Chapter 3

Committee's consideration of terms of reference

3.1 It is important to note that all witnesses were ultimately supportive of the bills. Professor John McMillan, the Commonwealth Ombudsman and Information Commissioner Designate commented that:

> Along with all of the other submissions to this inquiry I commend the reform initiative in the legislation that is under consideration by this committee and, along with all other submissions to this inquiry, I urge parliament to enact these reforms at the earliest opportunity.[1]

3.2 Mr Peter Timmins, an FOI consultant who appeared before the committee in a private capacity agreed, stating that 'I think the legislation is a good and positive move in the direction of more open and accountable government'.[2] Similarly, Dr Johan Lidberg, the Academic Chair of Journalism at Murdoch University commented:

> It is great to see that FOI is on the agenda. Quite often it is not, so it is great that it is up there. I would like to commend the whole process. I think it has been quite terrific thus far.[3]

3.3 During its inquiry, witnesses and submitters raised a number of issues with the bills, and made various recommendations as to how they might be improved. Many of these were contradictory and, with the exception of one issue—that of the alteration of the onus of proof in proposed section 61 of the FOI Bill—there was little consensus amongst submitters and witnesses as to what aspects of the bills ought to be amended. Accordingly, and particularly given the significant support that all witnesses ultimately expressed for the bills, the committee considers that, with respect to most aspects of the bills, the government has done an outstanding job of taking competing interests into account and has developed a new FOI framework which is focused on achieving open and accountable government.

3.4 Furthermore, despite the various suggestions for improvement made by many submitters and witnesses, each one ultimately emphasised the point that the reforms proposed by the FOI and Information Commissioner Bills are important reforms, which address the key issues with the current Act. As Mr Michael McKinnon, from Australia's Right to Know summarised:

> [W]hile this may not be the best reform of FOI, it is the best reform since 1982. We think it is very important that this reform go through before the end of the first term of government.[4]

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1 Professor John McMillan, Commonwealth Ombudsman, *Proof Committee Hansard*, 5 February 2010, p. 1.

2 Mr Peter Timmins, private capacity, *Proof Committee Hansard*, 15 February 2010, p. 15.

3 Dr Johan Lidberg, Academic Chair of Journalism, Murdoch University, *Proof Committee Hansard*, 15 February 2010, p. 7.

3.5 The Australian Press Council commended the government on addressing its main concerns—fees, delays and exemptions—in the bills.[5] And the President of the Australian Law Reform Commission (ALRC), Professor Rosalind Croucher, signalled that the ALRC is 'very supportive of many of the reforms in both the bills and that we consider the proposed amendments will improve the operation of the Freedom of Information Act and represent a very positive step towards open and accountable government'.[6]

3.6 This chapter sets out the key issues raised in relation to the bills during this inquiry and responds to each of reasons for referral of the bills. Given the emphasis by witnesses and submitters when discussing the bills, on the need for a fundamental shift in the way in which government perceives and treats FOI, the term of reference relating to the creation of a pro-disclosure culture is discussed first. The remaining three terms of reference, relating to: the right of access provided in the bills; the FOI application process; and the Information Commissioner are then discussed in turn.

Will the measures assist in the creation of a pro-disclosure culture with respect to government and what further measures may be appropriate?

3.7 One of the key positive aspects of the bills that witnesses emphasised was their potential to bring about a change in the culture of executive government towards information disclosure.

3.8 Witnesses agreed that there is a need for a shift in the way executive government treats FOI, and the handling of information generally. The committee received submissions from individuals and organisations representing professional groups who use existing FOI laws, many of whom have found the laws to be ineffective as a result of negative attitudes to disclosure within government agencies.[7]

3.9 Mr Andrew Murray, former Australian Democrats Senator, argued that:

> In the last 25 years the ability of individuals and organisations to access information held by Government departments has been slowly eroded. Many agencies are less than supportive of an open approach.[8]

3.10 Dr Lidberg, Academic Chair of Journalism at Murdoch University, was much more critical, and referred to the current FOI Act as 'severely dysfunctional'.[9]

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4 Mr Michael McKinnon, Australia's Right to Know, *Proof Committee Hansard*, 5 February 2010, p. 4.

5 Mr Jack Herman, Executive Secretary, Australian Press Council, *Proof Committee Hansard*, 15 February 2010, p. 20.

6 Professor Rosalind Croucher, President, Australian Law Reform Commission, *Proof Committee Hansard*. 15 February 2010, p. 23.

7 See for example Name Withheld, *Submission 1*; Ms Karen Kline, *Submission 5*; Mr Andrew Murray, *Submission 4*; and Associate Professor Anne Twomey, *Submission 2*.

8 Mr Andrew Murray, *Submission 4*, p. 1.

Dr Lidberg, explained the results of a study he conducted comparing the attitudes of various governments to information disclosure:

> I did a study in 2004-05 that surveyed a number of leading public servants and then government ministers; it clearly showed that the base notion within the Australian Commonwealth administration was that the government owns the information. Compared with the four other countries in this survey, this stood out clearly. The four other countries surveyed were Thailand, the United States, Sweden and South Africa, and their replies to the survey were very clearly that the government holds information on behalf of the people. So it is changing that owning of the information that is at the absolute core of this.[10]

3.11 Professor McMillan, the Commonwealth Ombudsman, noted that the proposed reforms 'address the three main deficiencies that have been made of freedom of information law and administration in Australia'.[11] Professor McMillan listed the deficiencies which the bills address as:

- the lack of a champion for FOI issues within government;
- the need to revise the terms of the FOI Act to encourage a pro-disclosure culture more clearly, 'give greater recognition to the public interest as a consideration weighing in favour of disclosure of most documents' and reduce of fees; and
- 'the need for a cultural shift within government both at the agency and at the political level'.[12]

3.12 One of the ways witnesses saw the bills as encouraging a pro-disclosure culture is through the revised objects clause. Mr Herman, the Executive Secretary of the Australian Press Council, expressed the view that:

> One of the reasons [that Australian FOI laws has not worked as well as New Zealand's laws] is that the Australian law has never contained an objects clause that has made it clear that an object of the legislation is to enable the release of information. If for no other reason than that this [Bill] actually includes an objects clause—one that makes clear what its objects are and makes clear to officials, to those administering the legislation and to

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9 Dr Johan Lidberg, Academic Chair of Journalism, Murdoch University, *Proof Committee Hansard*, 15 February 2010, p. 9.

10 Dr Johan Lidberg, Academic Chair of Journalism, Murdoch University, *Proof Committee Hansard*, 15 February 2010, p. 8.

