Chapter 2

Key issues

2.1 The issues raised during the inquiry focused mainly on the merits of the proposed changes to FOI review; the other roles performed by the OAIC which would be lost or moved under the Bill; and the workability of the new arrangements proposed for the Privacy Commissioner role. Many also advocated the need for a more comprehensive review of the FOI regime.

External Review of FOI decisions

2.2 Differing views were offered to the committee regarding the advisability of removing Information Commissioner (IC) review of FOI decisions, and replacing it with external review only by the Administrative Appeals Tribunal (AAT), following mandatory internal review.

2.3 Many submitters, such as Ms Megan Carter of Information Consultants Pty Ltd, argued that '[w]orldwide, the Information Commissioner model is acknowledged as the preferred method of dealing with external reviews of FOI matters', because it enables the IC to develop deep specialist knowledge in FOI and therefore take a more consistent approach to decision-making, as well as offering greater accessibility and affordability to applicants, and more flexibility in the methods used to resolve disputes.[1]

2.4 Some were not opposed to the change in review arrangements. Australia's Right to Know, a coalition of major media organisations, argued that from its members' perspective, the right to appeal directly to the AAT was a positive move, as OAIC review had proven far too lengthy and its non-adversarial model also had the potential to deny natural justice to applicants.[2]

Timely processing of appeals

2.5 The problem of delay in processing appeals through the OAIC was not disputed in the evidence given to the committee, but most submitters argued that this did not justify abandoning the process.

2.6 Many expressed the view that the delays experienced in OAIC processing of cases arose at least in part from inadequate resourcing. Mr Peter Timmins believed the OAIC had been 'set up to fail' by being under-resourced from the outset.[3] Mr John Wood agreed, and added that this situation was exploited by government agencies which responded 'less than diligently' to FOI requests in the knowledge that redress

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1 Information Consultants Pty Ltd, *Submission* 2, pp 1-2.

2 Mr Michael McKinnon, *Committee Hansard*, 10 November 2014, p. 17; Australia's Right to Know, *Submission* 24, p. 1. The NSW Council of Civil Liberties also indicated that it was not opposed in principle to the removal of merits review to the AAT, but objected strongly to the costs involved: *Submission* 20, p. 2.

3 Mr Peter Timmins, *Committee Hansard*, 10 November 2014, p. 13.

would be long delayed.[4] One submitter suggested that introducing a small fee for OAIC review would be likely to lower the volume of requests and should be considered as an alternative to removing it altogether.[5]

2.7 In evidence to the committee the Information Commissioner, Professor John McMillan, acknowledged that:

> A major criticism of the OAIC has been on the delay in IC reviews. It is an issue of which we have been acutely aware from the beginning of the commission. It is an issue on which we forecast, from the very beginning, that the settings in the FOI Act possibly needed alteration. We predicted from the outset that delays would occur, and we have made many proposals along the way in public submissions about amendments that were needed to the FOI Act, to make it a less complex and more efficient system.
>
> But, most importantly, we have taken those criticisms on board and constantly trialled new approaches for quicker resolution of disputes. Also, we have concentrated on building up a body of principle and case law in guidelines and in decisions, which does lead to a much more efficient resolution of disputes nowadays.[6]

2.8 The OAIC provided the committee with statistics demonstrating its improved performance in the timely resolution of FOI reviews: most recently, in 2013-14 the number of completed IC review decisions jumped by 54 per cent (from 419 to 646), and the time lag in actioning new cases reduced from 206 to 40 days.[7]

2.9 The committee did not receive evidence indicating that AAT review would necessarily be faster than review by the OAIC. On the contrary, FOI Commissioner Dr James Popple advised the committee that comparison of the FOI reviews dealt with since 2010 revealed that the AAT had taken almost exactly the same average time as the OAIC to resolve FOI cases.[8]

2.10 Moreover, submitters observed that the promise of faster processing did not account for the time that would be taken by the prerequisite internal review under the new system.[9] A few, including the OAIC, pointed out that removal of the power previously vested in the IC to declare an applicant vexatious may have additional impact upon the processing and review burden on agencies.[10]

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4 Mr John TD Wood, *Submission* 8.

