T R A N S C R I P T

INTEGRITY AND OVERSIGHT COMMITTEE

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

Melbourne – Monday 18 March 2024

MEMBERS

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

WITNESSES

Dr Catherine Williams, Research Director, and

Mahalia McDaniel, Research Officer, Centre for Public Integrity.

The CHAIR: I declare open this public hearing from the Integrity and Oversight Committee's Inquiry into the Operation of the *Freedom of Information Act 1982*. I would like to welcome the public gallery and any members of the public watching the live broadcast. I also acknowledge my colleagues participating today: from my left, Rachel Payne, Jade Benham, Deputy Chair Kim Wells, I am Tim Read, Ryan Batchelor, Eden Foster and Paul Mercurio.

On behalf of the Committee I acknowledge First Nations peoples, the traditional owners of the land which has served as a significant meeting place of the First People of Victoria. I pay respect to the elders of First Nations in Victoria and welcome any elders and members of communities who may be participating today.

To our witnesses, before you give your evidence, there are some formal matters to cover, so bear with me. Evidence taken by this committee is generally protected by parliamentary privilege. You are protected against any action for what you say here today, but if you repeat the same things anywhere else, including on social media, those comments will not be protected by this privilege. Any deliberately false evidence or misleading of the committee may be considered a contempt of Parliament.

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

I welcome from the Centre for Public Integrity Dr Catherine Williams, Research Director, and Mahalia McDaniel, a researcher, to give evidence at this hearing. Do you have any brief opening comments before we start, or should we go straight into questions?

Catherine WILLIAMS: We are happy to go straight to questions, thank you, Chair.

The CHAIR: Tremendous. All right. Rachel Payne might kick off.

Rachel PAYNE: Hello. Hello, Catherine. Hello, Mahalia. Nice to meet you, and thank you for coming today. My question is in relation to your view that the Cabinet documents exemption should be replaced with a public interest test, similar to the New Zealand model. My question is: In your view, what are the benefits of this model in practice, and does it protect the need for frank and fearless advice in executive decision-making?

Catherine WILLIAMS: Look, it is a really great question. We have for a long time in our work in respect of Freedom of Information [FOI] been really concerned about Acts where they contain a blanket exemption for Cabinet documents from the scope of the Act's application. So, we have looked closely at New Zealand, and obviously what is in place in New Zealand – and it has been in place since 2018, so it is good jurisdiction to look at if you want to see how this sort of amendment has actually functioned in practice – is a requirement that Cabinet documents are disclosed proactively, and that means within 30 days of a final decision having been taken. At the time that the decision was taken in New Zealand to go down this path, it was acknowledged by the Prime Minister that thriving democracies depend on there being transparent in respect of government decision-making, and trusted institutions depend on there being transparency in respect of how public power is exercised. That really is, for us, that what drives our belief that there needs to be transparency in respect of Cabinet documents.

Now, we are not talking about Cabinet deliberations, because we accept very much – and this is the case in New Zealand, and we will see similar amendments take effect very shortly; I think from 25 March in Queensland – that the maintenance of what they call in New Zealand Cabinet-related interests is vitally important. So, things like protecting individual and collective ministerial responsibility and accepting the importance of there being an opportunity for there to be frank and free conversation between ministers are what we really need to achieve best public policy outcomes. While those interests may at times require that certain Cabinet documents fall outside this proactive disclosure approach, as a rule proactive disclosure is what is best for democracy. In a sense something comes to mind: I do not know if you have ever seen those Juice Media

ads, but a really amusing one recently in respect of whistleblower reform said, 'The problem really is the Government thinks if you knew what went on here, well then you wouldn't trust us.' We want to change people's perception of that. We can know what is going on and we can trust in the decisions that government is making, and it is transparency that will best produce that outcome.

The CHAIR: Thank you. Jade.

Jade BENHAM: Thanks, Chair. Do you think that Victoria's FOI legislation can better protect against agencies' misuse or over-reliance on statutory exemptions?

