

The Senate

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Legal and Constitutional Affairs  
Legislation Committee

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Freedom of Information Amendment  
(New Arrangements) Bill 2014 [Provisions]

November 2014

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# Abbreviations

AAT	Administrative Appeals Tribunal
AHRC	Australian Human Rights Commission
AHRC Act	<i>Australian Human Rights Commission Act 1986</i>
AIC Act	<i>Australian Information Commissioner Act 2010</i>
FOI	freedom of information
FOI Act	<i>Freedom of Information Act 1982</i>
FOI Commissioner	Freedom of Information Commissioner
IC	(Australian) Information Commissioner
OAIC	Office of the Australian Information Commissioner
PGPA Act	<i>Public Governance, Performance and Accountability Act 2013</i>





# Recommendations

## Recommendation 1

**3.5** The committee recommends that item 3 of Schedule 2 of the Bill be amended to provide, under the proposed new section 43A(3) of the *Australian Human Rights Commission Act 1986*, that a member of staff of the AHRC made available to the Australian Privacy Commissioner is subject to the directions of the Commissioner 'in compliance with the Commissioner's statutory functions'.

## Recommendation 2

**3.8** The committee recommends that the government as soon as possible respond to the Hawke Review, and conduct a consultation process as recommended in the Hawke Review.

## Recommendation 3

**3.10** The committee recommends that, subject to Recommendations 1 and 2, the Bill be passed.



# Chapter 1

## Introduction

1.1 On 2 October 2014, the Hon Scott Morrison MP, Minister for Immigration and Border Protection, introduced the Freedom of Information Amendment (New Arrangements) Bill 2014 (the Bill) into the House of Representatives.<sup>1</sup> Following debate, and agreement to two amendments proposed by the government, the Bill was passed by the House on 28 October 2014.<sup>2</sup>

1.2 On 30 October 2014, pursuant to a report of the Selection of Bills Committee, the Senate referred the provisions of the Bill to the Legal and Constitutional Affairs Legislation Committee (the committee) for inquiry and report by 25 November 2014.<sup>3</sup> The Bill was introduced into the Senate the same day.<sup>4</sup>

### Conduct of the inquiry

1.3 In accordance with usual practice the committee wrote to 49 people and organisations, inviting submissions by 6 November 2014. Details of the inquiry were also made available through the media and on the committee's website ([www.aph.gov.au/senate/legalcon](http://www.aph.gov.au/senate/legalcon)).

1.4 The committee received 32 submissions, which are listed at Appendix 1. The committee thanks those individuals and organisations who made submissions to the inquiry. The committee held a public hearing on 10 November 2014 in Sydney. The witnesses who appeared at the hearing are listed at Appendix 2. Additional information received by the committee following the hearing is listed at Appendix 3.

### Background to the Bill

1.5 Freedom of information (FOI) is the statutory regime facilitating the right of citizens to access government documents, in order to encourage transparency and accountability in government, and combat corruption and wrongdoing. Australia was one of the first countries to adopt specific FOI laws in the 1970s and 1980s. However, with the passage of time there was a growing view that Australia's FOI laws were inadequate, and that the system was not working as intended.<sup>5</sup>

1.6 In 2009 and 2010, the then Labor government introduced a package of reforms intended to address perceived inadequacies in the FOI regime, and create a stronger culture of openness in government. A major element of the changes was the establishment in 2010 of a new statutory agency, the Office of the Australian Information Commissioner (OAIC). The OAIC incorporated the pre-existing Privacy

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1 House of Representatives, *Votes and Proceedings*, No.72, 2 October 2014, p. 875.

2 House of Representatives, *Votes and Proceedings*, No.78, 28 October 2014, pp 939-940.

3 *Journals of the Senate*, No. 63, 30 October 2014, pp 1689-1691.

4 *Journals of the Senate*, No. 63, 30 October 2014, p. 1701.

5 Parliamentary Library, *Bills Digest* No. 44, 2014-15, 27 October 2014, p. 3.

Commissioner role and placed alongside it two new statutory positions, a Freedom of Information Commissioner (FOI Commissioner) and an Information Commissioner (IC). The OAIC was given comprehensive oversight powers and functions with respect to privacy, FOI and information issues across Australian government agencies.

1.7 The 2010 changes established a two-tiered system for external review of FOI decisions, the first by the IC with a right of appeal, if a party was not satisfied, to the Administrative Appeals Tribunal (AAT). The first-tier review by the IC did not require prior internal review or legal counsel, and there were no application fees. 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.<sup>6</sup>

1.8 On 29 October 2012, former public servant Dr Allan Hawke AC was commissioned by the Labor government to review the operation of the FOI Act and the *Australian Information Commissioner Act 2010* 'and the extent to which those Acts and related laws continue to provide an effective framework for access to government information'.<sup>7</sup> The 'Hawke Review', submitted to the government on 1 July 2013, concluded that the 2009-10 reforms were operating as intended and had been generally well-received.<sup>8</sup> The Hawke Review considered that 'the establishment of the OAIC has been a very valuable and positive development in oversight and promotion of the FOI Act', while recognising concerns about 'lengthy and consistent delays in the OAIC's decision-making and complaint investigation processes'.<sup>9</sup> It recommended a range of legislative and administrative changes to streamline FOI procedures, reduce complexity and increase capacity to manage FOI workload both by agencies and the OAIC.

