

The Senate

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Legal and Constitutional Affairs  
Legislation Committee

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Freedom of Information Legislation Amendment  
(Improving Access and Transparency) Bill 2018

November 2018

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# **Recommendations**

## **Recommendation 1**

**2.91 The committee recommends that the Senate not pass the bill.**



# Chapter 1

## Introduction

1.1 On 23 August 2018, the Senate referred the Freedom of Information Legislation Amendment (Improving Access and Transparency) Bill 2018 (the bill) to the Legal and Constitutional Affairs Legislation Committee for inquiry and report by 30 November 2018.<sup>1</sup>

### Purpose of the bill

1.2 The bill was introduced in the Senate by Senator Rex Patrick, who explained that the primary purpose of the bill 'is to introduce measures that make government more transparent and accountable, and assist citizens and the media to access information under the law.'<sup>2</sup> Senator Patrick outlined the issues within the Freedom of Information (FOI) system, which the bill aims to resolve:

These changes are designed to address the considerable dysfunction that has developed in our FOI system which is now characterised by chronic bureaucratic delay and obstruction, unacceptably lengthy review processes and what appears to be an increased preparedness by agencies to incur very large legal expenses to oppose the release of information.<sup>3</sup>

1.3 Additionally, Senator Patrick notes that the bill 'seeks to restore the Office of the Australian Information Commissioner (OAIC) with the appointment of three independent Commissioners as was the intention of the Parliament.'<sup>4</sup>

### Office of the Australian Information Commissioner

1.4 The OAIC is an independent statutory agency established under the *Australian Information Commissioner Act 2010* (AIC Act). It is headed by the Australian Information Commissioner (Information Commissioner) and is supported by the Privacy Commissioner and FOI Commissioner.

### Functions

1.5 The OAIC has three functions:

- FOI functions, including review of decisions made by agencies and ministers and investigation of actions taken by agencies under the *Freedom of Information Act 1982* (FOI Act);
- Privacy functions, conferred by the *Privacy Act 1988* to ensure the proper handling of personal information in accordance with the Privacy Act and other legislation; and

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1 *Journals of the Senate*, No. 113, 23 August 2018, p. 3606.

2 Senator Rex Patrick, *Senate Hansard*, 22 August 2018, p. 5572.

3 Senator Rex Patrick, *Senate Hansard*, 22 August 2018, p. 5572.

4 Senator Rex Patrick, *Senate Hansard*, 22 August 2018, p. 5572.

- Information Commissioner functions, conferred under the AIC Act relating to information policy and practice in the Australian Government.<sup>5</sup>

### ***Background of the Office of the Australian Information Commissioner***

1.6 The OAIC commenced operations on 1 November 2010.<sup>6</sup> At the same time, the former Office of the Privacy Commissioner was integrated into the OAIC.<sup>7</sup>

1.7 While the AIC Act allows for the appointment of three statutory office holders for each of its functions, it also allows for the Privacy Commissioner to perform the functions of the FOI Commissioner, and vice versa.<sup>8</sup> Additionally, the Information Commissioner can also perform the functions of the FOI Commissioner and the Privacy Commissioner.

1.8 When the OAIC first commenced operations, separate Commissioners were appointed for each of its functions.<sup>9</sup>

1.9 On 13 May 2014, the government announced that it would disband the OAIC by 1 January 2015.<sup>10</sup> The Freedom of Information Amendment (New Arrangements) Bill 2014, was introduced in the House of Representatives on 2 October 2014, which sought to:

- repeal the AIC Act, including abolition of the OAIC; and
- amend the FOI Act and Privacy Act and related laws.<sup>11</sup>

1.10 The 2014 bill was not passed by the Senate, and subsequently lapsed at prorogation of the 44<sup>th</sup> Parliament, on 17 April 2016.<sup>12</sup> However, in anticipation of the abolition of OAIC, its funding was reduced. According to the Accountability Round Table, 'the OAIC's FOI function was halved.'<sup>13</sup>

1.11 Following the Government's announcement to disband the OAIC, the former FOI Commissioner, Dr James Popple, resigned in December 2014, followed by the resignation of the former Information Commissioner, Professor John McMillan, in

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5 Office of the Australian Information Commissioner, *Annual Report 2010–11*, p. 5.

6 Office of the Australian Information Commissioner, *Annual Report 2010–11*, p. v.

7 Office of the Australian Information Commissioner, *Annual Report 2010–11*, p. v.

8 Office of the Australian Information Commissioner, *Submission 6*, pp. 3-4.

9 Office of the Australian Information Commissioner, *Annual Report 2010–11*, p. 5

10 [www.oaic.gov.au/media-and-speeches/statements/australian-government-s-budget-decision-to-disband-oaic#australian-governments-budget-decision-to-disband-oaic](http://www.oaic.gov.au/media-and-speeches/statements/australian-government-s-budget-decision-to-disband-oaic#australian-governments-budget-decision-to-disband-oaic) (accessed 12 November 2018).

11 [www.aph.gov.au/Parliamentary\\_Business/Bills\\_LEGislation/Bills\\_Search\\_Results/Result?bId=r5350](http://www.aph.gov.au/Parliamentary_Business/Bills_LEGislation/Bills_Search_Results/Result?bId=r5350) (accessed 12 November 2018).

12 [www.aph.gov.au/Parliamentary\\_Business/Bills\\_LEGislation/Bills\\_Search\\_Results/Result?bId=r5350](http://www.aph.gov.au/Parliamentary_Business/Bills_LEGislation/Bills_Search_Results/Result?bId=r5350) (accessed 12 November 2018).

13 Accountability Round Table, *Submission 2*, p. 2.

June 2015.<sup>14</sup> The former Privacy Commissioner, Mr Timothy Pilgrim, was subsequently appointed to the role of Information Commissioner. He continued in his roles as Information Commissioner and Privacy Commissioner, while also performing the function of FOI Commissioner, until his retirement in March 2018.<sup>15</sup>

1.12 Ms Angelene Falk was appointed by the Governor-General on 16 August 2018 to the statutory positions of Information Commissioner and Privacy Commissioner for a three year term. Currently, the functions of the FOI Commissioner are being performed by Ms Falk as the Information Commissioner and the Privacy Commissioner.

### ***Reviewing FOI decisions***

1.13 Applicants who disagree with an agency or minister's decision relating to an FOI request for information, may apply to the Information Commissioner for review of that decision under Part VII of the FOI Act.<sup>16</sup> The OAIC noted that while an FOI applicant does not have to apply for an internal review before applying for a review by the Information Commissioner, it considers it best practice for an applicant to do so.<sup>17</sup>

1.14 The OAIC explained that Information Commissioner reviews are based on four key principles:

- it is a merit review process where the Commissioner makes the correct or preferable decision at the time of the Commissioner's decision
- it is intended to be as informal as possible
- it is intended to be non-adversarial, and
- it is intended to be timely.<sup>18</sup>

1.15 The OAIC outlined the ways in which an Information Commissioner review may be finalised:

- accepting a written agreement between the parties (s 55F),
- making a written decision under s 55K,
- deciding not to undertake an [Information Commissioner] review if satisfied that certain grounds exist (s 54W), or
- receiving a written notice from the applicant withdrawing the application for review (s 54R).<sup>19</sup>

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14 Mr Richard Mulligan, The slow death of the Office of the Australian Information Commissioner, Sydney Morning Herald, 26 August 2015, <https://www.smh.com.au/public-service/the-slow-death-of-the-office-of-the-australian-information-commissioner-20150826-gj81dl.html> (accessed 12 November 2018).

15 Attorney-General's Department, *Submission 3*, p. 2.

16 Office of the Australian Information Commissioner, *Submission 6*, p. 5.

17 Office of the Australian Information Commissioner, *Submission 6*, p. 5.

18 Office of the Australian Information Commissioner, *Submission 6*, p. 5.

19 Office of the Australian Information Commissioner, *Submission 6*, p. 6.

1.16 Additionally, the Information Commissioner, or their delegate, may exercise discretion to not undertake an Information Commissioner review pursuant to one of the grounds outlined in section 54W of the FOI Act.<sup>20</sup> One of the discretionary grounds is where the Information Commissioner is satisfied that the decision should be considered by the Administrative Appeals Tribunal (AAT).<sup>21</sup>

### **Key provisions of the bill**

1.17 As outlined in the Explanatory Memorandum, the provisions of the bill would amend the AIC Act, the FOI Act, and the *Archives Act 1983* (Archives Act). The key provisions of the bill are summarised below.

#### ***Australian Information Commissioner Act 2010***

##### *Legal qualifications*

1.18 New subsections 10(3) and 12(2) would prohibit the Information Commissioner and Privacy Commissioner, respectively, from reviewing decisions under Part VII of the FOI Act, unless they hold legal qualifications.

##### *Appointment of three separate Commissioners*

1.19 New subsection 14(5) of the bill would require three separate Commissioners to be appointed under the AIC Act, while item 6 of the bill clarifies that 'the same person must not simultaneously hold more than one appointment (including an acting appointment).' Additionally new subsection 14(6) would require a vacancy to any of these offices to be filled within three months.

#### ***Freedom of Information Act 1982***

##### *Requirement to publishing information between 10 to 14 days*

1.20 New subsection 11C(6) would require agencies to publish information released to an applicant between 10 and 14 days after it has been provided to the applicant, rather than the current requirement of 'within 10 working days'. The Explanatory Memorandum states that the timeframe is designed both to facilitate access to that information while also allowing applicants to examine released information before it is made public.

##### *Charges*

1.21 Charges related to FOI requests are covered in changes to paragraph 29(1)(d) and a new subsection 29(5A). Of particular note, new subsection 29(5A) would exempt Senators and Members of the House of Representatives from charges unless the work generated totals more than \$1000. The proposed exemption for Senators and Members is designed to support greater parliamentary scrutiny of public administration.

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20 Office of the Australian Information Commissioner, *Submission 6*, p. 8.

21 Subsection 54W(b) of the FOI Act, Office of the Australian Information Commissioner, *Submission 6*, p. 8.

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### Consistent application of exemptions

1.22 New section 55EA would require a consistent application of exemptions during Information Commissioner reviews by not allowing an agency or minister to rely on an exemption that was not relied upon in making the Information Commissioner review.

### Referral to the AAT

1.23 Item 12 of the bill deals with referrals to the AAT where an Information Commissioner review has taken, or is likely to take, 120 days or longer to finalise. New sections 55JA require the Information Commissioner to notify an applicant if a review is likely to take, or has already taken, more than 120 days. In such cases, new section 55JB would then allow the applicant to transfer their review to the AAT at no charge to the applicant.

1.24 Separately, item 13 of the bill would allow an applicant to apply to the AAT for review of any Information Commissioner review, without first having the matter reviewed by the Information Commissioner. The Explanatory Memorandum states that 'an applicant taking this option would pay the usual fee for an application to the AAT.'<sup>22</sup>

### Reporting of external legal expenses

1.25 New section 93AA covers the reporting of legal fees in agencies' annual reports, including listing each request made under section 15 of the FOI Act.

