



Monash University Faculty of Law

Submission to the Senate Legal and Constitutional Affairs Committee

***Inquiry into the Freedom of Information Legislation Amendment (Improving Access and
Transparency) Bill 2018***

Prepared by Asher Hirsch, Yee-Fui Ng and Maria O'Sullivan

Submission author information

Asher Hirsch is PhD Candidate in the Law Faculty, Monash University. His research is in public law and international law, especially in refugee and migration policies. Asher has also worked as a lawyer and policy officer for non-government organisations.

Dr Yee-Fui Ng is a Senior Lecturer in the Faculty of Law at Monash University. She has taught Administrative Law at Monash and RMIT University and is co-author of *Douglas and Jones's Administrative Law* (Federation Press, 8th ed, 2018). She has previously worked as a Policy Adviser at the Department of the Prime Minister and Cabinet, a Senior Legal Adviser at the Victorian Department of Premier and Cabinet, as well as a Manager at the Victorian Department of Justice.

Dr Maria O'Sullivan is a Senior Lecturer in the Faculty of Law at Monash University. She has taught Administrative Law and Public Law for 15 years and is the author of a number of papers on public law issues. Her most recent contribution is a co-authored book: *Public Law and Statutory Interpretation: Principles and Practice*, published by Federation Press in 2017.

It is in these capacities as academic researchers that we make this submission.

Submission

1. Context

Aims of FOI and importance to transparency and accountability

The purpose of FOI legislation is to set out the right of citizens to access government documents in order to encourage transparency and accountability in government.

Open and transparent government mechanisms are particularly vital for preventing corruption and for permitting such corruption to be addressed when it occurs. Public access to official information is a central part of those mechanisms.

Recent data indicates that, although Australia ranks 13th out of 180 countries for transparency, it has slipped eight points over the past six years.¹ Further, a recent Global Corruption Barometer survey conducted by Griffith University and Transparency International Australia shows that trust and confidence in all levels of government fell in the last year, to 46% for federal and state levels and 51% for local government nationally.²

In the absence of a Federal Bill of Rights in Australia, much of the responsibility for ensuring accountability and fairness in the operation of the executive government falls on our integrity bodies, such as the Ombudsman offices, Privacy Commissioner, FOI Commissioner and Information Commissioner. Therefore, we emphasise that it is important that FOI legislation is adequately drafted and the associated organisations (such as the Information Commissioners) are sufficiently resourced.

The importance of freedom of information legislation has been recognised by the judiciary and many academic commentators. For instance, Justice Ruth McColl in *General Manager, WorkCover Authority of NSW v Law Society of NSW* stated:

... freedom of information legislation ... was intended to cast aside the era of closed government and principles developed in that era may, with the benefit of twenty or more years of experience, be seen as anachronisms.³

The importance of citizens receiving information from government has been emphasised in a number of High Court cases (*Nationwide News; Aust Capital TV v Cth*). In these cases the Court dealt with the concept that freedom of communication on government and political affairs was a necessary part of the system of representative government in the Constitution. Mason CJ in *Aust Capital Television v Cth* noted:

‘... elected representatives have a responsibility not only to ascertain the views of the electorate but also to explain and account for the decisions and actions in government to inform the people so that they make informed judgements on relevant matters. Absent such a freedom of communication, representative

¹ <http://www.abc.net.au/news/2018-02-22/australia-slips-in-global-corruption-rank/9472114>

² Transparency Australia, ‘Media Release: Rising Corruption Concern Drives Support for Federal Integrity Body: Global Corruption Barometer Survey Results, 20 August 2018, <http://transparency.org.au/media-release-gcb-survey-2018/>.

³ *General Manager, WorkCover Authority of NSW v Law Society of NSW* [2006] NSWCA 84 at 154.

government would fail to achieve its purpose, namely government by the people.’

Problems with operation of current FOI legislation

A 2017 Australian National Audit Office report, *The Administration of the Freedom of Information Act 1982*, noted that:

the number of exemptions from release being claimed by all entities across the Commonwealth has increased by 68.4 per cent over the last five years, with the use of two particular exemptions having increased by more than 300 per cent and almost 250 per cent respectively.⁴

While the FOI system is meant to increase transparency, our experience of using the system and researching it has shown that there are many problems that current hinder efficient and fair access to government documents. Specific examples of the current problems facing the FOI system include:

- Broad use of refusal of documents under the exempted documents grounds, especially, in our experience, section 33. According to the ANAO, ‘The greatest growth has been in the use of the ‘certain operations’ exemption which has increased by more than 300 per cent in the five year period [to 2017]. The use of the ‘national security’ exemption has also increased substantially (by almost 250 per cent).’⁵
- Over reliance on practical refusal based on s 24AA(1)(a).
- Significant delays in response times, well over the statutory 30-day time limit, especially in relation to the Department of Immigration and Border Protection.⁶
- Further delays in seeking internal review, and extended wait times to seek review through the Information Commissioner.

