

Chapter 1

Introduction

1.1 On 2 October 2014, the Hon Scott Morrison MP, Minister for Immigration and Border Protection, introduced the Freedom of Information Amendment (New Arrangements) Bill 2014 (the Bill) into the House of Representatives.¹ Following debate, and agreement to two amendments proposed by the government, the Bill was passed by the House on 28 October 2014.²

1.2 On 30 October 2014, pursuant to a report of the Selection of Bills Committee, the Senate referred the provisions of the Bill to the Legal and Constitutional Affairs Legislation Committee (the committee) for inquiry and report by 25 November 2014.³ The Bill was introduced into the Senate the same day.⁴

Conduct of the inquiry

1.3 In accordance with usual practice the committee wrote to 49 people and organisations, inviting submissions by 6 November 2014. Details of the inquiry were also made available through the media and on the committee's website (www.aph.gov.au/senate/legalcon).

1.4 The committee received 32 submissions, which are listed at Appendix 1. The committee thanks those individuals and organisations who made submissions to the inquiry. The committee held a public hearing on 10 November 2014 in Sydney. The witnesses who appeared at the hearing are listed at Appendix 2. Additional information received by the committee following the hearing is listed at Appendix 3.

Background to the Bill

1.5 Freedom of information (FOI) is the statutory regime facilitating the right of citizens to access government documents, in order to encourage transparency and accountability in government, and combat corruption and wrongdoing. Australia was one of the first countries to adopt specific FOI laws in the 1970s and 1980s. However, with the passage of time there was a growing view that Australia's FOI laws were inadequate, and that the system was not working as intended.⁵

1.6 In 2009 and 2010, the then Labor government introduced a package of reforms intended to address perceived inadequacies in the FOI regime, and create a stronger culture of openness in government. A major element of the changes was the establishment in 2010 of a new statutory agency, the Office of the Australian Information Commissioner (OAIC). The OAIC incorporated the pre-existing Privacy

1 House of Representatives, *Votes and Proceedings*, No.72, 2 October 2014, p. 875.

2 House of Representatives, *Votes and Proceedings*, No.78, 28 October 2014, pp 939-940.

3 *Journals of the Senate*, No. 63, 30 October 2014, pp 1689-1691.

4 *Journals of the Senate*, No. 63, 30 October 2014, p. 1701.

5 Parliamentary Library, *Bills Digest* No. 44, 2014-15, 27 October 2014, p. 3.

Commissioner role and placed alongside it two new statutory positions, a Freedom of Information Commissioner (FOI Commissioner) and an Information Commissioner (IC). The OAIC was given comprehensive oversight powers and functions with respect to privacy, FOI and information issues across Australian government agencies.

1.7 The 2010 changes established a two-tiered system for external review of FOI decisions, the first by the IC with a right of appeal, if a party was not satisfied, to the Administrative Appeals Tribunal (AAT). The first-tier review by the IC did not require prior internal review or legal counsel, and there were no application fees. These factors contributed to a rapid increase in review applications, and the OAIC became beset by significant time delays and backlogs in processing FOI reviews.⁶

1.8 On 29 October 2012, former public servant Dr Allan Hawke AC was commissioned by the Labor government to review the operation of the FOI Act and the *Australian Information Commissioner Act 2010* 'and the extent to which those Acts and related laws continue to provide an effective framework for access to government information'.⁷ The 'Hawke Review', submitted to the government on 1 July 2013, concluded that the 2009-10 reforms were operating as intended and had been generally well-received.⁸ The Hawke Review considered that 'the establishment of the OAIC has been a very valuable and positive development in oversight and promotion of the FOI Act', while recognising concerns about 'lengthy and consistent delays in the OAIC's decision-making and complaint investigation processes'.⁹ It recommended a range of legislative and administrative changes to streamline FOI procedures, reduce complexity and increase capacity to manage FOI workload both by agencies and the OAIC.

1.9 With regard to the reformed system for merits review of FOI decisions, the Hawke Review found that there was insufficient evidence, two and a half years into its operation, to make a decision on whether the model was the best one, and recommended that this be the subject of further examination as part of a comprehensive review of the FOI Act.¹⁰

1.10 In the 2014 Federal Budget, the government introduced a measure entitled 'Smaller Government – Privacy and Freedom of Information functions – new arrangements'. The government stated that this measure would achieve savings of

6 Parliamentary Library, *Bills Digest* No. 44, 2014-15, 27 October 2014, p. 4.

7 Attorney-General's Department, Review of Freedom of Information Laws, Terms of Reference, at <http://www.ag.gov.au/consultations/pages/reviewoffoilaws.aspx>.

