



STRENGTHENING GOVERNMENT INTEGRITY

21 September 2018

The Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra 2600
ACT

Dear Sir/Madam,

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

The Accountability Round Table is pleased to forward its submission to the Committee with respect to this proposed amendment legislation.

Background

Commonwealth FOI legislation was substantially amended in 2010. The principal reforms to the legislation were:

- A clearer and more explicit pro-disclosure bias;
- An emphasis on developing a 'push' scheme (whereby information is made available proactively) as well as 'pull' scheme (which relies on requests for access to information);
- A restriction on Ministers from issuing conclusive certificates;
- A reformulation of the public interest test weighted in favour of disclosure; and
- The establishment of the Office of the Australian Information Commissioner (OAIC).

While all these changes have been welcome, there remains considerable work to do in improving FOI legislation and, in that way, strengthening Open Government in Australia. In this submission on the Bill presented by Senator Patrick we concentrate particularly on issues and problems that have occurred following the establishment of the OAIC.

ACCOUNTABILITY ROUND TABLE

The Office of the Australian Information Commissioner (OAIC)

In order to examine the proposals in Senator Patrick's bill, some background with respect to the political actions which have retarded to the work of the OAIC may be helpful.

Since the establishment of the OAIC, the most unwelcome development with respect to the operation of the FOI Act has been the Commonwealth's attempt to abolish the OAIC. Senator Brandis' proposal that the Office should be dispensed with and its functions transferred to the Administrative Appeals Tribunal would have been a highly retrograde step. The Accountability Round Table made many representations to the Attorney-General in relation to this matter. Partly as a result of these and other similar objections, the legislation to abolish the Office was withdrawn from Federal Parliament in the face of certain opposition in the Senate but many further obstacles to its effective functioning have been thrown in its way.

The OAIC's capacity to fulfil its legislative roles has deteriorated dramatically. Not only did the Government attempted to abolish the OAIC but it also reduced its funding in anticipation of that event. The Senate refused to pass the abolition Bill, but the reduction in its budget allocation was continued. Since then, the OAIC has been unable to discharge most of its significant statutory functions and responsibilities - including the operation of the proactive information disclosure system. (See ANAO Report of Performance Audit - Administration of the Freedom of Information Act 1982; Summary and Recommendations, paras 12-13).

As revealed in the Performance Audit by the ANAO (Administration of the Freedom of Information Act 1982- Figure 1.6) - the funding for the OAIC's FOI functions was halved to approximately \$2.5 million.

The new Office of the Information Commissioner was forced to operate on a very frayed shoestring, resulting in considerable delays in the conduct of every one of its functions including, most importantly, in its review functions. Applicants for review of decisions to refuse access to information waited months for reviews to be completed, thus in many cases resulting in their receipt of information that was already out of date. The delays far exceeded the statutory time limits provided for in the FOI Act.

The Government also abandoned the key 3 Commissioner management structure (Information Commissioner, Privacy Commissioner, and FOI Commissioner). It placed primary responsibility for managing FOI and Privacy matters in the hands of one person, the then Privacy Commissioner. The problem here was that the Privacy Commissioner did not have the legal qualifications set down in the legislation for the Freedom of Information Commissioner. In other words, from that point onwards, the Office operated contrary to law. The ART pointed this out to Senator Brandis but he took no action to rectify the situation.

Further, partly as a result of budget cuts, the OAIC's Canberra Head Office was shut. Staff numbers in the Office were reduced from 25 to 3. The Information Commissioner was forced to work from his office at home. This was a completely unacceptable state of affairs.

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On a different note, in late 2015 the Turnbull Government re-committed Australia to the Open Government Partnership, an international organisation committed to the greater openness, transparency and integrity in government. More than 30 Western democracies joined the partnership and signed up to the pact it provided. The pact requires each member state to develop a National Action Plan (NAP), to be revised and improved biennially. During the consultation with civil society in preparation for Australia's first plan, the OAIC matter was raised by several civil society organisations. This resulted in the inclusion of the following express Commitment in NAP1.

“The Government is committed to ensuring the adequate resourcing of the OAIC to discharge its statutory functions and will provide funding for this purpose over the next four years in the 2016 – 17 Budget. ”

NAP1 was published on 7 December 2016.

Despite its Commitment in NAP1, the Government has failed consistently to restore the previous level of funding for the FOI functions of the OAIC and so failed to adequately resource the OAIC to discharge its statutory functions.

