PARLIAMENT OF VICTORIA

Legislative Council
Legal and Social Issues Committee

Inquiry into the Freedom of Information Amendment (Office of the Victorian Information Commissioner) Bill 2016

Parliament of Victoria
Legal and Social Issues Committee

Ordered to be published

VICTORIAN GOVERNMENT PRINTER
March 2017

PP No 278, **Session** 2014-17
ISBN 978 1 925458 70 1 (print version)
978 1 925458 71 8 (PDF version)

Committee functions

The Legal and Social Issues Committee (Legislation and References) is established under the Legislative Council Standing Orders Chapter 23 — Council Committees, and Sessional Orders.

The committee's functions are to inquire into and report on any proposal, matter or thing concerned with community services, gaming, health, law and justice, and the coordination of government.

The Legal and Social Issues Committee (References) may inquire into, hold public hearings, consider and report on other matters that are relevant to its functions.

The Legal and Social Issues Committee (Legislation) may inquire into, hold public hearings, consider and report on any Bills or draft Bills referred by the Legislative Council, annual reports, estimates of expenditure or other documents laid before the Legislative Council in accordance with an Act, provided these are relevant to its functions.

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- Department of Health and Human Services
- Department of Justice and Regulation
- Department of Premier and Cabinet

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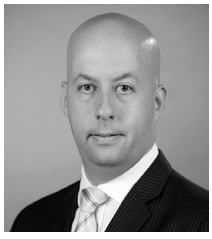

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This report is available on the Committee's website.

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Terms of reference

Inquiry into the Freedom of Information Amendment (Office of the Victorian Information Commissioner) Bill 2016

On 21 February 2017, the Legislative Council agreed to the following motion:

That the Freedom of Information Amendment (Office of the Victorian Information Commissioner) Bill 2016 be referred to the legal and social issues committee for inquiry, consideration and report by 21 March 2017.

Chair's foreword

I am pleased to present the Final Report of the *Inquiry into the Freedom of Information Amendment (Office of the Victorian Information Commissioner) Bill 2016*.

This report highlights key issues discussed during the Inquiry, including the proposed powers of the Information Commissioner and the consultation process surrounding the development of the Bill. As such, the Committee's report will inform further debate on the Bill in the Legislative Council and elsewhere.

The Bill proposes a major restructure of the administration of Victoria's freedom of information and privacy frameworks. It is important that such a significant restructure receives proper scrutiny and is informed by input from key stakeholders. Effective freedom of information and privacy frameworks are critical to a healthy democracy. They are relied on by citizens who are well removed from the institutions and individuals who formed part of this Inquiry. Any changes should serve the people's interests, not those of the government of the day.

The Inquiry was scheduled to take four weeks and therefore the Committee agreed it would report in the same way as previous Committee Inquiries with equally short timeframes: a summary of the key issues raised, a complete transcript of evidence presented to the Inquiry, and no recommendations.

This Inquiry examined the merging of the roles of FOI Commissioner and Commissioner for Privacy and Data Protection. It heard this is the "first stage" of reform of the frameworks, and that further significant change is intended. It is regrettable that no detail of this anticipated further reform was shared with the Inquiry.

In terms of scrutiny from those with particular expertise and insight, this Inquiry enabled detailed feedback from the current Acting FOI Commissioner and the current Commissioner for Privacy and Data Protection. Both gave evidence that they had had no opportunity to provide input regarding the intended restructure of their offices, prior to this being approved by Cabinet.

Similarly there was no public consultation undertaken by the Government in relation to the Bill, despite evidence that the two offices' extensive interaction with members of the public was a key reason for starting the first stage of reform with the two Commissioner roles.

It is also unfortunate that there was no scope to hear evidence from FOI officers who, in relation to the Bill, are at the coalface: accepting and assessing FOI applications, and making decisions about their organisations' responses.

I thank the witnesses who gave their time to provide information to the Committee at public hearings and through written information. Their insights were provided on short notice and were invaluable in informing the Committee's deliberations.

I thank my colleagues on the Committee who participated in this Inquiry: Ms Jaclyn Symes; Ms Colleen Hartland; Mr Daniel Mulino; Hon Edward O'Donohue; Ms Fiona Patten; Mrs Inga Peulich; Hon Gordon Rich-Phillips; and Hon Adem Somyurek.

I also thank the Secretariat staff who worked on this Inquiry: Mr Patrick O'Brien, Secretary; Mr Matt Newington, Inquiry Officer; and Ms Prue Purdey; Administrative Officer. Their hard work enabled the Committee to meet its short deadline in tabling this Report.

I commend this Report to the House.

Margaret Fitzherbert MLC
Chair

1 Introduction

1.1 Overview of the Bill

The main purposes of the Bill are to:

- Establish the Office of the Victorian Information Commissioner through combining existing functions of the Freedom of Information (FOI) Commissioner and Commissioner for Privacy and Data Protection
- Enhance the role and powers of the Information Commissioner, particularly in regards to FOI functions
- Make a number of amendments to the Victorian FOI framework.

Only minor changes are made to the privacy and data protection framework.

The amendments are made principally to the *Freedom of Information Act 1982*, with other substantial amendments to the *Privacy and Data Protection Act 2014* to reflect the Information Commissioner's new privacy role. Other consequential amendments are made to a number of other oversight agencies and those of note are discussed below.

1.1.1 Office of the Victorian Information Commissioner

The Bill abolishes the existing offices of the FOI Commissioner and the Privacy and Data Protection Commissioner. Their existing functions are combined into the Office of the Victorian Information Commissioner. This structure is similar to the New South Wales, Queensland and Commonwealth frameworks.

The Bill also creates two deputy commissioner positions, who will report to the Information Commissioner:

- Public Access Deputy Commissioner — to assist the Information Commissioner with FOI matters
- Privacy and Data Protection Deputy Commissioner — to assist with privacy and data protection matters.

Under the Bill the Commissioner and two deputies are appointed by Governor in Council for a maximum term of five years. Both deputy commissioners may be suspended and removed from office by Governor in Council. The Information Commissioner may be suspended by Governor in Council, however removal requires a resolution by both Houses of Parliament.

The Bill allows the Information Commissioner to delegate functions to any member of staff as the need arises, aside from a few exceptions. This removes the need to appoint assistant commissioners with specific functions under the Act and is intended to allow the Information Commissioner to focus more on strategic management of the office.

1.1.2 Increased powers granted to Commissioner

The Bill grants increased powers to the Information Commissioner under the FOI Act. These include:

- Expanding the types of FOI decisions the Commissioner can review to include:
  - exemptions of cabinet documents
  - Ministers refusing access to documents
  - decisions of principal officers[1] of agencies
- Receiving complaints about how Ministers or principal officers of agencies handled an FOI request (currently complainants must apply to the Victorian Civil and Administrative Tribunal [VCAT] for a review)
- The ability to conduct own-motion investigations (similar to but not as far-reaching as those conducted by the Ombudsman and the Independent Broad-based Anti-corruption Commission [IBAC])
- Coercive powers to send for documents or compel attendance at an examination
- Requiring an agency/principal officer/Minister to conduct a further search for documents when an agency refuses a request without processing it.[2]

1.1.3 Freedom of Information professional standards

The Bill grants the Information Commissioner the power to issue FOI professional standards for agencies covered by the FOI Act. Currently, these are issued by the Minister.

Content of the standards may include guidance on:

- Assistance for applicants making requests
- Identifying relevant documents
- Consultation
- Clear communication with applicants
- Timely decision making, including requesting time extensions from applicants.

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1 Such as a department head, chief administrative officer of a council or office holders.

2 Under section 25A of the *Freedom of Information Act 1982* (Vic).

The Bill also requires that any draft standards be published on the Commissioner's website and for the Commissioner to take into account any submissions on the standards. Once finalised, the professional standards are published in the government gazette and tabled in Parliament.

Professional standards issued by the Commissioner do not apply to FOI requests made to ministers — the Premier may issue ministerial professional standards through the government gazette.

1.1.4 Oversight arrangements

The Information Commissioner will be accountable directly to Parliament through the Accountability and Oversight Committee. The Bill also provides that the Commissioner and deputies will not be subject to the direction or control of the Minister.

In addition, the Bill amends the functions of the Victorian Inspectorate to give it certain oversight responsibilities of the Office of the Information Commissioner, in particular monitoring use of coercive powers. This arrangement is consistent with the Inspectorate's functions for other oversight agencies, including the Ombudsman, Auditor-General, IBAC, and Chief Examiner and other Examiners appointed under the *Major Crimes (Investigative Powers) Act 2004*.

The Inspectorate can also receive certain complaints about the conduct of the Information Commissioner and officers, including:

- Compliance with procedural fairness
- Conduct that was:
  - contrary to law
  - unreasonable, unjust, oppressive or improperly discriminatory
  - based on improper motives
  - an abuse of power
  - otherwise improper.

The Accountability and Oversight Committee also retains a function to receive complaints about the Information Commissioner. However, the Bill does not distinguish what types of complaints should be directed to the Committee as opposed to the Victorian Inspectorate.

1.1.5 Amendments to FOI framework

The Bill introduces a number of changes to Victoria's FOI framework. These include:

- New categories for FOI complaints:
  - decisions by a Minister that a document does not exist or cannot be located

  - a failure of the Minister to comply with ministerial professional standards
  - actions of a principal officer of an agency. This also includes holding the principal officer accountable for certain actions by officers of the agency
- Changes to time limits:
  - An agency must respond to an applicant's FOI request within 30 days instead of the current 45 days. However, agencies can notify the applicant that they require a time extension of up to 15 days
  - A reduction from 60 to 45 days for an agency to apply to VCAT for a review of a decision by the Commissioner
- New offences for obstructing, hindering or providing false information to the office (up to 60 penalty units[3] for a body or individual)
- Clarifying exemptions for FOI requests that may prejudice the functions or investigations of IBAC
- Various clarifications and amendments to existing FOI exemptions.

3 $9327.60 at the time of writing.

2 Key issues raised

The Committee held two public hearings on the Bill:

- 3 March 2017:
  - Office of the FOI Commissioner: Mr Michael Ison, Acting FOI Commissioner and Ms Sally Winton, Acting Assistant FOI Commissioner
  - Office of the Commissioner for Privacy and Data Protection: Adjunct Professor David Watts, Commissioner for Privacy and Data Protection.
- 8 March 2017:
  - Law Institute of Victoria (LIV): Ms Fiona Spencer, barrister and member of the LIV's Human Rights / Charter of Rights Committee
  - Department of Premier and Cabinet: Mr Chris Miller, General Counsel, Office of the General Counsel; Mr Sam Porter, Executive Director, Public Sector Integrity; and Mr David Butler, Director, Information Management and Technology.

In addition, Flemington & Kensington Community Legal Centre wrote to the Committee to highlight concerns it had with a provision of the Bill (see Appendix 3.

The key issues raised during the Inquiry are discussed below.

2.1 Provisions of the Bill

2.1.1 FOI exemptions for documents used in IBAC investigations

The Bill amends section 194 of the *Independent Broad-based anti-corruption Commission Act 2011* to clarify IBAC exemptions to FOI requests. In addition, a new exemption under section 31A of the Bill is inserted into the FOI Act.

The LIV raised concerns about unintended consequences of section 194 of the IBAC Act as it currently stands.[4] Section 194(1)(b) states that the FOI Act does not apply to documents disclosing information on 'an investigation conducted under this Act'.[5]

Ms Fiona Spencer from the LIV told the Committee that this exemption has been broadly interpreted by agencies, including Victoria Police, IBAC and VCAT:

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4 Law Institute of Victoria, Correspondence to Hon Martin Pakula MP and Hon Gavin Jennings MLC, *Amendments to s 194 Independent Broad-based Anti-corruption Commission Act 2011 by the Freedom of Information Amendment (Office of the Victorian Information Commissioner) Bill 2016*, 12 August 2016.

5 *Independent Broad-based Anti-corruption Commission Act 2011* (Vic), 66 of 2011, section 194(1)(b).

> At first blush that would seem to perhaps mean an IBAC investigation, but it has not been interpreted that way. It has been interpreted so that if, for example, there is a complaint made to IBAC that is referred back to Victoria Police for investigation and then Victoria Police investigates, Victoria Police's investigation is actually an investigation under the IBAC act. So it is captured by (b) because it came back from IBAC.
>
> The same thing can happen if Victoria Police gets the complaint first, sends it to IBAC and IBAC sends it back — it is still captured. It can also be caught where IBAC undertakes a random audit, for example, of matters and then it is somehow been infected by IBAC, if I can put it that way, and the documents again become captured by this provision.[6]

Although the Bill contains to provisions addressing IBAC exemptions, this issue remains unaddressed.

The LIV recommended two ways to address this:

(1) Remove section 194 from the IBAC Act, since the new exemption as proposed section 31A of the FOI Act as worded aptly achieves the original intention of section 194

(2) Insert the following phrases to the Bill's proposed amendment to section 194 of the IBAC Act:

> (1) The Freedom of Information Act 1982 does not apply to a document that is in the possession of any person or body to the extent to which the document discloses information that relates to—
>
> (a) a recommendation made by the IBAC under this Act; or
>
> (b) an investigation conducted **by the IBAC** under this Act; or
>
> (c) a report, including a draft report, on an investigation conducted **by the IBAC** under this Act.[7] [emphasis in original]

Flemington & Kensington Community Legal Centre supported the LIV's recommendation to remove section 194 from the IBAC Act.[8]

2.1.2 Removal of deputy commissioners from office

The provisions of the Bill allow for suspension or removal of the Public Access and Privacy and Data Protection Deputy Commissioners by Governor in Council on recommendation of the Minister. This is in contrast with the provisions for dismissal of the Information Commissioner. Under the Bill, the Commissioner may be suspended by Governor in Council but removal from office requires a resolution of both Houses or Parliament.[9]

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6 Fiona Spencer, Barrister and member of human rights/charter of rights committee, Law Insitute of Victoria, *Transcript of evidence*, 8 March 2017, p. 3.

7 Law Institute of Victoria, Correspondence to Hon Martin Pakula MP and Hon Gavin Jennings MLC, *Amendments to s 194 Independent Broad-based Anti-corruption Commission Act 2011 by the Freedom of Information Amendment (Office of the Victorian Information Commissioner) Bill 2016*, 12 August 2016, p. 5.

8 Flemington & Kensington Community Legal Centre, Correspondence to Standing Committee on Legal and Social Issues, 6 March 2017, p. 5.

9 Freedom of Information Amendment (Office of the Victorian Information Commissioner) Bill 2016 (Vic), clause 6.

The Commissioner for Privacy and Data Protection and the LIV were concerned that this weakens the independence of the two deputy commissioners.[10]

Representatives from the Department of Premier and Cabinet discussed this issue with the Committee. Mr Sam Porter noted that the suspension and removal arrangements for the deputy commissioners are the same as the current arrangements for assistant commissioners under the FOI Act.[11] In addition, Mr Chris Miller highlighted that the Bill contains further steps to protect the independence of the office from the Executive Government.[12]

The LIV recommended that the deputy commissioners be provided with the same protections from removal from office as the Information Commissioner. It noted that this would reflect similar protections provided to the Auditor-General, IBAC Commissioner, Ombudsman and Victorian Inspector.[13]

2.1.3 Power to require further search for documents

The Bill amends the FOI Act[14] to allow the Information Commissioner to require agencies or ministers to identify or process a 'reasonable sample' of documents when an agency refuses an FOI request without processing.

An agency or minister may make a refusal in this manner under section 25A of the FOI Act, if the work involved in processing the request:

- For agencies, would substantially and unreasonable divert its resources from its other operations
- For ministers, would substantially and unreasonably interfere with the Minister's functions.[15]

Under the Bill, a further search may be requested if the Information Commissioner believes that 'an agency or Minister has failed to undertake an adequate search for documents'.[16] This may be in the course of a conducting a review[17] or investigating a complaint.[18]

The LIV expressed several concerns about theses proposed amendments.

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10 Law Institute of Victoria, Correspondence to Hon Martin Pakula MP and Hon Gavin Jennings MLC, *Concerns about the Freedom of Information Amendment (Office of the Victorian Information Commissioner) Bill 2016*, 25 August 2016, p. 3.

11 Sam Porter, Exeuctive Director, Public Sector Integrity, Department of Premier and Cabinet, *Transcript of evidence*, 8 March 2017, p. 13.

12 Chris Miller, General Counsel, Department of Premier and Cabinet, *Transcript of evidence*, 8 March 2017, p. 13.

13 Law Institute of Victoria, Correspondence to Hon Martin Pakula MP and Hon Gavin Jennings MLC, *Concerns about the Freedom of Information Amendment (Office of the Victorian Information Commissioner) Bill 2016*, 25 August 2016, p. 4; David Watts, Commissioner for Privacy and Data Protection, Office of the Commissioner for Privacy and Data Protection, *Transcript of evidence*, 3 March 2017, p. 7.

14 Proposed sections 49KA and 63

15 *Freedom of Information Act 1982* (Vic), 9859 of 1982, section 25A.

16 Freedom of Information Amendment (Office of the Victorian Information Commissioner) Bill 2016 (Vic), clause 33.

17 Proposed section 49KA.

18 Proposed section 61GA.

Firstly, it noted that an agency or minister's refusal under section 25A of the FOI Act occurs without a request being processed. As no search has taken place, there is also no search for the Commissioner to consider adequate or inadequate. The LIV recommended addressing this by either:

- Removing proposed sections 49KA(1) and 61GA(1) from the Bill
- Changing the wording to focus on the adequacy of the refusal rather than the search itself.[19]

Secondly, the LIV highlighted that there are no review rights for agencies when the Commissioner requires a further search for documents. It recommended that agencies should be able to seek a review at VCAT, with the onus on the agency to justify the refusal.[20]

Thirdly, the LIV highlighted an inconsistency between the proposed sections and the existing section 49OA(1) of the FOI Act.[21] Section 49OA states that when the Commissioner conducts a review of a refusal under section 25A, the Commissioner must determine whether also to refuse the request 'without requesting the agency to search for or otherwise identify the documents to which the request relates'.[22]

Fourthly, the LIV noted that agencies that do not comply with a request to further search for documents may be at risk of committing an offence under proposed section 63F. It proposed that non-compliance on reasonable grounds should be an express exemption in the Bill.[23]

2.1.4 Terms of appointment

The Bill provides that the Information Commissioner and deputy commissioners can be appointed for a term up to five years.

The LIV recommended that the periods be fixed at five years to promote independence of the Commissioners.[24]

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19 Fiona Spencer, Barrister and member of human rights/charter of rights committee, Law Insitute of Victoria, *Transcript of evidence*, 8 March 2017, p. 4; Law Institute of Victoria, Correspondence to Hon Martin Pakula MP and Hon Gavin Jennings MLC, *Concerns about the Freedom of Information Amendment (Office of the Victorian Information Commissioner) Bill 2016*, 25 August 2016, p. 5.

20 Law Institute of Victoria, Correspondence to Hon Martin Pakula MP and Hon Gavin Jennings MLC, *Concerns about the Freedom of Information Amendment (Office of the Victorian Information Commissioner) Bill 2016*, 25 August 2016, p. 6.

21 Ibid.

22 *Freedom of Information Act 1982* (Vic), 9859 of 1982, section 49OA.

23 Law Institute of Victoria, Correspondence to Hon Martin Pakula MP and Hon Gavin Jennings MLC, *Concerns about the Freedom of Information Amendment (Office of the Victorian Information Commissioner) Bill 2016*, 25 August 2016, p. 6.

24 Fiona Spencer, Barrister and member of human rights/charter of rights committee, Law Insitute of Victoria, *Transcript of evidence*, 8 March 2017, p. 2; Law Institute of Victoria, Correspondence to Hon Martin Pakula MP and Hon Gavin Jennings MLC, *Concerns about the Freedom of Information Amendment (Office of the Victorian Information Commissioner) Bill 2016*, 25 August 2016, p. 3.

2.1.5 Consultation and review rights

The Bill introduces third-party consultation requirements for a number of existing exemptions under the FOI Act.[25]

Mr Ison raised some concerns about the phrasing of the consultation requirements. The Bill states that third-party consultation is required 'if practicable', however this is not defined in the legislation. Mr Ison believed that Professional Standards introduced by the Bill could help in defining 'if practicable'.[26]

The LIV recommended that the Bill should clarify that an agency should not release documents until the third party's review rights have expired.[27]

2.2 Development of the Bill and consultation process

During the Committee's hearings, the Committee heard issues that arose during the Government's consultation with the two Commissioners during the development of the Bill.

Both Commissioners told the Committee that they were not consulted before the drafting period of the Bill began. However, Mr Ison noted that it was not the role of his office to develop legislation, but rather to administer the FOI Act.[28]

Mr Ison told the Committee that he received a copy of the draft Bill on 24 May 2016 and was invited to provide comments within a three-day period. He also stated that some of his office's input was incorporated into the Bill.[29]

Mr Watts did not consider the development of the Bill a consultation process and was critical of the three-day timeframe he was given for comment:

> … on [24 May 2016] I received a preliminary draft of the Bill; my comments were sought by 27 May — three days afterwards; and on the same day I received a copy of a press release, which was published later that day, from Mr Miller, which said in part that the Bill would be introduced into Parliament and that the Information Commissioner would be adopted. That is not consultation.[30]

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25 Sections 29, 29A, 31, 31A, 33, 34 and 35.

26 Michael Ison, Acting Freedom of Information Commissioner, Office of the Freedom of Information Commissioner, *Transcript of evidence*, 3 March 2017, p. 12.

27 Fiona Spencer, Barrister and member of human rights/charter of rights committee, Law Insitute of Victoria, *Transcript of evidence*, 8 March 2017, p. 2; Law Institute of Victoria, Correspondence to Hon Martin Pakula MP and Hon Gavin Jennings MLC, *Concerns about the Freedom of Information Amendment (Office of the Victorian Information Commissioner) Bill 2016*, 25 August 2016, p. 4.

28 Michael Ison, Acting Freedom of Information Commissioner, Office of the Freedom of Information Commissioner, *Transcript of evidence*, 3 March 2017, p. 12.

29 Ibid., p. 5.

30 David Watts, Commissioner for Privacy and Data Protection, Office of the Commissioner for Privacy and Data Protection, *Transcript of evidence*, 3 March 2017, p. 24.

Mr Watts was also critical that the Bill had been drafted and introduced into Parliament before the current broader review of Victoria's information framework had been completed.[31]

In response to the issues raised by the Commissioners, representatives from the Department of Premier and Cabinet provided a chronology of the Bill's consultation process. A summary is as follows:

- **1 March 2016:** The Department Secretary met with the acting FOI Commissioner to communicate the Government's decision to merge the two offices.
- **3 March 2016:** The Secretary met with the Commissioner for Privacy and Data Protection to communicate the decision.
- **4 March 2016:** The acting FOI Commissioner received a detailed briefing from departmental staff on the proposed policy changes.
- **5 May 2016:** The Commissioner for Privacy and Data Protection received a similar briefing.
  - During both briefings the Department suggested the Commissioners announce the changes to their respective offices at the same time and in advance of a public announcement on the reforms.
- **6 May 2016:** The Department provided the Commissioner for Privacy and Data Protection with a communications plan for use with staff and a more detailed written outline of the reforms.
- **10 May 2016:** The Department provided a similar communications plan to the acting FOI Commissioner.
- **18 May 2016:** The Department provided both Commissioners with a draft media release announcing the reforms. The Commissioners announced the reforms to their staff.
- **24 May 2016:** The Government issued the media release and the Department provided both Commissioners with a draft Bill seeking comments by 27 May 2016.
- **22 June 2016:** The Bill was introduced into the Legislative Assembly.[32]

Mr Miller also clarified that development of the Bill did not include a broader public consultation process. He noted that a number of relevant stakeholder were consulted, including:

> ... public service departments, as you would expect, but included within that was the network of FOI managers, colleagues of [the Commissioner for Privacy and Data Protection] across the public sector, Victoria Police, the Victorian Inspectorate and IBAC, among others.[33]

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31 Ibid., p. 78.

