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COMMITTEE

Reference: Freedom of Information Amendment (Reform) Bill 2009

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SENATE FINANCE AND PUBLIC ADMINISTRATION

LEGISLATION COMMITTEE

Monday, 15 February 2010

Members: Senator Polley (*Chair*), Senators Cameron, Jacinta Collins, Kroger, Ryan and Siewert

Participating members: Senators Abetz, Adams, Back, Barnett, Bernardi, Bilyk, Birmingham, Mark Bishop, Boswell, Boyce, Brandis, Bob Brown, Carol Brown, Bushby, Cash, Colbeck, Coonan, Cormann, Crossin, Eggleston, Farrell, Feeney, Ferguson, Fielding, Fierravanti-Wells, Fifield, Fisher, Forshaw, Furner, Hanson-Young, Heffernan, Humphries, Hurley, Hutchins, Johnston, Joyce, Ludlam, Lundy, Ian Macdonald, Marshall, Mason, McEwen, McGauran, McLucas, Milne, Minchin, Moore, Nash, O'Brien, Parry, Payne, Pratt, Ronaldson, Scullion, Siewert, Sterle, Troeth, Trood, Williams, Wortley and Xenophon

Senators in attendance: Senators Cameron, Kroger, Ludlam, Polley and Ryan

Terms of reference for the inquiry:

To inquire into and report on:

Freedom of Information Amendment (Reform) Bill 2009

WITNESSES

CROUCHER, Professor Rosalind Frances, President, Australian Law Reform Commission.....	23
HERMAN, Mr Jack Richard, Executive Secretary, Australian Press Council.....	20
LIDBERG, Dr Johan, Academic Chair of Journalism, Murdoch University	7
PATERSON, Associate Professor Moira Rosalind Petrides, Private capacity	1
SIMPSON, Ms Elizabeth, Solicitor, Public Interest Advocacy Centre	30
TIMMINS, Mr Peter George, Private capacity.....	15
VERSEY, Ms Helen, Privacy Commissioner, Office of the Victorian Privacy Commissioner	26
WRIGHT, Ms Felicity, Policy and Compliance Officer, Office of the Victorian Privacy Commissioner	26
ZIFCAK, Professor Spencer Michael, Vice-President, Liberty Victoria.....	35

Committee met at 10.03 am**PATERSON, Associate Professor Moira Rosalind Petrides, Private capacity**

CHAIR (Senator Polley)—The committee will now commence its hearings into the Freedom of Information Amendment (Reform) Bill 2009 and the Information Commissioner Bill 2009. The purpose of the bills is to promote both greater openness and a pro-disclosure culture across government and to establish three related, independent statutory officeholders. I welcome our first witness, Associate Professor Paterson. Information on parliamentary privilege and the protection of witnesses and evidence has been provided to you. The committee has your submission. I now invite you to make a short opening statement. At the conclusion of your remarks, I will ask committee members to put their questions to you.

Prof. Paterson—Thank you for the opportunity to appear before you. I want to begin by saying that overall I think the package is terrific. What I want to do, though, is pick up on some of the key points in my written submission which highlight deficiencies. I want to start off with the provisions which lack public interest tests. Firstly, and most significantly, I want to argue that in my view it is a very retrograde step to amend the act from the version in the exposure draft of the business affairs exemption provision. ‘Trade secrets’ has been broadly interpreted in the case law. The other test relates to the possibility that the commercial value of information may be diminished. There will be circumstances where there are very strong public interest factors that might suggest that sort of information should be made available. That is likely to arise in a scenario where you have external contracted service providers and other business dealings, and I would argue very strongly that that public interest test should be retained. A related issue, the breach of confidence provision, which I pick up in my paper, currently lacks a public interest test. That is that the effect that an agency can contract out to create an obligation of confidentiality to protect dealings.

The cabinet documents provision is considerably improved but still very much a category based test that does not really focus on the issue at hand, which is the damage to collective responsibility. I have no exceptions and no time limit. I would suggest that at the very minimum you could have, say, an exception for fact based information and certainly some sort of time limit, such as the 10 years that you see in other legislation.

In the case of exemptions that are subject to public interest tests, I would like to highlight the potential difficulties that come from the double-barrelled tests of reasonableness and public interest that occur for business affairs and personal privacy. That is going to add a level of complexity. The reasonableness test has been previously construed as a public interest test, and it may have the paradoxical and I think unintended effect that it will be harder for people to claim their privacy interests. In other words, it is going to be detrimental to those interests. If they are going to be retained—for example, in relation to the privacy exemption—at least there should be something in the list of factors that attaches more significance to third-party privacy interests.

The definitions of the factors that cannot be taken into account in the public interest provisions are a very positive step. There is an important one missing, which is the candour and frankness issue. I understand that that goes to the heart of the provision, but there is some scope to provide for a narrowing of it so that it is claimed only where it can be proven. Possibly one way round that is for it to be dealt with in the guidelines, but it would be preferable if it could be dealt with in the act itself. It has been a very problematic issue.

In terms of the scope of the act, I would like to highlight the issue as to why bodies need to be exempted totally from the act’s operations when the harms that might result from the disclosure of their documents should logically be capable of being dealt with by the exemption provisions. That is an issue when you have security agencies and so on and where it is very important that people have public confidence that there is some transparency. The scope of the act applies to documents rather than information, and that is problematic given that there have been no changes to the Archives Act which require agencies to fully document all of their key decisions and policies, as was recommended by the ALRC. So at the moment there is no way of requiring documentation and then access.

Moving on to procedural aspects, I think there is a problem with the fact that there has been no shortening of the time limits. They are quite long in comparison with other laws. I think they do create a real issue, especially, for example, for media organisations. If journalists are going to use the FOI Act they need to have timely access, and there is no provision—any sort of provision—for expedited access as, for example, occurs in the United States. If the act is going to work and achieve its objectives it is really important that the media uses it, and that there is no very major disincentive to media use.

In terms of the publication requirements, I think they are really, really important. In the past with publication requirements there has not been a very high compliance rate. There do not seem to be any consequences for not complying, although at least you now have oversight by the Information Commissioner. Also, although there is scope for the detail to be provided in guidelines, there is no timeline for that, and I think that is something that ideally would happen sooner rather than later.

Finally, I would just like to point to the issue of applicants who need to use the FOI regime rather than the privacy regime for documents in which they have some particular personal interest—there are personal factors that add to the public interest in the disclosure of those documents to them, or at least detract from the public interest factors that go the other way. At the moment, the way section 11(2) of the act is set out, those factors cannot be taken into account. There are ways of dealing with that that mean that where there are positive factors they could be taken into account without undermining what is a very important underlying philosophy of the act—that people do not have to justify their disclosure.

CHAIR—I have one question before I hand over to committee members. In relation to the changes that this legislation is bringing about, would you agree that it is a cultural change from the changes under the Howard years, when it was far more predominant within the Public Service for secrecy? Do you see this as a good step forward?

Prof. Paterson—Absolutely. I think this has the potential to make a great deal of difference. It will also take a change in terms of policy in the way in which the act is administered, but I think this is a very, very positive way forward.

CHAIR—And there are further steps yet to be taken?

Prof. Paterson—Absolutely. I do not think this act is by any means ideal. But it is a tremendous improvement, and I think there are steps outside of the act in terms of internal policy; that are really fundamental.

CHAIR—Is there anything that you want to put on the record in relation to the structure, now, with the Information Commissioner? Do you have any comments about how you see that operating?

Prof. Paterson—It is early days. I know there are issues about the appeal structures. I think there can be potential problems, such as the fact that agencies can appeal and therefore increase the costs. There is the issue of the onus in the AAT, but I think in general terms the structure of having the overall information commissioner and the two other commissioners is an excellent idea, and I think it has the potential to work well.

CHAIR—Thank you. Senator Ryan.

Senator RYAN—Thank you, Chair, and thank you for the commentary opening up your first question. We can continue down that path for the rest of the day, if you would like. Professor Paterson, I refer to your last comment and your answer to Senator Polley on the onus of proof issue—which was raised in an earlier committee earlier hearing, particularly by the Law Council of Australia. According to, I think, Mr Robinson's knowledge, no similar amendment had been put in place to any FOI regime anywhere in the world that has a similar regime to reverse the onus of proof to the applicant for the information in the AAT. Do you not consider that to be a fairly substantial change? Mr Robinson outlined that, if all these other processes fail, we are going to have an applicant going to the AAT without access to the information to determine whether or not they should have access to the information. There is a huge information asymmetry there, isn't there?

Prof. Paterson—There is. I would hope that most appeals would be able to finish at the Information Commissioner if this works well.

Senator RYAN—Most people would.

Prof. Paterson—But, once you get to that point, then certainly that is a massive issue.

Senator RYAN—The exposure draft did not change the onus of proof, did it?

Prof. Paterson—No.

Senator RYAN—Would reversing the onus of proof be a 'retrograde' step, a term I think you used earlier in your verbal submission?

Prof. Paterson—Yes, I think it would be. How serious that turns out to be really depends on to what extent applicants need to go on to the AAT. But if you are going to have an AAT review and you are going to reverse the onus, then you are going to make it very difficult for applicants to make use of it.

Senator RYAN—The AAT is a safety net, if other systems fail?

Prof. Paterson—That is right.

Senator RYAN—It would strike me as fundamentally undermining the aim of the original FOI Act, let alone of the current proposed amendment to it. If other processes fail, if they do not work or there are disagreements all the way through, we would then have a situation where, as I understand it with proceedings at the moment—I am happy to be corrected—if an applicant before the AAT seeks information and an agency or government determines that information should not be released, the AAT can hear the government's submission with the information without the applicant present.

Prof. Paterson—That is right.

Senator RYAN—That is a reasonable safety valve to protect confidential information. But if a person has been knocked back by the commissioner and then goes to the AAT, they do not know what they are looking for. The government knows what it is looking for. The person then has to prove that something they do not have, and do not have a description of, is in the public interest. This strikes me as an almost impossible burden of proof to bear.

Prof. Paterson—It totally minimises the value of the safety net, in that range of situations where you have information of that type. A lot of the appeals probably would not involve information of that type, but where they do it effectively removes the safety net.

Senator RYAN—You and a number of submitters have mentioned that this bill is aimed partly at changing the culture, and you obviously have some expertise in this area. What cultural elements need to change and what aspects of this bill do you think are going to change the culture within government and agencies to a pro-disclosure culture?

Prof. Paterson—Obviously, what you need is a pro-disclosure culture. There are some elements—for example, the additional protection that is given to people who release where the document is exempt. That kind of thing helps. The rephrasing of the objects clause helps. Some of the other changes in terms of procedures and so on help. Ideally, what you would have in the act would be a stronger statement of that pro-disclosure.

Senator RYAN—A stronger statement than in the current draft?

Prof. Paterson—Yes.

Senator RYAN—Was that changed between the exposure and the current draft?

Prof. Paterson—No. Perhaps some of those things can be looked at when it is reviewed. For example, if you look at the Queensland act, there are stronger provisions in that which take you in that direction.

Senator POLLEY—That seems to be working very well. According to the evidence previously given to this committee the Queensland system is working very well with the change in the culture.

Prof. Paterson—That is right. I think the Queensland act actually provides a very good model. This goes part of the way towards that.

Senator RYAN—The Queensland act goes further, does it not?

Prof. Paterson—It goes much further.

Dr WASHER—I will just ask a technical question to finish up. There was some discussion at the first hearing about whether internal review should be an optional or compulsory step. Do you have a view on that particular issue?

Prof. Paterson—On balance, I favour it being optional. I think an internal review can certainly be of value in terms of changing processes within an agency, providing a quick and easy form of review, but I think there are circumstances where it is going to slow down the process. Where time is of the essence and where you have to go through that first, that would be a disadvantage to applicants. So I would favour, on balance, it being optional.

Senator RYAN—I understand this bill contains certain privileges, through time not being charged for journalists or public interest organisations.

Prof. Paterson—Yes.

Senator RYAN—I am not familiar with whether the bill has a definition of public interest organisations and how they are to be determined. Are you familiar with that?

Prof. Paterson—I am sorry, I have not got that before me.

Senator RYAN—That is okay. It is just a question that your comments raised with me.

Senator KROGER—Good morning, Professor. In your comments on publication requirements you indicated that that was one of the areas you were most disappointed with in terms of the fact that there was no requirement for those publications to be centrally coordinated. Could you expand upon that?

Prof. Paterson—I wouldn't say it is one of the ones I am most disappointed with, but I think it is a very important area and I think therefore that it is important to get it operating as soon as possible so that people are very clear what needs to be published. It is also very important to have very clear consequences for failure to comply with that and I think there is an ability there for the Information Commissioner to issue guidelines that will clarify the content, but there is no time line on that. Similarly, the Information Commissioner will be responsible for making sure that that system works—that there are no clear consequences or pathways or responsibilities where that is not being complied with. And I think proactive disclosure, what could be termed push rather than pull, is a very, very important element of modern FOI—that you try and push out as much as possible rather than requiring people to push it in. Therefore that is a very important aspect of the bill and it would be helpful if those aspects could be further strengthened.

Senator KROGER—So you think the compliance mechanism could be substantially strengthened otherwise the effectiveness of that publication's regime, those requirements, could be somewhat diminished.

Prof. Paterson—Yes, and it is not just the Commonwealth but other state acts. That has been a part of those acts that really has not been very strongly complied with in the past and I think it is important to send out that message and to fairly clearly spell out what should happen if those requirements are not complied with.

Senator CAMERON—Professor, you indicated in your opening submission that the bill was a terrific package overall. Nothing you have heard this morning changes that view, does it?

Prof. Paterson—Nothing I have heard this morning, no. As I say, it is making some very long overdue changes to the act that will considerably improve it. That is not to say there could not be a far better package overall that would go even further, but I think it is really important that it does get enacted.

Senator CAMERON—So rights for ordinary citizens have improved under this act compared to, for example, the previous decade?

Prof. Paterson—This act has the potential to improve their rights, yes.

Senator CAMERON—On the issue of the reverse onus of proof, the Administrative Appeals Tribunal is a judicial body—

Prof. Paterson—No, it is an administrative appeals body.

Senator CAMERON—But it is usually senior legal people who are on the AAT?

Prof. Paterson—The presidential members can be judges or lawyers. The ordinary members are not lawyers.

Senator CAMERON—Right. Is the reverse onus of proof used elsewhere?

Prof. Paterson—Not that I am aware of. I have not looked at this issue very closely but I am not aware of the reversal of the onus of proof.

Senator CAMERON—The reverse onus of proof is not a fundamental flaw for the bill, is it? It is a last resort issue and the bill could benefit many people until it comes to this issue where you are saying there could be a problem?

Prof. Paterson—Yes. I would put it that way. It minimises the usefulness of the safety net in a small range of cases where the applicant would not have any potential to understand the basis for the decision. They may be very important cases but it would be a tiny proportion, I would hope. It is very much dependent on how the Information Commissioner review mechanism works. If that is working really well, it becomes a minimal issue. If it is not perceived to be working well, if a lot of people are wanting to appeal, it will be more of an issue.

Senator CAMERON—Is this issue on the reverse onus of proof a reason to reject the bill, do you think?

Prof. Paterson—No. I think there is too much that is important and beneficial in it to reject it on that basis. But if it could be improved, so if that could be changed, then that would be very positive, as with a number of the other points that I have noted.

