Submission; Freedom of Information Amendment (New Arrangements) Bill 2014

Summary

The Committee should recommend a vote against the bill in its current form.

There is scope to improve many aspects of freedom of information legislation and practice.

However disbanding the Office of Australian Information Commissioner will have ramifications that go far beyond the government's stated intention of rationalising and streamlining FOI merits review arrangements.

The negative effect of separating the function from the related functions of information access and information management in the digital age, by maintaining and reassigning the position of Privacy Commissioner will be ameliorated as the proposed new arrangements continue to provide for an independent oversight and enforcement mechanism for the protection of personal information

However by abolishing the position of the Australian Information Commissioner the legislation removes and does not replace the independent mechanism that exists to provide leadership, advocacy, oversight and enforcement of the right to access government information and associated agency responsibilities of ministers and agencies.

New arrangements for external review of individual decisions by the AAT, for the investigation of complaints by the Ombudsman, for the Attorney General to provide guidance on the interpretation of the act and the attorney’s department to report annually to the parliament will not fill the independent monitor and ‘champion’ role identified as essential if FOI was to succeed by the Australian Law Reform Commission as long ago as 1995.

The information/FOI commissioner model is now accepted best practice in peer group countries around the world and in Australia in Queensland, NSW, Victoria, Western Australia and the Northern Territory and in Tasmania where it is the responsibility of the Ombudsman. The South Australian Ombudsman in a special report to government this year recommends the establishment of such a position.

Proposed Commonwealth legislation to dispense with the office and many of its functions flies in the face of widespread wisdom about mechanisms for effective leadership, monitoring and oversight of an access to government information system.

While there is evidence of the need for improvement in timely access to external

merits review of FOI decisions, and a range of options to achieve this remain unexplored, no evidence has been provided or the case argued that the OAIC has failed and should be abolished, that FOI applicants will benefit from the changes, and that overall significant savings will result.

Reverting to oversight and enforcement arrangements that were in place before November 2010 would be a backward step for the cause of open, transparent and accountable government.

Submission

The Freedom of Information Amendment (New Arrangements) Bill will *"establish new arrangements for the exercise of privacy and freedom of information (FOI) functions, including: disbanding the Office of the Australian Information Commissioner; arrangements for an Office of the Privacy Commissioner; making external merits review of FOI decisions only available at the Administrative Appeals Tribunal following compulsory internal review; and providing for the Ombudsman to take over responsibility for investigation of FOI complaints."*

1. Rationale

The primary reason for the introduction of the legislation, according to the Attorney General on Budget night is:
"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." (Media Release).

Senator Colbeck in concluding the second reading speech in the Senate on 30 October said:
"These institutional arrangements will 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 information in place before the establishment of the Office of the Australian Information Commissioner on 1 November 2010."

2. Other factors

It is questionable whether the significant processing delays in FOI reviews at the OAIC resulted from the nature of the system. Significant under resourcing, and a high level of demand (perhaps something to do with questionable decisions by agencies) are more likely reasons for the problems encountered.

Professor McMillan told parliamentary committees that the office had not been

resourced at the staff levels projected before commencement of operations.

The OAIC Annual Report 2013-14 reports that budget-supported staffing progressively declined from almost 80 Full-Time Equivalent (FTE) at 30 June 2011 to around 65 FTE at 30 June 2014.

The report indicates the problem of extremely long delay has dissipated to some degree in the year to June 2013. "The success is built upon an active internal program over the last two years to explore and trial different methods for efficient case handling."

3. Other options

I am not aware of any submission to the Hawke review that suggested the abolition of the OAIC. A number, including submissions by the Australian Information Commissioner and on behalf of a group of media organisations flagged a number of possible improvements in the review system.

No one outside the government appears to have been consulted before or after the Budget announcement of the government's intention to abolish the office.

Other options to improve current FOI merits review functions, for example that might arise from examination of both Australian and international experience in the operation and management of FOI oversight, compliance and review arrangements apparently were not considered. Adequately resourcing the OAIC while limiting further review rights to a question of law, as is the case in WA and Queensland is just one of many options that could streamline the multi-tiers.

Another that might reduce demand and free up resources would be the introduction of penalties of some kind or powers to be used by the OAIC that might dissuade agencies from resort to exemption claims that have little or no merit and serve only to bide time and waste resources.