32 Chris Miller, General Counsel, Department of Premier and Cabinet, *Transcript of evidence*, 8 March 2017, pp. 7–8.

33 Ibid., p. 9.

In response to questions from Committee members, Mr Miller confirmed that policy development work was undertaken before any decision on the Bill was made in Cabinet.[34]

The Department's representatives could not comment on the Bill's approval-in-principle in Cabinet.

2.3 Merging of FOI and privacy functions

A key issue discussed at the hearings was the Bill's intention to merge the existing functions of the two Commissioners' offices into the Office of the Victorian Information Commissioner. In the Bill's second reading speech, Attorney-General Hon Martin Pakula MP stated that this intended to bring Victoria's framework into line with similar systems in New South Wales, Queensland and the Commonwealth.[35]

Representatives from the Department of Premier and Cabinet clarified that the structure of the Information Commissioner's office in the Bill differs from those in other Australian jurisdictions. Mr Sam Porter, Executive Director, Public Sector Integrity, told the Committee:

> While the Bill does propose a merger of the privacy and FOI regulators, as has occurred in the Commonwealth, New South Wales and Queensland, the Bill does not replicate exactly the same governance structure in Victoria as exists in the Commonwealth, New South Wales and Queensland … Just to give you a few examples: in the Commonwealth office, rather than clearly delineating the powers and functions that can be exercised by each of the office holders, the Commonwealth office also has an Information Commissioner, an FOI Deputy Commissioner, in effect, and a Privacy Deputy Commissioner. Under that model, the Privacy and FOI Commissioners can each exercise the others' powers, and so in that sense there is not the clear delineation of functions in the same way that this Bill proposes.
>
> The New South Wales model is an interesting model because in that model there are only two Commissioners rather than the three that are proposed in this Bill. In that model what happens is that the Information Commissioner also performs the role of CEO and so, for example, has employment powers and in effect has the strategic control and direction of the office but they are also in their guise as the FOI regulator, with the privacy commissioner sitting separately. In contrast this Bill creates a very clear governance structure, with the Information Commissioner having a broad role and a mandate over both FOI and Privacy and then delineated roles for the FOI Deputy Commissioner and the Privacy Deputy Commissioner so that there is a clear split in the functions.
>
> The Commonwealth and New South Wales models also do not contain any express provision against the responsible minister issuing any directions or purporting to control the office. On the Queensland front I just note that the Queensland

34 Ibid.

35 Legislative Assembly Victoria 2016, *Debates*, vol. 9 of 2016, p. 2868.

> Information Commissioner does not have own motion investigation powers and cannot set professional standards for public officers to follow in dealing with FOI requests.[36]

Mr Porter provided the Department's policy rationale behind the decision:

> ... allowing FOI and privacy to be regulated by a single body first allows for broad oversight of the Victorian government's information management practices, which will support the identification of policy improvements and emerging issues that come up through the privacy and FOI system. Second, the proposal to merge the offices allows one body to manage the overlap between the FOI and privacy regimes and to align regulatory priorities across both regimes. Third, it creates an opportunity to integrate other information management functions into the office in future if that is a decision that the government of the day decides is an appropriate one to make. Fourth, it also partly addresses the deficiencies that the Victorian Auditor-General's Office identified in the former acting Auditor-General's report on accessing public sector information. I just remind the Committee that as part of that report the Acting Auditor-General made findings around a number of issues with Victoria's information management structure and legislation.[37]

The Commissioners had diverging thoughts on this change. Mr Ison considered that combining the functions of the two offices reflects an overarching 'information management' approach:

> ... the benefit from a public policy point of view is intended to give the office greater information management scope. So I see that record keeping, data retention, data security, privacy and access to information through FOI are all part of information management. I think it is interesting that in the comprehensive review of the act that it is not just of the FOI act but also the Public Records Act. So I think there is a theme there about information management and the combining of the offices from a public policy point of view is expected to give greater capacity for a policy role in information management.[38]

Ms Sally Winton, Acting Assistant FOI Commissioner, added that the merger would better inform FOI officers' assessment of personal privacy exemptions under the FOI Act.[39]

However, Mr Watts was critical of the proposed framework and considered it a loss of independence to the office holders. He also noted that it has caused dysfunction in other jurisdictions:

> In New South Wales, the Privacy Commissioner has actually been appointed on a part time basis, and there has been endless conflict between the Privacy Commissioner and the Information Commissioner to the point where I understand the Privacy Commissioner essentially had no staff to undertake her role. They have been subject to complaints, inquiries et cetera, but nothing has ever been done about it. So it has produced conflict within that context.

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36 Sam Porter, Exeuctive Director, Public Sector Integrity, Department of Premier and Cabinet, *Transcript of evidence*, 8 March 2017, p. 12.

37 Ibid., p. 11.

38 Michael Ison, Acting Freedom of Information Commissioner, Office of the Freedom of Information Commissioner, *Transcript of evidence*, 3 March 2017, p. 6.

39 Sally Winton, Acting Freedom of Information Commissoner, Office of the Freedom of Information Commissioner, *Transcript of evidence*, 3 March 2017, p. 6.

> When you talk candidly and off the record to other privacy regulators who have been subject to that sort of regime the unanimous view is that it adds nothing. There are virtually nil connections ...
>
> There was no evidence for the Commonwealth's original position. I have tried to find it. There is none. It has produced a degree of disjunction, disjointedness, difficulty with putting the roles together and trying to make something coherent out of it — the same in New South Wales. In Queensland the privacy commissioner role was left vacant for years and years and years. People have not been well served by that particular arrangement.[40]

Further, Mr Watts addressed the misconception of 'tension' between the two offices. He stated that when necessary both Commissioners will meet to discuss issues or conflict. However, there is very little in practical terms that affects both offices.[41] When asked about potential conflicts with the FOI Commissioner's office, Mr Watts stated:

> If those conversations were necessary to have, we would of course have them, as we have conversations with the Auditor General and as we have conversations with the Ombudsman.
>
> ...
>
> There is no point having regular conversations when there is no regular issue.[42]
>
> ...
>
> I think I answered a question before about the contact between our office and the FOI Commissioner's office. We have brought them along on information sessions that we have done and involved them in Privacy Awareness Week and regional events et cetera, and of course that is a useful thing to do. But in terms of dealing with the privacy exemption or anything like that, the contact is incredibly minimal.
>
> ...
>
> I would tell you if there had been the degree of engagement that indicated to me uncertainty in the relationship between our office and the FOI commissioner's office, and it just has not happened.[43]

2.4 Issues not addressed by the Bill

2.4.1 Consequences of delays to reviews by Commissioner

Section 49J of the FOI Act concerns instances where the Commissioner has failed to complete a review of agency decisions within the 'required period' — 30 days of receiving the review.

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40 David Watts, Commissioner for Privacy and Data Protection, Office of the Commissioner for Privacy and Data Protection, *Transcript of evidence*, 3 March 2017, p. 26.

41 Ibid., p. 23.

42 Ibid.

43 Ibid., pp. 23–26.

The LIV stated that there are two differing views on the interpretation of section 49J:

1. That once the required period expires, the decision taken to be made by the Commissioner exhausts the decision making powers of the Commissioner and the Commissioner cannot subsequently purport to make an actual decision. Unlike the deemed refusal provisions in s 53 where the review right can be cut off by an agency providing a written notice of an actual decision, there is no similar provision enabling the Commissioner to do so in s 49J.
2. Alternatively, that despite a reviewable decision having been taken to have been made, the Commissioner retains power to make an actual decision and that implicitly terminates the review right which existed beforehand in relation to the decision which was taken to have been made when the required period expired. However, we note that this effectively renders irrelevant the need to seek consent of the applicant to extend the required period by consent.[44]

Mr Ison noted instances where agencies disagreed with his office's interpretation of this section. This resulted in agencies rejecting his office's jurisdiction to continue the review and effectively ended the review:

> … under section 49J [of the FOI Act] there is a deeming provision. So we have 30 days to conduct a review or any longer period of time agreed to by an applicant. If the longer period of time expires, then what we say is that the applicants then have a choice. They have a choice to allow us to continue our review or to appeal to VCAT. My view is that our ability to conduct a review is not extinguished until the applicant has actually chosen to appeal to VCAT. This is borne out by practice, because lots of applicants do not give us a further extension of time but still want us to complete our review.
>
> What a small group of agencies — again relying on legal advice — say is that as soon as the extension of time has expired we are out of jurisdiction, and therefore the advice to their clients is not to communicate with us further. We think the legislation should be clarified to give effect to the intention of Parliament. I am confident that the intention of Parliament was that applicants would have a choice, not that their review rights, their ability to have an independent free review by our office, would be guillotined.[45]

To address this, the LIV recommend amending section 49J of the FOI Act to clarify one of the above interpretations.

2.4.2 Consequences of non-compliance by agencies

Similar to the issues raised above, Mr Ison noted that in a small number of instances agencies — particularly in the university sector — have ignored decisions made by his office.[46] The FOI Act provides no avenue to address this,

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44 Law Institute of Victoria, Correspondence to Hon Martin Pakula MP and Hon Gavin Jennings MLC, *Concerns about the Freedom of Information Amendment (Office of the Victorian Information Commissioner) Bill 2016*, 25 August 2016, p. 4.

45 Michael Ison, Acting Freedom of Information Commissioner, Office of the Freedom of Information Commissioner, *Transcript of evidence*, 3 March 2017, p. 4.

46 Ibid., p. 3.

since there is no provision that requires agencies to either comply with decisions made by his office or choose to appeal them at VCAT. As a result, agencies can effectively ignore a decision without consequence. The provisions of the Bill do not address this issue.

Appendix 1
Public hearing transcripts

T R A N S C R I P T

STANDING COMMITTEE ON LEGAL AND SOCIAL ISSUES

Inquiry into the Freedom of Information Amendment (Office of the Victorian Information Commissioner) Bill 2016

Melbourne — 3 March 2017

Members

Ms Margaret Fitzherbert — Chair
Ms Nina Springle — Deputy Chair
Mr Daniel Mulino
Mr Edward O'Donohue
Ms Fiona Patten
Mrs Inga Peulich
Mr Adem Somyurek
Ms Jaclyn Symes

Participating Members

Ms Georgie Crozier
Mr Nazih Elasmar
Ms Colleen Hartland
Mr Gordon Rich-Phillips

Witnesses

Mr Michael Ison, acting Freedom of Information Commissioner, and
Ms Sally Winton, acting assistant Freedom of Information Commissioner.

The CHAIR — Firstly, I apologise for the delay in kicking off promptly at 11.00 a.m. and extend a welcome to everybody to this inquiry into the Freedom of Information Amendment (Office of the Victorian Information Commissioner) Bill 2016. I welcome those who have come to give evidence as well as those who are watching in the gallery. I welcome you, Ms Winton and Mr Ison, very warmly. Thank you for coming along today.

Mr ISON — Thank you, Chair.

The CHAIR — The committee is hearing evidence today in relation to the inquiry into the Freedom of Information Amendment (Office of the Victorian Information Commissioner) Bill 2016, and the evidence is being recorded. Witnesses, welcome to the public hearing of the legal and social issues committee. All evidence taken at this hearing is protected by parliamentary privilege. Therefore you are protected against any action for what you say here today, but if you go outside and repeat the same things, those comments may not be protected by this privilege. Witnesses, I invite you to address the committee.

Mr ISON — Thank you, Chair. Just some housekeeping: firstly, we will introduce ourselves. I am Michael Ison. I am the acting Freedom of Information Commissioner. I was appointed as the assistant commissioner in November 2014 and have been acting commissioner since September 2015.

Ms WINTON — I am Sally Winton. I was appointed as acting assistant FOI commissioner in October 2016.

Mr ISON — Just some quick housekeeping: we have got copies of our presentation for members, so we will hand those to Matt to give to you. We also have arranged through Matt and Patrick for an overview of our office. In case any members have not got that, and for members who are not here today, we have got additional copies available as well. That is just our statutory functions and a broad overview of the office and what we do.

The CHAIR — Thank you.

Mr ISON — Thank you, Chair, and thank you, committee members, for the opportunity to present to you today in relation to the inquiry into what we call the OVIC bill, the Office of the Victorian Information Commissioner bill. We have provided a written copy of an overview of our office and our statutory functions, and what we will briefly address today are some themes that are apparent to Sally and me for FOI in Victoria. I will take you broadly through how the FOI system is operating in Victoria, and Sally will address the impact of our office. Then I will directly address some of the key impacts of the bill as we see them.

The importance of FOI to the transparency and accountability of government is well accepted. Now over 100 countries around the world have FOI legislation. Last year we celebrated the 250th anniversary of the first FOI laws in Sweden and Finland. So it is a well-established principle. Access to government information is also accepted as a cornerstone of participatory democracy. Access to government information contributes to participation and transparency. Participation and transparency contribute to accountability. Accountability produces better government decision-making.

Victorians are amongst the most active FOI users in the country. Last financial year Victorian agencies received over 34 000 FOI applications. That is far more than any other state, but not as many as the commonwealth. In 68 per cent of applications Victorians received all the information that they applied for. This release rate is largely driven by the health and hospital sector, which has a 93 per cent release-in-full rate and the largest number of applications of any of the sectors. We divide up into four sectors: government, emergency services, hospitals and health networks, and the rest.

At a broad level the trends that we are observing are that the rate of release of documents in full is slowly declining and that the rate of release of documents in part is slowly increasing. The rate of documents being denied in full is remaining relatively steady. Those are broad trends that we are observing.

Individual members of the public account for 84 per cent of all FOI applications in Victoria. The remaining 16 per cent are members of Parliament, the media and organisations. Of all FOI applications in Victoria approximately two-thirds are from people seeking their own personal information. Often it can be a mix, but part of it is seeking their own personal information.

I would like to now hand over to Sally to take you through the impact of our office on FOI in Victoria.

Ms WINTON — Victorians have welcomed the creation of our office, and there continues to be strong and growing demand for our services. Since the office commenced operations in December 2012 we have finalised nearly 3000 matters, including nearly 1700 reviews. Our workload in terms of new reviews and complaints is up over 40 per cent on last year. Just over 1 per cent of FOI applications in Victoria come to us on review each year. We make a different decision to agencies about 40 per cent of the time, and about one-third of those different decisions are significantly different to those made by agencies.

When our office was created, it was Parliament's intention that we would reduce the FOI workload on the Victorian Civil and Administrative Tribunal, or VCAT. We are pleased to report that since the office commenced, the number of appeals to VCAT has decreased dramatically. There were only 72 appeals to VCAT last financial year, compared with an average of 149 a year in the years following the commencement of the FOI act in 1983. Most of those 72 appeals will be resolved before a hearing by VCAT is even necessary.

We are also pleased to report that agency decision-making timeliness has improved since our office was created. In 2011 Victorian government departments and Victoria Police processed only 46 per cent of requests within 45 days. In 2015–16 that figure was over 80 per cent.

Having said all of that, there is scope to improve the FOI system in Victoria. The FOI act was drafted well before the widespread use of computers and the internet, and the FOI system is still largely a paper-based system. It is pleasing to us that a comprehensive review of the act has been announced. The review provides an opportunity for Victoria to modernise its FOI legislation and its practice.

Our office also has its challenges. From time to time some agencies exploit our lack of formal powers to avoid their FOI obligations, and this leads to frustration, delay and sometimes additional expense for applicants. The current legislative arrangements make it challenging for us to ensure that those agencies are acting consistently with the object of the FOI act.

Mr ISON — Thank you for those comments, Sally. The importance of what Sally has just said is that the OVIC bill, if passed, would address some of the challenges that our office experiences in the following way. The bill gives OVIC an expanded review and complaints jurisdiction. For example, OVIC will have the power to review decisions of ministers and decisions of principal officers, such as CEOs of councils or secretaries of departments. It will also have the ability to review claims of cabinet in confidence.

The bill also gives the information commissioner new powers to ensure compliance by agencies — for example, the coercive powers to compel evidence and to compel the production of documents, but also the power to order further quite specific searches for documents — and those are powers that we do not have at the moment. Additionally, there is a similar power to the Ombudsman in terms of conducting own-motion investigations. So those are quite significant new introductions.

The bill also makes procedural improvements to the FOI system in Victoria. For example, it enables the information commissioner to publish binding professional standards to assist agencies in the acquittal of their FOI responsibilities. If the legislation is passed, I think the publishing of those standards quite early will be very important for OVIC.

The bill places greater responsibility on principal officers and FOI officers of agencies, including duties to comply with any professional standards, and introduces criminal offences for obstructing, resisting or misleading OVIC. However, the bill does not address all of the issues experienced by our office, and we hope that a comprehensive review will be able to address the issues that remain.

We recognise the important role that this committee performs in scrutinising this legislation and also the very tight time lines in which this inquiry is operating, so we are pleased to be assisting the committee today and look forward to taking your questions. Thank you, Chair.

The CHAIR — I might kick off and ask a couple of questions, and then I will take it down the panel and everyone will have an opportunity to ask questions. But we do have a significant amount of time for discussion, so I think everyone should be able to ask questions and take the discussion as they see fit.

In the evidence you have just given you said that 'the bill does not address all of the issues experienced by our office' while acknowledging some improvements. Would you like to take us through what you see as the outstanding issues that have not been included in this bill?

Mr ISON — There is a small group of agencies that generally, relying on legal advice, raise procedural and substantive issues with our office that has the effect of delaying, slowing down and sometimes preventing us from completing a review. To do that they raise a variety of legal issues with the current legislation. I do not think we have time to go through them all, but I will give you a flavour of some of the issues — and some of the members will have experienced this directly, I think, particularly Mrs Peulich.

One of the significant issues we are in the process of making recommendations about to the Accountability and Oversight Committee that Ms Symes is a member of is that at the moment there is no provision in the legislation or the OVIC bill that agencies actually have to comply with our decision, or appeal it to VCAT. We have had a small number of times where I have made a decision or the previous Freedom of information commissioner has made a decision — I do not think it has happened to one of Sally's decisions yet — where the agency has just ignored it and we have no powers to address that. So that is a gap in the legislation that potentially could be addressed.

We certainly think there is a general provision in the act, section 49I — and there is a similar provision in relation to complaints — that agencies must assist Sally and me when we are conducting a review. From our point of view, assistance means prompt provision of documents, properly marking up documents and assisting us with questions and inquiries. Again, a small group of agencies relying on legal advice often resist that so we do not get documents promptly. If we get them, sometimes they are not marked up. Speaking to agencies ends up going through the law firms, which is very formal, very technical. So we certainly think that the intention of Parliament was really clear with section 49I. We believe in dealing with public authorities that they should act in accordance with the spirit of that provision, and it is only a small group of agencies that do not.

I think that we also have the issue, which some members will be aware of, that under section 49J there is a deeming provision. So we have 30 days to conduct a review or any longer period of time agreed to by an applicant. If the longer period of time expires, then what we say is that the applicants then have a choice. They have a choice to allow us to continue our review or to appeal to VCAT. My view is that our ability to conduct a review is not extinguished until the applicant has actually chosen to appeal to VCAT. This is borne out by practice, because lots of applicants do not give us a further extension of time but still want us to complete our review.

What a small group of agencies — again relying on legal advice — say is that as soon as the extension of time has expired we are out of jurisdiction, and therefore the advice to their clients is not to communicate with us further. We think the legislation should be clarified to give effect to the intention of Parliament. I am confident that the intention of Parliament was that applicants would have a choice, not that their review rights, their ability to have an independent free review by our office, would be guillotined.

There is a myriad of other issues. I think that gives you a flavour. We are certainly happy to provide the committee with more details if that is of interest.

The CHAIR — That would be very useful. You said there are some repeat offenders, if I recall your term correctly. Are you able to indicate which agencies they are?

Mr ISON — I prefer not to indicate individual agencies, but I can certainly indicate — and it is not necessarily all of the time. Sometimes they will pick and choose. I guess it depends, for the agency, on the sensitivity of the documents. Certainly the university sector — some of the universities are our most difficult agencies to deal with. We do not tend to have these issues raised by government departments anymore, which I am really pleased with. That has taken a fair bit of work. There were a couple that did that we have met individually, and that tends to be our approach. We speak to the FOI officers; if we cannot get a reasonable approach with FOI officers, then from time to time I will escalate to the principal officer and seek that they understand what we need to conduct a review efficiently.

We are very conscious of our obligations under section 49H that we are supposed to conduct our review in a fair, timely, efficient manner with as little formality and technicality as possible. My view is that the approach that these agencies take, based on the legal advice they are given, is a very formal and technical approach.

The CHAIR — I have one other question before I hand over to other members of the panel — that is, as the acting FOI commissioner, what role did you play in the development of this bill?

Mr ISON — The FOI act separates out our role from a policy development role. So under the provisions of the act we do not have a policy development role. We have a role where we can advise the minister but on request from the minister, so it is not a proactive policy role.

The CHAIR — Did the minister make that request?

Mr ISON — No; I have not had a request from the minister. The process, in terms of our involvement with the bill was: I was told by the secretary about the combining of the office — and I think that was 2 March 2016 — and then was given a more detailed briefing by Department of Premier and Cabinet officers. I think that was in April. We might have had discussions in March. I was given, cabinet in confidence, some words, so I could explain to my staff. I was given a copy of a draft bill on 24 May 2016 — that was a Tuesday — and was asked for comments by, I think, the Friday. We gave significant written comments. That was to the Department of Premier and Cabinet. So we gave written comments to the Department of Premier and Cabinet, and then we met with officers from the Department of Premier and Cabinet to talk through those comments. I think that meeting was in the following week, but I cannot recall.

The CHAIR — Was any of the input that you were asked to provide incorporated into the bill?

Mr ISON — Yes. We asked for some provisions to be changed, some provisions to be clarified and some provisions to be taken out. Some of that was picked up — not all of it — and we also picked up a number of errors and typographical mistakes and just did a general tidy-up that would have been picked up at some point.

The CHAIR — Certainly. Thank you.

Mr MULINO — I also have a question around consultation. So you had a meeting in early March —

Mr ISON — Yes.

Mr MULINO — at which it was outlined that there had been a policy decision to merge, and as you say your organisation does not have a policy role per se. At that meeting or the subsequent briefing in April or the period before 24 May, was there an opportunity for you to provide any feedback on the overall approach, or was your input basically limited to that period post-24 May?

Mr ISON — Yes, it was limited to the bill — the draft bill.

Mr MULINO — So you had some discussions up to that point — —

Mr ISON — And those discussions were really understanding the policy decision. So when I met with the secretary of Premier and Cabinet it was to announce that the government had made that decision — or cabinet had made that decision — and of course my first concern was for my staff and what would that mean for our staff. Then the subsequent meetings, from my recollection, with the Department of Premier and Cabinet were about fleshing out some of the detail and potential timing, and then I got a written one-pager that I was not able to circulate but that I read to staff.

Mr MULINO — Given that your organisation has that operational role and not a policy role, then it was really post-24 May trying to draw upon your operational experience —

Mr ISON — That is right.

Mr MULINO — to make sure that that expertise could be drawn upon in the drafting of the particular provisions?

Mr ISON — That is right.

Mr MULINO — Yes, okay. So then there was written feedback and a subsequent discussion?

Mr ISON — Yes.

Mr MULINO — In the dot points on page 2 of the document you talked about some of the challenges that your office faces which the bill addresses. I am just wondering: could you also provide comments on any benefits that you see might arise from merging the FOI function and the privacy function under the overarching OVIC role?

