

The Senate

Legal and Constitutional Affairs
References Committee

The operation of Commonwealth Freedom
of Information (FOI) laws

December 2023

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Abbreviations

AAT	Administrative Appeals Tribunal
ABC	Australian Broadcasting Corporation
ACF	Australian Conservation Foundation
ACT	Australian Capital Territory
AFSA	Australian Financial Security Authority
AGD	Attorney-General's Department
AIC Act	<i>Australian Information Commissioner Act 2010 (Cth)</i>
APC	Australian Press Council
APP 12	Australian Privacy Principle 12
APS	Australian Public Service
ARTK	Australia's Right to Know Coalition
CAJ	Centre for Advancing Journalism
CPI	Centre for Public Integrity
committee	Legal and Constitutional Affairs References Committee
CPA	Country Press Australia
FOI	Freedom of Information
FOI Act	<i>Freedom of Information Act 1982 (Cth)</i>
FOI Commissioner	Freedom of Information Commissioner
GIPA Act	<i>Government Information (Public Access) Act 2009 (NSW)</i>
Hawke Review	Review of the Freedom of Information Act 1982 and Australian Information Commissioner Act 2010
Home Affairs	Department of Home Affairs
IC	Information Commissioner
ICO	Information Commissioner's Office
IC review	Information Commissioner review
IPS	Information Publication Scheme
Law Council	Law Council of Australia
NCAT	New South Wales Civil and Administrative Tribunal
NSWCCL	NSW Council for Civil Liberties
NT	Northern Territory
OAIC	Office of the Australian Information Commissioner
OVIC	Office of the Victorian Information Commissioner
PIAC	Public Interest Advocacy Centre
PII	Public Interest Immunity
PIJI	Public Interest Journalism Initiative
Privacy Act	<i>Privacy Act 1988 (Cth)</i>
RACS	Refugee Advice and Casework Service
SACAT	South Australian Civil and Administrative Tribunal
SA FOI Act	<i>South Australian Freedom of Information Act 1991 (SA)</i>

Members

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AG, NSW

Senator Alex Antic

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LP, SA

Secretariat

Sophie Dunstone, Committee Secretary

Ash Clements, Principal Research Officer

Mervyn Piesse, A/g Senior Research Officer

Madeleine Wainwright, Parliamentary Graduate

Leah Schamschurin, Administrative Officer

Grace McElholum, Administrative Officer

Aaron Murphy, Administrative Officer

Suite S1.61

Parliament House

CANBERRA ACT 2600

Telephone: (02) 6277 3560

Email: legcon.sen@aphg.gov.au

List of recommendations

Recommendation 1

- 5.8 The committee recommends that an independent investigation be undertaken, reporting to the Secretary of the Attorney-General's Department and not the Office of the Australian Information Commissioner (OAIC), to consider the matters raised by Mr Hardiman in relation to workplace behaviour within the OAIC, the impact on employees (past and present), and appropriate action which needs to be taken.

Recommendation 2

- 5.21 The committee recommends that the Australian government amends the Freedom of Information Act 1982 and the Australian Information Commissioner Act 2010 to provide that:
- reviews internal to decision-making agencies be abolished and resources reallocated to primary decision-making;
 - intermediate reviews are not required to provide procedural fairness or formal reasons for a decision;
 - a full merits review process is only required at the level of the Administrative Appeals Tribunal (or its replacement); and
 - FOI applicants may appeal directly to the Administrative Appeals Tribunal (or its replacement) at any time after a primary decision for a full merits review of their claim without having to wait for a decision at the intermediate level.

Recommendation 3

- 5.24 The committee recommends that the Australian government amends the Australian Information Commissioner Act 2010 to separate out the FOI review and regulatory functions from the Office of the Australian Information Commissioner and to relocate the FOI Commissioner to the Office of the Commonwealth Ombudsman.

Recommendation 4

- 5.25 The committee recommends that the Australian government reallocates to the FOI Commissioner, newly located within the Office of the Commonwealth Ombudsman, all resources currently earmarked for the FOI functions of the Office of the Australian Information Commissioner and, going forward, provides the FOI Commissioner with adequate resources to perform its regulatory and review functions in a timely and efficient manner.

Recommendation 5

5.32 The committee recommends that the Australian government:

- **consults with key stakeholders and implements appropriate statutory timeframes for FOI reviews (with the timeline proposed by the Grata Fund as detailed in paragraph 3.56 of this report as an indicator), including consideration of provisions for extensions in exceptional circumstances due to the scale and complexity of an Information Commissioner review; and**
- **amends the Freedom of Information Act 1982 to impose statutory timeframes for the finalisation of FOI reviews. Statutory timeframes should expressly include the notification of reviews to decision-making agencies.**

Recommendation 6

5.34 The committee recommends that the Australian government amends subsection 4(1) of the Freedom of Information Act 1982 to ensure that a change in minister does not impede the right to access documents under the FOI system.

Recommendation 7

5.36 The committee recommends that the Australian government amends subsection 8D(3) of the Freedom of Information Act 1982 to require that decision-making agencies make directly available for public download, either from the disclosure log or another website, all information that is released through an FOI request, subject to recognised technical constraints and privacy concerns.

Recommendation 8

5.41 The committee recommends that the Australian government ensures that formal reporting obligations for both decision-making agencies and review bodies be expanded to ensure information is readily available regarding the timeliness and efficacy of FOI decision making.

Recommendation 9

5.47 The committee recommends that the Strategic Assessment of the Office of the Australian Information Commissioner (OAIC) specifically considers:

- **operational and resourcing requirements needed to rapidly resolve the current backlog of FOI reviews;**
- **the organisational culture of the OAIC, including its leadership, and its approach to the discharge of all its statutory functions;**

- whether resources can and should be reallocated internally to bolster the FOI functions of the OAIC;
- ways to ensure the agency's reporting of FOI applications and reviews is transparent, fulsome, and explicitly accounts for the impact of deemed refusals on finalisation statistics;
- the key performance indicators adopted to assess the performance of the FOI function of the OAIC so that there is a clear and transparent reporting of the backlog of substantive Information Commissioner review matters (as opposed to the clearance of less substantive matters, such as the rectification of deemed refusals by the relevant agency which requires minimal review);
- measures to support the agency to better adapt to the changing nature and scale of its FOI workload; and
- possible legislative changes that would improve the agency's functioning and improve outcomes for FOI applicants.

Further, the assessment should be made public.

Recommendation 10

5.48 The committee recommends that the Australian government publishes the Strategic Assessment of the Office of the Australian Information Commissioner.

Recommendation 11

5.51 The committee recommends that amendments giving effect to the recommendations contained in this report should be enacted as soon as practical (following a consultation period) and that, within three years of implementing the reforms recommended above, the Australian government conducts and tables in the Parliament a review into the effectiveness of the operation of the FOI regime and proposes any further changes that may be warranted. The review should consider, among other issues:

- whether reforms to the FOI regime have resulted in improved outcomes for applicants, in particular, whether the backlog of FOI reviews has been addressed and whether decision-making agencies are meeting statutory timeframes;
- the merits of introducing or maintaining fees, costs, and charges for FOI applications and FOI reviews;
- the merits of introducing a deemed disclosure regime;
- whether decision-making agencies and the Commonwealth's FOI review functions are adequately resourced to meet their statutory responsibilities;
- opportunities for increasing the use of proactive disclosures by decision-making agencies;

- opportunities for increasing the pathways for individuals and their representatives to access personal information outside the FOI regime;
- the merits of introducing a requirement for decision-making agencies to consider pro-actively releasing categories of information that have been subject to repeat successful FOI applications;
- whether adequate provisions and guidance are in place to support vexatious applicant declarations;
- potential reforms or initiatives to support smaller Commonwealth agencies to meet their FOI obligations; and
- how best to ensure that the documents of a minister remain within reach of the FOI Act for a specified period after the relevant minister leaves or changes office.

Recommendation 12

- 5.54** The committee recommends that the Strategic Assessment of the Office of the Australian Information Commissioner considers what additional funding is required to clear the chronic backlog of Information Commissioner review decisions and the funding reasonably required for the operation of the FOI system on an efficient and effective steady state basis.

Recommendation 13

- 5.58** The committee recommends that there be a whole of government campaign to encourage decision-making agencies to explore opportunities to create pathways to release personal information directly to the individuals to which the information pertains without requiring applicants to use the FOI regime.

Recommendation 14

- 5.59** The committee recommends that the Office of the Australian Information Commissioner prioritises efforts to develop guidance and build the capacity of decision-making agencies to strengthen pathways for people accessing personal information outside the FOI regime.

Recommendation 15

- 5.61** The committee recommends that the Office of the Australian Information Commissioner develops streamlined guidance and conducts training for decision-making agencies on applications for vexatious applicant declarations. In addition, if necessary to streamline processes and promote efficiency, consideration should be given to making amendments to the relevant legislation.

Chapter 1

Introduction

- 1.1 On 28 March 2023, the Senate referred an inquiry into the operation of Commonwealth Freedom of Information (FOI) laws to the Legal and Constitutional Affairs References Committee (committee) for inquiry and report by 7 December 2023.¹
- 1.2 The committee was required to inquire into the operation of Commonwealth FOI laws, with particular reference to:
- (a) the resignation of the Commonwealth Freedom of Information Commissioner and the resulting impacts;
 - (b) delays in the review of FOI appeals;
 - (c) resourcing for responding to FOI applications and reviews;
 - (d) the creation of a statutory time frame for completion of reviews; and
 - (e) any other related matters.

Conduct of the inquiry

- 1.3 The committee advertised the inquiry on its website and wrote to organisations and individuals inviting submissions by 5 June 2023. The committee received and published 43 submissions, which are listed at Appendix 1.
- 1.4 The committee held the following public hearings:
- Sydney, New South Wales on 28 August 2023; and
 - Canberra, Australian Capital Territory on 29 August 2023.
- 1.5 An in-camera meeting was held in Canberra, Australian Capital Territory on 9 November 2023. The only witness appearing was Mr Leo Hardiman PSM KC who held the position of FOI Commissioner for the period of 19 April 2022 to 19 May 2023. Mr Hardiman had provided evidence at the public hearing held on 29 August 2023.
- 1.6 It is noted that the Australian Information Commissioner, Ms Angelene Falk, was also provided an opportunity to attend an in-camera hearing but declined. Ms Falk referred to her oral evidence provided during the public hearing on 29 August 2023,² her response to Questions on Notice taken at the public hearing provided to the Committee on 10 October 2023 and her letter of

¹ *Journals of the Senate*, No. 43, 28 March 2023, pp. 1229–1230.

² Ms Angelene Falk, the Australian Information Commissioner, *Committee Hansard*, 29 August 2023.

8 November 2023 in response to Mr Hardiman's supplementary statement.³ For completeness, Ms Falk also noted that the OAIC provided a submission on 28 July 2023 and a supplementary submission on 14 November 2023.⁴ The committee refers to the invitation provided to Ms Falk for the sake of completeness to demonstrate that the committee has in good faith attempted to provide both Mr Hardiman and Ms Falk with an equal opportunity to provide evidence in camera.

1.7 A list of witnesses who appeared at the hearings is at Appendix 2.

Structure of the report

1.8 This report comprises five chapters, as follows:

- Chapter 1 introduces the inquiry and provides an overview of the conduct of the inquiry;
- Chapter 2 outlines the FOI system, including perceptions of its value, legislation underpinning it, key roles within the system, the application and appeal process, reviews into the system, and comparisons with other Australian jurisdictions;
- Chapter 3 provides evidence relating to the functioning of the FOI system, including the timeliness of appeal and review processes, cultural and leadership concerns, and changing demands on the system;
- Chapter 4 details a number of issues on the administration of the FOI system, including resourcing, the imposition of fees and charges, potential legislative and structural reforms, and the resignation of the former FOI Commissioner; and
- Chapter 5 provides the committee's views and recommendations on these matters, as well as the committee's view on the resignation of the former FOI Commissioner.

Background to the inquiry

1.9 The *Freedom of Information Act 1982* (FOI Act) was designed to establish legally enforceable rights of access to information held by government agencies and ministers, except where an overriding public interest requires confidentiality to be maintained.⁵

³ Office of the Australian Information Commissioner, answers to questions taken on notice at a public hearing on 29 August 2023 (received 10 October 2023); and Australian Information Commissioner, letter to the committee, received 8 November 2023.

⁴ Office of the Australian Information Commissioner, *Submission 33*; Office of the Australian Information Commissioner, *Submission 33.1*.

⁵ *Journals of the House of Representatives*, No. 124, 18 August 1981, p. 39. For further discussion on the original intent of the FOI Act, see Attorney-General's Department, *Submission 21*, pp. 2–3.

- 1.10 Subsequent independent reviews of the FOI Act recommended major reforms to the system, including a report in 1987 by the Senate Standing Committee on Legal and Constitutional Affairs.⁶ A joint report in 1995 by the Administrative Review Council and the Australian Law Reform Commission recommended, among other reforms, that a new statutory office of Freedom of Information Commissioner (FOI Commissioner) be established to monitor and promote the FOI Act.⁷ The Commonwealth Ombudsman conducted reviews of the FOI system in 1999 and 2006, with the latter review also recommending the establishment of an FOI Commissioner (potentially within the Office of the Commonwealth Ombudsman).⁸
- 1.11 Nearly thirty years after the FOI Act was passed, the *Australian Information Commissioner Act 2010* (AIC Act) established the independent statutory body of the Office of the Australian Information Commissioner (OAIC), headed by the Australian Information Commissioner and supported by a Privacy Commissioner and an FOI Commissioner. See Chapter 2 for more on the FOI system.

