

SUPPLEMENTARY STATEMENT TO THE SENATE LEGAL AND CONSTITUTIONAL AFFAIRS REFERENCES COMMITTEE INQUIRY INTO THE OPERATION OF COMMONWEALTH FREEDOM OF INFORMATION (FOI) LAWS

I make the following short statement which is supplementary to the written statement I provided to the Committee on Monday 28 August 2023 (my earlier statement) and matters dealt with in oral evidence provided to the Committee during the course of its public hearing on Tuesday 29 August 2023. I do not, in making this supplementary statement, depart from anything contained in my earlier statement or the oral evidence I provided to the Committee. Rather, the purpose of this supplementary statement is to set out additional contextual information which I consider is likely to assist the Committee in the conduct of its inquiry. I have set out that additional information under headings referable to relevant matters discussed in my earlier statement or raised in the hearing on 29 August.

(1) The resourcing narrative

2. I describe what I refer to as ‘the resourcing narrative’ at the end of paragraph 20, and at paragraphs 37 and following, of my earlier statement. I describe at paragraphs 37 to 39 of my earlier statement the way in which I first became aware of the resourcing narrative, that being in the context of the Federal Court unreasonable delay proceedings (the Patrick proceedings) which Mr Rex Patrick had brought against the Information Commissioner (the IC).

3. I go on at paragraphs 40 to 42 of my earlier statement to describe two conversations I had with the IC regarding the resourcing narrative. It is very clear in my mind that both of those conversations occurred in the context of discussing arguments which might be made by the IC in the Patrick proceedings.

4. The whole impetus for the first conversation (described at paragraph 40 of my earlier statement) was the apparent reticence of relevant OAIC officers to accept as valid my concerns around pursuing in the Patrick proceedings a line of argument based on the resourcing narrative. I had thought that the IC, in contrast to those OAIC officers, would be sure to understand my concerns and the risk which the resourcing narrative posed to her as the respondent to the proceedings. In fact, however, upon explaining my concerns to the IC, the IC initially responded by telling me that I was wrong about the scope of appropriations made for departmental purposes. I was genuinely perplexed at the prospect of the IC, a long serving agency head, not understanding the scope of an appropriation made for departmental purposes. I explained to the IC that I had extensive experience in advising on the scope of appropriations and suggested that I was not wrong. The IC’s further response, as I note in my earlier statement, was to the effect that the IC did not understand the scope of departmental appropriations and would need to learn more about the workings of appropriations. That seemed to me a simply extraordinary thing for a long serving agency head to say. It was neither possible to misunderstand, nor forget, either (1) the statements the IC made to me in the first conversation or (2) the context in which those statements were being made.

5. The second conversation (described at paragraph 41 of my earlier statement) was both close in time and directly related to – in the sense of directly following on from – the first conversation. The nature of the second conversation was such as to cement in my memory the purpose and context of that conversation as well as the first conversation. In my earlier statement I describe the second conversation as having involved the IC disclosing to me a communication which the IC had had with the former Government at a time I understood to have been long before the commencement of my appointment. That communication, which I did not detail in my earlier

statement, was described to me by the IC as occurring in the context of a previous allocation to the OAIC of additional departmental funding which had been formally earmarked for particular privacy work. The IC named a very senior member of the former Government as the other party to the communication and said that that person had told the IC she was 'not to spend a cent of' the relevant funding on FOI. The IC said to me that I was never to tell anyone what she had disclosed to me. This disclosure, and the direction that I was not to tell anyone of it, suggested the following things:

- The IC clearly had understood that an appropriation for departmental purposes could be applied to any activity properly characterised as 'departmental', including any activity for the performance of the FOI functions.
- The IC did not want anyone to ever know that the IC had apparently decided to give effect to a purported direction from a member of Government which the IC knew was not binding on her. (That is, by knowingly choosing to take an unnecessarily restrictive view of when appropriated funds were to be applied to activities for the performance of the FOI functions.)
- The IC was making the disclosure to me to ensure I understood that, so far as the IC was concerned, the resourcing narrative was one the IC would be adhering to irrespective of the concerns I had raised in the context of the Patrick proceedings.