Senator LUDLAM—Professor, you covered most of my questions in your opening statement. I want to bring you back to the comments you made about wholesale exemptions of specific bodies and agencies. If you were not happy about those, what would be your proposal for getting around those? Can you compare how FOI for security agencies in Australia is proposed to work with these wholesale exemptions maybe compared with some other countries?

Prof. Paterson—Unfortunately, there has been a tendency in most places to exempt bodies. But if you look at different countries different bodies are exempted. In those countries where specific types of bodies are not exempted, then what happens is that the issue that is really being dealt with—for example, if they have commercial information or if they have national security information or whatever it is—is dealt with in relation to an exemption provision, making sure that the exemption provision is worded in such a way that it is effective to protect what it is you are trying to get at. If you look at a lot of the bodies that are exempted it is because there are national security issues. If you look at the act you see it has a very good, strong national security exemption provision or if you look at bodies that have commercial information or other information you will see again there are business affairs and other exemption provisions that would seem to address the issue of concern. What that means therefore is that these bodies are perceived to be outside of transparency regimes, when that does not need to be the case.

Senator LUDLAM—It seems to me to be too broadly drafted in that you would then exclude any of the administrative or internal working documents and those kinds of documents just because the people happen to be handling national security information. I refer to the provisions that you spoke so much about, the provisions around business practices and trade secrets and so on. Do you believe that those clauses are drafted too broadly or do they hit the mark?

Prof. Paterson—That is what I was trying to say in my opening statement. I think that what has happened now is you have got the business affairs provisions divided into two parts. The first part of them, the trade secrets and the information which has a commercial value and which might be destroyed or diminished, is now no longer subject to a public interest test. I think that is very unfortunate because it has the consequence that, for example, if you argue that certain information has a value that might be diminished—which could be just slightly reduced—and you have a situation where there might be some perception of wrongdoing or where you are trying to check the integrity of the process, that information is exempted and that is it. There is then no capacity to consider any public interest factors when this might shed light on a wrongdoing or ensure integrity. I think that is very unfortunate because more and more of the information in government is commercial in nature in some way—government is more commercialised and there are a lot more contracted service providers—so a very large proportion of the documents that are held by government have some sort of commercial flavour to them. To the extent that you allow this exemption you are actually then allowing for a lot of those dealings to be claimed to be trade secrets or commercial information and to be exempt. For example, in the Victorian context there were even claims that information that was shedding light on suicides in private prisons was a trade secret because it went to the actual practices of the private prison contractors. So you can see that that level of breadth is a problem.

Senator CAMERON—On the suicides in prison issue and the Victorian legislation, was that upheld?

Prof. Paterson—The claim was made that the case actually ran on different issues. In Victoria there is a public interest override for the VCAAT, the review body. So if overall it is in the public interest for information to be disclosed it can order its disclosure even though it might be exempt under the business provision. I raise that because what is viewed as being potentially a trade secret or information having a commercial value is more and more intersecting with what I think ordinary people would view as being something of public concern or something that ought potentially to be transparent. These are not narrow terms in the concept of trade secrets that you might get in a normal legal context.

Senator LUDLAM—Let me pick up that. Is there anything in the proposed Commonwealth legislation that would provide a similar sort of override or public interest test?

Prof. Paterson—Is there anything in the current Commonwealth legislation?

Senator LUDLAM—Yes.

Prof. Paterson—No, there is not.

Senator LUDLAM—Or in the proposed legislation that is before us? Is there anything that would work in the same way?

Prof. Paterson—No, there is not. The Victorian act is unique in having that procedure. It is a very useful procedure that the review body can ultimately disclose certain documents. Not all of the exemption provisions but a number of the exemption provisions it can overrule in the public interest.

CHAIR—Thank you very much for your submission and for appearing before us today. We appreciate your time.

[10.33 am]

LIDBERG, Dr Johan, Academic Chair of Journalism, Murdoch University

CHAIR—Welcome, Dr Lidberg. Information on parliamentary privilege and the protection of witnesses and evidence has been provided to you. The committee has your submission. I now invite you to make a short opening statement. At the conclusion of your remarks, I will invite members of the committee to put questions to you.

Dr Lidberg—Thank you for the opportunity to address this hearing. I appear in my capacity as an FOI researcher. It is great to see that FOI is on the agenda. Quite often it is not, so it is great that it is up there. I would like to commend the whole process. I think it has been quite terrific thus far. In my view, it has been sincere, it has been thorough and it has been very consultative, which is quite important too. That is heartening to see. It is quite exciting to be part of this. What we have here is a rare opportunity to really make a difference, and I do not think we should squander it. So I want to start by saying that this is a great opportunity to increase access to government held information and we should really grab it. I would like to touch on a few things based on my submission and then add a few things based on the other submissions that I do support strongly.

I would like to start by picking up a bit from Professor Patterson's point on the general exemptions rule in schedule 2. There are two benchmark systems internationally: the US system and the Swedish system. Both those systems have no exemptions at all. There is not a single agency exempt. The CIA is not exempt. You would be aware that there were manuals handed out regarding certain interrogation methods, like waterboarding, for instance. Those manuals came from the CIA. That sends a very clear message: when you put any agency at all under general exemptions, it sends a message of secrecy rather than transparency. Although I do not think it is a reason not to pass the act, it is a serious issue. I noted that there were other submissions that pointed to the fact that there should be no exemptions at all, and I will return to that. It is about sending the message of transparency. It is also an issue of a system coming of age. It is something that needs to be revisited. I am taking heart that we have the information commissioners. I am sure they will look into it in the fullness of time.

I will spend almost my whole opening statement on the subject of the information commissioners, because I think it is the most important part. There should be a reconsideration as to whether the FOI Commissioner, for instance, has to have a legal background. I am not convinced by that. For instance, you may have the Information Commissioner who will be running the office, who may well have the legal background. But as far as I see it, the FOI Commissioner, just as much as he or she will sit and hear the appeals, he or she will become one of the main drivers of this cultural change that is so vital. So I am not sure that the Information Commissioner Bill has to go into detail regarding the background of future commissioners. I think that is important.

That brings me to how these commissioners are to be recruited. It is going to be absolutely pivotal, in terms of the success of this culture change, that the commissioners are recruited with quite an open mind. I have said in my submission that at least with the FOI Commissioner there should be an attempt to recruit this person from outside the Public Service. This is not because I do not trust the Public Service—the contrary is true—but because I think that the less baggage the FOI Commissioner carries when coming into the job, the better it will be.

I spent a bit of time in my submission on the Information Commissioner's challenge. If you go back to the explanatory memo that came with the IC bill, it says under clause 8:

The intention is that the Office of the Information Commissioner be a resource for agencies as well as for the public. In carrying out this function, it is also intended that the Information Commissioner and the FOI Commissioner will have a key responsibility in driving a pro-disclosure culture shift across government.

That is terrific; it sounds great—but there is no detail on how this is to be achieved. That is understood, because they have not taken office yet, but I want to bring to the fore the fact that this is the core of the whole issue, for me. You can tweak the FOI laws and systems forever—we can do this for the next 55 years, if we want—but it is not the law that will change the culture. The law gives the foundation for change, but it is not the law that will change the culture; it is the people who are applying and administering it who will. That is the key. And that is why the commissioner has become so pivotal in this.

In my view the Information Commissioner's office will have to come up with a wide-ranging strategy whereby they explain, convince and educate the Public Service, the government and the public on the win-win situation that can be achieved by a far-reaching and well-functioning FOI. The win-win could go something like this—this is just my view, of course: if a pro-disclosure information system is the norm, that means that the FOI coordinators receiving the request can point and say, 'It's already there', so you have dealt with it already. The public and the requesters will get tangible proof that government held information is there, is available and the government has nothing to hide. That is the next issue.

This will in turn work as a trust-building exercise: it will increase the trust between the public and the government, repair trust that could possibly be broken and increase the legitimacy of government. It demonstrates that the government is serious about accountability—again, the nothing-to-hide notion. Finally, the public will feel that they can choose to take a greater part in the political process based on the available information, because, as you know, independent access to quality, unspun information is the basis for any form of meaningful participation.

The starting point in achieving this cultural change boils down to the notion that the government owns the information. In my view, this is nonsense because the government holds information on behalf of people. I did a study in 2004-05 that surveyed a number of leading public servants and then government ministers; it clearly showed that the base notion within the Australian Commonwealth administration was that the government owns the information. Compared with the four other countries in this survey, this stood out clearly. The four other countries surveyed were Thailand, the United States, Sweden and South Africa, and their replies to the survey were very clearly that the government holds information on behalf of the people. So it is changing that owning of the information that is at the absolute core of this.

As you would appreciate, this is a Herculean task. This is not something that you can turn around and just switch on and off. This will take decades and it will take effort by consecutive governments to actually make the change. It hinges on the independence and integrity, and I would also say the passion, of the Information Commissioner. It is completely crucial. Apart from the fact that this is, on balance, a good package, if good independent commissioners with integrity are not recruited you will undo what you have done.

I want to conclude by commenting quickly on the things that I support in other submissions. The Administrative Review Council want to name the office the 'Australian Information Commissioner.' I think it is a good idea. There are several information commissioners out there and, from an international point of view, it is good to have the title as the office of the 'Australian Information Commissioner.' The Australian Law Reform Commission want to reduce the processing time from 30 to 14 days. I am strongly in support of that. However, I know that the information commissioners are charged with looking at these things so, although I support it, I would anticipate that it would happen eventually. Two or three submissions brought up that parliamentary departments should be subject to the FOI Act. I absolutely agree with that. I cannot see any reason why, apart from ongoing 'cabinet deliberation', that should not be a part of the FOI.

The Commonwealth Ombudsman pointed out that there is a risk of increased costs for processing requests for agencies because the new act would mean that there would be more requests. I am not convinced by this argument. In a study done by Greg Terrill, in a book called *Secrecy and openness: the federal government from Menzies to Whitlam and beyond*, that drew from the discussions leading up to the 1982 act, it was anticipated that each government agency would deal with tens of thousands of requests per year. This did not happen at all, and I do not think it will happen with this change either.

A few submissions brought forward the co-existence of the FOI Commissioner and the Privacy Commissioner. I have no problem with that. I think that, if you are going to have a far-reaching FOI system, you need to look after the privacy as well. I think it is actually two sides of the same coin. I think that should work well. The only other submission that I think really pointed out the importance of the recruitment of the Information Commissioner was from the Cyberspace Law and Policy Centre. I support that strongly as well. That is all I have as an opening statement.

CHAIR—I would like to pick up on a couple of things that you brought up in your opening statement. In relation to the Privacy Commissioner, you said that the recruitment of that person will be paramount to how we move forward.

Dr Lidberg—The FOI Commissioner.

CHAIR—Yes. What background are you suggesting this person needs to have and have you given any thought to the term of office?

Dr Lidberg—My whole point in saying that I do not think the bills should be prescriptive in terms of the background is that I would like to see this person demonstrate that they are coming in—I am not saying that we need an advocate only. Strong mediation skills would have to come in with this person. To be perfectly honest, I cannot really give you a description here and now of what I would think. It would be good if this person had done, possibly, research into FOI, had a good knowledge of the international systems, and was keen on benchmarking and explaining why it is important to benchmark Australia towards other systems. It would be good if this person understood that this is a long-term thing. I do not think you can be impatient with this. You have to have a long-term commitment towards this and possibly a demonstrated long-term commitment towards FOI. I am not saying that this person cannot have a legal background. Do not get me wrong there. I am saying: do not lock it into just being that. You need to look much wider here, I think.

CHAIR—And a length of time for the office?

Dr Lidberg—That is an interesting one. I just had a meeting with the Information Commissioner in WA who was recently appointed. He was appointed for five years. In order to get independence and a feeling that you have stability, certainly you would need more than three years. I would recommend five.

Senator KROGER—Your comments were quite interesting. In your submission you stressed your concerns about changing the culture, that people change the culture not the bills. Certainly an issue that has come up a number of times in submissions and from witnesses has been how we change the culture. What inputs do you think could be given to the recruitment process so that, whether or not it is a person with a legal background, we are not recruiting someone who is going to be constrained by the same sorts of cultural impediments that we are now looking at?

Dr Lidberg—Again, I want to stress that I am not targeting the Public Service here, but that was one of the reasons that I put in my submission. I think, especially if you have served some years in the Public Service, unfortunately—and we are only human beings—you get steeped into the organisation that you are working in. Unfortunately, because of the tradition of secrecy that comes with the Westminster system and because of our Public Service to such a great extent being modelled on the UK Civil Service, I do not think the FOI Commissioner should be drawn from the Australian Public Service. I think it is absolutely vital that he or she is drawn from the outside. That would be one of the main issues for me. I almost apologise to the Public Service here, but that is the case, unfortunately.

Senator KROGER—How difficult do you believe it is for journalists to access documents at the moment?

Dr Lidberg—I honestly think there is a great momentum for change at the moment. We have Queensland, we have New South Wales and we have Tasmania. I think it is a bit too early. I actually think that the juries are out on those. In WA it is getting better. For a while we had a number of years—I think it was five or six—where there was no commissioner at all; there was an acting one. Again it proves my point that if the government is not serious about FOI they appoint an acting commissioner who is weak and cannot really do anything. So in answer to your question the federal act is severely dysfunctional, as you know. It does not really work the way it is. You get dribs and drabs as a journalist. In the other reformed state systems I think it is too early to say. Queensland shows great promise. But it takes a while for these things to settle in. Likewise with the federal act, we cannot really assess it properly until after a few years. But at the moment it is not working. There are two main reasons for this, that all submissions have actually pointed out. It is turnaround time and it is fees and charges. I know fees and charges are not really addressed here, but I am putting my hope to the commissioners that they will speedily look at that, because the fees and charges are a very important part of it, of course. We have seen requests that have had quotes of thousands of dollars come back to them.

Senator KROGER—I saw you have made some suggestions about that. You thought that the time that was attached to the processing fee was too short. Is that right?

Dr Lidberg—Yes. You raised the point before with Professor Paterson. I think the bill refers to non-profit organisations and journalists. They are the ones that are supposed to have—was it half a day?

Senator KROGER—Yes.

Dr Lidberg—I have suggested a minimum of one day. That could be amended now, I think. I suppose this also depends a bit on how journalists make use of the act. I would like to see the information commissioners engaging with journalists and the media in how this is being used. I am not saying that we should penalise journalists who do not use it the way the government wants them to use it, but I think there is clearly an element of trust there as well: ‘If you as the media and journalists are sincere about using this, then it’ll work

better.' When I say 'sincere', I am not saying that they should be controlled but I am saying that there are different ways that you can use the information that you get. There have been examples where some media have clearly misrepresented the information that they have gotten and I think the Information Commissioner could have a role in looking into those cases, perhaps working in conjunction with the Australian Press Council, and saying, 'Listen, this was not the intent,' and so on.

Senator KROGER—It would be hard to set up guidelines bringing in some sort of judgment, wouldn't it?

Dr Lidberg—It would be very hard, yes.

Senator KROGER—So you do not think we are in a position to judge whether the information commissioners have actually improved the process in the states?

Dr Lidberg—We are, absolutely. You misunderstood me. You can clearly see that in Queensland and WA, which have had the commissioners for the longest, it has worked much better. In terms of appeals and the process flowing smoothly, there is no question that commissioners are absolutely the way to go. I must say, I find it very good that the change bypassing the internal review was made. I am much harsher in my judgment on that than Professor Paterson, because I think that with internal review, even though the stats say that it does work, that decisions are changed, it does not quite show how those decisions are changed. Very often, internal review does nothing, so it is fantastic that that has been changed and that we can go straight to the commissioner. The commissioner is certainly the way to go. It is quite a progressive way to go, actually.