Catherine WILLIAMS: Look, we think that it can. We think there are a couple of things there. In respect of the legislation itself, we look carefully at the New South Wales GIPA Act [*Government Information (Public Access) Act 2009* (NSW)]. You are probably aware that in New South Wales there are sanctions in place to deter officers and people in charge of agencies from making decisions that they know to be in breach of their obligations under the FOI Act. It can at times be helpful to look at a sanctions regime to avoid this over-reliance or misuse of the statutory exemptions. That is one element of it. Other elements of it are we are really supportive of this Committee's previous recommendation to appropriately resource OVIC to run a thorough review of the Freedom-of-Information Professional Standards. We see that as really important in changing the culture in respect of misuse and potential over-reliance on exemptions.

More broadly, there needs to be a conversation about a pro-disclosure culture. Culture is the point that was picked up at length by Professor Coaldrake in his review in Queensland, where he made this recommendation that Cabinet documents should be proactively disclosed. He spoke about the need for tone and practice to be right, because you can have the best legislative framework, but if the tone and culture as set by the top is wrong, then you are unlikely to get the result that you are really looking for. There are some practical ways to start to shift the culture in Victoria. You could do things like in the ministerial code affirm the importance of transparency and compliance with the FOI legislation, and you could do that also in relation to the *Members of Parliament (Standards) Act* – so at every opportunity re-emphasise how important transparency is, the expectation that a pro-transparent approach is always taken. These things, together potentially with something in the Act like sanctions, we would hope will start to shift the culture in the direction that it needs to go.

Jade BENHAM: Thank you.

The CHAIR: Kim Wells.

Kim WELLS: Thanks. What are the potential benefits of reducing or abolishing the FOI fees, or should there be at least a charge to try and offset some of the costs?

Mahalia McDANIEL: Our position with the fees is that we do understand that there may be some practical utility in opposing fees in terms of disincentivising claims that may not have merit, like vexatious claims. But particularly with the imposition of access fees – so that fee at the beginning of an application – we do think that that has the potential to disincentivise potential applicants. We would accept that perhaps access fees for voluminous requests – so there might be a cost per page in respect of those requests – may be necessary. But we do think that the access fee is something that does not accord with the spirit of the Act in terms of facilitating equitable access to government information.

The CHAIR: I wonder if we could get a bit more from you on your view of division 2, part 6, of the New South Wales Act, which sets a sanctions regime for FOI decision-makers who intentionally or repeatedly breach the Act, and whether that should be adopted in our legislation here.

Catherine WILLIAMS: It is our view that there is a place for that in the legislation, and it might be that it is not actually ever enforced against people. I am not sure if the Committee is hearing from, for example, journalists who practise and use FOI frequently in New South Wales, but we have spoken to a number of them. What they tell us about that mechanism is it is a very useful tool to remind people of when it appears that there is some sort of obstruction in relation to FOI decision-making or they sense that an approach that does not accord with the legislation might be being taken. It is a useful tool to remind people of, and it tends to incentivise compliance with the spirit of the Act. As I say, it might be the case that it does not get enforced, but it is an important signal. We would see it as part of helping with a cultural shift. The reason why we say 'repeated breaches in respect of officers' is that you do not want to see junior officers who might be subject to

pressure from senior members of an agency suffer consequences for things that are outside of their control, so you talk about sanctions in respect of them only if there are repeated breaches as found by the regulator and then sanctions in single cases also for people who are responsible for heading an agency and should be really carrying responsibility for failure to comply with FOI.

The CHAIR: Thank you. Eden Foster.

Eden FOSTER: Thank you. I am just wondering if you are able to please elaborate on your view that ministerial changes, including portfolio title changes, may void FOI requests because of the deeming provisions in section 5 of Victoria's FOI Act.

Mahalia McDANIEL: The issue with those provisions that govern when documents can be made available from a minister in particular is that sometimes when someone makes an FOI application, before a decision is made in respect of that application there is a change to the minister and that may cause the document to no longer be subject to the Act. We would propose that the decision as to whether it is a ministerial document, the time for making that determination should be the time at which the request is made rather than subsequently, after that time, at which the minister may no longer be the minister. Sorry, it is a complicated thing to explain, but I hope that makes sense.