### Transitional rules

1.26 Subitem 17(1) would allow the Attorney-General to make disallowable legislative instruments (transitional rules) for current applications. Subitem 17(2) confirms that certain significant matters (such as the creation of an offence or civil penalty) may not be included in the transitional rules.<sup>23</sup>

### **Archives Act 1983**

1.27 The bill proposes to amend the *Archives Act* to require the reporting of external legal expenses incurred by the National Archives of Australia. Under new section 55B, expenses published must include external legal expenses incurred:

- in making an initial decision in relation to an application for access to a record;
- as part of an internal reconsideration of a decision under section 42 of the Archives Act;
- as part of a review by the AAT of a decision by the Archives; and

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22 Explanatory Memorandum, p. 6.

23 Explanatory Memorandum, p. 7.

- as part of an appeal to the Federal Court of Australia from a decision of the AAT.<sup>24</sup>

### **Consideration by other Parliamentary committees**

1.28 The Senate Standing Committee for the Scrutiny of Bills provided no comment on the bill.<sup>25</sup>

1.29 The Parliamentary Joint Committee on Human Rights stated that the bill does not raise human rights concerns.<sup>26</sup>

### **Conduct of this inquiry**

1.30 In accordance with usual practice, the committee advertised the inquiry on its webpage and also wrote to various organisation and individuals inviting written submissions by 24 September 2018.<sup>27</sup> The committee received nine submissions, as listed at Appendix 1, and which are available on the committee's webpage.

1.31 The committee held a public hearing in Canberra on 16 November 2018. Details of the public hearing are provided at Appendix 2. Questions on notice and other material received by the committee are listed at Appendix 1.

### **Structure of this report**

1.32 This report consists of two chapters:

- This chapter provides an overview of the bill, as well as the administrative details of the inquiry.
- Chapter 2 discusses the key issues raised by submitters and witnesses, as well as providing the committee's views and recommendation.

### **Acknowledgements**

1.33 The committee thanks all organisations and individuals that made submissions to this inquiry and all witnesses who attended the public hearing.

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24 Explanatory Memorandum, pp. 2–3.

25 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 10 of 2018*, 12 September 2018, p. 10.

26 Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny Report 9 of 2018*, 11 September 2018, p. 22.

27 The committee's website can be found at [www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs).

# Chapter 2

## Key issues

2.1 A number of key issues were raised by submitters and witnesses concerning the Freedom of Information Legislation Amendment (Improving Access and Transparency) Bill 2018 (the bill). These issues included:

- *Australian Information Commissioner Act 2010* (AIC Act)
  - the resourcing of the Office of the Australian Information Commissioner (OAIC)
  - the requirement to appoint three separate Commissioners
  - the requirement that Commissioners have legal qualifications
- *Freedom of Information Act 1982* (FOI Act)
  - encouraging a pro-disclosure culture
  - the requirement that information be published within 10 to 14 working days
  - preventing agencies from relying on additional exemption grounds during the course of Information Commissioner reviews
  - allowing for referrals to the Administrative Appeals Tribunal (AAT)
  - exempting Senators and Members from charges under \$1000, and
- the reporting of external legal expenses under the FOI Act and the *Archives Act 1983* (Archives Act).

2.2 This chapter will outline the above issues and provide the committee's views and recommendation on the bill.

### **Australian Information Commissioner Act 2010**

#### ***Resourcing of the OAIC***

2.3 A number of submitters suggested that the reduction of funding to OAIC in 2014–15, in anticipation of its closure, was an area of concern.<sup>1</sup> Witnesses echoed this concern at the hearing, and concluded that the reduced funding had resulted in delays in the FOI system. For example, the Law Institute of Victoria stated:

The overall concerns that the Law Institute of Victoria has with the inefficient and ineffective operation of the FOI system in Australia are mainly due to insufficient resourcing of the Office of the Australian Information Commissioner, and it is our view that this has resulted in considerable delays at the Information Commissioner review stage. The

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1 Accountability Round Table, *Submission 2*, pp. 2–4; Mr Asher Hirsch, Dr Yee-Fui Ng, and Dr Maria O'Sullivan, *Submission 4*, p. 4-6, Mr Peter Timmins, *Submission 7*, p. 2, Transparency International Australia, *Submission 8*, p. 3.

Law Institute of Victoria is also concerned that the government sought to abolish the Office of the Australian Information Commissioner in 2014, and, since that time, has failed to restore the funding levels to the previous levels experienced.<sup>2</sup>

2.4 While the Attorney-General's Department (the department), acknowledged that funding to the OAIC was reduced, it also explained that the OAIC's funding has since been largely restored:

As part of the 2014–15 Budget measure there were expected to be savings of \$3.6m per year, reflecting the abolition of FOI and information law functions performed by the OAIC. When the Government decided that the OAIC would continue in its current form, an amount of \$2m per year was returned to the OAIC budget from those \$3.6m of savings. The \$1.6m which was not returned reflected streamlined arrangements that had been put in place by the OAIC to manage its workload, particularly in the area of FOI.<sup>3</sup>

2.5 However, the department recognised that the OAIC experiences 'ongoing stresses' due to an increase in the number of applications made to the OAIC.<sup>4</sup>

2.6 The Information Commissioner and Privacy Commissioner, Ms Angelene Falk, tabled the following statistics:

**Table 1: Overview of IC review applications received and finalised**

Type	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18
IC reviews received	456	507	524	373	510	632	801
IC reviews finalised	253	419	646	482	454	515	610
IC reviews where s 55K decision made	25	89	98	128	80	104	123
IC reviews finalised without s 55K decision being made	238 (90.5%)	330 (78.8%)	548 (84.8%)	354 (73.4%)	374 (82.4%)	411 (79.8%)	487 (79.84%)

2.7 Ms Falk confirmed that in 2017–18, the OAIC received 801 applications for Information Commissioner reviews, which is a 27 per cent increase from the previous financial year.<sup>5</sup> Furthermore, the OAIC had experienced similar increases of requests

2 Ms Fiona McLeod SC, Chair, Accountability Round Table, *Committee Hansard (Proof)*, 16 November 2018, p. 1.

3 Additional information provided by the Attorney-General's Department correcting evidence in Hansard, (received 26 November 2018), p. 1.

4 Mr Andrew Walter, First Assistant Secretary, Integrity and Security Division, AGD, *Committee Hansard (Proof)*, 16 November 2018, p. 29.

5 Ms Angelene Falk, Australian Information Commissioner and Privacy Commissioner, OAIC, *Committee Hansard (Proof)*, 16 November 2018, p. 34

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for Information Commissioner reviews in the last three years.<sup>6</sup> These figures appear to support the department's view that the OAIC experiences 'ongoing stresses' due to the number of applications it receives.

2.8 However, Ms Falk also noted that the number of Information Commissioner reviews finalised in 2017–18, also increased by 18 per cent.<sup>7</sup> Additionally, the table shows that the total number of Information Commissioner reviews finalised in 2017-18 was the second highest, and that only in 2013–14 were more reviews finalised.

2.9 When asked whether there needed to be more resources at both the early resolution stage, as well as at a later stage, to enable more Information Commissioner reviews to be finalised earlier, Ms Falk stated:

At this point in time, that's not what I'm seeing. I'm seeing that where I need to focus is on working with government to increase the offices resources to increase the capacity at the case-officer level and potentially, the executive level. If that were to be increased and then have a flow-on effect to more Information Commissioner reviews being required of the commissioner and that being something that's not manageable within other functions then that would be something that I would bring to the attention of government.<sup>8</sup>

2.10 Ms Falk went on to say:

...at this time, I consider that it's working in a way that's effective and, should that change, then that would be something that I would bring to the attention of government. The increased work of the OAIC right across all our functions is something that, as I say, we're very closely monitoring. In the three months since my appointment to the commission it has been a key focus of my tenure.<sup>9</sup>

### ***Requiring the appointment of three separate Commissioners***

2.11 New subsection 14(5) of the bill would require three separate Commissioners to be appointed under the Act, while new subsection 14(6) would require a vacancy to any of these offices to be filled within three months.

2.12 The Explanatory Memorandum provides a rationale for the proposed change:

While on its face section 14 of the AIC Act makes it clear that there should be three separate commissioners, the functions of the Freedom of Information Commissioner are currently being performed by the Australian Information Commissioner and Privacy Commissioner. Subsection 14(5) removes any doubt and clarifies that there is to be a

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6 Ms Angelene Falk, Australian Information Commissioner and Privacy Commissioner, OAIC, *Committee Hansard (Proof)*, 16 November 2018, p. 34.

7 Ms Angelene Falk, Australian Information Commissioner and Privacy Commissioner, OAIC, *Committee Hansard (Proof)*, 16 November 2018, p. 34.

8 Ms Angelene Falk, Australian Information Commissioner and Privacy Commissioner, OAIC, *Committee Hansard (Proof)*, 16 November 2018, p. 40.

9 Ms Angelene Falk, Australian Information Commissioner and Privacy Commissioner, OAIC, *Committee Hansard (Proof)*, 16 November 2018, p. 40.

separate Australian Information Commissioner, Freedom of Information Commissioner and Privacy Commissioner.<sup>10</sup>

2.13 A number of witnesses agreed that the AIC Act already requires three separate appointments as this was the intention of the Parliament of the day.<sup>11</sup> However, according to the department, 'there is no legal impediment to the appointment of a single person' to the three Commissioner roles.<sup>12</sup> The department went on to explain:

...the department's view is that it is open to the government to appoint only one commissioner. We think that the organisation can't effectively function without an information commissioner, so that one has to be in place. However, we think it would be perfectly open on the construction of the legislation to not have those other two positions filled. The government has decided to fill the privacy commissioner role. I might just contrast that with some other legislative schemes. I mentioned in my opening statement, for example, the Administrative Review Council. Once it falls below a certain number of appointments, it can no longer function. The parliament clearly didn't contemplate that. It contemplated a scheme where it could function with only one, even if it did provide for the establishment of the three.<sup>13</sup>

2.14 A number of submitters were supportive of the proposed amendment, suggesting that the appointment of three separate Commissioners had worked successfully in the past, and noting that a similar model is adopted in state governments as well as overseas jurisdictions.<sup>14</sup> Transparency International Australia stated that it supported this measure, provided the three Commissioners 'are also individually adequately resourced so that they can effectively perform their separate functions.'<sup>15</sup>

2.15 Dr David Solomon AM, Director of the Accountability Round Table, argued that having one person perform three roles was placing too much burden on that individual:

The functions that each of the three have are different. They are complex. The Information Commissioner has additional functions outside or on top of FOI in terms of general information policy and so on, and particularly additional functions under the national action plan and so on. There is more than enough work to have three people separately perform these functions,

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10 Explanatory Memorandum, p. 3.

11 Ms Lara Freidin, Policy Lawyer, Administrative Law and Human Rights Section, Law Institute of Victoria, *Committee Hansard (Proof)*, 16 November 2018, p. 6.