11 Professor John McMillan, Commonwealth Ombudsman, *Proof Committee Hansard*, 5 February 2010, p. 1.

12 Professor John McMillan, Commonwealth Ombudsman, *Proof Committee Hansard*, 5 February 2010, p. 1.

> the courts that the aim of the exercise is to release information—then it has improved the situation.[13]

3.13 The ALRC also commented on the objects clause favourably, stating that the proposed new clause 'reflect[s] the democratic principles underpinning freedom of information'.[14] Similarly, Associate Professor Moira Paterson explained:

> Obviously what you need is a pro-disclosure culture. There are some elements—for example, the additional protection that is given to people who release where the document is exempt. That kind of thing helps. The rephrasing of the objects clause helps. Some of the other changes in terms of procedures and so on help.[15]

3.14 However, Associate Professor Paterson went on to comment that '[i]deally, what you would have in the Act would be a stronger statement of that pro-disclosure'.[16] Associate Professor Paterson argued that Queensland's FOI laws go 'much further' than the Commonwealth's bills, and have been successful in changing the culture of the executive with respect to FOI. [17]

3.15 Dr Lidberg warned that laws alone cannot bring about a cultural change:

> The law gives the foundation for change, but it is not the law that will change the culture; it is the people who are applying and administering it who will. That is the key. And that is why the commissioner has become so pivotal in this.[18]

3.16 Professor McMillan argued that one of the most important ways in which the proposed laws address the problems with the current regime is by creating an advocate for FOI. He explained to the committee that there have been four major reviews of FOI laws over the last decade and that '[t]he common theme in all those reports has been a lack of overt cultural support for FOI laws'.[19] Professor McMillan argued that having a senior official to champion the FOI cause would go a long way to addressing the cultural issues with FOI that witnesses mentioned.

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13 Mr Jack Herman, Executive Secretary, Australian Press Council, *Proof Committee Hansard*, 15 February 2010, p. 22.

14 Professor Rosalind Croucher, President, ALRC, *Proof Committee Hansard*, 15 February 2010, p. 23.

15 Associate Professor Moira Paterson, private capacity, *Proof Committee Hansard*, 15 February 2010, p. 2.

16 Associate Professor Moira Paterson, private capacity, *Proof Committee Hansard*, 15 February 2010, p. 2.

17 Associate Professor Moira Paterson, private capacity, *Proof Committee Hansard*, 15 February 2010, p. 2.

18 Dr Johan Lidberg, Academic Chair of Journalism, Murdoch University, *Proof Committee Hansard*, 15 February 2010, p 8.

19 Professor John McMillan, Commonwealth Ombudsman, *Proof Committee Hansard*, 5 February 2010, p. 3.

3.17 Ms Elizabeth Simpson from the Public Interest Advocacy Centre (PIAC) described the problems with the existing FOI regime as 'endemic', however agreed with Professor McMillan's assessment of the bills, and stated that 'having an information commissioner as an independent body to oversee these kinds of things will make a huge difference'.[20] Ms Simpson noted that the powers given to the Information Commissioner in the bills will form a powerful basis on which to begin the necessary cultural shift.[21]

Conclusion

3.18 The committee is satisfied that the proposed new objects clause and the creation of the office of the Information Commissioner will be strong and effective measures for changing the culture and attitudes towards FOI within government.

3.19 However, the committee notes the substantial and challenging role that will be expected of the Information Commissioner in changing the culture of executive government towards FOI. This role will require significant support, as well as high-level policy input. The Information Commissioner will need avenues through which to ensure that the message of that office is received and implemented by government departments.

3.20 In order to facilitate this aspect of the Information Commissioner's role, the committee recommends that the Information Commissioner be made an *ex officio* member of the Administrative Review Council (ARC). The ARC is an expert body which provides advice to the Attorney-General and Commonwealth government on strategic the Commonwealth system of administrative law. As freedom of information has long been recognised as an integral aspect of Australian administrative law, adding the Information Commissioner as an *ex officio* member will also ensure that the ARC has a complete picture of all aspects of Australian administrative law.

Recommendation 1

3.21 The committee recommends that section 49 of the *Administrative Appeals Tribunal Act 1975* be amended to provide that the Information Commissioner is an *ex officio* member of the Administrative Review Council.

Do the Bills contain measures effective to ensure that the right of access to documents is as comprehensive as it can be?

3.22 The committee has identified three key elements of the FOI Bill which contain measures to ensure a comprehensive right of access to documents. These are: the new publication requirements; changes to exemption provisions; and fees and charges. The committee is satisfied that these changes proposed in the FOI Bill will be

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20 Ms Elizabeth Simpson, PIAC, *Proof Committee Hansard*, 15 February 2010 p. 31.

21 Ms Elizabeth Simpson, PIAC, *Proof Committee Hansard*, 15 February 2010, pp 33-34.

effective in ensuring that the right of access under the FOI Act is as comprehensive as it can be.

Publication requirements

3.23 Numerous witnesses emphasised to the committee the benefits of the proposed new publication requirements under the FOI Bill. For example, Associate Professor Paterson stated that 'I think they are really, really important'.[22] The ALRC also commended this aspect of the FOI Bill which it stated is 'consistent with the pro-disclosure culture'[23] which the ALRC and Administrative Review Council (ARC) recommended in the *Open government report*.[24]

3.24 However, Associate Professor Paterson, who appeared before the committee in a private capacity, commented that publication requirements will only be effective if there are suitable penalties for non-compliance.[25] She noted that disclosure requirements are an aspect of both state and Commonwealth FOI laws that:

> …really has not been very strongly complied with in the past and I think it is important to send out that message and to fairly clearly spell out what should happen if those requirements are not complied with. [26]

3.25 In this regard, Associate Professor Paterson argued that:

> I think proactive disclosure, what could be termed push rather than pull, is a very, very important element of modern FOI—that you try and put out as much as possible rather than requiring people to put it in. Therefore that is a very important aspect of the bill and it would be helpful if those aspects could be further strengthened.[27]

3.26 Mr Timmins, who appeared before the committee in a private capacity, argued that it should not be left up to agencies to decide what information ought to be published. He explained:

> The explanatory memorandum, however, states that agencies are generally best placed to identify information they hold which should be published, taking into account the object of the act. My response to that is, with about

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22 Associate Professor Moira Paterson, private capacity, *Proof Committee Hansard*, 15 February 2010, p. 2.

23 ALRC, *Submission 9*, p. 2.

24 ALRC and ARC, *Open government: a review of the federal Freedom of Information Act 1982*, ALRC Report 77, 1995.

25 Associate Professor Moira Paterson, private capacity, *Proof Committee Hansard*, 15 February 2010, p. 2.

26 Associate Professor Moira Paterson, private capacity, *Proof Committee Hansard*, 15 February 2010, p. 4.

27 Associate Professor Moira Paterson, private capacity, *Proof Committee Hansard*, 15 February 2010, p. 4.

> 28 years of experience, I do not think they support the fact that government agencies are best placed to do that.[28]

3.27 Professor McMillan agreed that he, too would be concerned if the regime relied on agencies to 'gauge its own compliance with the disclosure requirements of the legislation'.[29] However, Professor McMillan, pointed out that he:

> …would expect that the Information Commissioner and the Freedom of Information Commissioner will play a very active role in ensuring adequate compliance by all agencies with the publication requirements.[30]

Exemptions

3.28 The FOI Bill makes some significant changes to the exemption provisions within the FOI Act, which attempt to clarify the extent of exemptions, and simplify the exemption provisions. One of the key changes made by the FOI Bill surrounds the new public interest test and its application. Witnesses also raised concerns about the continued exemption of whole agencies from the scheme.

