



9 November 2018

Committee Secretary
Senate Legal and Constitutional Affairs Committee

By email: legcon.sen@aph.gov.au

TI AUSTRALIA SUBMISSION TO THE SENATE LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE INQUIRY – FREEDOM OF INFORMATION LEGISLATION AMENDMENT (IMPROVING ACCESS AND TRANSPARENCY) BILL 2018

I refer to the recent invitation from the Committee for Transparency International Australia to submit comments to the Senate Legal and Constitutional Affairs Committee on the above Bill, despite submissions having formally closed.

Transparency International Australia is pleased to provide these written comments for consideration by the Committee and also to appear at its hearings on the Bill.

SUMMARY

Public access to official information, and open and transparent government more generally, are vital for preventing corruption from taking hold – and for uncovering it when it does. Corruption thrives where the community and the media do not have access to official information about how government is functioning.

The Australian Government should enact access to information laws that comply with international standards and recognised best practice. The Australian Government and civil society should proactively inform people about access to information laws and encourage their use.¹ This would demonstrate a pro-integrity agenda and assist in addressing the falling trust and confidence in all levels of government, officials and elected representatives².

TRANSPARENCY INTERNATIONAL AUSTRALIA

TI Australia³ (TIA) is part of a global coalition to fight corruption and promote transparency, integrity and accountability at all levels and across all sectors of society, including in government. TIA was launched in March 1995 to raise awareness of corruption in Australia and to initiate moves to combat it. TIA believes that corruption is one of the greatest challenges of the contemporary world. Corruption undermines good government, distorts public policy, leads to the misallocation of resources, harms private and public sector development and particularly hurts the poor. It

¹ https://www.transparency.org/glossary/term/access_to_information

² <http://transparency.org.au/media-release-gcb-survey-2018/> and http://transparency.org.au/tia/wp-content/uploads/2018/08/Lillywhite-Speech_NIC-Options-for-Australia.pdf

³ TI Australia is the national chapter of [Transparency International \(TI\)](#), the global coalition against corruption, with a presence in over 100 countries. TIA fully supports TI's [Vision, Objectives and Guiding Principles](#) and [Mission and Strategy](#). TI Australia, is registered with the Australian Charities and Not-for-Profits Commission (ACNC).



drives economic inequality and is a major barrier in poverty eradication. Tackling corruption is only possible with the cooperation of a wide range of stakeholders. We engage with the private sector, government and civil society to build *coalitions against corruption*. Coalitions against corruption will help shape a world in which government, politics, business, civil society and the daily lives of people are free of corruption.

TI AUSTRALIA POSITION

Transparency International Australia holds the view that access to information is imperative to help prevent and detect corruption and misconduct, to address falling trust and confidence in government, and to ensure open access to information in support of a functioning democracy. This includes:

- Citizen access to official records of meetings between public decision-makers and those who stand to benefit from their decisions to help prevent undue influence and policy capture from special interest groups
- Public disclosure of beneficial ownership, including trusts and nominees, to strengthen due diligence checks and help ensure politically exposed persons and others are not able to benefit through the proceeds of crime and corruption
- Access to procurement and tender information and decisions to ensure adequate due diligence into the integrity, character and track record of project proponents

At the national level Australia takes a multi-agency approach to combatting corruption. This was made clear in the Australian National Anti-Corruption Statement presented at the International Anti-Corruption Conference in Copenhagen, October 2018⁴. With this in mind, ensuring adequate funding for the OAIC, and the appointment of the Information Commissioner, Privacy Commissioner and Freedom of Information Commissioner, and robust FOI regulatory activity and oversight, is in keeping with the Australian government's stated position.

Further, as a member of the Open Government Partnership⁵, Australia has committed to "expand open contracting and due diligence in procurement...and will publish federal Government procurement data using the Open Contracting Data Standard schema and review existing procurement due diligence processes". Access to information on procurement decisions and processes, in keeping with international standards is needed. A strong FOI regime will support this commitment.

Recommendation

TIA Australia recommends that:

1. The Australian Government renew its full and public support for a strong access to information regime by re-instating adequate funding for the OAIC to fulfil its mandate in relation to freedom of information, privacy, and information policy
2. Ensure prompt appointments of the statutory positions of the Information Commissioner, Privacy Commissioner and Freedom of Information Commissioner along with a respective range of powers related to undertaking FOI regulatory activity.

⁴ https://iaccseries.org/wp-content/uploads/2018/10/Australia_National_Statement_2018.pdf

⁵ <https://ogpau.pmc.gov.au/2018/09/21/australias-second-national-action-plan-2018-20-now-available>



Background

The Australian Freedom of Information Act 1982 (FOI Act) came into effect in March 1982 and was significantly revised in 2010 with the Australian Information Commissioner Act 2010 (AIC Act). The FOI Act and AIC Act together constitute the legislative framework to provide the public with a legally enforceable right of access to government documents.⁶

The FOI Act objectives include⁷:

- Giving the Australian community access to information held by the Government of the Commonwealth, by:
 - requiring agencies to publish the information; and
 - providing for a right of access to documents.
- Promoting Australia's representative democracy by contributing towards:
 - increasing public participation in Government processes promoting better-informed decision-making;
 - increasing scrutiny, discussion, comment and review of the Government's activities.
- Increasing recognition that information held is to be managed for public purposes, and is a national resource.
- That functions and powers given are to be performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost.

