

Dear Senate Legal and Constitutional Affairs Committee,

Thankyou for the opportunity to make a submission on this bill.

When this inquiry was announced I went to the Internet seeking information about compliance with the existing model litigant obligations. However, I found that there was no published reporting. There is not even an aggregate figure in any agency's annual report. All the reporting is secret.

I submitted a number of Freedom of Information requests, with mixed results. The released documents and the manner in which they were released (or withheld) may be of interest to you in determining the best way to supervise the executive's behaviour with respect to litigation.

The FOI requests were conducted through the public 'Right to Know' service, and so the requests and released documents can be viewed on the Internet as follows:

https://www.righttoknow.org.au/request/reporting_on_the_legal_services
https://www.righttoknow.org.au/request/reporting_on_the_legal_services_3
https://www.righttoknow.org.au/request/reporting_on_the_legal_services_4
https://www.righttoknow.org.au/request/reporting_on_the_legal_services_5

The results were as follows:

Department of Social Services:

The Department released annual compliance certificates and all reports on specific instances of (possible) non-compliance. The released documents provided insight into the types of issues faced by the Department and its litigation opponents.

As will appear from the below, the DSS's willingness to comply with the FOI Act in this regard was not shared by their colleagues in other agencies.

Australian Taxation Office:

The ATO determined that it had so many breaches that disclosing all the reports (over 800 pages) would crush its FOI unit. The ATO helpfully recommended that a request for only the annual compliance certificates would be small enough for it to handle. I accepted this option and the ATO is currently processing the revised request.

I note that from other sources (e.g. questions at Senate Estimates) that the ATO has had numerous breaches over a sustained period. Unfortunately this information was only released in an ad-hoc manner, preventing ongoing public scrutiny. Since the ATO claimed the 'too much work' exemption in the FOI Act, and I am not in a position to spend the time taking every agency to the OAIC, this situation (favourable to ATO officials) will continue.

Department of Home Affairs:

The Department determined that the Department had over 1,000 pages of breaches and so my request "would substantially and unreasonably divert the resources of this agency from its other operations". The Department suggested reducing the scope of my request to under 12 months and only the 2017 Directions, in order to make it manageable for the Department. Unfortunately I missed the cut-off for revising my request so it was deemed withdrawn.

Department of Human Services:

The Department refused to release any certificates or reports because:

"[R]eports given to the Attorney-General, Attorney-General's Department or Office of Legal Services Coordination are not 'regarding compliance', rather they are reports on significant issues or possible breaches of the Directions."

Apparently there was also an irreconcilable tension between the words "certificate" and "report" which DHS could not overcome, even though DSS had done it a month earlier. The ATO and Home Affairs also managed to cut the Gordian Knot (albeit there were too many reports to handle), but DHS could not.

That is, on DHS's reading of the FOI Act, if you ask for two things that might overlap then you get neither. This issue is currently before the Information Commissioner for review.

I would like to highlight the fact that the Department offered no insight into precisely what documents or types of documents it held when it sent me its 'section 24AB notice'; it also refused to give me a phone number to speak to anyone in the FOI unit to discuss the matter. This is one way that government agencies and Ministers can evade scrutiny: if nobody knows what to ask for, they can never ask for it. If I had no other source of information, I might take DHS's word for it that the matter really was ambiguous. However, based on the DSS response, I now know that there are really two classes of documents: annual compliance certificates and breach reports. This was not apparent from DHS's 24AB notice and, given the Department's commitment to gobbledygook, I could see no way to extract any sense from them via the written communication channels they offered to me. It is difficult to describe DHS's response as helpful, and I am unable to refute the hypothesis that DHS is using word-games to try to avoid scrutiny. I look forward to the outcome of the IC review but unfortunately, due to the OAIC's current budgetary situation, that is not expected to occur until 2019 or possibly 2020.

As always it is instructive to ponder what the Department would do if one of its clients refused to provide information in a similar manner.

Conclusion:

I submit that, given the existence of numerous breaches and the above agencies' willingness to bend the existing rules to minimise scrutiny, the Committee should recommend legislation with clear reporting requirements to allow parliamentary and public scrutiny. In the interim, the Committee should regularly review the operation of the model litigant policies to provide much-needed transparency and oversight.

Yours faithfully,

Charles Powers