5 Information Consultants Pty Ltd, *Submission* 2, p. 2.

6 Professor John McMillan, *Committee Hansard,* 10 November 2014, p. 26.

7 Office of the Australian Information Commissioner, *Submission* 26, p. 9 and Attachment 1.

8 Dr James Popple, *Committee Hansard,* 10 November 2014, p. 27.

9 In addition, a number of submitters expressed negative views about the value of internal review.

10 Commonwealth Ombudsman, *Submission* 14, p. 3; Office of the Australian Information Commissioner, *Submission* 26, p. 7; Australian Prudential Regulation Authority, *Submission* 32.

Accessibility of AAT review

2.11 Many submissions raised concern about the fact that application for external review of FOI decisions through the AAT incurs a fee of $861, plus additional costs to applicants for legal advice and representation, in contrast to the present first-stage IC review, which is fee-free and does not require legal counsel. Submitters saw this as compromising the accessibility of FOI review to ordinary citizens.

2.12 Ms Megan Carter commented that when fees for AAT review of FOI decisions were first introduced in Australia in 1986, the number of applications plummeted, and there were few cases involving individuals or personal matters.[11] The IC advised the committee that prior to 2010 the AAT had received around 130 review applications per year, but after the OAIC was established applications for OAIC review quickly reached 550 per year. While there may be various reasons for this, Professor McMillan believed that the absence of fees was 'certainly an element' and that the re-imposition of fees would be likely to result in fewer appeals.[12]

2.13 The Public Interest Advocacy Centre (PIAC) expressed concern that in addition to the burden of application fees, most individual applicants would not have the kind of legal representation that government agencies were able to retain, resulting in an 'imbalance that will happen in the litigious process'.[13] Professor Julian Disney further emphasised that monetary costs were not the only factor affecting the accessibility of the AAT to applicants:

> That is only one of the deterrents to ordinary people. A major one is formality and an unintended intimidatory impact not only of the environment but of being up against government. Often that is of much greater significance than the out-of-pocket costs. There is also the cost of taking time off work…There are a lot of other deterrents.[14]

2.14 Several submitters including Australia's Right to Know and the Press Council of Australia believed that allowing direct appeal to the AAT as an option, while retaining the right to IC review for those applicants who wished it, may be a better option than the removal of OAIC review altogether.[15] The OAIC itself indicated that there were various models used in other jurisdictions, including allowing applicants a choice of forum, which could be considered.[16]

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11 Information Consultants Pty Ltd, *Submission* 2, p. 1.

12 Professor John McMillan, *Committee Hansard*, 10 November 2014, p. 32.

13 Ms Sophie Farthing, *Committee Hansard*, 10 November 2014, p. 13.

14 Professor Julian Disney, *Committee Hansard*, 10 November 2014, p. 18.

15 *Committee Hansard*, 10 November 2014, p. 20; Public Interest Advocacy Centre, *Submission* 15, p. 4.

16 Professor John McMillan, *Committee Hansard*, 10 November 2014, pp 28-29. See also Mr Peter Timmins, *Submission* 9, p.3.