12 Mr Andrew Walter, First Assistant Secretary, Integrity and Security Division, AGD, *Committee Hansard (Proof)*, 16 November 2018, p. 28.

13 Mr Andrew Walter, First Assistant Secretary, Integrity and Security Division, AGD, *Committee Hansard (Proof)*, 16 November 2018, p. 31.

14 Accountability Round Table, *Submission 2*, p. 6 and Transparency International Australia, *Submission 8*, p. 3.

15 Transparency International Australia, *Submission 8*, p. 4.

and requiring one person to do all three is putting a burden on them which really is absolutely unrealistic.<sup>16</sup>

2.16 In contrast, the OAIC and the department did not consider this amendment necessary, noting that 'the OAIC has been operating efficiently with a single person ... since July 2015.'<sup>17</sup> Ms Falk reiterated this view at the hearing:

I consider that, from the perspective of the one-commissioner model, that's functioning effectively at this time, and that's something that I will continue to review and, if necessary, advise government on.<sup>18</sup>

2.17 In support of her view that one individual could effectively perform the functions of three Commissioners, are the figures provided at table 1, and particularly, row 3 of the table (the full table is available above).

**Row 3 of table 1: Overview of IC review applications received and finalised**

Type	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18
IC reviews where s 55K decision made	25	89	98	128	80	104	123

2.18 Ms Falk explained that a 's 55K' decision is a final decision that is made if the alternative dispute resolution or other mechanisms has not resolved the review.<sup>19</sup> Section 55K decisions are decisions that are made by the Information Commissioner and are non-delegable, and therefore must be made by Ms Falk.<sup>20</sup>

2.19 As noted in chapter 1, Dr James Popple resigned as FOI Commissioner in December 2014 and Professor John McMillan resigned as Information Commissioner in June 2015. Since this time, the OAIC has operated with one individual performing the functions of all three Commissioners. According to the table, the three periods which recorded the highest number of section 55K decisions being completed, were in 2014–15 (128 decisions), 2017–18 (123 decisions) and 2016–17 (104 decisions).

2.20 The committee notes that during all three periods, the OAIC was operating with less than three Commissioners. Based on the figures provided at row 3 of table 1, it is difficult to conclude that the effective operation of OAIC has suffered, due to having one individual performing the roles of three Commissioners.

16 Dr David Solomon AM, Director, Accountability Round Table, *Committee Hansard (Proof)*, 16 November 2018, p. 5.

17 Attorney-General's Department, *Submission 3*, p. 3. See also Office of the Australian Information Commissioner, *Submission 6*, p. 11.

18 Ms Angelene Falk, Australian Information Commissioner and Privacy Commissioner, OAIC, *Committee Hansard (Proof)*, 16 November 2018, p. 34.

19 Ms Angelene Falk, Australian Information Commissioner and Privacy Commissioner, OAIC, *Committee Hansard (Proof)*, 16 November 2018, p. 35.

20 Office of the Australian Information Commissioner, *Submission 6*, p. 13.

### ***Legal qualifications***

2.21 Most submissions were supportive of the requirement for the Privacy Commissioner and Information Commissioner to hold appropriate legal qualifications when reviewing FOI decisions, and raised concerns that the previous Information Commissioner did not hold such qualifications.<sup>21</sup> For example, the Law Institute of Victoria stated:

The [Law Institute of Victoria] believes that the FOI Commissioner should always have the appropriate legal qualifications to engage in the complex legal decision-making required to perform the functions of the FOI Commissioner. The functions of the FOI Commissioner should not be performed by another statutory officer in order to avoid the requirement that the FOI Commissioner must have appropriate legal qualifications.

The [Law Institute of Victoria] is concerned that the FOI Commissioner's role was vacant in recent years and the functions of the office were performed by the Information Commissioner, Mr Timothy Pilgrim, who does not hold the appropriate legal qualifications.<sup>22</sup>

2.22 Ms McLeod provided some background as to why it was considered necessary for the FOI Commissioner to hold legal qualifications:

I understand the intention in introducing those qualification requirements was to assist in the review process for claims of exemption, so that there was a person with understanding, or the qualifications to understand, the law and its application. So let's just take an area where there are frequent claims of exemptions, like national security, or perhaps public interest immunity, legal professional privilege: they're things that require the person viewing the exemptions to understand how the law works, what the law is and how the law is applied in practice, and to be abreast of developments and authority on those matters. It would appear logical that, even with a very experienced public servant acting in the role, you would need to have that capacity and that ability.<sup>23</sup>

2.23 However, the department did not support this view noting that '[t]here is no evidence that a lack of legal qualifications hindered Mr Pilgrim's effectiveness in making these decisions.'<sup>24</sup> The department explained why it considered the need for the FOI Commissioner to hold legal qualifications unnecessary:

[Information Commissioner] reviews are intended to be a 'simple, practical and cost efficient method of external merit review'. This is consistent with the objects of the FOI Act which is to facilitate public access to information promptly and at the lowest reasonable cost. Requiring the reviewer to have legal qualifications does not align with the informality intended in the

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21 Law Institute of Victoria, *Submission 1*, p. 2; Accountability Round Table, *Submission 2*, p. 6 and Mr Asher Hirsch, Dr Yee-Fui Ng, and Dr Maria O'Sullivan, *Submission 4*, p. 9.

22 Law Institute of Victoria, *Submission 1*, p. 2.

23 Ms Fiona McLeod SC, Chair, Accountability Round Table, *Committee Hansard (Proof)*, 16 November 2018, p. 6.

24 Attorney-General's Department, *Submission 3*, p. 2.

review process. Furthermore, the effective operation of the OAIC should not be dependent on a statutory officer holding legal qualifications, as that capability should be resident within the staff of that office as it is with every other agency.<sup>25</sup>

2.24 At the hearing, the department expanded on this point, noting that it is common practice for statutory office holders to draw on the expertise of its staff:

We have statutory office holders all around the Commonwealth who aren't lawyers making decisions that have legal impacts. They do so on the basis that they get advice from their own staff or, if necessary, they get legal advice to support those decisions. In general, that doesn't pose any particular problems. Naturally, we put lawyers in charge of courts because they're making final determinations of the legal rights as between various parties, and that's entirely appropriate. But, in terms of general administration of government, it's rare that you absolutely need a lawyer to make a decision. You just need somebody who is capable of taking into account all the relevant factors, which may include legal factors.<sup>26</sup>

## **Freedom of Information Act 1982**

### ***Encouraging a culture of pro-disclosure***

2.25 At the hearing, witnesses expressed concern that the current culture within agencies and government does not encourage the disclosure of information, which was the intention of the FOI Act.

2.26 The Explanatory Memorandum outlines the purpose of the bill:

These amendments are designed to significantly improve the effectiveness of Australia's freedom of information (FOI) laws. Freedom of information provides the lawful means for citizens, the media, and parliamentarians to obtain access to information that ultimately belongs to the public.

These changes are designed to address the considerable dysfunction that has developed in our FOI system which is now characterised by chronic bureaucratic delay and obstruction, unacceptably lengthy review processes and what appears to be an increased preparedness by agencies to incur very large legal expenses to oppose the release of information.<sup>27</sup>

2.27 Mr Asher Hirsch, Dr Yee-Fui Ng, and Dr Maria O'Sullivan commented that the purpose of the FOI legislation is to 'encourage transparency and accountability in government' through the right of citizens to access government documents.<sup>28</sup> Ms Karen Middleton, Reporter for the Saturday Paper explained:

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25 Attorney-General's Department, *Submission 3*, p. 2.

26 Mr Andrew Walter, First Assistant Secretary, Integrity and Security Division, AGD, *Committee Hansard (Proof)*, 16 November 2018, p. 31.

27 Explanatory Memorandum, p. 1

28 Mr Asher Hirsch, Dr Yee-Fui Ng, and Dr Maria O'Sullivan, *Submission 4*, p. 2.

The FOI system is one commitment to the public's right to know. It is a concern if the system gives the veneer of transparency and the veneer of accessibility but the process itself is used as a means to block access.<sup>29</sup>

2.28 In relation to the need for a change in culture, Dr Maria O'Sullivan stated:

I feel that, although this has been done in the legislation, there hasn't been sufficient change in the culture of decision-making, particularly in certain agencies... [T]here really needs to be more of an emphasis on open government, and disclosure of information absolutely has to be the starting point of any FOI decision.<sup>30</sup>

2.29 Mr Michael McKinnon, Journalist and FOI Editor for the Australian Broadcasting Corporation stated:

I can't remember the act working as badly as it does at the moment. Delays, wilful and wrongful exemption claims and a flawed appeals process mean that it's very difficult for journalists to do our job, which is to inform the Australian public accurately and fairly on what governments are doing.<sup>31</sup>

2.30 Mr McKinnon explained the importance of FOI for journalism and accurate reporting:

In the era of so-called fake news, FOI allows us to report accurately and fairly on the government's own documents. Whereby politics can often be a debate between 'he said, she said', it's about where the ultimate truth lies. We can publish documents that are the government's. ... FOI is crucial to what journalists do, because, rather than appealing to the bias or slant on any given issue because of any take or how the reporting occurs, we can simply report accurately and fairly on what the government's own documents say, and the public are in the delightful position of seeing the truth.<sup>32</sup>

2.31 Ms McLeod argued for the need for a 'push scheme' that is 'weighted in favour of disclosure and not endlessly chasing departments to disclose information'.<sup>33</sup>

2.32 Ms Falk explained the action that the OAIC is taking to promote a 'push scheme' model:

We've also been focusing on the proactive 'push' model of releasing information that is fundamental to the reforms to the FOI Act that occurred in 2010—that is, there is an obligation on government agencies to be proactively publishing information, where that's appropriate. To that end,

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29 Ms Karen Middleton, Reporter, The Saturday Paper, *Committee Hansard (Proof)*, 16 November 2018, p. 11.

30 Dr Maria O'Sullivan, *Committee Hansard (Proof)*, 16 November 2018, p. 18.

31 Mr Michael McKinnon, Journalist and FOI Editor, Australian Broadcasting Corporation, *Committee Hansard (Proof)*, 16 November 2018, p. 9.

32 Mr Michael McKinnon, Journalist and FOI Editor, Australian Broadcasting Corporation, *Committee Hansard (Proof)*, 16 November 2018, p. 10.