1.9 With regard to the reformed system for merits review of FOI decisions, the Hawke Review found that there was insufficient evidence, two and a half years into its operation, to make a decision on whether the model was the best one, and recommended that this be the subject of further examination as part of a comprehensive review of the FOI Act.<sup>10</sup>

1.10 In the 2014 Federal Budget, the government introduced a measure entitled 'Smaller Government – Privacy and Freedom of Information functions – new arrangements'. The government stated that this measure would achieve savings of

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6 Parliamentary Library, *Bills Digest* No. 44, 2014-15, 27 October 2014, p. 4.

7 Attorney-General's Department, Review of Freedom of Information Laws, Terms of Reference, at <http://www.ag.gov.au/consultations/pages/reviewoffoilaws.aspx>.

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

9 Australian Government, *Review of the Freedom of Information Act 1982 and Australian Information Commissioner Act 2010*, July 2013, p.24.

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

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\$10.2 million over four years, primarily by abolishing the OAIC and moving its functions to other bodies.<sup>11</sup>

1.11 Explaining the Budget measure, the Attorney-General said that it was 'in line with the Coalition's commitment to streamline government and reduce duplication to deliver efficient, effective government'. The Attorney stated that:

The complex and multilevel merits review system for FOI matters has contributed to significant processing delays. Simplifying and streamlining FOI review processes by transferring these functions from the OAIC to the AAT will improve administrative efficiencies and reduce the burden on FOI applicants.<sup>12</sup>

### **Purpose of the Bill**

1.12 The purpose of the Bill is to implement the new arrangements for privacy and FOI functions announced by the government in the 2014 Budget. The Bill amends various Acts in order to:

- abolish the positions of Freedom of Information Commissioner and Australian Information Commissioner, and the OAIC;
- create an independent statutory office of Australian Privacy Commissioner within the Australian Human Rights Commission (AHRC);
- remove the current two-stage process for review of FOI decisions, with external merits review to be available only from the AAT, following mandatory internal review;
- make the Attorney-General responsible for FOI guidelines, collection of FOI statistics and annual reporting on the FOI Act, in place of the Information Commissioner; and
- make the Commonwealth Ombudsman solely responsible for investigating complaints about FOI administration.<sup>13</sup>

1.13 In his second reading speech on the Bill, Senator Richard Colbeck said the new arrangements set out in the Bill would not affect the legally enforceable right of every person to access official documents under the FOI Act, nor change the substantive criteria governing agencies' and ministers' decisions on FOI requests. The Bill would, however:

reduce the size of government, streamline the delivery of government services and reduce duplication. It will mean business as usual for privacy and largely restore the system for the management of freedom of

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11 The Hon JB Hockey MP, Treasurer & Senator the Hon Mathias Cormann, Minister for Finance, *Budget Measures: Budget Paper no.2, 2014-15*, 13 May 2014, p. 64.

12 Senator the Hon George Brandis QC, Attorney-General and Minister for the Arts, 'Streamlined arrangements for external merits review', Media Release, 13 May 2014.

13 Explanatory Memorandum, p. 2.

information in place before the establishment of the [OAIC] on 1 November 2010.

The Bill makes it easier for applicants to exercise their rights under privacy and FOI legislation.<sup>14</sup>

### **Key provisions of the Bill**

1.14 The Bill repeals the *Australian Information Commissioner Act 2010* (AIC Act), and amends the *Freedom of Information Act 1982* (FOI Act), the *Ombudsman Act 1976* and other Acts. The Bill contains four schedules.

1.15 Schedule 1 amends the FOI Act and other legislation to provide for FOI functions to be undertaken by others upon the abolition of the OAIC. The amendments to the FOI Act include the following:

- Items 10 and 11 amend provisions for the IC to determine that certain information is not required to be included in an agency's information publication scheme. The amendments delete reference to the IC and substitute the Attorney-General;
- Items 14 and 15 repeal the IC's mandate to assist agencies with the information publication scheme, and to review compliance with the scheme. Upon the abolition of the OAIC, these functions will not continue;
- Items 18 and 19 move from the IC to the Attorney-General the power to make determinations of matters that would be unreasonable for an agency to publish on the disclosure log;
- Items 22, 24, and 25 repeal provisions which allow the IC to extend the request processing period when matters are complex or voluminous, or when the initial decision time has expired. Under the new arrangements, processing time can only be extended by agreement between the relevant agency (or minister) and the applicant. Item 34 similarly removes the IC's power to extend the period for internal review;
- Item 35 repeals Part VII of the Act, 'Review by the Information Commissioner'. Various related amendments replace reference to the IC with reference to the AAT, which will be the sole avenue for external merits review of FOI decisions;
- Item 36 substitutes provisions setting out the FOI decisions about which applicants will be able to seek review by the AAT. Generally, applicants will have to have first sought internal review of the decision, where possible. (Internal review is not available where a decision is made personally by a minister or head of agency. In those cases, applicants may appeal directly to the AAT.) Once an internal review decision is made, or deemed to have been made because the processing time has expired, the applicant may appeal to the AAT;

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14 Senator Richard Colbeck, Parliamentary Secretary to the Minister for Agriculture, Second Reading Speech, *Senate Hansard*, 30 October 2014, p. 72.

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- Item 43 repeals Divisions 1 and 2 of Part VIIB of the Act, which provide the IC with complaint investigation powers. The Ombudsman will be solely responsible for investigating complaints about agencies' FOI processing. Various consequential amendments are made to reflect this change;
  - Item 47 repeals provisions empowering the IC to declare a person a vexatious applicant. Following the abolition of the OAIC this function will not continue. Where AAT review is sought, the AAT can dismiss an application if it finds that it is frivolous or vexatious;
  - Items 50-52 place responsibility with the Attorney-General for preparing an annual report on the operation of the FOI Act, instead of the IC doing so under the AIC Act; and
  - Item 53 makes the Attorney-General responsible for issuing guidelines under the FOI Act, in place of the IC.