6. I noted at paragraph 37 of my earlier statement that I had, on the IC's request, agreed to assist her with providing instructions in the Patrick proceedings which, at the time my appointment commenced, were already well progressed. Consistent with the discussions about the resourcing narrative which I have described above and in my earlier statement, it was very clear that I would not be providing any sign off on the substantive legal arguments to be made in the matter. Rather, as was both necessary and appropriate, the IC was very clear that as the respondent to the proceedings she would provide that sign off and, to the best of my knowledge (noting that I withdrew from any involvement in the matter before the substantive hearing), the IC did in fact do so.

(2) The throughput narrative

7. I describe what I refer to as 'the throughput narrative' at the end of paragraph 20 of my earlier statement. The Committee may find it useful, in considering that description, to have regard to IC review statistics for the 2021-22 financial year. That was the period referenced by the IC when discussing FOI work throughput in estimates hearings held during the 2022-23 financial year. I understand that in 2021-22:

- 1956 IC review applications were received by the OAIC
- 1377 IC review applications were closed (or 'finalised') by the OAIC
- approximately 1145 IC review applications were closed or finalised within 12 months.

8. My recollection is that, of the 1956 IC review applications received in 2021-22, between 800 and 900 related to deemed access refusal decisions made by the Department of Home Affairs (the actual figure I recall is 885 applications, or approximately 45.25% of all applications received during the year, but I do not have access to information enabling me to confirm those figures). I also recall that, of the 1377 review applications finalised in 2021-22, over 90% were finalised without the need for an IC review decision under s 55K of the FOI Act. Around 300 of those were treated as out of jurisdiction or invalid. Of the remaining applications finalised without an IC review decision under s 55K, many hundreds were withdrawn under s 54R, or discontinued under a relevant provision of s 54W, of the FOI Act – those being the common finalisation outcomes for IC review applications

related to deemed access refusal decisions. Consistently with this, my understanding is that a very substantial proportion of those remaining IC review applications finalised without a decision under s 55K were applications related to deemed access refusal decisions.

9. The Committee may also be interested to note that 1145 divided by 1956 produces a percentage of approximately 58.54%. By contrast, 1145 divided by 1377 produces a percentage of approximately 83.15%. It was the latter percentage figure (or an approximation of it) which was used in the articulation of the throughput narrative.

(3) Work health and safety issues

10. In the Committee's hearing on 29 August some committee members asked questions relating to workplace behaviours and work health and safety issues. I note that during the early part of my appointment as FOI Commissioner I had two conversations with the IC about such matters. The first conversation was held at my request. The second conversation was requested by the IC for the stated purpose of continuing the discussion in the first conversation.

11. Part of the first conversation related to me exploring with the IC how a relationship with a particular senior officer of the OAIC might be made more functional, recognising that the relevant officer may have found my appointment as FOI Commissioner difficult. That part of the conversation did not concern work health and safety issues. My recollection is that for the most part, the remainder of the first conversation, and then the second conversation, related to broader concerns I had about possible work health and safety issues affecting OAIC employees working in the FOI space.

12. Those work health and safety concerns had arisen out of comments made to me by numerous staff members about the impact on them, and on others who had left the OAIC, of conduct engaged in by a particular senior officer of the OAIC. I did not witness that conduct, which was said to have occurred before I commenced my appointment. I accordingly could not say the conduct occurred. However, numerous employees were saying to me that they, and others, had been adversely impacted by behaviour which was described in essentially the same terms and said to have been engaged in by the same senior officer. Additionally, some of the employees I was working with displayed what I would describe, in non-technical terms, as symptoms of trauma related to what those employees were saying they had experienced.

13. I attempted at some length in the two conversations to explore the work health and safety concerns I had with the IC. The IC's responses in those conversations were both very surprising to me and unhelpful. I determined following the conversations that I would have to manage any possibility of work health and safety issues arising in future by ensuring, so far as I could, a separation of relevant employees from the senior officer in question. That is what I endeavoured to do for the remainder of my appointment.

14. I am concerned about making any other public statement regarding these matters. To do so may be both unfair to the senior officer in question and triggering for the employees and former employees involved. I would need to ask the Committee whether it would be prepared to take any further evidence *in camera*, should it consider these issues to be of continuing relevance to its inquiry and wish to seek more detailed evidence from me in that regard.