Senator RYAN—You mentioned there that the fees and charges issue is to be addressed by the Information Commissioner and you have spoken a lot about what you think the ideal commissioner might bring to the job. But this makes me wonder. While you say that there has been some change in Queensland and WA, there was also the example in WA you highlighted of a commissioner not being appointed. This bill gives a lot of autonomy and power to the commissioner, does it not?

Dr Lidberg—It does.

Senator RYAN—If a commissioner decided not to address the issues of fees and charges, that would mean that potentially you could be in a worse place than where we are now because we have the reversal of the onus of proof when we are looking at appeals before the AAT. I do not mean to put hypotheticals out there, but does this bill not place a little bit too much power in the hands of the executive to choose the person who then has to address all these issues you highlighted?

Dr Lidberg—One of the other submissions, the Cyberspace Law and Policy Centre one, pointed out that perhaps the commissioners should be appointed by a parliamentary committee. I think that is really worth considering. Because the commissioners are going to be so pivotal, perhaps it should be not only up to the government but up to a wider base to make the appointment. On the fees and charges issue, that is set up in the bill. It says in the bill that the information commissioners will review this, so I would assume that if they are not reviewing it they are actually in breach.

Senator RYAN—They could review it and come to the same answer we have at the moment.

Dr Lidberg—Yes.

Senator RYAN—I am not saying they would, but a review does not require an outcome. It is a process.

Dr Lidberg—True. So what you are saying is: what if we appoint commissioners and they are not delivering in the way that we hoped they would?

Senator RYAN—The way that a number of submitters expected them.

Dr Lidberg—It is a problem. I have no clear answer. I can only again get back to the point that it is going to be very important to have very due diligence regarding who you appoint.

Senator RYAN—So the appointment is the critical point here.

Dr Lidberg—I think so, absolutely.

Senator RYAN—Reflecting on what you said before about the potential role of the committee—I am not sure of the possibility of that—would it be fair to say that you think that some more oversight of or input into that appointment might not be a bad idea? .

Dr Lidberg—The more support that appointment has the better it is.

Senator RYAN—I will come at this from the other angle now. You have made the comment, without any intended insult towards the APS, that you think it would be better for the commissioner to come from outside the APS.

Dr Lidberg—Yes.

Senator RYAN—I assume that you assume that it would be better that they do not come from the state public service either. Or do you think they need to come from outside the APS per se—just the APS?

Dr Lidberg—I am sticking out my neck here of course, but I do not see the state public service being all that different in terms of onus, tradition and ethos.

Senator RYAN—That is the point I was getting to and wanting to clarify.

Dr Lidberg—To stay consistent with that I would have to say yes. I do not think they should come from the state public service either.

Senator RYAN—Coming at this from a different angle, from a government point of view, if you have someone from completely outside the system are you concerned that that person may not then have the same background that would enable a better balance of competing needs? Someone from completely outside the system—for example, an academic or a former journalist—would also come with a mindset that may in fact be weighted the other way a bit too much, and that could lead to, for example, not as much concern about privacy for an individual. Or they may bring a pro-disclosure balance with them that is counterweighted too far the other way. Does that concern you at all?

Dr Lidberg—When I read the draft Information Commissioner Bill I was quite sceptical about having three. To be honest, I thought that was a bit much. But then I thought about it some more and saw how pivotal the commissioners would become to the success of this culture change. It does not have to be the FOI Commissioner. It seems to me the way it could possibly work is like this. You could bring in an FOI commissioner from the outside who has quite a pro-disclosure bent. Then there would be an information commissioner. In the bill it says that the Information Commissioner is going to be the advisor for the government on information matters more widely. I noted that fact in some submissions where it was pointed out. If you have, say, that person and then you have the Privacy Commissioner—who I understand is going to keep up the appointment and move into the office—the FOI Commissioner is then balanced by the two others. That would be my way of ensuring that you have balance.

Senator RYAN—Sure. That makes some sense. I want to go to the issue of the free hours for not-for-profit organisations and for journalists as opposed to individuals, which strikes me at a personal level as a little bit odd. Is there a rationale for certain people getting preferential treatment? In the end, it means that if I apply as an individual I am not going to have the same exemption that a journalist or a not-for-profit organisation may have if the commissioner heads down this path of expanding that partial exemption. Shouldn't everyone be treated the same—individual or organisational?

Dr Lidberg—Correct me if I am wrong, but I thought that the individual requests did not have any processing fees on them either.

Senator RYAN—This was for the first five hours of time, though, wasn't it? You mentioned that in your verbal submission.

Dr Lidberg—Yes.

Senator RYAN—You mentioned that should be doubled to a whole day or to 10 hours.

Dr Lidberg—Yes. But you are now comparing third-party requests, which is the not-for-profit organisations or the journalists, for instance, with first-party requests, the individuals.

Senator RYAN—I am just trying to explore this issue because I was not aware of it before. Can you take me briefly through where the exemption currently applies in this bill? Does it apply to individuals making requests?

Dr Lidberg—As far as I understand, in the bill before us there are no processing fees for personal information. Is that correct?

Senator RYAN—Yes, but what about me as an individual making an application as a third party for information about others, as if I were a journalist?

Dr Lidberg—Now I see what you were saying—if you as an individual make a third-party request as, say, a citizen journalist.

Senator RYAN—If I write a blog, for example.

Dr Lidberg—I had not actually thought about that, and that is a good point. That needs to be explored perhaps. It makes it a bit messy in how you write it up, but it makes sense to me that non-profit organisations that have few resources and so on should not be slapped with big processing requests. That is a pretty given one, I think. Some journalists have a lot of money behind them in terms of media organisations and so on. I suppose it is sending some sort of message in terms of the accountability function for journalists that there is at least some provision, but what you are saying is that that needs to be looked at. It needs to be thought about, I think, and perhaps the information commissioners need to be charged with that as well. You are raising a good point there. Perhaps, as an individual making a third-party request, you should be given some sort of provision as well. This all comes back to the ownership again. It all comes back to whether governments own the information or should act as information access facilitators, which is what we see in the really mature, fully fledged, far-reaching FOI systems. In the benchmark systems, that is what the public servants do. They are information access facilitators and not gatekeepers.

Senator CAMERON—I am interested in this issue of the press. The press simply do not act as the guardians of public interest at times, do they?

Dr Lidberg—That can be discussed, I suppose. Some do, some do not.

Senator CAMERON—That is the point. It is not black and white, is it?

Dr Lidberg—No.

Senator CAMERON—I am just wondering why the public should pay for some non-public-interest investigation by a journalist that requires public funding.

Dr Lidberg—Now we are getting into theories of the press and why they should be the way they are and if they are the fourth estate and if they do guard the public interest and stuff. There is a whole five-day hearing on that one.

Senator RYAN—Only five days!

Dr Lidberg—Again I come back to benchmarking against other systems. I am not saying that Australia has to do this but I am saying that, when we have the opportunity, we should look at it. In a way, you have to take the good with the bad here, and that is the way it has always been with the press and the media. You have got things like *Four Corners* and *Background Briefing* and those guys that do ethically the right thing and do guard the public interest and do fill the role of accountability holders, and then you have got the other side—and I will not mention any names—and you have got everything in between. Yes, ideally we would like the press to behave like that up here and not like that, but, because we have the system we have and because we do not believe in restricting the press—because then we are going into another form of system—I cannot see how it could be done in any other way. I appreciate your question about why the public should pay for this, but I think that perhaps the public is prepared to pay for that body of good work that is being done by parts of the press.

Senator CAMERON—I suppose the other issue is the role of the Press Council. You raised the Press Council. There are lots of critiques and criticisms of the Press Council—as many as there were of the FOI Act. Now government is looking at the FOI Act, maybe the Press Council needs some surgery as well.

Dr Lidberg—I have stuck my chin out there as well actually and said repeatedly that we need to have a good long look at the whole self-regulation system in Australia of the media and the press. It is not only the Press Council; we have got the Australian Communications and Media Authority as well. That is a body that is supposed to have legal clout but just does not use it. Coming back to the information commissioners again, their role can be quite wide. I am in favour of it being quite wide, because they could take up a dialogue with the Press Council or ACMA, for instance, and say, ‘If we’re going to have a far-reaching FOI system, we also need to look at how the information is being used.’ I am not saying that there should be regulations but I am saying there should certainly be discussions about how the self-regulation system works.

Senator CAMERON—I was a bit confused by some of your submission this morning. You might be able to clarify this for me. You said there should be no exemptions for people who can be appointed as a commissioner and yet then you said, ‘but no different from the Public Service’.

Dr Lidberg—True.

Senator CAMERON—Can’t the gamekeeper turn poacher?

Dr Lidberg—Possibly. They are really two different things. First I said, ‘Don’t limit yourselves to saying that they have to have a legal background.’ That was a separate issue. Then I went on to the appointment—where they should be drawn from—because there were questions. I am sure that there are public servants out there that are very strong FOI supporters. It is just a matter of finding them. Having said that, I do not know how many of them there. On balance—and I take your point that I may be saying one thing on the one hand and another thing on the other hand—I would have thought that it would be hard to find that public servant who would be a strong FOI backer and advocate. Let us use the word ‘advocate’, because I think that is what the FOI commissioner is going to have to be.

Senator CAMERON—You indicated that, in dealing with this whole question of FOI, people have to be patient and they have to have a long-term commitment. You also indicated that the current act is severely dysfunctional. Is the proposal that is before parliament now a proposal that will make progress and is it worth while passing?

Dr Lidberg—Absolutely. I am a very strong supporter of both bills, but let me say again that the provision is that the right commissioners are appointed.

Senator LUDLAM—In your submission, you talk about having created an index that compares FOI regimes around the world. I am just wondering how Australia’s national scheme at the moment sits in the hierarchy from best to worst.

Dr Lidberg—I am not sure you will want to hear the numbers, to be honest. The assessment that I did was finished in 2006, so it was with the old Commonwealth act. On a scale from 0.0 to 10.0, Australia rated 2.8, and that was actually the lowest, even below South Africa, which had a very young act. The highest one ranked 8.2, I think. I am proposing to actually reassess the new Australian regime in two years, and I will then compare it to the old one, and I am hoping that there will be improvement.

Senator LUDLAM—So we are currently pretty low with the laws that we have, but you are assessing performance, I presume, rather than just drafting, so it is not really possible to get what these amendments would do to our standing worldwide.

Dr Lidberg—The index was built around three substudies. There was one study that looked at the letter of the law in terms of objects and how the law was drafted to support those objects. There was one study that surveyed public servants and ministers. The third one assessed the number of FOI requests. I can say, just by looking at the bills that are drafted now, that these bills would certainly increase the score for Australia, in terms of the letter of the law, quite remarkably. Just by making this change, Australia has come quite a bit of the way.

Senator LUDLAM—Great. My colleagues have asked most of what I wanted to ask. One of the things about costs you said was that there are clearly some improvements there in upfront costs that will hopefully lower the bar to participation. But my understanding—and this comes also from recent personal experience—is that the upfront cost is rarely the problem. When you get the bill for assessments and decision making, it can very quickly run into thousands of dollars even for a simple request. As far as I can tell, there are no changes at all to that in the amendments that we are looking at.

Dr Lidberg—No, there is not. I should point out, though, that if you look at the current situation in Australia the fees and charges vary enormously across the country. For instance, in WA, you seldom have any fees and charges put forward. It is problematic that it was not raised in the bill. However, as I have noted, the information commissioners are charged with reviewing the fee and processing structure as soon as possible. Certainly, whoever becomes commissioner should make it their first priority to look at the whole fee and structure system. That is a more productive way to address it rather than setting out a set schedule in the bill. Provided the commissioner does his or her job I think that issue will be addressed.

Senator LUDLAM—The other thing I think you spoke about before is section 53A. In your experience how long do requests, not with vexation claims but with the kind of run-of-the mill FOI claims, normally take to process?

Dr Lidberg—My experience with the Commonwealth Act is that it is very rare to have a decision before the full run of 30 days. It is actually more common that the agency would put in a request to go beyond the 30 days. You can only call the current turnaround time under the Commonwealth Act quite appalling.

CHAIR—Your final question, Senator Ludlam.

Senator LUDLAM—You mention, though, in your submission that you would prefer to take time and get it right. One of your comments that I raised about the problem was that things slow down for the wrong reason. Is there anything currently in the exposure draft that you think will speed up the process or can we expect it to make it work better?

Dr Lidberg—If I am going to make a prediction I would say that this is not going to change quickly, as I said in my opening statement. It will not be a case that the act is passed and then it changes; it will take time. I cannot see anything in the text as such that will speed up the processing time. But I do think that, if the commissioners act quite quickly after being appointed to put out the message that this is now a new regime, we will speed up processing times and I think we might see change. But it will not happen quickly.

Senator LUDLAM—Thank you.

CHAIR—Thank you, Dr Lidberg, for your submission and for appearing before us today.

Dr Lidberg—You are welcome.

[11.12 am]

TIMMINS, Mr Peter George, Private capacity

Evidence was taken via teleconference—

CHAIR—Welcome.

Mr Timmins—Good morning all.

CHAIR—Information on parliamentary privilege and the protection of witnesses and evidence has been provided to you. The committee has your submission. I now invite you to make a short opening statement. At the conclusion of your remarks I will invite members of the committee to put forward questions.

CHAIR—Do you have any comments to make on the capacity in which you appear?

Mr Timmins—I appear in a personal capacity, although my company, Timmins Consulting Australia, does work in this field. Thank you for the opportunity to talk to you this morning about this important legislation. I will make a couple of comments before responding to any questions you might like to ask. I think the legislation is a good and positive move in the direction of more open and accountable government, but I do not think we have shot for the stars. While there are many aspects of the legislation that could be improved I think at this stage of the game, with the committee faced with a reporting date of 16 March, I would like to emphasise some practical changes that could now be made, notwithstanding the fact that I think more substantial changes are warranted and should be explored at some early time. I think, currently, that we have half a loaf but what I am suggesting is that we try to take a few more slices which would really add significantly to the legislation.

I will just respond to the four questions you have posed very briefly. Are there effective measures to ensure that the rights of access are as comprehensive as they can be? Frankly, no. There are a couple of things that should be reconsidered. The first of those is the information publication scheme, which is mentioned in schedule 2 of the reform bill. The actual requirements for agencies to publish information are those that currently exist, plus two additional categories. That is, statutory appointments and information that is routinely released in response to a request under the act will in future be more widely available on the web.

The explanatory memorandum, however, states that agencies are generally best placed to identify information they hold which should be published, taking into account the object of the act. My response to that is, with about 28 years of experience, I do not think they support the fact that government agencies are best placed to do that. The act itself needs to be enhanced by specifying some categories that should be published. Things like contracts, grants are already required by the administrative process, but we could go a bit further with travel expenses for ministers and senior public servants and a range of other things that I could suggest. One of the difficulties is that nothing is specified in the act itself that goes into these sorts of areas and, when it comes to further guidance from the information commissioner, proposed section 93A states that it is a discretionary power. So the commissioner may or may not issue guidelines. The explanatory memorandum states, 'An agency must have regard to any guidelines issued'—that is, to consider the guidelines. It is not intended that the guidelines have any binding effect. In my view, we should put the commissioner in a position similar to that which exists in the UK where the information commissioner has mandatory powers in this field and in Queensland, where they have adopted a similar scheme, whereby an agency must—I emphasise 'must'—comply with guidelines issued by the Premier. I think in that respect we can beef this up.