Office holders

- 1.12 On 1 November 2010, Dr James Popple was appointed the inaugural FOI Commissioner to coincide with the establishment of the OAIC. Dr Popple held the position until his resignation in December 2014, when the Commonwealth government proposed to disband the OAIC under the Freedom of Information Amendment (New Arrangements) Bill 2014.
- 1.13 On 2 October 2014, in the second reading speech introducing the Freedom of Information Amendment (New Arrangements) Bill 2014, the rationale for the then Commonwealth government's proposal to disband the OAIC was stated as follows:

The bill will streamline arrangements for the exercise of privacy and freedom of information (FOI) functions from 1 January 2015. The Office of the Australian Information Commissioner (OAIC) will be abolished. The Australian Privacy Commissioner will continue to be responsible for functions under the Privacy Act 1988 as an independent statutory office holder within the Australian Human Rights Commission.

The Administrative Appeals Tribunal will have sole responsibility for external merits review of FOI decisions. Mandatory internal review of

⁶ See Professor John McMillan AO, *Submission 7*, p. 1.

⁷ Administrative Review Council and the Australian Law Reform Commission, [*Open government: a review of the federal Freedom of Information Act 1982*](#), December 1995.

⁸ See Commonwealth Ombudsman, [*"Needs to Know": Own motion investigation into the administration of the Freedom of Information Act 1982 in Commonwealth agencies*](#), June 1999; and Commonwealth Ombudsman, [*Scrutinising government: Administration of the Freedom of Information Act 1982 in Australian government agencies*](#), March 2006.

decisions of FOI decisions before a matter can proceed to the Administrative Appeals Tribunal will ensure access to low-cost and timely review for applicants. The tribunal will receive a funding boost to assist with processing FOI reviews.

The Commonwealth Ombudsman will be responsible for investigating complaints about actions taken by an agency under the *Freedom of Information Act 1982* (the FOI Act). The Attorney-General will be responsible for FOI guidelines and collection of statistics on agency and ministerial FOI activity...

The bill will create administrative efficiencies and reduce the burden on FOI applicants by providing that the Administrative Appeals Tribunal is the sole external merits review body. This aligns with other merits review processes across the Australian government.

Under the new arrangements, those applicants who wish to seek review of an FOI decision will first be required to seek internal review. If an applicant is not satisfied with the internal review decision, they may apply for full merits review at the Administrative Appeals Tribunal...

The bill also provides for an Australian Privacy Commissioner, as an independent statutory office holder within the Australian Human Rights Commission. The commissioner will continue to be responsible for the exercise of privacy functions under the Privacy Act and related legislation.⁹

- 1.14 The bill was not passed. Subsequently, the position of FOI Commissioner remained vacant for more than seven years, with the FOI functions exercised by the Information Commissioner. In August 2021, Deputy Commissioner Ms Elizabeth Hampton was appointed acting FOI Commissioner.¹⁰
- 1.15 On 17 March 2022, Mr Leo Hardiman PSM KC was appointed FOI Commissioner for five years, commencing on 19 April 2022.¹¹
- 1.16 On 5 March 2023, Mr Hardiman resigned from his position as FOI Commissioner, effective 19 May 2023. In announcing his resignation through social media, Mr Hardiman stated that he had been leading the implementation of 'significant changes' in the FOI system to reduce the backlog of appeals and to promote more timely access to government-held information, but was not empowered as FOI Commissioner to implement the further changes

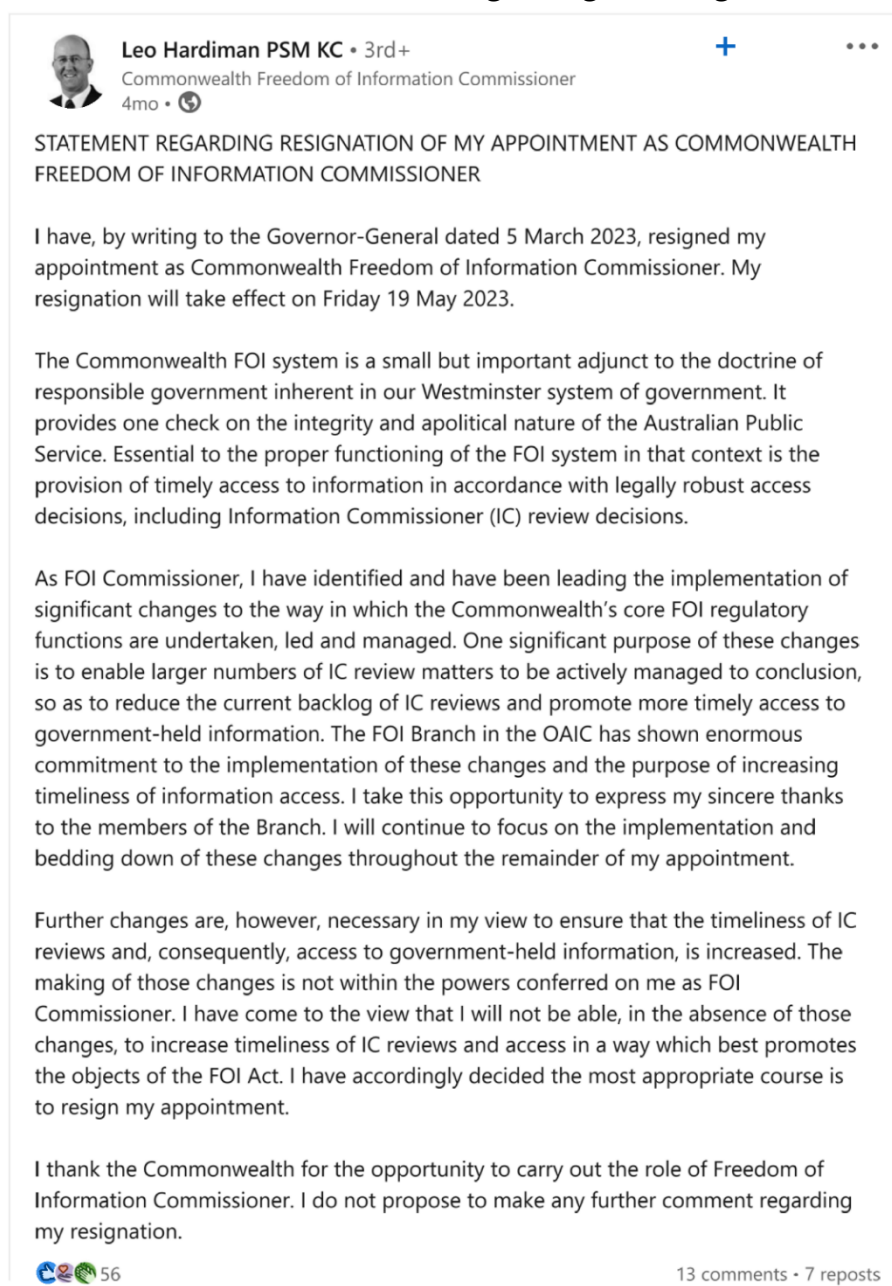
⁹ The Hon. Scott Morrison MP, Minister for Immigration and Border Protection, *House of Representatives Hansard*, 2 October 2014, pp. 11077-11078.

¹⁰ Office of the Information Commissioner, Queensland, *Submission 11*, p. 2; Law Council of Australia, *Submission 20*, p. 7; Office of the Australian Information Commissioner, *Submission 33*, p. 6; and Office of the Australian Information Commissioner, *Affidavit of Rocelle Ann Dowsett*, 22 August 2022, paras 10–11 (tabled).

¹¹ Order of 22 March 2023 (183) relating to the resignation of the Freedom Information Commissioner, [p. 19], available at aph.gov.au/Parliamentary_Business/Tabled_Documents/1625 (accessed 20 October 2023).

he deemed necessary.¹² The full text of Mr Hardiman's resignation announcement is at Figure 1.1, below.

Figure 1.1 Mr Hardiman's statement regarding his resignation



Source: Leo Hardiman, '[Statement regarding resignation of my appointment as commonwealth freedom of information commissioner](#)', *LinkedIn*, 6 March 2023.

Social media post by Mr Leo Hardiman PSM KC, on 6 March 2023, regarding his resignation of appointment as FOI Commissioner.

¹² Leo Hardiman, '[Statement regarding resignation of my appointment as commonwealth freedom of information commissioner](#)', *LinkedIn*, 5 March 2023. See also, Statement made by Mr Leo Hardiman PSM KC at a public hearing on 29 August 2023, p. 4.

- 1.17 This inquiry provided an opportunity to take evidence from Mr Hardiman where he could provide further background and details with respect to his resignation decision. See Chapter 4 for further discussion of Mr Hardiman's resignation. The committee's views on his resignation are outlined in Chapter 5.
- 1.18 Ms Toni Pirani was appointed acting FOI Commissioner on 20 May 2023.¹³ Commissioner Falk has served as Australian Information Commissioner and Privacy Commissioner since August 2018.¹⁴ On 10 November 2023, Commissioner Falk announced that she had advised the Attorney-General that she was not seeking a third term. Commissioner Falk's term will expire in August 2024.¹⁵
- 1.19 On 27 November 2023, the Attorney-General announced the appointment of Ms Elizabeth Tydd as Freedom of Information Commissioner for a five-year term commencing on 19 February 2024 and of Ms Carly Kind as Privacy Commissioner commencing on 26 February 2024.¹⁶
- 1.20 With the appointment of Ms Tydd and Ms Kind, there will be three discrete Commissioners holding the positions of Australian Information Commissioner, Privacy Commissioner and FOI Commissioner as originally envisaged under the *Australian Information Commissioner Act 2010* (AIC Act). This is sometimes referred to as the 'Three Commissioner Model'.

References

- 1.21 References in this report to *Committee Hansard* are to the proof (uncorrected) transcript. Page numbers may vary between the proof and the official transcript.

Acknowledgements

- 1.22 The committee thanks those individuals and organisations who made submissions and gave evidence at the public hearings.

¹³ Office of the Australian Information Commissioner, *Submission 33*, p. 6; and Senate Legal and Constitutional Affairs References Committee, *Budget Estimates Committee Hansard*, 23 May 2023.

¹⁴ Office of the Australian Information Commissioner, *Annual Report 2018-19*, September 2019, p. 16.

¹⁵ Office of the Australian Information Commissioner, *Commissioner Falk to conclude with second term*, 10 November 2023, oaic.gov.au/newsroom/commissioner-falk-to-conclude-with-second-term (accessed 30 November 2023).

¹⁶ The Hon Mark Dreyfus KC MP, Attorney-General, *'Freedom of Information Commissioner and Privacy Commissioner appointments'*, *Media release*, 27 November 2023.

Chapter 2

The FOI system

- 2.1 This chapter details how Australia's Freedom of Information (FOI) system has been designed, including its underpinning legislation, the application and appeal processes, and key roles within the system. It also provides an overview of some of the reviews and investigations into the functioning of the FOI system, and legal challenges to its administration. Finally, this chapter discusses the operation of FOI systems in comparable jurisdictions.

The perceived value of the FOI regime

- 2.2 Submitters were invariably supportive of a well-functioning FOI system. Australia's FOI system was seen by submitters to be vital to a healthy and well-functioning democracy,¹ a fundamental aspect of the rule of law,² crucial to ensuring government transparency and accountability,³ and essential to enabling the public to participate in and scrutinise government decision-making.⁴
- 2.3 The former FOI Commissioner, Mr Leo Hardiman PSM KC, described the FOI system as 'an important adjunct to the doctrine of responsible government' that provides 'a check on the integrity and apolitical nature of the [Australian Public Service]'.⁵ The Attorney-General's Department (AGD) outlined the role and significance of Australia's FOI system:

A well-functioning FOI system is a key part of Australia's integrity architecture; it promotes government accountability by enhancing the transparency of policy-making, administrative decision-making and service delivery. The right to access government information, subject to appropriate exemptions in the public interest, is now accepted as an essential component of a democratic society. The [*Freedom of Information Act 1982*] recognises that government-held information is a national resource, managed for public purposes, and as such, access to information should be prompt and at the

¹ See for example Public Interest Advocacy Centre, *Submission 4*, p. 8; Grata Fund, *Submission 5*, p. 2; Australian Press Council, *Submission 10*, p. 3; Centre for Public Integrity, *Submission 6*, p. 2; and Attorney-General's Department, *Submission 21*, p. 2.

² Law Council of Australia, *Submission 20*, p. 5.

³ See for example Public Interest Advocacy Centre, *Submission 4*, p. 8; and Attorney-General's Department, *Submission 21*, p. 2.

⁴ Grata Fund, *Submission 5*, p. 5.