33 Ms Fiona McLeod SC, Chair, Accountability Round Table, *Committee Hansard (Proof)*, 16 November 2018, p. 5.

we've undertaken a survey of the Information Publication Scheme, which is a proactive release model, and the results of that will be provided shortly. We've also worked to provide additional guidance to agencies in terms of facilitating administrative access outside of the FOI Act. And other activities that we have planned in our corporate plan include reviewing the application, or the administration, of the disclosure log provisions, whereby agencies and ministers are required to publish information that they have provided under FOI on their websites within 10 days of providing the information to the applicant. So it is a multifaceted approach to dealing with what is an ever-increasing workload.<sup>34</sup>

### ***Publishing information within 10 to 14 days***

2.33 New subsection 11C(6) would require agencies to publish information released to an applicant between 10 to 14 days after it has been provided to the applicant, rather than the current requirement of 'within 10 working days'. The Explanatory Memorandum states that the timeframe is designed both to facilitate access to that information while also allowing applicants to examine released information before it is made public:

This provision addresses the frequent practice of agencies discouraging journalists from using freedom of information by denying any measure of exclusivity to information that may have been only released after long delays and payment of substantial fees. This subsection will give applicants the opportunity to examine released information before it is released to the public in general.<sup>35</sup>

2.34 At the hearing, the committee heard from journalists, who expressed their support for this provision. Mr McKinnon explained the importance of this provision, particularly to journalists:

The reason we need 10 days is we get large lumps of information that are released only because they're in the public interest. You've won the public interest battle as soon as those documents have been released, because that's why they're released. What we would like to do, as journalists, is then research the documents appropriately, contact experts in the field, look for other documentation, even talk to politicians about it, and then produce a well-researched, concise, accurate and fair publication. We don't get that opportunity, because there are agencies that will release on the same day. I have had FOI documents coming back to me, and they have been given to other journalists by politicians in order to discourage us from doing FOIs.<sup>36</sup>

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34 Ms Angelene Falk, Australian Information Commissioner and Privacy Commissioner, OAIC, *Committee Hansard (Proof)*, 16 November 2018, p. 34.

35 Explanatory Memorandum, p. 4.

36 Mr Michael McKinnon, Journalist and FOI Editor, Australian Broadcasting Corporation, *Committee Hansard (Proof)*, 16 November 2018, p. 12.

2.35 Ms Middleton agreed, suggesting that 'the 10 days should be a minimum.... It disadvantages anyone doing longer term investigative work to have a short time frame.'<sup>37</sup>

2.36 However, the department confirmed that the FOI Guidelines<sup>38</sup> issued by the Information Commissioner already acknowledges how same day publication may adversely affect journalists.<sup>39</sup> Relevantly, the FOI Guidelines state:

A contested issue in the operation of the FOI Act is that of 'same day publication (that is, publication of information on the disclosure log within 24 hours of when it is provided to the FOI applicant). With an eye to lessening dispute about this issue, an agency or minister may consider the following issues when choosing the date of publication in an individual case:

...

- A practice of same day publication, if widely adopted or practised across government, may discourage journalists from using the FOI Act. This may work against the objects of the FOI Act by discouraging FOI requests from a particular section of the community who are experienced in accessing government information and making it available to the community.<sup>40</sup>

2.37 The department explained why it was preferable that this issue be dealt with in the Guidelines rather than through legislation:

The department considers that dealing with these matters through the FOI Guidelines provides the appropriate degree of flexibility to ensure agencies and Ministers can consider disclosure log publication timing on a case-by-case basis. This will ensure that disclosure log publication timing decisions strike the right balance between the objectives of the FOI Act in promoting access to Government information with the particular interests of journalists or others in receiving exclusive access to documents.<sup>41</sup>

2.38 The OAIC noted that the issue of the timing of the publication of documents was considered by the Hawke Report.<sup>42</sup> The Hawke Report recommended that 'there should be a period of five working days before documents released to an applicant are

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37 Ms Karen Middleton, Reporter, The Saturday Paper, *Committee Hansard (Proof)*, 16 November 2018, p. 13.

38 Office of the Australian Information Commissioner, *FOI Guidelines: Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982*, May 2018.

39 Attorney-General's Department, *Submission 3*, p. 4.

40 Office of the Australian Information Commissioner, *FOI Guidelines: Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982*, May 2018, para 14.27.

41 Attorney-General's Department, *Submission 3*, p. 4.

42 Dr Allan Hawke, *Review of the Freedom of Information Act 1982 and Australian Information Commissioner Act 2010*, 2013.

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published on the disclosure log, but considered that it would be preferable for this to be set out in guidelines rather than in the FOI Act.<sup>43</sup>

2.39 More broadly, the department noted that the proposed provision, as currently drafted, would apply to all applicants and not merely journalists. Consequently, the department argued that the provision could 'frustrate the policy objective of the FOI Act's disclosure log provisions of facilitating broader release of information released to FOI applicants,' as it could result in the slower release of information.<sup>44</sup>

### ***Consistent application of exemptions***

2.40 New section 55EA would require a consistent application of exemptions during Information Commissioner reviews, by not allowing an agency or minister to rely on an exemption that was not relied upon in making the Information Commissioner review. The Explanatory Memorandum explains the basis for the proposed amendment:

This section seeks to prevent agencies from making submissions to FOI decision reviews that have not been advanced by the agency in its internal decision making, so that they can't change the basis for exemptions half way through a review. In effect, this frequent practice allows agencies and ministers to remake decisions half way through a review, something not normally permitted in merits review processes run in superior jurisdictions and never intended under the FOI Act.<sup>45</sup>

2.41 Most submissions opposed the bill's proposed requirement of requiring a consistent application of exemptions during Information Commissioner reviews. The OAIC explained that the current review process conducted by the Information Commissioner supports its merits review function:

In an [Information Commissioner] review of an access refusal decision, the agency or Minister has the onus of establishing that the reviewable decision is justified and that the Commissioner should give a decision adverse to the review applicant (s 55D(1)). Further, section 55DA requires the decision maker to assist the Commissioner in making her decision, conduct further searches for documents if access has been refused under section 24A (section 54V) and under section 55E an agency or Minister can be required to provide a statement of reasons for the decision if the Commissioner believes no statement has been provided or the statement provided is inadequate.

When making decisions under s 55K, it is open to the Commissioner to vary the decision of the agency or minister by deciding that documents in dispute are exempt under an exemption that is different to the exemption contended by the agency or minister. Accordingly, in order for the Commissioner to undertake a full merits review and reach the correct or

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43 Office of the Australian Information Commissioner, *Submission 6*, p. 12.

44 Attorney-General's Department, *Submission 3*, p. 3.

45 Explanatory Memorandum, p. 5.

preferable decision at the time of making the IC review decision, any relevant exemptions and submissions should continue to be permitted.<sup>46</sup>

2.42 Similarly, the department, Transparency International Australia and the Law Institute of Victoria agreed that the ability to raise additional exemptions ensures the FOI system remains, as the Law Institute of Victoria states, a 'pure form of merits review'.<sup>47</sup> Additionally, Ms Elisa Hesling, representative of the Law Institute of Victoria, raised the following issue with the proposed provision:

There is the potential for locking someone into claiming an exemption—that then may require an organisation, an agency, to only consider that particular point and therefore not look further outside the field, which would be disadvantageous to justice in any event.<sup>48</sup>

2.43 The Department of Home Affairs also raised concerns that to limit agencies' use of exemptions during an Information Commissioner review would 'diminish the quality of the review process and limit the development of case law'.<sup>49</sup>

2.44 In expressing its opposition to the proposed provision, the Law Institute of Victoria provided the following explanation:

- Not permitting agencies to raise additional exemptions may be contrary to their statutory and ethical duty to properly and fully assist the Information Commissioner during IC reviews.
- If additional exemptions are raised by agencies, that does not mean that the Information Commissioner necessarily needs to agree that they apply; it just means that they ought to properly be considered if they have been appropriately raised.
- If additional exemptions were properly available and agencies were precluded from raising them at IC review just because they were not originally raised by the decision-making agency at first instance, that may have the unintended consequences of more agencies seeking review of Information Commissioner decisions from the AAT – a pure merits review body.
- The effectiveness of the FOI process is enhanced by promoting good communication between agencies and applicants, and formality and technicality in clarifying the documents sought in the FOI request and other aspects of the FOI process. Proposed section 55EA may result in a heightened risk that agencies would take a more rigid approach to drafting statements of reasons by looking for any conceivable exemption claim and including it at the outset, giving the perception that agencies may be seeking to obstruct access to information.

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46 Office of the Australian Information Commissioner, *Submission 6*, p. 13.

47 Law Institute of Victoria, *Submission 1*, p. 3. See also Attorney-General's Department, *Submission 3*, pp. 4–5 and Transparency International Australia, *Submission 8*, p. 4.

48 Ms Elisa Hesling, Committee Member, Administrative Review and Constitutional Law Committee, Law Institute of Victoria, *Committee Hansard (Proof)*, 16 November 2018, p. 3.

49 Department of Home Affairs, *Submission 5*, p. 3.

- If additional exemptions continue to be permitted to be raised by agencies, and if the 120 day time limit for IC reviews is put in place as proposed, the Information Commissioner may be more likely to make an assessment that consideration of the matter, including the additional exemptions, will take the matter beyond 120 days. This will increase the ability of FOI applicants to request that the matter be transferred to the AAT free of charge.<sup>50</sup>

2.45 At the hearing, the Law Institute of Victoria elaborated that by allowing agencies to reconsider exemptions, there may be situations where 'a government body decides that, no, the exemptions don't apply at all and decides to disclose the documents.'<sup>51</sup>

2.46 As an alternative to the proposed amendment, Ms McLeod and Mr Peter Timmins provided the following drafting alternative, with suggested timeframes:

Where an application for review is lodged:

- a) the OAIC is required to notify the agency or minister within (10) days;
- b) the agency is required to respond in writing to provide the OAIC within (14) days of any facts or other relevant considerations on which the decision is based that were not identified in the notice of decision provided to the applicant; and
- c) the OAIC review function is to affirm, vary or set aside the decision based on material provided to the applicant in the notice of decision and to the OAIC within 14 days of lodgement of the application.<sup>52</sup>

### ***Referral to the Administrative Appeals Tribunal***

#### ***Referral where review will take more than 120 days to finalise***

2.47 New sections 55JA would require the Information Commissioner to notify an applicant if a review is likely to take, or has already taken, more than 120 days. In such cases, new section 55JB would then allow the applicant to transfer their Information Commissioner review to the Administrative Appeals Tribunal (AAT), at no charge to the applicant.

2.48 The OAIC explained that the current process provides sufficient flexibility to allow matters to proceed to the AAT prior to an Information Commissioner review decision being made.<sup>53</sup> Under section 54W(b) of the FOI Act, the Information Commissioner can decline to undertake a review if they believe that the AAT is better placed to consider the review.<sup>54</sup> The OAIC provided the following

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50 Law Institute of Victoria, *Submission 1*, p. 3.

51 Ms Elisa Hesling, Committee Member, Administrative Review and Constitutional Law Committee, Law Institute of Victoria, *Committee Hansard (Proof)*, 16 November 2018, p. 3.

