

Dissenting report by Labor Senators

Introduction

1.1 Freedom of information laws are essential to Australia's democracy because they give the Australian public and media access to information about what the government elected by the Australian people is doing in their name. Labor has long championed strong and effective freedom of information in Australia. In 2009-10 the Labor government made the most substantial reforms to Australia's FOI regime since its establishment in 1982, following extensive public consultation and with widespread support.¹

1.2 This reform, with the introduction of the Office of the Australian Information Commissioner (OAIC) at its heart, is now being dismantled by the Abbott government with no mandate, no consultation and no justification. The government's claim that the Bill does not affect the substantive rights of citizens, civil society and the press under FOI is simply not true. Its argument that it reduces the burden on applicants is, as Professor Richard Mulgan of the Australian National University described it, 'deceitful sophistry'.²

1.3 The Bill is an attack on Australia's FOI regime, and on the work the former Labor Government did to revitalise that regime and bring it into line with international best-practice. It is an attack on transparent and accountable government. Labor Senators cannot support it.

No savings

1.4 The Bill is not, as the Committee's majority report claims, a savings measure. As has been noted, even the small cuts achieved by this Bill may be illusory. The costs to agencies of mandatory internal review have not been accounted for.

1.5 Moreover, as almost every submission to this inquiry pointed out, a portion of the proposed 'savings' are in fact nothing but cost-shifting to applicants, who will now have to pursue an expensive formal appeal process instead of a free and accessible one.

No review

1.6 This Bill would abolish all independent merits review of FOI decisions short of a full adversarial FOI challenge in the Administrative Appeals Tribunal (AAT). As has been noted by numerous submissions to the Committee, AAT review is inaccessible to most ordinary FOI applicants. While review by the OAIC is free-of-charge, applicants face a filing fee of over \$800 simply to commence an appeal in the AAT. While the OAIC conducts its own investigation, an appeal to the AAT involves

1 Mr Mark Dreyfus MP, Deputy Manager of Opposition Business, *House of Representatives Hansard*, 28 October 2014, p. 85.

2 Professor Richard Mulgan, 'How the FOI watchdog was starved to death', *Canberra Times*, 3 June 2014.

an adversarial process and many applicants would require legal assistance or representation. As a bespoke FOI watchdog, the OAIC has developed a specialist knowledge and institutional memory that a generalist administrative tribunal will find difficult to match.

1.7 The AAT and the OAIC are in no sense interchangeable means of review. As Associate Professor Moira Paterson of Monash University argued, 'the genuine availability of an independent review mechanism is fundamental both to the effective operation of the legislation and public confidence in it'. Limiting review to those with the resources and legal knowledge or advice to go to the AAT will not only limit the accessibility of the FOI scheme to applicants, but may also affect the behaviour of government agencies, which 'need to know that their decisions are subject to independent oversight if they are to continue to take their FOI obligations seriously'.³

1.8 Even Australia's Right to Know, the only submitter which overtly supported the move to direct review by the AAT, acknowledged that the situation of the media organisations which it represents was different to that of private individuals, and encouraged the consideration of a model which would retain the role of an information commissioner for those applicants who would benefit from it.⁴

No consultation

1.9 Labor engaged in extensive consultation on its proposed changes to FOI laws in 2009-10, resulting in a new FOI infrastructure that was well-considered and enjoyed broad support. In stark contrast, the government did not conduct any review or consultation prior to announcing the Budget measure this Bill implements.

1.10 As noted in the committee's report, the recent review of FOI led by Dr Allan Hawke AC found that the establishment of the OAIC had been 'a very valuable and positive development'. Hawke concluded that the new FOI system was largely working as intended, and that any further reform should only proceed after more comprehensive review.⁵ The Government has ignored the good work done by the Hawke review, and has not undertaken any serious analysis of its own on the operation of the FOI scheme or of the OAIC. It is simply unacceptable for the Government to proceed with the complete overhaul of the FOI system without a thorough review and proper consultation.