Catherine WILLIAMS: And that is an amendment too that we would see as being very much in line with the spirit of the Act, because an approach that sees requests fail because of a change in minister is not something that is consistent with the architecture of the FOI Act. I am not sure if you are aware that at the moment we are waiting for a decision in the Federal Court in respect of this matter, challenges being brought by Rex Patrick in relation to precisely this point. It is worth keeping an eye out for that, as it might have bearing on your consideration also.

Eden FOSTER: Okay. Is that similar to the New Zealand model?

Catherine WILLIAMS: In what –

Eden FOSTER: In terms of the ministerial changes and the portfolio changes and whether the FOI Act applies.

Catherine WILLIAMS: I have to say that is not an aspect of the New Zealand model that we have looked at in detail, but we are happy to take that on notice if you would like and come back to you on it.

Eden FOSTER: Okay. Thank you.

The CHAIR: Alright. Did you have anything to ask?

Paul MERCURIO: Yes. It is a quick statement. I just love what you said before, and I will paraphrase it, so it is probably not correct. You said something along the lines of, 'If people knew [what] went on in the political backrooms, then they would not trust pollies.' It just reminds me of that 'If you knew what went in a restaurant kitchen, you probably would not eat there either.' Mind you, the food that comes out is great, so pollies are trustworthy.

Just something that I am quite interested in – and I like all your values, where you are saying you are accountable, innovative, transparent, rigorous and ambitious. Keeping that in mind, do you have any thoughts on the use of AI in freedom-of-information requests?

Catherine WILLIAMS: I wish we had some thoughts on AI. It is such a complex area. We are a small organisation, so it is not something we have the ability to look at.

Paul MERCURIO: Is it something that you are considering looking at?

Catherine WILLIAMS: At this point, no. We have got a big reform agenda. We would like to look at it, but as I said, we are not able to at the moment.

Paul MERCURIO: Okay.

Catherine WILLIAMS: But if there are specific issues that you are interested in having us look at, we are happy to hear about it and see if we can find space to.

Paul MERCURIO: I just think the whole issue of how it is going to be used is going to be a big issue.

Catherine WILLIAMS: It is such an enormous and complex and terrifying proposition, a really terrifying proposition.

Paul MERCURIO: You are not the first to say that.

Catherine WILLIAMS: No, it really is a brave new world, and I do not envy policymakers needing to grapple with those considerations. It is terribly hard. From a democracy perspective, I am not sure who in our space is looking carefully at AI, but I will have a talk to some people and come back to you on it, because there must be some group that is looking at it from a democracy perspective.

Paul MERCURIO: Thank you.

The CHAIR: Ryan Batchelor might have some questions.

Ryan BATCHELOR: Yes, I wanted to come back to this issue with the Cabinet – how much of Cabinet's documentation should be proactively released – because it is a really interesting topic. We had in our last hearing David Solomon, the guru in Queensland, came and gave us his perspective. We also had some evidence from some academics from UNSW [University of New South Wales] about the need to protect the space where contested ideas can occur around the Cabinet table and, I think, within the public service, so that different agencies in the public service can put different views through their ministers around the Cabinet table. Where do you see the scope of documents that should be proactively released or made available more freely under FOI? Is it just decisions once they are taken or is it all the background material? Is it things like the coordination comments that often form parts of Cabinet submissions? Is it the briefings that departments provide to their ministers on the way into the room? Where do you think the line should be drawn to both promote disclosure and accountability but also protect collective and individual responsibility?

Catherine WILLIAMS: It is such a difficult conversation, that conversation. As a general proposition, we would say that it is the submissions, the briefing papers and the final decisions that should be made public within a short time, and then deliberations you would probably keep at the current 10-year disclosure threshold under section 28 of the Act. But, while ideally in our minds you have in place this general disclosure approach, obviously, there has to be a case-by-case assessment made of where it is necessary to protect those Cabinet-related interests, as they say in New Zealand, being, as you say, individual and collective ministerial responsibility and that really vital ability to have frank and free conversations, because we certainly accept that without those conversations it is unlikely that we will ever arrive at the best policy decisions. It is going to be hard to come up with the precise wording around it, which is why we say as a rule you would want to capture submissions, briefings and final decisions, but accepting that always there needs to be an assessment made of whether in a particular case Cabinet-related interests need to be protected and disclosure therefore is not justified.