52 Ms Fiona McLeod, answers to questions on notice, 16 November 2018 (received 22 November 2018).

53 Office of the Australian Information Commissioner, *Submission 6*, p. 14.

54 Office of the Australian Information Commissioner, *Submission 6*, p. 8.

examples of when the Information Commissioner may determine that it is desirable for the AAT to consider a matter instead of the Information Commissioner:

- the [Information Commissioner] review is linked to ongoing proceedings before the AAT or a court
- there is an apparent inconsistency between earlier [Information Commissioner] review decisions and AAT decisions
- [Information Commissioner] review decision is likely to be taken on appeal to the AAT on a disputed issue of fact, and
- the FOI request under review is complex or voluminous, resolving the [Information Commissioner] review matter would require a substantial allocation of OAIC resources, and the matter could more appropriately be handled through the procedures of the AAT.<sup>55</sup>

2.49 Regarding the application of section 54W(b) of the FOI Act, Mr McKinnon raised concerns that he has sought to have his matter heard by the AAT under section 54 of the FOI Act, but was not able to:

I've attempted to go to the AAT any number of times, via the Information Commissioner, because I argue, quite simply, that it would be so much quicker, and I'm not allowed to go to the AAT via the Information Commissioner, under section 54. I don't know what the reasons are for not allowing me to go, but I want access to a fair means of appeal on FOI.<sup>56</sup>

2.50 Submitters and witnesses were generally supportive of this provision. The Law Institute of Victoria expressed its support for 'measures which will contribute to addressing substantial delays in the [Information Commissioner] review process for FOI decisions.'<sup>57</sup>

2.51 The Accountability Round Table agreed that applicants' should be informed if their Information Commissioner review would take in excess of 120 days for a decision. However, it also noted that applicants 'would be wise to determine whether the [AAT] is likely to hear an application for documentary access more quickly.'<sup>58</sup>

2.52 OpenAustralia Foundation stated that it did not support the provision as it considered the timeframe too long:

The applicant has probably gone through a 30 day initial, 30 day internal review, maybe some consultation, even where the authority is straightforward in their dealings. It's possible for the request to be outstanding for 60+ days when the matter gets to the Information Commissioner (IC)—The IC should be sufficiently funded to be able to

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55 Office of the Australian Information Commissioner, *Submission 6*, p. 8.

56 Mr Michael McKinnon, Journalist and FOI Editor, Australian Broadcasting Corporation, *Committee Hansard (Proof)*, 16 November 2018, p. 12.

57 Law Institute of Victoria, *Submission 1*, p. 2.

58 Accountability Round Table, *Submission 2*, p. 7.

make decisions in the normal course of events within 30 days and allow them to be referred to the AAT.<sup>59</sup>

2.53 A number of witnesses were asked what timeframe they considered reasonable to complete an Information Commissioner review. Generally, those witnesses expressed the view that 120 days 'seems a more than adequate time' to complete an Information Commissioner review.<sup>60</sup> As a comparison, Ms Hesling noted that the Victorian legislation requires the Victorian Information Commissioner to make a decision on an FOI review within 30 days of receiving the application.<sup>61</sup> Ms Hesling explained:

That time can be extended by agreement between the FOI applicant and the commissioner as long as that extension is sought within the initial 30 days of the review. At the end of that time, the commissioner is taken to have made a decision whether or not a decision has actually been made, and that then gives the right to refuse to the Victorian Civil and Administrative Tribunal.<sup>62</sup>

2.54 In answers to questions on notice, Dr Solomon provided the following figures in relation to FOI reviews conducted by the Queensland Information Commissioner:<sup>63</sup>

***Table 2: Time taken for Queensland Information Commissioner to finalise an FOI review:***

Year	Median days to finalise review	Number of reviews finalised
2015–16	98	407
2016–17	86	413
2017–8	102	595

2.55 In contrast, Ms Falk tabled the following statistics in relation to the time taken for Information Commissioner reviews to be finalised:

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59 OpenAustralian Foundation, *Submission 9*, p. 6.

60 Dr David Solomon AM, Director, Accountability Round Table, *Committee Hansard (Proof)*, 16 November 2018, p. 7. See also Dr Maria O'Sullivan, *Committee Hansard (Proof)*, 16 November 2018, p. 18.

61 Ms Fiona McLeod SC, Chair, Accountability Round Table, *Committee Hansard (Proof)*, 16 November 2018, p. 8.

62 Ms Elisa Hesling, Committee Member, Administrative Review and Constitutional Law Committee, Law Institute of Victoria, *Committee Hansard (Proof)*, 16 November 2018, p. 8.

63 Dr David Solomon AM, Accountability Round Table, answers to questions on notice, 16 February 2018, (received 16 November 2018).

**Table 3: Overview of IC review finalisation times**

<b>Finalised</b>	<b>2011-12</b>	<b>2012-13</b>	<b>2013-14</b>	<b>2014-15</b>	<b>2015-16</b>	<b>2016-17</b>	<b>2017-18</b>
Number finalised within 120 days (percentage of all IC reviews finalised)	100 (39%)	124 (30%)	191 (30%)	165 (34%)	196 (43%)	198 (38%)	235 (39%)
Number finalised within 6 months (percentage of all IC reviews finalised)	145 (57%)	167 (40%)	270 (42%)	247 (51%)	274 (60%)	291 (57%)	285 (47%)
Number finalised within 9 months (percentage of all IC reviews finalised)	203 (80%)	242 (58%)	359 (56%)	301 (62%)	347 (76%)	392 (76%)	418 (69%)
Number finalised within 12 months (percentage of all IC reviews finalised)	232 (92%)	289 (69%)	462 (72%)	343 (71%)	395 (87%)	445 (86%)	513 (84%)
Number finalised over 12 months (percentage of all IC reviews finalised)	21 (8%)	130 (31%)	184 (28%)	139 (29%)	59 (13%)	70 (14%)	97 (16%)
<b>TOTAL Finalised</b>	<b>253</b>	<b>419</b>	<b>646</b>	<b>482</b>	<b>454</b>	<b>515</b>	<b>610</b>

2.56 As indicated in table 1, the OAIC received 801 Information Commissioner review applications in 2017–18. The above table shows that, during this period, the OAIC finalised 235 reviews within 120 days. Under the proposed amendment the reviews not finalised by the OAIC within 120 days would be transferred to the AAT (566 reviews).

2.57 The AAT's 2017–18 Annual Report shows that it received 47 lodgements in its FOI division during this period.<sup>64</sup> Based on the 2017–18 figures, if item 12 of the bill was enacted, the AAT's workload within its FOI division would increase from 47 lodgements to 566 lodgements—a 12-fold increase.

2.58 Ms Falk noted her concerns that the provision would 'transfer the issue from one jurisdiction to the other.'<sup>65</sup> On this point, Ms McLeod stated:

The AAT is another body that is also facing a burgeoning workload and would probably need additional resources to be allocated to take on that extra jurisdiction.<sup>66</sup>

64 Administrative Appeals Tribunal, *Annual Report 2017–18*, p. 28.

65 Ms Angelene Falk, Australian Information Commissioner and Privacy Commissioner, OAIC, *Committee Hansard (Proof)*, 16 November 2018, p. 36.

2.59 In answers to questions on notice, the OAIC explained that '[t]he time to progress each IC review and the time it is formally allocated to a case officer varies from case to case depending on the complexity of the matters involved and the outcome sought by the IC review applicant.'<sup>67</sup> Prior to an application for a review being allocated to a case officer, the OAIC will generally conduct preliminary inquiries with an agency or minister, issue a notice to the agency or minister that an IC review has been commenced and request submissions and key documents.<sup>68</sup> The OAIC confirmed that:

At 31 October 2018, the time from receipt to formal allocation for those matters not resolved in the early stages is approximately eight and a half months, noting, as set out above, there are many case management activities undertaken prior to formal allocation and the timeframe between the last case management event to allocation to case officer varies.<sup>69</sup>

Automatic referral to the AAT

2.60 The bill would also allow the applicant (at the normal cost), to by-pass a review by the Information Commissioner and apply to the AAT to review an FOI decision. Witnesses generally did not support this provision, noting that it would 'significantly increase the workload of the AAT.'<sup>70</sup>

2.61 The department made the following observation:

Any significant workload increase for the AAT resulting from the proposed amendments would adversely affect the AAT's ability to finalise matters. This in turn is likely to lead to longer finalisation timeframes and increased backlogs.<sup>71</sup>

2.62 The department also commented that by-passing the Information Commissioner is 'a very big system change' and that it would want to understand the flow-on effects:

We'd want to think through what that looks like in terms of the AAT load, what it means in terms of potentially decreasing the OAIC's load and what flow-on effects that has in terms of that kind of informal merits-based decision-making.<sup>72</sup>

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66 Ms Fiona McLeod SC, Chair, Accountability Round Table, *Committee Hansard (Proof)*, 16 November 2018, p. 5.

67 Office of the Australian Information Commissioner, answers to questions on notice, 16 November 2018 (received 29 November 2018), answer to question 3.

68 Office of the Australian Information Commissioner, answers to questions on notice, 16 November 2018 (received 29 November 2018), answer to question 3.

69 Office of the Australian Information Commissioner, answers to questions on notice, 16 November 2018 (received 29 November 2018), answer to question 3.

70 Mr Russell Wilson, Non-Executive Director, Transparency International Australia, *Committee Hansard (Proof)*, 16 November 2018, p. 24.

71 Attorney-General's Department, *Submission 3*, p.5.

72 Mr Andrew Walter, First Assistant Secretary, Integrity and Security Division, AGD, *Committee Hansard (Proof)*, 16 November 2018, p. 32.

2.63 Additionally, Ms Falk noted that in 2017–18, the AAT's FOI division finalised 65 per cent of matters within 12 months.<sup>73</sup> The committee notes that if the purpose of the provision is to provide the applicant with early resolution of their matter, it is questionable whether the proposed amendment would achieve this objective, particularly if the AAT received a significant increase in the number of lodgements in its FOI division.

### ***Exempting Senators and Members from charges***

2.64 Submitters expressed mixed views with respect to the proposal to not impose a charge on Senators and Members where the work generated was under \$1000.

2.65 As background, the department explained that agencies and ministers should interpret the 'lowest reasonable cost' objective broadly, in imposing any charges under the FOI Act.<sup>74</sup> Additionally, the department observed that the FOI Act currently allows flexibility regarding charges, particularly if the release of information is deemed to be in the public interest.<sup>75</sup>

2.66 The OAIC explained that the following principles apply to charges under the FOI Act:

- A charge must not be used to unnecessarily delay access or discourage an applicant from exercising the right of access conferred by the FOI Act
- Charges should fairly reflect the work involved in providing access to documents on request
- Charges are discretionary and should be justified on a case by case basis
- Agencies should encourage administrative access at no charge, where appropriate
- Agencies should assist applicants to frame FOI requests
- Agencies should draw an applicant's attention to opportunities available to the applicant outside the FOI Act to obtain free access to a document or information
- A decision to impose a charge should be transparent.<sup>76</sup>

2.67 Regarding the specific provision that Senators and Members be exempt from charges where the work generated totals less than \$1000, Ms Middleton made the following observation:

...senators and members also have other mechanisms to use to access information, like orders of the Senate, asking for questions on notice and

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73 Ms Angelene Falk, Australian Information Commissioner and Privacy Commissioner, OAIC, *Committee Hansard (Proof)*, 16 November 2018, p. 36.

