Submission to the Standing Committee on Legal and Constitutional Affairs

Freedom of Information Amendment (New Arrangements) Bill 2014 Inquiry

Submission of the Accountability Round Table

Summary

The proponents of this Bill have acknowledged to the Parliament that their intention is to return to the FOI system as it was before the reforms of 2010. Those reforms were introduced because that system had failed. Nothing has been put forward in this Bill to address those problems. Instead, the Bill removes the primary mechanism provided to address that failure by abolishing the Independent Office, the 0AIC, and, while retaining a number of the powers that were given to the 0AIC to enable it to monitor, guide and advise and promote the Right to Know objectives of the legislation, the Bill gives them to the Executive Government through the Attorney-General of the day. This in particular includes the power to provide guidelines on the application and interpretation of the objects of the legislation. If we remember our history, the lesson to be learnt is that that this will ultimately guarantee the failure of the proposed system.

The arguments advanced in support of the Bill are flawed;

1. *The argument that Combining oversight of privacy and FOI functions in the one office, the 0AIC has created an unnecessarily complex system.* This argument might, if sound, justify the separation of functions. It does not warrant the closure of the OAIC.
2. *The focus is solely on the external merits review function of the OAIC.* This ignores its critical role as an independent monitor and guider of the system and adviser to the public and government and the Parliaments in monitoring and guiding the system
3. *It is assumed that the merit review function of the OAIC is no different from other merit reviews on other issues and should therefore be handled in the same way.* This ignores the significance of the FOI system and its fundamental role in our democracy and the reality that internal reviews of FOI applications, are conducted by people in a position of conflict of interest who need the guidance and assistance of an independent office not the Attorney-Gen of the day, who will also be in a conflict of interest position.
4. *The argument that the proposed changes will streamline, simplify and reduce the cost of the review process.* Consideration does not appear to have been given to the reality that

- the independent review by the information Commissioner is available for each of the initial access decision and the internal review of that decision. Under the Bill, the independent review is to be provided by the AAT but cannot be pursued unless there has been an internal review
- there is no charge for the independent review by the Information Commissioner. For a review by the AAT a fee of $861.00[1] is payable.

5. *Repairing the budget.* It is said that the changes will result in a net benefit to the budget of $2.55 million each year. It is not clear how saving 0.0006274% of annual budget spending will help to repair the budget. The arguments advanced do not appear to address the task of balancing that against the cost to open and accountable government and the financial impact that the weakening of open and accountable government will cause.

The arguments so far advanced also fail to address

- the assessment of the 2013 Hawke Review that the OAIC establishment had been a very valuable and positive development in oversight and promotion of the FOI Act and the reforms were achieving their objectives. The review recommended that further reviews be carried out.
- the 2013-14 0AIC Annual Report's analysis of the significant improvements in expediting its independent reviews.

Open and accountable government has long been recognised as critical for good government, the functioning of our parliamentary democracy and reducing the risk of corruption. It is also now recognised as critical for domestic and international economic growth.

The present government committed itself to strengthening open and accountable in its election policy document – "Our Plan". The commitment was repeated for the Government during the Second Reading Speeches on the Bill in the House of Representatives. That commitment is part of our international commitments under the UNCAC, G 20 and Open Government Partnership.

In passing the 2010 reform legislation, the Members of that Parliament honoured that commitment and the largely forgotten ethical and legal principle that, as our elected representatives, they hold a position of public trust which requires that their decisions and exercise of power be taken in the interest of the beneficiaries -- the people of Australia. This requires that they put the public interest ahead of their own interests.

We submit that, on a proper and fair analysis of the evidence available and the relevant arguments, the public interest requires that this Bill should not be passed by the Parliament.

Detailed Submission

This submission will focus on the effect of the proposed changes to the present Freedom of Information system.

The Freedom of Information system is an integral and essential part of the National Integrity System. To inhibit or constrict public access to information held by government is to weaken Australia's National Integrity System.

To understand the scope and significance of the proposed changes it is necessary to understand the present system and its objectives.

The present system.

The Amending Bill focuses on the major reforms made in the 42nd Parliament.

A. **Right to Know**

The reforms introduced a presumption of openness and maximum disclosure; access to information was to be provided by government unless there was an overriding reason not to do so. Grounds for denying access were reduced - such as excluding potential loss of confidence in or embarrassment to government. Agencies and Ministers were also required to publish categories of information and lists of information released in response to requests.

It appears that these provisions are not sought to be changed by this Bill.

But it was realised at that time that to pass laws to that effect would not be enough to achieve the desired changes. Something more was needed to ensure that the changes were effective.

It is this aspect that The Bill effectively seeks to repeal.