2.15 Should the reformed review process go ahead, several witnesses proposed that the relevant AAT fees should be revised to ensure greater accessibility to applicants, particularly individuals and those seeking information in the public interest.[17]

2.16 Speaking on the Bill in the House of Representatives, Mr Paul Fletcher MP advised that:

> While it is true that the application fee to the [AAT] is $861, there is a reduced fee of $100 in the case of hardship. In certain specified cases there is no fee payable at all, and those include FOI reviews about Commonwealth workers compensation, family assistance, social security payments and veterans' entitlements. I also remind the House that consistent with other matters in the [AAT], successful FOI applicants will receive a refund of $761 of the full $861 fee.[18]

2.17 Addressing the committee, the Attorney-General's Department emphasised the 'flexible, innovative, alternative dispute resolution procedures' adopted by the AAT, and its recent record of around 80 per cent of cases resolved by consent and conciliation.[19] It also drew attention to the requirement for prior internal review by agencies, which it said would provide a 'free and effective form of merits review'.[20]

Other functions of the OAIC

2.18 Much evidence given to the committee pointed out that the role of the OAIC was broader than just the review function, and expressed concern about the impact of abolishing the OAIC on the other roles fulfilled by the Office.

2.19 In general terms, FOI advocates regarded it as essential to have an 'FOI champion' at arms' length from government control, and noted that independent FOI Commissioners were a feature of FOI regimes in comparable jurisdictions such as the United Kingdom and Canada, as well as several Australian states. One submitter spoke of a 'global trend' toward the establishment of Information Commissions and/or Commissioners, while another spoke of the model as 'accepted best practice…around the world'.[21]

2.20 Queensland Integrity Commissioner and former South Australian Ombudsman, Mr Richard Bingham, highlighted the OAIC's ability to take an integrated approach to privacy, FOI and broader information management issues, and

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17 Ms Sophie Farthing, *Committee Hansard* , 10 November 2014, p.13; Mr Michael McKinnon, *Committee Hansard*, 10 November 2014, p. 17; Open Australia Foundation, *Submission* 11, p. 1; Public Interest Advocacy Centre, *Submission* 15, pp 11-12; Mr Daniel Stewart, *Submission* 27.

18 Mr Paul Fletcher MP, Parliamentary Secretary to the Minister for Communications, *House of Representatives Hansard*, 28 October 2014, p. 92.

19 Mr Matt Minogue, *Committee Hansard*, 10 November 2014, p. 33.

20 Mr Matt Minogue, *Committee Hansard*, 10 November 2014, p. 38.

21 Parliamentary Library, *Bills Digest* No. 44, 2014-15, 27 October 2014, p. 4; Associate Professor Moira Paterson, *Submission* 5, pp 6-7; Transparency International Australia, *Submission* 6; Mr Peter Timmins, *Submission* 9, pp 1 & 7-8.

its work in assisting other Australian jurisdictions in that regard, and lamented that this would be lost under the new arrangements proposed by the Bill.[22]

2.21 Professor Julian Disney emphasised the importance of both independence and specialist expertise in the difficult context of FOI, where competing interests must be carefully balanced and consistent principles exercised in decision-making.[23] He further endorsed the value of the OAIC beyond the complaint handling role: 'I think in many regulatory systems it is actually the standards work – the setting of standards and the monitoring of standards – which is more important in its impact down the track than dealing with individual complaints'.[24]

Functions to be exercised by the Attorney-General: a conflict of interest?

2.22 Many submitters believed that the transfer of a number of FOI-related functions and powers from an independent statutory authority to the Executive branch of government was inappropriate and created a potential conflict of interest.

2.23 Associate Professor Moira Paterson of Monash University said that historically, oversight of the FOI Act by the Attorney-General's Department had not featured the same 'active championship and enforcement' of FOI as that now shown by the OAIC.[25] The Open Australia Foundation referred to 'gaming of the system' undertaken by some agencies, underlining the need for an independent monitor of FOI compliance, and further claimed that among agencies, the Attorney-General's Department was 'not modelling best practice in this area'.[26] Academic Bruce Baer Arnold went further, expressing scepticism 'that executives within the Attorney-General's department will demonstrate a sustained and vigorous enthusiasm for transparency'.[27]

2.24 PIAC and others expressed particular concern about the assumption of determinative powers by the Attorney-General, such as to exempt documents from disclosure under FOI. Ms Sophie Farthing of PIAC noted that the new arrangements would allow the Attorney to define categories of information that were 'unreasonable' to publish, including information sought from his own department: 'there is a conflict with changing an office which is independent in issuing this kind of regulation and guidance about how the FOI Act should operate to someone who is subject to the Act himself'.[28] The Public Law and Policy Research Unit at the University of Adelaide

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22 Queensland Integrity Commissioner, *Submission* 3, p. 1.

