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Senate Legal and Constitutional Affairs Legislation Committee
PO Box 6100, Parliament House
Canberra ACT 2600

Freedom of Information Amendment (New Arrangements) Bill 2014 (Cth)

This submission responds to the Committee's invitation in relation to its Inquiry into the *Freedom of Information Amendment (New Arrangements) Bill 2014* (Cth).

Summary

In summary the proposed legislation –

- is contrary to community expectations regarding the transparency and accountability of government
- cannot be justified on the basis of cost savings
- fails to address legitimate concerns regarding the performance of the Office of the Australian Information Commissioner
- will exacerbate existing problems in the operation of both freedom of information and privacy law
- will further reduce the trust in government that is increasingly essential in the context of current national security and law enforcement initiatives

We urge the Committee to reject the Bill.

The Australian Privacy Foundation and FOI

The Australian Privacy Foundation (APF) is the primary national association dedicated to protecting the privacy rights of Australians. The Foundation aims to focus public attention on emerging issues that pose a threat to the freedom and privacy of Australians.

Privacy protection is often incorrectly seen as being in opposition to Freedom of Information or 'the right to know'. It is our strong belief that the two rights are entirely consistent, and are both important aspects of holding large organisations – and particularly government agencies – to account.

The FOI and Privacy Acts have been carefully designed to balance the two public interests. Privacy protection will sometimes require agencies to carefully consider requests for information to ensure that irrelevant personal information is not disclosed inappropriately. However, in most cases where personal information is directly relevant to the public interest in access to government information – such as the names of public servants – the laws allow for disclosure.

Inadequate Consultation

The extremely short period for comment on the Bill and for the Committee's consideration is contrary to community expectations regarding scrutiny of legislation.

For the first time that we can recall, the Committee has felt unable to give us even a brief extension to work on our submission – we are all volunteers! We have done our best to highlight key issues, and would like to acknowledge information provided by knowledgeable experts including Mr Peter Timmins, Assistant Professor Bruce Baer Arnold, Associate Professor Moira Paterson, and Ms Megan Carter. To the extent that we have not been able to address all relevant issues in the time available, we endorse the substantive points made in their submissions, and in those by colleagues in organisations such as Transparency International.

There is no 'urgency' for these amendments. We can see no justification for the rushed consideration other than the Government's 'convenience'. The Parliament should have refused to accept the timetable.

The Bill in context

The Bill has been introduced in an environment marked by –

- growing community disengagement from and distrust in government, as evidenced by low voter turnout at elections and high levels of informal voting; low membership of the major parties, and increasing support for microparties and independents.
- loss of expertise through ongoing reduction of public service numbers at the Commonwealth, state and territory levels of government.
- politicisation of policy advice under all governments over the past 30 years, with a serious erosion of the tradition of 'independent fearless' advice by junior and senior officials
- serious questions about mismanagement and corruption at all levels of government
- capture of policymakers and regulators by vested interests
- evidence of confusion and misunderstanding amongst ministers and agency staff on the basics of information management and technology – most recently in almost incoherent policy positions on copyright, IP piracy, and metadata.
- badly-drafted statutes and delegated legislation that are inconsistent with community expectations regarding civil liberties or that purport to legitimately fetter the judiciary through a reference to national security, terror or a war on crime
- inappropriate 'fast-track' consultation by parliamentary committees and government agencies on changes to legislation and administrative practice that have a fundamental impact on taxpayers, business and civil liberties of all Australians.
- failure by successive governments to officially join, or take seriously, the international Open Government Partnership enthusiastically supported by the US, UK and New Zealand governments amongst many others.

In such an environment, the need for greater transparency and accountability is more important than ever. The *Freedom of Information Amendment (New Arrangements) Bill 2014* (Cth) makes changes that are in exactly the opposite (and wrong!) direction.

We strongly urge the Committee to reject the Bill as contrary to the values of transparency and accountability which supposedly have bipartisan support and which are of additional importance to minor parties and independent Members of Parliament.

We set out below our main concerns with the three main areas of change proposed in the Bill.

Changes to the FOI regime

The proposed legislation will reduce the accountability of Commonwealth Ministers and public servants. It will exacerbate the problems of inefficiency and legitimacy noted above. It should be rejected on that basis alone.

By recommending rejection of the Bill, Members of Parliament, in all parties and on the cross benches, would affirm a commitment to transparency in government, rather than endorsing changes which would be convenient the Executive - reducing scrutiny of its actions.

Rejection of the Bill would be acknowledge the many public benefits of transparency clearly identified by a range of law enforcement bodies, by courts and by international organisations (such as the Organisation for Economic Cooperation & Development and Transparency International) over the past 40 years. Endorsement by the Committee of a weaker accountability regime would place Australia further behind overseas benchmarks – we have already referred above to Australia's inexplicable reluctance to join the Open Government Partnership.

The claimed savings from the proposed legislation amount to an aggregate $10.2 million over four years. Even if this proved true in reality (and was not offset by additional costs resulting from less scrutiny), the figure is trivial compared to amounts the government can find for its favoured policies.

