

# Chapter 1

## Introduction

1.1 On 23 August 2018, the Senate referred the Freedom of Information Legislation Amendment (Improving Access and Transparency) Bill 2018 (the bill) to the Legal and Constitutional Affairs Legislation Committee for inquiry and report by 30 November 2018.<sup>1</sup>

### Purpose of the bill

1.2 The bill was introduced in the Senate by Senator Rex Patrick, who explained that the primary purpose of the bill 'is to introduce measures that make government more transparent and accountable, and assist citizens and the media to access information under the law.'<sup>2</sup> Senator Patrick outlined the issues within the Freedom of Information (FOI) system, which the bill aims to resolve:

These changes are designed to address the considerable dysfunction that has developed in our FOI system which is now characterised by chronic bureaucratic delay and obstruction, unacceptably lengthy review processes and what appears to be an increased preparedness by agencies to incur very large legal expenses to oppose the release of information.<sup>3</sup>

1.3 Additionally, Senator Patrick notes that the bill 'seeks to restore the Office of the Australian Information Commissioner (OAIC) with the appointment of three independent Commissioners as was the intention of the Parliament.'<sup>4</sup>

### Office of the Australian Information Commissioner

1.4 The OAIC is an independent statutory agency established under the *Australian Information Commissioner Act 2010* (AIC Act). It is headed by the Australian Information Commissioner (Information Commissioner) and is supported by the Privacy Commissioner and FOI Commissioner.

### Functions

1.5 The OAIC has three functions:

- FOI functions, including review of decisions made by agencies and ministers and investigation of actions taken by agencies under the *Freedom of Information Act 1982* (FOI Act);
- Privacy functions, conferred by the *Privacy Act 1988* to ensure the proper handling of personal information in accordance with the Privacy Act and other legislation; and

---

1 *Journals of the Senate*, No. 113, 23 August 2018, p. 3606.

2 Senator Rex Patrick, *Senate Hansard*, 22 August 2018, p. 5572.

3 Senator Rex Patrick, *Senate Hansard*, 22 August 2018, p. 5572.

4 Senator Rex Patrick, *Senate Hansard*, 22 August 2018, p. 5572.

- Information Commissioner functions, conferred under the AIC Act relating to information policy and practice in the Australian Government.<sup>5</sup>

### ***Background of the Office of the Australian Information Commissioner***

1.6 The OAIC commenced operations on 1 November 2010.<sup>6</sup> At the same time, the former Office of the Privacy Commissioner was integrated into the OAIC.<sup>7</sup>

1.7 While the AIC Act allows for the appointment of three statutory office holders for each of its functions, it also allows for the Privacy Commissioner to perform the functions of the FOI Commissioner, and vice versa.<sup>8</sup> Additionally, the Information Commissioner can also perform the functions of the FOI Commissioner and the Privacy Commissioner.

1.8 When the OAIC first commenced operations, separate Commissioners were appointed for each of its functions.<sup>9</sup>

1.9 On 13 May 2014, the government announced that it would disband the OAIC by 1 January 2015.<sup>10</sup> The Freedom of Information Amendment (New Arrangements) Bill 2014, was introduced in the House of Representatives on 2 October 2014, which sought to:

- repeal the AIC Act, including abolition of the OAIC; and
- amend the FOI Act and Privacy Act and related laws.<sup>11</sup>

1.10 The 2014 bill was not passed by the Senate, and subsequently lapsed at prorogation of the 44<sup>th</sup> Parliament, on 17 April 2016.<sup>12</sup> However, in anticipation of the abolition of OAIC, its funding was reduced. According to the Accountability Round Table, 'the OAIC's FOI function was halved.'<sup>13</sup>

1.11 Following the Government's announcement to disband the OAIC, the former FOI Commissioner, Dr James Popple, resigned in December 2014, followed by the resignation of the former Information Commissioner, Professor John McMillan, in

---

5 Office of the Australian Information Commissioner, *Annual Report 2010–11*, p. 5.

6 Office of the Australian Information Commissioner, *Annual Report 2010–11*, p. v.

7 Office of the Australian Information Commissioner, *Annual Report 2010–11*, p. v.

8 Office of the Australian Information Commissioner, *Submission 6*, pp. 3-4.

9 Office of the Australian Information Commissioner, *Annual Report 2010–11*, p. 5

10 [www.oaic.gov.au/media-and-speeches/statements/australian-government-s-budget-decision-to-disband-oaic#australian-governments-budget-decision-to-disband-oaic](http://www.oaic.gov.au/media-and-speeches/statements/australian-government-s-budget-decision-to-disband-oaic#australian-governments-budget-decision-to-disband-oaic) (accessed 12 November 2018).