⁵ Statement by Mr Leo Hardiman PSM KC at a public hearing on 29 August 2023, p. 18. See also Mr Leo Hardiman PSM KC, *Committee Hansard*, 29 August 2023, p. 3.

lowest reasonable cost, unless there is an overriding reason not to disclose it.⁶

- 2.4 The website of the Office of the Australian Information (OAIC) recognises that government-held information is 'a national resource and is managed for public purposes, and that public access to it should be prompt and at the lowest reasonable cost'.⁷
- 2.5 The OAIC also submitted that:
- A community that is better informed can participate more effectively in the nation's democratic processes. Consequently, an effective and efficient FOI system is fundamentally in the public interest.⁸
- 2.6 The Law Council of Australia told the committee that the FOI regime was 'critical to the effective operation of the administrative law system and more broadly to the integrity of Australia's democratic institutions'.⁹
- 2.7 A range of submissions received from representatives of the media also emphasised the importance of a robust FOI system for public interest journalism.¹⁰ Crikey claimed that 'the information journalists have revealed using the FOI system has been hugely consequential in informing readers of government decisions'.¹¹ Country Press Australia (CPA) told the committee that:
- Our laws and access to FOI is a fundamental ingredient of good and even great journalism in this country. The use of existing FOI rules has helped uncover some of the biggest and most important stories of our era...The ongoing existence of a free and open press is a fundamental component of any democracy'.
- 2.8 Civil society groups also emphasised the value of the FOI regime for their work, arguing that information obtained under FOI enables their clients to engage more effectively with government processes.¹²

⁶ Attorney-General's Department, *Submission 21*, p. 2. See also Opening statement made by the Attorney-General's Department at a public hearing on 29 August 2023, p. 1.

⁷ Office of the Australian Information Commissioner, *What is freedom of information?*, oaic.gov.au/freedom-of-information/your-freedom-of-information-rights/what-is-freedom-of-information (accessed 30 June 2023).

⁸ Office of the Australian Information Commissioner, *Submission 33*, p. 2.

⁹ Mr Luke Murphy, President, Law Council of Australia, *Committee Hansard*, 29 August 2023, p. 18.

¹⁰ See for example, Public Interest Journalism Initiative and Centre for Advancing Journalism, University of Melbourne, *Submission 9*, p. 2; Australian Press Council, *Submission 10*, p.3; Country Press Australia, *Submission 13*; and Crikey, *Submission 15*.

¹¹ Crikey, *Submission 15*, p. 1.

¹² See for example, Shooting Industry Foundation Australia, *Submission 24*, p. 4.

Legislation underpinning the FOI system

Freedom of Information Act 1982

- 2.9 The *Freedom of Information Act 1982* (FOI Act) underpins Australia's FOI system. At the time it was introduced, the FOI Act was the first such legislation brought forward by a Westminster-style government.¹³ Inaugural Information Commissioner, Professor John McMillan AO, described the legislation as 'a radical milestone in Australian public law'.¹⁴
- 2.10 The FOI Act is supplemented by the Freedom of Information (Charges) Regulations 1982—which provides that the agency that holds requested information (decision-making agency), may at its discretion, impose a charge for processing an FOI request or providing access to a document released under FOI—and the Freedom of Information (Miscellaneous provisions) Regulations 1982.¹⁵
- 2.11 The FOI Act was designed to ensure that government departments and authorities facilitate and promote the disclosure of the information they hold, except where there are 'special reasons' not to. The FOI Act acknowledges the need to balance these two objectives, and recognises that a government cannot function with an absolute right of access. The FOI Act therefore outlines circumstances where confidentiality over certain types of information should be maintained.¹⁶ The OAIC website lists three categories of exemption: exemptions, conditional exemptions, and documents that are accessible to the public under other arrangements for a fee. Each is detailed below.
- 2.12 First, certain documents may be exempt under the FOI Act, including documents:
- that affect national security, defence, or international relations;
 - of the Federal Cabinet;¹⁷
 - that affect law enforcement and public safety;
 - where the secrecy rules of a law applies;
 - where legal professional privilege applies;

¹³ *Journals of the House of Representatives*, No. 124, 18 August 1981, p. 39.

¹⁴ Professor John McMillan AO, *Submission 7*, p. 1.

¹⁵ Office of the Australian Information Commissioner, *Part 1: Introduction to the Freedom of Information Act 1982*, oaic.gov.au/freedom-of-information/freedom-of-information-guidance-for-government-agencies/foi-guidelines/part-1-introduction-to-the-freedom-of-information-act-1982 (accessed 7 July 2023).

¹⁶ Attorney-General's Department, *Submission 21*, pp. 2–3.

¹⁷ The Administrative Appeals Tribunal submitted that there is a degree of ambiguity with respect to exemptions related to Cabinet deliberations, arguing that 'there is scope to clarify [this exemption in the FOI act]'. See Administrative Appeals Tribunal, *Submission 22*, p. 13.

- that contain material collected in confidence;
- whose disclosure would be in contempt of parliament or in contempt of court;
- disclosing trade secrets or commercially valuable information; and
- electoral rolls and related documents.¹⁸

2.13 Second, some documents may be *conditionally* exempt under the FOI Act, including a document that has:

- personal information that would be unreasonable to disclose;
- information about certain operations of the agency (such as operations, audits, examinations, or employee management);
- information about the deliberative processes relating to an agency or minister's functions;
- information that could damage federal and state government relations;
- information that may damage the Australian economy; and
- information about the Australian government's financial or property interests.¹⁹

2.14 Third, documents that are accessible to the public under other arrangements for a fee are also exempt from the FOI Act.²⁰ See Chapter 4 for a discussion of the merits of fees, charges, and costs for FOI applications.

2.15 AGD submitted that FOI exemptions 'were intended to protect a specific "interest" which could be justified as outweighing the public interest of providing access to the particular information'.²¹ An agency that holds requested information may nevertheless decide to disclose a document, even if the document may be exempt or conditionally exempt. Agencies are therefore required to weigh up factors that favour access and those that favour non-disclosure. Factors that favour disclosure include whether the provision of access would promote the aims of the FOI Act and would promote the participation of the public in government decision-making. An agency or minister cannot take into account the potential for disclosure to result in

¹⁸ Office of the Australian Information Commissioner, *What is freedom of information?*, oaic.gov.au/freedom-of-information/your-freedom-of-information-rights/what-is-freedom-of-information#WhatYouCantAccess (accessed 30 June 2023).

¹⁹ Office of the Australian Information Commissioner, *What is freedom of information?*, oaic.gov.au/freedom-of-information/your-freedom-of-information-rights/what-is-freedom-of-information#WhatYouCantAccess (accessed 30 June 2023).

²⁰ Office of the Australian Information Commissioner, *What is freedom of information?*, oaic.gov.au/freedom-of-information/your-freedom-of-information-rights/what-is-freedom-of-information#WhatYouCantAccess (accessed 30 June 2023).

²¹ Attorney-General's Department, *Submission 21*, p. 3.

embarrassment or loss of confidence in government, misunderstandings, confusion or unnecessary debate, or the seniority of the document's author.²²

- 2.16 The OAIC encourages the use of proactive publication and administrative access (see Box 2.1, below), through which agencies and ministers elect to release information as a matter of course, rather than waiting for an FOI request.²³ The OAIC also oversees the Information Publication Scheme, which requires publication of specific categories of information by Australian government agencies, reflecting the pro-disclosure goals of the FOI Act.²⁴
- 2.17 A decision-making agency may also refuse access for 'practical refusal reasons' if an FOI request does not sufficiently identify the requested documents or if the work involved in processing the request would substantially and unreasonably divert the resources or interfere with the performance of the decision-making agency.²⁵
- 2.18 The Attorney-General's Department submitted that the FOI system, when designed more than 40 years ago, was intended 'to serve as one feature, within a broader landscape of integrity related measures, to ensure government transparency and accountability'.²⁶

Box 2.1 Proactive disclosure

The proactive disclosure of government-held information (or proactive publication, administrative access, administrative release, or disclosure by design) is the publication of documents of public interest without requiring an FOI request or an application under the *Privacy Act 1988* (see Chapter 3). Proactive disclosures conform with the principles underpinning the FOI Act—particularly government transparency and accountability—and consider formal information access requests to be a last resort. The pre-emptive release of documents may also mitigate requests for

²² Office of the Australian Information Commissioner, *What is freedom of information?*, oaic.gov.au/freedom-of-information/your-freedom-of-information-rights/what-is-freedom-of-information#WhatYouCantAccess (accessed 30 June 2023).

²³ Office of the Australian Information Commissioner, *Proactive publication and administrative access*, oaic.gov.au/freedom-of-information/freedom-of-information-guidance-for-government-agencies/proactive-publication-and-administrative-access (accessed 5 July 2023).

²⁴ Office of the Australian Information Commissioner, *Information Publication Scheme*, oaic.gov.au/freedom-of-information/freedom-of-information-guidance-for-government-agencies/proactive-publication-and-administrative-access/information-publication-scheme (accessed 21 November 2023).

²⁵ *Freedom of Information Act 1982*, S 24.

²⁶ Attorney-General's Department, *Submission 21*, p. 3.

government-held information, thereby reducing the administrative costs for decision-making agencies.²⁷

In September 2021, all Australian information commissioners and ombudsmen developed a statement of principles in support of proactive disclosure of government-held information.²⁸

Australian Information Commissioner Act 2010

2.19 The *Australian Information Commissioner Act 2010* (AIC Act) established the independent statutory body of the OAIC. The powers and structure of the OAIC are outlined below.

2.20 As discussed in Chapter 1, in 2014, the then Commonwealth government announced its intention to disband the OAIC and return largely to the FOI regime as it was prior to the AIC Act in 2010.²⁹ Consequently, the OAIC began to transfer certain FOI functions and resources to other agencies, closing its Canberra office. However, the efficiency and budget saving measures were not passed by the Senate, and in the 2016–17 budget, the OAIC received funding to resume its FOI functions.³⁰

2.21 See Chapter 4 for a discussion of proposed legislative changes related to the FOI system.

Privacy Legislation Amendment (Enforcement and Other Measures) Act 2022

2.22 The *Privacy Legislation Amendment (Enforcement and Other Measures) Act 2022* enables the Information Commissioner to delegate their powers under section 55K of the FOI Act to an OAIC member of staff employed at the Senior Executive Service level, with effect from the end of 2022.

Key roles within the FOI system

2.23 The FOI system requires a multi-faceted approach involving a range of Commonwealth agencies and departments.³¹ Key roles within the FOI system are outlined in this section.

²⁷ See for example, Office of the Information Commissioner, Queensland, *Submission 11*, p. 4; and Professor John McMillan AO, *Submission 7*, p. 4.

²⁸ See Office of the Australian Information Commissioner, [Joint Statement](#), 24 September 2021, (accessed 27 October 2023).

²⁹ Commonwealth Government, [Budget 2014–15: Budget Measures: Budget Paper No. 2](#), 13 May 2014, p. 64. See also Professor John McMillan AO, *Committee Hansard*, 29 August 2023, p. 25.

³⁰ Office of the Australian Information Commissioner, *Submission 33*, p. 12.

³¹ Office of the Australian Information Commissioner, *Submission 33*, p. 2.

Commonwealth departments and agencies

- 2.24 Commonwealth departments, agencies, and ministers are first-level decision-makers with respect to FOI requests for the information they hold. However, some agencies are exempt from the FOI Act.³²
- 2.25 The Department of Home Affairs (Home Affairs)—responsible for 43 per cent of all Commonwealth FOI requests in 2021–22, see Table 2.1, below—submitted that funding for its FOI program was allocated from the department's base budget and not linked to fluctuating demand. Home Affairs noted that its FOI program therefore 'competes' with its other core programs, such as law enforcement, emergency management, and border-related programs.³³
- 2.26 The Australian Financial Security Authority (AFSA) submitted that for small-to-medium-sized agencies, even straightforward FOI requests can constitute significant demands on their resources, with more complex and voluminous applications presenting a 'further resourcing strain'.³⁴ AFSA also noted that '[s]mall and medium agencies often have limited capacity to allocate suitable resources to deal with an unexpected surge in FOI requests'.³⁵

Table 2.1 Top agencies by number of FOI requests received, 2021–22

Agency	Requests	% of overall
Department of Home Affairs	14 644	43
Services Australia	4627	14
National Disability Insurance Agency	1884	6
Department of Veterans' Affairs	1785	5
Administrative Appeals Tribunal	1505	4
Department of Health	1254	4

Source: OAI, [Annual Report 2021–22](#), 2022, p. 137.

³² Exempted agencies include the Aboriginal Land Councils and Land Trusts, the Auditor-General, the Australian Secret Intelligence Service, the Australian Security Intelligence Organisation, the Australian Signals Directorate, the Inspector-General of Intelligence and Security, the National Workplace Relations Consultative Council, the Office of National Intelligence, the Parliamentary Budget Office, the Australian Geospatial-Intelligence Organisation, and the Defence Intelligence Organisation. In addition, program material from the Australian Broadcasting Corporation and Special Broadcasting Service is exempt, as are the commercial activities of the National Broadband Network. See Office of the Australian Information Commissioner, *What is freedom of information?*, oaic.gov.au/freedom-of-information/your-freedom-of-information-rights/what-is-freedom-of-information#WhatYouCantAccess (accessed 30 June 2023).