74 Office of the Australian Information Commissioner, *Submission 6*, p. 12.

75 Attorney-General's Department, *Submission 3*, p. 4.

76 Office of the Australian Information Commissioner, *Submission 6*, p. 13.

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compelling witnesses to public inquiries. Journalists have fewer avenues, so I would say that, if there's going to be an exemption for members and senators, maybe think about an exemption for media as well because we're, in the end, representing the public.<sup>77</sup>

2.68 Dr O'Sullivan noted that exempting certain people from charges could be 'a slippery slope':<sup>78</sup>

I was listening to the previous sessions where there was discussion about giving exemptions about payments to journalists, and then of course you run into the problem of: what about individual citizens, and what about civil society? I haven't really turned my mind extensively to this, but I think you need to bear in mind that if you make it free for certain people then you'll have to expand that circle of people. So I would give a note of caution about doing that.<sup>79</sup>

2.69 Mr Wilson made the following observation:

So the issue to us is more one of looking at the principle of the cost of allowing access to government information and tackling that issue rather than necessarily simply giving this exemption, as it were, for senators and members.<sup>80</sup>

### ***External legal expenses***

2.70 The bill proposes to amend the FOI Act to require external legal fees to be reported in agencies' annual reports. Additionally, the bill also proposes to amend the Archives Act to require the National Archives of Australia to include in its annual report the number of applications made to it for access to records in which external legal expenses have been incurred, and provide the particulars of those expenses.

2.71 The OAIC explained that agencies already report their external legal expenses related to FOI, and this data is available online:

Agencies and ministers provide to the OAIC annually the non-staff costs directly attributable to FOI request processing (FOI) and the Information Publication Scheme (IPS). Costs are separately provided for general legal advice costs (this is general legal advice on FOI or IPS matters either from an in-house legal section or external solicitor / legal counsel) and litigation costs (this is the cost of specific litigation in relation to particular FOI requests. It includes solicitor and legal counsel costs and internal agency legal services, if they can be costed.

Summary details of these costs are published in the OAIC annual reports.

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77 Ms Karen Middleton, Reporter, The Saturday Paper, *Committee Hansard (Proof)*, 16 November 2018, p. 14.

78 Dr Maria O'Sullivan, *Committee Hansard (Proof)*, 16 November 2018, p. 20.

79 Dr Maria O'Sullivan, *Committee Hansard (Proof)*, 16 November 2018, p. 20.

80 Mr Russell Wilson, Non-Executive Director, Transparency International Australia, *Committee Hansard (Proof)*, 16 November 2018, p. 23.

The specific data provided by individual agencies about FOI processing and costs are published annually by the OAIC on the website: [www.data.gov.au](http://www.data.gov.au).<sup>81</sup>

2.72 Similarly, the department argued that the provision 'would unnecessary duplicate existing practices around FOI reporting', while also adding an additional regulatory burden on agencies and ministers.<sup>82</sup>

The department considers that these arrangements, along with additional reporting obligations under the [Legal Services Directions], already achieve the transparency in relation to government activities intended to be achieved through this provision. This proposal would simply create additional regulatory burdens on agencies and Ministers to achieve ends which are already achieved through current reporting arrangements.<sup>83</sup>

2.73 In relation to the proposed amendments to the Archives Act, the department explained that the National Archives of Australia's external legal expenditure is already reported publicly on the Archives' website in an aggregated form.<sup>84</sup> Furthermore, the department raised concerns 'about imposing a new reporting obligation applying specifically to the Archives that is inconsistent with whole-of-government arrangements that apply under the [Legal Services Directions].'<sup>85</sup>

### **Committee view**

2.74 The committee is supportive of the broad intent of the bill. That is, 'to introduce measures that make government more transparent and accountable, and assist citizens and the media to access information under the law'<sup>86</sup> and 'to significantly improve the effectiveness of Australia's [FOI] laws.'<sup>87</sup>

2.75 However, underpinning the proposed amendments in the bill, is the contention that the FOI system is experiencing 'chronic bureaucratic delay and obstruction, unacceptably lengthy review processes and what appears to be an increased preparedness by agencies to incur very large legal expenses to oppose the release of information.'<sup>88</sup> The committee does not agree with this underlying contention.

2.76 Similarly, the committee is of the view that the provisions in the bill do not achieve their stated objectives. The committee's views on the bill's key provisions are set out below.

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81 Office of the Australian Information Commissioner, *Submission 6*, p. 14.

82 Attorney-General's Department, *Submission 3*, p. 6.

83 Attorney-General's Department, *Submission 3*, p. 6.

84 Attorney-General's Department, *Submission 3*, p. 1.

85 Attorney-General's Department, *Submission 3*, p. 2.

86 Explanatory Memorandum, p. 1.

87 Explanatory Memorandum, p. 1.

88 Explanatory Memorandum, p. 1.

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### ***Resourcing of the OAIC***

2.77 A central claim made during this inquiry was that the OAIC has been under-resourced and consequently overburdened since the government's decision in 2014 to disband the OAIC. The underlying assumption was that this resulted in considerable delays in finalising Information Commissioner reviews.

2.78 The committee acknowledges that funding to the OAIC was reduced in 2014. However, the committee received evidence that the OAIC's funding was largely restored in 2016, with a portion of funding not returned to reflect the streamlined arrangements that had been put in place by the OAIC.<sup>89</sup> Furthermore, the committee notes that when the Information Commissioner and Privacy Commissioner, Ms Angelene Falk, was specifically asked whether additional resourcing would help expedite Information Commissioner reviews, she responded that the OAIC was working effectively, but 'should that change, then that would be something that [she] would bring to the attention of government.'<sup>90</sup>

2.79 The committee notes that the number of Information Commissioner review applications received has increased in the last three financial years. However, the number of Information Commissioner reviews finalised has also increased in this period. According to table 1, in 2017–18, the OAIC finalised 610 Information Commissioner reviews—the second highest number of reviews finalised in a financial year since the OAIC commenced operations. Based on the evidence provided, the committee considers it difficult to conclude that the OAIC is under-resourced.

### ***Requiring the appointment of three separate Commissioners***

2.80 In relation to the requirement that three separate Commissioners be appointed, the committee is satisfied that the one-commissioner model is functioning effectively. Additionally, the committee is persuaded by the evidence tabled by Ms Falk, which shows that the three periods which recorded the highest number of section 55K decisions<sup>91</sup> being completed, were during periods when the OAIC was operating with less than three Commissioners. Accordingly, the committee does not consider this provision necessary.

### ***Requiring that Commissioners have legal qualifications***

2.81 The committee does not agree that it should be a requirement that Commissioners who review decisions under Part VII of the FOI Act have legal qualifications. The committee shares the view of the department, that it is often not essential for people in senior positions who make decisions that have legal impact to hold legal qualifications, and instead it is common practise for senior officials to draw on the expertise of their staff.

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89 Additional information provided by the Attorney-General's Department correcting evidence in Hansard, (received 26 November 2018), p. 1.

90 Ms Angelene Falk, Australian Information Commissioner and Privacy Commissioner, OAIC, *Committee Hansard (Proof)*, 16 November 2018, p. 40.

91 Section 55K are non-delegable decisions made by the Information Commissioner.

***Publication of information within 10 to 14 working days***

2.82 The committee notes that the current drafting of this provision would apply to all FOI applicants and not merely journalists. Therefore, the committee is mindful that this provision would result in information being released at a slower rate, which would appear to frustrate the objective of the FOI Act and the disclosure log.

2.83 A number of journalists submitted that the government's publication of information released under FOI sooner than 10 days after its release may be detrimental to public interest journalism. The committee acknowledges these concerns. The committee notes that the issue of early release of information provided to a journalist is considered in the FOI Guidelines, which the Hawke review considered to be the preferable way to deal with this issue. The committee agrees that this issue is best dealt with in FOI Guidelines. Nevertheless, the committee is of the view that there may be an opportunity to consider whether the guidance provided could be clarified and strengthened so that the general release of information does not unduly affect journalists who have received information pursuant to the FOI Act.

***Consistent application of exemptions***

2.84 Most submitters did not support the proposed amendment to prevent agencies from making additional exemption claims during the course of Information Commissioner reviews. The committee is persuaded by the evidence provided by submitters and witnesses that to do so would diminish the quality of the review process, would not align with a pure form of merits review, and would prevent an agency or minister from making a fresh decision that could otherwise be in favour of releasing of information to the applicant. Consequently, the committee does not support this provision.

***Referrals to the AAT***

2.85 The committee is sympathetic to the intent of this provision—that is, to provide a mechanism for a review of an FOI decision to be finalised in a shorter timeframe. Based on the figures provided by the OAIC, in 2017–18, it received 801 Information Commissioner review applications, finalised 235 reviews (39 per cent) within 120 days, which would result in at least 566 reviews to be transferred to the AAT, pursuant to item 12 of the bill. Noting that the AAT's FOI division received 47 lodgements in 2017–18, the committee shares the concerns of submitters and witnesses that item 12 of the bill may be transferring an issue to a different jurisdiction.

2.86 The committee is concerned that item 13 of the bill, which would allow applicants to by-pass an Information Commissioner review and apply to have their matter heard in the AAT, would only exacerbate the issue of managing a significant increase in workload. In light of the AAT's recent finalisation rates of 65 per cent of FOI matters finalised within 12 months, and particularly given the likely increase of FOI matters to be considered by the AAT, it appears questionable whether items 12 and 13 of the bill would result in matters being resolved at a faster rate than is currently the case.

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***Exempting Senators and Members from charges***

2.87 The committee agrees with the views expressed by witnesses, that to exempt Senators and Members of charges where the work generated is under \$1000, is a 'slippery slope'<sup>92</sup> whereby other groups may equally claim a public interest to also be exempt from these charges. The FOI Act currently allows flexibility regarding charges, particularly if the release of information is deemed to be in the public interest. The committee considers that the FOI Act and FOI Guidelines adequately and appropriately deal with charges, including advice that, where appropriate, agencies should encourage access to information at no charge. Consequently, the committee does not support this provision of the bill.

***Reporting of external legal expenses***

2.88 Having regard to the additional administrative burden placed on agencies, and the evidence that much of the requirement would duplicate existing reporting mechanisms, the committee does not support item 16 of the bill.

2.89 Similarly, the committee considers that item 1 of the bill largely duplicates existing reporting arrangements with respect to legal expenses incurred by the National Archives of Australia, while also creating a reporting obligation that would be inconsistent with whole of government arrangements that apply under the Legal Services Directions.

2.90 For the reasons outlined above, the committee recommends that the Senate not pass the bill.

**Recommendation 1**

**2.91 The committee recommends that the Senate not pass the bill.**

**Senator the Hon Ian Macdonald**

**Chair**

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92 Dr Maria O'Sullivan, *Committee Hansard (Proof)*, 16 November 2018, p. 20.