1.16 Schedule 1 also amends the *Ombudsman Act 1976* which provides for the Ombudsman to refer complaints about processing of requests under the FOI Act or the *Privacy Act 1988* (the Privacy Act) to the IC where appropriate. The relevant provisions are amended such that the Ombudsman will be solely responsible for FOI complaints, while complaints relating to the Privacy Act may be referred to the Australian Privacy Commissioner.

1.17 Schedule 2 amends the *Australian Human Rights Commission Act 1986* (AHRC Act) and the Privacy Act, to provide for an independent statutory office of Australian Privacy Commissioner within the AHRC, responsible for exercising privacy functions under the Privacy Act or other Commonwealth laws. Key amendments to the AHRC Act include the following:

- Item 1 amends Section 43A of the AHRC Act to reflect that some staff employed by the AHRC under the *Public Service Act 1999* will be assisting the Privacy Commissioner rather than the AHRC;
- Item 3 repeals the provision for the AHRC to provide administrative services to the IC, and replaces it with provision that the AHRC may provide such services to the Australian Privacy Commissioner as are necessary for the Commissioner to perform the functions conferred on that office by the Privacy Act. A new subsection, 43A(3), requires that staff made available to the Privacy Commissioner are subject to the Commissioner's directions in relation to the functions of that role, not those of the AHRC; and
- Item 7 inserts new section 45A providing that the purposes of the AHRC include the functions of the Australian Privacy Commissioner, for the purposes of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act).

1.18 The key amendment to the Privacy Act contained in Schedule 2 is Item 11, inserting new Division 1, which provides for the appointment and functioning of the Australian Privacy Commissioner outside the framework of the OAIC. The Commissioner is to be appointed by the Governor-General for a 5-year term (as previously), and is in most respects accountable directly to the Governor-General or

the minister, rather than the President of the AHRC, although the Commissioner is designated an 'official' of the AHRC for the purposes of finance law under the PGPA Act. The Commissioner may delegate certain functions to staff of the AHRC.

1.19 Item 14 of Schedule 2 repeals Part VII of the Privacy Act, abolishing the Privacy Advisory Committee. (The repeal of the AIC Act under Schedule 3 will also abolish the Information Advisory Committee.)

1.20 Schedule 3 repeals the AIC Act in its entirety, and makes consequential amendments to other legislation, effectively abolishing the IC, FOI Commissioner, and the OAIC. (The Privacy Commissioner is also removed, but is replaced by the Australian Privacy Commissioner under the new provisions in Schedule 2.)

1.21 Under clause 2 of the Bill, its substantive provisions will take effect on 1 January 2015. Schedule 4 sets out transitional arrangements, including the following:

- unresolved review applications with the IC at the commencement date will be sent to the AAT. The AAT's application fees will not be levied in such cases;
- following commencement, applicants may still apply for AAT review of decisions made by the IC prior to commencement, and retain the right to further appeal to the Federal Court on questions of law;
- FOI processing complaints made to the IC and not completed by commencement will be transferred to the Ombudsman;<sup>15</sup>
- upon commencement, the existing Privacy Commissioner will become the Australian Privacy Commissioner under the new provisions, for the balance of that person's appointment and on the same terms and conditions;
- things started but not finished by the IC for a privacy purpose can continue to be done by the Australian Privacy Commissioner; and instruments made for a privacy purpose prior to commencement which refer to the IC, Privacy Commissioner or OAIC will now be deemed to refer to the Australian Privacy Commissioner; subject to determination otherwise by the minister;
- employees of the OAIC immediately before the commencement day will be transferred to the AHRC by determination of the Australian Public Service Commissioner under the Public Service Act, and remain on the terms and conditions of their present enterprise agreement until the President of the AHRC negotiates a new enterprise agreement;
- the Attorney-General may make other rules prescribing matters of a transitional nature relating to the amendments and repeals made by the Bill.

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15 By agreement between the agencies, the Ombudsman began accepting complaints directly on 1 November 2014, and all complaints received by the OAIC since that date are being transferred to the Ombudsman. Office of the Australian Information Commissioner, *Submission 26*, pp 2-3.



## Chapter 2

### Key issues

2.1 The issues raised during the inquiry focused mainly on the merits of the proposed changes to FOI review; the other roles performed by the OAIC which would be lost or moved under the Bill; and the workability of the new arrangements proposed for the Privacy Commissioner role. Many also advocated the need for a more comprehensive review of the FOI regime.

#### *External Review of FOI decisions*

2.2 Differing views were offered to the committee regarding the advisability of removing Information Commissioner (IC) review of FOI decisions, and replacing it with external review only by the Administrative Appeals Tribunal (AAT), following mandatory internal review.

2.3 Many submitters, such as Ms Megan Carter of Information Consultants Pty Ltd, argued that '[w]orldwide, the Information Commissioner model is acknowledged as the preferred method of dealing with external reviews of FOI matters', because it enables the IC to develop deep specialist knowledge in FOI and therefore take a more consistent approach to decision-making, as well as offering greater accessibility and affordability to applicants, and more flexibility in the methods used to resolve disputes.<sup>1</sup>

2.4 Some were not opposed to the change in review arrangements. Australia's Right to Know, a coalition of major media organisations, argued that from its members' perspective, the right to appeal directly to the AAT was a positive move, as OAIC review had proven far too lengthy and its non-adversarial model also had the potential to deny natural justice to applicants.<sup>2</sup>

#### *Timely processing of appeals*

2.5 The problem of delay in processing appeals through the OAIC was not disputed in the evidence given to the committee, but most submitters argued that this did not justify abandoning the process.

