Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Freedom of Information Amendment (New Arrangements) Bill 2014

Pirate Party Australia

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1 Executive summary

The Pirate Party recommends that:

1. the Office of the Australian Information Commissioner is not abolished,
2. a simplified, uniform four-tier process is instituted,
3. the proposed transfer of functions and responsibilities to the Attorney-General be abandoned,
4. costs be reduced through other means, including greater consultation with NGOs and voluntary publication of governmental materials,
5. an in-depth review of the Freedom of Information Act is undertaken by an independent authority such as the Australian Law Reform Commission, and
6. the Government takes further action to stem the tide of Government secrecy and promote Governmental transparency.

2 Issues

Abolishing the Office of the Australian Information Commissioner ('OAIC') will remove a level of external merits review. This will reduce independent oversight and administration of the regime established by *Freedom of Information Act* ('*FOI Act*'). There may be some merit in separating responsibilities under the *Privacy Act* and *FOI Act*, as well as moving the responsibility for complaints to the Ombudsman, however abolishing the OAIC will undermine the independence of, and public confidence in, the freedom of information regime.

Transferring sole jurisdiction for external merits review to the Administrative Appeals Tribunal ('AAT') places such reviews in a confrontational or adversarial quasi-judicial context. This may have the effect of discouraging applicants from seeking external review especially in view of the substantial cost associated with such proceedings, while the compulsory internal review will delay applications and not give determined applicants confidence that their application has been adequately reviewed.

However, concerns regarding the complexity of freedom of information processes and the burden experienced by the OAIC may be reduced by the compulsory internal review provisions: abolishing the OAIC may not

be necessary to achieve this aim. While the commitment to smaller government is a Government policy decision and not under review by the Senate Legal and Constitutional Affairs Legislation Committee ('the Committee'), reducing the size of government at the expense of important independent oversight bodies is unacceptable.

The focus in this area should be on non-judicial, independent external review. The Freedom of Information Amendment (New Arrangements) Bill 2014 will instead leave open the AAT as the only avenue of external review. It seems as though this legislation is designed to deter unsuccessful FOI applicants from seeking further review. Any lack of confidence in the internal review process will mean making complaints directly to the Ombudsman rather than seeking a less confrontational external review under the current framework.

The current national security, foreign relations and immigration climate has led to a reduction in governmental transparency; as a result Australia needs a robust freedom of information framework with a focus on independent review. It would be preferable that rather than the Attorney-General being responsible for freedom of information guidelines, statistics and annual reports, these responsibilities would be granted to an independent statutory body. Streamlining the FOI review system does not necessitate the abolition of the OAIC.

A simplified, Commonwealth-wide freedom of information system could easily be achieved with the following review steps:

1. Initial application and determination by relevant officer.
2. Internal review by relevant officer.
3. External review by the Australian Information Commissioner.
4. Quasi-judicial determination by the Administrative Appeals Tribunal.

'[I]mproving the administration of privacy and FOI regulation in a transparent, accountable framework' is an appropriate goal but it is questionable whether reducing the degree of external review and giving the Attorney-General more responsibility in this area is the best approach. The Attorney-General is a cabinet minister and as a result may be perceived to be biased towards certain policy objectives that would affect the administration of the *Freedom of Information Act*.

It is also of concern that the Attorney-General's Department has, as recently as November 2013, preferred narrow compliance with the *Freedom of Information Act* rather than embracing a spirit of transparency. When asked why the Department had ceased publishing documents released under the *Freedom of Information Act* on its website the then

Acting Deputy Secretary of the Department's Strategic Policy and Co-ordination Group stated to the Senate Legal and Constitutional Affairs Legislation Committee that:

> Under section 11C of the Freedom of Information Act departments are able to define their disclosure log by release in different ways. The Attorney-General's Department has made a change in the way in which it does that although still complying with section 11C in the act, which is publishing on the website other details of how the information may be obtained. The reason why that change was made is because the documents … were in a PDF format … not accessible to all of the population. … [T]hat would have downgraded our overall website accessibility rating.
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> …
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> It still complies with the legislation but the decision was made as a consequence of the fact that the PDFs were having an impact on our overall accessibility rating[.][1]

This gives reason for concern that with reductions in independent processes there may be increased 'compliance' but a marked decrease in transparency.