Mr ISON — From a public policy perspective, and having spoken to interstate colleagues — I am in the fortunate position that Elizabeth Tydd from the Information and Privacy Commission of New South Wales and Rachael Rangihaeata, the information commissioner from Queensland, have been a terrific support to me as acting commissioner — the benefit from a public policy point of view is intended to give the office greater information management scope. So I see that record keeping, data retention, data security, privacy and access to information through FOI are all part of information management. I think it is interesting that in the comprehensive review of the act that it is not just of the FOI act but also the Public Records Act. So I think there is a theme there about information management and the combining of the offices from a public policy point of view is expected to give greater capacity for a policy role in information management.

Mr MULINO — Could you argue that in a sense you have got a series of principles now that we have developed as a government through the privacy commissioner around privacy and there is also a series of principles around freedom of information and that that could arguably help to dovetail those principles?

Ms WINTON — Commissioner, I was going to add that I think it is common ground that a large proportion of the information sought under FOI is for individuals' own personal information, so I think that the merge with privacy can only better inform our officers' assessment of the personal privacy exemption in the FOI act.

Mr MULINO — Just one final question of a more logistical nature: has there been a medium-term trend up in compliance with time lines?

Mr ISON — Yes.

Mr MULINO — What is driving that? Is that better data management, more resourcing or a combination of things across different agencies?

Mr ISON — I certainly do not think resourcing. I think what we are seeing is a trend of increasing applications. It went up and down for a couple of years, but overall the trend is pretty solidly increasing. I think the recruitment and retaining of good FOI staff is a challenge for all FOI units, particularly the large FOI units. Certainly the spotlight that our office has brought to agency practices has helped, and the work of other offices like the Ombudsman and the Auditor-General has brought a spotlight to some practices and made those practices accountable. I think it is a combination of factors. But I do not necessarily know that it is a significant increase in resources; I think that is a challenge for everyone.

Mr O'DONOHUE — Thank you very much for your evidence today. Just so I am clear again on the process: government made the decision, bill drafted, you were then consulted.

Mr ISON — Yes.

Mrs PEULICH — Did you receive any advice beforehand?

Mr ISON — Sorry?

Mr O'DONOHUE — Mrs Peulich asked: did you receive any advice from the minister about these changes or was that all done through the secretary of DPC?

Mr ISON — No, it was through the secretary.

Mrs PEULICH — And did you provide advice to the minister ahead of the draft bill?

Mr ISON — No.

Mrs PEULICH — Your office provided no advice to the minister before the drafting of the bill?

Mr ISON — No.

Mr O'DONOHUE — Can I just take you to the review that is being done?

Mr ISON — Yes.

Mr O'DONOHUE — Who is conducting that review?

Mr ISON — I do not know. It was announced by the minister in May last year. The details of the review have yet to be announced, to my knowledge.

Mr O'DONOHUE — Have you provided input to that review?

Mr ISON — No.

Mr O'DONOHUE — The review is scheduled to report in March is my understanding.

Mr ISON — I think that comment was made in the second-reading speech, yes.

Mr O'DONOHUE — So is that still your expectation?

Mr ISON — I do not know the details of the review, sorry.

Mr O'DONOHUE — You do not know who is doing it?

Mr ISON — No.

Mr O'DONOHUE — You do not know the terms of reference?

Mr ISON — No.

Mr O'DONOHUE — You do not know how far advanced it is?

Mr ISON — I do not think it has commenced, so I do not know. And I should clarify, I have seen the terms of reference but not been consulted on the terms of reference.

Mr O'DONOHUE — To your knowledge, are those terms of reference being distributed? Are people now responding to those?

Mr ISON — Not to my knowledge.

Mr O'DONOHUE — In the second-reading speech it was said the review would be completed this month. It is probably fair to say, based on your advice, that that is unlikely to be achieved.

Mr ISON — I would think that is unlikely, yes.

Mr O'DONOHUE — Given the central role you play in FOI, one would assume that you would be a key stakeholder in responding to the terms of reference. I have got more questions but I will leave it there so other members can ask some questions.

Mrs PEULICH — Mr Ison, have you had any formal or informal discussions with the Department of Premier and Cabinet or the Special Minister for State regarding taking on one of the redefined roles outlined in this bill and, if so, which role?

Mr ISON — When I met with the secretary and the secretary announced the merging of the office, I asked the secretary — I cannot remember exactly how I put it — 'What does that mean for my position in terms of the new roles?' and was told that I would be welcome to apply for one of the new roles.

Mrs PEULICH — So was this just the provision of information or was it encouragement?

Mr ISON — I certainly did not see it as encouragement.

Mrs PEULICH — So given that your present role is to be abolished and your appointment terminated, and you have been encouraged to apply, are you aware of the termination arrangements should you decide not to apply?

Mr ISON — I raised that with the secretary, but I do not think there are termination arrangements. What was indicated to me was similar to, I think, my colleague Mr Watts, which was the normal executive contract provides for four months notice of termination. What I indicated to the secretary was that I do not have an executive contract — I was appointed by Governor in Council and I have terms of appointment. Some Governor in Council appointments are backed by an executive contract; my appointment was not.

Mrs PEULICH — So if you decided not to apply, where would that leave you?

Mr ISON — If I decided not to apply?

Mrs PEULICH — Yes.

Mr ISON — I do not know. It would leave me without a position.

Mrs PEULICH — Okay. You have sort of intimated that there have not been any meetings with the minister or others since the bill was introduced, but can you just put that on record: have you had any meetings with the Special Minister of State since this bill was introduced and, if so, what is the nature of such meetings?

Mr ISON — The Special Minister of State came to our office in late June, and that was more a meet and greet. So we introduced the Special Minister of State, we had a high-level discussion — not specifically about the bill, from memory — and then introduced the Special Minister of State to our staff and conducted a tour of the office.

Mrs PEULICH — So did this high-level discussion canvass the policy context for the reforms which are being introduced?

Mr ISON — Not that I recall.

Mrs PEULICH — You are quite confident of that?

Mr ISON — I beg your pardon?

Mrs PEULICH — Quite confident of that?

Mr ISON — Yes. The discussion was a meet and greet. It was not intended to be an execution of formal business.

Mrs PEULICH — But you did say a high-level discussion. So a high-level meet and greet?

Mr ISON — Yes.

Mrs PEULICH — Was that with champagne?

Mr ISON — I am not trying to be evasive there. We did not have a formal agenda. It was just a discussion, an opportunity for me and our chief operating officer, Ted Lipiarski — at that point Sally obviously had not been appointed; Sally was not appointed until October — to meet the minister.

Mrs PEULICH — Thank you. Another two brief questions, if I may. You mentioned that your view is that the reforms would strengthen the interests of Victorians in terms of being able to access information. You do not believe that the merger of the two offices, being privacy and data protection and FOI, are inherently in conflict? It is a bit like consumer affairs and small business — putting them under the one banner is a bit difficult. I am a bit confused that you do not recognise that there are some inherent contradictions there, and conflict.

Mr ISON — It is not that I do not recognise those. My view, as I think Sally indicated, is that by bringing privacy and freedom of information together — I think freedom of information appropriately recognises and allows for privacy, and I think we can improve our FOI practices by learning from privacy, and we are already

seeking to do that through meetings and discussions with the privacy staff. I think that for the privacy people, they can learn from our practices that FOI is not a threat.

I have read that for some they see it as an inherent tension. I see it as part of a continuum of information management, and the personal privacy exemption in Victoria is particularly strong.

Mrs PEULICH — You do not see it as a centralisation of the management of information?

Mr ISON — It certainly can be in some respects. As I explained before, with the different features of information management that merger would bring together some of them together and certainly give you greater weight to be able to drive policy and to drive leadership. I think it was one of the criticisms the Auditor-General had in his 2015 *Access to Public Sector Information* report — the lack of information management leadership across government. Whether that will be effective is a matter for others, I think.

Mrs PEULICH — So whilst it could lead to improvement, it could also lead to a constriction of access if that was so inclined in terms of the policy settings that obviously you have stated you have no input into. If you merge the two offices and they do not report respectively to Parliament, how is this strengthening those roles?

Mr ISON — Sorry, I do not follow.

Mrs PEULICH — The reporting mechanisms of the new office: how do they differ from the previous arrangements?

Mr ISON — I think the reporting mechanisms are not changed, so the information commissioner will report to accountability and oversight. So I do not think that changes. I am assuming that the information commissioner, from my reading of the bill, will still be a Governor in Council appointment, so I do not think that at that level it changes.

Mr MULINO — Yes, that is correct.

Ms HARTLAND — I have had about three decades of experience with FOI. Usually it has been a dismal failure. I was one of the 72 last year who appealed to VCAT, and I found it a really terrible process and extremely costly, and I still did not get the documents I was looking for. In terms of community, I have not found it to be a very successful way of community members being able to get the information they need. Now, most of my experience previously has been around the chemical industry, trying to find out what was going on in the local community. Since then it has been on things like the western distributor et cetera. How do you see this bill changing access for the community? Do you see it as a way of simplifying it and making it easier for people to access, or will it be more complicated?

Mr ISON — I certainly do not think it will make it more complicated. I think it will give the Office of the Victorian Information Commissioner the ability to monitor and require agencies to take action more promptly. You would hope, with the nature of the provisions where there are criminal provisions for principal officers and FOI officers for delaying, for obfuscating and for hindering OVIC, that some of the practices that you and other members might have experienced and been concerned about, I think, would be addressed.

Certainly I think the power to introduce binding guidelines is very useful. I call them binding; under the act they are professional standards. What we have at the moment are professional standards that were promulgated by the Attorney-General in 2014, but they were not prescribed by regulation, so they are a guide only, whereas under the OVIC, the information commissioner would have the power to promulgate binding professional standards. What would a breach of those professional standards mean? It would ground a complaint and then further action in some circumstances. It could trigger those criminal provisions, although you would hope not — that it would never get to that point.

I think certainly, coming back to what I hope is the point of your question, it will hopefully speed up the process. I am not sure, because it does not address the nature of the exemptions, that it will alter outcomes in terms of what is released or not released significantly. It may do. I think the ability to review claims of cabinet in confidence will lead to different practices in that field, because at the moment they have not been subject to review, other than by VCAT. But for community members, which is your particular interest and the focus of your question, hopefully it will speed up the process. I am not sure if it will change significantly the percentage of outcomes.

Ms WINTON — I was going to add that the enhanced jurisdiction for our office in being able to review the decisions of principal officers and ministers, but particularly principal officers, might give members of the community access to the quick, independent, cost-free review that we offer, so I would hope that that would bring about some benefit there.

Ms HARTLAND — We talked about it going to VCAT, which is a pretty onerous process. I had a lawyer, the government sent a team of five lawyers and it was very costly. I was lucky I had lawyers who were prepared to do it for me at reduced rates, but the average community member has no capacity to do that, so I am not surprised there were only 72 appeals last year to VCAT. How do you see this process then, I suppose, stopping people having to go to VCAT to appeal?

Mr ISON — I am not sure it will do that, because I think the comprehensive review of the act, if and when that occurs, is much more likely to address those issues. At the moment we have in Victoria arguably the oldest FOI legislation in the country. The commonwealth legislation was six months earlier, but the commonwealth, New South Wales and Queensland have all revised their legislation. Ours has not been revised in the same manner. We have what we call a pull model of FOI, where if you want information from public authorities, applying under FOI is a first resort. In those other states and jurisdictions, applying under FOI is intended to be a last resort.

Coming back to your question about members of the public, it is something that Sally and I have discussed and I have discussed it with others. We have talked about trying to develop a pro bono representation scheme specifically for FOI matters with the Victorian Bar. The Victorian Bar will be surprised by that when they read this transcript because I have not yet discussed it with them, but we are acutely aware of the issue that you are raising — that often at VCAT there is a significant power imbalance.

Ms WINTON — Commissioner, I might just add that we hope the amendments in the bill will address the issues about delay and impeding our reviews that we have referred to. There are instances where we have to dismiss matters to VCAT where ordinarily we think we should be able to conduct a review, or we are deemed to have refused access to documents because of the expiry of the required period. So we would hope that the enhanced powers in the bill will address that issue to some extent, which should have a flow-on effect for the need for applicants to apply to VCAT.

Ms SYMES — Just sort of staying on the same theme, in terms of delay and the changes to the act to reduce the time and things: what is your observation of requests — it's mainly government departments I am interested in, maybe VicPol? What is your observation of requests that involve a considerable amount of resources? They might be really broad requests and things like that. How do you see that in operation — first of all now, and potentially after that may or may not pass?

Mr ISON — It is challenging on a couple of levels. Without personalising it too closely, we have one applicant who has filed a large number of requests and a large number of complaints this financial year. You understand that is really challenging for agencies. The difficulty is the bar the act is set at: you must go to VCAT, VCAT must have made a decision before you can consider an application to be a repeat application.

So if the applicant does not ever go to VCAT you cannot say, 'Well, this is a repeat application'. What you can do of course — you have done the work, so it will take less time — I certainly think there are some provisions in the OVIC bill around the ability to ask for samples, so we can get a sense of whether we think claims that something is going to divert resources are reasonable or not. I have completely lost my train of thought, sorry.

I think that that will certainly help in that regard. One of the things that we try and do — without having had the documents produced, because under section 25A(1) it is a substantial and unreasonable diversion of resources, and under section 25A(5) it is obviously exempt; the agencies are not required to search and produce the documents — I think the OVIC bill will help in that regard, help us assess some of that. Sally, is there anything you want to add? I am not sure that I have answered your question as directly as I — —

Ms SYMES — Would it be a case that agencies try to do the right thing regardless of whether sometimes they may be voluminous requests?

Mr ISON — I certainly think that is the case. Thank you for that clarification. I certainly think that is the case. I look at Victoria Police, for example — they are now topping 3000 applications a year. So they have got

large volumes of applications. Probably in their case you can break them down into six different types, so it is a very quick process for them.

Compare that to an agency like DHHS — and we can often see that applications, particularly for records for children who have been put into protective custody or wards of the state — the documents can number in the thousands. I think the biggest files that I have seen are TAC files, where we had one that was 4000 documents. What the Department of Health and Human Services tend to do is to try and break them down into parts and say, 'We can reasonably process this number of documents at a time', and have discussions with them about that and about what is reasonable. So, yes, it is certainly a factor.

Ms WINTON — I think what we do typically see is that agencies genuinely make attempts to negotiate to rescope a request that is too voluminous. It would be a rare occasion, I think, where reviews that come to us are not properly applying that provision.

Mr ISON — Yes.

Ms SYMES — Just related to that, because of the example you used in relation to DHHS for sensitive matters like child protection and stuff, would you say that having the privacy element next door to the FOI element in cases like that would work quite well in that the sensitive information has the privacy component versus the information that is being sought? Would that be a classic example of where the merger would be quite beneficial?

Mr ISON — It could certainly assist. The approach we take at the moment is to meet with the agency and try to understand the sensitivity. Child protection matters are incredibly challenging files. They do not really have a start and an end, so it is not as though when we are reviewing documents we can say, 'Okay, well, that matter's come to an end'. Sometimes the involvement of DHHS may have come to an end, but if another incident happens, then they will reactivate the file. So you have got to be very careful about what you release because you can do great damage. So, yes, certainly there are potential benefits from that. The challenge for us as a commission is to understand the work of the agencies whose documents we are reviewing, and that is really where we need to have constructive working relationships, and then, yes, to have a better understanding of those principles of privacy and other issues that go with that.

The CHAIR — Commissioner, thank you for the very open evidence you have given about the process that you have gone through to this point. I appreciate that you have described some events that you no doubt found uncomfortable as they occurred. You have told us about being briefed about a cabinet decision that would have significant impact on your own role and your agency that you were not consulted about prior to that. You have told us about discussing issues to do with the determination of your role and the feasibility of you applying for the new role and then the brief visit that the minister has made to your office that was a 'high-level discussion', in your words, if I have recalled them correctly. I do not want to make you feel uncomfortable, but I guess the obvious question is: how did it get to this point?

Mr ISON — I do not think that is a question I can answer, sorry.

The CHAIR — Thank you. I have a second question. In terms of combining the two roles in the way that we are discussing and the terms of this bill, has there been any work done on the cost of that?

Mr ISON — Not to my knowledge. The approach has certainly been that we have — as Sally indicated, our workload is up significantly this year and so that is certainly our focus — to get through as much of the transactional work as we can. We are moving more strongly into the education space. We are starting to deliver face-to-face education from March — technical training about the act for FOI officers. Accountability and Oversight has an inquiry on the books at the moment about our education and communication activities. That reflects my concern that private providers are teaching 'freedom from' rather than 'freedom of' information. We have given Accountability and Oversight information about that.

We are also communicating much more directly and more regularly with agencies. We now have a monthly bulletin. We are still running forums. We have developed a round table with general counsel for the health sector to look at proactive release, consistent again with Accountability and Oversight's recommendation in that regard. So we are doing a lot. We really have not done any significant preparation for OVIC yet until we see the passage of the legislation. We have redone our corporate plan and our business plan for the next two years so

that we are really clear on where we are going and what we need to be doing and then if and when the legislation gets through, we will revisit and reset. So that has been our approach to date.

Mr MULINO — Commissioner, the processing of FOI requests is quite a complicated task, both in terms of logistics but also often the judgement that is required. It is also quite a decentralised task in that there is a large number of agencies having to undertake this. You have referred to professional standards in your submission. I am just wondering if you could talk us through a bit about how the ability to publish binding professional standards — I suppose with the aim of improving professional standards and improving capacity across agencies — how that might help with complying with FOI processing standards.

Mr ISON — Sure. We conducted a detailed training needs analysis in September last year, basically asking agencies what training they currently receive, what training needs they identified they had, what training and education they were interested in and, when they became FOI officers, what training support they get and what resources they have available as FOI officers. Over 250 agencies responded to that training needs analysis, so that has given us a good body of information around what the training needs of agencies are, in particular FOI officers, so that will help inform what we may put in professional standards.

We need to remember, and one of the challenges we have is that the FOI act, as with all modern legislation, is enabling legislation. It is not like the old legislation, which was very prescriptive, and unless you could find a provision in the act, you could not do something. This is legislation that is enabling. So, for example, if you look at section 49I it says that 'agencies must assist' our office in conducting a review. It does not say any more than that. I think the Parliament intended that agencies would give us whatever assistance was necessary to further the object of the act, which is to release as much government-held information as possible at the lowest cost possible.

What we can do in professional standards potentially is put some meat on those bones. We can provide some details as to what we as the commission, or the information commissioner as the head of the Office of the Victorian Information Commissioner, can do to put some meat on those bones — the provision of documents within certain time lines, marking up of documents, answering questions. So professional standards will enable us also to potentially provide guidance. When you look at the OVIC bill, it introduces mandatory third-party consultation. At the moment you have third-party consultation for section 33, personal privacy for section 34, business financial commercial information and trade secrets. What the OVIC bill does is extend that to section 29, from memory — here is a memory test — section 31 and section 35, material obtained in confidence. Section 31 is law enforcement. The consultation is mandatory, subject to it being 'if practicable'.

One of the things we know that agencies want guidance on is what 'if practicable' means. That is where the professional standards can assist. You can give agencies guidance about that and in a way that is hopefully meaningful to them. I think the provision in the bill around how professional standards are to be developed and promulgated with public consultation is appropriate.

Ms WINTON — I think it is also really important for the committee to note that failure to comply with binding professional standards can ground a complaint to our office. So in that sense it enhances our jurisdiction to oversight and encourages agencies to apply best practice.

Mr MULINO — And while the overall rate of compliance has been tracking up for some time now, as you referred to — since 2011, I think you referred to as the starting point of your trend — when there are more than 250 agencies it is going to be important to track whether some of those agencies are finding it challenging, notwithstanding the overall improvement. It sounds like this strengthening of professional standards across the board should help with both identifying and capacity building where appropriate.

Mr ISON — I think so. I think capacity building is important. I think it is an important concept. I come back to what Sally said before, and I think I wrote this in my first annual report, that the vast majority of FOI officers and FOI agencies are trying to do the right thing. It is about us supporting their capacity to do the right thing and working within the constraints of the current system. I see it as Sally's and my responsibility and our office's responsibility to administer the legislation that we are given, and it is the responsibility of the Parliament to decide what that legislation should be.

I think, as we have touched on, there are a small group of agencies that do not fit into that mould and rely on legal advice to take a different approach. It is not always that they do that. It is at times. So, yes, I think professional standards can play a valuable role.

When we did the training needs analysis it was apparent that there is a very wide demand for different sorts of FOI training. Some people wanted online — not many, most people wanted face-to-face — some people wanted a comprehensive manual, so there are different needs and those will have resource implications. Certainly from speaking to officers at the Office of the Australian Information Commissioner, they have guidelines — there is a debate as to how binding they are — but they talk about it taking them two years to fully develop their guidelines. They divided them into chapters and did different chapters according to what their priorities were.

Mr MULINO — One final quick question. This relates to reviews of claims of cabinet in confidence. My sense from what you have said today is that you feel this proposed new regime, if anything, will make decision-making in relation to that category of documents in particular more transparent than it has been.

Mr ISON — I expect so. At the moment if there is a claim of cabinet in confidence, then it is outside of our jurisdiction, so we do not ever review those practices. The claims of cabinet in confidence are not statistically large. It was around 76 not last financial year but the financial year before that. I cannot remember off the top what it was last year. I think it was 160-something, so in terms of 35 000 applications it is not statistically large, but I suspect that that will become a significant body of work initially for our office until there is a body of practice that develops around it. So I think you are right. I think that it will increase the transparency.

Mr O'DONOHUE — Thank you, Mr Ison, for your evidence. You have described the benefits of the new model, and Mrs Peulich has asked questions of you about the inherent conflict that may exist in that. Can I ask you: do you have any concerns about an overarching information commissioner that an assistant FOI commissioner would then report to, in the context that it could diminish the independence of the current framework?

Mr ISON — There has certainly been a change to the public policy setting. The usual arrangement, to my knowledge, has been that these Governor in Council positions report through Parliament and are dismissed with a parliamentary process, so clearly with the creation of the two deputy positions, as my colleague David Watts has identified, there has been a change to that, and from a public policy point of view there could be an argument that that diminishes independence.

I think for these issues a lot comes down to who gets appointed, in the sense that when I am exercising my decision-making function — and you know from time to time you are going to be required to make decisions that are controversial — my focus is on my responsibilities as a commissioner, not whether that will be good or bad from a political or other perspective. So I am just focusing purely on the decisions that I have to make, and you would hope that anyone that is appointed to a Governor in Council position would take a similar approach.

The tension arises periodically anyway because you come up for reappointment, which is a decision that the executive recommend through to the Governor in Council, so there is always that tension there at some point. I was appointed as assistant commissioner for five years, so I am effectively — I have not done the numbers — 26 months, I think, into that 60-month appointment. So from a public policy point of view I understand the point. It is not something that I have reflected on. It was not something that I picked up in our initial review of the bill; it was something that I picked up from my colleague David Watts's analysis.

Ms WINTON — Mr O'Donohue, just in relation to the relationship between the commissioner and the deputy, which I think is where your question was going, I do note section 6S of the bill will maintain the current arrangements, which are that the deputy does not report to or cannot be directed by the information commissioner in the performance of their functions — their review and complaint-handling functions.

Mr O'DONOHUE — I suppose, Mr Ison, to pick up your point about it getting down to who is appointed, if we are relying on good appointments to maintain the integrity of the system, then we have got a failure in the design of the system, because the design of the system itself should maintain that integrity, and you have described the tension that currently exists with the Governor in Council appointment but that appointment reporting to the Parliament. I suppose my point to you is that that tension will only increase when that appointment reports to the executive as opposed to the Parliament itself.

