T R A N S C R I P T

INTEGRITY AND OVERSIGHT COMMITTEE

Inquiry into the Operation of the *Freedom of Information Act 1982*

Melbourne – Monday 18 March 2024

MEMBERS

Dr Tim Read – Chair
Hon Kim Wells – Deputy Chair
Ryan Batchelor
Jade Benham
Eden Foster
Paul Mercurio
Rachel Payne
Belinda Wilson

WITNESSES *(via videoconference)*

Nerita Waight, Chief Executive Officer, and

Patrick Cook, Head, Policy, Communications and Strategy, Victorian Aboriginal Legal Service.

The CHAIR: We are resuming the public hearing for the IOC's Inquiry into the Operation of the *Freedom of Information Act 1982*. To our witnesses, before you give your evidence there are some formalities to cover.

Evidence taken by this committee is generally protected by parliamentary privilege. You are protected against any action for what you say here today, but if you repeat the same things anywhere else, including on social media, those comments will not be protected by this privilege. Any deliberately false evidence or misleading of the Committee may be considered a contempt of Parliament.

All evidence given today is being recorded by Hansard. You will be provided with a proof version of the transcript for you to check once it is available, and then verified transcripts will be placed on the Committee's website. Broadcasting or recording of this hearing by anyone other than Hansard is not permitted.

I welcome, from the Victorian Aboriginal Legal Service [VALS], Chief Executive Officer Nerita Waight and the Head, Policy, Communications and Strategy, Patrick Cook, to present to us today. Thank you very much, both of you, for joining the public hearing, and thank you also for your submission. Do you have any brief opening comments that you want to make?

Nerita WAIGHT: Not at all, Tim.

The CHAIR: Great. In that case we might start off with Jade Benham.

Jade BENHAM: Thanks, Chair. We will start with Question 1. Thank you both for being here today and for your submission. Can you tell us why it is important for Indigenous Data Sovereignty and Governance Principles to be embedded into the data management and FOI [Freedom of Information] policies and procedures of Victorian agencies and ministers, and how you think this can best be achieved?

Nerita WAIGHT: Sure. Indigenous Data Sovereignty and Indigenous Data Governance are big concepts, but the two things that we hope that you take away from our submission and evidence are that Aboriginal knowledge systems are unique and valuable and that control of data is power. When the government controls data about Aboriginal people, it is controlling us. When we control data about ourselves, we get to be empowered and make decisions for our communities that work. Indigenous Data Sovereignty and Indigenous Data Governance are essential pillars of self-determination for our people. We need to have authority over the data that is about us, what is collected, how it is understood and how it is disseminated. Because we have not had appropriate authority over data about us—the data has often been used to present our people through a deficit lens, so what is wrong with us rather than what is right about us, what our strengths are—and we want to make sure that the data actually highlights that. We would certainly highlight the work of the Lowitja Institute and Maiam nayri Wingara, both referenced in our submission.

In terms of how Indigenous Data Sovereignty and Indigenous Data Governance can be incorporated into FOI systems, we would like to see a specific written FOI Act that place obligations on relevant parties to ensure they have Indigenous Data Sovereignty and Indigenous Data Governance policies in place in relation to all data that they collect. While we hope that the federal and Victorian governments enact all of the *United Nations Declaration on the Rights of Indigenous Peoples*, known as UNDRIP, through relevant legislation, articles 3, 4, 5, 18 and 20 are generally considered relevant to Indigenous Data Sovereignty and Indigenous Data Governance. In terms of what that looks like in practice, it is not for us to explain it alone. All of the relevant Aboriginal communities should be involved in shaping Indigenous Data Sovereignty and Indigenous Data Governance policies of a government body; otherwise it is not really Aboriginal-controlled.