B. The Establishment of the Office of the Australian Information Commissioner

The independent Office of the Australian Information Commissioner (OAIC) was established and given Privacy and FOI functions. In respect of the FOI functions, two new statutory offices were created - the Australian Information Commissioner (Information Commissioner) supported by the Freedom of Information Commissioner (FOI Commissioner).

In addition to acting as the independent reviewer of FOI access decisions made by agencies and ministers, including complaints about the handling of access requests (the Ombudsman retained the power to investigate such complaints where more appropriate or effective), the Information Commissioner was to

- act as independent monitor of FOI matters, including Information Commissioner reviews (IC reviews), audits, surveys, publication of FOI guidelines and fact sheets, and provide annual reports;
- provide discussion groups, training sessions, presentations to the community and government;
- be available to assist both the public and agencies if requested;

and generally to promote awareness and understanding of the FOI Act and its objects.[2]

C. Applications for access to information

The reforms simplified the request procedure, provided an independent specialist review by the Information Commissioner for either or both of each original access decision and each internal review of it, removed application fees, and reduced processing charges and excluding them for requests for personal information.

The Proposed changes

Specific proposed changes include the following.

- The office of the Australian Information Commissioner (OAIC) will be abolished.
- The Administrative Appeals Tribunal will have the sole responsibility for external merits review of FOI Decisions. Mandatory internal reviews of FOI decisions must be sought

[2] Australian Information Commissioner Act 2010s8,s11.

before a matter can proceed to the Administrative Appeals Tribunal. The Tribunal will receive an unspecified funding boost to assist with processing FOI Reviews

- The Commonwealth Ombudsman will be solely responsible for investigating complaints about actions taken by an agency under the Freedom of Information Act (the FOI Act).
- The Attorney General will be responsible for the FOI guidelines (which can range from the construction of the legislation - including the objects clause- to administrative and review priorities), the collection of statistics on agency and ministerial FOI activity and the annual report on the operation of the FOI Act. [3]

The reasons advanced for the proposed changes

In Parliament,[4] the Government has acknowledged that what is being proposed is in substance a return to the previous system, including for making FOI applications.

(a) *Privacy and FOI functions*. The case advanced for the overall changes proposed is that they will "streamline arrangements for the exercise" of these functions. It is said that the purpose of establishing the OAIC was "to bring together oversight of privacy protection and access to government information into one agency". It is said that this created an unnecessarily complex system, with multiple levels of external merits review for FOI matters. It is also said that it led to duplication in FOI and privacy complaint handling which had contributed to delays in these matters.

This argument might justify separation of the functions but it does not justify the demise of one of the 2 bodies concerned.

(b) *FOI functions*. As to the exercise of these functions, the focus appears to be on the OAIC's external merits review function. The value of its other FOI and open government functions appear to have been ignored. It is asserted that

- the Bill will "create administrative efficiencies and reduce the burden on FOI applicants by providing that" the AAT "is the sole external merits review body. This aligns with other merits review processes across the Australian Government."

[3] See Explanatory Memorandum, Cl. 2;
http://www.aph.gov.au/Parliamentary_Business/Bills_LEGislation/Bills_Search_Results/Result?bId=r5350

[4] Generally see explanatory memorandum and second reading speeches.
http://www.aph.gov.au/Parliamentary_Business/Bills_LEGislation/Bills_Search_Results/Result?bId=r5350

- to abolish the OAIC "simply removes an unnecessary and anomalous layer of external merits review for FOI decisions." "This will deliver an improved and simplified merits review system ... and will realign responsibility and accountability for external merits review of FOI decisions with the process applicable to other government decisions."

(i) Are the merit reviews the same?

On what basis can FOI "merit reviews" be considered to be the same as merit reviews of other issues and therefore able to be handled in the same way within government? The FOI area is a special area because it is directly concerned with a fundamental democratic right and obligation– our right to know what is happening and government's obligation to be open. The internal reviews are conducted by people with a personal interest in the outcome that extends beyond the immediate application. They are in a position of conflict of interests. The reforms provided the OAIC with the power and purpose to give guidance and support this difficult position and to improve the internal review system. If the OAIC is abolished and such powers, including the power to publish guidelines, are conferred on the Attorney- General of the day, that guidance and support will thereafter be provided by persons also in a conflict of interest position.

(ii) Streamlining and simplifying

Will the proposed changes streamline and simplify the review process? While it appears that the Bill seeks no changes to the

- rights of people to seek access to documents of agencies or ministers,
- objects of the Act or
- matters to be considered in responding to a request,

the proposed replacement review of decision system will require applicants seeking an independent review of an FOI decision to first seek an internal review before it can have it reviewed by the AAT. This is not presently required for reviews by the Information Commissioner; they can be sought from the initial decision as well as the internal review decision. In addition, to obtain an independent review by the AAT they will have to pay a substantial fee of $861.00[5] for that service. It is argued that

[5] http://www.aat.gov.au/FormsAndFees/Fees.htm

the proposed changes will ensure access to low cost timely reviews for applicants.[6] We submit that it will have the opposite effect.