Mr ISON — Yes, from a public policy point of view, I think the point is well made. From a personal point of view, it is not something that has occupied my mind particularly. For me it is an honour and a privilege to be the acting commissioner, and to be appointed to either the information commissioner, public access deputy commissioner or any other role would be a privilege to serve. The work that our office does — I know this is slightly off topic — makes a real difference to the lives of Victorians every day, and for as long as I am asked to be in the assistant commissioner role, I consider it a privilege to do that.

Ms SYMES — Sorry, I wanted to come back to me because this is directly a comment/question following on from Mr O'Donohue's comments. In instances where you have got three officers that are potentially unable to be dealt with except through the Parliament and with personality clashes which are reasonably public, having happened in other states and potentially here, do you consider that not having to go through the hoops of two houses of Parliament may in fact actually enable a smoother functioning of offices when you do have those personality clashes?

Mr ISON — Just as a starting point, as I said earlier, Elizabeth Tydd in New South Wales and Rachael Rangihaeata in Queensland have both been a terrific support, and I respect both of them and their professionalism enormously, so I certainly do not feel comfortable commenting on their offices. I am also not sure that it is a personality clash or whether it is a failure to accept a governance model. So from my point of view, if I was appointed to one of the roles, either as information commissioner or public access deputy commissioner, then my duty to the Parliament and to the people of Victoria is to make it work as best I can, and that is what I would seek to do. I think either model can work, I think either model can have problems and I think we have seen that under both models. So that would be my approach to it, and that is my view on it.

Mrs PEULICH — Thank you, Mr Ison. Just going to the culture and application of the existing legislation and then the proposed reforms, you made comment that some agencies just do not fit into the mould. So when I made an application through freedom of information for documents relating to me since the election and that was declined, is this a symptom of the culture or do you think that they were invoking that on the grounds of privacy?

Ms SYMES — Have you made a complaint to — —

Mrs PEULICH — I am not asking you; I am asking the witness.

Mr ISON — You are asking about the principle, not about the individual case.

Mrs PEULICH — Yes. You did say that some agencies do not fit into the mould, and is this an example of some agencies not fitting into the mould?

Mr ISON — I am not sure I understand the question, sorry.

Mrs PEULICH — Right, so when I made an FOI application to the Department of Premier and Cabinet for documents relating to me, Inga Peulich, and that was declined, is this an example of some agencies not fitting into the mould or do you think they could somehow in a convoluted argument argue that they were protecting my privacy?

Mr ISON — I do not know that they could argue — —

Mrs PEULICH — No, I am just being cynical.

Mr MULINO — No, just vexatious.

Mr ISON — I do not know that they could argue they are protecting your privacy from yourself.

Members interjecting.

Mr ISON — Sorry?

Mrs PEULICH — I am more interested in what you have to say than in their interjections.

Mr ISON — Sure. I think it is difficult for me to comment on that. I can make observations about the FOI system, but I am loath to comment about individual cases or individual examples, because I just do not know the circumstances.

Mrs PEULICH — Okay. Perhaps you may be able to comment on this example.

Mr ISON — Sure.

Mrs PEULICH — Freedom of Information review, DPC and me — Inga Peulich, MLC — reference C/16/00673. On 16 May 2016 I applied for a review of a decision. That was 16 May 2016. On 10 February 2017 the commissioner's office requested an extension in time to 15 February 2017, which was granted. The decision is dated 10 February but was not received until 23 February. This review took 270 days from 16 May to 10 February, much longer than 30 days, being the defined required period under section 49J(3) of the act. What would you attribute this sort of delay to? Is it resourcing or is it a failing of the existing system?

Mr ISON — I will talk at a high level rather than talking about that individual case, because I do not have the details before me.

Mrs PEULICH — The time lines, however, are accurate.

Mr ISON — Absolutely. I understand the point of your question. The conduct of a review is very fact and circumstance specific, so it depends on a number of factors: the cooperation received from the agency; how quickly we get the documents; the number of documents involved; and the number of exemptions applied. The more difficult reviews are those reviews with a large number of documents and multiple exemptions applied to each document. Typically you will see section 30 internal working documents, section 33 personal privacy, section 35(1)(b) material obtained in confidence and section 38 secrecy provisions. Often you will get a combination of those applied. It really is very case specific. Certainly the process for review with our office in relation to some agencies tends to be longer and more formal than what you would like and what I would hope for. But I cannot make a general comment about the time lines of reviews. Some are very quick; some are very long. I am not sure that I can make much more of a value judgement than that.

Mrs PEULICH — A last question in this round, if I may. We have got the bill. It is in the Parliament, but the root and branch review has not begun?

Mr ISON — Not to my knowledge.

Mrs PEULICH — It certainly has not been concluded and the recommendations have not been given a public airing. Do you think there is a bit of a problem with the process?

Mr ISON — In what respect?

Mrs PEULICH — Having legislation and then having a review afterwards. What happens if the recommendations coming out of the review are contrary to the legislation?

Mr ISON — It is a matter for the Parliament. It is not a matter I have input into or our office has input into or control over. The review has been announced by the minister; it is a matter for the minister. The legislation is a matter for the Parliament. What we are trying to do today is assist you in your consideration of the legislation.

Mrs PEULICH — And we want to make sure that we have got the best system moving forward. I for one would be very interested in knowing what the review generates.

Mr ISON — Sure. I think it is a matter of public knowledge that this legislation was not a comprehensive review. It was intended to be not a step in the process, but it was intended to respond to election commitments and has certainly gone beyond that. From our office's point of view, we certainly welcome the comprehensive review whenever that may occur. And I see it as our responsibility to assist that review, as we are assisting the committee today, as much as we can.

Mr O'DONOHUE — I have got just one final question, and it flows from the discussion on several questions regarding the consultation process. In an operational sense, what does that look like? Do you talk it

through with one of your staff, pick up the phone to the minister's office or the agency's FOI person and then have a discussion about how you can work it out? Can you just talk to that?

Mr ISON — Sure. When matters come into our office we triage them; we make an assessment of whether we think they can be resolved informally.

Ms WINTON — It might be about the bill. Is your question about consultation on the bill?

Mr O'DONOHUE — My question is as put.

Mr ISON — It is about how we consult?

Mr O'DONOHUE — Sorry, yes. Not on the bill itself — how you consult with stakeholders when a review is requested, or how your office in an operational sense deals with those.

Mr ISON — Yes. We do that initial assessment, and if we believe a matter, whether it is a review or a complaint, can be resolved informally, then we will speak to the parties. For example, on a review, by the time the documents come in you might get the documents and all the applicant has got is documents with a whole bunch of redactions, so they cannot see what has been deleted. We can look at that and see, 'Okay, it's only email addresses or mobile telephone numbers'. Often we will ring up the applicant and go, 'Are you really interested in this?'. Sometimes they will go, 'No', and you can resolve the matter quite quickly. That is a really simple case.

On complaints — and you will probably have complaints of interest to members of the committee — sometimes what you will see is departments seeking clarification and asking applicants to go through what can sometimes be a quite lengthy process of clarifying their application. We will speak to the applicant and find out what they have done, and come to an understanding of why they are applying for information and what they are seeking, noting that under the act everyone has a legal right to apply for information. You do not have to have a reason. Then we work with the agency. We will often have a disagreeing view, and we will put our view quite forcefully that we think this is clear and this can be processed.

Then sometimes it will be about delay. We will contact an agency and say, 'This decision is overdue. What is the reason for the delay, and when will a decision be made?'. It is about reporting that back but also then following up with the agency to stay on their case.

The challenge for us is that at the moment we do not have many formal powers. We have got the power to compel production of documents in complaints, which is not a power that we have used, because really in complaints you are trying to find the common ground, not the points of difference. It really is at that very basic operational level trying to find out what is going on and communicating. A lot of the issues in FOI are about communication. We have put on our website, for example, a template decision letter where we encourage agencies to record in their decision letter what searches they have undertaken, because so many complaints are about people thinking there has not been a sufficient search. So it is very operational.

Mr O'DONOHUE — Thank you. That is very helpful.

The CHAIR — I have an additional question, and it relates to a specific case. I want to ask you about the general practice, not what happened in that case, which I will not identify, but it was an FOI application that I made to a government department. It took ultimately, I think, about 14 months to get an outcome in that case. There were delays at every point. I did get your office involved. I was very happy with the service I received. There was a lot of negotiation. The claim was amended in major ways along the way. Ultimately the stumbling block was that when a decision had been made by the FOI officer and money had been paid for the release of documents it was then left with the minister for noting, for I think a couple of months, and there were multiple requests along the way to the FOI officer, who I think was increasingly embarrassed by what was happening. I said, 'A decision has been made. I am entitled to those documents, and when may I have them please?'. Is there anything in the bill that would address that situation, and is that a situation that you see commonly?

Mr ISON — It is certainly not uncommon in terms of member of Parliament applications. It is at times a challenge to work out what the hold-up is and where it is occurring. I do not think it is typically but it sometimes can be at FOI officer level. I think it is challenging for FOI officers at times.

In terms of the bill, potentially we can address some aspects of that process in the professional standards. The challenge we have got is making sure the professional standards do not exceed their source. But you would certainly expect that the coercive powers would put all parties in the FOI process on notice that they may be called before the information commissioner to directly explain their actions or lack of actions. I think that is quite a significant power.

At a systemic level there is potential for own-motion investigations to look at systemic issues. Those are, as they sound, own motion, so it is for the information commissioner to decide, so long as the investigation relates back to the functions and actions taken under the act.

The CHAIR — Thank you. Is there anything further that either of you would like to add?

Mr ISON — I do not think so. We would like to say thank you for the opportunity to appear before the committee today. We respect the work of the committee, as we do the work of the Accountability and Oversight Committee. I hope our evidence has helped the deliberations of the committee, because as best as we can we have tried to answer openly and fully. We understand that you are working within tight time lines. Just to confirm, we will get you a more detailed list of issues that we see have not been addressed. I think you asked for that early on. I think that is the only follow-up.

The CHAIR — I believe that is the only follow-up. That is my understanding as well.

Mr ISON — As I said, we will leave copies of the overview of our office with Patrick for the other committee members. I think Hansard will probably want an electronic copy of our presentation, so we will provide that as well to Patrick.

The CHAIR — Thank you very much. On behalf of the committee I thank both of you for coming today and for giving evidence. We appreciate that this is an inquiry that has come about very quickly. Thank you for making yourselves available and for being generous with your time. You will receive a copy of the transcript of today's proceedings within a few weeks for proofreading.

Mr ISON — Thank you.

Witnesses withdrew.

T R A N S C R I P T

STANDING COMMITTEE ON LEGAL AND SOCIAL ISSUES

Inquiry into the Freedom of Information Amendment (Office of the Victorian Information Commissioner) Bill 2016

Melbourne — 3 March 2017

Members

Ms Margaret Fitzherbert — Chair
Ms Nina Springle — Deputy Chair
Mr Daniel Mulino
Mr Edward O'Donohue
Ms Fiona Patten
Mrs Inga Peulich
Mr Adem Somyurek
Ms Jaclyn Symes

Participating Members

Ms Georgie Crozier
Mr Nazih Elasmar
Ms Colleen Hartland
Mr Gordon Rich-Phillips

Witness

Adjunct Professor David Watts, Commissioner for Privacy and Data Protection, Office of the Commissioner for Privacy and Data Protection.

The CHAIR — If everyone is ready, I think we will commence proceedings again. Mr O'Donohue is going to join us again in a moment. Mr Watts, I know that you have seen who is who from sitting in here earlier so I do not propose to go through the introductions again.

Mr WATTS — Chair, thank you for that. I am having a lot of difficulty hearing you. I have the flu. One of the things I am suffering from are problems with hearing and balance, so let us see how we go, but I could hear you better down there.

The CHAIR — I will speak up and hopefully that will be better. I do want to acknowledge that I understand you are unwell, so I do not want to prolong your agony any longer than is necessary. I particularly thank you for coming in today in those circumstances. Welcome to this public hearing of the Standing Committee on Legal and Social Issues. All evidence taken at this hearing is protected by parliamentary privilege. Therefore you are protected against any actions for what you say here today. If you go outside and repeat the same things, those comments may not be protected by privilege. I would invite you to address the committee, if you wish, and ask that you please keep any opening statement to about 5 to 10 minutes.

Mr WATTS — I have been unwell all week so we have not produced a submission for the committee on this occasion. However, our views are pretty clear — or my views are pretty clear. We published a document on 16 August 2016 entitled 'Amendment of privacy and data protection legislation'. It is a document that was published on our website. Then we published another document on 19 August 2016, which answered questions that had been raised by an unnamed government spokesman about the supposed consultation that occurred in relation to the bill. I stand by both of those documents, and I would be happy for them to constitute what our broad submission is in relation to the issues before the committee.

The CHAIR — Thank you. In that case I might start questions and just ask: as the Commissioner for Privacy and Data Protection in Victoria, what part have you played in the development of this bill?

Mr WATTS — None.

The CHAIR — None whatsoever?

Mr WATTS — None.

The CHAIR — So how did you become aware of the bill?

Mr WATTS — This is in fact the anniversary, the one-year anniversary, of me being told about it, ironically enough. So a year ago today I had a meeting with Chris Eccles; the meeting is recounted in the 19 August document. He said that the government had decided to draft legislation to merge our office with the FOI commissioner's office; that there would be an information commissioner and two deputy commissioners — I have referred to that structure as the information commissioner model — that both my role and the FOI commissioner's role would be abolished; that if I unsuccessfully applied for the Information Commissioner role, I would be offered four months in lieu of notice although I was not entitled to it. He also said that if I did not apply for it, I would be offered four months salary in lieu of notice, and he apologised for the appalling way I had been treated by DPC.

The CHAIR — You referred earlier to a couple of documents and said that you wanted to let those stand as your submission. Is it possible for us to get copies of that now?

Mr WATTS — Over which document?

The CHAIR — You referred earlier, I think, to a couple of reports of the circumstances in which you became aware of the bill and so on.

Mr WATTS — I have got copies for my own benefit, but I have not brought copies for the committee's benefit.

The CHAIR — I just thought it might make it a little bit easier if we could see the documents that are being referred to. Possibly one of the staff may be able to assist with that just while we wait.

Mr WATTS — They are on our website, and they are under 'What's new'.

The CHAIR — Just to follow up, then, Mr Watts, what do you understand were the reasons for you being left out of the development and consultation processes in relation to this bill?

Mr WATTS — I have no idea. The bill was developed, as I understand it, in complete secrecy and did not even go through the normal processes for coordination and comments. I know the department of justice did not see it, for example, before it got to cabinet.

The CHAIR — So what was the process?

Mr WATTS — Look, I could only speculate, but I think it was developed within the Department of Premier and Cabinet — certainly nothing was ever mentioned to me, and I was flabbergasted to have the meeting that I had with Mr Eccles — and that it went directly from DPC to cabinet. But that is an assumption, and the assumption is that it would have to get to cabinet somehow. If it did not go through the normal coordination process, then it has gone from DPC.

The CHAIR — Just for the benefit of the record, what is the normal coordination process?

Mr WATTS — Legislation is developed. Relevant parties within government would be consulted about it. A proposal to draft legislation would be produced. It would be circulated for coordination — and I actually forget the time periods. I used to do this often. Seven days seems to be my memory of it, but that might be my commonwealth memory of it. Departments would comment on it and brief ministers. It would go to the next cabinet meeting. Cabinet would make a decision.

The CHAIR — My understanding is a range of agencies or departments would usually be included in that consultation process as well for such a submission.

Mr WATTS — Yes. And in relation to a piece of legislation like this, where FOI in particular is quite a hot topic, there had been no consultation with the public and no consultation with key stakeholders.

Mr MULINO — I had a couple of follow-up questions on the process, and then I would be interested in your thoughts on a more conceptual issue. Just to drill down a little, you had a meeting with Mr Eccles, I think on the third, you said, or the second?

Mr WATTS — Yes. It would have been finishing around about now a year ago.

Mr MULINO — The timing is not a conscious decision on our part — an anniversary. The stars align sometimes.

Mr WATTS — No, I only realised it this morning, Mr Mulino, and I thought it was somewhat ironic.

Mr MULINO — Basically you had a discussion. Were there any subsequent discussions with you or anybody in your organisation with DPC around more logistical issues, as occurred with the FOI commissioner, following that?

Mr WATTS — What occurred with the FOI commissioner?

Mr MULINO — Sorry, just to go back a step. I do not know whether you heard any of the evidence from the FOI commissioner on our consultation with that organisation, but he indicated that he had a meeting — I think he said on 2 March — with Mr Eccles. There was then, following that, at some point in April a discussion in relation to some of the logistical specifics around some questions that the FOI commissioner had around how it might work in practice. Then following that, on 24 May, they were also given a draft bill, as you were, on the Tuesday for comments by the Friday. So I guess I am just asking — you have indicated that you also had a meeting with Mr Eccles in early March — to your knowledge was there any engagement with you or anybody in your organisation in March or April in relation to any of the more detailed issues, as occurred with the FOI?

Mr WATTS — No; there was no consultation about logistical issues. So if by that the reference is to what things would need to be done in an operational sense to consummate the marriage, like joining complex IT systems together — particularly ours, which does not run on CenITex and is security graded — certainly there have been no such conversations.

Mr MULINO — Were there any discussions?

Mr WATTS — No.

Mr MULINO — With nobody in your organisation?

Mr WATTS — No.

Mr MULINO — Okay. But basically, in terms of the overarching time line — so, as with the FOI commissioner, you were notified in March and then there was a follow up consultation on the specifics of the bill in late May. So in that sense the time line was similar to what occurred with the FOI commissioner.

Mr WATTS — To be specific about it, on 5 May I had a meeting with Mr Bates, the secretary at DPC responsible for coordinating our relationship, and Mr Porter and Mr Miller, who have variously seemed to slip between acting general counsel roles — I do not know who was in which capacity at that meeting. At that meeting I was told that the bill would only amend governance arrangements in relation to my legislation — so the only material change would be to the governance arrangements, i.e., my position, that the commissioners would be appointed and removed by executive government — and that the bill was planned to be introduced in June and passed in September. There was then — —

Mr MULINO — I am sorry, just to clarify, I think that was partly what I was trying to get at with my first question, which is that you had the initial meeting in early March, that there was some engagement in between that and 24 May to talk about some issues of more detailed — —

Mr WATTS — No, I was just told what was happening. That was not engagement.

Mr MULINO — A meeting in which other issues were discussed.

Mr WATTS — A meeting occurred in which DPC told me what was happening.

Mr MULINO — Sure, sure. But there was the meeting in March, there was a subsequent meeting and then on 24 May — as I think you have set out in your document, which is public — you were then provided with the draft bill, at the same time the FOI commissioner was, with an opportunity to provide details. He indicated that they provided some drafting suggestions and that some of those were taken up and some were not. Did you put some drafting suggestions in that last week of May?

Mr WATTS — No; the only change is a change to governance. Mr Eccles was abundantly clear, and I was abundantly clear on the day I spoke to him, about what I thought about those. So this was the sequence of events: on the 24th I received a preliminary draft of the bill; my comments were sought by 27 May — three days afterwards; and on the same day I received a copy of a press release, which was published later that day, from Mr Miller, which said in part that the bill would been introduced into Parliament and that the information commissioner would be adopted. That is not consultation.

Mr MULINO — I guess I would just ask — I mean the FOI commissioner was given the same time line that you were, and they put a series of proposed changes, and some of those were taken up, and then there was a subsequent discussion in the week following 27 May to discuss details with the FOI commissioner. I just wanted to ask: you did not take up that opportunity?

Mr WATTS — There was no opportunity. I was not given that opportunity. There was no discussion. No-one sought comment after 27 May — or after 24 May.

Mr MULINO — No, but you were offered an opportunity on 24 May to provide comments on the draft bill.

Mr WATTS — To comment within three days.

Mr MULINO — Right, and I am just clarifying that you did not take that up and the FOI commissioner did.

Mr WATTS — There was one comment I made. There was one comment, and it was made on 3 March. There would have been no-one in DPC under any illusion about what my view about the legislation was.

Mr MULINO — Sure, sure. I know you have made some comments about some of the policy positions, but three days for an organisation to respond to a draft bill does allow for some level of detail. It is a sufficient period to comment on some of the provisions.

Mr WATTS — I disagree. There was one change — one change as far as I am concerned. It is a change to governance. My views were abundantly clear.

Mr MULINO — It is fair to say, though, that in terms of the overall time line you were provided with a similar series of opportunities to what the FOI commissioner was.

Mr WATTS — I have no idea what opportunities the FOI commissioner has had, so I do not know. I received a bill on 27 May. The only change to my legislation was the disposal of my position — no other change — then I consider that my views had been made very, very clear. What was I going to comment about apart from that? The things that Mr Ison is concerned about? That is not within my statutory role or responsibilities. Why would I do that?

Mr MULINO — I will not get into all the merits now, because we do not have time, but clearly there are arguments around the broader impact of merging these two organisations in the sense that it might lead to better dovetailing between those functions, and it might lead to, for example, a better understanding of the privacy exemption when people are deciding FOI requests. So there is a lot more that affects your function and your organisation than just that one organisational change.

Mr WATTS — Well, we can come to that point if you like. I am very happy to address it — the coordination point.

Mr MULINO — The only reason I am raising that is that there was more for you to comment on.

The CHAIR — Is there a question?

Mr MULINO — Yes. I am just saying that there is more that you could have commented on that was relevant to your organisation than just — —

Mr WATTS — No, I disagree with you.

Mr MULINO — The last question I have is more a conceptual one. You have been involved in developing some robust privacy principles as part of your role, is it fair to say?

Mr WATTS — I have had 20 years experience in developing legislation.

Mr MULINO — Yes. I am just interested in your thoughts as to whether a robust privacy regime needs to be in conflict with a robust transparency regime. Some people have flagged the issue as to whether they can work in tandem and whether they are inherently in conflict. I am just interested in your thoughts at that more conceptual level.

Mr WATTS — There is no evidence. This was first floated and developed by the Rudd government. Try as I might, I can find no policy work in relation to it and no evidence base. It was done in New South Wales, but again I can find no evidence apart from efficiency arguments like, 'These two organisations deal with information, and therefore they might be able to save some money by working together', or something like that. There have been efficiency arguments, cost arguments, but the evidence is pretty clear that it just does not work.

Mr MULINO — I just mean at a conceptual level.

Mr WATTS — It has been a failure everywhere it has been tried, an absolute failure. There is no policy work that has been done in Victoria. I understand these debates, and people from DPC are coming this afternoon, and maybe at 5 to midnight they might produce such work. It would have been lovely had we seen it a long time ago. But there is no such evidence. I speak to my colleagues — the Australian information commissioner, the New South Wales privacy commissioner — and they think it is a nonsense and it does not work.

Mr MULINO — I guess I am just interested it in your philosophic view as to whether you are in — —

Mr WATTS — I think I have said what my philosophical view is: it does not work.

The CHAIR — I think the witness has made that quite clear, and we might move on to Ms Symes at this point.

Ms SYMES — What is your relationship like with the acting FOI commissioner? Do you meet regularly to discuss the interaction between the release of information and privacy concerns?

Mr WATTS — I have a cordial relationship with Mr Ison. Whenever Mr Ison needs to speak to me we speak frankly and fully. But in practical terms, there is very little that touches on between the two offices. You do not need to join the offices together to have a conversation about the privacy exemption.

Ms SYMES — That was not my question.

Mr WATTS — Your colleague mentioned it before. Michael Ison and I have never had that conversation; I assume it is not a difficult issue.

Ms SYMES — So there is no role to get together to help departments deal with the tension between FOI requests and privacy matters — —

Mr WATTS — What tension?

Ms SYMES — I am referring, as came up in the evidence earlier, particularly to potentially sensitive matters like family violence orders, DHHS child protection orders. You do not have conversations about advice to departments?