11 [www.aph.gov.au/Parliamentary\\_Business/Bills\\_LEGislation/Bills\\_Search\\_Results/Result?bId=r5350](http://www.aph.gov.au/Parliamentary_Business/Bills_LEGislation/Bills_Search_Results/Result?bId=r5350) (accessed 12 November 2018).

12 [www.aph.gov.au/Parliamentary\\_Business/Bills\\_LEGislation/Bills\\_Search\\_Results/Result?bId=r5350](http://www.aph.gov.au/Parliamentary_Business/Bills_LEGislation/Bills_Search_Results/Result?bId=r5350) (accessed 12 November 2018).

13 Accountability Round Table, *Submission 2*, p. 2.

---

June 2015.<sup>14</sup> The former Privacy Commissioner, Mr Timothy Pilgrim, was subsequently appointed to the role of Information Commissioner. He continued in his roles as Information Commissioner and Privacy Commissioner, while also performing the function of FOI Commissioner, until his retirement in March 2018.<sup>15</sup>

1.12 Ms Angelene Falk was appointed by the Governor-General on 16 August 2018 to the statutory positions of Information Commissioner and Privacy Commissioner for a three year term. Currently, the functions of the FOI Commissioner are being performed by Ms Falk as the Information Commissioner and the Privacy Commissioner.

### ***Reviewing FOI decisions***

1.13 Applicants who disagree with an agency or minister's decision relating to an FOI request for information, may apply to the Information Commissioner for review of that decision under Part VII of the FOI Act.<sup>16</sup> The OAIC noted that while an FOI applicant does not have to apply for an internal review before applying for a review by the Information Commissioner, it considers it best practice for an applicant to do so.<sup>17</sup>

1.14 The OAIC explained that Information Commissioner reviews are based on four key principles:

- it is a merit review process where the Commissioner makes the correct or preferable decision at the time of the Commissioner's decision
- it is intended to be as informal as possible
- it is intended to be non-adversarial, and
- it is intended to be timely.<sup>18</sup>

1.15 The OAIC outlined the ways in which an Information Commissioner review may be finalised:

- accepting a written agreement between the parties (s 55F),
- making a written decision under s 55K,
- deciding not to undertake an [Information Commissioner] review if satisfied that certain grounds exist (s 54W), or
- receiving a written notice from the applicant withdrawing the application for review (s 54R).<sup>19</sup>

---

14 Mr Richard Mulligan, The slow death of the Office of the Australian Information Commissioner, Sydney Morning Herald, 26 August 2015, <https://www.smh.com.au/public-service/the-slow-death-of-the-office-of-the-australian-information-commissioner-20150826-gj81dl.html> (accessed 12 November 2018).

15 Attorney-General's Department, *Submission 3*, p. 2.

16 Office of the Australian Information Commissioner, *Submission 6*, p. 5.

17 Office of the Australian Information Commissioner, *Submission 6*, p. 5.

18 Office of the Australian Information Commissioner, *Submission 6*, p. 5.

19 Office of the Australian Information Commissioner, *Submission 6*, p. 6.

1.16 Additionally, the Information Commissioner, or their delegate, may exercise discretion to not undertake an Information Commissioner review pursuant to one of the grounds outlined in section 54W of the FOI Act.<sup>20</sup> One of the discretionary grounds is where the Information Commissioner is satisfied that the decision should be considered by the Administrative Appeals Tribunal (AAT).<sup>21</sup>

### **Key provisions of the bill**

1.17 As outlined in the Explanatory Memorandum, the provisions of the bill would amend the AIC Act, the FOI Act, and the *Archives Act 1983* (Archives Act). The key provisions of the bill are summarised below.

#### ***Australian Information Commissioner Act 2010***

##### *Legal qualifications*

1.18 New subsections 10(3) and 12(2) would prohibit the Information Commissioner and Privacy Commissioner, respectively, from reviewing decisions under Part VII of the FOI Act, unless they hold legal qualifications.

##### *Appointment of three separate Commissioners*

1.19 New subsection 14(5) of the bill would require three separate Commissioners to be appointed under the AIC Act, while item 6 of the bill clarifies that 'the same person must not simultaneously hold more than one appointment (including an acting appointment).' Additionally new subsection 14(6) would require a vacancy to any of these offices to be filled within three months.