8 Australian Government, *Review of the Freedom of Information Act 1982 and Australian Information Commissioner Act 2010*, July 2013, p. 3.

9 Australian Government, *Review of the Freedom of Information Act 1982 and Australian Information Commissioner Act 2010*, July 2013, p.24.

10 Australian Government, *Review of the Freedom of Information Act 1982 and Australian Information Commissioner Act 2010*, July 2013, p.36.

\$10.2 million over four years, primarily by abolishing the OAIC and moving its functions to other bodies.¹¹

1.11 Explaining the Budget measure, the Attorney-General said that it was 'in line with the Coalition's commitment to streamline government and reduce duplication to deliver efficient, effective government'. The Attorney stated that:

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.¹²

Purpose of the Bill

1.12 The purpose of the Bill is to implement the new arrangements for privacy and FOI functions announced by the government in the 2014 Budget. The Bill amends various Acts in order to:

- abolish the positions of Freedom of Information Commissioner and Australian Information Commissioner, and the OAIC;
- create an independent statutory office of Australian Privacy Commissioner within the Australian Human Rights Commission (AHRC);
- remove the current two-stage process for review of FOI decisions, with external merits review to be available only from the AAT, following mandatory internal review;
- make the Attorney-General responsible for FOI guidelines, collection of FOI statistics and annual reporting on the FOI Act, in place of the Information Commissioner; and
- make the Commonwealth Ombudsman solely responsible for investigating complaints about FOI administration.¹³

1.13 In his second reading speech on the Bill, Senator Richard Colbeck said the new arrangements set out in the Bill would not affect the legally enforceable right of every person to access official documents under the FOI Act, nor change the substantive criteria governing agencies' and ministers' decisions on FOI requests. The Bill would, however:

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

11 The Hon JB Hockey MP, Treasurer & Senator the Hon Mathias Cormann, Minister for Finance, *Budget Measures: Budget Paper no.2, 2014-15*, 13 May 2014, p. 64.

12 Senator the Hon George Brandis QC, Attorney-General and Minister for the Arts, 'Streamlined arrangements for external merits review', Media Release, 13 May 2014.

13 Explanatory Memorandum, p. 2.

information in place before the establishment of the [OAIC] on 1 November 2010.

The Bill makes it easier for applicants to exercise their rights under privacy and FOI legislation.¹⁴

Key provisions of the Bill

1.14 The Bill repeals the *Australian Information Commissioner Act 2010* (AIC Act), and amends the *Freedom of Information Act 1982* (FOI Act), the *Ombudsman Act 1976* and other Acts. The Bill contains four schedules.

1.15 Schedule 1 amends the FOI Act and other legislation to provide for FOI functions to be undertaken by others upon the abolition of the OAIC. The amendments to the FOI Act include the following:

- Items 10 and 11 amend provisions for the IC to determine that certain information is not required to be included in an agency's information publication scheme. The amendments delete reference to the IC and substitute the Attorney-General;
- Items 14 and 15 repeal the IC's mandate to assist agencies with the information publication scheme, and to review compliance with the scheme. Upon the abolition of the OAIC, these functions will not continue;
- Items 18 and 19 move from the IC to the Attorney-General the power to make determinations of matters that would be unreasonable for an agency to publish on the disclosure log;
- Items 22, 24, and 25 repeal provisions which allow the IC to extend the request processing period when matters are complex or voluminous, or when the initial decision time has expired. Under the new arrangements, processing time can only be extended by agreement between the relevant agency (or minister) and the applicant. Item 34 similarly removes the IC's power to extend the period for internal review;
- Item 35 repeals Part VII of the Act, 'Review by the Information Commissioner'. Various related amendments replace reference to the IC with reference to the AAT, which will be the sole avenue for external merits review of FOI decisions;
- Item 36 substitutes provisions setting out the FOI decisions about which applicants will be able to seek review by the AAT. Generally, applicants will have to have first sought internal review of the decision, where possible. (Internal review is not available where a decision is made personally by a minister or head of agency. In those cases, applicants may appeal directly to the AAT.) Once an internal review decision is made, or deemed to have been made because the processing time has expired, the applicant may appeal to the AAT;

14 Senator Richard Colbeck, Parliamentary Secretary to the Minister for Agriculture, Second Reading Speech, *Senate Hansard*, 30 October 2014, p. 72.

