate disregard by national government agencies and private sector bodies, and encourage the regulatory capture evident in work by the Commissioner in areas such as genetic privacy and data breaches. It is not justified by significant cost savings, directly or otherwise, and references in the three Explanatory Memoranda to public benefits from 'streamlining' are disingenuous.

In the absence of a clear commitment to proper resourcing of the Commissioner the transfer should be condemned.

The Commissioner has sought to excuse delays in the handling of requests under the *Privacy Act 1988* (Cth) and delays in the provision of material needed for interpretation of that Act by relying on reference to resource problems. Proper resourcing, including expertise rather than merely gross staff numbers, is imperative. There has been no indication that such resourcing will be provided and the Government's statements as part of the Budget can be construed as signalling that there will be fewer rather than more resources.

It is traditional for officials to emphasise staff numbers rather than expertise. In relation to implementation of the Privacy Act that is of real concern. The Privacy Commissioner (as a standalone body and as part of the OAIC) has emphasised private consultation, has not engaged with civil society representatives and – as demonstrated through access to its records at a time when it was responsive to FOI requests – has experienced regulatory capture. I have emphasised engagement because that would offset a demonstrable lack of expertise in areas such as genetic privacy that will be significantly more important in the coming age of genomic medicine and big data.

Transfer to the Australian Human Rights Commission will have no benefits for Australian public administration, business and the community at large unless the Commissioner is properly resourced and is strongly encouraged by the Committee and the Government to adopt a positive view of responsibilities. Failure to do so will result in disregard, cynicism and confusion. At a time when Government ministers are evidently at odds about basic concepts the community wants certainty rather than confusion, progress rather than a pasteboard & tinsel approach to privacy law reform.