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.