Application of public interest test

3.29 Witnesses and submitters raised some concerns about the application of the public interest test to various exemptions. However, the committee notes that there was a distinct lack of consensus between witnesses and submitters as to which exemptions should attract a public interest test.

3.30 The FOI Bill's proposed application of a public interest test to the business affairs exemption, but not to the trade secrets exemption (clause 47G at item 33 of Schedule 3 to the FOI Bill), was argued by a number of submitters and witnesses to be inconsistent. Telstra noted the 'legal uncertainty' that would result from the different types of commercial information being subject to differing tests.[31]

3.31 With respect to the lack of public interest test for trade secrets, Associate Professor Paterson argued that:

> I think that is very unfortunate because more and more of the information in government is commercial in nature in some way—government is more commercialised and there are a lot more contracted service providers—so a very large proportion of the documents that are held by government have some sort of commercial flavour to them. To the extent that you allow this

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28 Mr Peter Timmins, private capacity, *Proof Committee Hansard*, 51 February 2010, p. 15.

29 Professor John McMillan, Commonwealth Ombudsman, *Proof Committee Hansard*, 5 February 2010, p. 2.

30 Professor John McMillan, Commonwealth Ombudsman, *Proof Committee Hansard*, 5 February 2010, p. 2.

31 Telstra, *Submission 10*, p. 3.

> exemption you are actually then allowing for a lot of those dealings to be claimed to be trade secrets or commercial information and to be exempt.[32]

3.32 Telstra[33] and the Law Council of Australia[34] also raised this issue, however from a different perspective. The Law Council argued that no public interest test should apply to the business affairs exemption as 'there will rarely be any public interest in releasing documents which record trade secrets or which divulge commercially valuable information'.[35]

3.33 In relation to the personal privacy exemption, the Victorian Privacy Commissioner, Ms Helen Versey, argued that 'the changes to the protection of personal information were really a step backwards'.[36] The issue Ms Versey raised with the bills is that:

> The model now being proposed includes not just an exemption based on an unreasonable intrusion into someone's privacy but a threshold decision by the organisation or the minister as to whether the person might want to rely on the exemption.[37]

3.34 Ms Versey further explained that this is not a mandatory decision that the agency or minister has to make, but involves discretion in deciding whether the person might wish to rely on the exemption, in which case they must, if it is reasonably practical, give notice to that person. Ms Versey argued that if an agency had already decided that information met the condition of being an unreasonable intrusion on a person's privacy, she did not see how it would be in the public interest to intrude on that person's privacy by releasing the information based on the discretionary question of whether the person might object.[38]

3.35 On the other hand, the PIAC argued that a public interest test should apply to all exemptions.[39] Australia's Right to Know also supported this position, and argued for the application of a public interest test to Cabinet documents.[40]

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32 Associate Professor Moira Paterson, private capacity, *Proof Committee Hansard*, 15 February 2010, p. 5.

33 Telstra, *Submission 10*, p. 3.

34 Law Council of Australia, *Submission 12*, p. 4.

35 Mr Mark Robinson, Law Council of Australia, *Proof Committee Hansard*, 5 February 2010, p. 15.

36 Ms Helen Versey, Victorian Privacy Commissioner, *Proof Committee Hansard*, 15 February 2010, p. 29.

37 Ms Helen Versey, Victorian Privacy Commissioner, *Proof Committee Hansard*, 15 February 2010, p. 29.

38 Ms Helen Versey, Victorian Privacy Commissioner, *Proof Committee Hansard*, 15 February 2010, p. 29.

39 Ms Elizabeth Simpson, PIAC, *Proof Committee Hansard*, 15 February 2010, p. 30.

40 Mr Michael McKinnon, Australia's Right to Know, *Proof Committee Hansard*, 5 February 2010, p. 4.

3.36 Mr McKinnon, from Australia's Right to Know, compared the situation in Australia with that in New Zealand, where a public interest test applies to Cabinet documents. He explained that in New Zealand Cabinet documents are subject to a very high public interest test, which he described as 'entirely appropriate', given the public interests in 'the solidarity and secrecy of the cabinet process'.[41] Yet, Mr McKinnon stated, the fact that a public interest test applies to Cabinet documents minimises the ability for that exemption to be overused by government in order to avoid FOI.[42]

3.37 From the above discussion it is evident that there was little consistency or consensus between witnesses as to whether, when and in what form a public interest test should apply to various exemptions. It is the committee's view that in the FOI Bill, the government has successfully dealt with the various, competing views when formulating the proposed exemption provisions.

Exemption of whole agencies

3.38 A number of witnesses and submitters questioned the continued exemption of entire agencies from the FOI scheme. Under the current FOI Act, security agencies, such as the Australian Security Intelligence Organisation and the Defence Signals Directorate, are exempt, as are various other agencies listed in Schedule 2 to the FOI Act, including the Australian National Audit Office, parliamentary departments and the Australian Government Solicitor. Other bodies have partial exemptions such as the ABC and SBS.[43]

3.39 Associate Professor Paterson submitted to the committee that as a matter of principle, classes and types of documents should be exempted from disclosure under FOI, not entire agencies.[44] She explained that:

> If you look at the [FOI] act you see it has a very good, strong national security exemption provision or if you look at bodies that have commercial information or other information you will see again that there are business affairs and other exemption provisions that would seem to address the issue of concern. What that means therefore is that these bodies are perceived to be outside of transparency regimes, when that does not need to be the case.[45]

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41 Mr Michael McKinnon, Australia's Right to Know, *Proof Committee Hansard*, 5 February 2010, p. 7.