The cost savings from the cut will be notional, rather than substantive. The proposed regime transfers costs to people with legitimate concerns, who will need to avail themselves of the AAT. That transfer is a barrier to access to justice – an objective that has traditionally enjoyed cross-party support. The regime will not eliminate complaints: challenges will still need to be addressed, either by government agencies themselves (with an inherent conflict of interest) or by bodies such as the Commonwealth Ombudsman (which demonstrably has been underfunded) and the Privacy Commissioner (which as noted below has historically had substantial backlogs and a low level of responsiveness because of under-resourcing).

The same shortsighted approach is evident in longstanding underfunding, under successive governments, of other accountability and review agencies including the Independent National Security Legislation Monitor, the Inspector General for Intelligence & Security, and the Australian Law Reform Commission.

Reduced transparency fosters administrative inefficiency and potential corruption. The costs of major inquiries when administrative failings only belatedly come to light – benchmarks include those inquiries regarding Cornelia Rau, Jayant Patel, Mohammed Hanif, ADF sexual abuses and 'Pink Batts' – dwarf the savings attributed to the current Bill. Reduction of transparency in the public sector shifts rather than eliminates costs and is not 'solved' by reference to bodies such as the Australian National Audit Office or an ICAC-like agency (which in any case does not exist at the federal level).

The current and preceding Governments have repeatedly paid lip service to a commitment to accountability. The Bill directly contradicts that commitment and will foster the cynicism about politicians that has been evident, and increasing, from independent polling over many years.

Abolition of the Office of the Australian Information Commissioner

The Bill seeks to give effect to the Government's announcement in May this year that it will abolish the Office of the Australian Information Commissioner (OAIC), an entity with responsibility for the Freedom of Information Act and for the *Privacy Act 1988* (Cth). The Office's responsibilities will be dispersed.

This is the direct opposite of 'evidence-based' policy making. The Government has yet to officially respond to the Hawke Review of the FOI regime. While we did not agree with either the processes of or all the recommendations made by that Review, it did clearly state the value of the OAIC.

> '…the Review found the recent reforms to be working well and having had a favourable impact in accordance with their intent. It (open government) has engaged more senior people in the process and triggered a cultural change across the Australian Public Service, although there is still some way to go on this aspect. Further effort, driven from the top, will be required to embed a practice where compliance with the FOI Act is not simply perceived as a legal obligation, but becomes an essential part of open and transparent government'. (p.i)

and, more directly:

> 'The Review considers that the establishment of the OAIC has been a very valuable and positive development in oversight and promotion of the FOI Act.' (p.24)

Abolition of the OAIC and dispersal of its functions will not foster good government and will not underpin the human rights enshrined in international instruments to which Australia is a party; it should be rejected by the Committee.

APF agrees that there are many significant issues surrounding the activities and performance of the OAIC, which has failed to meaningfully engage with civil society groups, has been unresponsive to legitimate criticisms, has been slow to act, has been unduly permissive to particular interests (i.e. has experienced regulatory capture) and until this year has failed to meaningfully articulate its expectations regarding the legislation.

OAIC's processing of FOI requests (and of Privacy complaints) has been slow and on occasion inappropriately legalistic. Much of that failure, which is of concern both to legal professionals and to the wider community, is attributable to substantive under-resourcing (in terms of staff numbers and expertise) rather than merely a problematical attitude on the part of its executives – although that too has been a problem.

The amendments in this Bill are not however designed to address the many legitimate criticisms of OAIC – they simply abolish the Office.

Abolition of OAIC would **not** result in a significant improvement in service. Dispersal of its functions – which in some cases will effectively meant that they cease to be performed – will instead exacerbate a systemic problem.

Abolition would send a strong message to Commonwealth agencies (and to observers in Australia and overseas) that the Government's commitment to transparency is very weak. Such signalling is already a problem, with indications over the past year that the Information Commissioner and his agency are 'out of the loop' in policy development and – importantly – prepared to use resource constraints as an excuse for a non-response to legitimate requests. The OAIC's reliance on the 'we don't have enough resources' excuse has told agencies that they in practice can fob off public interest requests, a rejection of transparency that is reinforced through imposition of charges and through a review mechanism that will now involve the costs associated with action at the Administrative Appeals Tribunal. There are similar concerns regarding practice in key agencies such as the Australian Federal Police (which has evaded its responsibility by transferring access requests to the Attorney-General's Department).

The Government has indicated that any concerns will be addressed by changes in the Attorney-General's Department and the Commonwealth Ombudsman's office. As yet there has been no indication that appropriate resourcing will be provided to the Ombudsman (a body that is already under-resourced, as evident in its reports and measures such as backlogs, and is gaining additional responsibilities under national security legislation). There is no indication that executives within the Attorney-General's department will demonstrate a sustained and vigorous enthusiasm for transparency. That Department had responsibility for FOI policy and practice in the decades before the creation of the OAIC, but only in the very early years did it show any real enthusiasm for promoting best practice. As the Department also responsible for national security and law enforcement, both of which have been high and ever-increasing priorities for successive governments, it is completely unrealistic to expect it to also act as an effective watchdog or guardian of transparency and accountability.