For VALS, we tended to think of things like bail and remand data obviously, given what we do. Through several years of working with Uncle Percy Lovett, who was the partner of Veronica Nelson, to achieve bail reforms, we saw a lot of people like Veronica who were remanded for low-level offending. But the remand and bail data that was published publicly was and still is often published well after the relevant period, and it is also not well desegregated, so not broken down into discrete sets. It also does not reflect what behaviour a person

who is remanded is accused of, so it is actually hard to tell the story of what is happening from the data. If Veronica had not passed [away] in Dame Phyllis Frost Centre in obviously horrific circumstances, and if her family had not really fought for justice, the story might never have been told.

Another example, from the recent bail reforms, was that we asked for bail decision-makers to be required to make a written record of how they considered Aboriginality, which they are required to under section 3 of the *Bail Act*, and we wanted that data to be analysed in a report that would be tabled in Parliament annually. We were told that it was too difficult for courts to make written records, which is a bit odd considering all the recording equipment in courts. Surely the audio could be transcribed by one of the court staff as they go and made part of the paperwork pretty quickly. But it is going to be a big problem for the bail reforms because it will mean that you are not going to have any solid data about how the changes to section 3 are progressing, which will make your statutory review in two years quite hard to do, let alone monitoring on-the-ground reform.

We also know from our legal practice that if there is not that data or that evidence base to reference people to, then, despite whatever our lawyers say, people will ignore it – courts, police, politicians. We also find that it is really hard to get government to fund a lot of the great programs that we and other services do. They have all kinds of data but they actually do not fund us to collect or analyse that data, and then it makes it really hard for us. It means that you basically get into a never-ending cycle of pilots, or starting something and then stopping something, which affects community both in the short term and the long term in terms of providing better outcomes. Pat, is there anything you wanted to add?

Patrick COOK: No, I think that covers it. I guess just for our communities, it is about having those policies in place so that there is some control from community over what data is collected about and how it is used.

The CHAIR: Okay. Thank you both very much. Let us go to Kim Wells.

Kim WELLS: Thanks. When considering the reform of Victoria's FOI scheme, what should the government consider with respect to its obligations under the National Agreement on Closing the Gap and Victoria's Closing the Gap Implementation Plan?

Nerita WAIGHT: Thank you. Priority reform 4 is really about governments providing disaggregated data about our people to our communities and organisations so that we can participate with government on an equal footing, build our own evidence base, develop our own solutions to deliver what our people need and want, and of course hold government to account for their progress under Closing the Gap. Unfortunately, the National Agreement on Closing the Gap is not driving this change quickly enough. Our organisations still face a huge asymmetry with government when it comes to data. FOI reform that puts obligations on government bodies to provide data that helped achieve those three aims of priority reform 4 would give us a tool to drive that change much faster. For instance, it will be useful if a request for data or information from government departments that would help us design services, if an FOI Act favoured the release of such information to Aboriginal organisations. Currently that kind of data will rely on good relationships with ministers or bureaucrats and obviously rely on them not having concerns about releasing such data. The existing FOI Act does not mention Aboriginal people, communities or organisations. There are many other pieces of legislation that do provide specific references to Aboriginal people and provide us with specific rights – I think the *Bail Act*, the *Children, Youth and Families Act* and the Victorian charter of rights and responsibilities [*Charter of Rights and Responsibilities Act 2006* (Vic)]. In signing on to the national agreements on Closing the Gap, the Victorian Government has agreed that our people should have particular rights to access government data and information, and we do not think it would be unreasonable to have those rights re-stipulated in the FOI Act. Anything to add**?**

Patrick COOK: Yes, just that it has been hard to get progress on these reforms through the Closing the Gap model. There was obviously a Productivity Commission report recently that really spoke to some governance issues that have been impacting the efficacy of Closing the Gap. And obviously it is not, I guess, the primary purpose of the FOI Act, but I think strong FOI reform could transform a whole range of policy areas in this space.

Kim WELLS: So just to follow on, would one of your recommendations be that we specify First Nations – if a First Nations person was making an FOI application, there would be an additional framework around that request?