The second point with regard to this question is the scope of the act. I think you have heard from others and you will hear today from others that the failure to act on a 1995 law reform recommendation that the act extend to the parliamentary departments is a significant gap in the accountability and transparency framework. This year the parliamentary departments had \$320 million to spend. Some of that money goes on payments to members and senators in the form of allowances and salaries. I think the lack of accountability in this area, as I detailed in my submission, is one that we should address.

There are some things that should be done to schedule 2 concerning those agencies excluded from the act entirely or in part. But I am afraid those things probably go beyond our capacity in the short time frame, and I am very keen to see this legislation pass in the first term. With exemptions, the backtracking from what was in the exposure draft to what we now have in the business affairs exemptions is unfortunate. I think the most significant thing I would mention in this respect is the need to do something more by including as a public interest factor that currently argues in seeking to defend policy or documents concerning government decision

making from disclosure—that is, the issue of frankness and candour. A whole range of other dubious exemption claims in the public interest are ruled out by this bill, but the absence of that one is a significant failing. I have included in my submission a quote from Senator Ludwig, speaking to the Institute of Administrative Law Forum in August last year, where he was very sceptical about this argument. In terms of policy documents I think this is something that should be addressed.

On the second question you raise about improvements to the request process, the only thing I would add is that I think the framework being established by the bill—that is, the abolition of application fees and the retention of charges—should have been looked at again. It is probably too big an issue now for much close attention, but in my view there should have been some cost benefit analysis of what would arise if the government retained the application fee, which is administratively easy to collect, and abolished processing charges. Last year they only collected \$262,000, but I would have thought the cost of maintaining that charge regime far outweighs the return. There could have been another way to look at that.

I would make two more points. On the pro-disclosure culture there are two things that should happen. Section 23, which is not mentioned anywhere in the reform bill, is a strange anomaly that gives a minister power to make a decision with respect to an application for an agency's documents. Whether that power is ever exercised, we have no idea. It is not reported on. I am told by many officials that it is not used, but it seems to be a strange anomaly and it would improve the pro-disclosure culture if ministers did not have authority to interfere in any way in the processing of applications for agency documents. In this area we should also pick up what is emerging in an Australian best practice idea from Queensland, New South Wales and Tasmania—that we should include offence provisions in the act that would make it an offence for improperly influencing a decision under the act.

Finally, on the issue that was raised last week about onus in the AAT, I have submitted that we should be more concerned or just as concerned about possible delaying tactics that arise from the fact that an agency may seek further merit review from the Administrative Appeals Tribunal. I have done some more detailed analysis of that this week and published it on my blog, but I would be happy to provide the committee with more detail on that matter should you wish to receive it. Thank you for the opportunity to make a few remarks. Would be happy to answer any questions.

CHAIR—Thank you very much, Mr Timmins.

Senator LUDLAM—Could you give a little bit more detail about the proposal to exempt an entire agency. We have heard a little bit about that from the previous witness. I think you have also noted that the ARC recommended those agencies in schedule 2 should be required to justify it. Acknowledging that these agencies do hold national security-sensitive information and so on, what is the best way of balancing the pro-culture where it is appropriate with the kind of information agencies hold?

Mr Timmins—Quite clearly they are ones where we need to be very cautious—that in schedule 2 you have others like the Auditor-General, the Australian Government Solicitor, the Australian Industry Development Corporation, all entirely excluded from the act, plus partially excluded organisations like the ABC and SBS in relation to program material and datacasting. There have been a couple of very generous decisions in the Federal Court and the AAT that have extended the meaning of those exemptions more broadly than most of us might have anticipated. For example, the ABC has been able to knock back requests of information about the handling of complaints about programs simply on the basis that it has been held its information in relation to its program material. I do not think that was the original intention. They are just examples. I think the intelligence agencies deserve some close and careful consideration—a lot of their information is clearly sensitive—but in schedule 2 there are a whole lot of others. I think that what has happened so far is that they have escaped the scrutiny that the Law Reform Commission recommended all those years ago that we should be giving to entire or partial exemptions from the act.

Senator LUDLAM—I would like to ask you the same question I asked Dr Lidberg about costs. That is one of the main barriers for applicants. I think everybody has uniformly welcomed the waiving of application fees in some cases. There is a certain period of time free if you are a public interest applicant. It seems to me that the costs of processing and decision making are the real barriers here as a means of deflecting applicants. Is there anything in the bill that you can see that addresses that? Where do you think we should go with that?

Mr Timmins—I think there are couple of things in the bill that are positive. There are no charges if the time limit is exceeded. As you just heard from Dr Lidberg, whose testimony I heard the last part of, it is the practice in many agencies that the time limit is not met. But, in the future, that will be a spur to some improvement in performance. I imagine that there will be a lot of those very large FOI bills that have been

mentioned publicly in the past and that agencies might struggle to impose them if they do not process applications within the time limit. However, as I mentioned in my opening remarks, it would be interesting to know whether there is any cost-benefit analysis in going the way that the Tasmanian government is going to go from 1 July this year. In new legislation there—that is, the Right to Information Act—which implements on that date, they will retain an application fee and abolish charges. I think that is worth some examination.

The government has put out an exposure draft of a regulation regarding fees and charges. I made a submission on that on the rather unfortunate date of 11 January, when submissions closed. The Prime Minister and Cabinet website for some reason says that submissions received on that exposure draft regulation will not be published on their website. I am not quite sure why. I would be interested to know whether others have raised concerns about the regulation. I think there are many weaknesses in it—for example, the failure to define journalism and what a non-profit organisation is. Why should they get preferential treatment rather than John or Mary Citizen who might be seeking to pursue the object of this act, which is to hold government to scrutiny and to increase public participation in government activity. It seems to me that we really should be rethinking some of those issues.

Senator LUDLAM—Thank you.

Senator RYAN—Mr Timmins, I was just reading your website with respect to comments you made about the AAT process. Could you briefly expand on what you said earlier. I understand you wrote that ‘reversing the onus of proof is not appropriate’, but you thought there were other problems as well. I have not been able to get through it all during the time you were answering questions from Senator Ludlam.

Mr Timmins—I think the bigger problem is under proposed section 60 of the act. Last week the committee had evidence from Michael McKinnon, and there has been some publicity about it, about the onus of proof reversing under proposed section 61, that the onus rests on whichever party seeks merit review from the Administrative Appeals Tribunal. My point is really that, under proposed section 60, an agency, an applicant or a third party may seek further review of an Information Commissioner decision simply on the basis that they assert that decision is wrong.

I think this opens up the prospect of delaying tactics from an agency or a minister who is not happy with an Information Commissioner decision and seeking to delay disclosure by simply lodging an application with the AAT. I think you do not have it before you but the acting Information Commissioner of Western Australia lodged a submission on the exposure draft to the Department of the Prime Minister and Cabinet, which I quote in that post on my blog, which warns against delaying tactics here, saying that we may have gone overboard a bit in allowing for these three levels of review: internal review, review by the Information Commissioner and review by the AAT. My view is that there is an argument for an applicant having that right, but I do not think there is an argument for an agency or a minister to have the right to seek further review by the AAT. They should have a right to seek review where it is alleged that there is an error of law in the Information Commissioner’s decision. But when it comes to simply asserting that it is wrong and therefore asking for full merit review again, a process that has been undertaken by the Information Commissioner previously, I think we should be looking closely at that because of the prospect of delay.

But if some of the evidence you had last week from both Michael McKinnon and, on behalf of the Law Council, Mark Robinson on the onus issue that the applicant will find himself or herself in the tribunal carrying an onus that he or she cannot be expected to carry at all, I think you need to bear in mind that as a result of the Information Commissioner process, which is mandatory before you get to the AAT, that any applicant who takes that first step will have the Information Commissioner’s decision. I am not clear whether that decision can be entered into evidence in the AAT. If things stay as they are, there should be some scope for the Information Commissioner’s decision to be accepted in evidence and taken into account by the tribunal. At the moment the proposed bill says the Information Commissioner will not defend the decision that he or she has made. I think in this area there is a bit of tidying up needed, but the bigger concern I think is that agencies will simply have a right to seek further merit review on the grounds they think the Information Commissioner was wrong. I cannot see why they need that.

Senator RYAN—Are you suggesting that an applicant should have the right to seek a merit review at the AAT, but you think that an agency seeking an appeal of the Information Commissioner’s decision to release things should potentially only be appealable on a matter of law?

Mr Timmins—I predict that would strengthen the sort of culture within which government agencies should be working. It favours pro disclosure. We have an Information Commissioner model to oversight this stuff. I think that would all be good. There is a barrier to John and Mary Citizen going to the AAT that I am sure it is

still going to be there in the future—that is, it costs \$682 to make an application. So these are not frivolous matters in the main. I guess there might be some that you can point to here and there that do not deserve a lot of attention in the AAT. It seems to me with that safeguard, which protects against too much gain—there were not many last year anyway; there were 139 FOI applications to the AAT last year. There will be considerably less under this regime because of the Information Commissioner process. So we are not talking about a lot, but the open door that is there for a government agency or minister to simply lodge an AAT application which has the effect of preventing disclosure as the Information Commissioner might have ordered, I think that is a very unfortunate aspect of what you have before you.

Senator RYAN—You mentioned an issue that was covered with the previous witness—that is, the status, for lack of a better term, given to journalists and non-profits as opposed to John or Mary Citizen making a third-party application. It is a concern to me that I do not understand—there is a definition of ‘journalist’, and as we know media is being redefined more widely. Do you think that is something that we should also look at to ensure that someone making a third-party application should be treated the same way regardless of whether they come from an approved organisation, for lack of a better way of putting it?

Mr Timmins—I guess you will get a chance in the disallowance process of regulation when that appears. The bill you have before you sets the framework because it does contain some provisions that say application fees are abolished and charges as specified in a regulation. I guess that is where you will get that chance. But I have suggested that one hour free for John and Mary Citizen, which is what it amounts to, and five hours free for anyone an agency reasonably believes to be a journalist or anyone an agency reasonably believes to be a non-profit organisation are both unsatisfactory. There is no definition of journalists, and of course it is very hard to define. In my submission I suggested that individuals, community or similar groups who individually or on behalf of others seek access to documents for the purpose of participating in government processes, or the purpose of scrutiny and review of government activities that impact on members of the public generally, or in a particular instance, should get some special concession if we are going to maintain this idea of special concession for charges under the act.

Senator RYAN—Thank you. We also discussed with the previous witness the fact that this bill places a lot of faith and authority in the hands of the various commissioners. You outlined that section 93A makes the issuance of guidelines discretionary and does not make them the mandatory upon the various agencies. In WA I understand they have appointed an acting commissioner—at least for a time; permanent now, I understand—which may have an impact upon the ability of the commissioner to change the culture. Are we placing too much trust in the appointment by the executive of a single person?

Mr Timmins—I have got enough faith to think that governments, who at some point end up in opposition, should be very mindful that these opportunities to step in the right direction are not to be wasted. I at this stage have no reason to think that there will not be someone is an outstanding leader who is appointed to this job, because it is very much leadership job. It is not just a clerical, law related job; it really is a leadership role, and I would hope that we have that sort of leadership, which has been lacking. FOI has been an orphan for 28 years. It has had no-one to nurture it publicly, it has had no lofty aims and objectives reinforced on the way through. This is the chance to give it some ownership within government. I think the commissioner should have stronger powers, as I have mentioned in a couple of context today, but I think the idea is a good one. We should beef it up a bit. I hope the government does the right thing and makes sure we have an outstanding leader there.

Senator CAMERON—I want to go to the issue of the appointment to the information commissioner. The argument has been put forward here earlier that you should exclude government bureaucrats or lawyers. What is your view on that?

Mr Timmins—I do not think anyone should be excluded—we want the best person for the job. It is working in a law related field, quite obviously. Excluding lawyers and public servants would not be wise. There are outstanding public servants who fully understand the importance of openness, transparency and accountability just as there are people outside government who fully understand these processes as well. It is a government role; it is a role where you have to work effectively with government agencies, so I don’t think someone with a lot of experience in government who might still be a public servant should be excluded. They do not sound to me like very sensible ideas.

Senator CAMERON—You mentioned in your verbal submission this morning that issues such as travel expenses for ministers and senior public servants should be published. Aren’t all of these issues clearly on the

public record and aren't they all also subject to quite significant scrutiny at estimates? Is this one of the key issues?

Mr Timmins—I think they certainly come up in estimates committees. But we should be taking a leaf out of the book elsewhere. Canada and Scotland, for example—an example you might like to follow, Senator—has some outstanding precedents in this sort of area. The Scottish parliament, for example, has a website that has all members' details of travel expenses and declarations of interests. They had a great scandal there a couple of years ago and that prompted it. Canada does something similar for travel expenses for ministers and senior public servants.

I think that we are missing an opportunity here to be more specific in the bill. But if we are not specific in the bill, the way to address it is to give information commissioner more power to make guidelines mandatory in some or all respects. In both those areas that bill and the proposal before you is lacking. We do not have specificity of new areas. The explanatory memorandum, as I quoted it, says that government agencies our best to decide themselves what information they should publish. I do not know how you might react to that, but my reaction was, 'Show me the evidence of that?' I do not think 28 years of experience with the FOI Act—or, for the last decade, where we have talked a lot more about open government—supports the contention. It is in the committee's hands whether you agree that it can be beefed up, but grants and contracts—we already do this. Why not put them in the legislation? What about Harradine files—that is, details about a government agencies filing system—that some senators will be familiar with? They have been a requirement for many, many years. They are not mentioned at all. I think we could do a lot more with the pro-disclosure specificity of the legislation or do something about the powers of the information commissioner.

Senator CAMERON—Could section 60 of the act, where there is a further review if there is an assertion that the decision is wrong, be resolved if there was a time limit not only to make the assertion but also a time limit to deal with the assertion?

Mr Timmins—That might help. One other thing I thought of it is whether the tribunal should be required to promptly undertake, in the event of an application from an information commissioner's decision, an assessment of the application and decide whether it has got merit. These are possibilities of refinements that might help, but mine is a bit more over the top maybe in saying, 'Why should an agency have a right to go simply on the basis for further merits review?' Sure, it should have a right to go on an error of law. But, if it is simply that it needs another look, I think that we should be confident that the information commissioner has given it a good look.

Senator CAMERON—If government was not inclined to adopt the proposals that you are putting forward, do you still believe that the legislation is good and positive, as you have outlined earlier, and should it go through—or, should we do nothing?

Mr Timmins—My view is yes. You have a lot of us who follow this area quite closely raising issues in the submissions—many of them were raised on the exposure draft last March. One of the problems is that the government has not explained its choices, not explained why it has not acted on some recommendations from the ALRC, for example. I guess many of us would like to see a debate about those. However, my view is that it is a more important issue at this stage to get this legislation through in the first term of government. To let it go further than this is undesirable. It has already been far too slow. We did not have a full and proper debate, as we might have, about best practice ideas. However, the bill is here and I think the bill should be acted on promptly. I guess if none of these things are acted on it is still a welcome reform.

Senator CAMERON—Thank you.

CHAIR—Thank you very much, Mr Timmins, for your submission and your evidence today via teleconference.

Mr Timmins—Thank you.