Mr WATTS — If those conversations were necessary to have, we would of course have them, as we have conversations with the Auditor-General and as we have conversations with the Ombudsman.

Ms SYMES — But you do not regularly have these conversations with the acting FOI commissioner?

Mr WATTS — There is no point having regular conversations when there is no regular issue.

The CHAIR — I might intervene at this point and ask just a couple of questions, if I may. One follows up on some evidence you gave earlier. You said you made it 'abundantly clear what I thought' when you were speaking to Mr Eccles. Could I ask you, if you would not mind telling us, what is it exactly that you said to him?

Mr WATTS — What did I say to him?

The CHAIR — When he briefed you on this.

Mr WATTS — I said, 'This is a model that has never worked. There is no evidence for it. It has been a failure in New South Wales, which is where you have come from, Mr Eccles, and it has produced utter conflict and chaos'. His response to me, 'It's too late. It has already been done'.

The CHAIR — Because it had gone through cabinet?

Mr WATTS — Yes.

The CHAIR — Okay. I have a further question. This bill was introduced to the Parliament in June 2016, but it did not progress beyond the lower house for some time, and the government has made it a priority for the start of 2017. Call me a cynic, but I note that you announced recently that you had sought information from the Premier regarding his audit of ministers' mobile phones. Do you think the interest in quickly progressing this bill is linked in any way to the intervention that you made in relation to the audit of ministers' phones?

Mr WATTS — Well, it is certainly a coincidence, is it not?

The CHAIR — I think so.

Mr WATTS — Nothing happened with the legislation for months and months and months. As soon as I start making inquiries about an audit of mobile phones, the bill is desperately on. The committee can draw what conclusions it wishes to from that.

The CHAIR — May I ask, have ministers cooperated with you in relation to your work in relation to that inquiry?

Mr WATTS — I have had no cooperation.

The CHAIR — Have they responded to you at all?

Mr WATTS — The responses I received from DPC — I actually initially sent a letter to the Premier seeking information about his understanding of his legal powers to do what he was reported to have done. What I received from DPC — just let me pull the document out — was a certificate saying the Premier's knowledge of his legal powers was a matter of cabinet confidentiality

CHAIR — Could we have a copy of that response tabled for the committee's benefit?

Mr WATTS — Yes, I can.

The CHAIR — Thank you.

Mr WATTS — I then sent a notice under the Act to the secretary, Christopher Eccles, dated 13 January 2017, seeking very broadly all of his communications with KPMG or any other person who he was seeking to undertake the forensic audit. I asked for that to be done in seven days, and I received a response from Mr Porter, who I understand is giving evidence this afternoon, dated 20 January, again producing a certificate under the Act saying that my request for information about who was being engaged to undertake the forensic audit was a matter of cabinet confidentiality. In addition, though, Mr Porter invoked the secrecy provisions under section 120 of my Act. Essentially, in practical terms, how that works is that he was seeking — excuse me for being blunt — to cover up the cover-up. In other words, I could not report on the fact that a certificate seeking secrecy on cabinet confidentiality grounds had been issued.

The CHAIR — Do you believe that is legal?

Mr WATTS — I am going to produce a further report. I consider it an abuse of power. That is my view.

The CHAIR — Thank you. Would you mind tabling the second response that you mentioned as well, for the benefit of the committee? Thank you.

Mr O'DONOHUE — Thank you, Mr Watts, for your evidence. The previous witness, the acting FOI commissioner, in his evidence said that — I am paraphrasing here, but words to this effect — the way a regime will operate, and in the context of the new legislative regime as proposed, will depend very much on the appointments that are made. My point to him was that the system should ensure the integrity and not actually rely on the individual's goodwill. Are you concerned that under the proposed new regime, with the merger of your functions and the FOI commissioner's functions, being reportable to the executive rather than being reportable to the Parliament could potentially diminish the appetite to pursue matters against the executive in the future?

Mr WATTS — Of course. I mean, at the end of the day what the legislation does is, even though it says that, no, the officers cannot be directed by the minister, they can be sacked, which is the ultimate power of direction, one would have thought. So it removes a significant degree of independence. Could you imagine any of those officers doing what I have done in looking at this forensic audit of telephone records? In practice, let us acknowledge what the reality is: you know, in practice a man in a suit — invariably a man in a suit — from DPC would come and have a quiet word to you.

Mrs PEULICH — Thank you, Mr Watts. I am of the belief that centralising power is not good for democracy, so I would concur with many of the comments you have made. Part of that is because I was born under a communist regime, so I am very wary about doing that. You have referred to this bill as basically putting in a new regime. I think you spoke about consummating a marriage. It sounds to me it is more like a

shotgun wedding. What have you done to deserve such targeting and punishment, apart from the audit of the phones? Are you just too independent?

Mr WATTS — It is hard for me to answer that. I can speculate. Yes, perhaps. I have made it public before. My belief is — and I have been told this — that this is the result of upsetting the CPSU; the unions have long memories. I was given a job to do by the previous government of joining two offices together and doing something that really no-one has ever done before: joining privacy and security together in a rational way and establishing security standards. Now, that is not something that the Department of Premier and Cabinet had been able to do in 10 years of being responsible for it. We did it in 18 months. So I do not know.

Mrs PEULICH — So is this legislation basically to nobble you?

Mr WATTS — That is my view, yes. That is my view. And, look, it is important — may I take you back to the consultation process. I had a meeting with Mr Bates on 5 May, as I have previously said in evidence. At that stage I actually said to Mr Bates — after Mr Porter and Mr Miller had left the meeting — I asked him whether the legislation was being amended specifically to remove me at the instigation of the CPSU, and Mr Bates said, 'Well, David, the unions have got long memories'. That was actually reported; I actually made that public on 19 August. On the evening of 19 August I received a text message from Mr Bates at 8.28 p.m. This is what Mr Bates said in the text message.

> I'm told you briefed James Campbell on my ALP membership. I look forward to hearing how you explain that decision to Bill and Chloe.

Perhaps I should give some background to make that explicable.

Mrs PEULICH — Please.

The CHAIR — I think that would be useful.

Mr WATTS — At the time James Campbell I think was the senior state politics reporter for the *Herald Sun*. I do not think he is anymore. I meet many people in my job. I have met Mr Campbell. At no point did I brief Mr Campbell about Mr Bates's ALP membership, but Mr Campbell actually raised it with me. The second sentence, 'I look forward to hearing how you explain that decision to Bill and Chloe': I live in the same street as the leader of the federal opposition. My wife is friendly with his wife. Our children go to the same school. On occasion they have been in and out of each other's houses, eaten at each other's houses, the usual thing that kids do. I regarded that threat as somewhat sexist and bullying — sexist in that the friendship is not mine; it is my wife's and my children's, and bullying because basically Mr Bates was saying, 'Well, I'm going to tell on you. I am going to tell on you'.

Mrs PEULICH — So this is Mr Tony Bates, deputy secretary in charge of governance, policy and coordination?

Mr WATTS — And my relationship with DPC, yes.

Mrs PEULICH — So in charge of governance, and these are the tactics that he resorts to?

Mr WATTS — Correct. That is correct. Would you like a copy?

Mrs PEULICH — Yes, absolutely.

The CHAIR — Thank you.

Mrs PEULICH — These are deplorable, absolutely deplorable. So basically this is legislation that has been framed to settle scores at the behest of a powerful union?

Mr WATTS — In the absence of any clear benefit, the fact that it has been developed in secret, the fact that at one stage — this was at some point in June; I would have to go back to my notes to confirm it — I actually said to Mr Bates, 'Look, if the government hates me that much, I'm happy to stand down. Send me somewhere else'. He said he would raise that with Chris Eccles, and I think at a subsequent meeting he said that Chris was not at all interested in that. I also raised with him — —

Mrs PEULICH — I am sorry, Mr Eccles was not interested in?

Mr WATTS — In my offer to stand down. The custom is that when a person moves from the public service to become an independent statutory office-holder the convention is that at the end of their term they are offered a position back in the public sector. I actually raised that with Mr Bates, but there has never been any conversation about that ever again. In fact since 19 August of last year I have not had a conversation with Mr Bates. We have exchanged formal correspondence on a 'Dear Deputy Secretary', 'Dear Commissioner' basis, but I have never had another meeting with Mr Bates, and he is in charge of our relationship.

Mrs PEULICH — Back to a policy question, if I may: in your assessment and your experience, is there any reason whatsoever to believe that the merger — a shotgun wedding — of these two offices will produce significant better privacy and data security results than would otherwise occur should these offices continue to operate independently?

Mr WATTS — It is nonsense.

The CHAIR — Mr Watts, can I just ask one question before moving on to Ms Hartland, and that is: after you received that text message from Tony Bates, which you characterised as 'bullying and sexist', how did you respond?

Mr WATTS — I did not.

The CHAIR — The only sort of discussion the two of you have had since then, as I understand it from your evidence, has been on a formal basis, in writing, as you gave evidence earlier?

Mr WATTS — Mr Bates has written to me saying, 'Here's a draft cybersecurity policy. Would you like to comment on it?' — communications of that nature.

Ms HARTLAND — I would like to understand why you believe the legislation will fail. You talked about New South Wales; could you give some examples of what has happened in New South Wales and why you believe it has not worked there?

Mr WATTS — In New South Wales the Privacy Commissioner has actually been appointed on a part-time basis, and there has been endless conflict between the Privacy Commissioner and the Information Commissioner to the point where I understand the Privacy Commissioner essentially had no staff to undertake her role. They have been subject to complaints, inquiries et cetera, but nothing has ever been done about it. So it has produced conflict within that context.

When you talk candidly and off the record to other privacy regulators who have been subject to that sort of regime the unanimous view is that it adds nothing. There are virtually nil connections. I think I answered a question before about the contact between our office and the FOI commissioner's office. We have brought them along on information sessions that we have done and involved them in Privacy Awareness Week and regional events et cetera, and of course that is a useful thing to do. But in terms of dealing with the privacy exemption or anything like that, the contact is incredibly minimal. Mr Ison has never phoned me to seek my views about how that works.

There was no evidence for the commonwealth's original position. I have tried to find it. There is none. It has produced a degree of disjunction, disjointedness, difficulty with putting the roles together and trying to make something coherent out of it — the same in New South Wales. In Queensland the privacy commissioner role was left vacant for years and years and years. People have not been well served by that particular arrangement. I would tell you if there had been the degree of engagement that indicated to me uncertainty in the relationship between our office and the FOI commissioner's office, and it just has not happened.

Ms HARTLAND — But I am actually asking about this legislation. I can understand all the things that you are talking about — it is obviously around conflict between offices — but what is it about this legislation that you believe is inadequate or will not work?

Mr WATTS — First, what I just said to you: it is inadequate. The evidence is that it does not work, so that is my first answer. The second is the loss of independence of the statutory office-holders.

Ms HARTLAND — And what would you do to improve the legislation?

Mr WATTS — What I would do is wait for the root and branch review. My understanding of that is that a consultant has been engaged and was engaged as long ago as I think November last year, but no work has started because there is no agreement on the terms of reference. So I would wait for the root and branch review. There are obvious improvements that can be made in relation to FOI, and if you think about it in terms of the environment that we live in, which is an electronic environment et cetera — and I am stepping outside my remit here, but I have run FOI sections in the commonwealth — the preface or the assumption that seems to still underpin FOI is of an almost Dickensian, paper-based environment. Whereas most government departments can find things pretty easily. You know, there is a thing called TRIM that manages documents that you can query. You can put complex queries through TRIM and find documents really quickly.

The Victorian government speaks a lot about the digital age and about digital competitiveness and having a data analytics centre et cetera so that there will be better evidenced-based policy. What goes on within FOI to take account of those capabilities? I think that is an incredible advantage. If I can retrieve practically anything within 0.3 of a second on Google, why does it take 14 months to process a request within the Victorian government, when people have invested in powerful file management software? I do not understand.

Ms HARTLAND — Thank you.

Mr MULINO — I just wanted to go back to the conversation with James Campbell. What did he say to you?

Mr WATTS — 'What do you know about Tony Bates?'.

Mr MULINO — And what did you say to him?

Mr WATTS — I said, 'I've known him for years'.

Mr MULINO — Is that all?

Mr WATTS — He said, 'We understand that he is part of the Labor Party'.

Mr MULINO — And what did you say?

Mr WATTS — I said, 'Yes, he is'.

Mr MULINO — Right. So you were involved in a discussion with a journalist that could implicitly have you as a source for matters along these lines. Is that the kind of discussion it was?

Mr WATTS — No. I am not an employee of DPC.

Mr MULINO — Sure.

Mr WATTS — I am not an employee of DPC — —

Mr MULINO — So you confirmed it, though.

Mr WATTS — No. I am entitled to have a conversation with journalists, and I often have conversations with journalists.

Mr MULINO — Right. But you understand the context is all I am asking.

Mr WATTS — What are you trying to accuse me of? Talking to a journalist and confirming something?

Mr MULINO — Just answering questions.

Mr WATTS — Confirming something that was well known within the public sector.

Mr MULINO — But James Campbell felt the need to ask you to confirm it.

Mr WATTS — Ask James Campbell.

Mr MULINO — I do not talk to James Campbell. One other question: you and the Chair speculated on reasons why the bill might have been delayed as to why the bill might have been delayed. I just wanted to ask: are you aware that the Leader of the Government, who was responsible for this bill, had been suspended for six months by way of a motion put by the opposition? Are you aware of that?

Mr WATTS — Yes. Does that mean the work stops?

Mr MULINO — What I am saying is that bills for which he had carriage were not progressed.

Mr WATTS — How many members of the government are there?

Mr MULINO — I am asking if you are aware of that? That applied to a number of bills.

Mr WATTS — I am aware of it. Yes, of course I am aware of it.

Mr MULINO — I am just asking if you were aware.

Ms SYMES — We had a conversation about your role in merging two offices, and there has been an allegation that the CPSU have something against you. I am just wondering why you think that is.

Mr WATTS — Because Mr Bates told me.

Ms SYMES — Did you contract out staff? Did you engage consultants to do people's work? Why would the CPSU have an issue with the way you handled the role that you were — —

Mr WATTS — I made redundant a number of people who no longer fitted the new model and who did not have the skills to support it. A number of people left beforehand too.

Ms SYMES — Did you have a conversation with the CPSU?

Mr WATTS — We did everything by the book.

Ms SYMES — Why were the CPSU upset with you, in your words.

Mr WATTS — Ask the CPSU.

Ms SYMES — You have given evidence today that you think that the CPSU have something against you.

Mr WATTS — I seriously do not know why the CPSU would have done what they have done. What I understand — —

Ms SYMES — What have they done?

Mr WATTS — Mr Bates indicated it pretty clearly. 'The unions have long memories' is what he said to me.

Ms SYMES — I do not understand the reference. What did you understand the reference to mean?

Mr WATTS — Let me take you to the document:

> On 5 May 2016 I attended a meeting with Tony Bates of DPC.
>
> …
>
> In the later stages of the meeting … Tony Bates and I were still present —

Mr Porter and Mr Miller had left —

> At that time I asked Tony Bates why the legislation was being amended specifically to remove me at the instigation of the CPSU. Tony Bates did not contradict that construction of events. Rather, he commented that 'the unions have long memories'.

So you take that piece of evidence, and then you combine it with the fact that a piece of legislation that was working is being amended and the only amendment so far as my responsibilities are concerned is to remove me. Take that — and there has been no consultation about it, no prior notice — the fact that I offered to stand down and was told that that was not something that was on the agenda, the fact that I have been isolated and the fact

that I have been left out of the loop. I have seen these things happen many times within government. I must say to you that I am surprised that it has happened to me. But all of the signs are there to do it. You and I might contest this — —

Ms SYMES — I was not arguing with you, Mr Watts.

Mr WATTS — Do I have a statement from Karen Batt saying, 'He's got to go'? No, of course I do not have that. I have given you the evidence, and I have told you I think it is a reasonable inference. No-one has contradicted it. Sorry — the CPSU contradicted. They said it was false.

Ms SYMES — How do you reconcile what you have just said? You have said you think the bill was a construction to get rid of your role, but your offer to stand down was not accepted.

Mr WATTS — I beg your pardon?

Ms SYMES — Your offer to stand down was not accepted, but you are saying that — —

Mr WATTS — I think they are easy to reconcile. They are very simple to reconcile. Why move me to somewhere else? The government were expecting me to fall over a long time ago. Practically every public sector trick in the book has been played on me to make me go.

Ms SYMES — Just to confirm, you think the ultimate aim of this bill is to get rid of you.

Mr WATTS — I think insofar as the bill applies to the Privacy and Data Protection Act, yes, of course.

The CHAIR — Mr Watts, I have two questions. The first is: you gave evidence just before on that extraordinary text message from Tony Bates. Are you aware that there was any follow-through on the threat to raise this with Bill and Chloe?

Mr WATTS — Pardon me, can you repeat that?

The CHAIR — Yes, I can. In relation to the text message from Mr Bates, are you aware of any follow-through on the threat to tell Bill and Chloe?

Mr WATTS — No.

The CHAIR — My second question is: you referred earlier to the terms of reference not being agreed for the root and branch review. Do you have any insight into where the disagreement is and what it is over?

Mr WATTS — No.

Mr O'DONOHUE — Mr Watts, can I just ask, further to the Chair's question about the text message from Mr Bates and reference to Bill and Chloe, would Mr Bates know that you live in that same street — well, assuming from his Labor Party affiliation that he knows your residence is in the same street as the federal Leader of the Opposition?

Mr WATTS — Yes.

Mr O'DONOHUE — What do you think should happen with this legislation? I mean, this committee is conducting an inquiry into this legislation. What would be your advice to the committee about the future of this legislation?

Mr WATTS — I think the root and branch review should take place. I think it should not and would not take very long. It should have been done. Well, it is supposed to be done by the end of March. I have no idea why that has not occurred. But then you have a much better idea of in fact what you are trying to govern and how the governance arrangements would actually work in practice.

I would be waiting for that. I would continue to urge the committee that we should not be included in this piece of legislation. What happens now works incredibly effectively. There is no evidence that it is ineffective; there is no cost argument, other than a negative cost argument — you know, things like joining our IT systems together would be a nightmare — and there is a human resources argument.

My staff are sick and tired of going through contested restructure. They have been getting down and doing a fabulous job. My staff are just sensational examples of public sector diligence and imagination, and they have worked under a cloud for the last year. They are naturally concerned, they are naturally upset and that can create some management challenges. That would be my recommendation.

Mr O'DONOHUE — Thank you, Mr Watts. How many staff do you have in your office?

Mr WATTS — About 20.

Mr O'DONOHUE — Thank you.

Mr WATTS — Small but perfectly formed, Mr O'Donohue.

Mrs PEULICH — Thank you, Mr Watts. The area of privacy and data protection is a particular concern and interest for me. In particular I imagine that — and this is just looking at how your role and this area may actually need to exponentially increase — your dealings with federal agencies would have to be substantial. I ask you, if you are able, to comment on that. But also there are breaches of which I have become aware — for example, the sale of telephone numbers internationally, where companies can actually provide a service and have access to the text messages of any particular telephone number that they see fit. Are you just able to very briefly sketch out, apart from obviously this internal effort to demolish your independence, what sorts of challenges there are and how we ought to be responding with legislation to actually strengthen your role to better at least defend privacy and data?

Mr WATTS — The area of privacy is one of the most complex areas of policy, technology, regulation and globalisation that you can imagine. There are some incredibly serious and interesting issues associated with it. One is whether information can be truly deidentified. The federal Department of Health released a billion lines of health data last September, and within a week it was reidentified. It is said, for example, that data like that can help produce better outcomes, better policy settings et cetera, but can it ever be really properly deidentified? The debate rages internationally. What are the benefits and what are the risks of big data? There are benefits in knowing things about better traffic flow, but do you want government to have an ability to link a whole range of different datasets, some generated within the public sector but some purchased from commercial service providers like Google, Facebook or whatever, to conduct surveillance on citizens? So issues around big data, issues around deidentification — but two of the complex issues.

When I speak to my colleagues internationally the consensus is that the amount of complexity around privacy issues, but more particularly data protection if you try and look at that as a broader term, has a greater emphasis on security, which is really what we have in Victoria — a data protection regime. Establishing the standards of working out where the vulnerabilities lie in relation to data protection or security issues et cetera are of significant complexity and require specialist assistance. It is right out there in terms of computer science, analytics et cetera. So internationally my colleagues and I have a conversation about scarcity of resources, about international cooperation and working together — pooling resources — and developing expertise in particular areas.

So the policy functions and the intellectual or thought leadership functions that are associated with privacy are significantly more complex than are the largely operational issues that go with FOI. I would not want any members of the committee to think that I was downgrading FOI, because I am not. But the issues are different. There are processing issues, there are speed issues, there are availability issues and there are exemption issues; all of those issues are important. But in the privacy sphere, the issues are at the cusp and at the cutting edge of the development of public policy, computer science — —

Mrs PEULICH — In a word, are any of these facilitated by this new bill?

Mr WATTS — No.

Mrs PEULICH — A last question if I may, the CPSU is a union associated with the Socialist Left, the same faction as the Premier.

Mr WATTS — I was not aware of that.

Mrs PEULICH — It has just been confirmed, and unfortunately you cannot access my phone on the basis of privacy, otherwise you would have to write to me.

Mr WATTS — I did not know that unions were entitled to privacy, but I am happy to raise that separately.

Mrs PEULICH — No, this is not a union. Are you able to inform us, or should we reserve that for Mr Bates, whether most of Mr Bates's employees — people in the department — would be members of the union and would he himself be a member?

Mr WATTS — I do not know.

The CHAIR — Ms Hartland?

Ms HARTLAND — I only wanted to ask questions about the bill, not about these other issues.

The CHAIR — Okay. Any further questions?

Mr O'DONOHUE — I have one. Mr Watts, on the bill, I am not sure if you are aware that the coalition is proposing three amendments to the bill. The first is to preserve the appointments of the existing CPDP and FOI commissioners and see them become the inaugural deputy commissioners for data protection and FOI respectively. The second is to ensure that the proposed deputy commissioners can only be removed by resolution of Parliament, as is currently the case with the existing commissioners. And the third, and less related to your function, is to remove the automatic right for agencies to extend FOI responses from 30 days to 45 days when they need to consult. Noting your response to the bill itself, can I have your feedback on those proposed amendments of the coalition?

Mr WATTS — My preferred option is the one I have stated. That would be a second option. Would I support it? Yes, but I would support my option more.

Mr O'DONOHUE — Yes, sure.

The CHAIR — I am conscious that our time has nearly expired. Are there any further questions?

Ms SYMES — I would just like to follow on from that. If you were the information commissioner and you had the two deputies under you and you had a situation in the office where there was poor performance or conflict or inability to work together, how would you seek to deal with that situation in the event that resolutions might have to go through Parliament?

Mr WATTS — This has happened in the commonwealth now. That is really a hypothetical question. Set some more facts around it. And if you are putting to me that that is the only way of managing, I would object to that.

Ms SYMES — I was not.

Mr WATTS — Okay. Thank you.

Mr O'DONOHUE — If I could ask one further question following on from Ms Symes, do you think the integrity of the office, either as it currently exists or is proposed, would be better upheld by being reportable to Parliament or to the executive?

Mr WATTS — To Parliament of course.

Mrs PEULICH — Are you able to give us an update on the phone audit?

Mr WATTS — There will be a further report, but you will have to wait.

The CHAIR — Commissioner, can I thank you for your evidence today, particularly when you are obviously feeling unwell. Is there anything further that you would like to say to the committee?

Mr WATTS — No, thank you.

The CHAIR — In that case on behalf of the committee I thank you for your contribution today. You will receive a copy of the transcript within a few weeks for proofreading.

Mr WATTS — Thank you.

Committee adjourned.