During the implementation phase of NAP1, the Accountability Round Table (ART) wrote to the Attorney-General and his Department (it being the lead agency for the FOI Commitment 3.1) seeking the honouring of the Government's commitment to adequately resource the OAIC. The most recent request made to Attorney-General Porter is available from <https://www.accountabilityrt.org/art-letter-to-new-attorney-general-re-lack-of-resources-office-of-the-australian-information-commissioner/> ; his reply is available from <https://www.accountabilityrt.org/?s=Porter>.

ART's most recent letters to each Attorney- General contained recently published, substantial evidence, including the above-mentioned recent Auditor-General's assessment of the performance of the OAIC, confirming the inability of the OAIC to perform several its statutory responsibilities – in including the proactive disclosure system. The new Attorney General, Christian Porter has maintained that further provision of resources is not necessary; no supporting information for that contention has been provided. A Freedom of Information Commissioner has still not been appointed. FOI reviews are still conducted within the remit of the Privacy Commissioner who is not qualified under statute, undertake them.

Over this period, however, increased funding has been provided to the OAIC for its rapidly expanding Privacy functions.

In the light of the above and accepting the importance of our FOI system for Australia, and the importance in it of our proactive information disclosure system, the ART submits that the present and future resourcing of the OAIC is a matter that should be given top priority in the formulation of our next National Action Plan. A doubling of funding would be required whether Australia were a member of the OGP or not. The existing and continuing shortfall reinforces the need to act.

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In considering the Government's budgetary commitment, it will be necessary to consider not just the funding needed to support the proactive information disclosure system. Funding must be restored so as to enable the OAIC to meet all of its statutory functions, for they are intended to support and strengthen all aspects of our FOI system and the effective monitoring and guidance of it by the OAIC. The Government and Parliament must also take account of the additional resources needed to enable the OAIC to play its role adequately in:

- the final implementation stages of NAP1 (NAP1 requires OAIC to be engaged in nine of its 15 commitments, two as a lead agency),
- the preparation of NAP2, and
- the implementation of NAP2

To facilitate both the implementation of NAP1 and the preparation of NAP2, it is also critical that the additional resources are made available as quickly as is possible.

The ART recommends that:

The FOI funding be restored to at least the level that existed prior to the 2014 – 15 Budget, to which should be added the resources needed to enable the OAIC to discharge its obligations under NAP1 and proposed NAP2.

Quite apart from funding and political issues, the OAIC's functioning could also be improved by a number of simpler expedients. These might include:

- Authorising the Commissioner to remit a matter to an agency for reconsideration.
- Providing a clearer mandate to the Commissioner to resolve FOI review applications by agreement between the parties to a review.
- Removing the prohibition in legislation with respect to the delegation of Information Commissioner review decision-making powers under s.55K of the Act.
- Clarifying the application of secrecy provisions in other legislation to Information Commissioner reviews.

Fees and Charges

Fees and Charges play an important role in the FOI scheme. It is appropriate that applicants make some contribution to the cost of processing requests. Charges also play a role in balancing demand by focusing attention on the scope of requests and regulating those that are voluminous and therefore burdensome to process. At the same time full cost recovery would be incompatible with the objects of the FOI Act and would unfairly prejudice large numbers of potential applicants.

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The principles that should govern the administration of a charging regime are:

- The democratic right of citizens to have access to governmental information.
- The desirability of providing that access at the lowest possible cost.
- The fees and charges framework should be clear and easy for agencies to administer.
- The promotion of an informal process of administrative access to governmental information, and the encouragement of the conciliation of applications for review, in order to avoid the costs that will otherwise be incurred.

A fee and charging regime may be constructed as follows:

- Agencies should be encouraged to establish informal administrative access schemes.
- There should be no charge for the first five hours of processing time. The charge for processing time between five and ten hours should be a flat fee of \$50.00.
- For processing over ten hours should be \$20.00 per hour.
- An agency may in its discretion apply a \$50.00 charge if a person makes an FOI request without first applying under an administrative access scheme that has been notified on the agency's website.

3. Senator Patrick's Bill

Senator Patrick's Private Members' Bill makes a number of helpful recommendations most of which derive from the Commonwealth Government's actions with respect to the OAIC and outlined in the sections above. The Bill makes recommendations for amendments to the Archives Act and FOI Act in five distinct areas:

- Overlaps in the functions undertaken by OAIC Commissioners
- The qualifications required for appointment as Freedom of Information Commissioner
- Fees and Charges
- Delays in the completion of FOI reviews by the Information Commissioner.
- Matters having to do with the application of FOI fees and charges.