Nerita WAIGHT: Correct.

Patrick COOK: Yes. I think that exists in some of the Acts that Nerita spoke about earlier. Obviously you would probably all be aware, after the debate at the end of last year, about section 3A in the *Bail Act,* and the case law around that at the Supreme Court level effectively says that section 3A should be considered to make it easier for Aboriginal people to get bail. That should be the effect of it. I think certainly there is reason for the FOI Act to give a similar privilege to Aboriginal people and communities, given the historic and continuing disadvantage.

Kim WELLS: Okay, thanks.

The CHAIR: Thank you. We have heard a bit about Body Worn Camera footage today, and we would be interested to hear more of your opinion that Body Worn Camera footage of police officers should not be excluded from the operation of the FOI Act. I wonder if you could explain that a bit more.

Nerita WAIGHT: Happily, Tim, given it is a big part of our work. Accessing Body Worn Camera footage has been a constant issue for VALS, particularly our Wirraway police and prison accountability unit. We would say in our experience Victoria Police has a broad culture that restricts the release of such footage. Obviously in some circumstances VicPol [Victoria Police] are required to produce body-worn camera footage as part of disclosure for legal proceedings. However, if a client of ours wanted to make a complaint against police for an incident where police are not proceeding with charges, then there is no disclosure requirement. We have previously tried to FOI that footage to help our clients with police complaints, but Victoria Police have clearly said they cannot provide Body Worn Camera footage under FOI.

The CHAIR: Sorry. Excuse my interrupting, but I just did not quite follow. Did you say if a client of yours was wanting to make a complaint against police –

Nerita WAIGHT: In the absence of charges.

The CHAIR: In the absence of charges – okay. That is the –

Nerita WAIGHT: There is no disclosure requirement, Tim. We think that that is according to them, that they say they cannot provide Body Worn Camera footage under FOI. We think that may be legally incorrect; however, we have not found a mechanism to resolve it yet. Obviously there is the Commission [Office of the Victorian Information Commissioner] and VCAT [Victorian Civil and Administrative Tribunal], but as a not-for-profit with limited resources, it is actually hard to challenge organisations like Victoria Police when they take positions like that. It also makes it really hard for clients. So, for them, they might be coming to us to make a police complaint and say, 'This is what happened.' But we cannot access the Body Worn Camera footage to assess the merit of pursuing that police complaint, and it just then furthers the disenfranchisement and [Zoom dropout] mechanisms with Aboriginal communities.

Belinda WILSON: Sorry about our little whispering. We are just discussing because we have had the –

The CHAIR: We spoke to the police earlier.

Belinda WILSON: We spoke to the police earlier. We are doubting that. That is not what they are saying.

The CHAIR: They have made it clear that Body Worn Camera footage is already available for review if a complaint has been made, but I think your point is that you want to see it –

Nerita WAIGHT: Prior. Yes.

The CHAIR: to decide whether it is worth making a complaint.

Nerita WAIGHT: Correct.

The CHAIR: Okay.

Belinda WILSON: So they are only going to give you that footage if you are ready to make a complaint and lodge that complaint. Then you can see it.

Nerita WAIGHT: Yes.

Belinda WILSON: Interesting.

Nerita WAIGHT: Which then means that as a legal service we actually cannot provide any sort of advice on merit to a client because we cannot access the Body Worn Camera footage before making a complaint. Often enough, as soon as there are barriers put in place to pursuing accountability, particularly when it comes to police, Aboriginal communities will pull back because that is what they have faced generation after generation after generation. They feel as though there is an entrenched culture of police being protected and ordinary citizens rather being pushed to the side.

The CHAIR: In the circumstances where, for example, one of your clients is charged with an indictable offence or a complaint is being made, as I understand it you have to go to the station to view the footage. Does one of your team of solicitors, for example, accompany the client to the station and you watch it together? Is that how it works?