Ryan BATCHELOR: Fortunately, we have that hard job.

Catherine WILLIAMS: Yes, you do.

Ryan BATCHELOR: In a circumstance where a minister takes a document to a Cabinet meeting and the collective view is contrary to the minister's view but the minister accepts the collective decision of the Cabinet, do you think it is within your definition of when things should or should not be released for the minister's view which is contrary to the collective to be put into the public domain following the decision?

Catherine WILLIAMS: It is appropriate that the document is, but who held what decision does not need to.

Ryan BATCHELOR: But – I am sorry, this is my former life as a public servant coming out – the minister goes in with a set of recommendations in a Cabinet submission that says, 'I believe X, Y, and Z.' The collective view of the room is different to that. They decide D, E and F. Should the A, B and C be put into the public domain 30 days after the decision or just the D, E and F?

Catherine WILLIAMS: Insofar as that in a sense goes to the deliberation aspect of it, that is the sort of thing that would tend to not require disclosure.

Kim WELLS: It would be humiliating for the minister to be rolled in Cabinet. If, as Ryan said, they had a position and then got rolled, probably the minister would not last long.

Catherine WILLIAMS: No, that is right, so that is why we say, insofar as that goes, what we are really interested in is briefing papers, submissions prepared by consultants or the public service, things like that – things that really go to who held what view in respect of something is not what we would be looking to capture.

The CHAIR: If Cabinet was deciding whether to make seatbelts compulsory, for example, a report from the college of surgeons saying how good it is if we all have seatbelts would be –

Catherine WILLIAMS: That needs to be disclosed.

The CHAIR: Whereas the transport minister saying, 'I think we should ban seatbelts' –

Catherine WILLIAMS: That is deliberation. That does not need to be disclosed.

Kim WELLS: What about the recommendation from the department that the minister agrees with? Would that be part of it?

Catherine WILLIAMS: The recommendation from the department would need to be disclosed. The minister's view is not something that needs to be disclosed. Maybe the practice around how those views are presented might need to shift if you were to take this pro-disclosure approach with cabinet documents. Of course, we would accept that ministers need to be able to go to Cabinet and have conversations frankly without fear of their views being used against them 30 days later when something comes out. That is not going to be conducive to good outcomes. We accept that, certainly. I think that the example that you give, Chair, of a report from the college of surgeons is what the public needs to see, and the public service advice, separate from the minister's opinion in respect of the public service advice, is what needs to be seen. Then the minister's opinion forms part of these deliberations that continue to be protected for a longer period of time.

The CHAIR: Views from the Department of Health or the Department of Transport about seatbelts, whatever those views are, would be in the public interest to disclose.

Catherine WILLIAMS: That is right.

The CHAIR: I suppose the question is: if you have a department saying something, it is almost always going to be the same as the view of the minister if it is coming to Cabinet. I wonder whether you are effectively –

Kim WELLS: That is I guess the point I was making. If the minister were defying the department's advice, the minister would say, 'I'm not going to take that to Cabinet.' If you have got the department advice and the minister contradicts that, he would not take it to Cabinet. I guess that is the problem I am circulating.

Ryan BATCHELOR: Have you ever come across any studies that anyone has done about how public service behaviours shift when they are aware that their advice on Cabinet matters is made public?

Catherine WILLIAMS: No.

Ryan BATCHELOR: The thing that I am concerned about is departments, and we have seen this in some other settings, effectively being asked to change their advice so that they are consistent with the minister's view. I think that is the point Kim is getting at from another way. Have you ever seen anyone who has done any analysis or studies of public administration or the public service that look at whether that is more or less likely under a more fulsome disclosure regime?

Catherine WILLIAMS: No, but I wonder if the Committee is hearing from any New Zealanders about what has happened in New Zealand.

The CHAIR: I think we need to look further at that. Have you anything to report on?