Each of these recommendations is dealt with in turn.

ACCOUNTABILITY ROUND TABLE

Commissioners

In the opinion of the ART, it has been regrettable that the OAIC three Commissioner model was abandoned by Senator Brandis when Attorney-General. This is a model that operated successfully before the Senator's unwarranted attack on the Commission. It is a model that applies in several Information Commissioner's offices in State Governments, including most recently in the modern and effective reforms adopted in Victoria. It is a model that is operates with success in several European and North American jurisdictions. At least three Commissioners are required to act effectively in covering the Office's relevant jurisdictions. The retarded performance of the OAIC with respect to Freedom of Information in the absence of a Freedom of Information Commissioner is illustrative of the problems that arise if the requisite number of Commissioners are not set in place.

Further, the likely huge expansion in the remit and work of the Privacy Commissioner consequent upon the advent of the digital economy make it next to impossible that a Privacy Commissioner alone could handle not only this jurisdiction but also the FOI jurisdiction concurrently.

The ART recommends strongly that, as in the Patrick Bill, the three Commissioner model be re-established within the OAIC.

Qualifications

It is fundamental and straightforward that if a statute prescribes that an Officer of the Commonwealth should possess certain qualifications as a pre-requisite for conducting his or office, the person appointed to that office should possess those qualifications. It is completely unacceptable that a situation has persisted in the OAIC where a Commissioner not possessing the relevant qualifications has been required to undertake functions in a jurisdiction in which they are required. No such displacement or overlap should be permitted.

The ART recommends, as in the Patrick bill, that the person occupying the position of Freedom of Information Commissioner must possess the relevant qualifications for the position.

Fees and Charges

The ART's position on fees and charges under the FOI Act has been delineated above. We note further that Senator Patrick has made an additional recommendation that Members of the House of Representatives and the Senate should be free from fees and charges unless the cost of meeting an access request exceeds \$1000. In the interests of governmental openness and transparency, and strengthening the capacity of MPs to obtain access to material relevant to their parliamentary work, the ART supports such a recommendation.

In summary, the ART's recommendations with respect to fees and charges are as follows:

Agencies should be encouraged to establish informal administrative access schemes.

There should be no charge for the first five hours of processing time. The charge for processing time between five and ten hours should be a flat fee of \$50.00.

For processing over ten hours should be \$20.00 per hour.

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An agency may in its discretion apply a \$50.00 charge if a person makes an FOI request without first applying under an administrative access scheme that has been notified on the agency's website.

No charge should be levied on FOI requests from Members of the House of Representatives or Senate unless the cost of responding effectively to a request exceeds the sum of \$1000.00.

Transfer of Requests

Senator Patrick's Bill proposes that if the Information Commissioner is of the view that more than 120 days will be required to review and respond to a request for access to documents, the Commissioner should notify the applicant and, then, the applicant should be entitled to transfer his or her request to the Tribunal for determination. The ART agrees that 120 days is an excessively long time in relation to which the Information Commissioner could claim an incapacity to undertake an FOI review. An applicant might rightly be dissatisfied with the need to wait for a response for four months. The ART agrees, therefore, that an applicant should be informed of this possibility and be accorded the entitlement to transfer their request to the Tribunal. Before doing so, however, an applicant would be wise to determine whether the Tribunal is likely to hear an application for documentary access more quickly.

The ART recommends that if the Information Commissioner informs an applicant for access to documents that his or her review of a refusal of access is likely to take more than 120 days, the applicant should be granted an entitlement to transfer the request for review to the Administrative Appeals Tribunal.

Legal Expenses

Senator Patrick's Bill proposes that a Minister or Agency that seeks external legal advice to assist with the legal matters involved in whether to grant access to documents, should publicly declare the expense involved in obtaining that advice.

The ART supports such an amendment in the interests of openness and transparency. No issue with respect to legal professional privilege arises. And it is highly unlikely that the declaration of such fees would result in any commercial disadvantage to the legal firms involved. The declaration of legal expenses would also add to a government's accountability for this aspect of public expenditure.

The ART recommends that external legal expenses incurred by a Minister or Agency for the purposes of responding to a request for access to documents in the possession of government be publicly declared.

Yours faithfully,

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