23 Professor Julian Disney, *Committee Hansard*, 10 November 2014, p. 19.

24 Professor Julian Disney, *Committee Hansard*, 10 November 2014, p. 23.

25 Associate Professor Moira Paterson, *Submission* 5, p. 3.

26 Mr Peter Timmins, *Committee Hansard*, 10 November 2014, p. 9, 11; Open Australia Foundation, *Submission* 11, pp 3-4 & Attachment 1.

27 Assistant Professor Bruce Baer Arnold, *Submission* 12, p. 4. See also Australian Privacy Foundation, *Submission* 17, pp 4-5 and Pirate Party Australia, *Submission* 19, pp 2-3.

28 Ms Sophie Farthing, *Committee Hansard*, 10 November 2014, p. 14. See also Public Interest Advocacy Centre, *Submission* 15, p. 13.

agreed, adding the observation that the department would 'both be implementing the [FOI] framework and providing a report on how well this has been achieved'.[29] Professor Disney described the placement of promotion, monitoring and guidance roles within the Attorney-General's Department as 'utterly inappropriate'.[30]

2.25 In its evidence, the Attorney-General's Department assured the committee that production of guidance and guidelines to government agencies would 'remain the same' under the department's administration as it had been under the OAIC, and that there would be no conflict with the department's decision-making role. The department further noted that the Bill provided for the transfer of staff from the OAIC to the department, ensuring that expertise would be brought in to discharge the functions formerly performed by the OAIC.[31]

Functions to be discontinued

2.26 Submitters further raised concern that some OAIC functions would be discontinued upon the abolition of the Office. These included assistance to agencies and review of their compliance with the information publication scheme, FOI training of agencies, the ability to institute own-motion investigations, dealing with vexatious applicants, and more general promotion of open government and proactive disclosure.

2.27 Mr Peter Timmins summed up the concerns of many submitters:

> Independent advice and guidance, leadership, advocacy and public awareness and assistance functions that included responding to thousands of phone and written inquiries each year seem destined to disappear.[32]

2.28 Associate Professor Paterson emphasised the need for an 'FOI champion' to monitor compliance and promote FOI more generally:

> given that the success of FOI requires fundamental cultural change and because a culture of transparency is fundamentally difficult to maintain in the face of governments' natural aversion to detailed scrutiny of their affairs.[33]

2.29 Guardian Australia claimed that since the abolition of the OAIC was announced, the incidence of agencies breaching time limits had already increased.[34]

2.30 Mr Timmins, among others, expressed particular alarm that the functions of the OAIC in promoting increased proactive publication of government information would be discontinued.[35] Speaking on behalf of the Open Australia Foundation, Mr Timmins told the committee that:

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29 Public Law and Policy Research Unit, *Submission* 10, p. 4.

30 Professor Julian Disney, *Committee Hansard*, 10 November 2014, p. 19.

31 Mr Matt Minogue, *Committee Hansard*, 10 November 2014, pp 36-37.

32 Mr Peter Timmins, *Submission* 9, p. 6.

33 Associate Professor Moira Paterson, *Submission* 5, p. 2.

34 Guardian Australia, *Submission* 18, p. 3.

35 Mr Peter Timmins, *Submission* 9, p. 10.

> we still have a long way to go in terms of the journey towards more open, transparent and accountable government. And to lose the independent monitor, advocate and champion of the Act at this stage of the game is a giant step backwards.[36]

2.31 In response, the Attorney-General's Department told the committee that 'any suggestion that the merit of the system is being disbanded is probably not right'. The department sought to assure the committee that it would take up the task of promoting a pro-disclosure culture across government, and that other core functions performed by the OAIC would continue, albeit within different bodies.[37]