42 Mr Michael McKinnon, Australia's Right to Know, *Proof Committee Hansard*, 5 February 2010, p. 7.

43 Mr Peter Timmins, private capacity, *Proof Committee Hansard*, 15 February 2010, p. 16.

44 Associate Professor Moira Paterson, private capacity, *Submission 20*, p. 4.

45 Associate Professor Moira Paterson, private capacity, *Proof Committee Hansard*, 15 February 2010, p. 5.

3.40 Associate Professor Paterson argued that removing an organisation in its entirety from the FOI Act removes that method of public scrutiny. She argued that this should not be necessary, even for security agencies, as:

> …the harms that might result from the disclosure of their [the exempt agency's] documents should logically be capable of being dealt with by the exemption provisions.[46]

3.41 Furthermore, Associate Professor Paterson argued that the increasing powers of security agencies heightens the need to ensure the accountability of those agencies through FOI.[47]

3.42 Dr Lidberg, the Academic Chair of Journalism at Murdoch University, noted that neither of the 'benchmark' FOI systems—those in the United States and Sweden—exempt any agencies entirely from FOI:

> The CIA is not exempt. You would be aware that there were manuals handed out regarding certain interrogation methods, like waterboarding, for instance. Those manuals came from the CIA. That sends a very clear message: when you put any agency at all under general exemptions, it sends a message of secrecy rather than transparency.[48]

3.43 In addition to security agencies, parliamentary departments are currently exempt from the FOI scheme. A number of witnesses commented on this including Dr Lidberg,[49] Mr McKinnon from Australia's Right to Know[50] and Ms Simpson from PIAC, who argued that:

> [I]f you come back to first principles, that the houses of parliament and parliamentary members are equally part of the government and also produce information and should also equally be accountable to the public. So to simply leave them outside the act leaves a part of government effectively unknowable to the public.[51]

3.44 Mr Timmins, who appeared in a personal capacity, told the committee that failure of the FOI Bills to:

> …act on a law reform recommendation that the act extend to parliamentary departments is a significant gap in the accountability and transparency framework. This year the parliamentary departments had $320 million to

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46 Associate Professor Moira Paterson, private capacity *Proof Committee Hansard*, 15 February 2010, p. 1.

47 Associate Professor Moira Paterson, *Submission 20*, p. 4 & p. 5.

48 Dr Johan Lidberg, Academic Chair of Journalism, Murdoch University, *Proof Committee Hansard*, 15 February 2010, p. 7.

49 Dr Johan Lidberg, Academic Chair of Journalism, Murdoch University, *Proof Committee Hansard*, 15 February 2010, p. 8

50 Mr Michael McKinnon, Australia's Right to Know, *Proof Committee Hansard*, 5 February 2010, p. 4.

51 Ms Elizabeth Simpson, PIAC, *Proof Committee Hansard*, 15 February 2010, p. 32.

> spend. Some of that money goes on payments to members and senators in the form of allowances and salaries. I think the lack of accountability in this area, as I detailed in my submission, is one that we should address.[52]

3.45 As was pointed out in the submission of the Queensland Information Commissioner,[53] this issue was examined by the Senate Standing Committee on Legal and Constitutional Affairs in 1979 when it examined the Freedom of Information Bill 1978. That committee found at the time that:

> The total exemption for parliamentary departments conferred by clause 3 of the Bill appears even less justified than in respect of the courts. The only official justification is that the Freedom of Information Bill is concerned with the granting of access to the documents of the Executive. Seen as an exercise in ensuring accountability of governmental decision making, there clearly is a difference between the executive and parliamentary departments. But that is not to say that there is not a corresponding need to open up for public inspection the activities of the parliamentary departments. The public has a legitimate interest in ensuring, first, that its parliamentary representatives are properly going about their tasks of representation and executive scrutiny, and secondly, that its parliamentary representatives are properly assisted to fulfil those functions.[54]

3.46 The ALRC and ARC's *Open government report* also recommended that parliamentary departments be made subject to the FOI Act,[55] and the Queensland Information Commissioner's submission points out that the FOI laws in both New Zealand and the United Kingdom apply to parliamentary departments.[56]

3.47 Various suggestions were made as to how the decision as to which, if any, agencies should continue to be exempt from FOI should be made. For example, PIAC recommended in its submission that all exempt agencies should be required to demonstrate public interest grounds for their continued exemption from the FOI Act.[57]

Conclusion

3.48 While the committee accepts the strength of the arguments regarding the inappropriateness of exempting entire agencies or organisations from the FOI regime, it also considers that the issues involved are more complex than can be dealt with by this committee in the timeframe available for report. Furthermore, the committee is of the view that the new Information Commissioner will be best placed to make

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52 Mr Peter Timmins, private capacity, *Proof Committee Hansard*, 15 February 2010, p. 15.

53 Queensland Information Commissioner, *Submission 3*, pp 3-4.

54 Senate Standing Committee on Legal and Constitutional Affairs, *Freedom of Information*, 1979, pp 158-9.

55 ALRC and ARC, *Open government: a review of the federal Freedom of Information Act 1982*, ALRC Report 77, 1995, para 11.8, Recommendation 73.

56 Queensland Information Commissioner, *Submission 3*, p. 4.

57 PIAC, *Submission 24,* p. 16.

decisions about this issue, and recommends that further consideration be given to the issue whether it is appropriate and necessary for entire agencies and organisations to be exempt from the FOI scheme.

Recommendation 2

3.49 The committee recommends that, if and when established, the Information Commissioner give consideration to whether it is necessary and appropriate for entire agencies and organisations to be exempt from the Commonwealth's freedom of information scheme.

Fees and charges

3.50 The third aspect of the FOI Bill which the committee identified that effectively improves access under the FOI scheme relates to the proposed removal of certain fees and charges. As noted in chapter 2, the FOI Bill enables different charges to be applied to different groups of people, with the intention that journalists and public interest organisations will be exempt from fees for the first five hours. Witnesses were generally in favour of this amendment, although some argued that it did not go far enough.

3.51 For example, Dr Lidberg, the Academic Chair of Journalism at Murdoch University, proposed that processing fees for journalists and public interest groups ought to be waived for the first day of processing.

3.52 The issue of the fairness of treating journalists and public interest groups as special, and exempting them from fees when making third party FOI applications, while not exempting other individuals, such as bloggers, from fees, was raised as an issue by the committee. Dr Lidberg commented that:

> [T]hat is a good point…it makes sense to me that non-profit organisations that have few resources and so on should not be slapped with big processing request…Some journalists have a lot of money behind them in terms of media organisations…Perhaps, as an individual making a third-party request, you should be given some sort of provision as well. This all comes back to the ownership again.[58]

3.53 The Australian Press Council raised similar concerns, with the Executive Secretary, Mr Herman stating that:

> The council is always wary about singling out groups, whether journalists or others. When journalists are making applications under FOI for public interest information, they should be in the same position as any other individual or group who is making similar sorts of applications…So I think

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58 Dr Johan Lidberg, private capacity, *Proof Committee Hansard*, 15 February 2010, p. 12.