And as Professor Mulgan in an article in The Canberra Times in June said *"If the government had been sincere in its aim to simplify service while minimising burdens on the public, it could have adopted other reforms canvassed by Hawke, such as abolishing the second tier of appeal to the AAT, leaving the OAIC as the sole avenue of external review while imposing a small application fee…."*
*(*Accessed at *http://www.canberratimes.com.au/national/public-service/how-the-foi-watchdog-was-starved-to-death-20140601-39ckf.html)*

4. Statutory review 2012-13

The statutory review of the 2010 reforms conducted by Dr Allan Hawke for the then Attorney General concluded:

"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 " (Page i)

On page 24 of his report Dr Hawke said:
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."

And with regard to the 'complex' review system:
"The current system of multi-tiered review has been in operation for two and a half years. At this stage there is insufficient evidence to make a decision on whether this is the most effective or efficient model for reviewing FOI decisions, particularly in relation to the two levels of external merits review. The Review considers this issue warrants further examination and recommends that the two-tier external review model be re-examined as part of the comprehensive review recommended in Chapter 1. "(Page 36)

5. Return to the pre 2010 system

While the second reading speech proclaimed that the proposed changes would move the system of management of freedom of information back to where it was prior to November 2010, there is no mention that the system then in place had few if any supporters.

Problems and shortcomings in the act and practice were for outlined in detail in the 2007 Report of the Independent Audit of Free Speech in Australia by the coalition of media organisations Australia's Right to Know, in assessments by the Ombudsman and other commentators.
(Independent Audit. Accessed at http://www.smh.com.au/pdf/foIreport5.pdf)

6. The independent monitor, 'champion' and advocate role

One of the more significant problems was the absence of a dedicated independent monitor and 'champion' for freedom of information, and the open transparent government cause.

The Australian Law Reform Commission in its 1995 report Open Government had identified this as a significant shortcoming in the FOI framework:
"The Review remains of the view that the appointment of an independent person to monitor and promote the FOI Act and its philosophy is the most effective means of improving the administration of the Act. The existence of such a person would lift the

profile of FOI, both within agencies and in the community and would assist applicants to use the Act. It would give agencies the incentive to accord FOI the higher priority required to ensure its effective and efficient administration. Vesting all the proposed functions in a single office will create the 'critical mass' required to ensure a public profile for FOI and greater effectiveness of the Act. The Review considers that no existing person or organisation could take on the role proposed for this independent person. Consequently, it recommends that a new statutory office of FOI Commissioner should be created." [6.4]
(1995 ALRC 77 A review of the Federal Freedom of Information Act 1982. Accessed http://www.austlii.edu.au/au/other/lawreform/ALRC/1995/77.html)

In 2006 by the then Ombudsman Professor McMillan after examining practices in 22 agencies, concluded there was a clear commitment to, and a high degree of compliance with the spirit and detailed requirements of the Act in some agencies. However, he also found widespread problems in FOI decision-making and the probable misuse of exemption provisions. Particular problems were excessive delays in processing requests, delays and inconsistencies in charges, and variable quality in the standard of decisions and letters of explanation of those decisions. The Ombudsman pointed to a failure by the heads of many government agencies to provide leadership on FOI. He urged the Government to act on reform first proposed 11 years previously to create a position of Information Commissioner to monitor performance, provide guidance on interpretation of the Act, and ensure greater consistency in FOI across all federal agencies.
(Scrutinising Government –Commonwealth Ombudsman Report 02/2006)

In a subsequent speech, Professor McMillan again referred to the patchy nature of federal agency FOI performance and said any deviation from high standards reflected badly on the integrity of FOI management overall:
"A person's enjoyment of the rights conferred by the FOI Act should not depend on the agency to which their FOI requests made. There should be a uniform commitment to FOI objectives across government—a whole-of-government standard, as it were. We expect all agencies to perform at a uniform standard in administering financial integrity laws, and we can equally expect consistency in the administration of democratic integrity laws."
(Open Government reality or Rhetoric? 15 June 2006)

In 2007 one of Australia's leading experts in the field Rick Snell of the University of Tasmania suggested three quick steps likely to lead to significant change in FOI performance including the appointment of an information commissioner.
(Three quick steps to enlightened FOI The Australian 28 September 2007.)

7.The 2010 reforms

The legislation introduced by the ALP government in 2009/10 to establish the current scheme was supported without opposition in either house and supported

by Liberal and National party members and senators.

The functions of the Australian Information Commissioner established as a result include regulator, decision maker, adviser, researcher and educator, encompassing freedom of information, privacy and advice to government on information policy and practice.

Amongst many other tasks the role involved seeking to increase public awareness of the importance of transparency and accountability and of citizen rights to access government information and protect privacy, and to promote open government ideals by encouraging government agencies to honour both the letter and spirit of the FOI law.