³³ Department of Home Affairs, *Submission 1*, pp. 5–6.

³⁴ Australian Financial Security Authority, *Submission 2*, p. 2.

³⁵ Australian Financial Security Authority, *Submission 2*, p. 4.

Attorney-General's Department

2.27 AGD has a dual role with respect to FOI. AGD responds to FOI requests made directly to the department, as well as supporting the Attorney-General to administer the FOI Act, including by providing policy and legal advice on the operation of the FOI Act, and working with the OAIC as a portfolio agency.³⁶

The Office of the Australian Information Commissioner

2.28 The OAIC is an independent statutory agency and the national regulator for privacy and Freedom of Information. The OAIC is headed by the Australian Information Commissioner, who is appointed by the Governor-General, and operates under a three-commissioner structure: the Information Commissioner, appointed by the Governor-General; an FOI Commissioner, who is a statutory office holder responsible for the effective management of the OAIC's FOI functions; and a Privacy Commissioner. The OAIC is supported by staff engaged under the *Public Service Act 1999*.³⁷

2.29 In relation to FOI requests, the OAIC has the power to:

- review FOI decisions made by agencies and ministers;
- investigate complaints about the handling of FOI applications;
- provide advice and assistance in relation to the FOI Act, and issue FOI guidance;
- oversee extension of time applications in relation to FOI requests;
- raise awareness and knowledge of the FOI system, including rights and obligations under the FOI Act;
- compile FOI data and assess trends;
- report and make recommendations to the minister in relation to legislative changes to the FOI Act; and
- monitor, investigate, and report on compliance.³⁸

2.30 As at May 2023, the FOI area of the OAIC consisted of 22.4 staff, in addition to one Senior Executive Service Band 1 officer and the FOI Commissioner.³⁹ In answers to questions on notice provided by the OAIC in 10 October 2023, the Information Commissioner advised that an 'above budget allocation' of 9 staff

³⁶ Attorney-General's Department, *Submission 21*, p. 2. See also Opening statement made by the Attorney-General's Department at a public hearing on 29 August 2023, p. 2.

³⁷ Attorney-General's Department, *Freedom of Information Commissioner*, ag.gov.au/about-us/careers/statutory-appointments/freedom-information-commissioner (accessed 5 July 2023); and Office of the Australian Information Commissioner, *Submission 33*, p. 5.

³⁸ Attorney-General's Department, *Submission 21*, pp. 3–4; and Office of the Australian Information Commissioner, *Submission 33*, p. 7.

³⁹ Ms Angelene Falk, Australian Information Commissioner and Privacy Commissioner, *Senate Legal and Constitutional Affairs Legislation Committee Hansard*, 23 May 2023, p. 124.

had been allocated for the 2023-24 year.⁴⁰ See Chapter 4 for a discussion on the adequacy of resourcing for the OAIC.

- 2.31 The Australia Institute emphasised the importance of a properly-functioning OAIC, submitting that it would deter public servants and the government from 'unnecessarily refusing, delaying and avoiding FOI requests'.⁴¹
- 2.32 In 2021–22, the OAIC received 1995 Information Commissioner reviews (IC reviews) and finalised 1392 IC reviews (70 per cent). In 2022–23, the OAIC received 1647 IC reviews and finalised 1519 IC reviews. Of these, 476 (31 per cent) were finalised without a formal decision; 879 were withdrawn by the applicant (58 per cent); two were finalised by agreement of the parties; 94 (six per cent) were reviewed by the Administrative Appeals Tribunal (AAT); and 68 (four per cent) were decided by the Information Commissioner.⁴² Of the 68 reviews decided by the Information Commissioner, nine (13 per cent) varied the original decision; 11 (16 per cent) affirmed the original decision; and 48 (71 per cent) set aside the original decision.⁴³
- 2.33 As at 22 May 2023, the OAIC had 2060 active cases.⁴⁴
- 2.34 For further details on the IC review caseload and backlog, and changes to processing of IC reviews over time, see Chapter 3.

The Administrative Appeals Tribunal

- 2.35 As with the Attorney-General's Department (discussed above), the AAT has a dual role in the FOI system. The AAT is both a first-level decision-maker with respect to FOI applications made directly to the AAT, whilst also being the second-level external merits reviewer under the FOI Act.⁴⁵ The AAT submitted that it is an 'integral part of the current FOI framework which enables applicants and other affected parties to seek independent review of [FOI decisions]'.⁴⁶

⁴⁰ Office of the Australian Information Commissioner, answers to questions taken on notice taken at a public hearing on 29 August 2023 (received 10 October 2023), p. 12.

⁴¹ The Australia Institute, *Submission 23*, p. 9.

⁴² Ms Angelene Falk, Australian Information Commissioner, *Committee Hansard*, 29 August 2023, p. 57; and Information Commissioner Review Statistics, tabled by the Office of the Australian Information Commissioner at a public hearing on 29 August 2023, [p. 2].

⁴³ Information Commissioner Review Statistics, tabled by the Office of the Australian Information Commissioner at a public hearing on 29 August 2023, [p. 3].

⁴⁴ Office of the Australian Information Commissioner, *Affidavit of Rocelle Ann Dowsett*, 6 March 2023, para 29, paras 10–11 (tabled); and Office of the Information Commissioner, *Annual Report: 2021–22*, p. 43.

⁴⁵ Administrative Appeals Tribunal, *Submission 22*, p. 3.

⁴⁶ Administrative Appeals Tribunal, *Submission 22*, p. 14.

- 2.36 Under the FOI Act, an application may be made to the AAT to review the following:
- a decision by the Information Commissioner affirming, varying, or setting aside a reviewable decision;
 - a decision by the Information Commissioner that a review should be conducted by the AAT rather than the OAIC; and
 - a decision by the Information Commissioner to make a vexatious applicant declaration.⁴⁷
- 2.37 The Information Commissioner may decide not to undertake or not to continue an IC review on the basis that the interests of the administration of the FOI Act make it desirable that the decision be considered by the AAT instead.⁴⁸
- 2.38 Applications to the AAT must be in writing, stating the reasons for the application, must be lodged within 28 days of the Information Commissioner's notice of the decision in question, and must include the application fee of \$1011, where due.⁴⁹
- 2.39 The agency or minister who made the reviewable decision must provide the AAT with justification for the decision and all documents relevant to the review, other than those that are claimed to be exempt, within 28 days of receiving a notice of an application for review. The AAT has broad discretion regarding the conduct of its proceedings, but must ensure that all parties are afforded procedural fairness.⁵⁰
- 2.40 The AAT laid out the following process for conducting a merits review of an FOI application or review:
- Merits review of an administrative decision involves considering afresh the facts, law and policy relating to that decision. The Administrative Appeals Tribunal (AAT) decides what is the correct or preferable decision based on the material before it, including any new or additional evidence that was not before earlier decision-makers.
- Applications may be finalised in different ways, including to affirm, vary or set aside the decision under review by the AAT.⁵¹
- 2.41 A decision of the AAT may be appealed in the Federal Court of Australia on a question of law only.⁵²

⁴⁷ Administrative Appeals Tribunal, *Submission 22*, p. 4.

⁴⁸ *Freedom of Information Act 1982*, SS 54W(b).

⁴⁹ Administrative Appeals Tribunal, *Submission 22*, p. 4.

⁵⁰ Administrative Appeals Tribunal, *Submission 22*, pp. 5–6.

⁵¹ Administrative Appeals Tribunal, answers to questions taken on notice at a public hearing on 28 August 2023 (received 15 September 2023), p. 10.

⁵² Administrative Appeals Tribunal, *Submission 22*, p. 7.

2.42 The AAT's caseload of FOI appeals is detailed in Table 2.2, below.

Table 2.2 Summary of AAT FOI Division caseload

Year	Lodged	Finalised	Clearance ratio
2017–18	38	47	124%
2018–19	33	25	76%
2019–20	69	30	43%
2020–21	74	46	62%
2021–22	57	73	128%
2022–23	54	69	128%

Source: Administrative Appeals Tribunal caseload data, tabled by the Administrative Appeals Tribunal at a public hearing on 28 August 2023.

- 2.43 Of the 54 applications lodged with the AAT in 2022–23, 45 (83 per cent) related to applications in which the Information Commissioner had declined to undertake a review or to not continue a review under subsection 54W(b) and seven (13 per cent) were for a review of an IC decision.⁵³ Ms Alison Nesbitt, Executive Director Review Support at the AAT, told the committee that applications for which the Information Commissioner had declined to undertake a review had increased in recent years both in absolute terms and as a proportion of the AAT caseload. Ms Nesbitt noted that in 2018, only four lodgements involved situations in which the Information Commissioner had declined to conduct a review.⁵⁴
- 2.44 The AAT submitted that its use of alternative dispute resolution—as opposed to formal hearings—was an important method of ensuring its review process was economical, informal, and timely.⁵⁵
- 2.45 The government has announced that it intends to abolish the AAT and replace it with a new body called the Administrative Review Tribunal. Remaining cases before the AAT will transition to the new body, once established.⁵⁶

⁵³ Mr Chris Matthews, Chief Legal Officer, Administrative Appeals Tribunal, *Committee Hansard*, 28 August 2023, p. 57.

⁵⁴ Ms Alison Nesbitt, Executive Director Review Support, Administrative Appeals Tribunal, *Committee Hansard*, 28 August 2023, p. 57.

⁵⁵ Administrative Appeals Tribunal, *Submission 22*, pp. 6–7, and 9.

⁵⁶ Administrative Appeals Tribunal, *A new federal administrative review body*, aat.gov.au/about-the-aat/a-new-federal-administrative-review-body (accessed 15 November 2023).

FOI application and appeal processes

- 2.46 Under the FOI Act, individuals or organisations (FOI applicants) may request access to a document directly from the Commonwealth department, agency, or minister that holds the information. The decision-making agency may grant the request (an access grant) or may refuse access to the document (an access refusal), in accordance with the FOI Act.
- 2.47 In the case of an access grant, a decision-making agency must make the information available for download; publish a link to download the information; or publish details of *how* the information may be obtained.⁵⁷ Some departments make documents available via a disclosure log, whilst others only provide an email address from which to request a copy of the document (see Chapter 4 for a discussion of the merits of these provisions).⁵⁸
- 2.48 In the case of an access refusal, an FOI applicant may apply either for an internal review of the decision by the decision-making agency (providing the original decision was not made by a minister or the principal officer of an agency) or a review of the decision by the Information Commissioner (IC review). If an internal review upholds the original decision, an FOI applicant may still apply for an IC review.
- 2.49 The OAIC noted that it may use a range of techniques to conduct IC reviews to ensure the most effective and efficient outcomes, including the use of alternative dispute resolution.⁵⁹
- 2.50 In the case of an access grant decision, an affected third party may apply for an internal review or an IC review of the decision.
- 2.51 An IC review can affirm, vary, or set aside a decision by the decision-making agency. The Information Commissioner may also decide *not* to undertake a review on the basis that it is desirable that the AAT undertakes the review, or the Information Commissioner may declare a person a 'vexatious applicant' — that is, the actions of the FOI applicant are deemed to constitute an abuse of process.
- 2.52 An FOI applicant may apply to the AAT for a review of a decision by the Information Commissioner, other than a decision not to undertake or continue an IC review. A review of the AAT decision can be made by the Federal Court only on a matter of law.

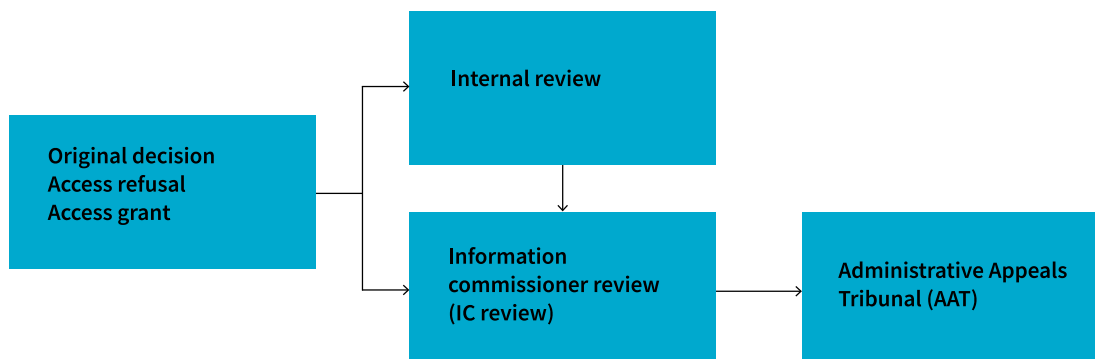
⁵⁷ *Freedom of Information Act 1982*, SS 11C(3).

⁵⁸ See Law Council of Australia, *Submission 20*, pp. 17–18.

⁵⁹ Office of the Australian Information Commissioner, *Submission 33*, p. 7.

2.53 This process is outlined in the flowchart in Figure 2.3, below.

Figure 2.3 FOI key principles flowchart



Source: Office of the Australian Information Commissioner's, answer to question on notice (received 28 July 2023).