> we would rather see it being expressed in terms of the sorts of information rather than the class of person making the application.[59]

3.54 Furthermore, Mr Timmins pointed out the difficulties in defining 'journalists' and suggested that 'individuals, community or similar groups who individually or on behalf of others seek access to documents for the purpose of participating in government processes' should all get some special concession under the scheme.[60] PIAC made similar comments on this issue.[61]

3.55 However, if free access to documents under FOI is not defined by the class of person applying, then the only other obvious option is to define the type of information that may be freely accessed, for example by distinguishing between information that is in the public interest to be released and that which is simply being requested to make a profit for a media organisation. However, the Australian Press Council noted the difficulties with this approach:

> Yes, newspapers, the press and the media generally tend to be profit-making organisations but they also happen to be organisations that are acting on behalf of the public in disseminating information that is of interest to the public, that is of public interest. To make the distinction between those two things I think is very difficult.[62]

3.56 Another suggestion was that the government retain application fees but eliminate processing charges.[63] This is the approach taken in the new Tasmanian FOI laws,[64] and was supported by Ms Simpson from PIAC, who argued that:

> From an individual's point of view, it is really the charges that are particularly prohibitive. We find that people have two issues with them. One is that sometimes they pay the charges and then discover that all of the material is exempt. So they pay up to several thousand dollars not to receive very much information or any information at all…The other is that…if an agency, for example, has bad record-keeping measures which mean they have to spend a lot of time working out what information is subject to an FOI request we do not believe that the individual should be required to pay for that.[65]

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59 Mr Jack Herman, Executive Secretary, Australian Press Council, *Proof Committee Hansard*, 15 February 2010, p. 20.

60 Mr Peter Timmins, private capacity, *Proof Committee Hansard*, 15 February 2010, p. 18.

61 Ms Elizabeth Simpson, PIAC, *Proof Committee Hansard*, 15 February 2010, p. 33.

62 Mr Jack Herman, Executive Secretary, Australian Press Council, *Proof Committee Hansard,* 15 February 2010, p. 22.

63 Mr Peter Timmins, private capacity, *Proof Committee Hansard*, 15 February 2010, p. 16.

64 Mr Peter Timmins, private capacity, *Proof Committee Hansard*, 15 February 2010, p. 17.

65 Ms Elizabeth Simpson, PIAC, *Proof Committee Hansard*, 15 February 2010, p. 32.

Conclusion

3.57 The committee notes that the issue of fees and charges is dealt with in the Freedom of Information (Fees and Charges) Regulations, and not in the Act itself. The committee urges the government, when drafting the relevant regulations, to give full and serious consideration to the issues raised by witnesses with respect to fees and charges, and particularly to the feasibility of removing processing charges while retaining application fees, as has been done in Tasmania. The committee also urges the government to consider what has been done with respect to fees and charges in other jurisdictions.

Recommendation 3

3.58 The committee recommends that the government give consideration to the issues raised with respect to fees and charges in this inquiry, and particularly to the feasibility of removing processing charges, while retaining application fees, in the context of drafting regulations.

Are the improvements to the request process efficient and could they be further improved?

3.59 There are a number of aspects of the FOI Bill that, if enacted, will significantly improve the cost and efficiency of the request process, particularly those relating to the Information Commissioner's new oversight role. The FOI and Information Commissioners will be charged with overseeing the way government agencies are managing FOI, and will have the power to issue directions, make recommendations, and assist in making agencies' processes more efficient. The committee sees this new FOI advocacy role as pivotal to improving the efficiency of the request process under the FOI Act.

3.60 Only one aspect of the proposed changes to the request process attracted any substantial criticism from witnesses and submitters—the appeal process. As noted in chapter 2 of this report, the bills make some significant changes to the structure of internal and external merits review with respect to FOI decisions.

3.61 Currently individuals who are dissatisfied with the decision of an officer of an agency regarding their FOI claim must request review of the decision internally by a senior officer within the same agency, before they may request external review of the decision. If the applicant is dissatisfied with the decision made by the senior officer, they may then request a review of that decision by the Administrative Appeals Tribunal (AAT).

3.62 Decisions by a minister or principal officer of an agency may be reviewed directly by the AAT.

3.63 The bills add a second level of external review before the AAT's review—by the Information Commissioner. However, in acknowledgment of the time that this change adds to the review process, the bills remove the requirement that internal

review be undertaken prior to external review. In addition, the FOI Bill amends the format of review in the AAT, altering the onus of proof in AAT reviews, such that the onus will be borne by the applicant. These two issues attracted comment from a range of witnesses.

Onus of proof in the Administrative Appeals Tribunal

3.64 It was strongly argued in evidence that the alteration of the onus of proof in AAT proceedings would be a retrograde step.

3.65 As outlined briefly in chapter 2, proposed section 61 provides that whichever party appeals a decision of the Information Commissioner—either the applicant, or the agency—bears the onus of proof in the AAT. This means that if the applicant is denied documents by the Information Commissioner and requests a review of the decision to the AAT, they will bear the onus of proving that the Commissioner's decision was not correct or preferable, and that they should be allowed access to the documents on the facts.

3.66 This is a significant change from the status quo, where the concept of an 'onus of proof' does not apply in AAT proceedings,[66] and the role of a respondent agency is 'to assist the Tribunal to reach the correct or preferable decision; but not simply to seek to uphold the existing decision'.[67] In practice this means that the respondent agency provides the AAT with documents and evidence relevant to the making of the decision, but does not take a partisan role.[68]

3.67 In a document comparing the main changes between the exposure draft and the FOI and Information Commissioner Bills as introduced, the Department of Prime Minister and Cabinet described the alteration of the onus of proof as a 'minor change to ensure the effective operation of the review process in the AAT'.[69]

3.68 Mr Mark Robinson, from the Law Council of Australia, responded that 'nothing could be further from the truth'.[70] Mr Robinson also noted the Law Council's

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66 *McDonald v Director-General of Social Security* (1984) 1 FCR 354.

67 The Hon Justice Garry Downes AM, *Government Agencies as Respondents in the Administrative Appeals Tribunal*, Paper delivered to the Australian Government Solicitor Government Law Group, 3 February 2005, at http://www.aat.gov.au/SpeechesPapersAndResearch/speeches/downes/governmentagencies.htm

68 The Hon Justice Garry Downes AM, *Government Agencies as Respondents in the Administrative Appeals Tribunal*, Paper delivered to the Australian Government Solicitor Government Law Group, 3 February 2005, at http://www.aat.gov.au/SpeechesPapersAndResearch/speeches/downes/governmentagencies.htm

69 Department of Prime Minister and Cabinet, *Summary of main changes between the exposure draft and introduced FOI reform Bills*, November 2009, available at: http://www.dpmc.gov.au/consultation/foi_reform/index.cfm, p.7, tabled by Law Council of Australia, 5 February 2010.

