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

WITNESS *(via videoconference)*

Fiona McLeay, Commissioner, Victorian Legal Services Board and Commissioner.

The CHAIR: We resume this public hearing of the Integrity and Oversight Committee's Inquiry into the Operation of the *Freedom of Information Act 1982*. To our witness, 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 or misleading evidence 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 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 Victorian Legal Services Board and Commissioner Fiona McLeay, the Commissioner, to give evidence at this hearing. Do you have any brief opening comments? Perhaps you would like to start.

Fiona McLEAY: Yes, thank you. I would be happy to do that. I should make the usual disclaimer that my internet is a bit glitchy, so I will try to do what I can to manage that. Thanks for the invitation to attend, and I am very happy to add whatever I can to your deliberations. As you know, I am Fiona McLeay. I am the Victorian Legal Services Commissioner and the CEO of the Victorian Legal Services Board. The Board and the Commissioner are the two independent statutory authorities which regulate the legal profession in Victoria. We do that under the Legal Profession Uniform Law, which is Victorian legislation which is adopted in New South Wales and Western Australia as well as a uniform framework for lawyers in those states. Although we are two separate statutory entities under this authorising legislation, the Board and the Commissioner operate as one body, with the rather unwieldy acronym of the VLSB+C. But we do have separate regulatory functions under that uniform law.

Basically, the Board is the licensing body. We license lawyers, issuing practising certificates to new lawyers, renewing practising certificates of existing members of the profession and considering fitness to practice in the course of that. That process actually commences next week and will run until the end of June, so it is an annual process. The Board has a range of other statutory functions, including among other things oversight of lawyers' management of trust accounts. We can also intervene in law practices if we have concerns about the operation of those practices. We can prosecute people for unqualified practice of law and for causing a deficiency in a trust account; those actually attract criminal penalties.

As Commissioner, the simplest way to think of that role is effectively as a legal ombudsman. I receive and investigate complaints about the conduct of lawyers and can take disciplinary action at VCAT where appropriate. I do have powers as Commissioner to informally resolve some types of complaints. We have got mediation powers, we can order apologies and various things like that, and we can also undertake formal investigations and prosecutions. They tend to be used in the more serious cases. Are there any questions about that? I have got some other points I want to make.

The CHAIR: Thank you for that little outline. That was very helpful. If you would like, keep going.

Fiona McLEAY: Yes. Great. I am not going to go through the submission in detail but a couple of points. We do not receive, historically, a large volume of applications, but there has been a significant increase in the last couple of years. You could speculate about why that is, but that is just the reality for us – five requests in 2020–21, then 35 in FY 2022 and then 33 in the last financial year. Most of the people who make FOI [Freedom of Information] applications to us are clients or former clients of lawyers and are looking for information in relation to complaints they have made to us about their lawyers. That might include information about investigations we have undertaken in response to their complaint. In those circumstances the person who made the initial complaint sort of changes from being a consumer making [a] complaint to a witness in our investigation and our potential prosecution. As I said before, not every complaint results in a prosecution, and we often can resolve things informally.

I am informed by my team that around one-third of those FOI requests go through the formal FOI process; the others are most often dealt with by providing information informally, as the Act itself contemplates. For example, we readily release documents that complainants have already seen following a completed investigation, or we help applicants find information that is available perhaps in our annual report or on our website. Those requests that we cannot resolve informally do require careful analysis, and that is because of the nature of the regulatory functions that we discharge. There are issues of confidentiality of the material, legal professional privilege and other privacy implications.

We do always try very hard to meet the FOI Act deadlines by talking with applicants to assist them to frame and scope their requests – but I have to say that is only effective where the applicant is willing to engage with us in those discussions – and try to appropriately cast the scope of application. That is not always the case, and over the last several years we have noticed an increase in applicants who are not willing to engage with us in those discussions. Where we do have complex issues or large amounts of documentation and substantial time commitments we do sometimes hire third-party FOI providers to assist or sometimes have to redeploy our regulatory staff to meet those deadlines. Both of those involve time and cost, and if it is our staff that are averted it means that we are taken away from the regulatory work that we are charged to do.

