

Dissenting report by the Australian Greens

Introduction

1.1 Freedom of Information laws provide the public with important and necessary access to information held by governments and government departments.

1.2 The primary goal of any Freedom of Information regime should be to prioritise accessibility and transparency.

1.3 Freedom of Information laws provide the public, media organisations and journalists with a critical pathway to accessing information that otherwise would not be able to be accessed.

1.4 Of the 32 submissions received by the committee, not a single one supports the proposed changes outlined in the Bill, highlighting the importance placed by the community on an accessible and transparent Freedom of Information regime and widespread concern about this Bill.

Key issues

1.5 One of the key arguments raised by the government in support of the Bill has been the delays experienced in the processing of cases by the Office of the Australian Information Commissioner (OAIC). The government has argued that this highlights inadequacies in the organisation and thus it should be abolished.

1.6 However, a number of witnesses argued that the delays associated with the OAIC processing cases were the result of underfunding from both Labor and Coalition governments. Mr Peter Timmins argued the OAIC had been 'set up to fail' by being under-resourced from its establishment.¹

1.7 Mr John Wood argued:

The reforms of 2010 promised much, but the failure to provide necessary resources to the Office of the Australian Information Commissioner, led to the failure of those reforms. In addition, departments and agencies read into the failure to provide these resources, an "approval" to respond less than diligently to requests in the knowledge that either complainants would become exhausted pursuing their request, or it would be held up, in review, within the OAIC for a long, long time.²

1.8 The majority committee report notes that the committee did not receive evidence indicating that AAT review would necessarily be faster than review by the OAIC. On the contrary, FOI Commissioner Dr James Pople advised the committee that comparison of the FOI reviews dealt with since 2010 revealed that the AAT had taken almost exactly the same average time as the OAIC to resolve FOI cases.³

1 Mr Peter Timmins, *Committee Hansard*, 10 November 2014, p. 13.

2 Mr John TD Wood, *Submission 8*.

3 Dr James Pople, *Committee Hansard*, 10 November 2014, p. 27.

1.9 Mr Timmins in evidence to the inquiry stated:

I think the argument we are going to save \$10 million over four years has some large question marks about it, to put it mildly. Some of the reasons I have raised in my submission include: the costs to individuals, the cost to the AAT; the cost to agencies for mandatory internal reviews, which has not been costed anywhere...⁴

1.10 Other concerns raised included the high level of fees required to be paid in order to apply for an external review of decisions through the AAT.

1.11 As noted in the Majority Committee report, the Public Interest Advocacy Centre (PIAC) expressed concern that in addition to the burden of application fees, most individual applicants would not have the kind of legal representation that government agencies were able to retain, resulting in an 'imbalance that will happen in the litigious process'.⁵

1.12 Professor Julian Disney also emphasised other factors that may affect accessibility to the AAT including the formality and intimidator impact of the AAT process and environment.⁶

1.13 The Guardian also noted other issues with the proposed AAT process, commenting:

The \$800 AAT filing fee is just the start of the potential costs to the requester in getting his or her application in front of the first reviewer who is genuinely independent of the agency which may have an interest in keeping the requested information secret and therefore in overstating the exemptions. OAIC reviews could be conducted on the papers, whereas AAT reviews will often involve hearings. The Committee will be aware that a tribunal must give procedural fairness to an unrepresented applicant, and that such hearings impose burdens on all parties and on the tribunal. Generally, they are not as efficient as proceedings in which all parties are represented by experienced practitioners.⁷

1.14 Concerns were also raised around potential conflicts of interest relating to the exercise of functions by the Attorney-General's department.

1.15 As noted in the majority committee report, the Open Australia Foundation referred to 'gaming of the system' undertaken by some agencies, underlining the need for an independent monitor of FOI compliance, and further claimed that among agencies, the Attorney-General's Department was 'not modelling best practice in this area'.⁸ Academic Bruce Baer Arnold went further, expressing scepticism 'that

4 Mr Peter Timmins, *Committee Hansard*, 10 November 2014, p. 9.

5 Ms Sophie Farthing, *Committee Hansard*, 10 November 2014, p. 13.

6 Professor Julian Disney, *Committee Hansard*, 10 November 2014, p. 18.

7 Guardian Australia, *Submission 18*, p. 4.

8 Open Australia Foundation, *Submission 11*, pp 3-4 & Attachment 1.

executives within the Attorney- General's department will demonstrate a sustained and vigorous enthusiasm for transparency'.⁹

1.16 As noted in the majority committee report, PIAC noted that the new arrangements would allow the Attorney to define categories of information that were 'unreasonable' to publish, including information sought from his own department: 'there is a conflict with changing an office which is independent in issuing this kind of regulation and guidance about how the FOI Act should operate to someone who is subject to the Act himself'.¹⁰

1.17 The Privacy Commissioner, Mr Timothy Pilgrim, stated that 'the Bill creates a model that is not suited to achieving the objectives of the [Privacy Act] in the most efficient way'.¹¹

1.18 It is important to note that the Hawke Review did not recommend what is currently being proposed by the Government and in fact commented positively on the OAIC. It made a number of recommendations to improve the functions and operations of Australia's FOI regime – none of which are being pursued by this Government.

1.19 The Hawke Review further called for a more comprehensive review of FOI laws and systems, something that has been pre-empted by the current Bill.

1.20 It is clear from the overwhelming evidence presented to the committee that the approach to FOI as proposed in the Bill would not improve accessibility and transparency, and in fact would create substantial barriers impacting the public's right to know.

Recommendation 1

1.21 The Australian Greens recommend that the Bill not be passed.

Recommendation 2

1.22 The Australian Greens recommend that the government establish a comprehensive review into Freedom of Information as recommended by the Hawke Review.

Senator Lee Rhiannon
Australian Greens

9 Assistant Professor Bruce Baer Arnold, *Submission 12*, p. 4.

10 Ms Sophie Farthing, *Committee Hansard*, 10 November 2014, p. 14. See also Public Interest Advocacy Centre, *Submission 15*, p. 13.

11 Mr Timothy Pilgrim, Privacy Commissioner, Additional Information provided to the committee on 12 November 2014, pp 1-2.