2.6 Many expressed the view that the delays experienced in OAIC processing of cases arose at least in part from inadequate resourcing. Mr Peter Timmins believed the OAIC had been 'set up to fail' by being under-resourced from the outset.<sup>3</sup> Mr John Wood agreed, and added that this situation was exploited by government agencies which responded 'less than diligently' to FOI requests in the knowledge that redress

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1 Information Consultants Pty Ltd, *Submission 2*, pp 1-2.

2 Mr Michael McKinnon, *Committee Hansard*, 10 November 2014, p. 17; Australia's Right to Know, *Submission 24*, p. 1. The NSW Council of Civil Liberties also indicated that it was not opposed in principle to the removal of merits review to the AAT, but objected strongly to the costs involved: *Submission 20*, p. 2.

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

would be long delayed.<sup>4</sup> One submitter suggested that introducing a small fee for OAIC review would be likely to lower the volume of requests and should be considered as an alternative to removing it altogether.<sup>5</sup>

2.7 In evidence to the committee the Information Commissioner, Professor John McMillan, acknowledged that:

A major criticism of the OAIC has been on the delay in IC reviews. It is an issue of which we have been acutely aware from the beginning of the commission. It is an issue on which we forecast, from the very beginning, that the settings in the FOI Act possibly needed alteration. We predicted from the outset that delays would occur, and we have made many proposals along the way in public submissions about amendments that were needed to the FOI Act, to make it a less complex and more efficient system.

But, most importantly, we have taken those criticisms on board and constantly trialled new approaches for quicker resolution of disputes. Also, we have concentrated on building up a body of principle and case law in guidelines and in decisions, which does lead to a much more efficient resolution of disputes nowadays.<sup>6</sup>

2.8 The OAIC provided the committee with statistics demonstrating its improved performance in the timely resolution of FOI reviews: most recently, in 2013-14 the number of completed IC review decisions jumped by 54 per cent (from 419 to 646), and the time lag in actioning new cases reduced from 206 to 40 days.<sup>7</sup>

2.9 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 Popple 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.<sup>8</sup>

2.10 Moreover, submitters observed that the promise of faster processing did not account for the time that would be taken by the prerequisite internal review under the new system.<sup>9</sup> A few, including the OAIC, pointed out that removal of the power previously vested in the IC to declare an applicant vexatious may have additional impact upon the processing and review burden on agencies.<sup>10</sup>

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4 Mr John TD Wood, *Submission 8*.

5 Information Consultants Pty Ltd, *Submission 2*, p. 2.

6 Professor John McMillan, *Committee Hansard*, 10 November 2014, p. 26.

7 Office of the Australian Information Commissioner, *Submission 26*, p. 9 and Attachment 1.

8 Dr James Popple, *Committee Hansard*, 10 November 2014, p. 27.

9 In addition, a number of submitters expressed negative views about the value of internal review.

10 Commonwealth Ombudsman, *Submission 14*, p. 3; Office of the Australian Information Commissioner, *Submission 26*, p. 7; Australian Prudential Regulation Authority, *Submission 32*.

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### *Accessibility of AAT review*

2.11 Many submissions raised concern about the fact that application for external review of FOI decisions through the AAT incurs a fee of \$861, plus additional costs to applicants for legal advice and representation, in contrast to the present first-stage IC review, which is fee-free and does not require legal counsel. Submitters saw this as compromising the accessibility of FOI review to ordinary citizens.

2.12 Ms Megan Carter commented that when fees for AAT review of FOI decisions were first introduced in Australia in 1986, the number of applications plummeted, and there were few cases involving individuals or personal matters.<sup>11</sup> The IC advised the committee that prior to 2010 the AAT had received around 130 review applications per year, but after the OAIC was established applications for OAIC review quickly reached 550 per year. While there may be various reasons for this, Professor McMillan believed that the absence of fees was 'certainly an element' and that the re-imposition of fees would be likely to result in fewer appeals.<sup>12</sup>

2.13 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'.<sup>13</sup> Professor Julian Disney further emphasised that monetary costs were not the only factor affecting the accessibility of the AAT to applicants:

That is only one of the deterrents to ordinary people. A major one is formality and an unintended intimidatory impact not only of the environment but of being up against government. Often that is of much greater significance than the out-of-pocket costs. There is also the cost of taking time off work... There are a lot of other deterrents.<sup>14</sup>

2.14 Several submitters including Australia's Right to Know and the Press Council of Australia believed that allowing direct appeal to the AAT as an option, while retaining the right to IC review for those applicants who wished it, may be a better option than the removal of OAIC review altogether.<sup>15</sup> The OAIC itself indicated that there were various models used in other jurisdictions, including allowing applicants a choice of forum, which could be considered.<sup>16</sup>

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11 Information Consultants Pty Ltd, *Submission 2*, p. 1.

12 Professor John McMillan, *Committee Hansard*, 10 November 2014, p. 32.

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

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

15 *Committee Hansard*, 10 November 2014, p. 20; Public Interest Advocacy Centre, *Submission 15*, p. 4.

16 Professor John McMillan, *Committee Hansard*, 10 November 2014, pp 28-29. See also Mr Peter Timmins, *Submission 9*, p.3.

