

Dissenting Report by Senator Rex Patrick

Freedom of information, but only after the Information Commissioner finally gets around to making a review decision

The work of the Committee and its conclusions

1.1 I thank the committee for its efforts in relation to this very important Bill to improve Freedom of Information (FOI) in the federal sphere. I also thank the secretariat for their behind the scenes efforts.

1.2 I dissent from the majority report of Government senators which not only opposes all the reforms proposed in the legislation, but makes absolutely no alternative suggestions as to how Australia's freedom of information laws might be improved.

1.3 The negative approach taken by Government Senators is disappointing but unsurprising. They express support for the 'broad intent' of the Bill while categorically rejecting all reforms. Their stance clearly demonstrates the extent to which the Coalition Government remains opposed to any reform designed to improve public, media and parliamentary scrutiny of public administration.

1.4 Since its early effort to abolish the Office of the Australian Information Commissioner (OAIC), the Government has demonstrated no enthusiasm and indeed outright hostility to scrutiny through FOI.

1.5 It may be that the attitude of these Government senators on the Committee, and indeed their colleagues, will change in the event that following the forthcoming Federal Election they find themselves in Opposition and again wish to apply a measure of scrutiny to executive government. It may be the case that they will then become interested in increased openness and transparency.

Freedom of information

1.6 FOI provides the lawful means for citizens, the media, and parliamentarians to obtain access to information that ultimately belongs to the public.

1.7 Knowledge will always govern ignorance. FOI is a crucial tool in ensuring those that are governed are indeed properly armed.

A well informed citizenry is the lifeblood of democracy; and in all arenas of government information, particularly time information, is the currency of power.¹

1.8 How can there be debate on important public issues without information? Of what value is information if it is only made available well after debate has passed?

1 Ralph Nadar, Freedom of Information: the Act and the Agencies.

A system in crisis

1.9 The Federal FOI regime is in crisis.

1.10 As a member of this Parliament who has made the frequent recourse to FOI applications in efforts to obtain valuable information about government administration—from exposing deficiencies in major defence contracting involving expenditure of billions of dollars of taxpayers' funds to revealing the flawed nature of the site selection process for Australia's national radioactive waste repository—I have experienced first-hand the chronic bureaucratic delay and obstruction that now characterises Australia's FOI system.

1.11 The witnesses who appeared at the hearing shared my view.

1.12 Ms Hesling of the Law Institute of Victoria and someone with experience and expertise in FOI law said:

The overall concerns that the Law Institute of Victoria has with the inefficient and ineffective operation of the FOI system in Australia are mainly due to insufficient resourcing of the Office of the Australian Information Commissioner, and it is our view that this has resulted in considerable delays at the Information Commissioner review stage.²

1.13 Mr McKinnon of the ABC was blunter in his consideration:

At the ABC, I'm responsible for not only lodging my own FOIs but also coordinating and advising all journalists at the ABC on FOIs. We're talking about hundreds of applications a year. My experience is that the act is getting progressively worse, and it is substantially worse than in 2010, when, with great hope and glee—not glee, but great hope and optimism—the reforms occurred. But one of the major problems was agencies quickly worked out that the Office of the Australian Information Commissioner was very slow on appeals, and, in fact, does not operate a fair process. It's as simple as that. I had gone to the AAT numerous times prior to 2010. I'm appearing in the tribunal in New South Wales next week. I've done over a hundred appeals to courts and tribunals. The great thing about that is that you get a fair hearing; you can cross-examine witnesses that are making claims in relation to documents. This does not occur with the Office of the Australian Information Commissioner. So you have a toothless tiger trying to control agencies whose view is that the government's political interests are the same as theirs. They will not release documents—the more damning a document is of a government policy, the more embarrassing, the harder they will fight to have a document not released, because they see their job as being synonymous with the government's political interests. It's very sad to say that, but that's the case. So FOI has got progressively worse ... I'm at the coalface probably more than most—I suspect more than any other

2 Ms Elisa Hesling, Committee Member, Administrative Review and Constitutional Law Committee, Law Institute of Victoria, *Committee Hansard (Proof)*, 16 November 2018, p. 1.

journalist in Australia—and I can see at the coalface how badly FOI is working.³

1.14 Karen Middleton of the Saturday Paper succinctly observed that:

It is a concern the system gives the veneer of transparency and the veneer of accessibility, but the process is used as a means to block access.⁴

1.15 The statistics back up the witnesses' experiences. Table 2 (time taken for Queensland Information Commissioner to finalise an FOI review) of the Committee report and Table 3 (Overview of IC review finalisation) show a stark contrast in performance between the Queensland and federal jurisdictions.