[11.44 am]

HERMAN, Mr Jack Richard, Executive Secretary, Australian Press Council

Evidence was taken via teleconference—

CHAIR—Good morning, Mr Herman. Information on parliamentary privilege and the protection of witnesses and evidence has been provided to you. The committee has your submission. I now invite you to make a short opening statement and at the conclusion of your remarks I will invite members of the committee to put questions to you. Do you have an opening statement?

Mr Herman—No, the committee has the Press Council's submission on this matter and I think it largely speaks for itself. The press council has been concerned for many years that the current freedom of information legislation has not been working to the benefit of those who want to use it to make public interest inquiries, and that is particularly the case for journalists. We did a study in 2002 which showed that journalists were basically put off using freedom of information for three reasons: fees, delays and the large number of exemptions. In our view the legislation currently before the Senate committee addresses the majority of those concerns and we commend the government for the introduction of the legislation.

There are two main areas where we have some reservations. The first is that we believe the legislation still does not go far enough in removing the exemption for cabinet documents, and we have made that argument in our submission. The second is that we think the Senate committee should be looking more closely at the fee structure to be applied for those making public interest inquiries under freedom of information, and we have commended the Tasmanian legislation from last year which, we think, of all the amendments that were done in 2009, best addresses the fee question and allows people making public interest inquiries best access to information.

CHAIR—Thank you. We will now go to questions.

Senator RYAN—Thank you, Mr Herman. We finished, with the previous witness, talking about the concessional aspects that may be included in the guidelines for journalists to access FOI. One of the issues that I had raised was whether there should be concessional access for journalists as opposed to citizens, and the definition of 'journalist'—which may or may not be in such guidelines. Do you have any particular views on whether there should be such concessions and how they should be defined?

Mr Herman—The council is always wary about singling out groups, whether journalists or others. When journalists are making applications under FOI for public interest information, they should be in the same position as any other individual or group who is making similar sorts of applications. We have always had concerns that, while individuals have been able, more easily, to make applications and get them honoured, they are for personal information, but the public interest information has been much more difficult to obtain. So I think we would rather see it being expressed in terms of the sorts of information rather than the class of person making the application.

Senator RYAN—One of the differences between the exposure draft and the draft as it is brought before the parliament has been this. If, for example, one of your members was making the application and they sought that to be reviewed at the AAT, they would bear the onus of proof—the onus would be upon them to prove that the Information Commissioner's decision had been incorrect. A number of other witnesses have highlighted that that is a retrograde step. But also, when we last met, a witness highlighted that that was really a first for FOI legislation in Australia or any of our states or in comparable countries. Do you have a view on whether or not the reversal of the onus of proof would make life more difficult for those seeking a merit review of a commissioner's decision?

Mr Herman—There are two issues there. The first question is whether, if you have an information commissioner—an independent arbiter—making a full merits review, there needs to be a separate appeal to the Administrative Appeals Tribunal. The second issue is, if there were to be such an appeal, who would bear the onus of proof. I was quite taken with the submission put to you by the acting Western Australian Information Commissioner, who noted that, basically, you do not need that second full merits review with the AAT. If you have an independent person such as an information commissioner making a determination, there is a possibility that the sorts of delays that I mentioned at the beginning that were a product of the old FOI regime would come back into the system were there to be several levels of merit review.

Our position would be that the best proposal for the Senate to recommend is the position that has been adopted by a number of states that have introduced information commissioners. That is that the information commissioner makes the merit review and the only appeal is then to the courts on questions of law rather than having a second whack at the full merits review. If, however, the Senate decided to have two levels of merit review, first by the information commissioner and then by the AAT, the council would suggest that the onus of proof in either merit review should rest with the officials who are contending that the information should not be released. The objects clause of the act makes it clear that the object of freedom of information is the release of information. Therefore, the onus to show that the information should not be released should always rest with the official trying to forestall release.

Senator RYAN—I appreciate that. A previous witness has suggested that one model that could be adopted is that a person seeking information could seek a merits review from the AAT but an agency or department seeking to deny access to information would not be able to go to the AAT; they would be stuck with the information commissioner's decision unless they appealed on a matter of law. Would that address your concern about delays?

Mr Herman—It would. I still think you are basically treating the officials and the applicants separately. I come back to the point that you are appointing an official, an information commissioner, to be an independent arbiter—an ombudsman of information, if you want. If you can invest that official with the power to make a full merits review, then I think probably either party should only have access to a review of that on law rather than seeking a second full merits review.

Senator RYAN—A concern I might have with that approach is that the government gets to appoint this particular commissioner. This commissioner is responsible for the education campaign and for developing guidelines, and then that commissioner is also responsible for a merits review. It would worry me that they could effectively be trying the success of their own performance in the role and that a government could effectively, by a single appointment of a commissioner, have an even more dramatic influence on the culture that every submission has referred to and that giving the executive such power that a single person is responsible for changing the culture, for educating people and for the only source of merits review is potentially placing a little too much faith in the hands of the executive or the single minister making the appointment.

Mr Herman—The legislation does in fact give two levels of appointment because there is an information commissioner and then two subordinates, one looking after privacy and one looking after freedom of information. So to some extent there is a second level there plus I believe that the commissioner is going to be responsible, through the minister, to the parliament. In this situation I think you have got to put some trust in the ability of these sorts of individuals, the people appointed to commissioner roles, to adequately address the law. I would not start out with the assumption that they are automatically going to be doing things at the behest of the executive. People like ombudsmen and information commissioners in several states have been appointed to do similar sorts of things and I think that the education program as to the culture change that is going to be required in the public service is probably going to be one of the major roles that the Information Commissioner will have. Given that situation—leaving aside the point we made in our submission on the Information Commissioner Bill itself that we believe that it should be an independent person reporting directly to parliament rather than through the relevant minister—we are quite happy with the way that has been framed.

Senator RYAN—I take your point. I do not mean to suggest that I think the person appointed would not act in good faith, but this bill is drafted around the idea of the tiny percentage of cases where it might not go as people like you might hope for. It strikes me as another fairly radical change for you to be suggesting that we should be doing away with the AAT merits review process.

Mr Herman—The position there concerns the question of delays from journalists' point of view. I go back to the 2002 report that the council commissioned. What the journalists said was that, in addition to the costs and the number of exemptions in existence—and both of those issues have been well addressed by the new legislation—one of the reasons why journalists were not using FOI to the extent that they should was the time it took from the time of application to the time they got the information. So the council is very conscious of not building into the system excessive delays. To have a full merits review after an independent arbitrator has already made such a review seems to me to be building in an unnecessary delay.

Senator CAMERON—Mr Herman, you have raised the issue of journalists being treated the same as others and have said it should be about the type of information that is requested, not the class of person. Can I

explore that with you for a minute. Some journalists make requests on the basis of a story that is being built up and that story is something that might appear on the front page of one of the newspapers of a newspaper proprietor. That sells newspapers and makes a profit for the proprietor. Is that the same as someone trying to get information on an issue that is not about profit?

Mr Herman—That is very interesting. It is very hard to draw those distinctions in a lot of ways because an article that may in fact be the sort of thing that is going to sell newspapers may also be exactly the sort of thing that serves a very great public interest in exposing crime, corruption, malfeasance, nonfeasance or some other aspect of public life. Yes, newspapers, the press and the media generally tend to be profit-making organisations but they also happen to be organisations that are acting on behalf of the public in disseminating information that is of interest to the public, that is of public interest. To make the distinction between those two things I think is very difficult. What we say is the freedom of the press is the freedom of the people to be informed and as long as the press are performing that duty of informing the public then they are acting in a responsible and proper way.

Senator CAMERON—I do not have much time left. I have got two quick questions. One is in terms of your indication that the legislation addresses the majority of your concerns, and you have commended the government. If the government were not inclined or unable to get any amendments through the Senate, would it still be more beneficial in the public interest to have the legislation as it stands passed?

Mr Herman—Absolutely. The distinction that the Press Council has made over a number of years is that freedom of information has worked in New Zealand and has not worked in Australia to the same extent, even though to a large extent the New Zealand law is in fact based on the Australian law. One of the reasons is that the Australian law has never contained an objects clause that has made it clear that an object of the legislation is to enable the release of information. If for no other reason than that this act actually includes an objects clause—one that makes clear what its objects are and makes clear to officials, to those administering the legislation and to the courts that the aim of the exercise is to release information—then it has improved the situation. By removing a number of the exemptions that have forestalled access to information and by changing the fee structure in such a way as to make public interest information more affordable, the legislation improves the situation. So, yes, the council would think, whether or not its proposals are included, that the current draft practically improves the situation.

Senator CAMERON—This is my last question. You do not necessarily need to answer this one, because it is on a bit of a tangent. Given that we are now having a look at the FOI Act, do you think that could be a catalyst for the Australian Press Council to have a look at its operation and deal with some of the criticisms that the Press Council receives in terms of its operation?

Mr Herman—Yes, we do and, yes, we are. You might be aware that in November the council appointed a new chairman, Professor Julian Disney. Professor Disney has been in office only about three months. He does in fact apologise to the committee for not appearing today. He is still coming to grips with some of the finetuning of his position as chair. Professor Disney has in fact initiated a series of reviews of the way the council operates and I think you will find that over the next few months the council will be making changes.

CHAIR—Mr Herman, I thank you for the submission that was put in by the Australian Press Council and for your taking the time to appear by teleconference today.

Proceedings suspended from 12.04 pm to 1.00 pm

CROUCHER, Professor Rosalind Frances, President, Australian Law Reform Commission

CHAIR—Welcome. Information on parliamentary privilege and the protection of witnesses and evidence has been provided to you. The committee has your submission. I now invite you to make a short opening statement. At the conclusion of your remarks, I will invite members of the committee to put questions to you.

Prof. Croucher—Thank you. First of all, I would like to thank the committee for the opportunity to speak on the proposed reforms to the FOI Act. As the committee is no doubt aware, the ALRC has been looking at a range of issues in the context of information availability over a number of years. Our brief is always to conduct inquiries into areas of reform at the request of the Commonwealth Attorney-General. Our recommendations do not become law of themselves—they are not self-executing—but we do have a strong record of implementation. I draw the committee's attention in particular to the fact that over 85 per cent of our reports have been either substantially or partially implemented. I think the message of this is the longevity of the ALRC's work, so that the 1990 *Open government* report of the ALRC and ARC is now in many ways the subject of the FOI bills. So, some 15 years after making the recommendations, our work is now coming to fruition in the forms of policy in action through legislative implementation. Perhaps I can draw the committee's attention to several other inquiries by the ALRC over the years in relation to FOI, including a review of the Archives Act 1983 in 1998, a review of the Privacy Act 1988 in 2008 and a review of federal secrecy laws which has just been completed, at the end of last year, and is awaiting tabling in parliament.

As a prelude before I am asked questions, perhaps I could signal that we are very supportive of many of the reforms in both the bills and that we consider that the proposed amendments will improve the operation of the Freedom of Information Act and represent a very positive step towards open and accountable government. In particular, there are several proposals that I would like to highlight: first of all, the enactment of a new objects clause reflecting the democratic principles underpinning freedom of information; secondly, the reformulation of the public interest test in favour of the disclosure of documents, which is substantially consistent with the report of the ALRC and ARC; and, thirdly, the repeal of a number of exemptions and amendment of the internal working documents exemption, as recommended by the ALRC.

In addition, we welcome the establishment of the Office of the Information Commissioner, a dedicated FOI commissioner, which was also recommended in the *Open government* report in 1995. With that as a prelude, we endorse the idea of law reform as a contribution to not just the long-term policy advancement but also the long-term policy objectives. The 15-year time frame between our own report and the current legislation is an example of the long-term impact of law reform as conducted by the ALRC. I would be very happy to explain our views on any of the issues raised in our submission to the committee. Again, I welcome the opportunity to speak to the committee on this occasion.

CHAIR—Thank you, Professor.

Senator LUDLAM—Thank you very much for your submission. A number of witnesses have raised concerns about blanket exemptions for whole agencies. You have taken a slightly different view. You have said that other agencies should be required to demonstrate within 12 months that they also merit exclusion. That is a bit different to what some of the other witnesses have told us. What do you think is the justification for agencies that remain completely outside the ambit of this act?

Prof. Croucher—In the report, the focus of having that review time was that it may require a bit of reflection in terms of whether the exemptions meet the objectives of the newly crafted act.

Senator LUDLAM—We have heard other witnesses say intelligence agencies in other jurisdictions, notably the United States, do not have a blanket exemption in the act. Do you think there is cause to review those exemptions overall?

Prof. Croucher—It is not something we can really comment on. We have covered the issue of exemptions in the report and the basis of that was the opportunity to review. I think any other issues are canvassed in the report.

Senator LUDLAM—Regarding your recommendations 46 to 48 and the ALRC report 77, you take a really interesting approach on cabinet documents that some other people have missed. You are proposing that exemptions only cover documents at the core of the cabinet process. Could you talk more about why you have made that recommendation. Also, how would you define a core part of the process?

Prof. Croucher—In the report we did address of some of these issues, and it is really only with respect to the matters traversed there that I can comment. We support the amendment to ensure it does cover documents at the core of the cabinet process which, Senator, you have identified. The amendments to terms in section 34 of the bill refer to terms that are rather open—officially published and officially disclosed but without any definition. Our own report is something I should refer to. We recommended that the terms be defined to avoid uncertainty about when the exemption applies. That is really the issue. It is a matter of definition and how wide the exemptions should be.

Senator LUDLAM—Lastly, you pointed out in your submission that you have concerns about the Privacy Commissioner and the FOI Commissioner performing each other's functions, in that it is blurring the line. Do you see the need for a defined advocate for each of those two different functions? Could you elaborate on those thoughts a bit.

Prof. Croucher—In our discussion in the context of our privacy review, some stakeholders considered that the two acts should be administered differently by two different bodies. The essence of our report in 1995, that the establishment of an FOI Commissioner is an important way to change the culture within the Public Service when it comes to FOI matters. We identified in our submission the possibility that, with two separate people able to perform each other's functions, there might be a potential blurring between roles. The ALRC does not object to the legislative proposals other than concerns about blurring of roles that could readily be dealt with in practise.

Senator LUDLAM—Thank you. I will leave it there.

Senator RYAN—Professor Croucher, we heard earlier this morning that one of the issues that could be raised with this bill—it was an issues that I raised—was that we are putting a lot of faith and authority in the hands of the Information Commissioner. Firstly, they may issue guidelines which departments may follow and they report to the minister. Do you or the ALRC have a view on whether or not we should mandate such guidelines so that the commissioner shall issue such guidelines and whether or not they should be binding on all agencies and departments?

Prof. Croucher—The matter was considered to some extent in our report in 1995 where we talked about the functions of the FOI Commissioner and that they should include the issuing of guidelines and how to administer the act. Whether that is mandated or by way of general discretion really is a matter for the solution of the role itself and not for comment beyond what was said in the report. The Privacy Commissioner has similar functions, and they can be used as a parallel.

Senator RYAN—One witness suggested that we could have the Information Commissioner report to parliament rather than through the minister to parliament, and I assume that would be done in a way similar to that in which the Auditor-General does at the moment. Do you have a view on whether having the Information Commissioner, given the critical and quite substantial role they will have, should report to parliament independently of the minister?

Prof. Croucher—We did not comment on the matter in the report, and I would defer to the development of that role in due course.