Arrangements for the Australian Privacy Commissioner

2.32 The AHRC raised concerns with the committee about the arrangements proposed in the Bill for the Australian Privacy Commissioner to be established as an independent statutory body within the AHRC:

> The Bill proposes that the Australian Privacy Commissioner should sit within the AHRC but not be a member of the [AHRC]. The staff assigned to the Commissioner will be staff of the AHRC but under the exclusive direction of the Privacy Commissioner. These provisions will not work as a matter of law as the Accountable Authority for the purpose of the *Public Governance, Performance and Accountability Act* (PGPA) remains the President of the AHRC.
>
> It is also proposed that the Privacy Commissioner should have the same status as a staff member for the purpose of the PGPA. While all the other Commissioners within the AHRC report through the President to the Attorney-General, the Australian Privacy Commissioner would report directly to the Attorney-General.
>
> …the model proposed by the Bill fails to understand the legal obligations under the PGPA and the *Australian Human Rights Commission Act* and, with the best will in the world, creates potential for conflict. There are confusing lines of authority both in financial and staffing respects.[38]

2.33 At the committee's public hearing, AHRC President Professor Gillian Triggs described the proposed arrangements as placing the Australian Privacy Commissioner 'in a separate bubble' within the AHRC:

> If this Bill is passed, we will continue to do what we are doing in the [AHRC] but we will have this bubble in the middle of it where you have a Privacy Commissioner with staff I will allocate to him notionally, but the curious phenomenon under the bill is that those staff would not, under any circumstances, be accountable to the commission. That is simply

36 Mr Peter Timmins, *Committee Hansard*, 10 November 2014, p. 9.

37 Mr Matt Minogue, *Committee Hansard*, 10 November 2014, p. 35.

38 Australian Human Rights Commission, *Submission* 22, p. 1.

> unworkable because of the way in which the financial requirements are and in relation to all sorts of staffing matters and other legislation.[39]

2.34 The AHRC proposed that these problems could be resolved by amending the legislation to reflect one of three alternative models: the creation of the Australian Privacy Commissioner as a separate Commonwealth entity (which could still receive corporate support from AHRC), the appointment of the Commissioner as a member of the AHRC in the same way as the other AHRC Commissioners, or an amendment to the Bill specifying that the Australian Privacy Commissioner would be empowered to direct staff only 'in compliance with his statutory functions', while in other respects the position would be subject to usual AHRC governance processes.[40]

2.35 The Privacy Commissioner, Mr Timothy Pilgrim, agreed with the AHRC that 'the Bill creates a model that is not suited to achieving the objectives of the [Privacy Act] in the most efficient way'. He stated that historical experience, under which the Privacy Commissioner had been part of the (then) Human Rights and Equal Opportunity Commission prior to 2000, had not proven to be effective, and that the 'significantly different regulatory focus' of the Privacy Commissioner's role made it a poor fit for the AHRC.[41] The Australian Privacy Foundation expressed a similar view, and believed that moving the Commissioner (back) into the AHRC risked 'repeating the mistakes of the original regime, and leaving the Commissioner with an even lower profile, and influence, than s/he [previously] had'.[42]

2.36 Mr Pilgrim advocated for the return to a stand-alone statutory Office of the Privacy Commissioner, as had existed from 2000-2010. He observed that arrangements already in place between OAIC and AHRC for sharing corporate services such as human resources, finance and IT could continue for the office of an independent Privacy Commissioner, mitigating against any additional costs.[43]

2.37 The Attorney-General's Department advised the committee that the relationship proposed in the Bill between the Australian Privacy Commissioner and the AHRC was not dissimilar to other models already in existence, citing the Classification Board as an example. The department stated that it was not unprecedented that office holders held statutory functions while not controlling their own finances and staffing.[44] The department added that parliament would provide guidance on the appropriate resourcing for the Australian Privacy Commissioner's functions, in the form of budget appropriations, and that the Attorney-General as

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39 Professor Gillian Triggs, *Committee Hansard*, 10 November 2014, p. 4.