Independence is essential for such a task.

The Australian Information Commissioner in reports to the parliament since commencement of operations in November 2010 cites evidence of some progress on a number of fronts.
(See also interview The Mandarin. Accessed at http://www.themandarin.com.au/6651-australian-information-commissioner-almost-gone-but-not-forgotten/)

However in the new arrangements there is no role envisaged for an independent monitor, 'champion' and leader on transparency. This despite the fact that all who observe government closely concede the job of moving government from the default position of excessive often unnecessary secrecy is ever done and dusted.

The legislation transfers the responsibility for guidance on the interpretation of the FOI act to which an agency must "have regard" in carrying out functions under the act from the independent Australian Information Commissioner to the Attorney General. And transfers responsibility for reporting to parliament from the independent Australian Information Commissioner to the Attorney General's Department.

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.

Rather than a return to pre 2010 arrangements, one alternative course would be to respond positively to the Hawke report recommendation for a comprehensive review of the FOI and Australian Information Commissioner acts. a task that was outside his terms of reference.

The Government is yet to respond to the report completed in April 2013.

8. Widespread adoption o the information commissioner model

The Commonwealth initiative to abolish the Office of Australian Information Commissioner is out of step with international and Australian best practice.

In Australia, Queensland, NSW, Victoria and Western Australia have in place similar but not uniform arrangements to those that the Commonwealth Government proposes to change. In each jurisdiction the system includes non-litigious review of information access decisions by an information or freedom of information commissioner, and a separate tribunal with review powers.

The Northern Territory has an information commissioner but no tribunal.

The commissioners and the Tasmanian Ombudsman in addition to conducting external merit review of decisions also have a legislated role that encompasses issuing FOI guidelines, ensuring public awareness of the FOI legislation, conducting FOI training, addressing complaints about the FOI process, monitoring and auditing agencies' FOI performance and recommending administrative and legislative reform in FOI.

The South Australian Ombudsman in a report in May this year recommended that the government establish such a position. Ombudsman Richard Bingham recommended:
"an independent oversight body with investigation, audit and recommendatory powers to issue FOI guidelines, ensure public awareness, provide advice and conduct training, deal with complaints, monitor and audit agency performance, conduct merit reviews with determinative powers, recommend reforms and report to Parliament." Mr Bingham continued "This body should also be responsible for the oversight of state privacy policies and legislation" (page 101), an aspect of the model the Federal Government plans to dismantle.

("An audit of state government departments' implementation of the Freedom of Information Act 1991 (SA)." Accessed at http://www.ombudsman.sa.gov.au/wp-content/uploads/An-audit-of-state-goverment-departments-implementation-of-the-Freedom-of-Information-Act-1991-SA1.pdf)

Further information and analysis of the information commissioner model is available in the 2007 Solomon Review of the Right to Information Act (QLD) Chapter 20.
(Accessed at http://www.rti.qld.gov.au/__data/assets/pdf_file/0019/107632/solomon-report.pdf)

Information commissioners are part of the best practice information access oversight and enforcement arrangements in Canada, the United Kingdom, Germany and other members of the European Union, India and more than 40 countries around the world.

A paper on enforcement models for access to information laws for the World Bank examined the development of information commissioner and tribunal systems. (Accessed at http://www.wds.worldbank.org/servlet/WDSContentServer/IW3P/IB/2009/04/03/000333038_20090403034251/Rendered/PDF/479910WBWP0Enf10Box338877B01PUBLIC1.pdf)

A study of access to information enforcement in ten countries published in the Journal of information Policy found that the benefits of the Information Commissioner model outweigh its drawbacks. Accessed at http://jip.vmhost.psu.edu/ojs/index.php/jip/article/view/104

And a comparative study, of oversight bodies and enforcement mechanism for the international NGO Right2info identified a global trend towards the information commissioner model. (Accessed at http://www.right2info.org/information-commission-ers-and-other-oversight-bodies-and-mechanisms)

9. Loss of synergies

Disbanding the OAIC involves separating information policy, privacy and FOI functions.

Much was made during discussion of reform in the period 2007-2010 of the benefits of combining information access and information privacy functions in the one office, and conferring strategic information management functions on the Commissioner as well.

The Information Commissioner was seen as having a key role in moving government to more open government in the digital age.