The AIC Act provides for the statutory positions of the Information Commissioner, as head of the agency, Privacy Commissioner and Freedom of Information Commissioner (FOI Commissioner) along with a respective range of powers related to undertaking FOI regulatory activity. The Office of the Australian Information Commissioner (OAIC) supports the three Commissioners in the discharge of their functions.

In 2014 the Federal Government withdrew funding and introduced legislation to abolish the OAIC and reassign its functions to other agencies and departments⁸ however the legislation failed to pass the Parliament. Richard Mulgan⁹, notes that though OAIC's statutory functions were later fully restored "*funds available for FOI functions remained well below former levels*". A 2017 Australian National Audit Office (ANAO) audit¹⁰ revealed increasing numbers of FOI applications received in contrast to a declining trend in funding for FOI functions and subsequent delay in completions.

TIA has set out below its views on the specific changes included in the Bill. TIA has had the benefit of reading the seven public submissions already made to the Committee on the Bill and for the sake of brevity has adopted some aspects of some of them where they are consistent with TIA's views.

Three independent commissioners.

The AIC Act provides for three independent statutory offices, being the Australian Information Commissioner, the Privacy Commissioner and the Freedom of Information Commissioner. Such a model has operated successfully in the past and is similar to models used at State level and overseas. The workload of the three offices, with a likely significant increase for the Privacy Commissioner in coping with issues arising from the digital economy, would justify three offices.

⁶ <https://www.anao.gov.au/work/performance-audit/administration-freedom-information-act-1982>

⁷ Section 3, FOI Act

⁸ http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r5350

⁹ <https://www.smh.com.au/public-service/freedom-of-information-australians-are-losing-the-battle-against-government-secrecy-20171203-gzxokd.html>

¹⁰ <https://www.anao.gov.au/work/performance-audit/administration-freedom-information-act-1982>



TIA supports this measure to ensure independent oversight of the separate functions as long as they are also individually adequately resourced so that they can effectively perform their separate functions. TIA agrees with the submission of the Law Institute of Victoria that this would demonstrate the Australian Government's commitment to open government and transparency.

Preventing agencies from publishing information released under FOI for at least 10 days

TIA agrees that an applicant who has gone to the trouble of making a FOI request and obtaining material should be given a reasonable period to consider the material before it is published generally. The period of 10 days seems a reasonable period. However, TIA is concerned that the window of 10 to 14 working days for agencies to make the general publication is too narrow for agencies and will lead to practical problems in their being able to meet this time frame.

Entitling Senators/Members access without charge unless charge >\$1K

TIA's position is that a reasonable balance needs to be struck between the cost of providing access to material (which ultimately is borne by the taxpayer) and the benefits of that access such as transparency and accountability. TIA does not accept that the subsidisation of access to material by Members and Senators will necessarily increase government openness and transparency as compared with a more equitable regime for public access.

Preventing agencies making additional exemption claims during the course of IC reviews

TIA shares the Law Institute of Victoria's concerns that "if agencies are not permitted to raise additional exemptions for the Information Commissioner to consider during an IC review, the Information Commissioner may not have to hand all information relevant to make the correct and preferable decision – it would detract from the intention that IC review be a pure form of merits review". TIA therefore does not support this measure.

Allowing applicants to seek Administrative Appeals Tribunal (AAT) review during the course of an IC review

TIA also supports measures which will contribute to addressing substantial delays in the IC review process for FOI decisions. Given that the current avenues for applicants to seek to address delays in the IC review process appear to be unsatisfactory, TIA supports the measure to allow applicants to have the review of the decision transferred to the AAT (at no cost to the applicant) if the review is delayed, or likely to be delayed, by more than 120 days.

Allowing applicants to appeal directly to the AAT

TIA is not convinced that there is merit in allowing applicants to have their matter bypass the Commissioner to go directly to the AAT. This may have the impact of simply increasing the workload of the AAT when the issue could be more effectively addressed by better resourcing the Commissioner to be able to make timely decisions or, where there are substantial delays in the IC review process, allowing the applicant in such a situation to go to the AAT.



Item 16: Publication of external legal expenses for FOI reviews

TIA sees merit in the declaration of actual legal expenses, rather than a summary, in the context of FOI decisions for the sake of government accountability for public expenditure. Such a requirement may have the benefit of agencies being more inclined to release information than have to justify significant legal expenditure in assisting non-disclosure.

CONCLUSION

TIA is broadly supportive of the measures in the Bill to the extent that they aim to improve the effectiveness of Australia's FOI laws and ensure open government, transparency and accountability. This support is premised on the expectation that the OAIC three independent statutory offices are adequately resourced to undertake their full mandate and respective range of powers.

Yours sincerely

Serena Lillywhite

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