

SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS  
ATTORNEY-GENERAL'S PORTFOLIO

**Program: 1.1**

**Question No. SBE15/009**

**Senator Rhiannon asked the following question at the hearing on 20 October 2015:**

Senator RHIANNON: I would like to move on to clarifying some information that was supplied in questions on notice from earlier this year—this is question number AE15/078. In response to a question at an earlier estimates—this is December 2013—I noted in my question that we had heard that the FOI workload was increasing by 10 to 15 per cent per year. I asked in February-March this year: was there anticipation that the workload would decrease? The answer that I received was:

Yes. It is anticipated that the number of applications to the Administrative Appeals Tribunal (AAT) will be less than the number of applications for external review received by the Office of the Australian Information Commissioner.

It goes on to say:

This is due to two major reasons—

and this is where my question goes to—

(1) the requirement for internal review will improve the quality of decision making ...

What evidence do you base that response on? I will say it again:

the requirement for internal review will improve the quality of decision making ...

How did you determine that that would occur before it had happened?

Senator Brandis: To whom is your question directed, Senator?

Senator RHIANNON: As you often come in, Attorney-General, and take over the questioning, I thought that you would be very capable of giving direction on this matter and assisting the committee.

Senator Brandis: I think the conclusion is made on a judgement about the best governance arrangements.

Senator RHIANNON: Surely, Attorney-General, even for you that is not an answer. An assumption has been made there. It is implied that there is evidence.

Senator Brandis: No, it is not.

Senator RHIANNON: It says:

... the requirement for internal review will improve the quality of decision making ...

Senator Brandis: That is a judgement.

Senator RHIANNON: Yes, and I am asking what the judgement is based on. That is quite a straightforward question.

Senator Brandis: I will take that on notice, because that judgement was, no doubt, contributed to by the thinking of a number of people, which, I venture to imagine, was based on their experience of governance arrangements.

Senator RHIANNON: There were two major reasons stating why the assumption is made that there will be a decrease. The second one is: 'The application fee for external merits—

Senator Brandis: It is not an assumption; it is a prediction, or an expectation.

Senator RHIANNON: The English language is very delightful, Senator Brandis.

Senator Brandis: No, it is a very important difference. That was not an input into the decision. That was an expectation of the outcome of the decision.

Senator RHIANNON: If you dispute that this is an assumption, I will look forward to hearing your answer. The second reason given is:

... the application fee for external merits review is an appropriate mechanism to ensure that

genuine applications are able to be pursued.

What is the evidence for coming to that assumption?

Senator Brandis: It is not an assumption and nor does it say there is evidence. I would characterise the proposition stated in the sentence you have read aloud as a judgement.

Senator RHIANNON: But what is it based on?

Senator Brandis: I will take it on notice, but I dare say it is based on the experience of governance of those who contributed to the decision.

Senator RHIANNON: And what is that experience? Has this been done before? Are they drawing on something practical?

Senator Brandis: I am advised by very experienced senior public servants. I am advised by very experienced and skilful policy advisers, as is any minister, and decisions about governance arrangements that are made are invariably informed by the views that emerge from those sources, as well as the judgement of ministers.

Senator RHIANNON: So you will take it on notice to—

Senator Brandis: I will, out of courtesy to you. I cannot imagine that I will be elaborating beyond that. When you say 'evidence', to me, as a lawyer, I think of evidence as empirical data of some description. But it is not only empirical data that informs policy choices. Often it is judgement, experience, intuition, values or the various other factors that go into ultimate policy choices.

**The answer to the honourable senator's question is as follows:**

In the four years before the Office of the Australian Information Commissioner (OAIC) was established the Administrative Appeals Tribunal (AAT) received an average of 130 applications for review of FOI decisions per year. Over the last four years the OAIC has received an average of 465 applications for FOI reviews.

Under the Freedom of Information Amendment (New Arrangements) Bill 2014 those applicants who wish to seek review of an agency FOI decision would first be required to seek internal review. If the applicant is not satisfied with the internal review decision, the applicant would then be able to seek AAT review of the decision. This is the system for FOI reviews that was in place from 1982 until 2010.

Internal review can be beneficial both for agencies and applicants. It provides access to a low cost and timely review process for applicants enabling them to test the lawfulness and merits of decisions. It also provides an easily accessible form of review for applicants who might otherwise not pursue external review rights and acts as a filter for those applicants who might unnecessarily pursue a more resource and time consuming external process.