In a 2009 report for the Department of Prime Minister and Cabinet on e-government and the implications of a changing ICT landscape, Dr Ian Reinecke said:
"The Australian Government needs quickly to begin the task of preparing the way for e-governance and e-consultation if it is not to fall further behind the significant advances made in the UK and the USA. The Office of the Information

Commissioner (OIC) has a key 'make ready' role to prepare agencies for deeper online engagement with communities and individuals…The Commissioner should initiate measures that begin to shift the perceived culture of the public service from secrecy and information protection to more proactive disclosure. This will involve building a general awareness that a continuous change management approach is necessary to ensure more open access to government. It should be understood that this will not be achieved overnight. The Commissioner should provide cross-government oversight of information policy and management and undertake a strong public advocacy role to promote open access to public sector information, drawing on the experience of initiatives such as the UK Power of Information report and taskforce." [Chapter 6]
(Accessed at http://www.dpmc.gov.au/PUBLICATIONS/information_policy/docs/information_policy_e-governance.pdf)

The Second Reading Speech on the FOI reform bill in 2009 states:
"The establishment of an Office of the Information Commissioner not only supports the important outcome of promoting a pro-disclosure culture and revitalising FOI, but also lays new, stronger foundations for privacy protection and improvement in the broader management of government information."
(Hansard. Accessed at http://www.openaustralia.org/debates/?id=2009-11-26.12.1)

In the Annual Report 2013-14 the Australian Information Commissioner said:
"*A key challenge since the establishment of the OAIC has been the integration of these functions and roles. In 2013–14, the OAIC demonstrated how these functions and roles can be performed effectively by the one office, and the significant benefits that an integrated model can deliver."*

As Professor Mulgan in the previously cited article in the Canberra Times said:
. The position of information commissioner was established in the context of the digital revolution, which has transformed the collection and dissemination of government data. One of the commissioner's main statutory functions was to report on "the collection, use, disclosure, management, administration or storage of, or accessibility to, information held by the government". As part of this responsibility, the OAIC has concentrated on issues of transparency and accessibility, particularly through government websites. In a number of reports and policy statements, it has stressed the values of open government and sought to encourage a culture of proactive disclosure, whereby agencies take the initiative in publishing the types of information and data that they would be willing to release under FOI...

There is no mention in the Media Statement issued by the Attorney

General on Budget night, the Budget papers or in statements to parliament by government speakers of the impact of abolition of the office on broader information policy and on open government generally

The proactive publication of government information was an important advance in the FOI concept in 2010 with a requirement for each agency to adopt an Information Publishing Scheme. There is a direct link between this statutory requirement and other developments that encourage the publication of information including data sets for social and economic advancement purposes.

The FOI act as amended in in 2010 requires each agency in conjunction with the Australian information Commissioner to review the Information Publishing Scheme once every five years.

This important aspect of the work of the OAIC has an uncertain future, as it is not mentioned in functions transferred to other agencies.

The OAIC Annual report states that work stopped earlier this year on plans for further review of agency information publishing schemes following the government's announcement of its plans.

10. Cost and other factors in the new arrangements for review of information access decisions.

The Second Reading speech states:
The Bill simply removes an unnecessary and anomalous layer of external merits review for FOI decisions. This will deliver an improved and simplified merits review system for FOI decisions and will realign responsibility and accountability for external merits review of FOI decisions with the process applicable to other government decisions."

Internal review will be reintroduced as a mandatory requirement before a still aggrieved applicant or third party may seek external merits review from the AAT.

No estimate has been provided of the additional cost to agencies as a result of reinstating the internal review requirement. There were 596 applications for internal review of FOI decisions in 2013-2014 and 524 applications for Information Commissioner review.

The information commissioner model for external review is non-litigious using alternative dispute resolution methods or any other appropriate technique. Hearings are rare. Where resolution is not possible, the commissioners decides and those decisions are binding on the agency, subject to an application for further review by either party by the AAT.

There is no application fee or other charge, but as is widely known, processing has been subject to unacceptable delay.

The proposed new arrangement following abolition of the office provide for external review by application to the AAT.

As Professor Mulgan wrote in The Canberra Times:
"... the budget papers say that "simplifying and streamlining" FOI review processes by transferring them from the OAIC to the AAT "will improve efficiencies and reduce the burden on FOI applicants". There is no mention of the fact that external reviews will now cost over $800 instead of being free. Certainly, if re-imposing a significant fee leads, as it must, to a substantial reduction in the number of appeals, those who can afford to seek a review can expect a faster, more efficient service. For this reason, the changes have been welcomed by representatives of media businesses, which have chafed at the increasing delays caused by the flood of less well-off appellants. But it is a deceitful sophistry to describe improved service caused by pricing out most would-be applicants as "reducing the burden" on applicants."