2.54 The OAIC submitted that the merits review process (an IC review) intends to determine the correct decision in the circumstances, as distinct from simply reviewing the reasons given by an agency or minister in its original decision. As such, the OAIC is required to consider material that has arisen since the decision of the decision-making agency was made, as well as any impact that the passage of time may have when determining whether disclosure would be in the public interest.⁶⁰

2.55 The OAIC detailed its approach to IC reviews, as follows:

In conducting an IC review, the Commissioner must balance timely decision-making with the importance of ensuring an accurate and appropriate outcome for each matter. This process requires a careful assessment of the documents subject to review, the submissions put forward by the applicant and agency and any other information that may be appropriate in the circumstances. It also involves the preparation of clear and cogent written reasons to inform and assist both the parties to the review, as well as the AAT in the event that a party seeks review of the Commissioner's decision.⁶¹

2.56 The OAIC also emphasised with respect to IC reviews that 'accuracy is critical, given the potential consequences of an incorrect decision'.⁶²

2.57 A document that may be subject to the FOI Act is defined as information or a document that exists at the time of the FOI request to which a minister or an officer of an agency has the power to publish or grant access.⁶³ It may include, but is not limited to, a piece of paper or other material on which there is writing,

⁶⁰ Office of the Australian Information Commissioner, *Submission 33*, p. 8.

⁶¹ Office of the Australian Information Commissioner, *Submission 33*, pp. 8–9.

⁶² Office of the Australian Information Commissioner, *Submission 33*, p. 9.

⁶³ *Freedom of Information Act 1982*, SS 3A(1).

maps, drawings, photographs, sound and video recordings, messages on mobile devices, digital files, and other records of information.⁶⁴

2.58 Whilst official documents of a minister are subject to the FOI Act, under subsection 4(1), access to these documents under FOI may be refused if there is a change of minister. The NSW Council for Civil Liberties submitted that '[t]he Information Commissioner has, in three instances, construed section 4(1) narrowly to mean that the FOI Act does not apply to documents of *former* ministers'.⁶⁵

2.59 The website of the OAIC similarly noted:

The FOI Act gives you a right to access official documents in the possession of a minister. If a new minister is appointed, some documents will be transferred from the former minister to the new one. However, not all documents will be transferred to the new minister. Some documents may be transferred to the National Archives of Australia, while others may be destroyed.

If the new minister does not hold the documents you asked for, your FOI request can be refused because the documents are no longer in the possession of a minister, and they are therefore not official documents of a minister.⁶⁶

2.60 See Chapter 4 for a discussion on accessing the documents of a minister under the FOI system.

Statutory timeframes

2.61 The following statutory timeframes apply under the FOI Act:

- as soon as practicable and within 14 days, an agency or minister must acknowledge receipt of an FOI request;⁶⁷
- as soon as practicable and no later than 30 days after receiving a request, an agency or minister must take all reasonable steps to enable the applicant to be notified of a decision in relation to the FOI request;⁶⁸
- extensions may be requested by the decision-making agency with the agreement of the applicant or on approval of the Information Commissioner

⁶⁴ *Freedom of Information Act 1982*, SS 4(1).

⁶⁵ NSW Council for Civil Liberties, *Submission 12*, p. 8, emphasis added.

⁶⁶ Office of the Australian Information Commissioner, *Request an official document held by a minister*, oaic.gov.au/freedom-of-information/your-freedom-of-information-rights/request-an-official-document-held-by-a-minister (accessed 6 July 2023).

⁶⁷ *Freedom of Information Act 1982*, para. 15(5)(a).

⁶⁸ *Freedom of Information Act 1982*, para. 15(5)(b).

under certain circumstances, such as to enable third-party consultations or for complex or voluminous requests;⁶⁹

- within 30 days of an FOI applicant being notified of an agency's decision, the FOI applicant may request an internal review;
- within 60 days of an FOI applicant being notified of an access refusal decision, the FOI applicant may apply for an IC review;⁷⁰ and
- within 28 days of an FOI applicant being notified of a decision by the Information Commissioner, the FOI applicant may apply for review to the AAT.

2.62 Initial decisions that are not made by the decision-making agency within the statutory timeframe are deemed to have been refused (a 'deemed refusal').⁷¹ The applicant may apply for internal review or an IC review. Deemed refusals under appeal may still be finalised by the decision-making agency and would be reported as a finalised IC review. See Chapter 3 for details on FOI delays and processing timeframes.

Requests for personal information

2.63 FOI requests may involve requests for personal information. For the purposes of the FOI Act, personal information has the same meaning as in the *Privacy Act 1988* (Privacy Act):⁷²

...information or an opinion about an identified individual, or an individual who is reasonably identifiable, whether the information or opinion is true or not, and whether the information or opinion is recorded in a material form or not.⁷³

2.64 The FOI Act does not specifically distinguish between requests for personal information and non-personal requests. Nevertheless, whether an FOI request concerns personal information or not may impact how it is processed and may influence decisions regarding its release.⁷⁴ As such, decision-making agencies often differentiate between personal and non-personal FOI requests. Some decision-making agencies therefore disaggregate personal and non-personal requests. The OAIC, for example, reported that, of the total number of FOI

⁶⁹ For guidelines and further details related to extensions of time, see Office of the Australian Information Commissioner, *Apply for an extension of time to process a freedom of information request*, oaic.gov.au/freedom-of-information/freedom-of-information-guidance-for-government-agencies/guidance-on-handling-a-freedom-of-information-request/processing-time/apply-for-an-extension-of-time-to-process-a-freedom-of-information-request (accessed 7 July 2023).

⁷⁰ *Freedom of Information Act 1982*, SS 54S(1).

⁷¹ *Freedom of Information Act 1982*, S 15AC.

⁷² *Freedom of Information Act 1982*, SS 4(1).

⁷³ *Privacy Act 1988*, SS 6(1).

⁷⁴ See for example *Freedom of Information Act 1982*, SS 8(2); ss 11B(3); SS 11C(1); and SS 15A(1).

requests (as distinct from IC reviews) it received in 2022–23, 56 per cent were for personal information.⁷⁵ Home Affairs submitted that, in 2021–22, 87 per cent of its FOI requests were for personal information.⁷⁶ The proportion of requests for personal information as a proportion of all FOI requests fell from 87 per cent in 2015–16 to 74 per cent in 2021–22.⁷⁷

- 2.65 Whilst requests for personal information may be processed under the FOI Act, decision-making may consider such requests under the Privacy Act. The Privacy Act governs how Australian government agencies handle personal information and provides a general right for individuals to access personal information held by government agencies under Australian Privacy Principle 12 (APP 12). OAIC Guidelines state that APP 12 operates alongside the right of access in the FOI Act.⁷⁸
- 2.66 Opportunities and challenges associated with this alternative pathway for handling personal information requests are discussed further in Chapter 3.

Fees, charges, and costs

- 2.67 Under the FOI Act, a decision-making agency has a discretionary power to charge applicants.⁷⁹ Charges for users of the FOI system are regulated by the Freedom of Information (Charges) Regulations 2019, under which charges do not apply for documents containing personal information or if applicants are notified of a decision outside the statutory timeframe.⁸⁰ Decision-making agencies may impose a charge in relation to the request for access to a document, or the provision of the document, at a standard amount or rate provided for in the regulations.⁸¹ If the actual costs of providing the document is lower than estimated, the applicant may receive a waiver or reduction in the amount charged.⁸²

⁷⁵ The number of personal FOI requests received by the OAIC in previous years were 41 per cent in 2017–18; 61 per cent in 2018–19; 61 per cent in 2019–20; 63 per cent in 2020–21; and 55 per cent in 2021–22. See Office of the Australian Information Commissioner's response to questions on notice, taken at a public hearing on 29 August 2023 (received 10 October 2023), p. 18.

⁷⁶ Department of Home Affairs, *Submission 1*, p. 3.

⁷⁷ Office of the Australian Information Commissioner, *Submission 33*, p. 13.

⁷⁸ Office of the Australian Information Commissioner, *What does APP 12 say?*, oaic.gov.au/privacy/australian-privacy-principles/australian-privacy-principles-guidelines/chapter-12-app-12-access-to-personal-information#what-does-app-12-say (accessed 11 September 2023).

⁷⁹ *Freedom of Information Act 1982*, s 29.

⁸⁰ Freedom of Information (Charges) Regulations 2019, S 7.

⁸¹ Freedom of Information (Charges) Regulations 2019, S 8.

⁸² Freedom of Information (Charges) Regulations 2019, S 10.

2.68 The Australian Conservation Foundation described the process for determining fees as follows:

When a request is made, the responding agency is required to estimate the amount of work and fees to be charged (if any), consider whether these should be waived and, if not, notify the applicant of the estimated fee. The estimated fee can be reduced or waived once the work has been completed based on actual time taken. The applicant can choose to withdraw a request once they have received notice of the estimated charges.⁸³

2.69 The OAIC noted in 2021–22 that decision-making agencies collected only 28 per cent of the charges notified to applications.⁸⁴

2.70 Fees do not apply for internal reviews or for IC reviews.⁸⁵

2.71 Most applications to the AAT incur a \$1011 fee unless the applicant holds a card certifying entitlement to Commonwealth concessions or in cases in which payment of the fee would cause financial hardship to the applicant. Successful applicants are refunded the application fee, minus \$100.⁸⁶

Reviews of the FOI system

2.72 The FOI system has been reviewed regularly since its introduction. This section outlines some of the recent reviews of the system.

Moss Report [2007]

2.73 In 2007, Ms Irene Moss AO was commissioned by Australia's Right to Know coalition (ARTK), a coalition of media organisations) to investigate limitations on, and threats to, free speech and press freedom that have an impact on media access to information (Moss Report). The Moss Report identified failings within the FOI system related to delays, high costs, discrepancies between federal and state systems, legal technicalities, and a tendency of FOI processes to favour refusal of access over disclosure.⁸⁷

Hawke Review [2013]

2.74 In 2013, Mr Allan Hawke AC conducted a review (Hawke Review) into the FOI Act, the AIC Act, and the extent to which those Acts continued to prove effective in granting access to government information. The Hawke Review

⁸³ Australian Conservation Foundation, *Submission 14*, p. 25.

⁸⁴ Office of the Australian Information Commissioner, *Annual Report 2021–22*, p. 144.

⁸⁵ Office of the Australian Information Commissioner, *Summary of freedom of information review process*, oaic.gov.au/freedom-of-information/freedom-of-information-guidance-for-government-agencies/freedom-of-information-reviews/summary-of-the-freedom-of-information-review-process (access 20 November 2023).

⁸⁶ Administrative Appeals Tribunal, *Submission 22*, pp. 4 and 7.

⁸⁷ See generally, Irene Moss, *Report of the Independent Audit into the State of Free Speech in Australia*, 31 October 2007.

made 40 recommendations for improving the FOI system, including that a comprehensive review of the FOI Act be undertaken.⁸⁸

2.75 The Hawke Review found that:

- reforms made in 2009 and 2010 were 'operating as intended' and 'generally well-received';
- actioning FOI requests required significant resources from government agencies and departments;
- legislative changes were required to reduce the complexity of the FOI system; and
- exemptions for classes of documents and agencies were warranted.⁸⁹

2.76 Professor McMillan claimed that the OAIC submission to the Hawke Review proposed that proactive disclosures 'could be taken further', for example through the publication of ministerial diaries or the imposition (through legislative reform) of time limits on the operation of some exemptions. Professor McMillan claimed that such an approach—which he submitted has been adopted in some jurisdictions, such as New Zealand—'would potentially limit the FOI Commissioner's caseload'.⁹⁰

Commissioner-initiated investigation into the Department of Home Affairs [2020]

2.77 In 2020, the Information Commissioner, Ms Angelene Falk, initiated an investigation into Home Affairs' compliance with the department's statutory processing timeframes related to non-personal information under subsection 69(2) of the FOI Act. The investigation report found shortfalls in the department's governance, systems of accountability, policies, and processes.⁹¹ The report concluded that Home Affairs did not have adequate governance and systems of accountability in place to ensure compliance. The report further found that greater support and leadership related to the department's FOI functions was warranted and that its policies and procedures were inadequate in certain respects.⁹²

⁸⁸ Allan Hawke, [Review of the Freedom of Information Act 1982 and Australian Information Commissioner Act 2010](#), 1 July 2013, p. 6.

⁸⁹ Allan Hawke, [Review of the Freedom of Information Act 1982 and Australian Information Commissioner Act 2010](#), 1 July 2013, pp. 3–10.

⁹⁰ Professor John McMillan AO, *Submission 7*, p. 4.

⁹¹ The Australia Institute, *Submission 23*, p. 6.

⁹² See generally, Angelene Falk, Australian Information Commissioner, [Commissioner-initiated investigation report: Department of Home Affairs' compliance with the statutory processing requirements under the Freedom of Information Act 1982 in relation to requests for non-personal information](#), 11 December 2020.

- 2.78 The Department of Home Affairs submitted that it had improved its FOI policy, procedures, and systems since the OAIC Home Affairs review.⁹³
- 2.79 The Public Interest Advocacy Centre noted with respect to the outcomes of the review, '[w]hile issues with Home Affairs persist, the OAIC's scrutiny and suggested reforms were a welcome step toward prioritising transparency'.⁹⁴
- 2.80 A follow-up review was subsequently conducted by the Information Commissioner.⁹⁵ See Chapter 3 for a discussion of reforms in relation to the handling of FOI applications by Home Affairs and other departments.