In terms of exemptions in the Act, we use all of them where appropriate, but in our submission we focused on section 38, the secrecy provision, and then section 30, the internal working documents exemption. These are important exemptions given the nature of our regulatory functions. We do have, as I have mentioned, documents which contain information which is confidential, subject to privilege or have other privacy implications. We have very broad powers to compel lawyers to disclose this type of information to us – information which would otherwise not be able to be disclosed by a lawyer except in very limited circumstances. Lawyers, as I am sure you are aware, have very strict ethical and legal obligations in relation to confidentiality and privilege, so we have powers to require disclosure of that information in the course of our work.

We strongly support the principles of FOI, and we try to support applicants to get access to information wherever we can. We do spend a lot of time helping people to scope their enquiries so they can get the information that they want, whether that is through a formal FOI process or, ideally, if we can, without them needing to do that. We do think there is some scope to amend the Act to be a bit more efficient and provide an appropriate use of resources, in particular additional time to complete requests that are complex or voluminous, without needing to depend on an applicant's consent, which as I have mentioned, we have been finding in the last couple of years has been increasingly difficult to get.

We would also welcome amendments to allow us to manage situations where the cumulative effect of multiple requests represents an unreasonable diversion of resources. We have had applicants who make successive requests – sometimes 10, 15, 20 requests – with only minor changes in form, and we need to treat each one as a new request even if it is asking for what appears to be the same information as we previously advised them that we cannot provide. So we do think there is some room for some change there.

I might pause there. That is really what I wanted to say by way of opening. If you wanted to ask me questions about any of those things that we have highlighted in our submission, I would be happy to do what I can to assist.

The CHAIR: Thank you very much. Let us start with Paul Mercurio.

Paul MERCURIO: Thank you, Commissioner. You sort of touched on the basis of my question, and my question is about the retention of the Freedom of Information exemptions applicable to information held by the Victorian Legal Services Board and Commissioner, such as sections 30 and 38 of the Act. You said that these were important. Can you elaborate on why they are important?

Fiona McLEAY: Yes. I think, as I said, it is because confidentiality and legal professional privilege are absolutely axiomatic to lawyers being able to do their work. If a person cannot go to a lawyer and expect that that lawyer will hold that information confidential, then they are not able to engage in a full and frank way, so we take a very dim view of lawyers who breach confidentiality or legal professional privilege.

However, when we are investigating lawyers for conduct which might fall foul of the law or the rules, most of the information upon which we will need to rely is likely to be confidential or privileged. Therefore we have in

our legislation the ability to require the production of that material in circumstances, as I have said, where it would ordinarily be subject to a claim of confidentiality or privilege. To get full and frank information, we really need to be able to do that. As a consequence of that, section 462 of the Uniform Law prohibits us from disclosing information we obtain in the performance of our duties and functions other than in strictly defined circumstances, and that means that we can prevent the highly sensitive information from being shared inappropriately, especially to third parties who have no direct interest in a matter. In our view, if that was changed, it would have very serious ramifications for an individual lawyer and their client, for the profession as a whole and, ultimately, I think, for trust and confidence in the legal profession. There is an essential public interest in the effective regulation of the legal profession, and disclosure of inappropriate content in response to an FOI request would be really problematic and undermine that.

Paul MERCURIO: Thank you.

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

Eden FOSTER: Thank you, Chair. Thank you, Fiona. I am wondering if you could tell me what would make it easier for agencies to determine whether exemptions apply to an FOI request and ensure consistency of decision-making with respect to those exemptions.

Fiona McLEAY: Yes, sure. We do not ourselves worry too much about consistency. All of our FOI applications are undertaken or overseen by our in-house lawyer, and we follow the latest case law and all of the OVIC guidance wherever we can. So I guess we try and avoid a situation where inconsistency can arise in the first place. We think that is important for the integrity of the FOI system. We do not use formulaic kind of assessments, and we try to, as I said before, avoid exemptions wherever we can and make very clear and deliberative decisions about exemptions. I have mentioned that we engage with applicants to help them frame their requests, and we give clear reasons if we do invoke an exemption.

Eden FOSTER: Great, thank you.

The CHAIR: Ryan Batchelor.