The current application fee is $861. No fee is payable in some circumstances and there are a number of concessions. If the full fee is paid and the matter resolved in favour of the applicant all but $100 is refunded. The tribunal has no power to award costs but can recommend to the responsible minister that the costs be paid by the Commonwealth where the person is successful, or substantially successful-few such orders have been made.

Clearly for many FOI applicants dissatisfied with an agency decision taking a matter further than internal review will in future be an expensive exercise.

Apart from the application fee, and despite tribunal efforts to accommodate and assist unrepresented applicants and use alternative dispute resolution, the tribunal is lawyers' territory.

AAT proceedings are or in the case of disputed access to documents concerning policy development and implementation for the purposes of accountability usually become litigious.

Parties are entitled to be represented in the AAT.

FOI applicants who seek review often are in such proceedings for the first perhaps only time and for the most part self represent.

Agencies almost without exception are legally represented by counsel, a lawyer from the Australian Government Solicitor or from an external firm of solicitors, all highly experienced in the field.

It is not a level playing field.

For example in reported AAT FOI decisions in recent months the applicants in every case were unrepresented while the agency concerned was represented as follows: ABC (Senior Lawyer ABC), ASIC (Australian Government Solicitor and Chief Legal Officer ASIC), Australian Customs and Border Protection (Legal Services Branch) CSIRO (Australian Government Solicitor), Immigration (DLA Piper), Australian Prudential Regulation Authority (Counsel), Australian Curriculum, Assessment and Reporting Authority (Australian Government Solicitor); Department of the Prime Minister and Cabinet (Australian Government Solicitor).

In 2009-10, the year before the FOI reforms the AAT received 110 FOI review applications.

As the Productivity Commission in the Draft Report on Access to Justice Arrangements (May 2014) notes, the use of legal representation is thought to be contributing to increased cost and delays in the timeliness of decisions in tribunals.

(Chapter 10. Accessed at http://www.pc.gov.au/projects/inquiry/access-justice)

The cost of FOI cases to the AAT and to the parties is not known.

However the AAT's submission to the Productivity Commission inquiry Access to Justice said generally:
"Cost per case at the AAT has increased for both cases that proceed to a hearing and those that do not. Between 2004 and 2013 the average cost of finalisations without a hearing increased from $2000 to $3500, and those with hearings from $11 000 to $16 600 (2013 prices). (Accessed http://www.pc.gov.au/projects/inquiry/access-justice/submissions)

The Draft Commission Report cites information provided by Comcare regarding disputes over workplace compensation — usually resolved in the AAT: "Comcare report that they incurred average costs per case of $15 500 when matters were withdrawn, $23 000 when matters were resolved by consent and $48 000 for matters that went to hearing (Comcare, pers. comm., 28 February 2014)" The mean cost to the opposing party in such disputes is just under $20 000 (median of around $15 000)
(Chapter 10. Accessed at http://www.pc.gov.au/projects/inquiry/access-justice)

The Commission Draft Report suggested that commissions responsible for privacy and freedom of information complaints receive very small numbers of disputes. And have very high average costs per complaint ($9200 per case in 2011-12, figure 9.2, panel A). Efficiency and visibility of these services could be improved

if they were run by the appropriate state or territory ombudsman (as is currently the case in Tasmania), or an amalgamated tribunal (as in the case of Victoria, where the Victorian Civil and Administrative Tribunal hears freedom of information cases — this forms part of its administrative division, which on average deals with cases at a cost of around $2500.

The Commission appears to make no distinction between complaints and merit review functions.

The OAIC in a submission argued the cost figures are incorrect in any event and that the OAIC
"should be in the same category as the Australian Competition and Consumer Commission which the draft report excluded from case/cost comparisons due to its wide range of regulatory responsibilities and the difficulty of separating out its complaints functions (see p 284 and p 285, Figure 9.1)."
(Submission. Accessed at http://www.pc.gov.au/projects/inquiry/access-justice/submissions)

11. Conclusion

The decision to abolish the OAIC is not based on evidence and may not achieve the cost savings anticipated but will remove a key element in the oversight and enforcement of agency obligations under the FOI act.

Passage of the bill in its present form would be a retrograde step for the cause of more open government.

While there are other options that are likely to improve problems of delay in the review of FOI decisions by the OAIC, while avoiding adverse effects, none have been explored outside government circles.

The Committee should recommend a vote against the bill.

I would welcome the opportunity to respond to questions or provide additional information.

Peter Timmins