

The Secretary
Legal and Constitutional Affairs Legislation Committee

Freedom of Information Legislation Amendment (Improving Access and Transparency) Bill 2018

Thank you for the opportunity to comment on the Bill.

I have over 30 years involvement in freedom of information and related information access issues, write the Open and Shut Blog and am the Interim Convener of the Australian Open Government Partnership Network. This submission is in my personal capacity.

Context

Senator Patrick is to be congratulated for introducing a bill for the purpose of improving access and transparency.

Most provisions in the bill will have this effect and deserve support.

This despite the fact that a comprehensive review, reform and a complete rewrite of the legislation in plain English, as recommended by Dr Alan Hawke in the 2012-2013 statutory review report, is long overdue and to be preferred to piecemeal changes. Dr Hawke said changes over the years had been "largely developed and inserted into the form and structure of the FOI Act as it was in 1982."

<https://www.ag.gov.au/Consultations/Documents/FOI%20report.pdf>

There has been no comprehensive review of the FOI act since the joint Australian Law Reform Commission/Administrative Review Council inquiry culminating in Report 77 Open Government, completed in December 1995.

It had been hoped that comprehensive reform would emerge from the government commitment in its Open Government National Action Plan adopted in December 2016 to ensure that information access law, policy and practice are fit for the 21st century.

Unfortunately almost two years later there is no indication of what will be done to achieve this goal.

The submission to the committee from the Attorney General's Department makes no mention of the commitment.

In December 2017 AGD provided recommendations for the Government's consideration setting out possible next steps and the recommendations were re-submitted to the Government in March 2018.

<https://ogpau.pmc.gov.au/commitment/australias-first-open-government-national-action-plan-2016-18/nap1-commitment-dashboard-6>

That reform is necessary is clear from international comparisons. The Freedom of Information Act 1982 received 84 points out of 150 in the RTI Index published by the (Canadian) Centre for Democracy and is now ranked 65 of 123 laws assessed.

<https://www.rti-rating.org/country-detail/?country=Australia>
<https://www.rti-rating.org/country-data/>

In earlier assessments the law ranked 39th, later 48th. Movement in our placing is largely the result of improvements elsewhere

There is room for differing views about aspects of the scoring and assessment, However Australia's law is indisputably middle of the pack, and not among those that lead in this area.

The Bill

In the absence of a comprehensive approach to reform that reflects changed community expectations, international best practice, technological change and the known shortcomings in implementation and administration of the FOI act over 35 years, the bill proposes sensible measures for improvement.

OAIC

Of particular significance and urgency are the measures concerning the operation of the Office of Australian Information Commissioner.

As is well known the government embarked on piecemeal reform when it sought to abolish the OAIC in 2014, withdrew the bill that would achieve this purpose in 2016, reduced funding for the FOI functions despite increased demand and has allowed the Office to operate with one commissioner since July 2015. It has appointed the same person Australian Information Commissioner and Privacy Commissioner and announced it does not intend to appoint a Freedom of Information Commissioner.

None of these steps have been explained or justified by evidence or research that drew on Australian or international experience.

Submissions from Accountability Roundtable and Mr Asher Hirsch, Dr Yee-Fui Ng, and Dr Maria O'Sullivan of Monash University present the case for reinstating the three commissioner model and adequate funding for the office.

Parliament decided in 2010 that the Office should have three commissioners with defined functions, not one. That legislation remains in force. The decision that one commissioner will suffice hardly seems in line with executive government responsibility to execute and maintain the laws of the Commonwealth.

The submission from the Attorney General's Department states the "department considers that at present the OAIC is operating properly and efficiently under the one-Commissioner model..... The changes proposed by this Bill are unnecessary to the successful functioning of the OAIC."

It provides little in the way of supporting material citing only performance against an indicator of a target 80% of reviews and complaints to be finalised within 12 months.

Operating efficiently is one thing, operating properly another.

Few who seek assistance from the office would be satisfied with an outcome within 12 months or within six months, the target time-frame for completion of merit reviews in place prior to 2013-14

External review available only months or years after the event is of limited value to many.

An ANAO Performance Audit last year

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

notes that despite reported compliance or near compliance with the 80% target "the time required to conduct a merit review varies substantially, with the elapsed time for decisions reported by OAIC in 2015–16 ranging from 81 to 1228 days (average of 372 days)."

In my experience applicants who seek review or lodge a complaint are told it will be five months before a case officer is assigned-six months has been mentioned in some acknowledgements this year.

The Audit Report, based on the OAIC's assessment, shows (Figure 1.6) that the funding expended on FOI functions in 2016-17 was approximately half that expended in 2012-13. Applications for review have increased substantially every year since.

In any event there is more to the operation of the office than FOI merits review, originally envisaged as 'an information champion, with a comprehensive range of powers and functions to promote open government, protect information rights and advance information policy.'

<https://www.ag.gov.au/Consultations/Documents/ReviewofFOIlaws/OAIC%20submission%20to%20Hawke%20review.pdf>

The impact of the one commissioner model on this 'champion' role would appear to be substantial.

<https://www.oaic.gov.au/information-policy/about-information-policy>.

This submission is lodged incomplete in the interests of time.

Should it assist the committee I would be in a position to lodge further comment on other aspects of the bill in the next week or so.

Peter Timmins
Open and Shut

www.foi-privacy.blogspot.com.au

5 October 2018