# **Dissenting Report by Senator Rex Patrick**

## **Freedom of information, but only after the Information Commissioner finally gets around to making a review decision**

### **The work of the Committee and its conclusions**

1.1 I thank the committee for its efforts in relation to this very important Bill to improve Freedom of Information (FOI) in the federal sphere. I also thank the secretariat for their behind the scenes efforts.

1.2 I dissent from the majority report of Government senators which not only opposes all the reforms proposed in the legislation, but makes absolutely no alternative suggestions as to how Australia's freedom of information laws might be improved.

1.3 The negative approach taken by Government Senators is disappointing but unsurprising. They express support for the 'broad intent' of the Bill while categorically rejecting all reforms. Their stance clearly demonstrates the extent to which the Coalition Government remains opposed to any reform designed to improve public, media and parliamentary scrutiny of public administration.

1.4 Since its early effort to abolish the Office of the Australian Information Commissioner (OAIC), the Government has demonstrated no enthusiasm and indeed outright hostility to scrutiny through FOI.

1.5 It may be that the attitude of these Government senators on the Committee, and indeed their colleagues, will change in the event that following the forthcoming Federal Election they find themselves in Opposition and again wish to apply a measure of scrutiny to executive government. It may be the case that they will then become interested in increased openness and transparency.

### **Freedom of information**

1.6 FOI provides the lawful means for citizens, the media, and parliamentarians to obtain access to information that ultimately belongs to the public.

1.7 Knowledge will always govern ignorance. FOI is a crucial tool in ensuring those that are governed are indeed properly armed.

A well informed citizenry is the lifeblood of democracy; and in all arenas of government information, particularly time information, is the currency of power.<sup>1</sup>

1.8 How can there be debate on important public issues without information? Of what value is information if it is only made available well after debate has passed?

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1 Ralph Nadar, Freedom of Information: the Act and the Agencies.

## A system in crisis

1.9 The Federal FOI regime is in crisis.

1.10 As a member of this Parliament who has made the frequent recourse to FOI applications in efforts to obtain valuable information about government administration—from exposing deficiencies in major defence contracting involving expenditure of billions of dollars of taxpayers' funds to revealing the flawed nature of the site selection process for Australia's national radioactive waste repository—I have experienced first-hand the chronic bureaucratic delay and obstruction that now characterises Australia's FOI system.

1.11 The witnesses who appeared at the hearing shared my view.

1.12 Ms Hesling of the Law Institute of Victoria and someone with experience and expertise in FOI law said:

The overall concerns that the Law Institute of Victoria has with the inefficient and ineffective operation of the FOI system in Australia are mainly due to insufficient resourcing of the Office of the Australian Information Commissioner, and it is our view that this has resulted in considerable delays at the Information Commissioner review stage.<sup>2</sup>

1.13 Mr McKinnon of the ABC was blunter in his consideration:

At the ABC, I'm responsible for not only lodging my own FOIs but also coordinating and advising all journalists at the ABC on FOIs. We're talking about hundreds of applications a year. My experience is that the act is getting progressively worse, and it is substantially worse than in 2010, when, with great hope and glee—not glee, but great hope and optimism—the reforms occurred. But one of the major problems was agencies quickly worked out that the Office of the Australian Information Commissioner was very slow on appeals, and, in fact, does not operate a fair process. It's as simple as that. I had gone to the AAT numerous times prior to 2010. I'm appearing in the tribunal in New South Wales next week. I've done over a hundred appeals to courts and tribunals. The great thing about that is that you get a fair hearing; you can cross-examine witnesses that are making claims in relation to documents. This does not occur with the Office of the Australian Information Commissioner. So you have a toothless tiger trying to control agencies whose view is that the government's political interests are the same as theirs. They will not release documents—the more damning a document is of a government policy, the more embarrassing, the harder they will fight to have a document not released, because they see their job as being synonymous with the government's political interests. It's very sad to say that, but that's the case. So FOI has got progressively worse ... I'm at the coalface probably more than most—I suspect more than any other

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2 Ms Elisa Hesling, Committee Member, Administrative Review and Constitutional Law Committee, Law Institute of Victoria, *Committee Hansard (Proof)*, 16 November 2018, p. 1.

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journalist in Australia—and I can see at the coalface how badly FOI is working.<sup>3</sup>

1.14 Karen Middleton of the Saturday Paper succinctly observed that:

It is a concern the system gives the veneer of transparency and the veneer of accessibility, but the process is used as a means to block access.<sup>4</sup>

1.15 The statistics back up the witnesses' experiences. Table 2 (time taken for Queensland Information Commissioner to finalise an FOI review) of the Committee report and Table 3 (Overview of IC review finalisation) show a stark contrast in performance between the Queensland and federal jurisdictions.

1.16 Since 2012 there has been an average of more than 110 reviews that took more than 365 days to complete. No doubt these FOI's were complex to a degree, but likely pretty important from a public debate perspective. In my own experience of FOI, the more embarrassing the information sought, the greater resistance offered by Government to its access.

1.17 It is further noted that there appears to be an increased preparedness by agencies to incur very large legal expenses to oppose the release of information.

1.18 Sunlight is said to be the best disinfectant, but the poor FOI culture mentioned at 2.25 of the Committee's report acts as a superbug.

### **Purpose of the bill**

1.19 The purpose of the Freedom of Information Legislation Amendment (Improving Access and Transparency) Bill 2018 is to introduce measures that address current problems in the regime to make government more transparent and accountable, and assist citizens and the media to access information under the law.

1.20 Reforms proposed in the Bill include:

- (a) Requiring the government to fill all three offices of the Australian Information Commissioner, the Privacy Commissioner and the Freedom of Information Commissioner.
- (b) Allowing FOI review applicants to elect to have their matter bypass the Information Commissioner, who can take more than a year to make a decision on controversial issues, to the Administrative Appeals Tribunal.
- (c) Granting an FOI applicant the right to switch a review into the AAT, without charge, in the event that the Information Commissioner takes, or indicates he or she will take, more than 120 days to make a decision.
- (d) Preventing agencies from making submissions to FOI decision reviews that have not been advanced by the agency in its internal decision

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3 Mr Michael McKinnon, Journalist and FOI Editor, Australian Broadcasting Corporation, *Committee Hansard (Proof)*, 16 November 2018, p. 11.

4 Ms Karen Middleton, Reporter, The Saturday Paper, *Committee Hansard (Proof)*, 16 November 2018, p. 11.

making, so that they can't switch exemptions half way through a review as often happens now. This would prevent a current practice that, in effect, allows an agency to remake decision half way through a review; something not normally permitted in merits reviews being run in superior jurisdictions.

- (e) Preventing the Information Commissioner from making FOI decisions if he or she does not hold the legal qualifications required of the FOI Commissioner (as happens now).
- (f) Preventing agencies from publishing information released under FOI until at least 10 days after the applicant has received his or her copy of the information.
- (g) Requiring an agency to publish its external legal expenses for each Information Commission or AAT FOI matter that has concluded. This would apply in relation to agency FOI legal expenses and to expenses incurred by the National Archives in respect of applications made for access to information under the Archives Act 1983.

1.21 This comprehensive array of reforms reflects the practical experience of constituents, journalists, researchers and members of Parliament seeking information under FOI.

### **Improvements drawn from the committee process**

1.22 The benefits of the proposed changes to the law in the Bill are spelt out in my second reading speech. The submissions and testimony from FOI observers and customers give support to most of the changes.

1.23 There were exception to the above statements and I address these now.

### **Improvements – consistent applications of exemptions by decision maker**

1.24 There was almost unanimous opposition to the new Section 55EA that required, in law, the agency or Minister must not seek to rely on any exemptions in a review that were not relied upon in making the IC reviewable decision. On the arguments presented, it is accepted that this provision is not consistent with general principles of review in administrative law, that a merit review is *de novo*.

1.25 Most agreed that a new exemption advanced late in a review is not helpful.

### **Recommendation 1**

#### **1.26 Section 55EA should be removed from the bill.**

1.27 Most, however, agreed that a new exemption advanced late in a review is not helpful. Ms McLeod and Mr Peter Timmins of the Accountability Round Table provided, by way of a response to a question on notice, an alternate remedy to the problem. This alternate approach should be adopted with a slight variation in time to afford a Minister or Agency fairness.

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## Recommendation 2

**1.28 The Information Commissioner should incorporate in a practice direction the following:**

- **Where an application for review is lodged:**
  - **The Information Commissioner is required to notify the agency or minister within ten days;**
  - **The agency is required to respond in writing to provide the OAIC within 21 days of any facts or other relevant considerations on which the decision is based that were not identified in the notice of decision provided to the applicant.**

## Improvements – Exempting Senators and Members from Charges

1.29 The Committee is correct in stating that there were mixed views in relation to the proposal not to charge Senators and Members where work generated was under \$1000.

1.30 This provision was based on Regulation 6 the South Australian Freedom of Information (Fees and Charges) Regulations 2003 which allows for a Member of Parliament to apply for access without charge if the fees and charges for the work generated are less than \$1000.

1.31 This provision will support greater transparency of public administration through parliamentary scrutiny of agencies and provide the public with information that is published following the release of information to Senators and MPs.

1.32 However, I was drawn to the comments of Mr McKinnon on this matter when he said at hearing:

It seems to me that any document being released under the act is being released because it's in the public interest to release it. It also says, then, that the government, by keeping it secret up until it is released, has failed in its duty to inform the public. Why any applicant should then have to pay because the government hasn't discharged its duty to inform the public is beyond me. But, certainly, I think politicians have other avenues. In this era of journalism, where budgets are very tight and where there is incredible pressure, because of the internet, on traditional forms of media—which, to my mind, still do the bulk of investigative journalism—there is a very good argument that if we get documents released to us, then there should be no fees or charges. That's because we've actually done a job for the Australian public by taking the time to lodge, find and reveal information that's in the public interest and that would inform the voters of Australia. I come back to the same thing. I think our job is to inform the public so that, when they go

to the ballot box, they can cast an informed vote about which political party and/or politicians can best serve their interests as Australians.<sup>5</sup>

1.33 Noting Mr McKinnon's role and 'FOI stature' within the ABC, great weight must be given to his remarks.

1.34 I further note that on 30 July 2018 the Hon. Kelly O'Dwyer, the then Minister for Revenue and Financial Services, and Senator Cormann, the Minister for Finance, issued a joint media release announcing a fee exemption for journalists associated with ASIC search fees.<sup>6</sup> Minister O'Dwyer and Minister Cormann stated that 'expanding the group of journalists that will benefit from the exemption from fees will aid public discussion.'<sup>7</sup>

1.35 Exempting journalists, whose role in informing public debate is integral, makes sense in light of the exemption that the Government announced for ASIC search fees. While there were some concerns that this may lead to a 'slippery slope', it is clear that a policy to exempt a class of professionals with a clear justification, as the Government did with ASIC search fees, will not lead to a slippery slope and should be encouraged.