OAIC strategic assessment

- 2.81 The OAIC received \$1 million in funding to conduct a strategic assessment under the 2023–24 federal budget.⁹⁶ Ms Falk described the 2023 strategic assessment as aiming to ensure 'the OAIC is appropriately positioned to meet the challenges of the future'.⁹⁷ AGD submitted that the assessment would help government determine appropriate resourcing (for both FOI and privacy functions of the OAIC) and identify areas to improve the functioning of the OAIC across both its privacy and FOI functions.⁹⁸ AGD told the committee that the assessment would be overseen by a steering group of the OAIC, Department of Finance, and AGD, and would aim to reflect the relevant policy, operational, cultural, and financial issues facing the OAIC.⁹⁹ The committee understands that the strategic assessment was already underway at the time of writing and is due to be presented to government in early 2024.

⁹³ Department of Home Affairs, *Submission 1*, p. 5.

⁹⁴ Public Interest Advocacy Centre, *Submission 4*, p. 17.

⁹⁵ Mr Steve Biddle, Assistant Secretary, FOI and Records Management, Department of Home Affairs, *Committee Hansard*, 29 August 2023, p. 47.

⁹⁶ Mr Simon Newnham, Deputy Secretary, Integrity and International Group, Attorney-General's Department, *Committee Hansard*, 29 August 2023, p. 50. See also Office of the Australian Information Commissioner, [Annual Report 2022–23](#), pp. 8–9.

⁹⁷ Ms Angelene Falk, Information Commissioner, *Committee Hansard*, 29 August 2023, p. 58. See also Ms Angelene Falk, Information Commissioner, *Senate Legal and Constitutional Affairs Legislation Committee Hansard*, 23 May 2023, p. 125

⁹⁸ Attorney-General's Department, *Submission 21*, p. 4.

⁹⁹ Mr Simon Newnham, Deputy Secretary, Integrity and International Group, Attorney-General's Department, *Committee Hansard*, 29 August 2023, p. 50.

Patrick v Australian Information Commissioner

- 2.82 In 2021, then-Senator Rex Patrick initiated legal proceedings against the OAIC, alleging unreasonable delays in dealing with FOI reviews.¹⁰⁰ Mr Patrick detailed a series of delayed FOI appeals—some of which had been lodged more than four years prior to his legal action.¹⁰¹
- 2.83 During proceedings, the OAIC revealed that around 80 per cent of the 325 IC reviews lodged with the OAIC in 2020 had not been allocated to a reviewer.¹⁰²
- 2.84 The presiding judge, Justice Michael Wheelahan, found the delays within the OAIC were 'striking', but ultimately ruled against Mr Patrick, deciding that the delays were 'not legally unreasonable' given the OAIC's lack of resources.¹⁰³ Justice Wheelahan further concluded that it was the responsibility of the Parliament to legislate to ensure that sufficient funding was appropriate for the OAIC to discharge its functions.¹⁰⁴
- 2.85 The cost of the legal proceedings to the Commonwealth was reported to be \$780 000.¹⁰⁵

OAIC reforms

- 2.86 Facing increasing numbers of IC review applications (see Chapter 3), the OAIC has since 2018 sought to 'maximise operational efficiencies' by undertaking reforms. The OAIC submitted that it has undertaken a number of reviews and restructures, and has continually sought to implement refinements and improvements in its processing of FOI matters.¹⁰⁶
- 2.87 In an affidavit given by OAIC Deputy Commissioner, Ms Elizabeth Hampton, in connection with *Patrick v Australian Information Commissioner*, Ms Hampton outlined changes to the IC review process, including handling of deemed decisions, increased automation of smart forms and templates, adjustments to clearance processes, streamlined case management reporting

¹⁰⁰ Ronald Mizen, '[Senator on the hook for \\$150,000 in government legal fees](#)', *Australian Financial Review*, 25 November 2021. See also Ms Angelene Falk, Information Commissioner, *Senate Legal and Constitutional Affairs Legislation Committee Hansard*, 23 May 2023, p. 125.

¹⁰¹ The Australian Institute, *Submission 23*, pp. 9–10.

¹⁰² Australia's Right to Know Coalition, *Submission 31*, p. 4.

¹⁰³ The Australian Institute, *Submission 23*, p. 10.

¹⁰⁴ *Patrick v Australian Information Commissioner (No 2)* [2023] FCA 530, 26 May 2023, para 6. See also Law Council of Australia, *Submission 20*, p. 17.

¹⁰⁵ Ms Angelene Falk, Australian Information Commissioner and Privacy Commissioner, *Senate Legal and Constitutional Affairs Legislation Committee Hansard*, 23 May 2023, p. 125.

¹⁰⁶ Office of the Australian Information Commissioner, *Submission 33*, p. 12.

systems, and updated internal process documentation.¹⁰⁷ Additionally, Ms Hampton stated that the OAIC had encouraged agencies and ministers to proactively publish information of public interest to reduce the reliance on FOI processes.¹⁰⁸

- 2.88 The OAIC undertook a restructure of the FOI branch in February 2023 to enable IC reviews to be finalised more quickly.¹⁰⁹ Prior to the February 2023 restructure, the FOI branch comprised four teams: Investigations and Compliance; Intake and Early Resolution; Reviews; and Significant and Systemic Review. The February 2023 restructure put in place the following four teams: Monitoring, Guidance, and Engagement (responsible for providing guidance and advice); Intake and Early Resolution (which registers and triages IC review applications); Reviews and Investigations (responsible for managing IC reviews); and Significant Decisions (which drafts decisions for consideration by the FOI Commissioner or Information Commissioner, and determines applications for vexatious applicant declarations).¹¹⁰
- 2.89 A list of potential legislative changes developed by the OIAC intended to 'improve IC review procedures/processes' is available on the committee's website and at Appendix 3.¹¹¹

Jurisdictional comparisons

- 2.90 All Australian states and territories, as well as many other countries around the world, have implemented equivalent legislation to the FOI Act. Many jurisdictions use the term 'freedom of information', whilst others refer to 'access to information' or a 'right to information' within legislation.¹¹²

South Australia

- 2.91 Under the *Freedom of Information Act 1991* (SA) (SA FOI Act) requests may be made for access to documents held by South Australian government agencies,

¹⁰⁷ Office of the Australian Information Commissioner, *Affidavit of Elizabeth Hampton*, 5 August 2022, para 29 (tabled).

¹⁰⁸ Office of the Australian Information Commissioner, *Affidavit of Elizabeth Hampton*, 5 August 2022, para 30 (tabled).

¹⁰⁹ Office of the Australian Information Commissioner, *Affidavit of Rocelle Ann Dowsett*, 6 March 2023, paras 8–9 (tabled).

¹¹⁰ Office of the Australian Information Commissioner, *Affidavit of Rocelle Ann Dowsett*, 6 March 2023, paras 10–13 (tabled).

¹¹¹ Office of the Australian Information Commissioner internal legislative change recommendations, February 2023 (tabled).

¹¹² Office of the Australian Information Commissioner, *Freedom of information in other jurisdictions*, oaic.gov.au/freedom-of-information/freedom-of-information-legislation-and-determinations/other-foi-jurisdictions (accessed 8 August 2023).

ministers, and local government councils. The SA FOI Act provides two avenues for external review of FOI decisions made by government, either through the Ombudsman SA,¹¹³ or the South Australian Civil and Administrative Tribunal (SACAT).¹¹⁴ Determinations made by the Ombudsman SA may be further reviewed by the SACAT if the applicant is dissatisfied with the outcome. Decisions made by the SACAT are final.¹¹⁵ Whilst there is no statutorily mandated timeframe for review, the Ombudsman SA has a stated aim to complete their determinations within four months of receipt of a request for external review.¹¹⁶

- 2.92 Mr Patrick submitted that the South Australian Ombudsman procedure for review of FOI decisions is more effective than the OAIC review process.¹¹⁷ Mr Patrick described the efficiency of the South Australian Ombudsman model:

[The Ombudsman] makes the provisional decision, gives people a couple of weeks to respond to those. Both parties, the applicant and the respondent agency, get to make a submission in relation to the provisional decision, and then there's a final decision. He is quite brutal.¹¹⁸

- 2.93 Mr Patrick added that the government may appeal a decision by the South Australian Ombudsman on a point of law only. But if they do so, they must pay the legal costs for the applicant, which serves as a deterrent for 'not advancing improper claims', he stated.¹¹⁹
- 2.94 The Australia Institute also pointed to the efficiency of the South Australian Ombudsman in its submission, noting that in 2021–22, the average time taken for the OAIC to complete a review was 192 days, whereas the average time taken for the Ombudsman SA to conduct an FOI review was 86 days.¹²⁰
- 2.95 The Australia Institute considered the relative efficacy of the South Australian FOI system may be the result of a number of factors, including: the option for applicants to go straight to administrative review through SACAT, the

¹¹³ *Freedom of Information Act 1991* (SA) SS 39(2).

¹¹⁴ *Freedom of Information Act 1991* (SA) S 40.

¹¹⁵ Ombudsman SA, *Freedom of Information*, ombudsman.sa.gov.au/freedom-of-information (accessed 8 August 2023).

¹¹⁶ Ombudsman SA, *Make a request for an external review*, ombudsman.sa.gov.au/freedom-of-information (accessed 8 August 2023).

¹¹⁷ Mr Rex Patrick, *Submission 3*, p. 8. See also Mr Rex Patrick, *Committee Hansard*, 28 August 2023, p. 40.

¹¹⁸ Mr Rex Patrick, *Committee Hansard*, 28 August 2023, p. 40.

¹¹⁹ Mr Rex Patrick, *Committee Hansard*, 28 August 2023, p. 40.

¹²⁰ The Australia Institute, *Submission 23*, p. 5. See also Mr William Browne, Director, Democracy & Accountability Program, The Australia Institute, *Committee Hansard*, 29 August 2023, pp. 31 and 38.

Ombudsman SA's stated aim to complete determinations within four months, and the use of an ombudsman rather than a commissioner.¹²¹

Victoria

- 2.96 The *Freedom of Information Act 1982* (Vic) provides a mechanism for requesting information from Victorian government agencies or ministers. Where an agency or minister refuses or defers access in full or in part to a document, applicants may apply to the Office of the Victorian Information Commissioner (OVIC) for review of the decision.¹²² The Victorian FOI Act requires the Information Commissioner to complete a review within 30 days of receiving an application, or by an extended period as agreed with the applicant.¹²³ If the Information Commissioner has not provided a decision within 30 days, or the applicant is not satisfied with the Commissioner's decision, they may apply to the Victorian Civil and Administrative Tribunal for a review.¹²⁴
- 2.97 The Public Interest Journalism Initiative and Centre for Advancing Journalism, University of Melbourne, submitted that delays in FOI application and review processes were prevalent in the Victorian system, notwithstanding the existence of a statutory time limit on FOI review.¹²⁵ In their 2021–22 Annual Report, the OVIC reported completion of 60 per cent of reviews within the statutory timeframe or as agreed with the applicant, with the average time taken to complete a review of 110 days.¹²⁶

Western Australia

- 2.98 The Western Australian *Freedom of Information Act 1992* (WA) operates similarly to the Victorian regime. External reviews of FOI decisions may be sought through the Information Commissioner of WA, with the Commissioner required to review and provide a decision within 30 days unless they consider it impracticable to do so.¹²⁷ Decisions made by the Commissioner are binding, subject to an appeal to the Supreme Court of WA on a question of law.¹²⁸

¹²¹ The Australia Institute, *Submission 23*, p. 16.

¹²² *Freedom of Information Act 1982* (Vic) s 49A.

¹²³ *Freedom of Information Act 1982* (Vic) ss 49J(3).

¹²⁴ Office of the Victorian Information Commissioner, *Freedom of Information Reviews*, ovic.vic.gov.au/freedom-of-information/for-the-public/foi-reviews/ (accessed 9 August 2023).

¹²⁵ Public Interest Journalism Initiative and Centre for Advancing Journalism, University of Melbourne, *Submission 9*, p. 3.

¹²⁶ Office of the Victorian Information Commissioner, *Annual Report 2021–2022*, September 2022, p. 60.

¹²⁷ *Freedom of Information Act 1992* (WA) ss 76(3).

¹²⁸ Office of the Information Commissioner, *What happens in an external review?*, oic.wa.gov.au/en-au/FTP025 (accessed 9 August 2023).