Nerita WAIGHT: Yes, that is correct. And we also provide them with our client service officer from Wirraway, the police and prison accountability unit. They have the ability to culturally debrief that person pre and post viewing that footage, just noting obviously attending a police station can be very isolating for an Aboriginal person.

The CHAIR: Indeed. And I wonder, do you have any comments about the police requirement for attendance at the station to view the footage?

Nerita WAIGHT: Two words – utterly ridiculous.

The CHAIR: One of the points that police raised – I am not sure if this is the only reason, but one reason – is they are worried about where footage will pop up, you know, on social media or whatever if they give it to people. Can you see a way around that other than going to the station?

Nerita WAIGHT: Yes, providing it to the legal service that is assisting them. We obviously are in receipt of very confidential footage all the time, whether it be a transcript of an interview on record or whether it be footage from a coronial proceeding. All of those things, videos and electronic files, we hold really close and obviously protect adequately; otherwise we would not be a legal service.

The CHAIR: Okay. Great. Thank you. Belinda Wilson.

Belinda WILSON: Thanks for those points, and I think that was interesting. We were all looking at each other, but we were not sure of that clarification, which does make a big difference. So thanks for sharing that with us.

Can Victoria's FOI legislation better protect against agencies' misuse of or over-reliance on statutory exemptions to providing access to information, and if so, how?

Nerita WAIGHT: VALS's view is that the Act should encourage the release of government data information, both proactively and in response to applications, to the greatest extent possible. The breadth of exemptions in the existing FOI Act allows a government who decides it is in their best interest not to release information a whole range of tactics. A government can deny anything at the first request with even the flimsiest of reasoning. They can go through a whole range of processes to delay the release of information. Records can go unfulfilled for years just through delay tactics alone, and we go through this with our clients a fair bit with some government bodies.

The Cabinet exemption really incentivises governments to attach everything to a Cabinet document, and they can make it protected. Obviously there have been a lot of legal system reforms in the last 10 to 20 years where there was not a lot of public or stakeholder consultation, if any, and all the relevant information could be hidden

behind the Cabinet exemptions, which is [Zoom dropout] accountable to the public. The Yoorrook Justice Commission received evidence that the Victorian Government knew the 2017 bail laws would adversely affect Aboriginal people, but they progressed anyway. The information they relied on had that Cabinet protection, so we had to wait until Veronica Nelson had passed away and many, many, many lives were ruined before some scrutiny could be placed on the Government's decision-making. VALS certainly supports the types of exemptions that protect vulnerable individuals, like not disclosing the contact details of a family violence victim-survivor. We even understand that there needs to be some protection for Cabinet deliberations – naturally. But an FOI Act that incentivises governments to hide everything in Cabinet documents so that it can make decisions without the scrutiny of experts and the public just does not function the way most Victorians would want it to. Pat, anything you want to add?

Patrick COOK: Yes. I just think those couple of examples sort of speak to getting the settings right of the FOI Act. Even beyond the specifics of some of those provisions, the general tenor of the FOI Act leans much too far towards protecting the government rather than providing information.

Nerita WAIGHT: Which affects public trust, particularly for marginalised communities.

Belinda WILSON: Thank you.

The CHAIR: Yes, thanks. Let us go to Eden Foster.

Eden FOSTER: Thanks, Chair. Thank you, both, for making it online. I am just wondering, based on your submission, could you elaborate, please, on your view that the time limit applying to use of the Cabinet documents exemption should be reduced from 10 years to 30 days?