Senator RYAN—Finally, an issue that has been raised on a number of fronts is when people are seeking merits review at the AAT from the Information Commissioner, that the onus of proof rests with the person who is seeking the review. This would effectively mean that if an interested party—a citizen, a journalist or whoever—is seeking a review of a decision of the Information Commissioner to deny access to documents, the onus of proof would rest on the person seeking the information, which represents a substantial change from current practice. Do you have a view on whether a change in the onus of proof, from the draft legislation that was released to the bill that we now have before the parliament, is appropriate or otherwise?

Prof. Croucher—I can appreciate the concerns; however, the question of an onus was not specifically considered by the ALRC and the ARC in our *Open government: a review of the federal Freedom of Information Act 1982*, nor was it in any of our other reports, and so I should not comment on the matter.

Senator RYAN—Are you aware of any other jurisdiction that places the onus upon the person seeking information?

Prof. Croucher—I am not aware.

Senator RYAN—Thank you.

Senator CAMERON—Professor Croucher, we have had a number of views put to the committee this morning on some problems that various witnesses have identified with the act. Predominantly, these witnesses have said that the act is a significant step forward from where we have been over the last decade and longer and that, on balance, they would prefer the act to be passed if the amendments would delay or see the act not passed at all. Do you have a view on that?

Prof. Croucher—As I commented in my opening statement, the ALRC welcomes moves towards the implementation of our recommendations in our earlier report. The timetable for doing so is a matter for government and is not something I want to comment on.

Senator CAMERON—One witness also raised the view that we had to be a bit patient, that this would be a long-term commitment. You have spoken about the role of the Information Commissioner evolving. Do you want to expand on this evolving role and what that could mean?

Prof. Croucher—In our report we described a number of the functions that the commissioner could perform. I would expect that a number of other jurisdictions have introduced similar functions that would provide excellent examples for the development of the role of the Information Commissioner and the associated FOI and Privacy Commissioners and their relationship to each other in this country.

Senator CAMERON—The argument has been put that it would put too much faith in a single appointment by government, but would you agree that there are many examples where government has made appointments and those appointments play a very constructive role in the ongoing access to democratic processes for the community?

Prof. Croucher—As an aspiration, I think we would all agree with those comments. But, in terms of commenting specifically in my capacity as president, I will not add any further comment.

Senator CAMERON—Thank you.

CHAIR—Professor, I would like to take you to your submission, where you state:

The ALRC also recommended that both archives legislation and the FOI Act should include an exemption category relating to information that, under Indigenous tradition, is confidential or subject to particular restrictions on disclosure.

Can you elaborate for us on that point?

Prof. Croucher—That is towards the end of our submission.

CHAIR—On our printed copy it is the last page, page 9.

Prof. Croucher—We made that comment in our written submission because that was a matter that was not specifically picked up in the FOI commission bill and hence we wanted to bring it to the attention of the government via this committee that they are matters that are still open for consideration.

CHAIR—Okay. As there are no further questions I thank your organisation for their submission and you, professor, for taking the time to make a contribution via teleconference this afternoon.

Prof. Croucher—Senator, it is my great pleasure.

CHAIR—We will suspend the hearing for five minutes until the next witnesses arrive.

Proceedings suspended from 1.16 pm to 1.29 pm

VERSEY, Ms Helen, Privacy Commissioner, Office of the Victorian Privacy Commissioner

WRIGHT, Ms Felicity, Policy and Compliance Officer, Office of the Victorian Privacy Commissioner

CHAIR—Welcome. Information on parliamentary privilege and the protection of witnesses and evidence has been provided to you. The committee has your submission. I now invite one of you to make a short opening statement, and at the conclusion of your remarks I will invite members of the committee to put questions to you. Would you like to make a short opening statement?

Ms Versey—I will make a short opening statement, yes. Because of the status of my office, which is obviously focused on privacy, I would like to make it clear that I focus on the privacy aspects of the new system, so I have not in my submission addressed the details of the provisions of the Freedom of Information Act—and nor do I feel expert today to do so. So my comments on the Freedom of Information Amendment (Reform) Bill 2009 were limited to the extent that I viewed it as impacting on personal privacy.

In general terms, one point that I want to make to the committee is that, although I often find people saying to me in my capacity as the privacy commissioner that privacy and freedom of information are seen in contention and that people cannot comply with both freedom of information legislation and privacy legislation, my submission is that there is a close interconnection between the laws. Both laws in effect promote transparency of government. Privacy laws promote transparency in that they promote the right of individuals to know what information government collects about them, how it is used and who it is disclosed to. Such rights are incorporated in the general right of access to government information.

On the other hand, I recognise that sometimes there can be tensions between disclosure of government information generally and the recognition that there are privacy rights of individuals. But my view is that they can work together and that government ought to protect the privacy of the personal information of individuals because that information is often information that the government collects compulsorily, so individuals do not have the choice as to whether or not to provide that information. It is important that that balance is struck. While maintaining transparency and people's right to know government information, the government must nevertheless protect the personal privacy of individuals because of the way that the government collects that information.

Senator RYAN—You mention in your submission that the bill in your opinion lacks what you describe as a day-to-day description of what the Privacy Commissioner's job would entail given that it is being incorporated into the Office of the Information Commissioner. What would a more detailed description look like if we were looking at that respect of this proposed legislation?

Ms Versey—The thrust of my submission is that there is a lack of clarity because of the way that the structure is being created. The Information Commissioner is given certain functions exclusive to the Information Commissioner. There are then the privacy functions, which are carried out by the Privacy Commissioner. Then there are the freedom of information functions, which are carried out by the Freedom of Information Commissioner. Then the act allows the Privacy Commissioner and the Freedom of Information Commissioner to do each other's functions and the Information Commissioner to do everyone's functions. What I was talking about when I raised the lack of specificity was that technically everyone could be doing everyone else's functions. It is not clear when one should only be doing their functions and the other should only be doing their functions.

For example, if you take by contrast the Queensland model, the Queensland Information Commissioner has all the functions but delegates the privacy functions to the Privacy Commissioner and the FOI functions to the FOI Commissioner, so that everyone is clear. The Information Commissioner has all the functions but by delegation there is clarity as to what functions are delegated to the Privacy Commissioner and what functions are delegated to the FOI Commissioner. There is not this sort of model where everyone can do everyone's functions except for those few functions that are purely with the Information Commissioner. I think that is a slightly confusing model. It will certainly depend on the absolute cooperation of everyone because the legislation itself basically says everyone can do each other's functions.

Senator RYAN—With the powers being vested in the Information Commissioner though, are the functions undertaken by the new Privacy Commissioner—new in the sense that it is now in this larger office—up to the Information Commissioner to delegate?

Ms Wright—No. What happens is that in the Privacy Act all the references to the Privacy Commissioner are replaced by references to the Information Commissioner. So by looking at the act it looks like the

Information Commissioner has all the privacy functions so the Information Commissioner can exercise them. The Privacy Commissioner, under the Information Commissioner Bill, also has those functions. What is not clear is who is going to exercise what when. In other jurisdictions such as Queensland, as in the example Helen just gave, there is provision for the Privacy Commissioner to exercise the functions to the extent provided in the delegation. So the actual delegation would specify what functions the Privacy Commissioner would have in Queensland. But there is no provision like that in this bill.

Senator RYAN—So this bill would be improved by such a provision, basically.

Ms Versey—I think it could be. One of the amendments that has been made to the Privacy Act is that wherever the name Privacy Commissioner appears it is now Information Commissioner, which I think adds a little confusion because for 20 years the general public has known that they have the Privacy Commissioner who does privacy but now they have a Privacy Act which talks about the Information Commissioner. So it appears from the new Privacy Act that it is the Information Commissioner carrying out all the functions, but then the Privacy Commissioner is also given those functions under the Privacy Act. I think it is a confusing model.

I can understand that the intention was that the FOI Commissioner should do the FOI functions and the Privacy Commissioner should do the privacy functions, and I can understand why there was a feeling that you should have just one head of the whole body. But I think the way the model has been put together could potentially lead to a great deal of confusion.

Senator RYAN—Is there a potential threat to the autonomy or independence of the Privacy Commissioner through this confusion given that the head of the office, I understand, is the Information Commissioner?

Ms Versey—That was one of my other concerns, because there are some functions which the Information Commissioner has to do which are in fact the Privacy Commissioner's functions. They have to approve, for example, the Privacy Commissioner's guidelines. That certainly could, I think, undermine the autonomy of the Privacy Commissioner. You have to bear in mind of course that the FOI Commission and Privacy Commission function very much in a regulatory role whereas the Information Commissioner's own, separate functions are these sort of strategic policy type roles and management of whole-of-government information. The Privacy Commissioner would be regarded as, one might say, the specialist in the privacy field and the person dealing with the day-to-day issues as a regulator does with government, so you would expect that government organisations would be consulting with the Privacy Commissioner on privacy issues. For the guidelines which the Privacy Commission might wish—in our office, for example, we put out a lot of guidance to the public sector as to how the act operates and how I am interpreting the act and its impact—to be approved by the Information Commissioner, who may actually have different ideas or may not even be as expert in the field as the Privacy Commissioner, I think has a potential to undermine the autonomy. And I think that all goes back to this lack of clarity, really.

Senator CAMERON—You say there is a lack of clarity. I suppose it is a lack of clarity if you compare it with where we have been for a long time with that rule, but any new act will require some education of the public, won't it?

Ms Versey—Yes, certainly any new act requires education of the public, but my own belief is that it is an unnecessary confusion to amend the Privacy Act to refer only to the Information Commissioner. The general public will expect, when having their privacy matters dealt with, to go to someone called the Privacy Commissioner, which they have been doing for the past 20 years. It seemed to me an unnecessary amendment to suddenly have all the decisions apparently made by the Information Commissioner whereas, in practical terms, the day-to-day decisions are being made by the Privacy Commissioner. That does seem, to me, to undermine some of the autonomy of the Privacy Commissioner. I am not sure why it is such a necessary amendment.

Senator CAMERON—The bill provides, in clause 66C(f), that the commissioner has to promote an understanding of the act. Surely that then would be promoting an understanding in the public about how you manoeuvre through the various aspects of the act, the same as any act?

Ms Versey—True. I do not disagree with you, but I am just wondering if there is any real functional value in it. That is my question. Yes: if you have new legislation you have to promote an understanding of how it all works, but is it a necessary thing to do—to simply change reference to the Privacy Commissioner to 'Information Commissioner' in the Privacy Act? It could cause unnecessary confusion. Frankly, the public have enough trouble understanding legislation without adding any unnecessary confusion to it.

Senator CAMERON—If the public can work their way through the various industrial relations acts that have been in place I am sure they can work their way through this one.

Ms Versey—No, the public has a great deal of difficulty working their way through complex legislation.

Senator CAMERON—But if there is an issue I am sure people do manage.

Ms Versey—One example is that already the public has enough trouble understanding that there is Commonwealth privacy legislation and there is state privacy legislation. A significant proportion—I think it is something like 30 per cent of the inquiries to our office—are in fact matters which we refer back to the federal Privacy Commissioner. All the public is really concerned with is: ‘My privacy has been breached, so who do I go to? I’ll go to a Privacy Commissioner.’ So they will come to the Victorian Privacy Commissioner, if they live in Victoria.

Senator CAMERON—People have different views about certain aspects of the act that could be changed. But to generalise, from all the evidence we have heard this morning, people were saying that overall it is a terrific package; it is a massive change to where we have been, and we should not risk the package as it stands by arguing for some amendments that might be perfect amendments but could jeopardise the passage of the act. Have you got a view on that?

Ms Versey—I certainly agree that there are aspects of it which are a great improvement. Obviously there are some real improvements to the FOI regime. Even though I am not an expert I take a general view. For example, I certainly think that the moving of the access to your own personal information to the Privacy Commissioner’s realm is a very good aspect of it.

Again, my own experience in Victoria is that people can still only access their own personal information with the Victorian public sector through the FOI Act. It causes them a great deal of confusion because they think they can come to the Privacy Commissioner for that aspect. Overall I do not have problems with the concept. But I still believe that there are practical amendments—not amendments to change what the government is trying to achieve. I am just talking about practical amendments which will retain the autonomy of the Privacy Commissioner—which is, I believe, what the government wanted to achieve—and also make it simpler for the general public to understand what the new regimes are about.

Senator CAMERON—If the government determine not to adopt the approach that you are advocating, should we then abandon the whole process? That is the key question.

Ms Versey—It is difficult for me to answer that. I am, yes, saying what I think could be an improvement, but at the end of the day it is obviously for this committee to decide. I am not saying I would like to see the baby thrown out with the bathwater, obviously. It is really, I feel, a matter of judgement for the committee as to whether they feel that amendments I might be suggesting, which I think might improve the operation of the act, are justified. I do feel that is a matter of the committee, really.

Senator CAMERON—Some witnesses have argued that we should not limit the Information Commissioner to persons with a legal background. Do you have a view on that?

Ms Versey—I did have a view, although I did not think it was necessarily appropriate for me to put it in my submission. I could not understand why you would have only the FOI Commissioner with the legal qualifications when the Information Commissioner and the Privacy Commissioner did not have to have legal qualifications yet the Privacy Commissioner could carry out the FOI Commissioner’s functions and the Information Commissioner could carry out the Privacy Commissioner’s functions. It seemed illogical to have only that position having legal qualifications. I have legal qualifications, but I do not necessarily think that regulators have to have legal qualifications.

Senator CAMERON—The other argument that has been put forward is that public servants should not be considered for the role because of the Westminster culture that has pervaded the public sector. Do you have a view on that?

Ms Versey—Having been a public servant who is now a regulator—

Senator CAMERON—Is that gamekeeper turned poacher or poacher turned gamekeeper?

Ms Versey—It is an interesting concept. I think it would be a shame if all public servants were excluded from being eligible to apply simply because they have been public servants. They may have very strong views about government transparency, as I do. From my own personal point of view, the advantage of having been a public servant is that I have a practical understanding of how the Public Service operates. So I probably would have a greater insight into what the culture is and what actually you are dealing with in terms of changing it.

Senator LUDLAM—I just have one question. The others have covered most of it. The ALRC made some comments on changes to the personal information exemption. I am just wondering whether you agree with their point of view that the way those changes are proposed now may not adequately protect those advantages.

Ms Versey—Yes, I have a fairly strong view of that, which I think I reflected in my submission. I felt the changes to the protection of personal information were a real step backwards. The model now being proposed includes not just an exemption based on an unreasonable intrusion into someone's privacy but a threshold decision by the organisation or the minister as to whether the person might want to rely on the exemption.

That is not a mandatory decision they have to make. They decide whether there might be an objection and then, if they think that the person might want to rely on the exemption, they have to, if it is reasonably practical, give notice. But also when deciding whether or not to rely on the exemption they to not only consider whether it is an unreasonable intrusion into that person's privacy but also add onto that the public interest consideration.

My view is that if you have drawn the conclusion that it is an unreasonable intrusion into someone's privacy I find it difficult to understand how it is in the public interest to then unreasonably intrude on that person's privacy. My concerns about that threshold, which is not mandatory, of deciding whether they might object or not is that I would not have thought that the organisation or the minister could possibly come to that conclusion without actually speaking to the person involved, because there may be very good reasons why that person's information should not be disclosed that neither the organisation nor the minister have any idea about.

An example would be one of the very early complaints we had in Victoria of a woman who had been in a very serious domestic violence situation who finally decided that she would leave her husband. She went into hiding. Only her father knew where she was. She changed her name and she went around to all of the government organisations to lodge her change of mail. At one of the government organisations the customer service person was persuaded by the husband who was out looking for her to disclose the information. The customer service person believed they were doing the right thing because it was her husband and they had no knowledge of the real background. That is the sort of circumstance where the organisation may have no idea or understanding about a particular reason a person may not want that information disclosed. They may be in a witness protection program, for example.