1.16 Since 2012 there has been an average of more than 110 reviews that took more than 365 days to complete. No doubt these FOI's were complex to a degree, but likely pretty important from a public debate perspective. In my own experience of FOI, the more embarrassing the information sought, the greater resistance offered by Government to its access.

1.17 It is further noted that there appears to be an increased preparedness by agencies to incur very large legal expenses to oppose the release of information.

1.18 Sunlight is said to be the best disinfectant, but the poor FOI culture mentioned at 2.25 of the Committee's report acts as a superbug.

Purpose of the bill

1.19 The purpose of the Freedom of Information Legislation Amendment (Improving Access and Transparency) Bill 2018 is to introduce measures that address current problems in the regime to make government more transparent and accountable, and assist citizens and the media to access information under the law.

1.20 Reforms proposed in the Bill include:

- (a) Requiring the government to fill all three offices of the Australian Information Commissioner, the Privacy Commissioner and the Freedom of Information Commissioner.
- (b) Allowing FOI review applicants to elect to have their matter bypass the Information Commissioner, who can take more than a year to make a decision on controversial issues, to the Administrative Appeals Tribunal.
- (c) Granting an FOI applicant the right to switch a review into the AAT, without charge, in the event that the Information Commissioner takes, or indicates he or she will take, more than 120 days to make a decision.
- (d) Preventing agencies from making submissions to FOI decision reviews that have not been advanced by the agency in its internal decision

3 Mr Michael McKinnon, Journalist and FOI Editor, Australian Broadcasting Corporation, *Committee Hansard (Proof)*, 16 November 2018, p. 11.

4 Ms Karen Middleton, Reporter, The Saturday Paper, *Committee Hansard (Proof)*, 16 November 2018, p. 11.

making, so that they can't switch exemptions half way through a review as often happens now. This would prevent a current practice that, in effect, allows an agency to remake decision half way through a review; something not normally permitted in merits reviews being run in superior jurisdictions.

- (e) Preventing the Information Commissioner from making FOI decisions if he or she does not hold the legal qualifications required of the FOI Commissioner (as happens now).
- (f) Preventing agencies from publishing information released under FOI until at least 10 days after the applicant has received his or her copy of the information.
- (g) Requiring an agency to publish its external legal expenses for each Information Commission or AAT FOI matter that has concluded. This would apply in relation to agency FOI legal expenses and to expenses incurred by the National Archives in respect of applications made for access to information under the Archives Act 1983.

1.21 This comprehensive array of reforms reflects the practical experience of constituents, journalists, researchers and members of Parliament seeking information under FOI.

Improvements drawn from the committee process

1.22 The benefits of the proposed changes to the law in the Bill are spelt out in my second reading speech. The submissions and testimony from FOI observers and customers give support to most of the changes.

1.23 There were exception to the above statements and I address these now.

Improvements – consistent applications of exemptions by decision maker

1.24 There was almost unanimous opposition to the new Section 55EA that required, in law, the agency or Minister must not seek to rely on any exemptions in a review that were not relied upon in making the IC reviewable decision. On the arguments presented, it is accepted that this provision is not consistent with general principles of review in administrative law, that a merit review is *de novo*.

1.25 Most agreed that a new exemption advanced late in a review is not helpful.

Recommendation 1

1.26 Section 55EA should be removed from the bill.

1.27 Most, however, agreed that a new exemption advanced late in a review is not helpful. Ms McLeod and Mr Peter Timmins of the Accountability Round Table provided, by way of a response to a question on notice, an alternate remedy to the problem. This alternate approach should be adopted with a slight variation in time to afford a Minister or Agency fairness.

Recommendation 2

1.28 The Information Commissioner should incorporate in a practice direction the following:

- **Where an application for review is lodged:**
 - **The Information Commissioner is required to notify the agency or minister within ten days;**
 - **The agency is required to respond in writing to provide the OAIC within 21 days of any facts or other relevant considerations on which the decision is based that were not identified in the notice of decision provided to the applicant.**

Improvements – Exempting Senators and Members from Charges

1.29 The Committee is correct in stating that there were mixed views in relation to the proposal not to charge Senators and Members where work generated was under \$1000.