The Government acknowledges that it is in essence seeking to return to the previous system. That system was significantly reformed by the 42nd Parliament because it was seen as unsatisfactory, not just in the processes for the review of decisions denying access to information, but also because that the system was failing in its task of assisting open and accountable government. Restoring the former review system, and requiring it be pursued, without the discipline provided and guidance and consistency given by the independent and expert body, the OAIC, is likely to defeat the expressed intent to streamline the review operation and only add to the cost to applicants.

If the concern is for the improvement of the internal review system and the reduction of appeals, we should maintain the present system. Over time such a system should improve the standards of initial responses to requests for access.

(iii) Helping the budget crisis

A further justification advanced for the Bill is that the change will assist in repairing the Budget. It is said that the measures in the Bill will save $10.2 million over four years, i.e. $2.55 million each year. How that figure is arrived at does not appear to have been explained. Whether it includes the additional funding foreshadowed for the AAT and how much that will be is a matter that does not appear to have been publicly addressed.

A lot of good can be done with $2.55 million dollars. To put that saving in context, however, it should be compared with the annual budget spending of the federal government. In the last financial year the budget papers reveal an expenditure of $406.4 billion. Is it worth seriously weakening the government integrity system to save 0.0006274% of government annual spending?[7] And what will be the costs to the budget of reverting to what was, and still is, accepted to be a deficient system. And what will be the cost to open and accountable government of the loss of the present responsibilities undertaken and services provided by the OAIC. For the OAIC was introduced to provide much more than just an independent review system.

Matters not addressed

[6] See explanatory memorandum and second reading speeches.
http://www.aph.gov.au/Parliamentary_Business/Bills_LEGislation/Bills_Search_Results/Result?bId=r5350
[7] http://www.budget.gov.au/2013-14/content/fbo/html/01_part_1-01.htm

(a) Control of the system.

A very important consideration is that the result of passing this legislation will be that the Executive Branch, through the Attorney General of the day, will have express statutory control of a very important part of our National Integrity System, the role of which is to make government more open to scrutiny. This carries the serious risk of misuse of the powers given, such as the guideline power, and of the internal decision and review system failing as a result.

We have been unable to find any public indication from those proposing the new system as to whether such aspects have been considered and, if so, why it is thought desirable to dispense with the independent statutory office presently charged with these important tasks.

(b) The 2013 Hawke Review

No consideration appears to have been given to the findings of the Hawke Review.

The operation of the new system was critically examined by Dr Hawke.[8] He summed up his views in his covering letter to the Attorney-General report as follows:

> "In essence, the Review found the recent reforms to be working well and having had a favourable impact in accordance with their intent. It 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".

In the Report he also commented[9]

> "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".

Overall he found that the 2010 reforms were achieving their objectives but there were matters that should be reviewed including the system for reviewing decisions on FOI applications.[10] But what is quite clear is he did not recommend repeal of the OIAC approach to strengthen the FOI system. If his assessment has been considered, on

[8] Review of the Freedom of Information Act 1982 and Australian Information Commissioner Act 2010 http://www.ag.gov.au/consultations/pages/reviewoffoilaws.aspx

[9] At p 24
[10] AT p.36

what basis has his assessment been rejected? There does not appear to be any express public reliance by the proponents of the Bill on the issues raised in the review.

An initial and ongoing issue had been delay in handling applications for access and for reviews. As to the latter, the issues appear to have been largely a lack of resources and the time inevitably needed in a new organisation to develop the best approaches to the managing and handling of review applications. The Annual Report for 2013-14 reveals an increase in applications for reviews (up 3%) while at the same time a significant increase in the number of reviews carries out (up 54%) and a corresponding reduction in the number of outstanding matters (56%), waiting time for the oldest review reduced (from 206 to 40 days) and the number of reviews outstanding (by 27%).

Why Abolish the OAIC?

We find the situation puzzling in the extreme. On the one hand the case put for change appears to have been carefully prepared in a number of respects. For example, the Explanatory Memorandum addresses the issues of compliance with the clauses 2 and 17 of the International Convention on Civil and Political Rights and argues the case for compliance. But then it does not refer to clause 19 which provides

> "1. Everyone shall have the right to hold opinions without interference.
>
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, or in print, in the form of art, or through any medial of his choice."

The clause acknowledges a right to receive information. Should it not also have been the subject of analysis in the Explanatory Statement? Why did that not occur?