T R A N S C R I P T

STANDING COMMITTEE ON LEGAL AND SOCIAL ISSUES

Inquiry into the Freedom of Information Amendment (Office of the Victorian Information Commissioner) Bill 2016

Melbourne — 8 March 2017

Members

Ms Margaret Fitzherbert — Chair
Ms Nina Springle — Deputy Chair
Mr Daniel Mulino
Mr Edward O'Donohue
Ms Fiona Patten
Mrs Inga Peulich
Mr Adem Somyurek
Ms Jaclyn Symes

Participating Members

Ms Georgie Crozier
Mr Nazih Elasmar
Ms Colleen Hartland
Mr Gordon Rich-Phillips

Witness

Ms Fiona Spencer, barrister and member, human rights/charter of rights committee, Law Institute of Victoria.

The CHAIR — I want to welcome everybody who is attending this evening, including those who are watching. I would like to introduce the committee members who are here. The committee is hearing evidence today in relation to the inquiry into the Freedom of Information Amendment (Office of the Victorian Information Commissioner) Bill 2016. The evidence is being recorded. All evidence taken at this hearing is protected by parliamentary privilege; therefore you are protected against any action for what you say here today, but if you go outside and repeat the same things, those comments may not be protected by this privilege.

What we might do at this stage is if you wish to address the committee, we have asked that any opening statements are about 5 or 10 minutes, and then after that we might open it up to questions. Thank you for coming this evening, Ms Spencer.

Ms SPENCER — Thank you, and thank you for inviting the law institute to attend the hearing today to assist the committee. My name is Fiona Spencer, and I appear in the capacity of a member of the law institute's human rights/charter of rights committee. I propose to provide a short overview of some of the key issues that the LIV has raised in its submissions in relation to the bill before taking questions. I will note at the outset that my personal area of expertise lies around the area of section 194 of the IBAC act and the related amendments to the bill. Unfortunately the LIV's representatives who have been involved in the submissions on the other aspects of the bill were not available to appear today, so I will most likely be taking any questions on those aspects on notice, and the LIV will provide a written response.

The CHAIR — Thank you.

Ms SPENCER — The LIV's general comments about the FOI amendment bill in summary are that the LIV welcomes many of the amendments in the bill, particularly those that will enable the new commissioners to review FOI decisions made by ministers and principal officers and to review refusals to grant access on the basis that documents contain cabinet material. However, the LIV is also concerned about some of the amendments in terms of their practical application and effects, and I will turn to some of those concerns now.

The first concerns the terms and conditions of appointments of deputy commissioners. The recommendation that the LIV has put forward is that the terms should be fixed for five years to promote the independence of the commissioners by protecting them from real or perceived political interference, and obviously as presently drafted the bill allows for periods of up to five years in clause 6.

The second recommendation that I wish to highlight today is in respect of removal from office, and this again pertains to deputy commissioners. The recommendation is that deputy commissioners be provided with the same protections from removal from office as the information commissioner to reflect the importance of their respective roles within the integrity system. That would require amending clauses 6 and 80 of the present bill to provide that only Parliament could remove the deputy commissioners.

The third matter is consultation and review rights. The LIV's recommendation is that where the bill provides review rights relating to consultation to a third party, the bill should make it clear that until the party's review rights expire the agency should not release the documents. The LIV's position is that stating this expressly would avoid confusion or doubt about that issue that presently exists.

The next matter is the effect of delay by the commissioner. There is at present, in the LIV's view, uncertainty surrounding the legal consequences of delay on the part of the commissioner in making a relevant determination under the act. This uncertainty presently exists under the present regime, and the bill does not address it. So the recommendation is that section 49J of the FOI act should be amended to make it clear what the legal consequences are of delay by the relevant commissioner by adopting one of the positions set out in the LIV submission. Obviously there are some proposed amendments to 49J but they do not address that particular issue.

The next matter is the power to acquire a further search for documents. The LIV has identified concerns with the way that the future search for documents provisions in the bill as presently drafted would apply in practice, and they are set out in the submission provided. For example, one of the examples given is that a decision to refuse access under section 25A, subsections 1 and 5, occurs without the request being processed, and so the requirement therefore to undertake a search would seem to be imposing an additional requirement that is not presently required to be undertaken. So when the commissioner is called upon to determine whether a search has been adequate, no search would actually have been undertaken so there is no search to find whether it is

adequate or not. Our understanding is that the decision is made without any searches being done. That seems to be perhaps an anomaly in the present drafting, and the LIV suggests that, as presently drafted, in that context the proposed new section 49KA(1), would have no work to do.

The next matter is section 194 of the IBAC act, and I will address this slightly more fully as time permits. The LIV welcomes the government addressing the LIV's concerns with section 194 of the IBAC act and the way that it currently operates, which is to prevent the release of some Victoria Police investigation documents where IBAC has handled the complaint in some way, but we are concerned that the current wording of the amendments does not achieve the intended aims of the reform. The particular concern is this: the new, if I can put it that way, section 194(1)(b) actually is in the same form as it presently is, so there is no actual change to that aspect of the legislation. The difficulty is that, as presently interpreted, that provision has been interpreted so as to exempt from FOI Victoria Police investigation documents, even where there has been no IBAC investigation.

What it actually says is that:

> The Freedom of Information Act 1982 does not apply to a document that is in the possession of any person or body to the extent to which the document discloses information that relates to —
>
> …
>
> (b) an investigation conducted under this Act …

At first blush that would seem to perhaps mean an IBAC investigation, but it has not been interpreted that way. It has been interpreted so that if, for example, there is a complaint made to IBAC that is referred back to Victoria Police for investigation and then Victoria Police investigates, Victoria Police's investigation is actually an investigation under the IBAC act. So it is captured by (b) because it came back from IBAC.

The same thing can happen if Victoria Police gets the complaint first, sends it to IBAC and IBAC sends it back — it is still captured. It can also be caught where IBAC undertakes a random audit, for example, of matters and then it is somehow been infected by IBAC, if I can put it that way, and the documents again become captured by this provision.

Mr RICH-PHILLIPS — Basically if the document has been in the possession of IBAC, it is deemed by Victoria Police as not to be available under FOI.

Ms SPENCER — In effect that seems to be the way that the provision has been so broadly interpreted on behalf of those bodies and by VCAT. I should also mention that one of the VCAT cases went on appeal and was upheld on appeal, so we have actually got a Court of Appeal decision upholding that interpretation of VCAT. So if that provision is not changed, the risk, the LIV says, or the most likely outcome is that the same interpretation will be applied and therefore the stated aims of amending the act to remove the unintended capturing of Victoria Police documents, if I can put it that way, will not be effective because that provision will remain.

The LIV has recommended two alternative ways that this could be addressed. The first is that new section 31A is proposed, which is a new exemption for IBAC documents to be inserted into the FOI act. In the LIV's submission that is a comprehensive exemption which directly targets the intention of section 194, which is to protect from disclosure sensitive documents that may disclose investigatory methods of IBAC and so on. That targeted provision is apt to do that, and so it begs the question whether there is actually any need now for section 194 to remain when section 31A is so precisely targeted to that particular need.

In the alternative, the LIV has recommended that there be amendment to section 191, subsection 1B, to make it clear that it only applies to investigations conducted by IBAC and not by Victoria Police. The LIV's urging is that the first recommendation be adopted because, even if it is inserted, for example, 'investigation by IBAC', there is a concern, given the way it has been interpreted in the past, that it still could be interpreted that a Victoria Police investigation somehow falls within the ambit of that provision, unless of course the drafting was extremely clear.

Thank you again to the committee for inviting us to provide this presentation. The LIV, I should mention, is also in the process of putting together a further submission concerning some additional matters, concerning the drafting of the bill in particular, and that will be provided, the LIV hopes, to the committee later this week.

The CHAIR — Thank you, Ms Spencer, for that overview that you have provided. It is really useful. I will open up to questions now, and I am conscious that we will have to be fairly succinct.

Mr RICH-PHILLIPS — Ms Spencer, thank you for your presentation this evening, indeed for the LIV's written submission and indeed earlier written advice during an earlier consultation stage on the bill. They have been particularly helpful. I will not go back over the material you have just covered because the LIV's position is quite clear. But just on your latter comments about LIV having some views on the drafting of the bill, are you able to put a broad framework around that now?

Ms SPENCER — My understanding is that there will be certain further submissions provided in relation to certain aspects of particular drafting of certain clauses. Really, given that the submissions are anticipated to be provided later this week, I would probably rather leave it at that if I can, and the LIV can follow up in its written submissions.

Mr RICH-PHILLIPS — I think certainly your oral and written submissions thus far are very clear, so I am happy to leave it there.

Ms PATTEN — Ms Spencer, it was very interesting where you touched upon section 25A and the proposed section 49KA about the searching of documents that made that section completely ineffective. Could you just elaborate on that again?

Ms SPENCER — Yes, I can. I will just run through again what I said.

Ms PATTEN — Yes, almost explain it to me again.

Ms SPENCER — Sure. The new section 49KA(1) relates to providing the information commissioner effectively with powers to require that a search be conducted — sorry, enables the commissioner to determine whether a search that has been conducted is adequate or not adequate. The concern is that when you have a decision to refuse access pursuant to section 25A(1) and (5) — —

Ms PATTEN — There has been no search.

Ms SPENCER — There is no search, yes. The decision is just made that it is going to be too onerous and so on to process the FOI request and it stops at that point, the LIV understands, so no searches are actually undertaken, so there is nothing for the commissioner to review.

Ms PATTEN — So you would suggest that we just delete that section?

Ms SPENCER — That is one option that has been proposed by the LIV. The other option that has been proposed is to change the wording to focus on the adequacy of the decision-making by the agency or minister rather than the adequacy of the search itself, because there would not have been a search.

Ms PATTEN — Okay. So if there had been a refusal, it would be to review the adequacy of that refusal?

Ms SPENCER — Of that refusal, that it was too onerous and so on to process the FOI request, which would be something meaningful that the information commissioner could actually review.

Ms PATTEN — Thank you. That is helpful.

Mr MULINO — One of the organisational changes that this bill will put into place is to merge the two functions under one organisational structure. I am just wondering, does the LIV have a view as to the merits of that organisational change, bringing us into line with some other jurisdictions?

Ms SPENCER — That is a matter I will have to take on notice. I am not currently briefed with a position on that.

Mr MULINO — I have just one quick follow-up. Given that there will be two functions under that one organisational umbrella, you have recommended that the removal-from-office provisions be strengthened for the two officers under the information officer.

Ms SPENCER — Yes.

Mr MULINO — Do you think there is a risk, were those removal-from-office procedures to be strengthened, that it might cause difficulties if there were differences of opinion or difficulties in working together amongst those three officers?

Ms SPENCER — Again that is not something that I believe the LIV has got a position on, so again I would have to take that on notice.

Ms HARTLAND — What you have presented is actually really comprehensive. You have already answered all of my questions in the submission. I really appreciate this, thank you.

The CHAIR — Is there anything further that you would like to tell the committee?

Ms SPENCER — No, thank you.

The CHAIR — Like Ms Hartland, I would like to thank you for the submission that has been made and for coming along this evening to provide some further explanations to us. It has been enormously useful.

Witness withdrew.

T R A N S C R I P T

STANDING COMMITTEE ON LEGAL AND SOCIAL ISSUES

Inquiry into the Freedom of Information Amendment (Office of the Victorian Information Commissioner) Bill 2016

Melbourne — 8 March 2017

Members

Ms Margaret Fitzherbert — Chair
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Ms Jaclyn Symes

Participating Members

Ms Georgie Crozier
Mr Nazih Elasmar
Ms Colleen Hartland
Mr Gordon Rich-Phillips

Witnesses

Mr Chris Miller, general counsel,
Mr Sam Porter, executive director, public sector integrity, and
Mr David Butler, director, information management and technology, Department of Premier and Cabinet.

The CHAIR — Thank you for coming this evening. The committee is hearing evidence today in relation to the inquiry into the Freedom of Information Amendment (Office of the Victorian Information Commissioner) Bill 2016, and the evidence is being recorded. I welcome witnesses to public hearings of this legal and social issues committee. All evidence taken at this hearing is protected by parliamentary privilege. Therefore you are protected against any action for what you say here today, but if you go outside and repeat the same things, those comments may not be protected by this privilege.

I would invite each of you to address the committee if you wish to do so and suggest that submissions should be around 5 to 10 minutes, and then I will open it up for questions.

Mr MILLER — Thank you very much, Chair. I might begin, if I may, with a brief opening statement, and I will introduce my colleagues here as part of that opening statement. Firstly, thank you to the committee for giving us an opportunity to appear and to assist you with your inquiry into the bill.

By way of introduction, I am the general counsel at the Department of Premier and Cabinet. My colleague Mr Sam Porter is an executive director in the office of the general counsel, in my team, and is the lead senior executive responsible for implementing the Special Minister of State's integrity, transparency and accountability reform program. David Butler, to my right, is the department's CIO and the director with line management responsibility for DPC's FOI unit.

During the period of the bill's policy and legislative development process Mr Porter and I were at different points in time responsible for leading the policy development and the consultation process on the bill, so in that context we are able to hopefully assist the committee tonight with information about the consultation process and the policy underpinning the bill. However, as the committee will no doubt appreciate, we are not able to disclose cabinet deliberations or processes.

As between the three of us tonight, Mr Porter is probably going to be best placed to answer questions about policy and the technical details of the bill that is currently under consideration; I will hopefully be able to provide some assistance in explaining elements of the consultation process; and David will be available to assist the committee with any queries it has about the operation of the current FOI framework in so far as it impacts on the department.

Given the evidence that the committee has already heard from the privacy commissioner and the acting FOI commissioner, particularly around the consultation process, we thought it might be helpful if I provide a very brief chronology of the consultation on the bill. If I may, Chair?

The CHAIR — Yes.

Mr MILLER — The secretary of DPC met with the acting FOI commissioner on 1 March and the privacy commissioner on 3 March to communicate with both of them government's decision to merge their offices. He offered both commissioners the opportunity to receive a more detailed briefing about the proposed policy changes, both on the decision to merge their respective offices and on the other changes proposed to acquit the government's election commitments to reform the FOI system. And in that context Mr Porter briefed the acting FOI commissioner with further details about the proposed policy changes on 4 March 2016.

At that point in time the bill was very much in the development phase; my recollection is that at that point in time we did not have a bill from parliamentary counsel. Following Mr Porter's meeting with the acting FOI commissioner, the acting FOI commissioner provided written comments to DPC on the proposed policy settings, and that was sometime in March. The privacy commissioner met with me, Mr Porter and Mr Bates, deputy secretary for governance policy and coordination at DPC, on 5 May to receive a similar briefing.

During both of those briefings we proposed that the commissioners announce the government's decision on the reforms in parallel to their respective offices in advance of a public announcement from the government on the reforms, and we also offered to provide a communications plan to both commissioners with some suggested speaking points and answers to potential questions to use in briefings with their staff. We also promised to provide the commissioner for privacy and data protection a more detailed written summary of the proposed reforms given that we were not able to secure an opportunity to meet with him earlier and take him through the proposed policy changes in person, as Mr Porter had done with the acting FOI commissioner in March.

In that context, on or around 6 May DPC provided the privacy commissioner with a communications plan and a more detailed written outline of the reforms, and on 10 May DPC provided a communications plan for use with staff to the acting FOI commissioner.

On 18 May 2016 DPC provided the commissioners with the government's draft media release announcing the reforms, and I am advised that both the commissioners announced the decision to their staff on the same day, 18 May. On 24 May 2016 the government issued the media release announcing the reforms, and DPC provided both commissioners on that day with a draft of the bill for comment, seeking comments by 27 May, a Friday I believe

I met with the acting FOI commissioner on 27 May and talked with him about his comments on the bill, which were relatively detailed, and on the same day, 27 May, I received those comments in written form — about eight pages worth of comments.

As the committee would be aware, the bill was introduced into the Assembly on 22 June 2016. I thought I might hand over briefly to my colleague Mr Porter just to take you through a high-level overview of the policy and the bill if that is okay, Chair?

The CHAIR — Yes.

Mr PORTER — Great. As the committee is aware, the bill itself proposes a number of changes to Victoria's FOI and, to a lesser extent, the privacy legislation. The primary purpose of the bill, I think it is fair to say, is to implement the government's election commitments in the FOI space. Just to recap on what they were, the government made a number of election commitments. The first was to create a public access counsellor role in Victoria. The second was to give the FOI commissioner — or the FOI regulator now — a much broader mandate, and that would allow the FOI commissioner with the ability to set professional standards for departmental officers; to educate the public as well as the public sector about FOI; and to review decisions to exempt documents under the cabinet exemption, reflecting the fact that at the moment the FOI commissioner does not have power to review those decisions and that any decision about a cabinet document essentially has to be appealed to VCAT rather than the FOI commissioner.

There were two other commitments: the first was to allow the FOI commissioner to review decisions of ministers and principal officers — that is, secretaries and equivalent heads of other public sector bodies. In addition there were some commitments to reduce the time to respond to FOI requests from 45 to 30 days and to reduce the time that agencies have to seek VCAT appeal rights of the FOI commissioner's decisions from 60 days to 14 days. The bill also then went on to make a number of complementary changes to FOI and privacy legislation.

As you know, the bill includes proposed changes to the governance structure to manage the offices of the FOI commissioner and the commissioner for privacy and data protection. It allows the FOI commissioner to consider a broader range of complaints made against principal officers and ministers, and it gives the FOI regulator the power to undertake own-motion investigations and powers to require agencies to undertake further and better searches, as well as compulsory information gathering powers essentially to boost the FOI regulator's ability to effectively deal with complaints and review requests that he receives.

The CHAIR — Thank you. I have a couple of questions just to start off, and the first is that I understood that Tony Bates was going to be coming this evening, but he is not. Is there a reason for that?

Mr MILLER — I understand, Chair, that the committee was to be informed of Mr Bates's unavailability. It sounds from your comments as if that might not have happened, but I can tell you that Mr Bates has been approved a period of leave for a period including tonight.

The CHAIR — Okay. When is he returning from leave?

Mr MILLER — I actually do not have those details at my fingertips, Chair.

The CHAIR — Okay, thank you. One other question: you have referred to the consultation process that went on prior to the bill being released. Was there any form of public consultation? Given that we have had evidence earlier in this inquiry that the vast majority of applications under FOI are made by members of the public, what has their involvement been in this bill?

Mr MILLER — There was no public consultation as such, but a number of relevant stakeholders were consulted in the process of the bill's development, and those stakeholders included the public service departments, as you would expect, but included within that was the network of FOI managers, colleagues of David's across the public sector, Victoria Police, the Victorian Inspectorate and IBAC, among others. But no, in answer to your question, Chair, there was no broader public consultation before the bill was introduced into the Parliament.

Mr RICH-PHILLIPS — Mr Miller, I am just wondering, we were expecting Tony Bates, the deputy secretary — —

The CHAIR — I have just covered that. I did just ask some questions regarding that.

Mr RICH-PHILLIPS — Obviously there was a lot of evidence relevant to Mr Bates which I would certainly like to test in a hearing. I assume you are not going to be able to answer questions about things Mr Bates did or did not do which have been previously given in evidence?

Mr MILLER — Obviously I cannot answer any questions that are not within my direct knowledge. What Mr Porter, Mr Butler and I can do is talk to the policy underpinning the bill and talk to the committee about any further questions it has got about the consultation process or indeed the detail of the bill.

Mr RICH-PHILLIPS — Are we likely to have an opportunity to talk to Mr Bates to go through some of the evidence the committee heard last week?

Mr MILLER — As I said to the Chair, Mr Bates is on approved leave for this evening. I am not privy to when Mr Bates is returning to the office, so it is not a question I can really help you with, Mr Rich-Phillips.

Mr RICH-PHILLIPS — Okay. It would be good to get his position on a number of matters which were canvassed last week. Are you expecting extended leave?

Mr MILLER — As I said, I am just not privy to those details.

Mr RICH-PHILLIPS — Mr Miller, you went through a series of dates around the process of the preparation of this legislation. Can I ask you: on what date did the bill receive approval in principle in cabinet?

Mr MILLER — Mr Rich-Phillips, that is not information that I can provide. I mentioned in my opening that I am not able to stray into areas that would expose the deliberative processes of executive government or of the cabinet.

Mr RICH-PHILLIPS — The reason I asked the question is that you would appreciate that with the preparation of legislation, policy work takes place prior to the approval-in-principle stage. Agencies and departments go through a policy development process, following which an approval-in-principle cabinet submission is prepared, which is then signed off by cabinet, and the bill is then drafted after the approval in principle. What I am keen to get a handle on is when the policy development process took place versus the legislative drafting process, so that date, that AIP date, is quite critical to understanding the development process of this legislation.

Mr MILLER — Mr Rich-Phillips, I do not disagree with your assumptions about the usual policy development process, and I can confirm that policy development work was undertaken by the department before any cabinet decision was taken, but what I cannot do, Mr Rich-Phillips, is provide you with the details of the dates on which any decision was taken by cabinet. What I can do, as I offered to the Chair in the opening statement, is confirm that as at the time that the secretary met with Mr Watts and Mr Ison, the bill was very much in the development phase and actually not to hand. There was no bill in existence within the department's custody at that point in time.

Mr RICH-PHILLIPS — Had it been drafted at that point?

Mr MILLER — Again, I think the answer to that question would reveal and go to questions of cabinet deliberation.

Mr RICH-PHILLIPS — It is critical to the consideration of the consultation process. If the bill was being drafted, it means the policy decision had already been made.

Ms SYMES — I think he has answered the question.

Mr RICH-PHILLIPS — The first date you gave, Mr Miller, was around 4 March, maybe 3 March. Was that before or after the AIP decision?

Mr MILLER — Mr Rich-Phillips, I cannot provide you with those details. What I can offer is that a government decision had been taken before Mr Watts and Mr Ison were consulted by the secretary.

Mr RICH-PHILLIPS — A government decision being a cabinet decision?

Mr MILLER — I cannot elaborate any further on that, Mr Rich-Phillips.

Mr RICH-PHILLIPS — What do you mean by a government decision?

Mr MILLER — I think any answer to that question would take me into the territory of revealing the dates and details of the cabinet processes.

Mr RICH-PHILLIPS — Were Mr Watts or Mr Ison involved in the policy decision?

Mr MILLER — All I can do, with respect, Mr Rich-Phillips, is take you through the facts, and the facts were that on 1 and 3 March respectively the secretary had that initial discussion with Mr Watts and Mr Ison, and I am happy to take you through some of the detail that followed that, but Mr Watts and Mr Ison were both in various forms and at various stages provided with more detailed outlines of the proposed policy reforms.

Mr RICH-PHILLIPS — Did that precede the policy decisions?

Mr MILLER — Again, Mr Rich-Phillips, I cannot see a way to answer your question. I am sorry. I am here to be as cooperative as I can be.

Mr RICH-PHILLIPS — I appreciate that, Mr Miller, but that is critical to the committee's understanding of whether Mr Ison and Mr Watts were consulted on the policy. As you appreciate from the evidence last week, the consultation process has become significant in the committee's consideration of this legislation. Understanding the policy development, as distinct from the drafting of the legislation — you three gentlemen would have a very clear appreciation of the difference between those two stages — and understanding where the engagement with Mr Ison and Mr Watts came is critical to this committee's understanding of what went on.

Mr MILLER — Mr Rich-Phillips, all I can do is direct you, I think, to my previous answers that I have offered: that conversation with Mr Watts and Mr Ison followed the taking of a government decision. I cannot elaborate in any more detail on the nature of the decision or the steps in the cabinet process that preceded or followed it.

The CHAIR — I think at this stage we might move on to Ms Patten, and ensure that others can ask their questions, and I think we will get an opportunity to come back.