The bill alarmingly means that the Attorney-General will have substantial powers to make determinations regarding what would be unreasonable for agencies to publish on the disclosure log. This is the proverbial wolf guarding the sheep: the Attorney-General should not be given such broad powers on this issue for the very reason that they are a government minister.

In accordance with the above broad statements, specific concerns relate to the following:

Sch 1 items 10–13, 16–20 — These provisions should remain the responsibility of an independent commissioner and not be transferred to the Attorney-General. Transferring responsibility will undermine the impartial nature of the current framework and reduce public confidence in the freedom of information system.

Sch 1 items 14–15 — Although necessitated by the abolition of the

[1] Evidence to Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 18 November 2013, 147 (Louise Glanville).

OAIC, some form of independent external compliance review and assistance ought to be maintained.

Sch 1 items 23–25, 32, 34–35 — As has been stated above, having the AAT as the first external merits review body needlessly creates a confrontational or adversarial relationship which is not preferred.

Sch 1 item 50, 51–53 — Responsibility for reporting on the operation of the *FOI Act* and the issuing of guidelines should be given to an independent statutory commissioner in order to retain confidence in its operation. The Attorney-General is an unsuitable replacement, introducing concerns of impartiality. A government minister should not be responsible for determining matters relating to the effectiveness of legislation that is ultimately intended to guarantee its transparency. The *FOI Act* exists to ensure the government is open and transparent, and can only be assessed accurately by an independent authority.

The Freedom of Information Amendment (New Arrangements) Bill 2014 will create a more efficient regime at the expense of valuable oversight and public confidence.

3 Recommendation

As it stands, the Committee should not recommend that the Bill be passed without substantial amendment. This includes not abolishing the OAIC. It is preferable to have two internal assessments, a non-confrontational external merits review, and finally an appeal to the AAT. This could be applied uniformly to agencies and would not be particularly complicated, thus reducing concerns that the current system is needlessly complex.

The case for abolishing the OAIC has not been made out. If the OAIC is overburdened it would instead be appropriate to transfer certain responsibilities to other independent bodies or increase existing funding rather than abolishing it entirely.

The 2013 Hawke Review seemed supportive of the role of the OAIC in reducing the burden on the AAT indicating that the OAIC may be better position to satisfactorily resolve disputes:

> So far there has been a significant reduction in the number

> of cases proceeding to the AAT, with most of the workload being referrals from the IC exercising his powers to refer matters where it would be more appropriate for the AAT to review the matter.[2]

Costs could be lowered substantially if government agencies worked more closely with pro-transparency non-governmental organisations such as OpenAustralia, who provide the freedom of information website, Right to Know[3]. A cultural shift towards greater openness by default and greater cooperation with NGOs would reduce processing costs, as would increased voluntary publishing of materials by government agencies online.

The last formal, comprehensive, consultative review of the FOI Act seems to have been conducted in 1996 by the Australian Law Reform Commission.[4] The Hawke Review recommends that a comprehensive review is undertaken.[5] The Pirate Party recommends that such a review is undertaken as soon as possible.

4 Conclusion

This proposed legislation sends the wrong message, given the Government has been pressing forward with privacy-impinging legislation such as the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014. This legislation, perhaps unintentionally, continues the trend of this Government of seeking to take away privacy of Australian residents while limiting Government transparency and access to information.

Transparency is a vital feature of a free democracy, and it should not be sacrificed for short-term savings that would result in the Government effectively overseeing the very system designed to make it more transparent.

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[2] Allan Hawke, 'Review of the *Freedom of Information Act 1982* and *Australian Information Commissioner Act 2010*' (Report, Attorney-General's Department, 2013) 36.

[3] Right to Know <http://righttoknow.org.au>

[4] Australian Law Reform Commission, *Open Government — A Review of the Federal Freedom of Information Act 1982*, Report No 77 (1996).

[5] Allan Hawke, 'Review of the *Freedom of Information Act 1982* and *Australian Information Commissioner Act 2010*' (Report, Attorney-General's Department, 2013) 16.