2.15 Should the reformed review process go ahead, several witnesses proposed that the relevant AAT fees should be revised to ensure greater accessibility to applicants, particularly individuals and those seeking information in the public interest.<sup>17</sup>

2.16 Speaking on the Bill in the House of Representatives, Mr Paul Fletcher MP advised that:

While it is true that the application fee to the [AAT] is \$861, there is a reduced fee of \$100 in the case of hardship. In certain specified cases there is no fee payable at all, and those include FOI reviews about Commonwealth workers compensation, family assistance, social security payments and veterans' entitlements. I also remind the House that consistent with other matters in the [AAT], successful FOI applicants will receive a refund of \$761 of the full \$861 fee.<sup>18</sup>

2.17 Addressing the committee, the Attorney-General's Department emphasised the 'flexible, innovative, alternative dispute resolution procedures' adopted by the AAT, and its recent record of around 80 per cent of cases resolved by consent and conciliation.<sup>19</sup> It also drew attention to the requirement for prior internal review by agencies, which it said would provide a 'free and effective form of merits review'.<sup>20</sup>

### ***Other functions of the OAIC***

2.18 Much evidence given to the committee pointed out that the role of the OAIC was broader than just the review function, and expressed concern about the impact of abolishing the OAIC on the other roles fulfilled by the Office.

2.19 In general terms, FOI advocates regarded it as essential to have an 'FOI champion' at arms' length from government control, and noted that independent FOI Commissioners were a feature of FOI regimes in comparable jurisdictions such as the United Kingdom and Canada, as well as several Australian states. One submitter spoke of a 'global trend' toward the establishment of Information Commissions and/or Commissioners, while another spoke of the model as 'accepted best practice...around the world'.<sup>21</sup>

2.20 Queensland Integrity Commissioner and former South Australian Ombudsman, Mr Richard Bingham, highlighted the OAIC's ability to take an integrated approach to privacy, FOI and broader information management issues, and

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17 Ms Sophie Farthing, *Committee Hansard*, 10 November 2014, p.13; Mr Michael McKinnon, *Committee Hansard*, 10 November 2014, p. 17; Open Australia Foundation, *Submission* 11, p. 1; Public Interest Advocacy Centre, *Submission* 15, pp 11-12; Mr Daniel Stewart, *Submission* 27.

18 Mr Paul Fletcher MP, Parliamentary Secretary to the Minister for Communications, *House of Representatives Hansard*, 28 October 2014, p. 92.

19 Mr Matt Minogue, *Committee Hansard*, 10 November 2014, p. 33.

20 Mr Matt Minogue, *Committee Hansard*, 10 November 2014, p. 38.

21 Parliamentary Library, *Bills Digest* No. 44, 2014-15, 27 October 2014, p. 4; Associate Professor Moira Paterson, *Submission* 5, pp 6-7; Transparency International Australia, *Submission* 6; Mr Peter Timmins, *Submission* 9, pp 1 & 7-8.

its work in assisting other Australian jurisdictions in that regard, and lamented that this would be lost under the new arrangements proposed by the Bill.<sup>22</sup>

2.21 Professor Julian Disney emphasised the importance of both independence and specialist expertise in the difficult context of FOI, where competing interests must be carefully balanced and consistent principles exercised in decision-making.<sup>23</sup> He further endorsed the value of the OAIC beyond the complaint handling role: 'I think in many regulatory systems it is actually the standards work – the setting of standards and the monitoring of standards – which is more important in its impact down the track than dealing with individual complaints'.<sup>24</sup>

*Functions to be exercised by the Attorney-General: a conflict of interest?*

2.22 Many submitters believed that the transfer of a number of FOI-related functions and powers from an independent statutory authority to the Executive branch of government was inappropriate and created a potential conflict of interest.

2.23 Associate Professor Moira Paterson of Monash University said that historically, oversight of the FOI Act by the Attorney-General's Department had not featured the same 'active championship and enforcement' of FOI as that now shown by the OAIC.<sup>25</sup> 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'.<sup>26</sup> Academic Bruce Baer Arnold went further, expressing scepticism 'that executives within the Attorney-General's department will demonstrate a sustained and vigorous enthusiasm for transparency'.<sup>27</sup>

2.24 PIAC and others expressed particular concern about the assumption of determinative powers by the Attorney-General, such as to exempt documents from disclosure under FOI. Ms Sophie Farthing of 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'.<sup>28</sup> The Public Law and Policy Research Unit at the University of Adelaide

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22 Queensland Integrity Commissioner, *Submission 3*, p. 1.

23 Professor Julian Disney, *Committee Hansard*, 10 November 2014, p. 19.

24 Professor Julian Disney, *Committee Hansard*, 10 November 2014, p. 23.

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

26 Mr Peter Timmins, *Committee Hansard*, 10 November 2014, p. 9, 11; Open Australia Foundation, *Submission 11*, pp 3-4 & Attachment 1.

27 Assistant Professor Bruce Baer Arnold, *Submission 12*, p. 4. See also Australian Privacy Foundation, *Submission 17*, pp 4-5 and Pirate Party Australia, *Submission 19*, pp 2-3.