- 2.99 The Office of the Information Commissioner of WA reported that 48 per cent of reviews were finalised in less than six months. A third (33.8 per cent) took between six and 12 months to finalise, and 18.2 per cent took more than 12 months to finalise.¹²⁹

New South Wales

- 2.100 In New South Wales, either the NSW Information Commissioner or the NSW Civil and Administrative Tribunal (NCAT) are able to undertake external reviews of decisions made under the *Government Information (Public Access) Act 2009* (NSW) (GIPA Act).¹³⁰ If an applicant is unhappy with a determination made by the NSW Information Commissioner, they may seek further review through NCAT.¹³¹
- 2.101 The NSW Information Commissioner is statutorily required to complete reviews of decisions within 40 working days after receiving all information they consider necessary to complete the review.¹³² In its 2021–2022 Annual Report, the Information and Privacy Commission NSW reported that 100 per cent of reviews received by the Information Commissioner were finalised within the statutory timeframe.¹³³
- 2.102 In its submission, the Centre for Public Integrity noted the disciplinary sanctions present in the GIPA Act, available to be used where FOI officers make decision contrary to the Act, may be of benefit to the efficient operation of the GIPA regime.¹³⁴

Other states and territories

- 2.103 Similar to the South Australian framework, in Tasmania and the Australian Capital Territory (ACT) applications for review of agency decisions are made to the state or territory ombudsman.¹³⁵ The ACT regime has an option for further review of the Ombudsman's decision through the ACT Civil and Administrative

¹²⁹ Office of the Information Commissioner (Western Australia), *Annual Report 2021/22*, p. 39.

¹³⁰ *Government Information (Public Access) Act 2009* (NSW) s 89; s 100.

¹³¹ Information and Privacy Commission New South Wales, *How to lodge an application for review of a government information access decision*, ipc.nsw.gov.au/information-access/citizens/lodge-review (accessed 10 August 2023).

¹³² *Government Information (Public Access) Act 2009* (NSW) s 92A.

¹³³ Information and Privacy Commission NSW, *IPC Annual Report 2021–22*, p. 35.

¹³⁴ The Centre for Public Integrity, *Submission 6*, p. 16. For further details on the functioning of the South Australia FOI regime, see Mr Rex Patrick, *Committee Hansard*, 28 August 2023, p. 40; and The Australia Institute, *Submission 23*, pp. 13–17.

¹³⁵ *Right to Information Act 2009* (Tas) s 44; *Freedom of Information Act 2016* (ACT) s 73.

Tribunal.¹³⁶ Neither jurisdiction statutorily mandates a timeframe for review by the Ombudsman.

2.104 In Queensland, the *Right to Information Act 2009* (QLD) provides that applications for external reviews of the agency decisions may be made to the Right to Information Commissioner.¹³⁷ Appeals of decisions made by the Commissioner may only be made to the Queensland Civil and Administrative Tribunal on a question of law.¹³⁸ The Queensland framework does not have a statutory timeframe for external review. The Office of the Information Commissioner Queensland states that formal reviews of decisions may take up to one year to finalise.¹³⁹

2.105 In the Northern Territory (NT), the *Information Act 2002* (NT) allows for decisions to be reviewed by either the Information Commissioner NT or the NT Ombudsman, depending on the content of the complaint.¹⁴⁰ Decisions may also be subsequently referred to the NT Civil and Administrative Tribunal.¹⁴¹ Whilst there is no mandated statutory timeframe within which reviews must be completed, the NT framework requires the Information Commissioner NT to decide whether to accept or reject complaints within 90 days.¹⁴²

International comparisons

2.106 The United Kingdom FOI framework operates similarly to the Australian Commonwealth. The *Freedom of Information Act 2000* (UK) provides that FOI decisions made by public bodies can be appealed to the Information Commissioner's Office (ICO), for review by the Information Commissioner.¹⁴³ If an applicant is unhappy with the decision of the Information Commissioner, they have the right to appeal to the First Tier Tribunal (Information Rights).¹⁴⁴ The ICO reported that in 2022–23, two-thirds (64 per cent) of FOI cases were finalised in 180 days or less, 27 per cent of cases

¹³⁶ *Freedom of Information Act 2016* (ACT) S 84.

¹³⁷ *Right to Information Act 2009* (QLD) S 85.

¹³⁸ *Right to Information Act 2009* (QLD) S 119.

¹³⁹ Office of the Information Commissioner Queensland, *What to expect at external review*, oic.qld.gov.au/guidelines/for-community-members/information-sheets-access-and-amendment/what-to-expect-at-external-review (accessed 10 August 2023).

¹⁴⁰ *Information Act 2002* (NT) S 103 and S 108.

¹⁴¹ *Information Act 2002* (NT) S 112A.

¹⁴² *Information Act 2002* (NT) S 106.

¹⁴³ *Freedom of Information Act 2000* (UK) S 50.

¹⁴⁴ Information Commissioner's Office, *What can the ICO do to resolve my complaint?*, ico.org.uk/make-a-complaint/foi-and-eir-complaints/what-to-expect-from-the-ico-when-making-an-foi-or-eir-complaint/after-you-complain/ (accessed 11 August 2023).

took between 181–365 days to finalise, and nine per cent took more than 366 days to finalise.¹⁴⁵

- 2.107 The Scottish *Freedom of Information (Scotland) Act 2002* enables the Scottish Information Commissioner to review FOI decisions of public authorities.¹⁴⁶ The Commissioner is statutorily required to reach a decision before the expiry of four months after receiving an application for review, or before the expiry of such other period as is reasonable in the circumstances.¹⁴⁷ Decisions of the Information Commissioner are legally binding, however can be appealed to the Court of Session on a point of law.¹⁴⁸ In its 2021–22 Annual Report, the Scottish Information Commission reported closing half (52 per cent) of appeals for review within the statutory timeframe of four months or less.¹⁴⁹
- 2.108 In Ireland, the *Freedom of Information Act 2014* (Ireland) provides that decisions made by public bodies with respect to requests for information can be externally reviewed by the Office of the Information Commissioner.¹⁵⁰ The Information Commissioner does not have a mandatory timeframe for review of decisions. Australia's Right to Know submitted that the power of the Irish Information Commissioner to make binding determinations, with appeals to the High Court only able to be brought on a point of law, appears to assist in timely processing of appeals.¹⁵¹
- 2.109 In New Zealand, decisions made under the *Official Information Act 1982* (NZ) are reviewable by the Office of the Ombudsman.¹⁵² The Ombudsman is not statutorily required to complete reviews within a set timeframe. Professor John McMillan AO, noting New Zealand's practice of publishing Cabinet submissions and decisions after a short period, submitted that proactive disclosure for documents of particular interest to the public would potentially limit the FOI Commissioner's caseload (see also Chapter 4).¹⁵³

¹⁴⁵ Information Commissioner's Office, *ICO Annual Report 2022–23*, p. 62.

¹⁴⁶ *Freedom of Information (Scotland) Act 2002* (Scot) S 47.

¹⁴⁷ *Freedom of Information (Scotland) Act 2002* (Scot) SS 49(3).

¹⁴⁸ Scottish Information Commissioner, *Responding to requests*, itspublicknowledge.info/responding-requests (accessed 11 August 2023).

¹⁴⁹ Scottish Information Commissioner, *Annual Report and Accounts 2021–22*, p. 20.

¹⁵⁰ Information Commissioner, *What we do*, oic.ie/about/what-we-do/ (accessed 11 August 2023).

¹⁵¹ Australia's Right to Know, *Submission 31*, p. 12.

¹⁵² *Official Information Act 1982* (NZ) s 28.

¹⁵³ Professor John McMillan AO, *Submission 7*, p. 4.

Chapter 3

Challenges to the functioning of the FOI system

3.1 This chapter outlines general views on the effectiveness of the freedom of information (FOI) regime and discusses challenges in the operation of the FOI system, including:

- delays in finalising FOI applications and reviews, and issues related to the introduction of statutory timeframes for FOI reviews;
- cultural and leadership concerns;
- FOI applications related to personal information; and
- changes in the volume and nature of FOI applications.

General views

3.2 As detailed in Chapter 2, submitters were invariably supportive of a well functioning FOI system. However, virtually all submitters and witnesses argued that Australia's FOI system is not functioning effectively. The former FOI Commissioner, Mr Leo Hardiman PSM KC, stated, '[i]t is a matter of fact that the IC [Information Commissioner] review experiment has not been a success to date'.¹ The Grata Fund similarly submitted that a range of problems facing Australia's FOI System have contributed to 'decay in democratic accountability in Australia'.²

3.3 Ms Lauren Gray submitted:

Access to government information is essential for informed public discourse, effective policy analysis, and the participation of citizens in shaping government decisions. When people are denied access to crucial information, their ability to contribute meaningfully to public debates and hold the government accountable is severely curtailed.³

3.4 Australia's Right to Know coalition (ARTK) submitted that the current FOI system is 'not fit-for-purpose', arguing that its operation is leading to perverse outcomes that encourage government agencies to ignore processing times, have the effect of nurturing secrecy, discourages the use of the FOI system, and

¹ Statement made by Mr Leo Hardiman PSM KC at a public hearing on 29 August 2023, p. 17.

² Grata Fund, *Submission 5*, p. 2.

³ Ms Lauren Gray, *Submission 43*, [p. 2].

undermines the public's right to know.⁴ ARTK also cautioned that '[a] secret government hides failures, hides mistakes and hides corruption'.⁵

- 3.5 Country Press Australia (CPA) warned that substantial delays in processing FOI requests are impacting the news value of media stories, and pointed to inconsistencies in exemptions and unwarranted redactions of key information contained in documents released under FOI.⁶ Crikey, similarly described 'obstructionist tactics' and 'administrative torture' faced by journalists pursuing FOI requests.⁷
- 3.6 The Public Interest Journalism Initiative (PIJI) and Centre for Advancing Journalism (CAJ) at the University of Melbourne emphasised the value of investigative journalism in ensuring the community was well informed and able to hold to account those in power, but submitted that '[t]he quality and robustness of reporting is compromised when journalists [face FOI delays]'.⁸
- 3.7 The Public Interest Advocacy Centre (PIAC) described how timely access to government-held information could be 'immensely empowering' for vulnerable people, and enabled its clients to receive better and more informed legal advice.⁹ However, PIAC described how 'FOI fatigue' had become common in the community legal centre sector, as repeated experiences of delay with the FOI system has led to demoralisation and cynicism amongst practitioners:¹⁰

Increasingly advocates and legal practitioners, including PIAC, are reluctant to rely on the FOI process to obtain information, due to the significant delays and likelihood of extensive redactions being applied to any material received.¹¹

- 3.8 Much of the evidence singled out the FOI reviews and the performance of the Office of the Australian Information Commissioner (OAIC). NSW Council for

⁴ Australia's Right to Know, *Submission 31*, pp. 1 and 3.

⁵ Mr Michael McKinnon, Member, Australia's Right to Know Coalition, *Committee Hansard*, 28 August 2023, p. 1.

⁶ Country Press Australia, *Submission 13*, pp. 2–3.

⁷ Crikey, *Submission 15*, p. 2.

⁸ Public Interest Journalism Initiative and Centre for Advancing Journalism, University of Melbourne, *Submission 9*, p. 2.

⁹ Mr Jonathan Hall Spence, Principal Solicitor, Public Interest Advocacy Centre, *Committee Hansard*, 28 August 2023, p. 26.

¹⁰ Public Interest Advocacy Centre, *Submission 4*, p. 6.

¹¹ Public Interest Advocacy Centre, answer to question taken on notice at a public hearing on 28 August 2023 (received 15 September 2023), pp. 1–2.

Civil Liberties (NSWCCL), for example, told the committee that 'there is dysfunction within the OAIC as it is presently constituted'.¹²

- 3.9 The Australian Financial Security Authority (AFSA) suggested to the committee that the FOI regime may be too favourable to those seeking information:

...we question whether the regime has, in some instances, moved too far towards the rights of the applicant when the regime can be and, in our experience is, weaponised by those who seek to cause harm and detriment to government agencies and officials.¹³

Timeliness of FOI applications and appeals

- 3.10 In announcing his resignation as FOI Commissioner 5 March 2023, Mr Hardiman expressed his concern at prolonged delays in the processing of FOI requests and appeals (see Chapter 1). He stated:

The Commonwealth FOI system is a small but important adjunct to the doctrine of responsible government inherent in our Westminster system of government. It provides one check on the integrity and apolitical nature of the Australian Public Service. Essential to the proper functioning of the FOI system in that context is the provision of timely access to information in accordance with legally robust access decisions, including Information Commissioner (IC) review decisions.¹⁴

- 3.11 Most submitters shared similar concerns with delays in the processing of both FOI applications and appeals. For example, the Australia Institute described Australia's FOI system as 'slow and byzantine'.¹⁵ PIAC highlighted 'sustained delays at all levels in the handling of FOI requests and reviews', describing these delays as 'the single biggest issue facing the FOI system today'.¹⁶ Such delays are 'incongruous with the objects of the FOI act', submitted Mr Peter Timmins.¹⁷
- 3.12 The next section discusses delays in both FOI applications and reviews, and provides the views of submitters in relation to the viability of statutory timeframes.

¹² Mr Stephen Blanks, Executive Member, NSW Council for Civil Liberties, *Committee Hansard*, 28 August 2023, p. 21.

¹³ Ms Ellyse Herrald-Woods, National Manager, Government Business, Australian Financial Security Authority, *Committee Hansard*, 29 August 2023, p. 39.

¹⁴ Social media post by Mr Leo Hardiman PSM KC on 5 March 2023 regarding his resignation of appointment as FOI Commissioner, see Leo Hardiman, '[Statement regarding resignation of my appointment as commonwealth freedom of information commissioner](#)', *LinkedIn*, 6 March 2023..