70 Mr Mark Robinson, Law Council of Australia, *Proof Committee Hansard*, 5 February 2010, p. 19.

serious concerns about the fairness of AAT appeals if section 61 is amended in the manner proposed in the FOI Bill.[71] Mr Robinson gave evidence that the alteration of the onus of proof in the AAT:

> It puts the applicant in an impossible position, both practically and as a matter of fairness, and as a matter of law. On one view of it, that onus could never be discharged, ever.[72]

3.69 Associate Professor Paterson further explained that:

> [I]f a person has been knocked back by the commissioner and then goes to the AAT, they do not know what they are looking for. The government knows what it is looking for. The person then has to prove something they do not have, and do not have a description of, is in the public interest. This strikes me as an almost impossible burden of proof to bear.[73]

3.70 Mr McKinnon, the spokesperson from Australia's Right to Know coalition, told the committee that his organisation was extremely concerned about this aspect of the bills, and had raised the issue with the Minister.[74] Mr McKinnon explained to the committee his personal experiences as a journalist with FOI appeals, and outlined the difficulty that he, as an applicant, would face if the onus of proof in the AAT were reversed:

> I have done more than 50 appeals to the AAT because you have a chance given the onus rests of the government to prove why documents should be secret. That means that the government has to put up its evidence and its witnesses and we are in a position to cross-examine and to develop our arguments from the government. Equally, it is only logical that it is very difficult to prove that documents should not be secret when you have no access to those documents.[75]

3.71 Furthermore, Associate Professor Paterson commented that the ability of the AAT to hear evidence from agencies and ministers without the applicant present 'is a reasonable safety valve to protect confidential information', arguing that the alteration of the onus of proof in the AAT is therefore unnecessary for protecting confidential information held by agencies.[76] Professor Zifcak, Vice President of Liberty Victoria

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71 Mr Mark Robinson, Law Council of Australia, *Proof Committee Hansard*, 5 February 2010, p. 19.

72 Mr Mark Robinson, Law Council of Australia, *Proof Committee Hansard*, 5 February 2010, p. 19.

73 Associate Professor Moira Paterson, *Proof Committee Hansard*, 15 February 2010, p. 3.

74 Mr Michael McKinnon, Australia's Right to Know, *Proof Committee Hansard*, 5 February 2010, p. 4.

75 Mr Michael McKinnon, Australia's Right to Know, *Proof Committee Hansard*, 5 February 2010, p. 5.

76 Associate Professor Moira Paterson, private capacity, *Proof Committee Hansard*, 15 February 2010, p. 3.

reiterated Associate Professor Paterson's position with regard to this aspect of the bills.[77]

3.72 The Department of Prime Minister and Cabinet explained the reasons for the alteration of the onus of proof in the AAT to the committee:

> The issue behind that is that at present, if you appeal from a decision of an agency, you appeal straight to the AAT, and you are appealing from the agency's decision, so the agency bears the onus of defending its position. With the interposition of the Information Commissioner as a new review opportunity for people, if an agency or applicant wishes to appeal from the Information Commissioner's decision to the AAT, they are actually appealing the Information Commissioner's decision, not the department's decision. So the provision in relation to the onus of proof was included because it would not be appropriate for the Information Commissioner to be a party in the AAT, having to defend their position.[78]

3.73 In a response to a question on notice put by the committee, the Department of Prime Minister and Cabinet reiterated this point arguments, stating that:

> The introduction of the IC review before AAT review means that the AAT will be reviewing the decision of the Information Commissioner not the decision of the agency or minister. The Information Commissioner will not be a respondent to AAT review proceedings and will not be defending his or her decision. It is for those reasons that the Bill placed the onus on whoever applies for AAT review.[79]

3.74 Ms Lynch explained that the position is analogous to that of appeal from a decision of the AAT to the Federal Court, in which the AAT does not defend its position, but instead, the relevant department does.[80]

Conclusion

3.75 The department's explanation satisfies the committee with respect to those aspects of item 42 of Schedule 4 to Part 1 of the FOI Bill which give the responsibility for appearing before the AAT in FOI matters to the relevant department or agency instead of the Information Commissioner (proposed section 61A). This is also consistent with the role of departments and agencies when the AAT is reviewing the decision of an intermediate external merits review body, such as the Social Security Appeals Tribunal.

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77 Professor Spencer Zifcak, Vice President, Liberty Victoria, *Proof Committee Hansard* 15 February 2010, p. 36.

78 Ms Philippa Lynch, First Assistant Secretary, Department of Prime Minister and Cabinet, *Proof Committee Hansard*, 5 February 2010, p. 13.

79 Department of Prime Minister and Cabinet, *Answer to question on notice,* 2 March 2010, pp 1-2.

80 Ms Philippa Lynch, First Assistant Secretary, Department of Prime Minister and Cabinet, *Proof Committee Hansard*, 5 February 2010, p. 13.

3.76 However, when questioned on the issue of the applicant bearing the onus of proof in the AAT, legal academic, Associate Professor Paterson, President of the ALRC, Professor Croucher,[81] and barrister, Mr Robinson[82], were all unaware of examples of the onus of proof being altered in such a way in similar situations.[83]

3.77 The committee notes that there are other situations where individuals may request review of decisions of an external merits review body to the AAT, such as social security decisions by the Social Security Appeals Tribunal, and that in those situations government has not considered it necessary to require an individual aggrieved by an administrative decision to bear the onus of proof in the AAT. The committee is not satisfied that there are any reasons for the onus of proof to be altered in this situation, when it is not in others.

3.78 The committee considers that the alteration of the onus of proof such that whichever party applies for review by the AAT bears the onus of proof is inappropriate, unnecessary and unfair to individuals. Accordingly, in order to make the FOI Act consistent with the lack of onus in the rest of the AAT's jurisdiction, the committee recommends that proposed section 61 be amended to remove the concept of onus of proof from the FOI Act entirely. The committee recommends that any other amendments required to give effect to the removal of the notion of onus from the FOI Act also be made.

Recommendation 4

3.79 The committee recommends that proposed section 61, in item 42 of Schedule 4 to Part 1 of the Freedom of Information Amendment (Reform) Bill 2009, which provides that whichever party that appeals a decision of the Information Commissioner bears the onus of proof in the Administrative Appeals Tribunal, as well as any other relevant sections of the Bill and *Freedom of Information Act* 1982, be amended to remove the concept of an onus of proof from the Act.

3.80 Mr Timmins noted that, while he also has concerns with this aspect of the FOI Bill, he is more concerned with the fact that agencies could appeal decisions from the Information Commissioner to the AAT, and that this may be used as a delaying tactic by departments.[84] He argued that there is no reason for agencies or ministers to have a right of appeal to the AAT:

> They should have the right to seek review where it is alleged that there is an error of law in the Information Commissioner's decision. But when it comes

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81 Professor Rosalind Croucher, President, ALRC¸ *Proof Committee Hansard*, 15 February 2010, p. 25.

82 Mr Mark Robinson, Law Council of Australia, *Proof Committee Hansard*, 5 February 2010, p. 22.

83 Associate Professor Moira Paterson, private capacity, *Proof Committee Hansard*, 15 February 2010, p. 4.

84 Mr Peter Timmins, private capacity, *Proof Committee Hansard*, 15 February 2010, p. 17.

to simply asserting that it is wrong and therefore asking for full merit review again, a process that has been undertaken by the Information Commissioner previously, I think we should be looking closely at that because of the prospect of delay.

