



## **Freedom of Information Amendment (New Arrangements) Bill 2014**

**Submission to the Legal and Constitutional Affairs Legislation Committee**

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# 1. Introduction

The Public Interest Advocacy Centre (PIAC) welcomes the opportunity to provide a submission to the Senate Standing Committee on Legal and Constitutional Affairs (the Committee) to assist its review of the Freedom of Information Amendment (New Arrangements) Bill 2014 (New Arrangements Bill).

PIAC is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues. Through its legal casework, PIAC has direct experience of the operation of Freedom of Information (FOI) legislation.

The changes proposed in the New Arrangements Bill will have far-reaching consequences. FOI forms the underpinning of transparent and accountable government, which is central to the proper functioning of Australia's democracy. PIAC believes that many of the proposals in this Bill will ultimately act as a deterrent to those who seek to exercise their right to information under the *Freedom of Information Act 1982* (Cth) (FOI Act) and will undermine the broader objectives of the Act. PIAC therefore opposes many of the radical changes proposed by the Bill, particularly in the absence of a strong evidence-based case for these changes and without a proper process of public consultation. If the Committee considers that the New Arrangements Bill should be passed, PIAC makes a number of recommendations in this submission that would go some way to mitigating its impact on open and transparent government.

## 1.1 The Public Interest Advocacy Centre

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights;
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the (then) Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from NSW Trade and Investment for its work on energy and water, and from Allens for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

## 1.2 PIAC's work on freedom of information

PIAC has a long-standing interest and expertise in the operation of the FOI Act and comparable legislation in other Australian jurisdictions. For over 15 years, PIAC has represented individuals and groups exercising their right to access government-held information, the release of which is a matter of public interest. This includes undertaking a number of test cases under FOI legislation.<sup>1</sup> More recently, PIAC successfully sought access, on behalf of a consortium of public interest organisations, to important information regarding Australia's role in the conflicts in Iraq and Afghanistan.<sup>2</sup>

Based on its legal casework experience, PIAC has made a number of submissions to consultations and inquiries regarding the development of FOI legislation and reviews of its operation. These include submissions to:

- the statutory review of FOI laws undertaken by Dr Hawke in 2012 (the Hawke Review),<sup>3</sup>
- the Australian Information Commissioner's review of charges under the *Freedom of Information Act 1982* in November 2011,<sup>4</sup>
- the Senate Finance and Public Administration Committee on the Commonwealth FOI reforms in 2009;<sup>5</sup> and
- the Commonwealth Government in response to its exposure drafts of the Freedom of Information Amendment (Reform) Bill 2009 and the Information Commissioner Bill 2009.<sup>6</sup>

PIAC continues to represent a number of clients in their applications for important information via the FOI Act. By assisting and representing such individuals and groups – noting that they do not have the means to obtain paid representation elsewhere – PIAC plays an important role in contributing to the achievement of the objectives of the FOI Act.

## 2. General comments on the proposed reform

The Government has stated the Bill 'simply removes an unnecessary and anomalous layer of external merits review for freedom of information decisions'.<sup>7</sup> However, as detailed below, the Bill goes much further than removing an option for merits review.

<sup>1</sup> See, for example, *Searle Pty Ltd v PIAC* (1992) 102 ALR 163 and *Re Organon (Australia) Pty Ltd and Department of Community Services and Health* (1987) 13 ALD 588.

<sup>2</sup> This work was covered extensively in the media. See, for example, Davies, A and Snow, D 'Little firm exposes big mess', *Sydney Morning Herald* (4 July 2011). The full repository of documents is available at <http://military.piac.asn.au>.

<sup>3</sup> Cohen, M et al *Review of Freedom of Information Laws* (7 December 2012) Public Interest Advocacy Centre, available at <http://www.piac.asn.au/publication/2012/12/review-freedom-information-laws>.

<sup>4</sup> Santow, E and Simpson, L *Freeing up government information* (2011) Public Interest Advocacy Centre, available at <http://www.piac.asn.au/publication/2011/12/freeing-government-information>.

<sup>5</sup> Simpson, L *Freedom of information repackaged: submission to the Senate Finance and Public Administration Committee on the Freedom of Information Amendment (Reform) Bill 2009 and the Information Commissioner Bill 2009* (2009) Public Interest Advocacy Centre, available at <http://www.piac.asn.au/publication/2010/02/100129-piac-sub-re-cth-foi-reforms>.

<sup>6</sup> Simpson, L *Putting public interest at the heart of FOI: Submission in response to the Commonwealth Government's exposure draft of the Freedom of Information Amendment (Reform) Bill 2009 and the Information Commissioner Bill 2009* (2009) Public Interest Advocacy Centre, available at <http://www.piac.asn.au/publication/2009/05/090519-piac-fedfoisub>.