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- Item 43 repeals Divisions 1 and 2 of Part VIIB of the Act, which provide the IC with complaint investigation powers. The Ombudsman will be solely responsible for investigating complaints about agencies' FOI processing. Various consequential amendments are made to reflect this change;
 - Item 47 repeals provisions empowering the IC to declare a person a vexatious applicant. Following the abolition of the OAIC this function will not continue. Where AAT review is sought, the AAT can dismiss an application if it finds that it is frivolous or vexatious;
 - Items 50-52 place responsibility with the Attorney-General for preparing an annual report on the operation of the FOI Act, instead of the IC doing so under the AIC Act; and
 - Item 53 makes the Attorney-General responsible for issuing guidelines under the FOI Act, in place of the IC.

1.16 Schedule 1 also amends the *Ombudsman Act 1976* which provides for the Ombudsman to refer complaints about processing of requests under the FOI Act or the *Privacy Act 1988* (the Privacy Act) to the IC where appropriate. The relevant provisions are amended such that the Ombudsman will be solely responsible for FOI complaints, while complaints relating to the Privacy Act may be referred to the Australian Privacy Commissioner.

1.17 Schedule 2 amends the *Australian Human Rights Commission Act 1986* (AHRC Act) and the Privacy Act, to provide for an independent statutory office of Australian Privacy Commissioner within the AHRC, responsible for exercising privacy functions under the Privacy Act or other Commonwealth laws. Key amendments to the AHRC Act include the following:

- Item 1 amends Section 43A of the AHRC Act to reflect that some staff employed by the AHRC under the *Public Service Act 1999* will be assisting the Privacy Commissioner rather than the AHRC;
- Item 3 repeals the provision for the AHRC to provide administrative services to the IC, and replaces it with provision that the AHRC may provide such services to the Australian Privacy Commissioner as are necessary for the Commissioner to perform the functions conferred on that office by the Privacy Act. A new subsection, 43A(3), requires that staff made available to the Privacy Commissioner are subject to the Commissioner's directions in relation to the functions of that role, not those of the AHRC; and
- Item 7 inserts new section 45A providing that the purposes of the AHRC include the functions of the Australian Privacy Commissioner, for the purposes of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act).

1.18 The key amendment to the Privacy Act contained in Schedule 2 is Item 11, inserting new Division 1, which provides for the appointment and functioning of the Australian Privacy Commissioner outside the framework of the OAIC. The Commissioner is to be appointed by the Governor-General for a 5-year term (as previously), and is in most respects accountable directly to the Governor-General or

the minister, rather than the President of the AHRC, although the Commissioner is designated an 'official' of the AHRC for the purposes of finance law under the PGPA Act. The Commissioner may delegate certain functions to staff of the AHRC.

1.19 Item 14 of Schedule 2 repeals Part VII of the Privacy Act, abolishing the Privacy Advisory Committee. (The repeal of the AIC Act under Schedule 3 will also abolish the Information Advisory Committee.)

1.20 Schedule 3 repeals the AIC Act in its entirety, and makes consequential amendments to other legislation, effectively abolishing the IC, FOI Commissioner, and the OAIC. (The Privacy Commissioner is also removed, but is replaced by the Australian Privacy Commissioner under the new provisions in Schedule 2.)

1.21 Under clause 2 of the Bill, its substantive provisions will take effect on 1 January 2015. Schedule 4 sets out transitional arrangements, including the following:

- unresolved review applications with the IC at the commencement date will be sent to the AAT. The AAT's application fees will not be levied in such cases;
- following commencement, applicants may still apply for AAT review of decisions made by the IC prior to commencement, and retain the right to further appeal to the Federal Court on questions of law;
- FOI processing complaints made to the IC and not completed by commencement will be transferred to the Ombudsman;¹⁵
- upon commencement, the existing Privacy Commissioner will become the Australian Privacy Commissioner under the new provisions, for the balance of that person's appointment and on the same terms and conditions;
- things started but not finished by the IC for a privacy purpose can continue to be done by the Australian Privacy Commissioner; and instruments made for a privacy purpose prior to commencement which refer to the IC, Privacy Commissioner or OAIC will now be deemed to refer to the Australian Privacy Commissioner; subject to determination otherwise by the minister;
- employees of the OAIC immediately before the commencement day will be transferred to the AHRC by determination of the Australian Public Service Commissioner under the Public Service Act, and remain on the terms and conditions of their present enterprise agreement until the President of the AHRC negotiates a new enterprise agreement;
- the Attorney-General may make other rules prescribing matters of a transitional nature relating to the amendments and repeals made by the Bill.

15 By agreement between the agencies, the Ombudsman began accepting complaints directly on 1 November 2014, and all complaints received by the OAIC since that date are being transferred to the Ombudsman. Office of the Australian Information Commissioner, *Submission 26*, pp 2-3.