3.81 Similar concerns regarding delay were raised by the Law Council of Australia.[85]

3.82 However, while the committee acknowledges Mr Timmins' concerns with respect to this issue, the committee notes that model litigant provisions apply to the behaviour of agencies before the AAT and courts. Model litigant provisions should limit any possibility of the Commonwealth's right of review being used as a delaying tactic. Furthermore, the committee notes that it is not unprecedented for Commonwealth departments and agencies to have a right of review or appeal to a higher tribunal or court.

Removal of compulsory internal review

3.83 The body charged with advising government with respect to administrative law matters, the Administrative Review Council (ARC) has, in a number of its reports, highlighted the importance of internal review.[86] As noted in chapter 2, the FOI Bill proposes to make internal review an optional step, rather than a mandatory step as it currently is under the FOI Act.

3.84 Professor McMillan noted that:

> Generally I have been in favour of internal review as a mandatory stage in all administrative processes. Indeed, even in the Ombudsman's office, we insist that a person first complain to and take up an issue with an agency before coming to the Ombudsman.[87]

3.85 However, Professor McMillan also acknowledged that as the bills add multiple appeal stages:

> Multiple appeal stages run the risk of prolonging disputes and exhaustion of complainants. So the balance that has been struck is to make internal review optional. My view is that it is best to go with that balance for the moment and to allow the Information Commissioner to review whether it is

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85 Mr Mark Robinson, Law Council of Australia, *Proof Committee Hansard*, 5 February 2010, p. 16.

86 See for example Administrative Review Council, *Internal Review of Agency Decision-Making*, Report No 44, November 2000; and *Better Decisions: review of Commonwealth Merits Review Tribunals 1995*, Report No 39, September 1995.

87 Professor John McMillan, Commonwealth Ombudsman, *Proof Committee Hansard*, 5 February 2010, p. 2.

> receiving an undue number of small matters that could more suitably be resolved within an agency.[88]

3.86 Similarly, Associate Professor Paterson expressed the view with respect to internal review that:

> On balance, I favour it being optional. I think an internal review can certainly be of value in terms of changing processes within an agency, providing a quick and easy form of review, but I think there are circumstances where it is going to slow down the process. Where time is of the essence and where you have to go through that first, that would be a disadvantage to applicants. So I would favour, on balance, it being optional.[89]

3.87 Dr Lidberg expressed much stronger support for making internal review optional rather than mandatory:

> I find it very good that the change bypassing the internal review was made. I am much harsher in my judgment on that than Professor Paterson, because I think that with internal review, even though the stats say that it does work, that decisions are changed, it does not quite show how those decisions are changed. Very often, internal review does nothing, so it is fantastic that it has been changed and that we can go straight to the commissioner.[90]

3.88 Similarly, Mr McKinnon from Australia's Right to Know stated that:

> It is rare in my view that important policy issues are overturned on internal review...Right to Know argued for that optional internal review even though agencies are bloody minded and you never win on internal review, so what is the point. What an internal review process does do is remove at least to some extent the timeliness of the information and in journalism that is all.[91]

3.89 Therefore, despite the general advice of the ARC regarding the advantages of internal review, it appears that in this instance, there are sufficient review mechanisms and accountability safeguards so as to justify making internal review an optional rather than mandatory step.

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88 Professor John McMillan, Commonwealth Ombudsman, *Proof Committee Hansard*, 5 February 2010, p. 2.

89 Associate Professor Moira Paterson, private capacity, *Proof Committee Hansard*, 15 February 2010, p. 2.

90 Dr Johan Lidberg, Academic Chair of Journalism, Murdoch University, *Proof Committee Hansard*, 15 February 2010, p. 10.

91 Mr Michael McKinnon, Australia's Right to Know, *Proof Committee Hansard*, 5 February 2010, p. 10.

Assessment of the functions, powers and resources of the Information Commissioner

3.90 As with other aspects of the bills, the establishment of the Information and FOI Commissioners was overwhelmingly regarded as a positive step by witnesses, although a number of suggestions were made regarding the specific aspects of the commissioners' roles.

3.91 It has been contended that FOI and privacy interests often conflict, and accordingly it may be inappropriate to combine both roles within one office.[92] However, the Victorian Privacy Commissioner, Ms Helen Versey disagreed with this argument, and stated:

> …my submission is that there is a close interconnection between the laws. Both laws in effect promote transparency of government. Privacy laws promote transparency in that they promote the right of individuals to know what information government collects about them, how it is used and who it is disclosed to. Such rights are incorporated in the general right of access to government information.[93]

3.92 However, Ms Versey also pointed out in both her submission and in evidence to the committee, that there is a lack of detail in the legislation regarding when the Privacy and FOI Commissioners are to exercise the privacy and FOI functions of the Information Commissioner respectively.[94] Ms Versey also expressed concern that the independence and autonomy of the Privacy Commissioner may be undermined by placing them within the Information Commissioner's office. However, Ms Versey emphasised that this would depend on the practical operation of the bills, and could be fixed by greater clarity within the Information Commissioner Bill specifically.[95]

3.93 Other witnesses also raised concerns with the lack of clarity in the Information Commissioner Bill regarding the roles of the new commissioners. The NSW Privacy Commissioner commented that the model proposed in the Information Commissioner Bill 'appears open to confusion, as the Commissioner's functions are interchangeable and no provision is made for the finality of decisions'.[96] The Public Interest Advocacy Centre argued that 'having an FOI Commissioner who can use or perform the functions of a Privacy Commissioner undermines the value of having these different subordinate commissioners, who are each meant to be an independent

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92 NSW Privacy Commissioner, *Submission 6*, p. 2.

93 Ms Helen Versey, Victorian Privacy Commissioner, *Proof Committee Hansard*, 15 February 2010, p. 26.

94 Ms Helen Versey, Victorian Privacy Commissioner, *Proof Committee Hansard*, 15 February 2010, p. 27; Victorian Privacy Commissioner, *Submission 15*.

95 Ms Helen Versey, Victorian Privacy Commissioner, *Proof Committee Hansard*, 15 February 2010, p. 27.

96 NSW Privacy Commissioner, *Submission 6,* p. 3.

specialist advocate for their own regime'.[97] The ALRC echoed these concerns, however, its President, Professor Croucher, ultimately concluded that the ALRC does not object to the specifics of the proposal in the Information Commissioner Bill as 'that could readily be dealt with in practise'.[98]

3.94 A second issue that arose during the inquiry regarding the specifics of the Information Commissioner model was the requisite qualifications of each of the commissioners. The Information Commissioner Bill requires that the FOI Commissioner have legal qualifications, but no similar requirement is placed on either the Information Commissioner or the Privacy Commissioner.