<sup>7</sup> Commonwealth, *Parliamentary Debates (Proof)*, House of Representatives, 28 October 2014, p 92, Parliamentary Secretary to the Minister for Communications, The Hon Paul Fletcher MP, p 92.

PIAC believes that, should the New Arrangements Bill be passed in its current form, it will lead to a weaker FOI regime. This is due to a number of factors, including:

- the loss of a body that is tasked with guiding and advising government agencies as to how to best comply with the FOI Act;
- the loss of expertise specific to the resolution of disputes regarding access to and publication of information; and
- the high application fee in the Administrative Appeals Tribunal (AAT) which will deter many would-be applicants, thereby preventing proper scrutiny of decisions to restrict the right of access to information under the FOI Act.

On the other hand, PIAC does welcome the Bill's proposal to place the onus in AAT proceedings on the relevant Minister or agency to establish that an impugned decision is justified or that 'the Tribunal should give a decision adverse to the applicant who made the request for the information'.<sup>8</sup> This is an appropriate change that supports the pro-disclosure culture that the 2010 reforms aimed to achieve. It also responds appropriately to the inherently uneven relationship between the FOI applicant and the agency, the latter having full access to the disputed documents and is aware of their content and therefore is in a much better position to prove that any exemptions properly apply.

Other parts of the New Arrangements Bill, however, are of great concern.

## **2.1 Importance of the FOI regime**

The principle of open government is the hallmark of a well-functioning democracy. An FOI regime is a central plank of open government, ensuring transparency and accountability for decisions made by those who have been elected to govern. It is also fundamental to the freedom of expression embraced by Australian society, and protected by international law,<sup>9</sup> as well as supporting the fulfilment of representative and responsible government enshrined in the Australian Constitution.

These objectives are set out in the FOI Act itself. Section 3 provides the purpose of the FOI Act includes: promoting Australia's representative democracy by providing for public participation leading to better-informed decision-making and increasing scrutiny, discussion, comment and review of governmental activities.<sup>10</sup> The Act recognises that information held by Government is a national resource, and access to it should be provided promptly and at the lowest reasonable cost.<sup>11</sup> In assessing the potential impact of the radical changes in the New Arrangements Bill, these statutory objectives must be borne in mind.

## **2.2 New Arrangements: savings guaranteed?**

If the New Arrangements Bill is passed, it will abolish the Office of the Australian Information Commissioner, which has only been in place since November 2010. The Government's motivation for proposing the change is to make it 'easier for applicants to exercise their rights under privacy and FOI legislation' by delivering 'an improved and simplified merits review system

<sup>8</sup> Item 39, Schedule 1 New Arrangements Bill.

<sup>9</sup> See, for example, Article 19(2) of the *International Covenant on Civil and Political Rights*, opened for signature on 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), ratified by Australia on 13 August 1980.

<sup>10</sup> Section 3(2) FOI Act.

<sup>11</sup> Section 3(3) and (4) FOI Act.

for FOI decisions'.<sup>12</sup> While PIAC would support that goal, our FOI experience suggests that the Bill is highly unlikely to make the FOI regime more accessible; indeed PIAC fears it will do the opposite. Similarly, PIAC believes it unlikely that the amendments will make the FOI regime more efficient.

PIAC has worked closely with the OAIC since its inception – both in our role representing clients seeking review of FOI decisions through the OAIC's merits review process and also by the Attorney-General's appointment of PIAC's chief executive officer to the Information Advisory Committee. Constrained in its operation by insufficient resources, the OAIC has in some ways not been as effective and efficient as PIAC first hoped. Certainly the delays in processing have been significant and have risked undermining the purposes of the FOI Act.

PIAC has in previous submissions recommended that the merits review function of the IC be retained, recognising that the introduction of a more informal external review process, as opposed to review by the AAT, was an important step in making FOI processes more accessible and better able to achieve the legislated objectives. PIAC also believes that it is important that a review be available 'on the papers' without requiring the applicant to pay an application fee. To address the problems PIAC experienced in its interaction with the OAIC, PIAC made a number of recommendations to improve its operation, including:

- the insertion of statutory timeframes setting deadlines for IC review and deemed refusal periods;<sup>13</sup>
- a requirement that the IC establish and publish case-management procedures consistent with those adopted by the AAT or Federal Court to ensure that matters are properly dealt with in a timely manner; and
- the retention of AAT review as an option for applicants, particularly where complex issues of statutory interpretation arise which the applicant considers will be more appropriately dealt with by the AAT.<sup>14</sup>

PIAC has also submitted that the OAIC must be adequately resourced to fulfil all its functions under the FOI Act.<sup>15</sup>

PIAC welcomed the Hawke Review and many of its recommendations. PIAC has also welcomed recent data that indicates the functional problems in the operation of the OAIC are in the process of being addressed. The OAIC's Annual Report for 2013-14 indicates that progress is being made in reducing delays in the OAIC review process, with the backlog of FOI reviews reduced and the length of time taken to action IC review applications decreased.<sup>16</sup>

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<sup>12</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 2 October 2014, 16-11077, Minister for Immigration and Border Protection, The Hon Scott Morrison MP.

