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Submission to Senate Legal and Constitutional Affairs Committee

The operation of Commonwealth Freedom of Information (FOI) laws

My background

As background to this submission, my experience includes working since 1981 with access to government information (FOI) regimes in the Commonwealth, NSW, Queensland, NT, Victoria, UK, Ireland, the Cayman Islands, Bermuda and China. I have worked with Information Commissioners in the Commonwealth, Queensland, Victoria, NT and Ireland; to provide training, and for several of them, assistance with casework. I spent around 15 years working within government, and the remaining time as a consultant in this field.

My view of the issues

Virtually all Information Commissioners world-wide have been (or still are) in a position where inadequate resources have been provided by government for them to process applications for review in a timely and appropriate manner. Many factors affect this, such as the structure of the review system (including whether internal reviews are mandatory before an external review can be sought) and whether there is a fee for external review. Under-resourcing Information Commissioner Offices is infamous as a method whereby governments delay the processing of FOI reviews and the release of information which may be perceived as unflattering to the Government's image. Placing a statutory deadline on Information Commissioners to complete reviews has a benefit in reducing delays, but it can only function effectively when sufficient resources are provided to meet such deadlines. (Note: this is equally true for agencies being able to meet statutory deadlines, and in this respect too, governments which do not support FOI frequently under-resource the function resulting in delays and a consequent reduction in accountability for the agency/government – by the time the matter has been finalised, the topic may well have lost relevance /value to the applicant and to the public more generally).

In the Commonwealth, the role of the OAIC is somewhat different from other jurisdictions, in that there is also a path to seek merits review at the AAT (also famous for its delays and similarly under-resourced). Although the original concept behind setting up the AAT as part of the late 1970s administrative law reform package was to provide accessible, quick and affordable justice, it became more like a mini-court, with its procedures, complexity and delays. When significant levels of fees were established for appeals to the AAT in the mid 1980s, the number of appeals in the FOI sphere decreased markedly, and remains low relative to other jurisdictions. (It also affected the nature of such appeals – very few

individual applicants pursued matters to the AAT, apart from journalists and members of parliament, and the resulting body of caselaw is lacking in some key areas of practice as a result). The introduction of the OAIC model as part of the 2010 reforms was to bring back the concept of quick, accessible, affordable justice as the AAT no longer provided that. Any changes which are proposed should be towards achieving those aims.

There are benefits in placing a statutory deadline on completion of reviews, mainly to improve the speedy provision of information to applicants. A deadline also acts as an incentive for the Office to speed up processing to meet such a deadline, and as the basis for an argument to government that additional resources are required to meet such a deadline. However, in the absence of adequate resources, a statutory deadline becomes merely a stick to beat the OAIC with.

Options

There are a number of options to improve the situation with regard to the delays and backlogs in decision-making within the OAIC.

Many jurisdictions have retained the requirement for an applicant to first seek internal review within the agency, before they are eligible to see external review. This has merit in that it provides a filter for decisions from agencies, which should lead to fewer appeals to the OAIC. However I would suggest that third parties be allowed to appeal directly to the OAIC to reduce the delays in this area (see comments below on delays in third party matters).

I do not support charging a fee for appeals to the OAIC, as experience with the AAT has shown that it can become a matter of justice only for the wealthy. However there is no doubt that charging a fee will reduce the number of appeals, and therefore the delays and backlogs. The 2013 Hawke Review[1] in Recommendation 27 proposes fees for OAIC reviews with provision for refunds in certain circumstances, and the Committee may find these proposals useful if considering fees.

The role of the OAIC to be notified of and approve extensions of time under s.15AA and s.15AB appears to require, and in my view waste, considerable resources. In other jurisdictions, similar extensions are available without approval / notification of their OICs. The requirement to undertake this role could be eliminated with little risk of negative consequences, and a saving of resources.

Delegation of the decision-making powers within the Office to appropriately-skilled staff should also speed up the decision-making process.

The OAIC should be given power to remit matters to agencies, similar to that available to the AAT. In matters such as deemed refusals, it is a better use of resources to require the agency to undertake work such as searches, consultation and redacting, with some

[1] Allan Hawke, "Review of the Freedom of Information Act 1982 and Australian Information Commissioner Act 2010" July 2013

direction/guidance from the Office. This would save the OAIC the work which otherwise amounts to them having to make the entire original determination instead of the agency.

With regard to statutory deadlines for the OAIC to complete reviews, there are a number of options. One option would be to place differing deadlines, depending on the nature of the case, which reflect the complexities and importance of resolving each type of review.

The worst affected area for delays in resolving reviews is in relation to appeals by third parties against release of their information. In these cases, the agency has already decided to disclose the third party information in the public interest, but the actual release is deferred pending the outcome of the review. In the case of appeals by business entities, this often results in a delay in releasing information which has been sought in relation to environmental /public health and safety issues. While I would not propose removing the right of third parties to seek review, placing a deadline on the Information Commissioner for resolving such matters would achieve more timely and useful release of information which benefits the community. I am of the view that a period of 60 days is an appropriate timeframe within which such reviews should be resolved, allowing sufficient time for the third party to make submissions and the agency to respond (if required).

For appeals by applicants for information which has been refused on procedural grounds (such as section 24AA – unreasonable diversion of resources) or relating to charges, these should be able to be resolved within a period of 30 days, although if protracted negotiations with an applicant occur, this could extend to say 60 days.

For appeals by applicants for information which has been exempted, or for deemed refusals, the time to resolve is affected by the volume of material. For smaller matters (say, under 250 pages) I consider 30 days should be sufficient; 60 days for under 1,000 pages; and 90 days for larger matters. (It should not be common for matters larger than 1,000 pages to be processed, as agencies should be making appropriate use of the s.24AA provision for unreasonable diversion of resources).

On the question of adequate resources for the Office, the functions of training and advice to public service agencies should not be forgotten. Improving the skills and knowledge of agency staff will improve the quality of decisions, thereby reducing the number of appeals, and will expedite agency responses to OAIC enquiries made of them during the review process. The OAIC is uniquely placed to observe patterns of deficiencies in agencies' skills and knowledge, and also well-placed to remedy such deficiencies through updated Guidelines, publishing knowledge updates/case reports, and of course the provision of training.

The opening terms of reference refer to the "operation of Commonwealth Freedom of Information (FOI) laws". While I recognise that the present focus of the committee is on the issue of the delays in handling appeals, a thorough review of the Act as a whole is overdue. The review leading to the 2010 reforms was only partial, and while it made many improvements, it was not comprehensive, and many of the amendments resulted in the Act becoming more cumbersome in its numbering and wording. A review such as the Solomon Review undertaken in Queensland in 2008 of their FOI Act would be welcome.

[I am travelling overseas at present and not able to provide as much detail in this submission as I would have liked. I would be very happy to discuss or provide further material if the Committee is interested.]

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Director

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