A particular concern in watering down that provision is the fact that if they decide that a person is not going to object and so they go ahead and disclose then there is an obligation for the organisation to then publish the information on the website. So not only is information disclosed to the applicant; it also inevitably ends up on the website.

Senator LUDLAM—Okay. I will leave it there. Thank you.

CHAIR—There are no further questions, so thank you both for appearing before us today and taking time out of your busy day. Thank you for your submission as well.

[1.56 pm]

SIMPSON, Ms Elizabeth, Solicitor, Public Interest Advocacy Centre

Evidence was taken via teleconference—

CHAIR—I would now like to welcome Ms Elizabeth Simpson, from the Public Interest Advocacy Centre, who is appearing via teleconference. Information on parliamentary privilege and the protection of witnesses and evidence has been provided to you. The committee has your submission. I now invite you to make a short opening statement. At the conclusion of your remarks I will invite members of the committee to put questions to you.

Ms Simpson—I will refer to the Public Interest Advocacy Centre as PIAC for short. The Public Interest Advocacy Centre is an independent not-for-profit law and policy organisation which identifies public interest issues and then advocates for affected individuals and groups around this, using different strategies including policy development, research, submissions and litigation. We have an interest in government accountability and, in particular, freedom of information, which we set out in our written submission. Our starting point—I will just make a few short comments today—is the sense that we and other NGOs have that there is a general consensus throughout Australia that the FOI legislation has not achieved its fundamental objective of opening up government information to the public and making government more transparent. The more difficult question, obviously, is how to fix those problems and limitations in the legislation and the practices that have developed around freedom of information legislation, to be sure that it lives up to the promise of improving government accountability.

In our view, the Commonwealth legislation is representative of a significant step in the right direction, albeit a relatively conservative one. I would compare this with the overhauled scheme and the return to first principles that has been conducted in New South Wales, which is perhaps why in our submission we view it as ‘repackaging’ the existing FOI Act. Overall, PIAC is extremely supportive of the proposals set out in these bills.

There are just a couple of issues which I would like to raise again with the committee, which we have raised in our submission. The first one is that in PIAC’s view there are still too many exceptions and exemptions to the act. For us, one of the most critical issues is ensuring that a really appropriate balance is finally struck between the public interest in opening up government and—

CHAIR—Can I just interrupt you there for a moment. Are you on a speakerphone? We are having trouble hearing you—your voice is cutting out. If you pick up the phone, it might help, because your voice is cutting out.

Ms Simpson—Okay, no problem. Is that a bit better?

CHAIR—That is much better.

Ms Simpson—How much have you got for the first bit? Is there anything that anyone needs me to go over, or shall I just continue?

CHAIR—Just continue on.

Ms Simpson—Okay. Overall, PIAC strongly supports the proposed changes to part III of the FOI Act—particularly proposed 11A and the introduction of the proposed 11B—but it does maintain that the public interest test should apply to all exemptions. The reason we say that is that we believe there should be the opportunity to look at the specific circumstances in each case and weigh up the different public interest issues in each matter. For example, a document might initially be very sensitive because it is in relation to a current criminal investigation, and it may not be in the public interest at that point to release it; but 20 years down the track it may be appropriate to release it, particularly if questions about the propriety or the powers involved have been raised.

The other more general point we would like to make about exemptions is that, while the FOI bill does anticipate that a certain small number of existing exemptions will be repealed, there are still a number of other exemptions that we believe should be either at least amended, if not repealed. In particular, I note that the Australian Law Reform Commission, in their 1995 report on the FOI Act, suggested that sections 38, proposed 47E(1)(b), 47J and 47H were actually unnecessary and were really covered by other exemptions. PIAC strongly submits that these additional exemptions should be reconsidered and perhaps repealed as well.

We also raised a number of concerns in our submission around the appropriate test for a national security document and cabinet documents, and whether or not after 10 years they should be open to the public.

We also note some concern about the fact that, since the exposure draft, there is now a new trade secrets exemption. We cannot see any justification for this exemption. We suggest that it is very much counter to the spirit of these reforms to begin to introduce yet more exemptions rather than be trying to strip them back.

Another concern is in relation to the ongoing list of excluded agencies and documents in schedule 2, which has remained almost entirely untouched. In our submission on the exposure draft we strongly suggested that agencies should actually be required to establish a justification behind their ongoing exclusion—not simply exemption but exclusion from the act. It appears to us that that has not been done, and instead they continue to remain entirely outside the regime. We are particularly concerned about intelligence agency documents and the issues we raised in our submission. That is probably enough about exemptions and exclusions.

We would like to briefly make two additional points. One is about delays and the fact that, in the FOI bill there is a proposal around section 15AB and 15AC to allow an agency or a minister, even though a time limit has actually expired, to apply directly to the Information Commissioner for an extension. PIAC express concern about that because we think that, at the very least, there should be particular, limited reasons that this can be done and that the applicant should also be notified of such a proposal for an extension and should have an opportunity to make submissions about those kinds of extensions. The concern we really have is that, in our experience, coming from the clients we have had and so on, people typically only ask for information from the government for a reason, and that reason is usually fairly time limited—so, you are talking about someone who is thinking about starting litigation, making a public protest or trying to write a submission themselves. So to be subject to delays really makes the system fairly unworkable, and my understanding is that that is one of the greatest complaints that people have about the FOI regime.

The final point we would like to raise is about the overlap, the crossover, that is proposed between the FOI Commissioner, the Privacy Commissioner and the Information Commissioner in clauses 10(1), 11(2) and 12(2) of the Information Commissioner Bill. We strongly object to the proposal that there can be crossover between these different commissioners. We really believe that, in particular, having an FOI Commissioner who can use or perform the functions of a Privacy Commissioner undermines the value of having these different subordinate commissioners, who are each meant to be an independent specialist advocate for their own regime. Different issues will arise in relation to particular issues if you are coming at something from a privacy point of view as compared with an FOI point of view. They have quite different objectives, so it is important that they each have different champions within an office. We do not believe that the new proposal in subclauses 11(4) and 12(4) really address this problem and deal with it properly.

CHAIR—Thank you for those opening comments. In your submission you suggest that many agencies and departments have a negative attitude towards FOI applicants. Would you explain any of your experiences and advise whether you think these proposed amendments will address some of those concerns. Or would you rather the legislation stay as it is?

Ms Simpson—I think a lot of what this legislation is proposing will come at it from a very different point of view. Certainly, in our experience with a lot of the agencies—and I probably do not want to name individual ones—one of the biggest problems is delay. It is fairly endemic. I have made around 10 FOI requests in the last two years and, of them, I do not think we have ever received the documents or a decision within the 30 days. That is a fairly significant problem that we think will be addressed by things like the changes around the delays included in the proposals. Certainly, having an information commissioner as an independent body to oversee these kinds of things will make a huge difference.

Also, the statement of affairs that exists under the current legislation is completely inadequate, whereas our understanding is that the proposals around pushing forward information would be quite a significant step in the right direction and, hopefully, would mean there would be no need to request a lot of the basic information that some of our clients ask for in FOI requests.

The other thing, of course, is that, when it looks at the right to access, we have always believed that the starting point should really be that information is available unless there is a particular public interest reason against it. Even in the litigation we have been involved in, like Searle Pty Ltd as in versus PIAC, which was a 1992 case, and an older case, Re Orgonon, that simply was not how the agencies or sometimes the AAT approached the issue. So we certainly believe that in a number of areas that will really make a difference.

Senator LUDLAM—Yours is one of the few submissions to mention the application of the FOI Act to parliament and to parliamentary departments. Would you elaborate on how you see this working and why you have pointed that out in particular.

Ms Simpson—This is actually relatively consistent with a number of other jurisdictions—including the UK experience, in part, which does apply FOI legislation a little more broadly. I guess we essentially believe, if you come back to first principles, that the houses of parliament and parliamentary members are equally part of the government and also produce information and should also equally be accountable to the public. So to simply leave them outside the act leaves a part of government effectively unknowable to the public.

On how this might affect their ability to, for example, represent their constituents or do their jobs effectively, we believe that actually most of the exemptions in the act really should be sufficient to cover those concerns. For example, if a person goes to a member of parliament and provides them with private information about an issue, and they then take that issue up, that should be covered by personal privacy or even breach of confidence as an exemption so that that material would not be available under an FOI request.

We also believe that, if the definition of ‘official documents of a minister’ included those documents that a member had that related to, for example, electoral matters or local constituents issues, that may be another way of ensuring that certain documents of members of parliament have in their possession are not subject to an FOI request. So we believe that most of the existing exemptions would be sufficient to protect that kind of sensitive information that MPs have access to but that, fundamentally, MPs and the houses of parliament should still be subject as part of government to the FOI Act. It is certainly the case in the United Kingdom, Ireland and South Africa.

Senator LUDLAM—I think you would find that a certain amount of material would be covered by parliamentary privilege as well.

Ms Simpson—Yes, absolutely.

Senator LUDLAM—So there are some safety nets there. Do you think that the volume of FOI applications is going to increase substantially if we go down the track of deleting all references to charges and fees in the act? What do you think of the counter-argument that agencies are going to be swamped with applications?

Ms Simpson—It is difficult to know, without actually having the experience, but I do not imagine that there would be a swamping. Most people find that the fees are not terribly prohibitive, so they still make an initial FOI application. Generally speaking, I think most people do make FOI applications, certainly in our experience, because they are genuinely interested in the material.

That being said, I think the charges are the more difficult issue, possibly for agencies as well as for individuals. From an individual’s point of view, it is really the charges that are particularly prohibitive. We find that people have two issues with them. One is that sometimes they pay the charges and then discover that all of the material is exempt. So they pay up to several thousand dollars not to receive very much information or any information at all, which is one problem with the charges. The other is that, from our point of view, if an agency, for example, has bad record-keeping measures which mean that they have to spend a lot of time working out what information is subject to an FOI request we do not believe that the individual should be required to pay for that. More fundamentally, we feel that if it is true that information is really a public resource it is therefore inappropriate to suggest that people have to pay quite significant charges to access that information.

But I do not think that changing the charges to reflect what people actually receive would open the floodgates and lead to people asking for hundreds and hundreds of documents. If someone was told that, if they wanted 300 documents they would have to pay \$3,000, they might start to decide what they really want out of those documents. So if anything it may be that, by beginning to charge for what people receive, people become more realistic or sensible about what they want to see.

Senator LUDLAM—You have argued pretty strongly that agencies in their entirety should not be excluded from the FOI Act. A number of agencies are exempt here, so could you just elaborate on that view with reference, for example, to ASIO or other intelligence agencies? How can we best balance national security considerations and the need for transparency?

Ms Simpson—The first and the most fundamental objection we would have is to agencies being entirely excluded, because there is really a significant distinction between exclusions and exemptions. Once an agency is excluded from the act, it means that, for example, it is not even subject to the proactive information publication scheme. It simply becomes a bit of a black hole in the entire regime. Putting intelligence agencies

to one side, there are a number of agencies listed in schedule 2 where we simply cannot see the rationale for why they are entirely excluded. It seems to us that it is a historical thing that has just continued and even under these reforms is being allowed to continue.

Looking at intelligence agencies, we appreciate that there are concerns that they have—for example, an agency like ASIO. But we believe that the exemptions in the act, particularly the national security exemptions, are very strong exemptions. In our experience the courts and tribunals are very reluctant to force documents that generally will affect national security to be released. So we believe that those existing exemptions are a better way of trying to protect the agency against the harm of the release of the document.

Senator RYAN—Ms Simpson, I noticed that you have a section in your report with respect to Information Commissioner reviews and then some comment on review by the AAT, particularly around whether you could have a deemed refusal by the Information Commissioner. But you do not make any comment on the change in this bill from the exposure draft which reversed the onus of proof so that the person seeking the merits review—in the case I am putting to you, it would be a person seeking information—has the onus of proof on them to illustrate why the information should be released. Does PIAC have a view on that particular change in the bill?

Ms Simpson—I did not actually pick up that point, so I would like to take that question on notice.

Senator RYAN—That would be appreciated. It has been commented upon by several people and it has taken up a bit of the time the committee that the change from the exposure draft to the bill before parliament represents a significant change.

One issue we discussed this morning was that there is potential for the information commissioner to issue guidelines and those guidelines can provide for concessional charges for not-for-profits or for journalists. It could also include citizens, but it may not. Do you have a view on whether or not there should be any such concessional access for any preferred groups or should there be a blanket sort of concession for people based on the number of hours or something like that?

Ms Simpson—Again, I might take that on notice, because it is a difficult question. Once you get into allowing decision makers to look at who is making a request and why they are making a request I think it gets into slightly troubled water. I would appreciate it if I could take that on notice as well.

Senator RYAN—That would be appreciated—and particularly the reference to journalists, only because, as I understand it, there is no definition of that and one of the issues we had raised this morning was that the definition of ‘journalist’ these days is different to what it might have been 15 years ago, particularly with respect to those that may use a website that is not a major daily newspaper to bring issues to public attention.

Ms Simpson—Yes.

Senator CAMERON—Thanks, Ms Simpson. On page 3 of your submission under the heading ‘Changing the culture’ you say that without wishing to downplay the amendments—I am paraphrasing—they are unlikely to have a significant impact on the problem is that most applicants experience unless a new culture of openness and accountability is nurtured and enforced. That is a very strong statement to say that it really will not work unless this change takes place. Can I ask you to comment, then, on the objects of the act and how important the objects of the act in clause 3 of the act, which lays out quite clearly the rights to access information and creates a general right of access? There is the division 2 functions and powers of the commission under section 66C, which talks about compliance, establishing guidelines, providing advice to the minister, promoting an understanding of the act, coordinating the objects of the act throughout government departments and reporting to the minister. If you take the objects and the functions of the commissioner collectively, isn’t that quite a powerful tool to get that change of culture in place?

Ms Simpson—That is a powerful tool and we certainly have, in relation to the exposure draft, commented on the fact that we think the objects of the act are a very positive step forward, as are the division 2 functions and powers of the information commissioner. However, unless there is still a very significant focus internally on changing the culture, there is a real difficulty. It is very difficult, for example, to argue the objects when a decision maker comes back and refuses it. If a decision maker still comes at it and has been, I guess, taught over time to come at a request potentially from a point of view of erring on the side of caution rather than erring on the side of openness, it is not much use as an applicant to point to the objects or even points to general guidelines, because as an applicant you do not know how appropriate and what is actually in the decision makers possession. Always an applicant comes at these situations from, I guess, a point of view of

ignorance and, as a result, are much more vulnerable position, because they ultimately cannot argue because they have not seen the documents.

So those general changes, as to the objects and the Information Commissioner, are very important. But I think what needs to go hand in hand with that is a focus within government on simple things like training and ministers making it very clear that they want a different approach taken within governments. Really, that old practice of erring on the side of caution needs to be changed. The starting point of openness really has to be adopted by the decision-makers, not just in the legislation.

Senator CAMERON—But the legislation provides the framework—

Ms Simpson—Yes it does.

Senator CAMERON—and the legislation quite clearly gives the functions and powers of the commissioner as to compliance issues, appropriate guidelines, providing advice to the minister, and coordinating how the various agencies are responding to these changes in the act. I would have thought that those were more than just generalities; these are quite specific roles, functions and powers. Surely the culture in the public sector would have to change with a commissioner exercising these powers and these reporting responsibilities to a minister?