Similarly the case has been otherwise carefully put together but, if our analysis is sound, fails to take into account highly relevant information.

It is also difficult to reconcile the approach taken in the case presented by the proponents of the Bill with the statement by the Parliamentary Secretary to the Minister of Communications in the Second Reading debate of the Bill, that "The Abbot Government is strongly committed to transparent, accountable and open government "[11]. But that is was stated in the Government's election policy document "Our Plan".[12] Such a commitment is also expected of Australia as a

[11] House of Representatives Debate on the Bill, 28 October
[12] http://lpa.webcontent.s3.amazonaws.com/realsolutions/LPA%20Policy%20Booklet%20210x210_pages.pdf; see section 21.

signatory to, or member, actual or provisional, of the UNCAC, G20 and the Open Government Partnership.

The importance of open and accountable government has long been recognised. An on-going commitment to it is one of the most important commitments required of those we elect to public office. It is critical for

- good government,
- the functioning of our parliamentary democracy and
- reducing the risk of corruption; for corruption thrives on secrecy.

It is also now recognised as critical for domestic and international economic growth. Economic growth was also a commitment in the Coalition's "Our Plan"[13]. The British Prime Minister, David Cameron, late last year spoke eloquently on the subject.[14] He said

> " --the best way to ensure that an economy delivers long-term success, and that success is felt by all of its people, is to have it overseen by political institutions in which everyone can share. Where governments are the servants of the people, not the masters. Where close tabs are kept on the powerful and where the powerful are forced to act in the interests of the whole people, not a narrow clique. That is why the transparency agenda is so important."

That is not to say that it is easy. The Prime Minister commented later:

> "So I want to finish by saying this: none of what I've outlined today is easy for us politicians. Transparency brings risks – indeed we often find that out here on a day-to-day basis – but it is absolutely critical. Time and again, history has shown us that open governments make for successful nations. From the children across Africa who depend on it, to the pensioners in this country who rely on this, it matters. So let's keep the momentum up, let's keep going, and when history comes to be written let us make sure that this generation was not found wanting".

The proposed Bill seeks to remove the very important legislation passed in 2010 to reform the then FOI system to increase the openness and accountability of our Commonwealth Government and thereby strengthen its integrity. In doing so, the Members of that Parliament acted in the public interest thereby honouring their fiduciary obligations to the people of Australia. As explained by Sir Gerard Brennan speaking last year at the presentation of the ART Integrity Awards –

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[13] http://lpa.webcontent.s3.amazonaws.com/realsolutions/LPA%20Policy%20Booklet%20210x210_pages.pdf

[14] David Cameron, speaking at the 2013 Open Government Partnership Summit; https://www.gov.uk/government/speeches/pm-speech-at-open-government-partnership-2013 ; And see the Speech give recently by the President of the USA, like the UK, also a founding member of the OGP at the recent New York OGP Summit - http://www.whitehouse.gov/photos-and-video/video/2014/09/24/president-obama-speaks-open-government-partnership-meeting#transcript .

> It has long been an established legal principle that a member of Parliament holds "a fiduciary relation towards the public" and "undertakes and has imposed upon him a public duty and a public trust" … The duties of a public trustee are not identical with the duties of a private trustee but there is an analogous limitation imposed on the conduct of the trustee in both categories. The limitation demands that all decisions and exercises of power be taken in the interests of the beneficiaries and that duty cannot be subordinated to, or qualified by the interests of the trustee. [15]

It must also be acknowledged, however, that we, the people, and our elected representatives and public servants, appear to have forgotten this principle which states the ethical and legal nature of our relationship and our responsibilities. That being the case, we should not be surprised if it has been overlooked in this instance.[16]

Conclusion

Applying this guiding principle, we submit that, on a proper and fair analysis of the evidence available and the relevant arguments, it is clearly in the public interest that this Bill should not be passed by the Parliament. That is not to say that ongoing independent review of the present system should not occur. Plainly it should occur in due course for this system - like all parts of our National Integrity System. However, any such reviews should seek to improve and strengthen Australian's National Integrity System, not inhibit or constrict public access to information held by government thereby weakening the National Integrity System and putting good governance at risk.

The Hon. T.H.Smith QC
Chair, Accountability Round Table

[15] http://www.accountabilityrt.org/integrity-awards/sir-gerard-brennan-presentation-of-accountability-round-table-integrity-awards-dec-2013/

[16] http://www.accountabilityrt.org/wp-content/uploads/2014/10/Smith-Tim-Smith-Tim-Paper-021014-Urban-Dev-Conf-Final_4_.pdf ; and http://www.accountabilityrt.org/wp-content/uploads/2009/11/Smith-T-2014-Lyceum-U3A-Speech-final-_3_.pdf