<sup>13</sup> For example, the Independent Review panel has suggested that the Queensland FOI legislation should specify that there are 20 working days for an IC mediation, 20 working days are then allowed for the parties to make additional submissions if they fail to reach an agreement during mediation, and a further 40 working days for the IC to reach a decision about an external review. Where those time frames are not met, the IC review would be considered a deemed refusal. See the Freedom of Information Independent Review Panel, *The Right to Information: Reviewing Queensland's Freedom of Information Act* (2008), 250-53.

<sup>14</sup> Cohen, M *Review of Freedom of Information Laws*, above note 3, at page 9.

<sup>15</sup> Cohen, M *Review of Freedom of Information Laws*, above note 3, at page 5.

<sup>16</sup> Office of the Australian Information Commissioner *Annual Report 2013-14* (September 2014), at page 7 and Chapters 6 and 7, available at <http://www.oaic.gov.au/images/documents/about-us/corporate-information/annual-reports/annual-report-2013-14/Office-of-the-Australian-Information-Commissioner-Annual-report-2013-14.pdf>.

It is unfortunate that the OAIC is slated for abolition at the point where it is beginning to address its operational issues and make a real difference to the functioning of the FOI regime. An opportunity is also being missed to improve the Office on the basis of the detailed recommendations put forward in the Hawke Review. PIAC believes that while the OAIC's operations could be improved, it is no solution to abolish the body altogether – especially in the absence of a strong evidentiary basis for this change. PIAC submits that the parliamentary passage of the Bill should be deferred to allow for a comprehensive inquiry to be conducted, taking into account the recommendations made in the Hawke Review and properly assessing the widespread impact of the abolition of the OAIC.

#### ***Recommendation – consultation***

*PIAC recommends that the Bill be deferred until a comprehensive inquiry and consultation on the Bill's proposals can take place, taking into account the proposals to improve the OAIC made in the Hawke Review.*

The Government has stated that the abolition of the OAIC will save \$10.2 million over four years.<sup>17</sup> As far as PIAC is aware, however, there is no publicly available cost-benefit analysis that weighs these savings with additional costs that these changes will induce elsewhere within government. For example, there will undoubtedly be an influx of review applications to the AAT, likely involving an increase in unrepresented litigants. This will necessarily involve an increase in the cost of the operation of the AAT.<sup>18</sup> Without a centralised body overseeing FOI, there will also be the loss of precedents to establish best practice and streamline FOI processes across all government departments, which have the potential to greatly improve the efficiency – and therefore reduce the cost of FOI for government.<sup>19</sup>

Accordingly, while there may well be some initial savings made by the abolition of the OAIC, it is far from clear what will be the net, long-term financial impact of the Bill. If the Government has indeed undertaken such a cost-benefit analysis, PIAC urges for it to be released.

#### ***Recommendation – release of cost benefit analysis***

*PIAC urges the Government to release any cost-benefit analysis or impact assessment that has been undertaken to support the New Arrangements Bill.*

## **2.3 What will be lost if the New Arrangements Bill is passed?**

### **2.3.1 Loss of relevant expertise in FOI review**

The New Arrangements Bill will see a transfer of the function of complaints and review of FOI decisions from the OAIC to the Commonwealth Ombudsman and the AAT respectively. No agency will be assigned the OAIC's current own-motion investigations function. PIAC is

<sup>17</sup> 2014-15 Budget measure, *Smaller Government – Privacy and Freedom of Information functions – new arrangements*, available at [http://www.budget.gov.au/2014-15/content/bp2/html/bp2\\_expense-05.htm](http://www.budget.gov.au/2014-15/content/bp2/html/bp2_expense-05.htm).

<sup>18</sup> In the Second Reading Speech (see above, note 12) in the House of Representatives the Minister for Immigration, The Hon Scott Morrison MP, stated 'The tribunal will receive a funding boost to assist with processing FOI reviews', but it is not clear what that increase in funding will be.

<sup>19</sup> See, for example, the *Open Sector Public Information Principles* developed by the OAIC that are intended to build a culture of openness in government, available at <http://www.oaic.gov.au/information-policy/information-policy-resources/information-policy-agency-resources/principles-on-open-public-sector-information>.

concerned that this attempt at streamlining services will reduce significantly the scope for government to ‘self-correct’ by investigating systemic problems in FOI practice.

The Government has stated that providing only for FOI decisions to be determined by the AAT will align FOI legislation ‘with other merit review processes across the Australian Government’.<sup>20</sup> However, it will also mean the loss of expertise that the OAIC has developed since its inception in the operation of the FOI Act, as well as the removal of a body equipped with a range of powers and statutory functions to improve the ability of government departments to deal with FOI requests properly in the first instance. Should the OAIC be abolished, the experience and knowledge capital the OAIC has developed in determining often difficult questions of whether information should be publicly released or withheld will be lost.

In past submissions PIAC has noted its concern that the two paths of merit review may potentially be a cause of delay in the FOI process.<sup>21</sup> If the Government is aiming to simplify the FOI process and remove duplication by abolishing a level of external merits review, PIAC submits that this would be best achieved by removing the option to make an application for merits review to the AAT – not by abolishing the OAIC. The AAT could potentially remain an option for the resolution of complex legal questions arising from the operation of the Act, but efficiency will be far better served by retaining the cost effective, specialised merits review function currently exercised by the OAIC.

### **2.3.2 A cost-effective solution for FOI review**

Under current arrangements, there is no application fee for a merits review by the OAIC. If the New Arrangements Bill is passed, the only option to review an access decision will be by application to the AAT. The application fee to lodge an appeal in the AAT is \$861.<sup>22</sup> An application will be dismissed if the fee is not paid.<sup>23</sup>

The fee will be reduced to \$100 where an applicant: has been granted legal aid; holds a health care or benefit card or is a pensioner; or is in prison; is a child; is in receipt of youth allowance, austudy or ABSTUDY.<sup>24</sup> The fee may also be reduced if the Registrar, District Registrar or Deputy Registrar considers that payment of the fee would cause financial hardship to the person, taking into account such factors as the applicant’s income, whether the fee would prevent them from buying food or other essentials and any debts incurred.<sup>25</sup> An applicant will also bear the costs and disbursements associated with the determination of their application.

During parliamentary consideration of the Bill in the House of Representatives, several concerns were raised about the deterrent effect of the AAT application fee.<sup>26</sup> For many of PIAC’s disadvantaged clients, the fee will prevent them from bringing an application to review an access

<sup>20</sup> Stated in the Second Reading Speech, above note 12.

<sup>21</sup> Simpson, L *Putting public interest at the heart of FOI*, above note 6, at page 27.

<sup>22</sup> Regulation 19 *Administrative Appeals Tribunal Regulations 1976* (AAT Regulations). The fee is increased biannually: Regulations 19A, 19B.

<sup>23</sup> Section 69C *Administrative Appeals Tribunal Act 1975* (Cth).

<sup>24</sup> Regulation 19(6) AAT Regulations.

<sup>25</sup> Regulation 19(6A) AAT Regulations.

<sup>26</sup> See the Second Reading Debate on the Freedom of Information (New Arrangements) Bill 2014: Commonwealth, *Parliamentary Debates*, House of Representatives, Tuesday 28 October 2014, per the Shadow Attorney-General, Mark Dreyfus QC MP at page 86; Sharon Claydon MP at pp 87-88; Graham Perrett MP at p 89.

decision. While the Government has adverted to the reduced fee as a safeguard for impecunious applicants,<sup>27</sup> PIAC's experience suggests that the possibility that an application fee may be reduced should not be overstated as a solution to the concerns raised about minimising the accessibility and availability of AAT reviews. The bar is set high for eligibility for fee reduction in the AAT. Of the 7,623 applications for review received by the AAT in 2013-14,<sup>28</sup> only 212 applications were found to be eligible to pay a reduced fee and 99 fee applications were reduced on financial hardship grounds.<sup>29</sup> (There were only 35 applications lodged in the AAT to review an FOI decision; it is not clear whether the fees reduced were applied to these FOI applications.)<sup>30</sup> In contrast, the OAIC resolved 646 applications for IC review in 2013-14, which was an increase of 54.2% on the previous year, handled 16,491 phone enquiries and answered 3,789 written inquiries – none of which would have attracted an application fee.<sup>31</sup>

There are also reasons of principle that mean the imposition of fees for the review of FOI decisions is inappropriate. FOI legislation is about the fundamental right of individuals to access information. Successful applications shed light on the workings of government – something that is critical to the functioning of Australia's constitutionally-protected system of representative and responsible government. Given the high threshold set for reducing the application fee in the AAT, many of the sorts of disadvantaged people that PIAC represents will be prevented from applying for a review of an access decision. The loss of the free merits review and other functions provided by the OAIC will accordingly deal a blow to open government.

### **2.3.3 Supportive functions performed by the OAIC**

The abolition of the OAIC will see the cessation of a number of key functions it undertakes to support the operation of FOI legislation. While some functions will be transferred elsewhere, including the issuance of guidelines under s 93A of the FOI Act to the Attorney-General, certain functions will not be undertaken at all in future. These include:

- promoting awareness and understanding of the FOI Act and its objects;<sup>32</sup>
- assisting agencies to publish information in accordance with the information publication scheme under Part II of the FOI Act;<sup>33</sup>
- the provision of information, advice, assistance and training relevant to the operation of the Act;<sup>34</sup>
- monitoring, investigating and reporting on compliance by government agencies with the FOI Act;<sup>35</sup> and
- undertaking investigations under Part VIIB of the FOI Act.<sup>36</sup>

<sup>27</sup> See the Second Reading Debate on the Freedom of Information (New Arrangements) Bill 2014, *ibid*, per the Parliamentary Secretary to the Minister of Communications, The Hon Paul Fletcher MP, at page 92.

<sup>28</sup> Administrative Appeals Tribunal, *Annual Review 2013-14*, at page 24, available at <http://www.aat.gov.au/docs/Reports/2014/AR1314-complete.pdf>.

<sup>29</sup> Administrative Appeals Tribunal, *Annual Review 2013-14*, *ibid*, at page 180.

<sup>30</sup> Administrative Appeals Tribunal, *Annual Review 2013-14*, *ibid*, at page 167.

<sup>31</sup> OAIC Annual Report, above note 17, at page 4.

<sup>32</sup> Section 8(a) *Australian Information Commissioner Act 2010* (Information Commissioner Act), repealed by Part 1 of Schedule 3 of the New Arrangements Bill.

<sup>33</sup> Currently provided for in s 8E of the FOI Act, which will be abolished by Item 14 of Schedule 1 of the New Arrangements Bill.

<sup>34</sup> Currently provided for in s 8(e) Information Commissioner Act.

<sup>35</sup> Currently provided for in s 8(g) Information Commissioner Act.

<sup>36</sup> Currently provided for in s 8(h) Information Commissioner Act.

PIAC believes that the loss of these functions will undermine the operation of the FOI regime. The OAIC has been able to fulfil a number of essential functions, including monitoring, reporting, providing education, advice and guidance to both agencies and the community about the FOI Act. Opening up government and changing hostile attitudes to FOI requests was one of the key problems that the establishment of the OAIC was intended to address. Speaking to the proposed creation of the OAIC in 2009, The Hon Senator Faulkner stated:

There has been a wide-spread and not unjustified perception that, at least in practice, the culture of FOI at a Federal level in Australia has been that the Act sets out minimum requirements that decision-makers determine in favour of disclosure only where forced to and that, too often, FOI applications are viewed as a contest between applicant and agency.<sup>37</sup>

PIAC has endorsed the OAIC's role as an advocate for a whole-of-government approach to information policy and opening up government information to the public. In PIAC's view, the fulfilment of these functions has been an essential part of the on-going process of acculturating government agencies to openness and eschewing unnecessary restrictions on the flow of information. PIAC fears that the loss of the OAIC may see a return to the 'closed shop' attitudes that the body was intended to address.

PIAC also is concerned that the loss of the OAIC's function in training and educating public servants as to how the FOI Act should be applied will lead to a step backward in the pursuit of consistency across government departments. PIAC has in the past observed differences in the interpretation of key FOI provisions, varying views as to the process and timeline for consultation with third parties as well as various degrees of transparency exhibited by agencies.<sup>38</sup> PIAC believes this inconsistency will recur and will likely increase in severity with the loss of the general overarching monitoring function currently being performed by the OAIC.

### **2.3.4 Independent oversight**

PIAC strongly supported the Australian Parliament's decision to establish the OAIC as an independent statutory office. Robust scrutiny of government decision making and working across government agencies to create transparency is greatly enhanced by the independence of the office. Being able to perform its functions unfettered is a great strength of the current office, the loss of which will deal a significant blow to the overall efficacy of the FOI regime.

PIAC is concerned that transferring certain functions from the OAIC to the Attorney-General will create inevitable conflicts of interest. Under the New Arrangements Bill, the Attorney-General will be able to determine, by legislative instrument, information he or she believes would be 'unreasonable' to publish under the Public Information Scheme<sup>39</sup> or under general access provisions.<sup>40</sup> This will mean that the Attorney-General will be able to decide unilaterally to exclude information from publication, which has been requested from his or her own department, in circumstances where he or she may have an interest in non-disclosure. Any parliamentary check

<sup>37</sup> The Hon Senator John Faulkner, 'Open and Transparent Government – the Way Forward' (Speech delivered at the Australia's Right to Know, Freedom of Speech Conference, Sydney, 24 March 2009), available at <http://www.australiasrighttoknow.com.au/files/john-faulkner.pdf>.

<sup>38</sup> See Cohen, M et al, above note 3.

<sup>39</sup> Item 10, Schedule 1 New Arrangements Bill, amending s 8(2)(g)(iii) of the FOI Act.

<sup>40</sup> Items 18 and 19, Schedule 1 New Arrangements Bill, amending s 11C of the FOI Act.

on this decision will be hampered by the limited parliamentary scrutiny afforded to legislative instruments under the *Legislative Instruments Act 2003*.

In addition, the Attorney-General will also gain the function of issuing guidelines under s 93A, regarding the operation and compliance with Part II of the FOI Act (Public Information Scheme); factors to be taken into account when determining whether access to a document would be contrary to the public interest under s 11B(5); and whether a request should be granted under s 15 of the FOI Act.

PIAC is most concerned that the Attorney-General will gain such significant determinative power over what will and what will not enter the public domain. Where that concerns his or her own department, there will be an unresolvable conflict should the Attorney-General determine that certain information be withheld from public access in circumstances where the Attorney-General may well have a vested interest in non-disclosure.

## **2.4 Consequent risks of enacting the New Arrangements Bill**

PIAC believes that the net result of these changes will be a less effective FOI regime in which applicants will be deterred from exercising their right to access information. This in turns leads to serious concern that overall accountability of Government will be unduly diminished.

This Bill is a radical departure from the structural arrangements that were put in place in 2010 following lengthy consultation and consideration. To sweep away those changes without a similarly considered approach risks replicating the problems the 2010 reforms were designed to address. PIAC believes that such a departure from the current regime must not proceed unless supported by evidence that the system in place is not working to support open government, or that changes to the regime – such as those recommended by the Hawke Review – would not make it work better.

In the event the Senate determines that the changes in the New Arrangements Bill should proceed, PIAC urges that the Bill be amended to mitigate, as much as is possible, the negative impact this Bill will have on government transparency, accessibility and accountability. These recommendations are set out below.

## **3. Recommendations**

### **3.1 Fees, charges and costs**

Fees and charges are imposed on applicants:

- when they apply for access to documents under Part 3 of the FOI Act;<sup>41</sup> and
- when external review of an access decision is sought.

Costs are also incurred by applicants in the review process – for example, legal fees and disbursements costs.

#### **3.1.1 Fees and charges**

As in previous FOI-related submissions, PIAC maintains that the idea of recovering costs from applicants by way of charges and fees is at odds with the fundamental principle that FOI is

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<sup>41</sup> Section 29 FOI Act.

designed to vindicate the right of individuals to access information. The right of access to public information should not be a user-pays system. This is a cost that government should bear as part of fulfilling its democratic responsibilities of being transparent and accountable to the people.

As stated above, passing the New Arrangements Bill risks deterring applications for information under the FOI Act and the fee to review a decision will be prohibitive for many of PIAC's clients. As a counterbalance, PIAC recommends that all fees and charges be removed in respect of initial FOI applications. This would not represent a significant loss to government departments and agencies. In 2013-14, the charges collected represented only 0.6% of the total cost to government agencies of administering the Act.<sup>42</sup> This indicates that fees and charges are not imposed to cover the costs associated with processing FOI applications. Instead, FOI fees and charges appear to exist as a deterrent against overuse or misuse of the Act – a blunt instrument that carries with it the risk of significant unintended consequences in reducing access to public information more generally.

#### ***Recommendation – fees and charges***

*Fees and charges should not be levied in respect of applications made under the Freedom of Information Act 1982 (Cth).*

In the alternative, fees and charges should not be payable when applications for government-held documents are made in the public interest. A reduction in charges for documents accessed in the public interest is already contemplated under s 29 of the FOI Act. Under s 29, in exercising their discretion to reduce a charge for access under the Act, the Minister or agency must take into account whether providing access is in the general public interest or in the interest of a substantial section of the public.<sup>43</sup> This discretion is currently applied in an opaque and uneven manner across government. Further, in PIAC's experience, while agencies are often prepared to reduce fees and charges when its clients can demonstrate major financial hardship (for example, by providing a pensioner card), they are extremely reluctant to reduce fees on the basis of public interest.

PIAC accordingly recommends that provision be made for the automatic waiver of all fees and charges applicable to individuals, not-for-profit organisations and journalists where persons in each of these categories make FOI requests to further the public interest. This would help support the objectives of the FOI Act and will be necessary should the New Arrangements Bill pass.

In the alternative, guidance should be issued in relation to the exercise of the discretion under s 29 with a view to increasing its application. One way of doing this would be to provide a non-exhaustive list of factors that might be taken into account in considering this public interest criterion. In addition, it would be of assistance to provide training or targeted guidance on this issue to government agencies.

#### ***Recommendation – public interest waiver***

- 1. Charges and fees should be waived for applications that are made to further the public interest.*

<sup>42</sup> OAIC Annual Report, above note 17, at page 143.

<sup>43</sup> Section 29(5) FOI Act.

2. *In the alternative, training and guidance should be provided to government agencies to support the exercise of the discretion to reduce charges under s 29 FOI Act.*

If charges are to be retained, PIAC recommends a different approach than the one contained in the Act. As recommended by the Australian Law Reform Commission in its 1995 Report,<sup>44</sup> PIAC supports amendment of the FOI Act to impose charges based on the amount of information provided rather than the time taken to process a request.

This would better reflect the actual costs incurred by agencies as well as enabling costs to be more easily calculated. It would also improve the consistency of charging across different government agencies. Moreover, PIAC believes that applicants should not be penalised if agencies do not have efficient record-management systems. If an agency's record-keeping systems are such that it takes many hours to process even a simple FOI request, the applicant should not be required to pay for that time. This approach would also have the benefit of encouraging efficiency across government departments processing FOI requests.

#### ***Recommendation – calculation model***

*Charges for processing an FOI access request should be calculated on the basis of the documents received, not the time taken to consider a request or retrieve the information requested.*

#### **3.1.2 Application fees for merits review and costs in the AAT**

As outlined above, the \$861 application fee for merits review in the AAT will undoubtedly act as a deterrent for many applicants. Regulation 19 of the *Administrative Appeals Tribunal Regulations 1976* sets out an exhaustive list of grounds on which the application fee can be reduced (for example, if the applicant is a pensioner or in receipt of education assistance or legal aid). Regulation 19 also provides for the reduction of fees on the basis of financial hardship, to be determined by the Tribunal Registrar.

PIAC submits that there should also be an opportunity to reduce or waive the fee on the ground that there is an argument that the information requested is of public interest. This would accord with the overarching public interest goal of FOI legislation as well as going some way to mitigating the impact of the loss of a free avenue of merits review of a government or agency decision.

#### ***Recommendation – application fee for AAT Review***

*PIAC recommends that there be an additional public interest ground that can be advanced by an applicant in order to reduce the application fee for review of a decision under the FOI Act. This would require a simple amendment to Regulation 19 of the Administrative Appeal Tribunal Regulations 1976.*

An applicant for merits review to the AAT will also bear the costs incurred in the proceedings. These costs will be incurred by anything from legal advice and representation to disbursements such as photocopying. These costs, particularly where there is a question of law to be resolved, are unlikely to be insignificant to the individual applicant.

<sup>44</sup> Australian Law Reform Commission (ALRC), *Open Government: a review of the Federal Freedom of Information Act 1982*, ALRC Report 77 (1995), at 187.

The AAT does not have any power under the AAT Act to order that a party must pay the other's costs associated with their bringing the action. However, section 66 of the FOI Act provides that the AAT may, where the applicant is successful in their review application, exercise its discretion to recommend to the responsible Minister that the costs incurred by the applicant in relation to the proceedings be paid by the Commonwealth. In deciding whether to exercise that discretion, without limiting the factors to be taken into account, the AAT should consider whether the payment of costs would cause financial hardship to the applicant; whether the Tribunal's decision will be of benefit to the general public; whether the applicant will commercially benefit from the decision; and the reasonableness of the decision under review.<sup>45</sup> The Minister may then authorise payment of costs to the applicant.<sup>46</sup>

In line with the recommendations regarding fees and charges above, PIAC believes that this provision should be strengthened by amending s 66 of the FOI Act to give the AAT the power to order costs if the following conditions are met:

- the applicant is successful or partially successful; and
- there is public interest in publishing the information that has been requested under the FOI Act.

There is precedent for providing the AAT with the power to order costs. Section 67 of the *Safety, Rehabilitation and Compensation Act 1988* (Cth) provides that the AAT may order the costs of the claimant to be paid by the respondent if the claim is successful.

Allowing for the AAT to order costs in its FOI jurisdiction will go some way to supporting the overall aims of the FOI Act if the general advocate for FOI, the OAIC, is abolished. It will also address the gross imbalance in FOI proceedings, with government agencies having access to all the information and legal advice while the applicant has a small amount of information and faces the costs of proceedings as an individual. The possibility that costs will be able to be recouped will be an important factor to be weighed in the balance by any applicant considering whether to commence legal proceedings in the AAT.

#### ***Recommendation – payment of costs under s 66 FOI Act***

*PIAC recommends that s 66 of the FOI Act be amended to give the AAT power to order costs in the applicant's favour if: (a) the applicant is successful or partially successful; and (b) there is a public interest in the information being sought under the FOI Act being published.*

### **3.2 Representative complaints**

PIAC has previously submitted that investigation of complaints under the FOI Act could be enhanced by making provision for representative complaints to the OAIC, made on behalf of a group against the same agency, where a common issue of law or fact arises.<sup>47</sup> Currently, the FOI Act does not specifically provide for a representative complaints process.

Take the following hypothetic example, based on PIAC's experience in a number of situations. Imagine a residential community group became aware that a number of people had sought information through the FOI Act from a particular government agency, concerning matters that

<sup>45</sup> Section 66(2) FOI Act.

<sup>46</sup> Section 66(3) FOI Act.

<sup>47</sup> Cohen et al, above note 3.

affect their community. At a local community meeting, a number of community members became aware that the relevant agency had failed adequately to respond to their FOI requests and failed to comply with the FOI Act in the same way (ie, all the decisions were not made within time, or no applicant was provided with reasons for the decision). In this situation, it would be more efficient for a representative complaint to be made rather than each complaint being dealt with on a case-by-case basis. A precedent for representative complaints exists in relation to breaches of the *Privacy Act 1988* (Cth).<sup>48</sup>

If the New Arrangements Bill is passed, complaints will now be directed to the Commonwealth Ombudsman. PIAC recommends that amendments also be made in the Bill to provide for representative complaints. PIAC believes that such a provision would have the effect of reducing the number of complaints made and reduce the resources needed to investigate individual complaints that continually raise the same or similar issues. This will be of even greater benefit should the Bill be passed given the loss of the OAIC's ability to investigate complaints related to the operation of the FOI Act on its own motion.<sup>49</sup>

#### ***Recommendation – representative complaints***

*The FOI Act should be amended to allow for review applications to be made as representative complaints.*

### **3.3 Withholding information from publication**

As noted above, it is significant that the Attorney-General is being transferred functions that will enable the exemption from publication documents and categories of information by way of legislative instrument. This is a function the OAIC currently carries out, protected from overuse and abuse by the statutory independence of the office.

PIAC does not believe it is appropriate to transfer this function to the Attorney-General. It is certainly not beneficial for open and transparent government. At a minimum, PIAC recommends that the threshold on which information can be withheld under s 11C of the FOI Act be raised. If left unamended, s 11C will enable the Attorney-General to determine, by legislative instrument, the non-publication of 'other information' in requested documents where it would be 'unreasonable to publish the information'. This should be tightened to specific information the publication of which would be detrimental to the public interest should it be published.

#### ***Recommendation – function of the Attorney-General***

*Due to the conflict of interest that will arise by transferring certain OAIC regulatory functions to the Attorney-General, PIAC recommends that this part of the Bill be reconsidered and the power given to an independent statutory authority such as the Australian Human Rights Commission.*

#### ***Recommendation – s 11C FOI Act***

*If the regulatory functions of the OAIC are to be transferred, PIAC recommends that s 11C(1)(c) of the FOI Act be amended to provide that the Attorney-General may only determine the non-publication of information where it would be detrimental to the public interest should it be published.*

<sup>48</sup> Section 38 Information Commissioner Act.

<sup>49</sup> Part VIIB, Division 2 FOI Act.

### **3.4 Training and education**

As in previous submissions, PIAC considers that one of the most important functions of the OAIC was to provide proper training, advice and assistance to those government employees making determinations about the application of the FOI Act. PIAC believes that if the initial decision-making process is improved, benefits will be reaped in the form of less reviews and complaints later down the line.

For example, in PIAC's experience, most agencies tend to err unnecessarily on the side of cautious refusal to disclose information in making the first FOI decision in the knowledge that another, usually more senior person within the agency will review the decision. On some occasions internal review simply becomes a 'rubber stamping' exercise. The New Arrangements Bill provides that an internal review must take place before an application can be made to the AAT to review an access-refusal or access-grant decision.<sup>50</sup> Given our concern about the quality of the initial decision-making process, PIAC does not believe that this factor will address the issues created by the abolition of the OAIC as outlined above. To ensure that internal review is a meaningful and helpful stage under the Act, PIAC recommends that greater emphasis be placed on improving education and training FOI decision-makers, Ministers and other senior officials.

#### ***Recommendation – Training and education***

*PIAC recommends that training and education in relation to the operation of the FOI Act which the OAIC has engaged in since its inception be continued.*

### **3.5 Exemptions**

In previous submissions related to FOI legislation, PIAC has consistently noted its concerns about the broad categories of information that are exempt from the operation of the FOI Act and has made a number of recommendations to minimise the impact of exemptions on the Act's operation.<sup>51</sup> PIAC accepts that an in-depth review of the exemptions is beyond the scope of this Committee inquiry into the New Arrangements Bill. PIAC does, however, stress the importance of reviewing, when the opportunity arises, the negative impact of broad exemptions in the Act on the principle of open government. The need for this review is heightened by PIAC's conclusion that the New Arrangements Bill will have a negative impact on the operation of the FOI Act.

#### ***Recommendation – review of exemptions in the FOI Act***

*PIAC recommends, at the first possible opportunity, that the exemptions under the FOI Act be reviewed to determine if they are in the public interest.*

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<sup>50</sup> Item 36, Schedule 1 New Arrangements Bill, inserting new s 57A to the FOI Act.

<sup>51</sup> See Cohen, M, above note 3, at page 10.