Rather than abolishing the OAIC the Government should be supporting the development of an even more independent, expert and vigorous national Information Commissioner. Such a body should report to Parliament, using the Auditor-General model, and accordingly be more inclined to offer the independent advice and scrutiny that may be contrary to the agenda of a particular Attorney-General. It should be sufficiently resourced to undertake its responsibilities on a timely and comprehensive basis. Those responsibilities are identifiable in the Objects of the current FOI Act. They are consistent with good government, i.e. a public administration that offers true value for money (rather than merely shifts costs) and fosters accountability through oversight by both the 'Fourth Estate' role of the media by civil society NGOs, and by ordinary Australians, irrespective of whether the latter have a personal grievance or are concerned with broader public policy.

The Government should also be strengthening the Information Publication regime, a key aspect of FOI but one that has been implemented on an idiosyncratic and at times subversive basis by different agencies. Consistent and timely publication of information about FOI requests and of documentation provided in response to those requests is a key function of the FOI regime. Publication does cost money, a cost that is legitimately borne by the government. In a liberal democratic state it is the same sort of cost as the funding of Courts, Tribunals and Parliament itself – all mechanisms for justice and accountability.

Relocation of the Australian Privacy Commissioner

The Australian community, the legal profession, business and legislators (for example the Victorian Parliament's Law Reform Committee) have recurrently and strongly indicated that respect for privacy is a fundamental value. That respect is one thing that differentiates Australia from totalitarian states such as North Korea and Syria, and from terrorist groups such as ISIS. It is not something that can or should be abandoned on the basis of rhetoric about a 'hundred years war on terror' or a supposed existential threat to the Australian state.

Disregard for privacy through disproportionate or in some cases clearly unnecessary national security legislation is a major concern – George Williams AO for example recently noted that an enactment was passed every six and half weeks for several years after 9/11, arguably primarily because of a 'need to be seen to be doing something' rather than any considered and convincing policy evidence.

Another major concern is the ongoing weakness of overall Australian privacy law, evident in

- inconsistencies and omissions across the Australian jurisdictions,
- some significant weakening of some key Privacy Principles in the 2012 amendments to the Privacv Act 1988 (Cth) which took effect in March 2014 – these retrograde changes being cleverly obscured behind some improvements in both the Principles and the enforcement regime,
- a failure by successive governments to address ALRC recommendations for removal or reform of the many exemptions from the Privacy Act.
- a failure by the current and preceding Governments to embrace repeated and well-argued recommendations by a range of law reform bodies to enshrine a statutory cause of action for serious invasions of privacy,

In that environment we need an empowered, expert, independent and vigorous privacy agency, one that has the authority, resources and will to promote respect for privacy in the public and private sectors through action, example, advice and education.

The transfer of the Privacy Commissioner from the OAIC to the Human Rights Commission reverts to an earlier model – effectively the one in existence in the early 1990s when the Commissioner's staff, and budget, were provided indirectly through the then Human Rights and Equal Opportunity Commission (HREOC). This had some serious flaws, which were eventually recognized by the creation of an independent Commissioner with a separate office, staff and budget appropriation. The changes proposed in the Bill risk repeating the mistakes of the original regime, and leaving the Commissioner with an even lower profile, and influence, than s/he had between the mid-1990s and 2010 (which was more than low enough!).

The new/old administrative arrangements are likely to exacerbate disregard by Commonwealth agencies and private sector organisations for the Privacy Act, and encourage the regulatory capture evident in work by the Commissioner in areas such as genetic privacy and data breaches. This change does not even result in significant cost savings, directly or otherwise, and references in the Explanatory Memoranda to 'streamlining' are disingenuous.

In the absence of a clear commitment to proper resourcing of the Privacy Commissioner the transfer should be rejected.

The Information and Privacy Commissioners have sought to excuse delays in the handling of requests under the Privacy Act 1988 and delays in the provision of material needed for interpretation of that Act by reference to resource constraints. Proper resourcing, including relevant expertise rather than merely gross staff numbers, is imperative. There has been no indication that such resourcing will be provided and the Government's statements as part of the Budget can be construed as signalling that there will be fewer rather than more resources.

It is traditional for officials to emphasise gross staff numbers rather than expertise. In relation to implementation of the Privacy Act that is of real concern. The Privacy Commissioner (both as a standalone office and as part of the OAIC) has favoured private consultation with regulated entities, has not engaged with civil society representatives and – as demonstrated through access to its records at a time when it was responsive to FOI requests – has experienced a degree of regulatory capture. The lack of engagement with external experts has exacerbated a demonstrable lack of expertise in areas such as technology, business practices and genetics that are already and will become even more important in the coming age of 'big data', increasing surveillance and genomic medicine.

Transfer of the Privacy Commissioner to the Australian Human Rights Commission will bring no benefits to Australian public administration, business or the community at large unless the Commissioner is properly resourced and is strongly encouraged by the Committee and the Government to adopt a positive view of responsibilities. Failure to do so will result in further disregard, cynicism and confusion.