Ryan BATCHELOR: Thanks, Chair. Commissioner, you talked in your submission about the 30-day time limit under section 21 of the Act, and in circumstances of the applications that you are receiving, including obviously the increased volume, often that is too short. I wonder if you could elaborate a bit more about what it is that makes that time frame too short for complex assessments or accessing large numbers of documents. We have had evidence before the Committee critiquing how long it takes agencies to make decisions and suggesting that there be shorter time frames. I am interested – you have given us some evidence about why it takes a long time – if you could elaborate on that and maybe tell us what you think might be a reasonable amount of time or what sort of circumstances in terms of the type of application you think might warrant a longer processing time.

Fiona McLEAY: Yes, thank you. It is a good question. I think the starting point is that a lot of the applications that we receive are very broad in nature. As I have said, we do our best to try and engage with the applicant to limit the scope and really understand what is it that they are actually after. But it is not always possible to do that, so in that case we may need to search through large volumes of material. We had a recent case where an applicant submitted a number of FOI applications which involved thousands of pages of material that needed to be read. We do have some data management systems that can help us do things more quickly, but a lot of the material that we hold are paper files. Not all law practices have their files in digital form, and so in those circumstances we need to go through paper manually. Or it might be stored electronically but it is not searchable electronically; there is no metadata or tags attached to it that allow a meaningful search that can be done. So that is the first issue.

The second one really again comes back to the complexity of making that determination about whether a document is confidential or privileged or may impact the privacy of a third party. We need to do this really carefully, and that can only be done manually. So if you have got a thousand pages and each page needs to be looked at, that just takes time. As I have mentioned, we do outsource where we can, but we think that some additional time to process complex or voluminous requests would be good, or a process where you could obtain an extension of time, perhaps with a third party determining the way that that could be undertaken. There are some suggestions I think in some of these submissions from some of the other stakeholders that have submitted

to this inquiry in terms of longer time periods in certain circumstances where it would not cause disadvantage, and so we think there is scope for that.

It is hard to pick another time. I think it would be helpful if we were able to match the time period to the amount of work rather than just necessarily have an arbitrary figure. As I said, we can sometimes do that through discussion with applicants, but it is those situations where we cannot do that that are quite problematic. They sometimes unfortunately also coincide with an applicant who has been unwilling or unable to narrow the scope of their request, so we can get this kind of perfect storm of a very broadly cast request that requires lots of material to be looked through and then an applicant who is unwilling to engage with us about how long that might take. Does that answer your question?

Ryan BATCHELOR: Yes. Thanks.

The CHAIR: And I think it half answers what I am about to get to as well. In the ACT [Australian Capital Territory] their FOI Act allows agencies to seek extensions to the statutory time frame of up to 24 months with the consent of the applicant and subject to conditions such as staged information releases for large and complex requests. Is that approach preferable to expanding the section 25A exemption of the FOI Act to multiple requests received from the same applicant?

Fiona McLEAY: I think in terms of multiple requests we would like a process where there could be some way of addressing that separately, because sometimes it is really just one request but is broadly drawn, and even if it is a well-cast request, it still might require a lot of material to be gone through. Some of our investigations can take a long time. Because we are the one-stop regulator, we might end up looking at a lawyer's trust account and might be looking at particular files that they had handled in relation to a particular client. That might sometimes extend out to questions of fitness, so it means that we are able to look at lawyers' conduct as a whole, which in our view makes us effective. But it does mean that there can ultimately end up being a really large amount of material. The volume question I think is one thing, but the multiple requests from a persistent and perhaps unreasonable applicant is a separate issue. The ACT approach could be a viable option, although, as I understand it, it does still require the applicant to engage with the agency.

The CHAIR: Okay. Kim Wells.

Kim WELLS: Thanks, Commissioner. My question is also on 25A. What are the complexities involved in establishing a statutory threshold for using section 25A exemptions?