⁴ Australian National Audit Office, *Administration of the Freedom of Information Act 1982*, 2017, <https://www.anao.gov.au/work/performance-audit/administration-freedom-information-act-1982>.

⁵ Australian National Audit Office, *Administration of the Freedom of Information Act 1982*, 2017, <https://www.anao.gov.au/work/performance-audit/administration-freedom-information-act-1982>.

⁶ In 2015–16, only 69.1% of the Department of Immigration and Border Protection’s 19,928 FOI determinations were made within 30 days: Australian National Audit Office, *Administration of the Freedom of Information Act 1982*, 2017, <https://www.anao.gov.au/work/performance-audit/administration-freedom-information-act-1982>.

A further problem faced by the FOI system is the reduced funding of the Officer of the Australian Information Commissioner, especially in relation to the funds available to address FOI appeals. We believe that a functioning, transparent and efficient FOI system relies on well-funded and independent oversight, and we support calls to increase funding to this role.

Our submissions on the specific changes proposed by the Bill

We have set out the specific changes proposed in the Bill and our submissions in response:

1. Requiring the government to fill all three offices of the Australian Information Commissioner, the Privacy Commissioner and the Freedom of Information Commissioner.

We support this proposal as it will facilitate the continued existence and functioning of these Commissioners. We note that there may be some debate as to whether it is necessary to have three separate commissioners or merge the offices into one commissioner role. We would argue that the *form* and *structure* of the bodies, whilst important, are only one aspect of the issue. Thus, the emphasis should be on ensuring that the functions of freedom of information, privacy and broader information policy are covered and well-resourced. The proposed amendment assists this objective as it will reduce the ability of governments to block these watchdogs from scrutinising their actions.

We note that in 2015 the Commonwealth Information Commissioner was starved of funding by a hostile Liberal Government, leading to the shutdown of its main Canberra office, thus reducing the Information Commissioner to working from home with the help of a few remaining staff in the Sydney office.⁷ The supporting Freedom of Information Commissioner position was left vacant.⁸ Allowing the Commissioner positions to stay vacant is contrary to enabling independent office-holders to perform their statutory functions of enforcing the FOI regime.

⁷ Richard Mulgan, 'The Slow Death of the Office of the Australian Information Commissioner' (2015) *The Canberra Times* <<http://www.canberratimes.com.au/national/public-service/the-slow-death-of-the-office-of-the-australian-information-commissioner-20150826-gj81dl.html>>.

⁸ 'OAIC limps on as Pilgrim gets three more months' (2015) *IT News* <<https://www.itnews.com.au/news/oaic-limps-on-as-pilgrim-gets-three-more-months-406587>>.

To enable them to perform their watchdog function more effectively, all integrity bodies should be granted a level of independence from the executive through a closer link to Parliament. In Canada and New Zealand, there is a well-articulated concept of the officer or agent of Parliament, where integrity bodies have a link to Parliament in term of appointments, budget-setting, and scrutiny.⁹ From the literature, there are a few indicators of the independence of independent accountability agencies:

- parliamentary involvement in appointment and dismissal;
- a statutory committee which is responsible for budget approval and oversight;
- a specific select committee to which the officer is bound to report;
- staffing independent of the civil service; and
- whether the officer is free to identify issues for study (own motion powers) and whether it can compel the production of information.¹⁰

The Commissioners do enjoy certain guarantees of their independence. Appointments are made under statute and are separate from the normal public service employment framework. They can only be removed on an address of either or both Houses of Parliament on limited grounds, such as proven misbehaviour.

However, to further bolster their independence, the Commissioners should also have a statutorily-protected budget to fulfil their mandate or budget approval processes through a parliamentary committee.

⁹ Paul G Thomas, 'The Past, Present and Future of the Officers of Parliament' (2003) 46(3) *Canadian Public Administration* 287, 288.

¹⁰ Oonagh Gay, 'Officers of Parliament: A Comparative Perspective' (2003) Parliament and Constitution Centre, House of Commons Library, Research Paper 03/77; Paul G Thomas, 'The Past, Present and Future of Officers of Parliament' (2003) 46(3) *Canadian Public Administration* 287; Jeffrey Bell, 'Agents of Parliament: A New Branch of Government' (2006) 29 *Canadian Parliamentary Review* 13, 15.

2. AAT Review

The Bill will make two changes:

- Allowing FOI review applicants to elect to have their matter bypass the Information Commissioner, who can take more than a year to make a decision on controversial issues, to the Administrative Appeals Tribunal;
- Granting an FOI applicant the right to switch a review into the AAT, without charge, in the event that the Information Commissioner takes, or indicates he or she will take, more than 120 days to make a decision.