Catherine WILLIAMS: No, no studies about it. One can imagine the impact, but at the same time that public service culture question is part of a really big conversation about the relationship between government and the public service and appropriate protections for public servants to be able to provide free and frank advice. It is a tricky one, but I really think, given that this requirement has been in place in New Zealand for a very long time now and there have not been any reported difficulties there in respect of its operation, it might be useful to hear from New Zealand policymakers, including public servants, about how they have experienced the change.

The CHAIR: Good. Thank you. Do you have more?

Ryan BATCHELOR: Not on that. I have got something else.

The CHAIR: Go ahead.

Ryan BATCHELOR: There was a discussion in your submission about the impact of consultation requirements on delay.

Catherine WILLIAMS: Sorry, say that again?

Ryan BATCHELOR: There is a part of your submission about the impact that third-party consultation requirements have on delaying and exacerbating processing times under the Act, and that is quite clear. How do you think we should resolve that to balance both the needs and rights of third parties who are mentioned in documents with applicants' rights to get their materials processed efficiently? At a practical level, how do you think we should resolve that in a policy setting?

Catherine WILLIAMS: It is always difficult when you are dealing with limited resources, but ideally the resourcing would be sufficient for a decision to be made quite quickly in respect of whether the consultation is required so the consultation time period can commence shortly after an application is received rather than a longer time down the line, which effectively delays it more. It is going to be quite clear in many cases when that consultation is required. You could tell it in a lot of cases from looking at an application on its face, so if that decision can be made early on and the consultation period commenced, it reduces the delay at the other end.

Ryan BATCHELOR: Do you think we should maintain the right to have consultation by third parties under the Act?

Catherine WILLIAMS: There needs to be consultation where interests are legitimately affected, yes.

Ryan BATCHELOR: The other area where we had quite a lot of evidence last week I think or the week before was in the health sector, where there were concerns about the sort of confidential, would you describe?

The CHAIR: Yes.

Ryan BATCHELOR: Confidential information that has been provided to medical practitioners about patients by third parties and, would you say, the value in having a –

The CHAIR: This is particularly important in mental health cases where, for example, a family member might report to a mental health staff member about someone's behaviour and you would not get that information in any other way, but the identity of the source needs to be kept confidential. That is the sort of scenario that we are hearing, and it is not uncommon.

Ryan BATCHELOR: We are asking: Do you have a view on what the general FOI process and consultation requirements and time frames should be in those sorts of circumstances?

Catherine WILLIAMS: That is not an issue that we have considered at all. It is one we are happy to have a think about and come back to you on, but it has not been the focus of our research, I am sorry, so far.

The CHAIR: I have got one other thing. Were you about to ask something? Just looking at our time, I have just got time to ask it. You commented in your submission about the importance of resourcing OVIC (Office of

the Victorian Information Commissioner] I think to obtain an independent review of the Professional Standards. I wonder if you could expand on that a bit further.

Catherine WILLIAMS: Obviously OVIC has a really important function under the Act of setting professional standards. In essence if you look at what its function is to do with those standards, it is to promote the achievement of the Act's objectives. We see that as vitally important, particularly in the context of a need to shift culture to reduce what looks like over-reliance, for example, on statutory exemptions and misuse of those exemptions. That function that OVIC has is vitally important in the cultural shift, and it is resources are such that it is unable to perform that function at the moment. It needs more resourcing for it to be possible, and we would very much like to see it resourced to do so. It is the agency appropriately expert to do it, its statutory function is to do it, and we think it needs the resources to do it.

The CHAIR: How important is it that that be done independently? Could that be done by OVIC, for example, or should it be outsourced to an independent law firm to review the professional standards?

Catherine WILLIAMS: There can be a case for, obviously, engagement with independent experts or for independent experts taking on the work if the capacity of OVIC is such that it is unable to perform the role itself because its resources are such that it cannot get to it. Then there is a case to involve independent experts in the matter also.

The CHAIR: Good. Thank you. Does anyone have further questions? I think we are all good. That just about takes us up to time anyway. I want to thank you both very much for making the effort to come in and also for your very helpful submission.

Catherine WILLIAMS: Thanks for having us.

The CHAIR: Thank you very much.

Witnesses withdrew.