Nerita WAIGHT: Reducing the period of time that Cabinet documents are exempt would stop governments using Cabinet as a way to protect information from release, which kind of talks to what we just spoke about before. Time periods with this length are being used or are about to be implemented in other jurisdictions. Particularly as we come out of the emergency period of the COVID pandemic, it is worth reflecting how different that might have been if the FOI Act had restricted the exemption for Cabinet documents to just 30 days. The government exercised extraordinary powers during the pandemic to try and save as many lives as possible, and it said it was making decisions about lockdowns and other measures based on expert advice. But it did not always seem that way. As experts in the legal system, VALS certainly criticised the overuse of Victoria Police to respond to a health crisis. Cabinet submissions are often big documents with lots of attachments, some of them more relevant than others, naturally, and we certainly think applicants need greater mechanisms to challenge Cabinet exemptions to ensure [Zoom dropout] only if the document's dominant purpose was for Cabinet deliberations. However, a short period for the exemption, like 30 days, would also resolve many of the current problems with the Cabinet exemption. Pat, anything to add?

Patrick COOK: Not particularly. Just that maybe some of our evidence has focused in on the Cabinet exemption as one of the easier ways to highlight some of the setting problems with the Act more broadly.

Eden FOSTER: Thank you.

The CHAIR: All right. Let us go to Paul Mercurio.

Paul MERCURIO: Could you please elaborate on your view that there should be a means-tested or fee-waiver scheme for Aboriginal people and Aboriginal community–controlled organisations and a refund mechanism where agencies do not comply with statutory time frames?

Nerita WAIGHT: Sure. As discussed in our submission, application fees are often waived already, and data from the Office of the Victorian Information Commissioner suggests that only a very small amount of revenue is actually collected from FOIs. To VALS it just seems clear that there is a not insignificant cost recovery related to these fees. The fees really seem to exist to limit the number of requests or the amount of information to be released, and neither of those motivations aligns with the intent of the FOI Act as we understand it. Removing fees altogether makes sense to VALS, particularly given that more information should be able to be shared digitally, because we have moved on now; printing fees and the like no longer actually makes sense.

However, at the very least there should be a means test or more formalised fee waiver policies, particularly for Aboriginal people. Aboriginal people are more likely to be discriminated against or treated unfairly in a whole range of settings, whether that be a hospital, a school or by police. And our people still earn a lot less than non-Indigenous people. For example, in 2021 the median weekly personal income for our people in Victoria was $619 compared with $810 for all Victorians. So we are more likely to need access to FOI but less likely to be able to afford it, hence our submissions on fee waiver schemes.

Paul MERCURIO: Pat.

Patrick COOK: Nothing to add to that.

Paul MERCURIO: Just checking. Thanks.

The CHAIR: Thanks, Paul. Ryan Batchelor might have a question.

Ryan BATCHELOR: Thank you, Chair. Obviously, Victoria's FOI Act is, like, 40 years old and has not had a good look in a long time. Other jurisdictions have done more work in the intervening generation – New South Wales, Queensland, even our Commonwealth – and they have moved towards a more sort of push model, you know, getting proactive release, pushing information out rather than making people apply through FOI Acts. I am wondering if you had spoken to any of your counterparts in other jurisdictions or had any reflections on the experience in Queensland or New South Wales or even the Commonwealth about how things might have improved and what those might be so that we can take on board some of that here.

Nerita WAIGHT: Yes, look, in terms of observations on the FOI experiences of the Commonwealth, New South Wales and Queensland, we do not have a lot of experience with other jurisdictions as almost all of our requests would be under Victoria's FOI legislation. However, there is certainly a general consensus amongst our colleagues that Victoria is pretty backwards compared to other jurisdictions that have models that promote proactive publishing of data. It remains a really live topic of discussion through the Justice Policy Partnership, which has memberships from NATSILS [National Aboriginal and Torres Strait Islander Legal Services], which is the national peak professional legal services across Australia as well as all the state and territory departments [Zoom dropout]. Victoria does not have a push model and it does not have a particularly great legal system for FOIs, given both the Commissioner and VCAT are under-resourced. It is hard to get information from government and hard to appeal government's decisions not to release information, so the system really just is not working well.

Ryan BATCHELOR: It might be useful maybe if you could provide separately some counterpart organisations that you might have, particularly in New South Wales and Queensland, that we might be able to get in touch with to see how their changes in recent years have gone from the perspective of their Aboriginal legal services up there.