Fiona McLEAY: We think that if we can define 'substantial and unreasonable diversion of resources' that would be a good idea. It is not very helpfully cast. We do not often use 25A, because it is hard to know from the outset whether an application will or will not substantially and unreasonably divert our resources. But I think that in terms of setting steps on at what point something becomes a substantial and unreasonable diversion of resources, thinking about how you set that would need to be important. There is not necessarily a difference between processing 100 and 110 documents, so in terms of cut-offs I think it can be a little bit complex. Some jurisdictions that have factors that are relevant for determining whether an application involves substantial and unreasonable use of resources. There is guidance, I understand, in New South Wales, so that could be a useful way of approaching this issue. I understand there is also some case law that could be prompted. My staff also have got some more information. If you want to delve into that a bit more, we could provide you some more information afterwards. I guess as a final point, as I have said, where one applicant is making multiple substantially similar requests, we do think that is a substantial and unreasonable diversion of resources, and we would like to see that reflected in any statutory threshold that might be introduced.

The CHAIR: Okay. Jade Benham.

Jade BENHAM: Thanks, Chair. Thanks, Commissioner. Earlier you mentioned that the number of applications is increasing year on year, but you have also mentioned a couple of times now that engagement with those applications is decreasing, which of course then makes the whole process much more difficult. Have you got any insights into why this might be? Is there a cultural shift? What are your insights?

Fiona McLEAY: It is a good question. We ponder this a lot not just in this context. The first thing I would say is that it is a good thing if people are aware that they have got a right to information and they know that they can request that, and they are engaging with the process. We are absolutely very supportive of FOI principles.

Why is there a change? I do not know. We are seeing, as is any agency or any service provider who has engaged with the public in the last four to five years, an increase in people who have expectations about what can be provided by the organisation and the time frame in which it can be provided, which are in our view unreasonable. They want things that we cannot deliver, they want them in a time frame that we cannot deliver them, and they get very upset if we cannot do either of those things. There is absolutely more engagement, and more engagement with the arms of government and statutory authorities is a good thing – we should be doing that. But there is no doubt that there have been increased difficulties. It is probably outside my bandwidth to speculate on why that is. But people definitely – some of them – can be more complex to deal with, yes.

Jade BENHAM: Interesting. Thanks.

The CHAIR: Rachel Payne.

Rachel PAYNE: Thank you. Thank you, Fiona, for presenting for us today. You may have covered some of this in your opening statement and just in response to some of the questions, but if you do not mind please elaborate on your view that the strict transfer and notifications requirements in the FOI Act should be amended to provide greater flexibility for agencies like the Victorian Legal Services Board and Commissioner, which are separate legal entities, to deal with misaddressed FOI requests.

Fiona McLEAY: I mean, we are unusual. My role in particular – I am the Commissioner and also the Board CEO, so I am two statutory bodies in one, which is interesting. As I said, I think it is effective from a regulatory perspective but occasionally presents some complexity, and this is an example where it does. Our current FOI policy – and this has not always been the case – advises applicants to simply address their applications to the VLSB+C, and we will do the work to work out, 'Is it Board or is it Commissioner?' At various other times in our history we have actually felt the need to go back to people and say, 'No, you've addressed it to the Board, but it's actually the Commissioner.' It is not a good use of anybody's time and creates frustration, understandably, for applicants. We now, as I said, have this policy: just address it to the VLSB+C. The same person is handling it. It is the same process internally. However, we are not strictly in keeping with section 17 of the legislation when we do that, and so I would prefer always to be in keeping with the legislation.

That is really the reason why we think it would be good to have some changes to the legislation to make it more flexible in relation to transfer or notification. It is not a situation for us where we are trying to transfer it off to another department or an agency somewhere else. We are the same organisation, so a simple change would be to allow an agency to correct an application if there is a minor or technical error, without needing to have the applicant make a new request or to transfer that request in a simple way. We do agree with the submissions from IBAC and the Ombudsman, who have reiterated the importance of a formal FOI request to ensure that information is properly identified and released appropriately. It is important for applications to be in writing and clear enough to know what we are looking for. But as I said, if we could correct minor technical errors without needing to have a new request, that would be very helpful.

Rachel PAYNE: Thank you.

The CHAIR: Terrific. Thanks, Commissioner. Any other questions from the Committee? Great. I think we are done with questions. I just thank you once again, Commissioner, for appearing and for your submission. It has been very helpful.

Fiona McLEAY: Pleasure. If we can be of any further assistance, do not hesitate to let us know.

The CHAIR: Terrific. Thank you very much.

Witness withdrew.