### **Recommendation 3**

**1.36 Section 29(5A) should be amended so that journalists are entitled to access to the documents without charge unless the work generated by the application involves charges totalling more than \$1,000.**

### **Additional OAIC resourcing**

1.37 Whilst not within the scope of the Bill under review, it was clear from the submissions and oral evidence taken that the OAIC is underfunded and that this was having an adverse effect on the ability of Information Commissioner to assist in achieving the objectives of the FOI act, particularly in reference to facilitating and promoting prompt public access to information.

1.38 The Attorney General's Department offered the following explanation:

As part of the 2014–15 Budget measure there were expected to be savings of \$3.6m per year, reflecting the abolition of FOI and information law functions performed by the OAIC. When the Government decided that the OAIC would continue in its current form, an amount of \$2m per year was returned to the OAIC budget from those \$3.6m of savings. The \$1.6m which was not returned reflected streamlined arrangements that had been

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5 Mr Michael McKinnon, Journalist and FOI Editor, Australian Broadcasting Corporation, *Committee Hansard (Proof)*, 16 November 2018, pp. 16–17.

6 Joint Media Release, The Hon. Kelly O'Dwyer and Senator Mathias Cormann, <http://kmo.ministers.treasury.gov.au/media-release/091-2018/> (Accessed 30 November 2018).

7 Joint Media Release, The Hon. Kelly O'Dwyer and Senator Mathias Cormann, <http://kmo.ministers.treasury.gov.au/media-release/091-2018/> (Accessed 30 November 2018).

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put in place by the OAIC to manage its workload, particularly in the area of FOI.<sup>8</sup> [Emphasis added]

1.39 Sir Humphrey Appleby would be proud.

#### **Recommendation 4**

**1.40 That the OAIC Commission funding be increased substantially.**

#### **The Customer is Always Right**

1.41 It is clear that there is dissatisfaction amongst users of the federal FOI scheme. The providers of the service seem to disagree. Unfortunately for the providers of the FOI product, and the Government that acts as the board, the customer is always right.

#### **Recommendation 5**

**1.42 The bill as amended by recommendations 1 and 3 should be passed by the Senate.**

**Senator Rex Patrick**  
**Senator for South Australia**

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8 Additional information provided by the Attorney-General's Department correcting evidence in Hansard, (received 26 November 2018), p. 1.



## Australian Greens dissenting report

1.1 The Greens acknowledge the extensive work of the Committee in this inquiry, and thanks everyone who made a public submission, or gave evidence at a public hearing.

1.2 Peter Timmins, Interim Convener of the Australian Open Government Partnership Network, noted in his submission to the inquiry (in a private capacity) that there has been no comprehensive review of the *Freedom of Information Act 1982* (FOI Act) since the Australian Law Reform Commission and Administrative Review Council joint reference review in 1994, which tabled its report in ALRC Report 77, in January 1996.<sup>1</sup>

1.3 This is despite hopes that comprehensive review and reform would result from the Government's commitment to the National Action Plan for Open Government, adopted in December 2016, and again in its second National Action Plan for 2018-20.

1.4 Mr Timmins also further noted these failures to review and reform came:

...despite the fact that a comprehensive review, reform and a complete rewrite of the legislation in plain English, as recommended by Dr Alan Hawke in the 2012-2013 statutory review report, is long overdue and to be preferred to piecemeal changes. Dr Hawke said changes over the years had been "largely developed and inserted into the form and structure of the FOI Act as it was in 1982".<sup>2</sup>

1.5 Instead, amendments to the FOI Act have been ad-hoc over time, including a suite of reforms resulting from the Freedom of Information Amendment (Reform) Act 2010, legislated under Labor Governments, which included the establishment of the Office of the Australian Information Commissioner.

1.6 A subsequent Abbott Liberal Government announced the abolition of the OAIC in the 2014–15 Budget. However, the Freedom of Information Amendment (New Arrangements) Bill 2014 that would facilitate this abolition of the office failed to gain support of the Senate, and ultimately lapsed on prorogation on 17 April 2016. But regardless of the bill's failure, with reduced funding, operations were reduced, and the Canberra office was closed in December 2014.

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1 Mr Peter Timmins, *Submission 7*, p. 1.

2 Mr Peter Timmins, *Submission 7*, p. 1.

1.7 Since 2014, due to reductions in funding, the Accountability Roundtable noted in its submission to the inquiry that:

...the OAIC has been unable to discharge most of its significant statutory functions and responsibilities – including the operation of the proactive information disclosure system.<sup>3</sup>

### **Recommendation 1**

**1.8 That Freedom of Information funding is restored to at least 2013–14 Budget levels plus CPI, along with the additional resources needed to enable the OAIC to discharge its obligations under National Action Plans 1 and 2 (NAP1 and NAP2).**

1.9 As noted by the Accountability Roundtable, the Freedom of Information Legislation Amendment (Improving Access and Transparency) Bill 2018 makes recommendations for amendments to the *Archives Act 1983* (Archives Act) and FOI Act in five distinct areas:

- Overlaps in the functions undertaken by OAIC Commissioners;
- The qualifications required for appointment as Freedom of Information Commissioner;
- Fees and Charges;
- Delays in the completion of FOI reviews by the Information Commissioner;
- Matters having to do with the application of FOI fees and charges.<sup>4</sup>

1.10 Regarding overlaps in the functions undertaken by OAIC Commissioners, the bill would instil three separate Commissioners, as was the original intent of Parliament in 2010, which are:

1. Information Commissioner (lead commissioner)
2. Freedom of Information Commissioner
3. Privacy Commissioner

1.11 Transparency International Australia concluded in its submission to the inquiry that:

TIA is broadly supportive of the measures in the Bill to the extent that they aim to improve the effectiveness of Australia's FOI laws and ensure open government, transparency and accountability. This support is premised on

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3 Accountability Round Table, *Submission 2*, p. 2.

4 Accountability Round Table, *Submission 2*, p. 5.

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the expectation that the OAIC three independent statutory offices are adequately resourced to undertake their full mandate and respective range of powers.<sup>5</sup>

1.12 In its submission to the inquiry, the Law Institute of Victoria, while raising concerns about possible negative unintended consequences resulting from the bills limiting agencies' ability to rely on exemptions in the Information Commissioner review (IC review) process that were not relied on in the decision, concluded that it is:

...broadly supportive of measures which aim to improve the effectiveness of Australia's freedom of information (FOI) laws and ensure open government and transparency. The LIV supports the measures in the Bill that seek to ensure that there are three independent statutory officers with appropriate legal qualifications, and measures that seek to respond to delays in the IC review process.<sup>6</sup>

1.13 On the matter of appropriate legal qualifications, the Law Institute of Victoria submitted:

The LIV is concerned that the FOI Commissioner's role was vacant in recent years and the functions of the office were performed by the Information Commissioner, Mr Timothy Pilgrim, who does not hold the appropriate legal qualifications ... [and that it] supports the proposed measures which require the Information Commissioner and the Privacy Commissioner to have appropriate legal qualifications when reviewing FOI decisions.<sup>7</sup>

1.14 Regarding Fees and Charges, the bill provides a schedule, and provides that Senators and Members Parliament should be free from fees and charges unless the cost of meeting an FOI request exceeds \$1000. The Accountability Roundtable submitted:

In the interests of governmental openness and transparency, and strengthening the capacity of MPs to obtain access to material relevant to their parliamentary work, the ART supports such a recommendation.<sup>8</sup>

1.15 The Bill also grants an FOI applicant the right to switch a review into the AAT, without charge, in the event that the Information Commissioner takes, or indicates he or she will take, more than 120 days to make a decision.

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5 Transparency International Australia, *Submission 8*, p. 5.

6 Law Institute of Australia, *Submission 1*, p. 1.

7 Law Institute of Australia, *Submission 1*, p. 2.

8 Accountability Round Table, *Submission 2*, p. 6.

1.16 On this matter of delays in Information Commissioner reviews, the Law Institute of Victoria submitted it:

...supports measures which will contribute to addressing substantial delays in the IC [Information Commissioner] review process for FOI decisions.<sup>9</sup>

1.17 Echoing the conclusion of OpenAustralia Foundation, who submitted it 'broadly support[s] the intentions of these amendments, as laid out in the explanatory memorandum',<sup>10</sup> the Australian Greens share the views of this and other expert information stakeholders in broadly supporting this bill.

## **Recommendation 2**

**1.18 The Australian Greens recommend that the Senate pass this bill.**

**Senator Nick McKim**

**Senator for Tasmania**

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9 Law Institute of Australia, *Submission 1*, p. 2.

10 OpenAustralia Foundation, *Submission 9*, p. 1.

# **Appendix 1**

## **Submissions**

- 1 Law Institute of Victoria
- 2 Accountability Round Table
- 3 Attorney-General's Department
- 4 Mr Asher Hirsch, Dr Yee-Fui Ng, and Dr Maria O'Sullivan
- 5 Department of Home Affairs
- 6 Office of the Australian Information Commissioner
- 7 Mr Peter Timmins
- 8 Transparency International Australia
- 9 OpenAustralia Foundation

## **Answers to questions on notice**

- 1 Accountability Round Table - answers to questions taken on notice at the public hearing on 16 November 2018 (received 16 November 2018).
- 2 Law Institute of Victoria - answers to questions taken on notice at the public hearing on 16 November 2018 (received 26 November 2018).
- 3 Office of the Australian Information Commissioner - answers to questions taken on notice at the public hearing on 16 November 2018 (received 29 November 2018).
- 4 Accountability Round Table – answers to questions taken on notice at the public hearing on 16 November 2018 (received 22 November 2018)

## **Additional information**

- 1 Additional information provided by the Office of the Australian Information Commissioner at the Canberra hearing of 16 November 2018.
- 2 Additional information provided by the Attorney-General's Department correcting evidence in Hansard (received 26 November 2018).



## **Appendix 2**

### **Public hearing and witnesses**

#### **Friday, 16 November 2018 - Canberra**

FALK, Ms Angelene, Australian Information Commissioner and Privacy Commissioner, Office of the Australian Information Commissioner

FREIDIN, Ms Lara, Policy Lawyer, Administrative Law and Human Rights Section, Law Institute of Victoria

HESLING, Ms Elisa, Committee Member, Administrative Review and Constitutional Law Committee, Law Institute of Victoria

McKINNON, Mr Michael, Journalist and FOI Editor, Australian Broadcasting Corporation

McLEOD, Ms Fiona, SC, Chair, Accountability Round Table

MIDDLETON, Ms Karen, Reporter, The Saturday Paper

MINIHAN, Mr Colin, Director, Information Law Unit, Attorney-General's Department

NG, Dr Yee-Fui, Private capacity

O'SULLIVAN, Dr Maria, Private capacity

SOLOMON, Dr David, AM, Director, Accountability Round Table

TAYLOR, Mr Josh, Senior Reporter, BuzzFeed Australia

WALTER, Mr Andrew, First Assistant Secretary, Integrity and Security Division, Attorney-General's Department

WALTER, Mr Andrew, First Assistant Secretary, Integrity and Security Division, Attorney-General's Department

WILSON, Mr Russell, Non-Executive Director, Transparency International Australia