Nerita WAIGHT: I am more than happy to provide you with the ALS [Aboriginal Legal Service] contact details for New South Wales and ACT [Australian Capital Territory] as well as Queensland, as well as the Aboriginal women's family violence legal service up there in Queensland.

Ryan BATCHELOR: That would be great.

Nerita WAIGHT: [Zoom dropout].

The CHAIR: Thank you.

Patrick COOK: I might add, if that is all right, Redfern Legal Centre are pretty active in this space in New South Wales, so that could be particularly useful. It might also be worth looking at the US; particularly in the legal system space there is a lot more proactive pushing of information, but there are also stronger legal mechanisms to challenge decisions.

Ryan BATCHELOR: Great. Thanks very much.

The CHAIR: Very good. Let us go to Belinda Wilson.

Belinda WILSON: The last question – well, maybe not, we might have some more. From your perspective, what kinds of information could the Victorian Government proactively publish that it currently does not publish?

Nerita WAIGHT: Yes, sure. We get a lot of government data in relation to the legal system confidentially through various forums that is not published publicly – so, for example, the Dhelk Dja forum, which concerns domestic violence, and the Aboriginal Justice Forum, which is obviously centred on justice, as well as the Closing the Gap Partnership Forum. Often it is about more specific desegregation data relating to Aboriginal people, and all of that could be easily published publicly in a proactive way. Obviously, in keeping with Indigenous Data Sovereignty and Indigenous Data Governance, any data relating to Aboriginal people should go through relevant processes first so that our people have authority over it, but we certainly want more of that data published publicly in a timely manner.

We would love to work with the Government or anyone to develop a whole range of datasets that could publish based off information they already collect. For us, prison health care is obviously a priority, because it has been a huge problem for Aboriginal people in recent years and has played a big role in spiking Aboriginal deaths in custody in Victoria. All of the records that are kept as part of prison health care service delivery should be able to be turned into segregated datasets that would provide Victoria with some better understanding of what is actually happening and what the solutions are.

Another big issue for us in prisons at the moment is the use of isolation. The government has created a lot of different terms and jargon to describe it, but most Victorians would understand it as solitary confinement. The various facilities record a lot of information in relation to these incidents, but not much is published publicly and certainly not proactively. We also know, for example, in youth justice, they collect data on how long a person spends in solitary confinement, but they do not collect and report on that annually like they do the rest of their isolation data. We also know from our client experience isolation causes a lot of physical and mental health issues and shortened life expectancy. So for us, where the government has a duty of care like that, there should be proactive publishing of data that provides oversight and accountability.

Belinda WILSON: Yes.

The CHAIR: All right. Thank you. Committee members, do you have any other questions? I have got one. I just want to go back to really the beginning, when we were talking about control of data and Indigenous Data Sovereignty. I am trying to imagine some different ways that that could be put into effect. Are you thinking, for example, that this could be an agency or department having an Aboriginal adviser or staff member or someone on the board who is advising on the way that agency handles data, or were you thinking more of proactively giving data to Aboriginal agencies, ACCHOs [Aboriginal Community Controlled Health Organisations] and so on?

Nerita WAIGHT: It is the latter at the moment, Tim. I know that when it relates to the former, VACCHO, which is the Victorian Aboriginal Community Controlled Health Organisation, has looked at how you could create a body that would not only provide that transparency and accountability on funding streams and obviously quantum, but also data. But that is a long way off. In the interim, to me it would seem not only for issues of self-determination and better outcomes but just plain smart to be providing that data to Aboriginal organisations who are controlled by their communities.

The CHAIR: Great. Thank you. At this point, then, I will say thank you both very much. Thanks for your submission and thanks also for your very helpful answers to our questions, and for joining us.

Nerita WAIGHT: Not a problem, have a lovely afternoon.

The CHAIR: All right, you too. At this point we will suspend the hearing and resume shortly with our next witness.

Witnesses withdrew.