Ms PATTEN — Thank you for coming this evening. We have just had some evidence from the law institute. They pointed out just a couple of anomalies, and I just wanted to ask about one, which was the new section 49KA about a review of a decision about an information investigation. But what they seem to find is that if there had been a decision that there could be no investigation, then that section was null and void effectively, because it was a review to say how was that an adequate search, yet the decision could have been that there was no search because the office said it was too onerous or was restricted in one way or another. And they suggested two solutions to that. One was just to get rid of section 49KA or to expand on it and suggest that that review could be not just about the search but about the decision not to search. I wonder if you were aware of this and what your thoughts were.

Mr MILLER — I can take the first part if you like. As to whether we were aware, it has been a little while, to be honest with you, Ms Patten, since we last received the comments from LIV. LIV did make submissions to government on the bill and my memory is that they made submissions that identified the issue or area of

concern that you have just raised. I do not have the technical details of the bill in front of me. I am not sure if my colleague Mr Porter can shed any more light on that question.

Mr PORTER — Yes. Ms Patten, all I would say is that this power that has been proposed in the bill does add to the suite of tools that the FOI commissioner would have ready to hand to address concerns that come up when he reviews decisions. This is a power that does not currently exist, and there are certainly circumstances in which I think it could properly be deployed in response to what the regulator sees as a failed response.

Ms PATTEN — A failed search.

Mr PORTER — Yes, that is right. So in that sense I think it does broaden the suite of tools that are available.

Mr MULINO — I have two questions. One is on the consultation process. As part of the consultation process there were meetings on 1 and 3 March to run through the overarching government decision, then on 4 and 6 March in relation to a more detailed discussion around some of the elements of the proposed changes, and then on 24 May with both commissioners in relation to the draft bill. So I just wanted to clarify: at each of these meetings was it make clear that any comments or feedback in relation to what was discussed at the meetings were welcome?

Mr MILLER — Thanks for your question, Mr Mulino. I just wanted to take you back quickly to the dates. So it is right to say that there were meetings with the secretary on 1 and 3 March, and the briefing between Mr Porter and the acting FOI commissioner on 4 March. I am not sure that there was a further meeting on 6 March.

Mr MULINO — Sorry, 6 May.

Mr MILLER — 6 May. The meeting with the privacy commissioner was on 5 May, but in each of those meetings I obviously cannot speak to what exactly the secretary offered to each of the commissioners in his initial meetings with them, but certainly in the meetings that Mr Porter and I attended either together or individually the tone of the conversations were to the effect of: we are here to provide some further detail about the reforms further to your initial conversations with Mr Eccles, the secretary, and we offered both commissioners the opportunity to receive some more information from the department if it liked to about the policy reforms and an indication from us to both of them that their comments would be sought on the draft bill.

Mr MULINO — And a question on the policy framework. There are a number of changes that are fairly technical and self-explanatory, like reducing time limits for responding and so forth. One of the key changes is of an organisation structure nature, which is to merge the two functions under one information officer. I am just wondering if you could outline what the policy rationale for that is.

Mr MILLER — I might invite Mr Porter to respond to that question.

Mr PORTER — I just momentarily lost my notes on this point, Mr Mulino; just give me a tick. So in terms of the decision to merge the two offices, there is some policy rationale sitting behind that decision, and that is that allowing FOI and privacy to be regulated by a single body first allows for broad oversight of the Victorian government's information management practices, which will support the identification of policy improvements and emerging issues that come up through the privacy and FOI system. Second, the proposal to merge the offices allows one body to manage the overlap between the FOI and privacy regimes and to align regulatory priorities across both regimes. Third, it creates an opportunity to integrate other information management functions into the office in future if that is a decision that the government of the day decides is an appropriate one to make. Fourth, it also partly addresses the deficiencies that the Victorian Auditor-General's Office identified in the former acting Auditor-General's report on accessing public sector information. I just remind the committee that as part of that report the acting Auditor-General made findings around a number of issues with Victoria's information management structure and legislation.

In essence I think it is fair to say that he found that Victoria's information environment is fragmented and confused, with a proliferation of numerous unconnected, overlapping and inconsistent plans, strategies, standards and guidance. He also said that there is an absence of a single point of accountability for the intended framework, with information management oversight and leadership dispersed across multiple uncoordinated

bodies, and that the essential elements of an effective framework, such as developing and implementing information management better practices, lack of effective authorisation and oversight. So while it is not true to say that the decision to merge the offices wholly addresses these issues, it is the first step in doing so.

Mr RICH-PHILLIPS — Can I just quickly ask: when was that Auditor-General's report, Mr Porter?

Mr PORTER — It was December 2015, Mr Rich-Phillips.

The CHAIR — You indicated that it is the first step in bringing together a fragmented system. Are you able to explain the remaining process?

Mr PORTER — No, I am not. Victoria's information management environment is complex and contains a vast number of bodies and entities who are participants and regulators. This bill really focuses on the two regulators for whom the public is an important stakeholder and who, perhaps it is fair to say, have the most significant regulatory functions over information management practices in that they affect how government releases information that it holds to the public and they affect how people's personal privacy and personal information is held, collected and used by government agencies.

The CHAIR — One of the main reasons for merging these two bodies within the framework was their importance to the public in terms of privacy and information release, but evidence was given earlier that the public has not been consulted on this at all. How does that work?

Mr MILLER — Look, I think, Chair, all we can say in response to that is that as part of the policy development process, the impacts on the public and the various reports and materials available around the public's access to information and the public's interest in private information being protected were available to the department and considered fully as part of the policy development process.

Ms SYMES — Thank you for appearing this evening. Some of the evidence we have received points to New South Wales and Queensland as a reason that we should not follow their model. I am just wondering if you had a comment in response to that view.

Mr PORTER — Thanks, Ms Symes. While the bill does propose a merger of the privacy and FOI regulators, as has occurred in the commonwealth, New South Wales and Queensland, the bill does not replicate exactly the same governance structure in Victoria as exists in the commonwealth, New South Wales and Queensland. It actually proposes a bespoke governance framework that is appropriate for the Victorian setting and that in fact addresses some of the governance concerns that have arisen in other jurisdictions. Just to give you a few examples: in the commonwealth office, rather than clearly delineating the powers and functions that can be exercised by each of the office-holders, the commonwealth office also has an information commissioner, an FOI deputy commissioner, in effect, and a privacy deputy commissioner. Under that model, the privacy and FOI commissioners can each exercise the others' powers, and so in that sense there is not the clear delineation of functions in the same way that this bill proposes.

The New South Wales model is an interesting model because in that model there are only two commissioners rather than the three that are proposed in this bill. In that model what happens is that the information commissioner also performs the role of CEO and so, for example, has employment powers and in effect has the strategic control and direction of the office but they are also in their guise as the FOI regulator, with the privacy commissioner sitting separately. In contrast this bill creates a very clear governance structure, with the information commissioner having a broad role and a mandate over both FOI and privacy and then delineated roles for the FOI deputy commissioner and the privacy deputy commissioner so that there is a clear split in the functions.

The commonwealth and New South Wales models also do not contain any express provision against the responsible minister issuing any directions or purporting to control the office. On the Queensland front I just note that the Queensland information commissioner does not have own-motion investigation powers and cannot set professional standards for public officers to follow in dealing with FOI requests.

Ms SYMES — That was much more thorough than I expected, so thank you very much for your answer. Just a brief question: we received evidence from Mr Watts, particularly in relation to his view that the purpose

of the bill, as far as it relates to the Privacy and Data Protection Act, was constructed to get rid of him. Can you provide any comment on whether he has any basis for that view?

Mr PORTER — It was not constructed to remove Mr Watts from office.

Mr RICH-PHILLIPS — But it does in fact do that, doesn't it?

Mr PORTER — If passed, it will have the effect of abolishing the Office of the Commissioner for Privacy and Data Protection.

Ms PATTEN — Can I just follow quickly on that? Was there any reason why you decided that for the current protection for the privacy commissioner and the Freedom of Information Commissioner, which is that they can only be removed by Parliament, that that position be diluted substantially in this bill? Certainly the LIV would recommend that those two important commissioners maintain that protection of the Parliament from the removal. What was the policy position for diluting that protection?

Mr MILLER — Let me start, Ms Patten, with my thoughts on that question, and I presume in particular you are referring to the mechanisms for removing or suspending commissioners?

Ms PATTEN — Yes, correct.

Mr MILLER — In the case of the Victorian information commissioner — the role to be set up by this bill — the determination, if you call it that, and the removal arrangements are as per the determination and removal arrangements that apply to the privacy and data protection commissioner. As Mr Porter has mentioned, there are steps in the bill to further clarify the independence of that office from the executive government, including the provision that the minister responsible cannot issue directions to control the information commissioner. I think it is an important point here that the bill equips the information commissioner, which sits at the head of the consolidated office, with all of the regulatory and decision-making powers that are currently available to both the privacy and data protection commissioner and the acting FOI commissioner.

Mr PORTER — It is also just worth noting, Ms Patten, that the suspension and removal arrangements for the deputy commissioners are the same as the current arrangements for removing or suspending assistant FOI commissioners under the FOI act.

Ms HARTLAND — I have had a lot of experience with FOI over 30 years as a community activist and as an MP, and in my mind it has failed nearly the entire time under a range of governments, so how will these changes to the bill, especially for community, make it easier for community to actually use FOI and be able to access the documents that they are seeking?

Mr MILLER — Thanks, Ms Hartland, I might start just with a couple of observations in response to that. You would be aware that the bill seeks to reduce the time available to agencies to respond to an FOI request, the intent of which is to expedite the process between application and receipt of FOI documents. Added to that, the proposed changes to the appeal periods give agencies less time within which to appeal a decision made by the FOI commissioner or the new Victorian information commissioner. Again, that is designed to expedite the time between application and receipt and final determination of an FOI request. I think the proposed changes to OVIC's role with respect to the cabinet exemption will also assist in addressing some of the frustrations and issues that you are talking about, in that by providing the community with access to the Office of the Victorian Information Commissioner — which I should note is a no-cost review function in terms of the commissioner's hearing — it will again provide some more alternative and more user-friendly and more accessible pathways for applicants to have their FOI requests resolved finally. Did you want to add anything to that, Mr Porter?

Mr PORTER — Yes, look, I will just add to that to say, Ms Hartland, that this bill also makes clear that the FOI regulator's mandate — and it will be the information commissioner — is to educate the public as well as the public sector about how to get access to their information under FOI, and so in that sense hopefully the commissioner will go out and educate the community to help them get better access to any of their information held by government. I would also just add that the suite of extra tools that will be provided to the information commissioner that do not currently exist will help the commissioner to deal with circumstances where government has not properly withheld documents in response to FOI requests.

Ms HARTLAND — If I could have a follow-up, in terms of the education, what I have found — and I do assist a lot of community groups currently with doing their FOI requests — is that you have to be incredibly specific about what it is you are asking for or you will get a truckload of documents and not get the one piece of paper that you are actually looking for. In that education, how will people know that that is available? How will community groups know that that education is available?

Mr PORTER — Yes, look, that ultimately is probably a question that the information commissioner is perhaps better equipped to handle as part of the implantation of the new arrangements for the office, but I would expect that the information commissioner would make information available through a wide range of media including through their website. They, I think, at the moment have a helpline as well that anyone can call to ask questions about their FOI issues and about their FOI reviews that are underway, and so it really is probably an implementation issue.

Mr RICH-PHILLIPS — Mr Porter, can I take you back to your answers to Ms Symes or Mr Mulino about the rationale for the amalgamation of the two offices that will bring them under the one commissioner. You referred to managing the overlap between the two offices. Can you outline the extent of that overlap and the nature of that overlap, please?

Mr PORTER — Sure, look, while it is true to say there is some overlap, that arises because the FOI and privacy regimes both support the release of government information but in different ways. The FOI regime is primarily concerned with the release of government information, but in contrast the privacy regime allows access but with the focus on protecting the use and disclosure of personal information. I would also just note that the FOI and privacy and data protection acts contain regimes for accessing personal information held by government, but those regimes operate somewhat differently.

Mr RICH-PHILLIPS — So where is the overlap? To what extent do these agencies work together? Because the evidence last week from both Mr Watts and Mr Ison suggests they operate quite independently and there is very little — certainly operational — overlap and certainly very little operational contact. So I am trying to get a sense of what is the overlap that justifies the rationale for bringing the two offices together.

Mr PORTER — I am not sure it is fair to say that operationally there is no room for the two regimes to intersect, because at their heart what both the FOI and privacy regulatory regimes deal with is the use, collection and disclosure of information that is held by government. So operationally someone accessing their information under the FOI regime will be accessing the same information that they might seek access to under the Privacy and Data Protection Act.

Mr RICH-PHILLIPS — Under what circumstances is an applicant likely to seek information under the FOI regime and separately under the privacy and data protection regime?

Mr PORTER — The practice that I am aware of is that about two-thirds of FOI applications made to government are by people seeking to access their personal information, but I cannot comment on the circumstances in which particular individuals make a choice to access their information through the Privacy and Data Protection Act versus the FOI regime.

Mr RICH-PHILLIPS — But that two-thirds — Mr Ison has given me similar numbers in private briefings — are handled through the FOI regime, and if there are disputes, they are handled through the FOI office. I assume they do not engage with the commissioner for privacy and data protection's office. There is not an overlap between the two offices in that sense.

Mr PORTER — Well, no, except that the privacy commissioner could receive complaints and consider complaints, I think, under his legislation around access requests submitted under the Privacy and Data Protection Act.

Mr RICH-PHILLIPS — I think typically doesn't, if I am correct — if I understand correctly Mr Ison's advice.

Mr PORTER — Look, I cannot comment on the practice of individuals seeking access to their information or how they handle complaints.

Mr MILLER — But I think, Mr Rich-Phillips, just to add to Mr Porter's answer, in an operational sense, if you think about the various geneses for complaints about privacy, for example, or complaints about the way agencies respond to FOI applications — the timeliness, the manner of those sorts of issues — by consolidating those two functions within the same office you are effectively bringing together two agencies that, both from different lenses sure, are exposed to agencies and the way that those agencies handle, store, provide access to and make secure information. So one of the key benefits we see from a policy perspective here is that you are bringing that know-how together into the same office such that the information commissioner can better engage with government about the way that government holistically deals with information.

Mr RICH-PHILLIPS — Does the ordinary departmental consultation policy development process not allow for that interaction between agencies without having to pass new statute to combine them?

Mr MILLER — I think the beauty of consolidating at that, if I might call it, oversight level is that both the privacy commissioner and the FOI commissioner in their current roles have a perspective across all agencies. I think it is very difficult for departments even with an active culture of collaboration to, if you like, sit above the operational practices and identify high-level trends. So our view is the governance structure enables and puts into place positions — vantage points — which actually offer that view on the government.

Mr RICH-PHILLIPS — Thank you. We are limited on time, are we?

The CHAIR — We are scheduled to finish at 8.

Mr RICH-PHILLIPS — I would just ask for one. The root and branch review of the FOI act, are you able to provide the committee with a copy of the terms of reference for that, please?

Mr MILLER — I am not able to provide a copy, Mr Rich-Phillips, of the terms of reference.

Mr RICH-PHILLIPS — Are you able to take that on notice? By your answer, do you mean that you do not have it with you now, or — —

Mr MILLER — What I can offer to do is take your question on notice and consider an appropriate response to that question.

Mr RICH-PHILLIPS — It was committed by the minister to be completed now. I take it that is not going to be the case — in March 2017?

Mr MULINO — In March.

Mr MILLER — Look, I will take your question on notice and come back to you with an appropriate response — on both of your two questions, if that is okay, Mr Rich-Phillips.

Mr RICH-PHILLIPS — Thank you, Mr Miller.

The CHAIR — Are there any further brief questions? No? In that case, gentlemen, I thank you for coming this evening and for your evidence. You will be provided with a transcript that you can check for accuracy within a few weeks time.

Mr RICH-PHILLIPS — Thank you, gentlemen.

Committee adjourned.

Appendix 2
Law Institute of Victoria's response to Questions on Notice

A2

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14 March 2017

Ms Margaret Fitzherbert MLC
Chair
Legal and Social Issues Committee
Parliament House, Spring Street
East Melbourne VIC 3002

By email: lsic@parliament.vic.gov.au

Dear Ms Fitzherbert,

Thank you for inviting the Law Institute of Victoria (LIV) to give evidence at the Legal and Social Issues Committee's inquiry into the Freedom of Information Amendment (Office of the Victorian Information Commissioner) Bill 2016 (FOI Amendment Bill).

This letter includes details of further issues that the LIV believes should be addressed by amendments to the Bill and also responds to several questions taken on notice.

Response to questions taken on notice

1. The Committee asked whether the LIV has a view on the merits of the merging of the FOI Commissioner and Privacy and Data Protection Commissioner into the one body: the Office of the Victorian Information Commissioner, in line with other jurisdictions

The decision as to whether to merge privacy and FOI function in one agency or several agencies is complex and ultimately a decision for Parliament to make. As noted by the Commonwealth Ombudsman:

> there is a risk that the FOI and privacy functions will clash if located in the one office: one function is principally concerned with public disclosure of information, the other with confidentiality and protection of information. Whether that clash is best resolved within one agency, or between two agencies, is a challenging issue.[1]

Merging the two regimes into one body appears to provide commonality in the privacy exemption under FOI and personal information concepts under the *Privacy and Data Protection Act 2014* (Vic) (PDP Act). However, this perception is likely to be limited due to the operation of the two statutes which do not have the same definition for privacy or handle it in the same way. These differences are not addressed in the Bill.

The overarching requirement in disclosing personal affairs information in the *Freedom of Information Act 1982* (Vic) (FOI Act) is for disclosure not to be unreasonable. This subjective consideration does not exist in the PDP Act. It is likely that personal affairs information disclosed under FOI could be considered inappropriate for disclosure under the PDP Act. Due to these differences, the LIV supports

[1] Professor John McMillan, Commonwealth Ombudsman, *Designing an effective FOI oversight body - Ombudsman or independent Commissioner?* (27 November 2007)

Mr Watts' view that merging the offices is unlikely to create an opportunity for a joint approach to privacy; however, there may be other benefits in terms of sharing resources etc.

It has been raised that the merging of these two regimes has not been successful in other jurisdictions, however, lack of adequate resourcing may have played a role.

We note, for example, the Federal Government's decision to significantly reduce the funding of the Office of the Australian Information Commission. While we welcomed the increase in funding that was announced in the 2016 budget,[2] we remain concerned that the funding has not returned to pre-2014 levels[3] and impairs the agency's ability to carry out its functions.

The LIV highlights the importance of providing adequate funding to the new Office of the Victorian Information Commissioner in order to enable it to carry out its functions. We also note that the root and branch review of FOI is currently occurring. If that review recommends a different model / different functions to those proposed in the Bill, then there may be additional resources required for the new OVIC.

2. The Committee asked whether, if the removal-from-office procedures were to be strengthened, that it might cause difficulties if there were differences of opinion or difficulties in working together amongst the three officer-holders?

We note that there are examples of other statutory office holders working together who have similar protections from removal-of-office. For example, the *Ombudsman Act 1976* (Cth) establishes the role of the Commonwealth Ombudsman and up to three Deputy Ombudsman, all of whom have a fixed period of appointment and who can only be removed from office by Parliament (s 28).

It is our view that the importance of preserving the independence of these three statutory officeholders, all of whom have important and distinct roles, should take precedence over the hypothetical scenario of different office-holders having difficulties working together. Such a situation could be guarded against through careful recruitment.

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[2] Office of the Australian Information Commissioner, 'OAIC forward funding in 2016-17 Federal Budget' (4 May 2016) <https://www.oaic.gov.au/media-and-speeches/statements/oaic-forward-funding-in-2016-17-federal-budget>.

[3] See, e.g. Crikey, 'Turnbull delivers on transparency promise, with Information Commissioner saved' (3 May 2016) < https://www.crikey.com.au/2016/05/03/turnbull-delivers-transparency-promise/>.

Additional suggested amendments to the Bill

As noted in our presentation to the Committee, the LIV has a number of further suggested amendments to the FOI Amendment Bill. These are detailed below.

1. Removal of review ability for 'deemed refusals'

Under s 53 of the FOI Act where a request is made to an agency and the time period expires without notice of the decision being provided to the applicant, the legislation currently deems that the principal officer of an agency has refused access in accordance with the request 'for the purpose of enabling an application to be made to the Tribunal under section 50' (s 53(1)). Section 50(1)(a) then allows decisions of the principal officer of an agency refusing to grant access to a document to be reviewed by VCAT.

The FOI Amendment Bill does not amend s 53(1), however clause 42 of the Bill repeals s 50(1)(a) FOI Act. This means that 'deemed refusals' will no longer be able to be reviewed by VCAT. The Bill does not amend s 49A to allow 'deemed refusals' to be reviewable by the new Information Commissioner.

The outcome of these amendments appears to be that 'deemed refusals' will not be reviewable by either VCAT or the new Information Commissioner.

We recommend that the FOI Amendment Bill be amended to ensure that 'deemed refusals' are reviewable by VCAT. Keeping such deemed decisions reviewable by the Victorian Civil and Administrative Tribunal places more pressure on agencies to ensure that decisions are made within time.

This could be achieved by amending clause 42 of the FOI Amendment Bill so that s 50(1)(a) is no longer repealed, but rather amended to allow VCAT to conduct a review of a deemed refusal by a principal officer under s 53, consistently with being able to conduct a review of a deemed refusal to amend made by a principal officer (see current operation of s 53 with s 50(3B).

Section 50(1)(a) would then read as follows:

> (a) a decision of the principal officer of an agency, deemed under s 53 to have been made, refusing to grant access to a document in accordance with a request;

However, if it is instead decided that deemed refusal decisions applying to requests for access are to be reviewable by the Information Commissioner (not by VCAT), then we note that the following amendments would need to be made:

(a) to s 53 so that it does not apply to deemed refusals arising from requests for access (and is limited to requests under Part V and s 12); and

(b) by inserting in Part VI an equivalent to s 53 applying only to requests for access which make clear that a deemed refusal by a principal officer arises for the purposes of enabling review by the Information Commissioner; and

(c) to s 49A (perhaps as s 49A(1)(aa)) by adding as a decision reviewable by the Information Commissioner a decision of the principal officer of an agency, deemed under the specific section to have been made, refusing to grant access to a document in accordance with a request.

2. Notification period

Section 21 of the FOI Act sets out how long an agency has to notify an applicant of a decision. The Bill reduces the maximum period from 45 to 30 days (clause 8, FOI Amendment Bill).

Section 21(2) (as substituted by clause 8 of the FOI Amendment Bill) states that an agency or Minister 'may extend the period for deciding a request' in two ways. However, the period for deciding a request is very different to the date of notification.

For consistency and clarity, LIV recommends that references in clause 8 of the FOI Amendment Bill to 'deciding a request' be amended to 'notifying an applicant of a decision on a request' (note that this change should be made to s 21(2), (3), (4) as amended).

3. Notification of agencies

Currently the FOI Commissioner does not notify agencies of the date on which they received an application for review or of any extensions of time (and when obtained and for how long).

In our view, given that an applicant can only seek review within 28 days of being notified of an agency's decision, it is a jurisdictional fact of which the agency should be informed when receiving notice of the application for review (see s 49D(1)).

We suggest that s 49D(1) be amended to require that any notice to the principal officer/Minister includes the date on which the Information Commissioner receives the application for review.

Section 49J should also be amended to notify the agency/Minister of when an extension of time was sought and obtained each time it is so sought and obtained.

4. Decision on review – documents affecting personal privacy, trade secrets and material received in confidence

Under s 49P of the FOI Act, after conducting a review of an agency the Information Commissioner must make a fresh decision. This decision does not take effect until the time specified in the legislation.