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

agreed, adding the observation that the department would 'both be implementing the [FOI] framework and providing a report on how well this has been achieved'.<sup>29</sup> Professor Disney described the placement of promotion, monitoring and guidance roles within the Attorney-General's Department as 'utterly inappropriate'.<sup>30</sup>

2.25 In its evidence, the Attorney-General's Department assured the committee that production of guidance and guidelines to government agencies would 'remain the same' under the department's administration as it had been under the OAIC, and that there would be no conflict with the department's decision-making role. The department further noted that the Bill provided for the transfer of staff from the OAIC to the department, ensuring that expertise would be brought in to discharge the functions formerly performed by the OAIC.<sup>31</sup>

#### *Functions to be discontinued*

2.26 Submitters further raised concern that some OAIC functions would be discontinued upon the abolition of the Office. These included assistance to agencies and review of their compliance with the information publication scheme, FOI training of agencies, the ability to institute own-motion investigations, dealing with vexatious applicants, and more general promotion of open government and proactive disclosure.

2.27 Mr Peter Timmins summed up the concerns of many submitters:

Independent advice and guidance, leadership, advocacy and public awareness and assistance functions that included responding to thousands of phone and written inquiries each year seem destined to disappear.<sup>32</sup>

2.28 Associate Professor Paterson emphasised the need for an 'FOI champion' to monitor compliance and promote FOI more generally:

given that the success of FOI requires fundamental cultural change and because a culture of transparency is fundamentally difficult to maintain in the face of governments' natural aversion to detailed scrutiny of their affairs.<sup>33</sup>

2.29 Guardian Australia claimed that since the abolition of the OAIC was announced, the incidence of agencies breaching time limits had already increased.<sup>34</sup>

2.30 Mr Timmins, among others, expressed particular alarm that the functions of the OAIC in promoting increased proactive publication of government information would be discontinued.<sup>35</sup> Speaking on behalf of the Open Australia Foundation, Mr Timmins told the committee that:

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29 Public Law and Policy Research Unit, *Submission* 10, p. 4.

30 Professor Julian Disney, *Committee Hansard*, 10 November 2014, p. 19.

31 Mr Matt Minogue, *Committee Hansard*, 10 November 2014, pp 36-37.

32 Mr Peter Timmins, *Submission* 9, p. 6.

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

34 Guardian Australia, *Submission* 18, p. 3.

35 Mr Peter Timmins, *Submission* 9, p. 10.

we still have a long way to go in terms of the journey towards more open, transparent and accountable government. And to lose the independent monitor, advocate and champion of the Act at this stage of the game is a giant step backwards.<sup>36</sup>

2.31 In response, the Attorney-General's Department told the committee that 'any suggestion that the merit of the system is being disbanded is probably not right'. The department sought to assure the committee that it would take up the task of promoting a pro-disclosure culture across government, and that other core functions performed by the OAIC would continue, albeit within different bodies.<sup>37</sup>

### *Arrangements for the Australian Privacy Commissioner*

2.32 The AHRC raised concerns with the committee about the arrangements proposed in the Bill for the Australian Privacy Commissioner to be established as an independent statutory body within the AHRC:

The Bill proposes that the Australian Privacy Commissioner should sit within the AHRC but not be a member of the [AHRC]. The staff assigned to the Commissioner will be staff of the AHRC but under the exclusive direction of the Privacy Commissioner. These provisions will not work as a matter of law as the Accountable Authority for the purpose of the *Public Governance, Performance and Accountability Act* (PGPA) remains the President of the AHRC.

It is also proposed that the Privacy Commissioner should have the same status as a staff member for the purpose of the PGPA. While all the other Commissioners within the AHRC report through the President to the Attorney-General, the Australian Privacy Commissioner would report directly to the Attorney-General.

...the model proposed by the Bill fails to understand the legal obligations under the PGPA and the *Australian Human Rights Commission Act* and, with the best will in the world, creates potential for conflict. There are confusing lines of authority both in financial and staffing respects.<sup>38</sup>

2.33 At the committee's public hearing, AHRC President Professor Gillian Triggs described the proposed arrangements as placing the Australian Privacy Commissioner 'in a separate bubble' within the AHRC:

If this Bill is passed, we will continue to do what we are doing in the [AHRC] but we will have this bubble in the middle of it where you have a Privacy Commissioner with staff I will allocate to him notionally, but the curious phenomenon under the bill is that those staff would not, under any circumstances, be accountable to the commission. That is simply

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

37 Mr Matt Minogue, *Committee Hansard*, 10 November 2014, p. 35.

38 Australian Human Rights Commission, *Submission 22*, p. 1.

unworkable because of the way in which the financial requirements are and in relation to all sorts of staffing matters and other legislation.<sup>39</sup>

2.34 The AHRC proposed that these problems could be resolved by amending the legislation to reflect one of three alternative models: the creation of the Australian Privacy Commissioner as a separate Commonwealth entity (which could still receive corporate support from AHRC), the appointment of the Commissioner as a member of the AHRC in the same way as the other AHRC Commissioners, or an amendment to the Bill specifying that the Australian Privacy Commissioner would be empowered to direct staff only 'in compliance with his statutory functions', while in other respects the position would be subject to usual AHRC governance processes.<sup>40</sup>

2.35 The Privacy Commissioner, Mr Timothy Pilgrim, agreed with the AHRC that 'the Bill creates a model that is not suited to achieving the objectives of the [Privacy Act] in the most efficient way'. He stated that historical experience, under which the Privacy Commissioner had been part of the (then) Human Rights and Equal Opportunity Commission prior to 2000, had not proven to be effective, and that the 'significantly different regulatory focus' of the Privacy Commissioner's role made it a poor fit for the AHRC.<sup>41</sup> The Australian Privacy Foundation expressed a similar view, and believed that moving the Commissioner (back) into the AHRC risked 'repeating the mistakes of the original regime, and leaving the Commissioner with an even lower profile, and influence, than s/he [previously] had'.<sup>42</sup>