1.30 This provision was based on Regulation 6 the South Australian Freedom of Information (Fees and Charges) Regulations 2003 which allows for a Member of Parliament to apply for access without charge if the fees and charges for the work generated are less than \$1000.

1.31 This provision will support greater transparency of public administration through parliamentary scrutiny of agencies and provide the public with information that is published following the release of information to Senators and MPs.

1.32 However, I was drawn to the comments of Mr McKinnon on this matter when he said at hearing:

It seems to me that any document being released under the act is being released because it's in the public interest to release it. It also says, then, that the government, by keeping it secret up until it is released, has failed in its duty to inform the public. Why any applicant should then have to pay because the government hasn't discharged its duty to inform the public is beyond me. But, certainly, I think politicians have other avenues. In this era of journalism, where budgets are very tight and where there is incredible pressure, because of the internet, on traditional forms of media—which, to my mind, still do the bulk of investigative journalism—there is a very good argument that if we get documents released to us, then there should be no fees or charges. That's because we've actually done a job for the Australian public by taking the time to lodge, find and reveal information that's in the public interest and that would inform the voters of Australia. I come back to the same thing. I think our job is to inform the public so that, when they go

to the ballot box, they can cast an informed vote about which political party and/or politicians can best serve their interests as Australians.⁵

1.33 Noting Mr McKinnon's role and 'FOI stature' within the ABC, great weight must be given to his remarks.

1.34 I further note that on 30 July 2018 the Hon. Kelly O'Dwyer, the then Minister for Revenue and Financial Services, and Senator Cormann, the Minister for Finance, issued a joint media release announcing a fee exemption for journalists associated with ASIC search fees.⁶ Minister O'Dwyer and Minister Cormann stated that 'expanding the group of journalists that will benefit from the exemption from fees will aid public discussion.'⁷

1.35 Exempting journalists, whose role in informing public debate is integral, makes sense in light of the exemption that the Government announced for ASIC search fees. While there were some concerns that this may lead to a 'slippery slope', it is clear that a policy to exempt a class of professionals with a clear justification, as the Government did with ASIC search fees, will not lead to a slippery slope and should be encouraged.

Recommendation 3

1.36 Section 29(5A) should be amended so that journalists are entitled to access to the documents without charge unless the work generated by the application involves charges totalling more than \$1,000.

Additional OAIC resourcing

1.37 Whilst not within the scope of the Bill under review, it was clear from the submissions and oral evidence taken that the OAIC is underfunded and that this was having an adverse effect on the ability of Information Commissioner to assist in achieving the objectives of the FOI act, particularly in reference to facilitating and promoting prompt public access to information.

1.38 The Attorney General's Department offered the following explanation:

As part of the 2014–15 Budget measure there were expected to be savings of \$3.6m per year, reflecting the abolition of FOI and information law functions performed by the OAIC. When the Government decided that the OAIC would continue in its current form, an amount of \$2m per year was returned to the OAIC budget from those \$3.6m of savings. The \$1.6m which was not returned reflected streamlined arrangements that had been

5 Mr Michael McKinnon, Journalist and FOI Editor, Australian Broadcasting Corporation, *Committee Hansard (Proof)*, 16 November 2018, pp. 16–17.

6 Joint Media Release, The Hon. Kelly O'Dwyer and Senator Mathias Cormann, <http://kmo.ministers.treasury.gov.au/media-release/091-2018/> (Accessed 30 November 2018).

7 Joint Media Release, The Hon. Kelly O'Dwyer and Senator Mathias Cormann, <http://kmo.ministers.treasury.gov.au/media-release/091-2018/> (Accessed 30 November 2018).

put in place by the OAIC to manage its workload, particularly in the area of FOI.⁸ [Emphasis added]

1.39 Sir Humphrey Appleby would be proud.

Recommendation 4

1.40 That the OAIC Commission funding be increased substantially.

The Customer is Always Right

1.41 It is clear that there is dissatisfaction amongst users of the federal FOI scheme. The providers of the service seem to disagree. Unfortunately for the providers of the FOI product, and the Government that acts as the board, the customer is always right.

Recommendation 5

1.42 The bill as amended by recommendations 1 and 3 should be passed by the Senate.

**Senator Rex Patrick
Senator for South Australia**

8 Additional information provided by the Attorney-General's Department correcting evidence in Hansard, (received 26 November 2018), p. 1.