Clause 40 of the FOI Amendment Bill substitutes a new s 49P(4) and makes amendments to s 49P(5). These amendments mean that new s 49P will contain two different descriptions that determine when the decision to release a document takes effect:

- New s 49P(4)(a) applies where the decision requires 'release of a document of a kind referred to in section 33, 34 or 35 in respect of which a person has a right of review under section 50' (60 days)

- New s 49P(4)(b) applies where the decision 'requires release of any other document or a document to the extent that it does not include information of a kind referred to in section 33, 34 or 35 in respect of which a person has a right of review under section 50' (14 days).

The wording of these sections is different to the wording of s 49P(5) (as amended) which uses the term 'a document that is claimed to be exempt under section 33, 34 or 35'.

We believe that the different terms used in these provisions may lead to confusion.

For consistency, we suggest that the term 'a document that is claimed to be exempt under section 33, 34 or 35' be used throughout this section.

5. Professional standards

Under the new Part IB (clause 7 FOI Amendment Bill), the Information Commissioner will be able to develop professional standards which must be complied with by agencies.

Before doing so, drafts of them must be published on the OVIC internet site. In addition, notification must be provided in writing to principal officers of agencies and 'any other relevant person'. Who would be considered as falling within this is quite vague and should be clarified (s 6U(4)(b)). For example, it could at least specify those officers authorised under s 26 of the FOI Act to make decisions on behalf of agencies.

We are also concerned that providing the Information Commissioner with the ability to develop professional standards and then providing the Public Access Deputy Commissioner and Information Commissioner with the power to monitor compliance with these professional standards may give rise to conflicts in roles. These professional standards appear to be legislative instruments under the *Subordinate Legislation Act 1994*.

The professional standards developed by the Information Commissioner would then have to be applied by the Commissioners in any review of decision-making processes. We have raised concerns about similar conflicts in relation to educative roles of integrity bodies in LIV's submission on the Integrity Consultation paper.[4]

In comparison, the Commonwealth *Freedom of Information Act 1982* provides for guidelines to be issued by the Information Commissioner, however it specifically states that these guidelines are not legislative instruments (s 93A(3)) and they have been held to be non-binding guidelines that must be considered and possibly applied unless there is good reason not to.[5] We suggest that this may be a more appropriate way of providing guidance and avoiding a conflict in roles.

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[4] See Law Institute of Victoria, Submission to Department of Premier and Cabinet, *Community Consultation on IBAC, the Victorian Ombudsman and the Auditor-General* (10 June 2016) 10 (in relation to IBAC), 18 (in relation to the Ombudsman) and 24 (in relation to the Auditor-General).

[5] *Re Francis and Department of Defence* [2012] AATA 838, [18].

Finally, we note the different procedures for the making and amending of professional standards under new s 6V as opposed to Ministerial professional standards under new s 6Y. Before publishing professional standards the Information Commissioner must publish the draft standards on the website, provide notification and call for submissions. Professional standards must then be published in the Government Gazette and on the relevant website. Professional standards must then be reviewed at least once every 4 years and any substantive amendments must go through the same consultation process.

In comparison, Ministerial professional standards do not have a legislated consultation process for either new or amended standards. The Premier can adopt professional standards (and modify them) so that they apply to Ministers without any requirement to consult. We suggest that the consultation process should be the same for both forms of professional standards, as consultation plays an important role in identifying issues and concerns before new or amended standards are introduced.

6. Documents affecting national security, defence or international relations

We suggest that new ss 29A(2) and (3) of the FOI Act (amended by clause 13 of the FOI Amendment Bill) should contain a reference to s 29A(1C).

Currently, ss 29A(2) and (3) (as amended) are repeating the omission that occurred in the amendments made by the Emergency Management Amendment (Critical Infrastructure Resilience) Bill 2014 (clause 6), which introduced s 29A(1C) but did not make the necessary amendments to ss 29A(2) and (3).[6]

The Explanatory Memorandum to the Emergency Management Bill makes it clear that s 29A(1C) was intended to cover the same documents that were previously covered in s 29A(1B) and which could have been the subject of a certificate under s 29A(2) before the 2014 amendments.[7]

It therefore appears to have been an oversight that the same documents could arguably no longer be the subject of a certificate under ss 29A(2) and (3) and the new sections in the FOI Amendment Bill repeat this error.

7. Documents affecting personal privacy

For accuracy and consistency, we suggest that the words 'or document with deletions (as the case requires)' be inserted at the end of proposed s 33(2B)(c) (clause 16 FOI Amendment Bill). This change would mirror the wording in new s 33(3A) and would provide greater clarity.

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[6] http://www.legislation.vic.gov.au/domino/Web_Notes/LDMS/PubPDocs_Arch.nsf/5da7442d8f61e92bca256de50013d008/CA2570CE0018AC6DCA257D2B000F18D9/$FILE/571524bi1.pdf .

[7] Explanatory Memorandum, Emergency Management Amendment (Critical Infrastructure Resilience) Bill 2014, 23 <http://www.legislation.vic.gov.au/domino/Web_Notes/LDMS/PubPDocs_Arch.nsf/5da7442d8f61e92bca256de50013d008/CA2570CE0018AC6DCA257D2B000F18D9/$FILE/571524exi1.pdf>.

If the Committee has any further questions in relation to these suggested recommendations and responses to questions on notice please contact Kate Browne on (03) 9607 9489 or kbrowne@liv.asn.au.

Yours sincerely,

Belinda Wilson

President

Law Institute of Victoria

Appendix 3
Correspondence from Flemington & Kensington Community Legal Centre

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Flemington & Kensington Community Legal Centre Inc

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PO Box 487, Flemington VIC 3031
Phone: 03 9376 4355 Fax: 03 9376 4529
Email: fklegal@fkclc.org.au
www.communitylaw.org.au/flemingtonkensington
ABN: 38 029 753 353 Reg No: A0017061M

The Secretary
Legal and Social Issues Committee
Parliament House, Spring Street
EAST MELBOURNE VIC 3002

By email: lsic@parliament.vic.gov.au

6 March 2017

Dear Committee Members,

RE: Submission on reforming section 194 of the IBAC Act through the Freedom of Information Amendment (Office of the Victorian Information Commissioner) Bill 2016

We refer to the *Freedom of Information Amendment (Office of the Victorian Information Commissioner) Bill 2016* (Bill), which was referred to your committee on 21 February 2017, for inquiry, consideration and report by 21 March.

The purpose of this short submission is to address two proposed clauses of the Bill, which, if enacted, will have direct impact on many of the Flemington & Kensington Community Legal Centre's clients. Specifically, clauses 129 and 15, which if passed, will amend section 194 of the Independent *Broad- Based Anti- Corruption Commission Act 2011* (IBAC Act) and amend the *Freedom of Information Act 1982* (Vic) (FOI Act) to exempt certain IBAC documents from public disclosure.

Section 194 currently operates to exclude some documents held by IBAC and other bodies (including Victoria Police) from being accessible under the FOI Act, where the documents relate to a complaint made to IBAC or an investigation carried out by it (even upon IBAC's referral of that investigation to Victoria Police: that is, in situations where IBAC does not carry out the investigation). Section 194 has created inconsistency in the law with respect to who can access information/documents relating to police misconduct allegations that are the subject of complaint or investigation. It has also reduced transparency in investigations of complaints about police misconduct and in turn, eroded public trust and confidence in the operation of Victoria's police complaint system. Flemington & Kensington Community Legal Centre therefore welcomes the government's intent to change section 194 of the IBAC Act. However, we consider that the Bill as presently drafted will not bring about

the changes that are needed to ameliorate the unintended effects of section 194. This submission sets out current issues with section 194, why the proposed legislative amendments require revisiting and recommends making the bill more effective through the deletion of section 194.

The FKCLC's Police Accountability Project

Our Centre's Police Accountability Project is a specialist, public interest legal project that includes a state wide Police Complaints Advice Clinic for Victorians who seek to make a complaint against Victoria Police and Protective Service Officers. Through this clinic, and the Police Accountability Project's law reform and case work practices more generally, we have had extensive experience with Freedom of Information laws, including with freedom of information requests made on behalf of clients who are seeking information about police conduct they wish to complain about, or who are seeking information about a complaint they have made to IBAC or Victoria Police concerning allegations of police misconduct.

Issues with section 194 under the current IBAC Act

As currently drafted section 194 precludes Victorians from accessing information under the FOI Act if that information relates to a complaint they have made to IBAC or to IBAC's investigation of their complaint. There are two key issues with this blanket exemption from the FOI Act that section 194 creates:

1. Such an exemption does not meet the requirement, under international human rights law, that a police oversight system be transparent. Transparency requires that procedures and decision making process governing police conduct and investigations of police complaints are accountable and open to public scrutiny. 1 Precluding Victorians from accessing information that would otherwise be accessible under the FOI Act, on the basis that they have made a complaint to an independent body charged with investigating their allegations of misconduct is at odds with the requirement for transparency in decision making.
2. The provision creates an inconsistency in the law between how applications made under freedom of information laws are dealt with. From practical experience, it has meant that:
    - Victorians who make a complaint to Victoria Police for documents and information relevant to a complaint being investigated by Victoria Police are able to obtain that information, subject to the exemptions set out in the FOI Act. Whereas Victorians who elect to have their complaint investigated by IBAC or whose complaint is referred to IBAC for investigation, would not be able to obtain that same information.

1 See Chapter 5 in: *An Effective System for Handling Complaints Against Police,* (Hopkins, 2009), from page 73.

- Victorians who have chosen to make *no* complaint about alleged misconduct by police (that is, they have decided not to complain to Victoria Police or to IBAC) may be able to obtain information relevant to the circumstances surrounding the alleged misconduct, subject to exemptions set out in the FOI Act, whereas a person who has made a complaint to IBAC, could not.
- Victorians who have elected to complain to IBAC but whose complaint is referred to Victoria Police for investigation, will be unable to access information under FOI, even though the investigation is not being carried out by the IBAC.
- Victorians who have complained to Victoria Police, had their complaint investigated by Victoria Police, but whose complaint has been the subject of random review by IBAC (without the knowledge of the complainant), are unable to access information under FOI.2

History of the proposed changes to section 194

Section 194 of the IBAC Act was the subject of review by the Parliament of Victoria's IBAC Committee in 2016. In its report *Strengthening Victoria's Key Anti-Corruption Agencies?3,* the Committee recommended that section 194 be examined as a matter of priority, "to review any inconsistency in accessing documents between complaints lodge with the [IBAC] and Victoria Police."4 The Government in its response (tabled in August 2016) supported the review recommended by the Committee, stating:5

> *The Committee notes stakeholder concerns that section 194 creates an inconsistency in whether the FOI Act applies based on whether a person complains to IBAC or Victoria Police. IBAC.told the Committee that changes to section 194 may compromise IBAC's ability to protect its investigation methods and other sensitive information, as well as the safety and welfare of witnesses, in overseeing Victoria Police investigations into complaints referred by IBAC. The Freedom of Information Amendment (Office of the Victorian Information Commissioner) Bill 2016 addresses the inconsistency noted by the Committee by:*
>
> - *narrowing the scope of the FOI exemption so that it only applies to*

2 Please see enclosed redacted example of this occurring. In the case example, the review of the Victoria Police investigation was done randomly by IBAC, as part of IBAC's *Audit of Victoria Police Complaints Handling Systems at Regional Level* (IBAC, 2016).

3 Independent Broad-Based Anti-Corruptions Commission Committee, Parliament of Victoria, *Strengthening Victoria's Key Anti-Corruption Agencies?* (2016) 78.

4 Ibid, recommendation 4.5. See also pages 75 – 78 of the Committee's report.

5 Victorian Government, *The Victorian Government's response to recommendations made by the Independent Broad-based Anti-corruption Commission Committee in its 2016 report, Strengthening Victoria's key anti-corruption bodies?* (2016), pages 3-4.

documents:

- *held by any person or body that disclose information relating to an IBAC investigation, a recommendation made by IBAC or an IBAC report (or draft report); or*
- *in IBAC's possession that disclose information relating to a complaint or notification to IBAC or information relevant to the carrying out of IBAC's investigative functions received by IBAC under section 36 of the IBAC Act; and*

• *clarifying that the law enforcement exemption includes documents relating to IBAC's investigations – which ensures documents which would adversely affect the integrity of IBAC's investigations remain exempt.*

A decision that a document is exempt from an FOI request will be able to be reviewed by the FOI regulator and VCAT. The reforms will ensure that any documents that could prejudice an IBAC investigation will be exempt from FOI requests, while improving transparency and access to justice.

The Bill gives effect to the changes set out in the Government's response above, by inserting a new exemption (s 31 A) into the FOI Act to ensure documents which, if disclosed, would adversely affect the integrity of IBAC's investigations are exempt from disclosure. The Bill also amends section 194.6

Problems with the proposed changes to section 194

We share the concern identified in the Law Institute of Victoria's (LIV) submission dated 12 August 2016 (enclosed),7 that, consistent with past case law, the new section 194(1)(b) will be interpreted to exclude information being released in circumstances where *Victoria Police is investigating* a complaint on referral from IBAC because that investigation, despite not being carried out by IBAC, is deemed an 'investigation under the IBAC Act'. As identified by the LIV, in such circumstances, Victorian Courts and Tribunals have held that Victoria Police investigation documents are documents that relate to an investigation under the IBAC Act (or its predecessor, s 51 *Police Integrity Act 2008* (Vic)) and therefore cannot be released. Such an interpretation would defeat a key purpose of the changes to section 194, being to address the "unintended outcome, where release of certain Victoria Police

6 Victoria, Parliamentary Debates, Legislative Assembly, 23 June 2016, 2868-69 (Martin Pakula, Attorney-General)

7 Law Institute of Victoria, *Amendments to s 194 Independent Broad-based Anti-corruption Commission Act 2011* by the Freedom of Information Amendment (Office of the Victorian Information Commissioner) Bill 2016, available at: https://www.liv.asn.au/getattachment/Staying-Informed/Submissions/submissions/October-2016/Amendments-to-s194-IBAC-Act-in-Freedom-of-Informat/20160812_Letter_LIV_Section194_FreedomOfInformationAmendmentBill2016_finalforcirculation.pdf.aspx (accessed 24 January 2017)

documents may be inadvertently prevented by the FOI exemption in the IBAC Act"8.

The issue of transparency was not explored by the IBAC Committee. It is critical that the FOI Bill be reviewed in light of human rights benchmarks requiring transparency in investigations into allegations of police misconduct. We do not consider there should be different benchmarks of transparency that apply to a person seeking documents relating to the subject matter of a complaint about police misconduct, based solely on which investigative body is (or isn't) investigating their complaint.

Recommendations

We support the LIV's recommendation that section 194(1) be deleted, noting:

> *"the proposed new section 31A achieves what this section set out to do, namely to exempt from disclosure under the FOI Act any documents that would, or would be reasonably likely to—*
>
> *(a) prejudice an investigation undertaken by the IBAC; or*
>
> *(b) disclose, or enable a person to ascertain, the identity of any person or body (other than Victoria Police) who has provided information to the IBAC; or*
>
> *(c) disclose methods or procedures for preventing, investigating or dealing with protected disclosures, complaints or notifications relating to corrupt conduct or police personnel conduct the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures; or*
>
> *(d) endanger the lives or physical safety of persons engaged in or in connection with the IBAC's functions or persons who have provided information to the IBAC.*
>
> *Proposed new s 31A is so comprehensive in scope that it obviates any need for s 194 of the IBAC Act. Section 31A addresses the concern about disclosure of documents prejudicing IBAC's investigations that s 194 was intended to address in a far more direct and effective manner, and in a way that should not have the unintended effect that s 194 has of exempting from disclosure Victoria Police investigation documents."9*

Such an amendment would mean also, that only those documents relating to an IBAC investigation that legitimately risk disclosing sensitive information (eg, that might compromise witness safety) are precluded from release, rather than providing a

8 Victoria, Parliamentary Debates, Legislative Assembly, 23 June 2016, 2868-69 (Martin Pakula, Attorney-General)

9 Above n.7, p 4.

blanket exemption on all IBAC documents.

This ensures that the spirit of freedom of information law is protected in Victoria, being that the community should, as far as possible, have the right to access information in the possession of the Government and its agencies, including in relation to their operations, rules and practices, which affect members of the public.10

We acknowledge that IBAC is concerned to protect the integrity of its investigative processes, which is a legitimate and important public interest need. However, the new section 31A will provide an exemption in the FOI Act which will balance this need against the public interest of transparency in investigations concerning police misconduct – which should, as far as possible, be open to public scrutiny, regardless of which public agency investigates the allegations. Blanket exemptions precluding accessing to complaint documents such as investigation reports, and the evidence upon which an agency decision was made, do irreparable harm to any efforts of ensuring there is public transparency in Victoria's police investigation system. As explained by Hopkins (2011), without transparency in decision making -

> *"Complainants are left with no real information about the investigation, the evidence it obtained or the reasons a decision was made. This lack of transparency in the process does nothing to dispel any concerns by complainants that it has been anything other than a cover-up. Failure to provide information means the complainant has no capacity to scrutinise the investigation or its result, to participate in it to protect their interests, or to appeal the basis for the decision. As discussed in Chapter 7, these are further breaches of human rights standards."11*

Conclusion

An effective police oversight system requires transparency of police conduct, including how complaints against police are handled. Complainants should be able to access information relevant to events the subject of their complaint and should be able to access information about their complaint, subject to lawful exemptions. Freedom of Information laws help facilitate this and investigative bodies should be subject to them. The new s 31A proposed in the Bill is an effective way to balance the need for transparency with the need for exemptions to protect legitimately sensitive information. Section 194 should be deleted to promote transparency and consistency in the law so far as accessing documents is concerned.

10 See further, section 3, *Freedom of Information Act 1982* (Vic).

11 See: paragraph 7.3.9. 'Information Provision to Complainants (transparency)' in *An Effective System for Handling Complaints Against Police,* (Hopkins, 2009), page 113. See also, chapter 5 on human rights standards with respect to transparency.

If you wish to discuss the enclosed submission, please contact Sophie Ellis of our office on (03) 9376 4355. We would also be happy to appear before the Committee regarding our submission if that would be of assistance.

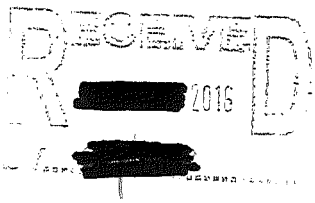
Yours sincerely,

Sophie Ellis
Solicitor
Flemington Kensington Community Legal Centre

Encl:

1. *FOI case study: Communications from IBAC and Victoria Police*
2. *LIV Submission dated 12 August 2016*

ibac independent broad-based anti-corruption commission
Victoria



Our ref: [redacted]

[redacted] 2016

[redacted]
Flemington & Kensington Community Legal Centre
PO Box 487
FLEMINGTON VIC 3031

Dear [redacted]

Police complaint – [redacted]

I write in response to your letter dated [redacted] 2015 on behalf of [redacted] regarding [redacted] Victoria Police complaint file.

The file to which you refer, [redacted] was included in an audit the Independent Broad-based Anti-corruption Commission (IBAC) is conducting of Victoria Police's local complaints handling processes.

Conducted pursuant to our prevention and education functions under the *Independent Broad-based Anti-corruption Commission Act 2011*, the purpose of this audit is to identify any systemic issues related to Victoria Police's local complaints handling processes and procedures, and ways in which they could be improved.

As part of this audit, IBAC has looked at all complaint files handled by Victoria Police's Southern Metro Region and Western Region which were closed in 2014-15. The audit has examined the way Victoria Police handled the complaint files against specific process criteria, such as timeliness, investigation processes and record keeping. It is not a merits review of particular complaints and is based on the documented complaint files only. Consequently, IBAC is not contacting individual complainants as part of this project.

IBAC intends to publish a final report informed by the audit later this year. The report will highlight key issues identified in the course of the audit, focusing on general trends rather than specific files. Some examples of particular complaints may be cited (in de-identified form) as illustrative case studies. However, it is not intended to use [redacted] complaint as a case study.

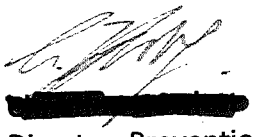
Level 1, North Tower, 459 Collins Street, Melbourne Victoria 3000 | GPO Box 24234, Melbourne Victoria 3001
Telephone: 1300 735 135 | Facsimile: (03) 8635 6444 | DX 210187 | info@ibac.vic.gov.au | www.ibac.vic.gov.au

This report will be made available via the 'Publications and resources' section of IBAC's website - www.ibac.vic.gov.au

With regards to your query as to whether Victoria Police has finalised its consideration of [redacted] you will need to please contact the Professional Standards Command.

Thank you for your correspondence.

Yours sincerely



[redacted]
Director, Prevention & Communication

VICTORIA POLICE

[redacted]2015

Our ref: [redacted]

Business Services
Freedom of Information

Victoria Police Centre
GPO Box 913
Melbourne Vic 3001
Australia
DX 210096

Office Hours: 8.30am – 4pm

Telephone [61 3] 9247 6801
Facsimile [61 3] 9247 5736

[redacted]
Flemington and Kensington Community Legal Centre Inc
PO Box 487
FLEMINGTON VIC 3031

Dear [redacted]

FREEDOM OF INFORMATION REQUEST - [redacted]

I refer to your letter received on [redacted] 2015 in which, under the provisions of the *Freedom of Information Act* 1982 (the Act), you have requested a ***"Copy of the Professional Standards Command complaint Investigation File No. [redacted]***.

In response to your request I have caused a search of Victoria Police records.

I have been advised by Professional Standards Command (PSC) that this file was reviewed by the Independent Broad-based Anti-corruption Commission ('IBAC').

Independent Broad-based Anti-corruption Commission

I draw your attention to section 194 of the *Independent Broadbased Anticorruption Commission Act 2012* (IBAC Act) which provides that:

> *"(1) The Freedom of Information Act 1982 does not apply to a document that is in the possession of any person or body to the extent to which the document discloses information that relates to—*
>
> *(a) a complaint; or*
> *(b) an investigation conducted under this Act; or*
> *(c) a recommendation made by the IBAC under this Act; or*
> *(d) a report, including a draft report, on an investigation conducted under this Act; or*
> *(e) information received by the IBAC under section 56; or* [redacted]
> *(f) a notification made to the IBAC under section 57. "*

The term 'relates to' is broad and will encompass any type of connection or relation between the two subject matters to which the words refer. As such, this provision has a broad reach and will capture those parts of documents that have any connection to a complaint, investigation, or the oversight functions of the IBAC.

PSC advised this office that the requested file was investigated and completed by Victoria Police members; the file was then reviewed by IBAC.

I draw your attention to the provisions of sections 56 and 15 of the IBAC Act which state:

Section [redacted] The IBAC may receive information

'(1) The IBAC may receive from any body or person information relevant to the carrying out of the IBAC's investigative functions or the IBAC's functions under section 5(7)(a).

(2) The IBAC may receive information under subsection (1) even if that information does not form part of, or is not related to, a complaint. [redacted]

(3) The IBAC may use information received under this section in carrying out its investigative functions.'

Section 15 Functions of the IBAC

'(1) The IBAC has the functions conferred on the IBAC under this Act or any other Act.

(2) Without limiting the generality of subsection (1), the IBAC has the following functions—

(a) to identify, expose and investigate serious corrupt conduct;

(b) to identify, expose and investigate police personnel misconduct;

(c) to assess police personnel conduct.'

This provision of information to the IBAC was made in accordance with the sections 56 and 15(2)(c) of the IBAC Act.

The document you seek access to falls within the ambit of section 194(1)(e) of the IBAC Act, and is not subject to the FOI Act.

If you have any queries regarding my response, please contact this office on 9247 6801 and quote file number [redacted]

Yours sincerely

Robin Davey
Manager
Freedom of Information Division

Date: [redacted]