2.36 Mr Pilgrim advocated for the return to a stand-alone statutory Office of the Privacy Commissioner, as had existed from 2000-2010. He observed that arrangements already in place between OAIC and AHRC for sharing corporate services such as human resources, finance and IT could continue for the office of an independent Privacy Commissioner, mitigating against any additional costs.<sup>43</sup>

2.37 The Attorney-General's Department advised the committee that the relationship proposed in the Bill between the Australian Privacy Commissioner and the AHRC was not dissimilar to other models already in existence, citing the Classification Board as an example. The department stated that it was not unprecedented that office holders held statutory functions while not controlling their own finances and staffing.<sup>44</sup> The department added that parliament would provide guidance on the appropriate resourcing for the Australian Privacy Commissioner's functions, in the form of budget appropriations, and that the Attorney-General as

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39 Professor Gillian Triggs, *Committee Hansard*, 10 November 2014, p. 4.

40 Australian Human Rights Commission, *Submission 22*, p. 2; Professor Gillian Triggs, *Committee Hansard*, 10 November 2014, pp 6-7.

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

42 Australian Privacy Foundation, *Submission 17*, p. 6.

43 Mr Timothy Pilgrim, Privacy Commissioner, Additional Information provided to the committee on 12 November 2014, p. 1.

44 Mr Matt Minogue, *Committee Hansard*, 10 November 2014, p. 34.



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portfolio minister would be able to resolve any difficulties which may arise between the AHRC President and the Australian Privacy Commissioner with regard to the exercise of their respective statutory responsibilities.<sup>45</sup>

### ***Projected Savings***

2.38 Several submitters queried the government's assertion that the reforms made by the Bill would result in savings of \$10.2 million over four years. In particular, many pointed out that the additional costs to agencies of mandatory internal review had not been taken into account.<sup>46</sup> In addition, attention was drawn to projected increased costs of AAT review not only to individual applicants, but to government agencies and the AAT itself.<sup>47</sup>

2.39 Many were unconvinced that savings at the level of \$2.5 million per year, even if realised, were significant enough to justify the losses to public accountability and open government which they believed would result from abolition of the OAIC. Professor Julian Disney expressed the view that 'achieving small government at the expense of good, efficient and open government seems rather contradictory'.<sup>48</sup>

### ***The argument for comprehensive FOI review***

2.40 The committee's attention was drawn by many to the fact that the Hawke Review, submitted in July 2013, had commented positively on the OAIC, but also made a large number of recommendations to improve the operation of the FOI process, and recommended that these be considered further in a comprehensive review of FOI. Many submitters queried the government's decision to proceed with the measures in the Bill in advance of completing its consideration of the Hawke review, and without any broader review or consultation.

2.41 Mr Edward Santow of PIAC spoke strongly about this issue:

There has been no public case made in any detail at all for what can only be described as radical changes to our FOI law. Indeed, the FOI law was overhauled as recently as 2010. Very little public consultation has taken place in respect of the Bill's proposals and the government is yet to respond to the recommendations in the statutory review that took place last year under Dr Allan Hawke. If the government is minded to make major changes to FOI law and practice we would urge the government first to undertake a full public consultation that also takes into account the recommendations of the many reviews since the Australian Law Reform Commission's review in 1995.<sup>49</sup>

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45 Mr Matt Minogue, *Committee Hansard*, 10 November 2014, pp 39-40.

46 Associate Professor Moira Paterson, *Submission 5*, p. 5; Mr Peter Timmins, *Submission 9*, p. 10.

47 Mr Peter Timmins, *Submission 9*, p. 12; Public Interest Advocacy Centre, *Submission 15*, p. 5.

48 Professor Julian Disney, *Committee Hansard*, 10 November 2014, p. 19.

49 Mr Edward Santow, *Committee Hansard*, 10 November 2014, p. 9.

2.42 Megan Carter commented: 'it seems that the proposed solution is to throw the baby out with the bathwater, rather than undertake a thorough review to assess the best solution'.<sup>50</sup> Submitters were not all in agreement with the Hawke Review's findings, but were consistent in urging the government to facilitate a comprehensive review of the FOI Act and its operation, in preference to making piecemeal changes.

2.43 In debate on the Bill in the House of Representatives, the government advised that it was 'carefully considering' the recommendations of the Hawke review and would respond in due course.<sup>51</sup>

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

51 Mr Paul Fletcher MP, Parliamentary Secretary to the Minister for Communications, *House of Representatives Hansard*, 28 October 2014, p. 93.

# Chapter 3

## Committee view

### Committee View

3.1 The committee notes that the objectives pursued by the Bill are fundamental to the government's core policy objectives of realising Budget savings, and creating smaller and more efficient government.

3.2 The committee has carefully considered the concerns raised by the AHRC in relation to the proposed arrangements for the Australian Privacy Commissioner. The committee recognises the need expressed by the AHRC to ensure that it is able to meet appropriate standards of governance, accountability and practicality in relation to the management of its finances and staff. The committee also acknowledges the perspective of the Privacy Commissioner on the particular requirements of that role, and his preference for maintaining the independence of the office.

3.3 The committee notes the advice provided by the Attorney-General's Department that the type of arrangement proposed for the Australian Privacy Commissioner is not unprecedented, and that the department is satisfied that it will not compromise the ability of the AHRC President to comply with her legislative responsibilities.

3.4 The committee takes the view that the amendment to the Bill proposed by the AHRC is warranted, in as much as it is a relatively small change but one which would give comfort to the AHRC, and may assist all involved, in ensuring that lines of governance and accountability are clear and workable.