Ms Simpson—I am not downplaying the changes in the framework, and I agree that the Information Commissioner acting and really putting into place these kinds of guidelines and this kind of advice will cause a change almost automatically. But I think that it cannot just be assumed that that will flow through to every department without some prodding internally, because, if you take it from an applicant's point of view, they may have a situation where they still think that an agency is perhaps acting contrary to that advice or those guidelines but it is difficult for them to know, without seeing those documents, if that is what is actually going on or if it is just what they think, and so they may not know how to take it forward.

Senator CAMERON—Ms Simpson, you are dealing with the mechanics of the operation of the act when you are talking about the availability of documents. You are saying a fundamental issue is that, unless the culture changes—all I am putting to you is that if you take the objects of the act and you take the functions and powers of the commissioner then that is a huge change of culture for government. It has never been specifically put forward, to my knowledge, in the last decade, that these things should take place. What would be the position? Would you rather have this act in place with no amendments or, as we have seen in the Senate unless the amendments are picked up, the act just be put aside and no progress be made?

Ms Simpson—No, I am certainly not suggesting that the act should stay the same. I thought that our submission made it very clear that we are extremely supportive of most of the changes and, in particular, of the objects and also of the Information Commissioner. We entirely agree that that should lead to quite fundamental and positive changes. We are just also saying that that really needs to be accompanied by a recognition that a piece of legislation like the FOI legislation does not just play out under the legislation. There are attitudes and cultural practices that also need to be addressed, and we think that government should take some internal responsibility as well as leaving it to the legislative changes and the Information Commissioner.

Senator CAMERON—Sure but, on balance, do you say that the act is a step forward?

Ms Simpson—Oh yes, and we said that in our introduction.

Senator CAMERON—Okay. Thanks.

CHAIR—Thank you, Ms Simpson, not only for appearing and giving evidence via teleconference but for the submission on behalf of your organisation. So thank you very much.

[2.28 pm]

ZIFCAK, Professor Spencer Michael, Vice-President, Liberty Victoria

CHAIR—I welcome the representative from Liberty Victoria, I understand there could be another representative from that organisation shortly. Information on parliamentary privilege and the protection of witnesses and evidence has been provided to you. The committee has your submission. Would you like to make a short opening statement?

Prof. Zifcak—Yes, thank you. It might help the committee if I give you a brief introduction to my own background with freedom of information. As the committee will be aware, I am a vice president of Liberty Victoria but I have also had a longstanding involvement with their drafting and administration of freedom of information legislation. I assisted in the drafting of the original Freedom of Information Act of Victoria. I was then deputy director of policy and research in the Attorney-General's department in Victoria, and one of my principal responsibilities in that context—and I was to be the first person with this responsibility—was, across the Victorian government, the implementation of the Freedom of Information Act. I undertook that for three years. Later on I was the director of research for the constitutional and legal committee of the Victorian parliament, which undertook a comprehensive inquiry into the Freedom of Information Act in Victoria and made a wide-ranging series of recommendations. Not long after that, I became the freedom of information editor for the Australian administrative law service, which is a loose-leaf service edited by Dennis Pearce, the former Commonwealth Ombudsman. So this is an area in which I have had a longstanding interest.

You have before you the Liberty submission. Let me briefly draw your attention to those aspects of the submission that I would like to address. In the mid part of page 2 of the submission, Liberty addresses the extension of the exemption to documents with respect to cabinet—the cabinet documents exemption. I would also like to address very briefly the deliberative documents exemption, I would like to address the exemption with respect to the proper and efficient conduct of the operations of an agency and I would like to address briefly the business documents exemption. Those are the principal matters that I would like to speak about with you today.

Again, I am happy to address this at more length during the course of questions, but, in relation to those matters: it is Liberty's view that the cabinet documents exemption is drawn too widely, it is Liberty's view that the deliberative documents exemption is also drawn very widely, it is Liberty's view that the exemption with respect to the proper and efficient conduct of the operations of an agency is unnecessary, it is Liberty's view that the business documents exemption is drawn too widely and it is Liberty's view that the broad exemption applicable to military and intelligence agencies also ought not to be included in the legislation.

Having said all that, as the submission indicates, we are very supportive of the introduction of the Office of the Information Commissioner. We think that is an enormously positive step. Generally speaking, we are also very positive about the authorities and the functions allocated to the Information Commissioner. I am happy to leave it there. If you wish me to go into the arguments in relation to the exemptions in more detail, I am very happy to do so.

CHAIR—Thank you very much.

Senator RYAN—Thank you, Professor Zifcak. I will go to an issue I have raised with every witness. You raise in your conclusion that you are disappointed that there has not been as much change in the bill as Liberty would have hoped for from, I am assuming, the exposure draft.

Prof. Zifcak—Yes.

Senator RYAN—One of the changes from the exposure draft of this bill has been the reversal of the onus of proof so that if, for example, you were seeking information from the department of transport, you sought an internal review and that was knocked back, and the Information Commissioner also knocked you back, you could still seek an AAT review but the onus would be on you to prove that the information should be released, rather than the way it is at the moment, where there is a merits review and that government or agency has to illustrate why the information should not be released. You do not comment on that in your submission. Does that particular change—which we were informed when we last met is possibly the only time that onus has been reversed anywhere in FOI amendments in Australia, state or federal—worry you? That is a significant change from the exposure draft to now—

Prof. Zifcak—That change does worry me. The reason it worries me is evident. It is the department or the agency that has the document in its possession. Therefore, the department or the agency knows the contents of the document. The applicant does not know the content of the document and is seeking to find out the content. It is very difficult, therefore, for an applicant without the requisite knowledge to make the argument that a document whose contents he or she does not know about should be released. Consequently, the capacity of the applicant to make an appropriate case for internal review or to the Information Commissioner or eventually to the AAT is severely compromised.

Senator RYAN—I should add that that onus of proof is only reversed for appeals from the Information Commissioner to the AAT. But with all your expertise that would be an almost impossible onus to surmount given the information, as you mentioned, resides with the person or the agency or government.

Prof. Zifcak—I agree with that.

Senator RYAN—You also stated towards the end of your submission that there is an inconsistency between the objectives of the bill and its implementation. You put a little bit in there about that but I was wondering if you could elaborate. You refer to the fees, charges and regulations. I was wondering if you could just explain your own thinking on the issue.

Prof. Zifcak—The specific matters to which we refer are nominated in our submission. In other words, we are referring in that regard to the imposition of fees, charges, time limits and unnecessarily complex regulation. It does seem to us that there has to be some reasonable regulation of the fees charged for FOI requests. There does need to be some system of determining whether or not those charges are reasonable in all of the circumstances. For example, there does need to be some system which would call to account an agency which took an excessively long time to locate particular documents but having taken an excessively long time then chose to charge for the time taken rather than what might have been a reasonable time.

Senator RYAN—So a benchmarking of those?

Prof. Zifcak—Yes.

Senator RYAN—We had some discussions on this earlier today and it has become apparent through a number of the submissions that a great deal of faith has been placed in this one office of the Information Commissioner. They get to, if they choose, draft guidelines. I understand that they can set fees. They can provide exemptions from fees or concessional access to charges. You allude to some concern about the functions of the Information Commissioner because this person is effectively appointed by the government and if they either choose not to or are not as good at their job as is hoped that is going to have a dramatic impact upon the cultural change or various other aspects of this bill. Someone suggested that potentially this person should be appointed by a means other than by the minister. This person reports through only the minister to parliament. Do you think that is a concern that the committee should take on board—that a minister is getting to appoint one person? Really this system is going to have a break around the Information Commissioner. Is there a conflict between the minister appointing this person or maybe leaving the position vacant for a while and the objectives of the bill?

Prof. Zifcak—Not necessarily. One has a whole array of ombudsman type positions that are appointed on the recommendation of a minister, so I am not unduly concerned about that. I would be concerned if a government mate was appointed through this process, for example, but it is not something that you can really control now. Normally speaking, there will be a process of selection. There will be an interview process. There will be a panel recommendation to the minister as to a person who ought to be appointed. I would be very concerned if that sort of process was bypassed, but as long as that sort of fair and impartial type of process was gone through there seems no reason—

Senator RYAN—There is no requirement for that sort of system in the bill though, is there?

Prof. Zifcak—No, there is not.

Senator RYAN—This job does not pay as much as the National Broadband Network, so it might not be quite as—

Prof. Zifcak—That is right.

Senator RYAN—Given the importance of this position, do you think it would be worthwhile for the committee to consider such provisions about the appointment being put into the bill?

Prof. Zifcak—I think it would be worthwhile for the committee to consider it, but it seems to me that, if a person were appointed as a result of what was self-evidently an inappropriate process, the accountability would be through the political process.

Senator LUDLAM—I believe from your introduction that you have quite longstanding experience with the Victorian FOI regime. Could you describe the fee structure and the way that operates in Victoria and tell us whether we should see that operating at the federal level?

Prof. Zifcak—I am a bit too far out of touch with it, I have to say, to talk to you about how the fee process operates currently, so I am simply not in a position currently to advance your knowledge about that. Having said that, I can say that, based on my past experience in Victoria, the more sensitive government becomes about the disclosure of information it believes to be confidential, the more likely it is that the fees and charges applicable to persons making FOI requests tend to rise correspondingly. So there would need to be some measure of control or review to prevent the kind of process occurring.

Senator LUDLAM—Can you see anything in the amendments before us at the moment that looks like it would go some way towards dealing with that?

Prof. Zifcak—I think some of the powers of the Information Commissioner to review fees, charges and so on may go some way toward assisting with that. My answer there, again, is influenced by the fact that I have thought that the introduction of an Information Commissioner's office to assist with the implementation of FOI and conduct reviews is a long overdue reform not only at the federal level but also in Victoria.

Senator LUDLAM—Thanks. I will leave it there.

Senator CAMERON—You have indicated, Professor, that there are a number of issues in the proposed legislation. According to Liberty, what would be for the best for the public if there were no amendments accepted by government—to have this bill proceed or not have a bill at all? That is a real option for how this will move ahead. Given the way the Senate is set up, if the government does not accept amendments and the Senate does not accept amendments, where would that lead? Would this bill still be an improvement?

Prof. Zifcak—Do you mean the bill as opposed to the existing act?

Senator CAMERON—Yes.

Prof. Zifcak—The bill is a clear improvement.

Senator CAMERON—So, even though Liberty has concerns about it, would Liberty say that we should put this through if that were the only option?

Prof. Zifcak—Absolutely.

Senator CAMERON—Over the last 10 years, has Liberty made any submissions to the government on the Freedom of Information Act?

Prof. Zifcak—I think we have made submissions to inquiries in Victoria, but I think this is the first inquiry we have had for some time in relation to federal legislation. Liberty has had a longstanding interest in access to information and privacy issues, so we are pretty constant submitters in relation to this particular matter.

Senator CAMERON—But there has been no movement over the last decade at the federal level; this is the first change.

Prof. Zifcak—Yes.

Senator CAMERON—One of the arguments we had put forward was that these things are evolving; that these things will take time and you cannot have international best practice in the first round of changes. Would you agree with that proposition that this will need further changes as we move along?

Prof. Zifcak—I think it would be incorrect to say that this is the first opportunity; we have had federal FOI legislation since the 1980s. We have been running along with this for almost 25 years, so we have had a lot of chances to put better practice into place, if not best practice.

Another way of answering your question is to say that, generally speaking, Liberty regards the bill as a positive step. We have some significant reservations in relation to the breadth of exemptions, to which I have already referred. But overall we regard this as an important advance. However, I would recommend very strongly to the committee that there be a provision in the bill for its review, say, every five years so that we can continue to develop best practice on the basis of experience.

Senator CAMERON—A proposed section of the bill does call for a review of the commission's functions on the fifth anniversary. Does that help you?

Prof. Zifcak—It helps me in relation to the commission's functions but it does not help me in relation to a review of the operation of the other provisions of the bill particularly, for example, the operation of what I regard as being exemption provisions that remain too wide.

Senator CAMERON—So you would argue that there should be a general review?

Prof. Zifcak—Yes.

Senator CAMERON—In that fifth year?

Prof. Zifcak—Yes.

Senator CAMERON—One of the arguments that have been put forward is that the public will be confused by the bill. Do you think that the Information Commissioner has got sufficient powers to publicise what has happened and to make the bill more readily available through education?

Prof. Zifcak—Are we talking about the bill or an act as amended?

Senator CAMERON—An act as amended.

Prof. Zifcak—The Information Commissioner has got broad-ranging power and ought to engage in a process of public education as the information commissioner—and privacy commissioners, for that matter, too—in Canada has for many years. I think that will be an important function. I am not sure of the source of the argument that the public generally will be confused. There are a lot of technical legal matters involved in legislation of this kind—that is clear—but there are in all sorts of legislation. So public education, sure, but public confusion? To some extent when you have got complex legislation involving sometimes difficult legal concepts you are going to have some level of confusion, a feeling of powerlessness or whatever, but it is almost inevitable.

Senator CAMERON—One of the issues that have been raised again is the requirement for the Information Commissioner to have a legal background. Do you have any views on that?

Prof. Zifcak—I am very strongly of the view that the Information Commissioner does have to have a legal background. You would expect me, as a professor of law, to say that, of course.

Senator CAMERON—That was my next question.

Prof. Zifcak—I just do not think the position could operate effectively unless you have got an inexperienced lawyer in it, I am sorry to say.

Senator CAMERON—Most executives are not legally trained but they have people who are legally trained to advise them. Why can't you have advisers who provide that legal advice?

Prof. Zifcak—Because the advisers do not take the decision. The person who has to make the decision—like a judge in a court or president or a deputy president of the Administrative Appeals Tribunal—is the person who has to take the decision and, in order to take the decision, the buck stops with them. They necessarily have to have some sort of legal background and preferably some extensive measure of legal training.

Senator CAMERON—But don't ministers of the Crown with no legal background have to make some pretty big decisions on legal issues? Don't chief executives make big decisions on legal issues without necessarily having a legal background?

Prof. Zifcak—They do. But if you are trying to work out whether the document before you fits within the legal definition of a particular exemption, that is the decision that you have got to make. You have got to have the capacity and the training to do so. No matter how great a chief executive you are, if you do not have sufficient skill to actually make that decision, which is the decision that you are responsible for under the legislation, the system will not work as effectively. I am not saying it will collapse but I am saying it is strongly preferable that the person who is making the decision has the training and the capacity to do so—and that involves some legal knowledge and expertise.

Senator CAMERON—So you are saying is there no-one with a capacity, without legal training, to carry out this function?

Prof. Zifcak—I would hardly say that. I refer you to the wording I put before: it is strongly preferable.

CHAIR—As there are no further questions, I thank you, Professor, for appearing before us today and Liberty for providing their submission to this inquiry.

Prof. Zifcak—Can I just make one further comment? I know you have to go, but I did want to talk to you a little bit about the cabinet documents exemption. In relation to the breadth of the cabinet documents exemption, can I refer you to this report? This is the report that was written by the legal and constitutional committee of the Victorian parliament in 1989. It contains an extended analysis of what a cabinet documents exemption should look like, what its philosophical foundation is and the desirable breadth of such an exemption. If I may, I would like to suggest that you take that report into consideration in developing your recommendations on the cabinet documents exemption.

CHAIR—Thank you, Professor. That concludes today's public hearing. The committee will now stand adjourned until we table the report on 16 March 2010.

Committee adjourned at 2.51 pm