No OAIC

1.11 The management of FOI and related information policy through an independent national body is best practice, and follows a global trend in comparable jurisdictions. The creation of such a body at federal level was advocated as long ago as 1995, in the Open Government Report of the Australian Law Reform Commission

3 Associate Professor Moira Paterson, *Submission 5*, p. 2.

4 Mr Michael McKinnon, *Committee Hansard*, 10 November 2014, p. 20.

5 Australian Government, *Review of the Freedom of Information Act 1982 and Australian Information Commissioner Act 2010*, July 2013, p.3, 36.

and Administrative Review Council.⁶ The OAIC was the centrepiece of the revitalisation and reform of FOI successfully brought about under the former Labor government. The continued existence of the OAIC received overwhelming support in submissions to this inquiry.

1.12 Labor senators accept that there have been complaints about long timelines for IC processing of FOI reviews, but notes the observation of FOI experts that these have been caused largely by the inadequacy of resources provided to the OAIC. Any delays in the OAIC review process should be dealt with by reviewing and if necessary increasing the resourcing of that office, not abolishing it. The OAIC and other FOI experts also noted that various suggestions had been made to improve the efficiency of OAIC processes.⁷ The OAIC has worked on its own volition to dramatically reduce its review timelines, as demonstrated in its most recent annual reporting.⁸ The Government has made no attempt to grapple with real solutions to perceived problems with the operation of the OAIC. Rather, its approach has been, as one submitter put it, to throw the baby out with the bathwater.⁹

1.13 Under the arrangements proposed in the Bill, oversight of FOI – a system designed to hold executive government to account – will now be led by a core government department. This is a clear conflict of interest. Liberty Victoria observed that open government 'is now to be sacrificed to the very entities in whose interests the limitation of access to governmental information will, from time to time, be prevalent.'¹⁰

1.14 In evidence to the committee, Information Commissioner Professor John McMillan observed that:

open government is ultimately more a matter of culture than precise legal rules, and that culture requires constant pressure. Even when one achieves a far more open and transparent system, the default system within any organisation is for greater confidentiality, greater information control, which some regard as greater secrecy. So, whatever system is in place for information oversight with a view to greater transparency, it requires constant pressure across government to ensure that the messages for transparency are heard and properly implemented...any achievement in the area of transparent government will be a temporary achievement unless there is constant pressure for greater transparency.¹¹

6 Australian Law Reform Commission & Administrative Review Council, *Open Government – A Review of the Federal Freedom of Information Act 1982*, ALRC Report 77, 20 January 1996.

7 See for example Transparency International Australia, *Submission 6*.

8 See Office of the Australian Information Commissioner, *Submission 26*, Attachment 1, which is extracted from the OAIC *Annual Report 2013-14*.

9 Information Consultants Pty Ltd, *Submission 2*, p. 3.

10 Liberty Victoria, *Submission 21*, p. 3.

11 Professor John McMillan, *Committee Hansard*, 10 November 2014, p. 29.

1.15 Labor senators believe that the OAIC must be retained. The agency has a key role to play in ensuring the transparency of our governance, and the government's proposed rearrangement is an opportunistic attack on an institution which enjoys broad support and has achieved demonstrated success. It is telling that the Abbott government, a government already known for secrecy and opaqueness, is the only voice calling for the abolition of the OAIC. If the government were truly committed to a credible FOI regime and accountable government, it would investigate measures to strengthen, not destroy, the best-practice body at its heart.

Recommendation 1

1.16 Labor senators recommend that the Bill not be passed.

Recommendation 2

1.17 Labor senators recommend that the government immediately restore necessary funding to the Office of the Australian Information Commissioner to allow it to continue its work.

Recommendation 3

1.18 Labor senators recommend that the government commission a review of the operation of the OAIC, including its resourcing.

**Senator Jacinta Collins
Deputy Chair**