3.95 Dr Lidberg argued that the requirement that the FOI Commissioner has legal qualifications[99] should be reconsidered.[100] In this respect, Dr Lidberg argued that the requirement does not take into account the wider components of the job of an FOI Commissioner. He stated:

> It would be good if this person [the FOI Commissioner] had done possibly, research into FOI, had a good knowledge of the international systems, and was keen on benchmarking and explaining why it is important to benchmark Australia towards other systems. It would be good if this person understood that this is a long-term thing.[101]

3.96 The Victorian Privacy Commissioner, Ms Helen Versey, agreed with Dr Lidberg's view on this issue, noting that 'I do not necessarily think that regulators have to have legal qualifications'.[102]

3.97 On the other hand, Professor Zifcak from Liberty Victoria strongly supported this aspect of the Bill, and argued that the Information Commissioner should also be required to have a legal background.[103]

3.98 Dr Lidberg also argued that the FOI Commissioner should not be appointed from within the public service, in order to foster the requisite change in culture. He noted:

> Unfortunately, because of the tradition of secrecy that comes with the Westminster system and because of our Public Service to such a great

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97 Ms Elizabeth Simpson, PIAC, *Proof Committee Hansard*, 15 February 2010, p. 31.

98 Professor Rosalind Croucher, President, ALRC, *Proof Committee Hansard*, 15 February 2010, p. 24.

99 Information Commissioner Bill 2009, clause 14.

100 Dr Johan Lidberg, Academic Chair of Journalism, Murdoch University, *Proof Committee Hansard*, 15 February 2010, p. 7.

101 Dr Johan Lidberg, Academic Chair of Journalism, Murdoch University, *Proof Committee Hansard*, 15 February 2010, p. 9.

102 Ms Helen Versey, Victorian Privacy Commissioner, *Proof Committee Hansard*, 15 February 2010, p. 28.

103 Professor Spencer Zifcak, Vice President, Liberty Victoria, *Proof Committee Hansard*, 15 February 2010, p. 38.

> extent being modelled on the UK Civil Service, I do not think the FOI Commissioner should be drawn from the Australian Public Service.[104]

3.99 Mr Timmins disagreed with Dr Lidberg on this point arguing that 'I do not think anyone should be excluded—we want the best person for the job'.[105]

Conclusion

3.100 The committee notes that on 26 February 2010, Professor John McMillan was appointed as the Information Commissioner Designate. Despite the varied nature of the numerous suggestions made by witnesses as to what category of person would make an appropriate Information Commissioner, Professor McMillan's appointment manages to fulfil them all. Professor McMillan has a strong background as an advocate for FOI, has done exceptional work as the Commonwealth Ombudsman in improving government administration, and has an outstanding legal credentials. The committee commends the government on this appointment.

3.101 The Commonwealth Ombudsman suggested in his submission that the name of the Information Commissioner be changed to the Australian Information Commissioner, in order to distinguish the position from that of information commissioners in other states and internationally, as well as to identify that the Information Commissioner's role relates to the Australian Government.[106] This suggestion was supported by the Administrative Review Council[107] and Dr Lidberg.[108]

3.102 The committee supports this suggestion, and recommends that the government make the necessary amendments to the Information Commissioner and FOI Bills.

Recommendation 5

3.103 The committee recommends that the Freedom of Information Amendment (Reform) Bill 2009 and the Information Commissioner Bill 2009 be amended such that all references to the 'Information Commissioner' are replaced by references to the 'Australian Information Commissioner'.

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104 Dr Johan Lidberg, Academic Chair of Journalism, Murdoch University, *Proof Committee Hansard*, 15 February 2010, p. 9.

105 Mr Peter Timmins, private capacity, *Proof Committee Hansard*, 15 February 2010, p. 18.

106 Commonwealth Ombudsman, *Submission 8,* p. 8.

107 Administrative Review Council, *Submission 28,* p. 2.

108 Dr Johan Lidberg, Academic Chair of Journalism, Murdoch University, *Proof Committee Hansard*, 15 February 2010, p. 8.

Resources of the Information Commissioner

3.104 As noted in chapter 2, the Office of the Information Commissioner will be resourced with $19.5 million over four years, in addition to existing resources of the Privacy Commissioner (approximately $6.4 million in 2008-09[109]).

3.105 The committee raised concerns regarding whether this level of resourcing will be adequate to enable the commissioners to perform the significant role required of them. In this respect, the Department of Prime Minister and Cabinet stated:

> The budget process itself requires a very robust process internally and it would be based on the number of cases in the past, the expected number of cases in the future, and current activity levels. It went through our budget process.[110]

3.106 The Commonwealth Ombudsman pointed out that the amendments to the FOI scheme may result in increased costs to government, as it would likely encourage more requests.[111] Specifically, the reduction in fees, and the removal of a requirement of an Australian address remove significant practical barriers to the making of FOI applications. The Ombudsman submitted that, in his experience, 'these are the most common causes of a request being considered invalid by the receiving agency' and the removal of these barriers will accordingly result in more valid requests.

3.107 However, there was not unanimity amongst witnesses that an increase in FOI applications would result from the proposed amendments. Dr Johan Lidberg disagreed with the Ombudsman's analysis, explaining that:

> In a study done by Greg Terrill…that drew from the discussions leading up to the 1982 act, it was anticipated that each government agency would deal with tens of thousands of requests per year. This did not happen at all, and I do not think it will happen with this change either.[112]

Conclusion

3.108 The committee is concerned that the Financial Impact Statement for the FOI Bill, and the basis on which resourcing has been determined do not take into account the increase in FOI applications across government that is likely to result from the proposed amendments. The committee urges the government to monitor the funding of the Office of the Information Commissioner on an ongoing basis, and ensure that the commissioners have sufficient resources to undertake the significant and important role that has been designated to them by the proposed legislation.

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109 Office of the Privacy Commissioner, *Annual Report 2008–09*, p. 145

110 Ms Glenys Beauchamp, Deputy Secretary, Department of Prime Minister and Cabinet, *Proof Committee Hansard*, 5 February 2010, p. 13.

111 Commonwealth Ombudsman, *Submission 8,* p. 7.

112 Dr Johan Lidberg, Academic Chair of Journalism, Murdoch University, *Proof Committee Hansard,* 15 February 2010, p. 8.

Conclusion

3.109 It is evident from the above discussion that FOI in Australia is in need of significant legislative reforms, and particularly of a cultural shift in the way in which FOI laws are administered. The reform package proposed by the government in the FOI and Information Commissioner Bills has the ability to address the key problems that have been identified with the 1982 FOI Act, including, through its objects clause and the introduction of the FOI and Information Commissioners, to bring about the requisite cultural change.

3.110 The committee commends the government for the consultative approach taken to the development of this legislation, and strongly supports the FOI and Information Commissioner Bills. The committee considers that, but for a few minor suggestions for amendment, the bills effectively take into account the various competing views on how FOI laws should operate. Accordingly, the committee recommends that the bills be passed by the Senate without delay.

Recommendation 6

3.111 The committee recommends that, subject to the amendments outlined in Recommendations 4 and 5 being made, the Freedom of Information Amendment (Reform) Bill 2009 and the Information Commissioner Bill 2009 be passed by the Senate as soon as practicable.

Senator Helen Polley

Chair