40 Australian Human Rights Commission, *Submission* 22, p. 2; Professor Gillian Triggs, *Committee Hansard*, 10 November 2014, pp 6-7.

41 Mr Timothy Pilgrim, Privacy Commissioner, Additional Information provided to the committee on 12 November 2014, pp 1-2.

42 Australian Privacy Foundation, *Submission* 17, p. 6.

43 Mr Timothy Pilgrim, Privacy Commissioner, Additional Information provided to the committee on 12 November 2014, p. 1.

44 Mr Matt Minogue, *Committee Hansard*, 10 November 2014, p. 34.

portfolio minister would be able to resolve any difficulties which may arise between the AHRC President and the Australian Privacy Commissioner with regard to the exercise of their respective statutory responsibilities.[45]

Projected Savings

2.38 Several submitters queried the government's assertion that the reforms made by the Bill would result in savings of $10.2 million over four years. In particular, many pointed out that the additional costs to agencies of mandatory internal review had not been taken into account.[46] In addition, attention was drawn to projected increased costs of AAT review not only to individual applicants, but to government agencies and the AAT itself.[47]

2.39 Many were unconvinced that savings at the level of $2.5 million per year, even if realised, were significant enough to justify the losses to public accountability and open government which they believed would result from abolition of the OAIC. Professor Julian Disney expressed the view that 'achieving small government at the expense of good, efficient and open government seems rather contradictory'.[48]

The argument for comprehensive FOI review

2.40 The committee's attention was drawn by many to the fact that the Hawke Review, submitted in July 2013, had commented positively on the OAIC, but also made a large number of recommendations to improve the operation of the FOI process, and recommended that these be considered further in a comprehensive review of FOI. Many submitters queried the government's decision to proceed with the measures in the Bill in advance of completing its consideration of the Hawke review, and without any broader review or consultation.

2.41 Mr Edward Santow of PIAC spoke strongly about this issue:

> There has been no public case made in any detail at all for what can only be described as radical changes to our FOI law. Indeed, the FOI law was overhauled as recently as 2010. Very little public consultation has taken place in respect of the Bill's proposals and the government is yet to respond to the recommendations in the statutory review that took place last year under Dr Allan Hawke. If the government is minded to make major changes to FOI law and practice we would urge the government first to undertake a full public consultation that also takes into account the recommendations of the many reviews since the Australian Law Reform Commission's review in 1995.[49]

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45 Mr Matt Minogue, *Committee Hansard*, 10 November 2014, pp 39-40.

46 Associate Professor Moira Paterson, *Submission* 5, p. 5; Mr Peter Timmins, *Submission* 9, p. 10.

47 Mr Peter Timmins, *Submission* 9, p. 12; Public Interest Advocacy Centre, *Submission* 15, p. 5.

48 Professor Julian Disney, *Committee Hansard*, 10 November 2014, p. 19.

49 Mr Edward Santow, *Committee Hansard*, 10 November 2014, p. 9.

2.42 Megan Carter commented: 'it seems that the proposed solution is to throw the baby out with the bathwater, rather than undertake a thorough review to assess the best solution'.[50] Submitters were not all in agreement with the Hawke Review's findings, but were consistent in urging the government to facilitate a comprehensive review of the FOI Act and its operation, in preference to making piecemeal changes.

2.43 In debate on the Bill in the House of Representatives, the government advised that it was 'carefully considering' the recommendations of the Hawke review and would respond in due course.[51]

50 Information Consultants Pty Ltd, *Submission* 2, p. 3.

51 Mr Paul Fletcher MP, Parliamentary Secretary to the Minister for Communications, *House of Representatives Hansard*, 28 October 2014, p. 93.