Our submission

Efficiency concerns

The history of amendments to the FOI Act indicate that in 2010 changes were made to establish a two-tiered system for external review of FOI decisions: the first review is undertaken by the Information Commissioner. Then a right of appeal, if a party was not satisfied, to the Administrative Appeals Tribunal. The first-tier review by the Information Commissioner did not require prior internal review or legal counsel, and there were no application fees.

According to a Senate Legal and Constitutional Affairs Committee on a FOI Bill 2014, the Committee states that:

These factors contributed to a rapid increase in review applications, and the OAIC became beset by significant time delays and backlogs in processing FOI reviews.¹¹

The Attorney General at this time, also stated that:

The complex and multilevel merits review system for FOI matters has contributed to significant processing delays. Simplifying and streamlining FOI

¹¹ Senate Legal and Constitutional Affairs Committee
https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/FIO_Amendment_Bill/Report/c01, para 1.7.

review processes by transferring these functions from the OAIC to the AAT will improve administrative efficiencies and reduce the burden on FOI applicants.¹²

We have some concerns about the current amendment in relation to transfers to the AAT. Whilst allowing transfers to the AAT will improve efficiency, it will further backlog the AAT (which also has similar funding issues), and reduce the role the Commissioner. The Commissioner does a great deal more than just a de novo review, including inquiring into the process used by the Department to find documents. The AAT will not be able to do this. Thus, a better response would be to fund the Commissioner role so to reduce backlog in the system.

We also express some concerns that this may be used as a backdoor attempt to further remove or reduce the need for the Commissioner. Therefore, bypassing the Information Commissioner raises potential concern. However, this problem may be lessened by the fact that parties are free to elect whether or not to go through the Information Commissioner. Thus, as long as there is free and informed choice, this change may be less concerning than it otherwise would be.

Fairness and cost concerns

Review by the OAIC is free of charge, whereas an application for review by the Commonwealth AAT will incur a filing fee. The AAT is supposed to be a low-cost accessible avenue for review. However, increasingly government is represented by legal counsel.¹³ Therefore, applicants before the AAT may be at a disadvantage. Applicants would need to be informed about this and this needs to be considered in assessing the proposed amendment to the FOI Act.

3. Preventing agencies from making submissions to FOI decision reviews that have not been advanced by the agency in its internal decision making.

The EM says that this is proposed so that the agency will be prevented from switching exemptions half way through a review (and that this occurs often now). The EM states that this would prevent a current practice that, in effect, allows an agency to change the basis of

¹² Senate Legal and Constitutional Affairs Committee, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/FIO_Amendment_Bill/Report/c01 para 1.11.

¹³ See ALRC, *Open Government - A Review of the Federal Freedom of Information Act 1982* [1995] ALRC 77 [14.27]

their exemption half way through a review, something not normally permitted in merits reviews being run in superior jurisdictions.

We support this amendment, as the agency practice of excessively claiming exemptions to providing access to information stymies the operation of the FOI Act. It also encourages agencies to prepare their statement of reasons and claimed exemptions more carefully in the first tier IC review.

4. Preventing the Information Commissioner from making FOI decisions if he or she does not hold the legal qualifications required of the FOI Commissioner.

We support this amendment so as to ensure the integrity of the office of the FOI Commissioner and that persons affected by its decisions, and the public generally, continue to have confidence in the operation of the FOI system.

5. Preventing Agencies from publishing information released under FOI until at least 10 days after the applicant has received his or her copy of the information.

We support this amendment as it recognises that an individual, who may be affected by a decision relating to the FOI request, and who has an interest in the matter, should be given the chance to read and reflect upon the documents prior to wider publication to the public. This accords with accepted dignitarian understandings of due process/procedural fairness.¹⁴

6. Requiring an agency to publish its external legal expenses for each Information Commission or AAT FOI matter that has concluded.

The EM states that this would apply in relation to agency FOI legal expenses and to expenses incurred by the National Archives in respect of applications made for access to information under the *Archives Act 1983*. We also support this amendment in the interests of transparency and the wider, long-term objective of reducing legal expenses.

¹⁴ For a summary of these principles, see Emily McDonald and Maria O’Sullivan, ‘Protecting Vulnerable Refugees: Procedural Fairness in the Australian Fast Track Regime’ (2018) 44(2) *UNSW Law Journal* at 18-19, <http://www.unswlawjournal.unsw.edu.au/article/protecting-vulnerable-refugees-procedural-fairness-in-the-australian-fast-track-regime-advanced/>

Summary and Recommendation

We recommend that this Bill be passed but ask the Committee to consider the issues raised above in deliberating on the amendments. Namely, the cost of utilising the AAT.

If the Committee has any questions arising from the above submission, please contact Dr Maria O'Sullivan at