### Recommendation 1

**3.5 The committee recommends that item 3 of Schedule 2 of the Bill be amended to provide, under the proposed new section 43A(3) of the *Australian Human Rights Commission Act 1986*, that a member of staff of the AHRC made available to the Australian Privacy Commissioner is subject to the directions of the Commissioner 'in compliance with the Commissioner's statutory functions'.**

3.6 The committee further acknowledges concerns raised that because the Bill has been developed quickly to implement a Budget measure, it has pre-empted the government's response to the Hawke Review, and limited the consultation process that may otherwise precede such reform.

3.7 The committee believes that, notwithstanding the changes made by the Bill, there remains a case for a broader review of FOI as recommended in the Hawke Review and by many submitters. As the government itself has noted, the Bill reforms the review and administrative machinery for FOI but does not seek to change other substantive elements of the regime. A full review would allow for the broad consultation that was not possible within the timeframe of this Bill, and for holistic consideration of the effectiveness of the FOI regime and the related information policy and activities of government.

**Recommendation 2**

**3.8 The committee recommends that the government as soon as possible respond to the Hawke Review, and conduct a consultation process as recommended in the Hawke Review.**

3.9 In the meantime, the committee considers that the Bill implements a sensible structural efficiency measure which does not detract from the broader integrity of the FOI regime. The government has made clear that the substantive rights of citizens under FOI are not being weakened by the changes made by the Bill. In fact, they will be enhanced by a more streamlined review process.

**Recommendation 3**

**3.10 The committee recommends that, subject to Recommendations 1 and 2, the Bill be passed.**

**Senator the Hon Ian Macdonald  
Chair**

# 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.<sup>1</sup>

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'.<sup>2</sup>

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

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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'.<sup>3</sup>

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.<sup>4</sup>

### **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.<sup>5</sup> 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

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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.

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and Administrative Review Council.<sup>6</sup> 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.<sup>7</sup> The OAIC has worked on its own volition to dramatically reduce its review timelines, as demonstrated in its most recent annual reporting.<sup>8</sup> 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.<sup>9</sup>

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.'<sup>10</sup>

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.<sup>11</sup>

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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**



# 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.<sup>1</sup>

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.<sup>2</sup>

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.<sup>3</sup>

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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...<sup>4</sup>

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'.<sup>5</sup>

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.<sup>6</sup>

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.<sup>7</sup>

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'.<sup>8</sup> Academic Bruce Baer Arnold went further, expressing scepticism 'that

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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.

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

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'.<sup>10</sup>

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'.<sup>11</sup>

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**

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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.



# Appendix 1

## Public submissions

- 1 Mr Craig Thomler
- 2 Ms Megan Carter
- 3 Queensland Integrity Commissioner
- 4 Mr George Samuel
- 5 Associate Professor Moira Paterson
- 6 Transparency International Australia
- 7 Mr Andrew Donnellan
- 8 Mr John Wood
- 9 Mr Peter Timmins
- 10 Public Law and Policy Research Unit
- 11 OpenAustralia Foundation
- 12 Assistant Professor Bruce Baer Arnold
- 13 Office of the Information Commissioner
- 14 Commonwealth Ombudsman
- 15 Public Interest Advocacy Centre Ltd
- 16 Dr Johan Lidberg
- 17 Australian Privacy Foundation and Privacy International
- 18 Guardian Australia
- 19 Pirate Party Australia
- 20 NSW Council for Civil Liberties
- 21 Liberty Victoria
- 22 Australian Human Rights Commission
- 23 Accountability Round Table
- 24 Australia's Right to Know
- 25 NSW Information Commissioner
- 26 Office of the Australian Information Commissioner
- 27 Mr Daniel Stewart
- 28 Law Council of Australia
- 29 Confidential
- 30 Electronic Frontiers Australia Inc.
- 31 Dr David Solomon
- 32 Australian Prudential Regulation Authority



## **Appendix 2**

### **Public hearings and witnesses**

**Monday, 10 November 2014—Sydney**

LINDLEY, Ms Michelle, Deputy Director, Legal Section, Australian Human Rights Commission

RAMAN, Ms Padma, Executive Director, Australian Human Rights Commission

TRIGGS, Professor Gillian, President, Australian Human Rights Commission

FARTHING, Ms Sophie, Senior Policy Officer, Public Interest Advocacy Centre

SANTOW, Mr Edward, Chief Executive Officer, Public Interest Advocacy Centre

TIMMINS, Mr Peter, Private capacity

DISNEY, Professor Julian, AO, Chair, Australian Press Council

McKINNON, Mr Michael, Australia's Right to Know

MCMILLAN, Professor John, Australian Information Commissioner, Office of the Australian Information Commissioner

PILGRIM, Mr Timothy, Privacy Commissioner, Office of the Australian Information Commissioner

POPPLER, Dr James, Freedom of Information Commissioner, Office of the Australian Information Commissioner

MINOGUE, Mr Matt, First Assistant Secretary, Civil Law Division, Attorney-General's Department

PFITZNER, Mr Paul, Acting Assistant Secretary, Legal Services, Attorney-General's Department

WARD, Ms Janine, Principal Legal Officer, Legal Services, Policy Branch, Attorney-General's Department





## **Appendix 3**

### **Tabled documents, answers to questions on notice and additional information**

#### **Additional information**

*Monday, 10 November 2014*

- 1 Additional Information provided by Mr Timothy Pilgrim, Privacy Commissioner, received 12 November 2014