#### ***Freedom of Information Act 1982***

##### *Requirement to publishing information between 10 to 14 days*

1.20 New subsection 11C(6) would require agencies to publish information released to an applicant between 10 and 14 days after it has been provided to the applicant, rather than the current requirement of 'within 10 working days'. The Explanatory Memorandum states that the timeframe is designed both to facilitate access to that information while also allowing applicants to examine released information before it is made public.

##### *Charges*

1.21 Charges related to FOI requests are covered in changes to paragraph 29(1)(d) and a new subsection 29(5A). Of particular note, new subsection 29(5A) would exempt Senators and Members of the House of Representatives from charges unless the work generated totals more than \$1000. The proposed exemption for Senators and Members is designed to support greater parliamentary scrutiny of public administration.

---

20 Office of the Australian Information Commissioner, *Submission 6*, p. 8.

21 Subsection 54W(b) of the FOI Act, Office of the Australian Information Commissioner, *Submission 6*, p. 8.

---

### Consistent application of exemptions

1.22 New section 55EA would require a consistent application of exemptions during Information Commissioner reviews by not allowing an agency or minister to rely on an exemption that was not relied upon in making the Information Commissioner review.

### Referral to the AAT

1.23 Item 12 of the bill deals with referrals to the AAT where an Information Commissioner review has taken, or is likely to take, 120 days or longer to finalise. New sections 55JA require the Information Commissioner to notify an applicant if a review is likely to take, or has already taken, more than 120 days. In such cases, new section 55JB would then allow the applicant to transfer their review to the AAT at no charge to the applicant.

1.24 Separately, item 13 of the bill would allow an applicant to apply to the AAT for review of any Information Commissioner review, without first having the matter reviewed by the Information Commissioner. The Explanatory Memorandum states that 'an applicant taking this option would pay the usual fee for an application to the AAT.'<sup>22</sup>

### Reporting of external legal expenses

1.25 New section 93AA covers the reporting of legal fees in agencies' annual reports, including listing each request made under section 15 of the FOI Act.

### Transitional rules

1.26 Subitem 17(1) would allow the Attorney-General to make disallowable legislative instruments (transitional rules) for current applications. Subitem 17(2) confirms that certain significant matters (such as the creation of an offence or civil penalty) may not be included in the transitional rules.<sup>23</sup>

### **Archives Act 1983**

1.27 The bill proposes to amend the *Archives Act* to require the reporting of external legal expenses incurred by the National Archives of Australia. Under new section 55B, expenses published must include external legal expenses incurred:

- in making an initial decision in relation to an application for access to a record;
- as part of an internal reconsideration of a decision under section 42 of the Archives Act;
- as part of a review by the AAT of a decision by the Archives; and

---

22 Explanatory Memorandum, p. 6.

23 Explanatory Memorandum, p. 7.

- as part of an appeal to the Federal Court of Australia from a decision of the AAT.<sup>24</sup>

### **Consideration by other Parliamentary committees**

1.28 The Senate Standing Committee for the Scrutiny of Bills provided no comment on the bill.<sup>25</sup>

1.29 The Parliamentary Joint Committee on Human Rights stated that the bill does not raise human rights concerns.<sup>26</sup>

### **Conduct of this inquiry**

1.30 In accordance with usual practice, the committee advertised the inquiry on its webpage and also wrote to various organisation and individuals inviting written submissions by 24 September 2018.<sup>27</sup> The committee received nine submissions, as listed at Appendix 1, and which are available on the committee's webpage.

1.31 The committee held a public hearing in Canberra on 16 November 2018. Details of the public hearing are provided at Appendix 2. Questions on notice and other material received by the committee are listed at Appendix 1.

### **Structure of this report**

1.32 This report consists of two chapters:

- This chapter provides an overview of the bill, as well as the administrative details of the inquiry.
- Chapter 2 discusses the key issues raised by submitters and witnesses, as well as providing the committee's views and recommendation.

### **Acknowledgements**

1.33 The committee thanks all organisations and individuals that made submissions to this inquiry and all witnesses who attended the public hearing.

---

24 Explanatory Memorandum, pp. 2–3.

25 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 10 of 2018*, 12 September 2018, p. 10.

26 Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny Report 9 of 2018*, 11 September 2018, p. 22.

27 The committee's website can be found at [www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs).