



International
Commission
of Jurists

GPO Box 173
Sydney NSW 2001
Australia
t: +612 8249 3221
e: tahlia.gordon@icj
-aust.org.au
www.icj-aust.org.au

17 August 2015

ICJ GENEVA

Senator the Hon George Brandis QC
Attorney General of Australia
PO Box 143
Albion DC QLD 4010

President
Prof. Sir Nigel Rodley, United Kingdom
Secretary-General
Wilder Tayler
Australian Commissioner
The Hon Justice Evatt AC
The Hon Judge O'Meally AM RFD

ICJ AUSTRALIA

NATIONAL SECTION

President
The Hon John Dowd AO QC
National Vice-President
The Hon Justice Bromberg
Federal Court
Chairperson
Steve Mark
Secretary-General
Tahlia Gordon

STATE BRANCH PRESIDENTS

Australian Capital Territory
The Hon Jeffrey Miles AO
New South Wales
The Hon Judge O'Meally AM RFD
Northern Territory
Sally Gearin
William Forester Chambers, NT
Queensland
The Hon Justice Atkinson AO
Supreme Court of Queensland
South Australia
The Hon Justice Bleby
Supreme Court of SA
Tasmania
The Hon Justice Alan Blow OAM
Supreme Court of Tasmania
Victoria
The Hon Justice Bromberg
Federal Court
Western Australia
Adjunct Professor Greg McIntyre SC

Dear Mr Attorney,

It is noted that the Government has introduced the *Freedom of Information Amendment (New Arrangements) Bill 2014* (The Act) – which abolishes the Office of the Australian Information Commission (OAIC). However, that legislation has not been passed by the Parliament.

Prior to the failure to have the legislation passed, a budgetary decision had been made by the government to cease funding the OAIC from January 2015. While some funding remained and has continued throughout this year and some provision has been made in the 2015-2016 Budget, it is insufficient to enable the OAIC to discharge its statutory obligations. The Government has allowed the Freedom of information Commissioner position to remain vacant since the beginning of this year and recently called on the Privacy Commissioner to act as the Acting information Commissioner (for an unpublished term) to replace the original incumbent, Professor MacMillan, who vacated his office as from the 1st July 2015.

The present situation is that it is the formal position of the Government to cease funding the effective operation of the OAIC. The result is that the Government is seeking to achieve executively what it cannot achieve legislatively.

This is of profound concern to the ICJ which has the responsibility of defending the Rule of Law.

The Rule of Law is not a nebulous concept but does have some very specific components one of which is the doctrine of the Separation of Powers. Professor A V Dicey, over one

hundred years ago, identified this as a fundamental principle of British Constitutional law. It is clearly enshrined in our own Constitution with distinct chapters specifying the powers of the three branches of government. It is disappointing that we have to draw this simple principle to your attention.

When a government is seen to be doing executively what it is unable to do by legislation, concerns about insults to Rule of Law and the doctrine of the Separation of Powers are understandably aroused. When this executive function has the effective result of emasculating a statutory body, which can only be abolished by Statute, there can be no doubt that the wall of protection separating the Executive from the Legislature has been breached.

There might be many reasons that persuade a government to abolish a statutory body but while the law requires that the statutory body continue in existence, it is a clear breach of the doctrine of the Separation of Powers for the executive branch of government to prevent the ongoing effective discharge of the functions of that body. If this were not so, the consequences in a civilised society such as ours would be too disastrous to contemplate. For instance, the government, without any legislative approval could effectively emasculate any statutory body that causes the government displeasure. This is the reason that the Rule of Law and the doctrine of Separation of Powers are so critical in a democratic society.

The recent appointment of Mr Pilgrim in an acting position, while encouraging, does not address the fact that there is no formal budgetary provision for the ongoing activities of the OAIC or of the Commissioners appointed under the Act.

I would be slow to conclude that the government is intentionally ignoring this precious doctrine of the Separation of Powers and accordingly, I seek your reassurance that the government will continue to fund the Office of the Australian Information Commissioner so that it can effectively discharge its statutory mandate. This funding will essentially include provision for the engagement of a permanent Commissioner to replace Professor MacMillan and a Commissioner to fill the vacant statutory office of the Freedom of Information Commissioner.

At some point in time I would like to raise with you the wider issue of the Government's policy to abolish the Office of the Australian Information Commission as I see it as an institution essential to ensure open and accountable government. In the meantime I seek your immediate assurance that sufficient funding will be made available to ensure the continuation of the work of the OAIC and the engagement of three full time Commissioners.

Yours Faithfully,



The Hon John Dowd AO QC
President
ICJ Australia