¹⁵ Mr William Browne, Director, Democracy & Accountability Program, The Australia Institute, *Committee Hansard*, 29 August 2023, p. 35.

¹⁶ Public Interest Advocacy Centre, *Submission 4*, pp. 4 and 5.

¹⁷ Mr Peter Timmins, *Submission 25*, p. 2.

Delays in FOI requests

- 3.13 NSWCCCL submitted that 'the existing FOI regime has been plagued by unreasonable delays', arguing that these delays have often extended for years, rendering the information being sought 'irrelevant' or 'obsolete'.¹⁸ Mr Rex Patrick submitted that '[d]elay is the enemy of FOI. It serves as a cancer on the objects of the FOI Act'. He noted that where there were unreasonable delays in processing FOI requests, the information provided may no longer be of use.¹⁹
- 3.14 The Grata Fund submitted that FOI applications were increasingly being finalised more than 90 days over the statutory timeframe, as detailed in Table 3.1, below.

Table 3.1 FOI decisions more than 90 days late

Year	Percentage over 90 days late
2018–19	2
2019–20	10
2020–21	12
2021–22	19

Source: Grata Fund, Submission 5, p. 8.

- 3.15 The Grata Fund argued that a key reason for the delays was a lack of consequences within the FOI Act for breaches of statutory timeframes.²⁰
- 3.16 Submitters noted the impact of FOI delays on academia. Dr Amanda-Jane George and Professor Julie-Anne Tarr submitted that such delays undermine the capacity of researchers to monitor and evaluate government policies, which in turn diminishes the sector's ability to propose new and better policies.²¹ Dr George told the committee that a more timely and effective FOI system would 'make for better publications, better policy observations and potentially better policies at the end of the day'.²²
- 3.17 The Refugee Advice and Casework Service (RACS) also emphasised that the timely processing of FOI requests was vital to support advisory services and legal advice to refugees and people seeking asylum. PIAC similarly observed that FOI delays may mean that information is no longer relevant when released

¹⁸ NSW Council for Civil Liberties, *Submission 12*, p. 4.

¹⁹ Mr Rex Patrick, *Submission 3*, p. 2.

²⁰ Grata Fund, *Submission 5*, p. 8.

²¹ Dr Amanda-Jane George and Professor Julie-Anne Tarr, *Submission 17*, pp. 1–2.

²² Dr Amanda-Jane George, *Committee Hansard*, 28 August 2023, p. 48.

years later, and may constrain the ability of advocacy and legal services to properly advise clients.²³

- 3.18 RACS told the committee that, under a more effective FOI regime, visa applicants would receive full documentation *before* making visa applications, meaning the applications would be stronger, and 'the whole ecosystem would be changed'.²⁴ RACS also submitted that delays were of particular concern in relation to FOI applications for personal information (see below), claiming that refugees and people seeking asylum may otherwise face visa uncertainty that could lead to separation from family members, financial stress, extended unemployment, poverty, and mental health complications.²⁵
- 3.19 RACS highlighted concerns regarding the timeliness of FOI requests made to the Department of Home Affairs (Home Affairs), noting that data released by the OAIC showed Home Affairs had processed fewer FOI requests within the statutory timeframe in 2021–22 (41 per cent) than it did in 2020–21 (61 per cent) or in 2019–20 (69 per cent).²⁶ RACS told the committee that the performance of Home Affairs with respect to FOI processing had 'definitely degraded' and was worsening.²⁷ However, evidence from Home Affairs, outlined below, suggests the department has undertaken a number of cultural and process reforms in the last financial year that have significantly improved its handling of FOI applications.
- 3.20 Delays in FOI application processing timeframes are well recognised by the legal profession, according to the Law Council of Australia (Law Council), which claimed that some departments are routinely in breach of the FOI Act by failing to notify applicants of processing extension requests.²⁸ The Law Council argued:

The Departments are breaching their statutory obligations without penalty. To the extent that this is occurring, at the very fundamental level the lack of communication regarding the timeframe to respond to a request compromises public confidence in administrative processes that fail to

²³ Public Interest Advocacy Centre, *Submission 4*, pp. 5–6.

²⁴ Ms Sarah Dale, Principal Solicitor and Centre Director, Refugee Advice and Casework Service, *Committee Hansard*, 28 August 2023, p. 25.

²⁵ Refugee Advice and Casework Service, *Submission 8*, pp. 11 and 16. See also Ms Mursal Rahimi, Policy and Casework Solicitor, Refugee Advice and Casework Service, *Committee Hansard*, 28 August 2023, pp. 17–18.

²⁶ Office of the Australian Information Commissioner, [Annual Report: 2021–22](#), pp. 146–147.

²⁷ Ms Sarah Dale, Principal Solicitor and Centre Director, Refugee Advice and Casework Service, *Committee Hansard*, 28 August 2023, p. 19.

²⁸ Law Council of Australia, *Submission 20*, p. 13.

comply with its statutory obligations. This discourages individuals from engaging with the FOI system.²⁹

3.21 The OAIC noted that across Commonwealth departments in 2021–22, 70 per cent of all FOI requests were decided within the statutory timeframe. This represented a 'significant reduction' from previous years, during which 77 per cent of all requests were decided within the statutory timeframe in 2020–21; 79 per cent during 2019–20; and 83 per cent during 2018–19.³⁰

3.22 Some agencies decided significantly fewer FOI applications within the statutory timeframe, including Sport Integrity Australia (17 per cent), the Northern Australia Infrastructure Facility (18 per cent), and the Treasurer (25 per cent).³¹

3.23 The OAIC acknowledged the impact of these increasing delays:

This decline in timeliness negatively impacts the rights of members of the public to access information, including individuals seeking their own personal information.³²

3.24 The OAIC attributed the decline in meeting statutory timeframes across the Australian Public Service (APS) to:

- high staff turnover;
- recruitment difficulties (especially of FOI staff);
- the onboarding and training of new FOI staff;
- the increased complexity and volume of applications; and
- a backlog of Information Commissioner reviews (IC reviews) since the establishment of the OAIC.³³

3.25 The OAIC also noted that deemed access refusals resulting from agencies failing to meet their statutory timeframes had led to increased applications for IC reviews being made to the OAIC. For example, of the 1641 IC review requests received by the OAIC in 2022–23, 697 (42 per cent) involved applications originally made to Home Affairs. Of the FOI reviews originating with Home Affairs, 592 (or 85 per cent) were the result of deemed access refusals due to the non-adherence by Home Affairs to statutory timeframes (see below for more on deemed refusals).³⁴ However, as noted above, the Department of Home Affairs has taken action to address this issue (see Chapter 2).

²⁹ Law Council of Australia, *Submission 20*, p. 13.

³⁰ Office of the Australian Information Commissioner, [Annual Report: 2021–22](#), p. 146.

³¹ Office of the Australian Information Commissioner, [Annual Report: 2021–22](#), p. 146.

³² Office of the Australian Information Commissioner, [Annual Report: 2021–22](#), p. 146.

³³ Office of the Australian Information Commissioner, [Annual Report: 2021–22](#), p. 146; and Office of the Australian Information Commissioner, *Submission 33*, p. 12.

³⁴ Office of the Australian Information Commissioner, *Submission 33*, p. 11.

Delays in IC reviews

3.26 Table 3.2 below shows the number of IC reviews received and finalised each year since 2010–11 and the average time taken to finalise IC reviews.

Table 3.2 IC Review Statistics, 2010–11 to 2022–23

Year	# received	# finalised	Average time to finalise (months)
2010–11	178	26	2
2011–12	461	254	5.6
2012–13	507	419	8.8
2013–14	524	646	9.2
2014–15	373	482	9.2
2015–16	510	515	6.8
2016–17	633	633	6.2
2017–18	802	610	6.7
2018–19	923	659	7.8
2019–20	1067	829	8.1
2020–21	1225	1017	8.3
2021–22	1955	1376	6.4
2022–23	1647	1519	9.8

Source: Information Commissioner Review Statistics, tabled by the Office of the Australian Information Commissioner at a public hearing on 29 August 2023, [p. 1].

3.27 The combination of an increase in the volume of FOI reviews and the related increase in the length of time taken to finalise FOI reviews has resulted in a significant backlog for the OAIC. Former Senator and strong FOI advocate Mr Patrick noted that a major cause of delay in the FOI regime is the time it takes for appeals to be resolved through the OAIC.³⁵ The evidence clearly supported Mr Rex Patrick's point and is perhaps the best indicator the FOI system is not working as intended. The evidence is disturbing. As at 22 May 2023, the OAIC had 2060 active cases, some of which had been lodged as far back as 2018 (see Table 3.3, below).

³⁵ Mr Rex Patrick, *Submission 3*, p. 2.

Table 3.3 Active IC Reviews by year lodged, as at 22 May 2023

Year lodged	# active appeals
2018	34
2019	172
2020	310
2021	451
2022	702
2023	391
Total	2060

Source: Australian Information Commissioner and Privacy Commissioner, Budget Estimates Hansard, 23 May 2023, p. 120.

3.28 Annual reports of the OAIC prior to 2021–22 did not clearly report the number of IC reviews on hand for each period.³⁶ Hence, whilst there was an increase in the percentage of IC reviews finalised within the 12 months the subject of the annual report, the extent of the increasing backlog and the unacceptable time that a material number of active IC reviews have been outstanding was not readily apparent.³⁷ This should not be a matter which needs to be extracted through the Estimates process.

3.29 Evidence before the committee pointed to a range of impacts from these extensive delays in finalising FOI reviews. For example, Ms Gray submitted:

The backlog of appeals awaiting review creates significant frustration and harms for individuals and the community seeking access to government information. It places an undue burden on those who are awaiting the resolution of their cases, often impacting their ability to make informed decisions or engage in important public discussions. The prolonged waiting times erode the principle of timely access to information, which is essential for a functioning democracy.³⁸

3.30 Delays may also result in frequent decisions to vary the outcome of a review, even if the initial decision was valid. The Australian Broadcasting Corporation

³⁶ For the 2021–22 period the OAIC reported the number of IC reviews on hand increased from approximately 1316 in 2020–21 to around 1874 in 2021–22. For the 2022–23 period the OAIC reported that the number of IC reviews on hand increased from 1876 in 2021–22 to 2004 in 2022–23. See Office of the Australian Information Commissioner, [Annual Report: 2021–22](#), p. 44; and Office of the Australian Information Commissioner, [Annual Report: 2022–23](#), p. 34.

³⁷ See Office of the Australian Information Commissioner, [Annual Report: 2020–21](#), pp. 13, 42, and 145–148; Office of the Australian Information Commissioner, [Annual Report: 2019–20](#), pp. 15, 44, and 153–156; Office of the Australian Information Commissioner, [Annual Report: 2018–19](#), pp. 14, 45, 77–78, and 187–190.

³⁸ Ms Lauren Gray, *Submission 43*, [p. 3].

(ABC) noted that a public interest assessment is applied at a specific point in time. When significant time has passed, the public interest assessment may change, potentially resulting in previously valid decisions being varied on appeal.³⁹

- 3.31 ARTK cautioned that the above data may in fact obscure the extent of the problem, telling the committee that the settlement rate of IC reviews would include matters in which the applicant 'gets tired of waiting' and withdrawals their application, thereby being recorded as a finalised IC review.⁴⁰ The finalisation of deemed refusals may also obscure the extent of delays in IC review finalisations, as discussed below. Mr Bill Browne from The Australia Institute similarly stated that the overall picture was likely worse than the data suggests as many FOI requests are never submitted because 'people know that they won't get something out of them'.⁴¹ These observations are particularly sobering.

Deemed refusals

- 3.32 As outlined in Chapter 2, if an agency or minister fails to make a decision within the statutory timeframe, the decision is deemed to have been refused under section 15AC of the FOI Act (a 'deemed refusal'). The application is then automatically referred to the OAIC for review. Home Affairs submitted that the effect of this automatic referral to the OAIC of decisions not taken within the statutory timeframe may be an increased workload and further delays to FOI applications:

The Department seeks to process the majority of access requests in chronological order, unless compelling or compassionate circumstances exist. When 54V and 54Z Notices [notices relating to the information gathering powers of the OAIC] are issued by the OAIC in relation to 15AC deemed refused requests, the Department is required to reallocate resources away from operational teams processing in-time or on-hand 15AC deemed refused requests to process IC reviews. In practice, this means the Department may be required to prioritise 35 day-old IC review requests over on-hand 100 day-old requests. This delays other FOI applicants' access to documents, encourages applicants to seek IC review as a means of expediting their request, and results in flow-on adverse impacts on the Department's service delivery and statutory compliance—which drives further IC review requests and increases the age of the backlog.⁴²

³⁹ Australian Broadcasting Corporation, *Submission 27*, p. 2.

⁴⁰ Mr Michael McKinnon, Member, Australia's Right to Know Coalition, *Committee Hansard*, 28 August 2023, p. 1.

⁴¹ Mr William Browne, Director, Democracy & Accountability Program, The Australia Institute, *Committee Hansard*, 29 August 2023, p. 34.

⁴² Department of Home Affairs, *Submission 2*, p. 5.

- 3.33 Nearly nine out of 10 (89 per cent) of IC review requests in which Home Affairs was the decision-making agency related to section 15AC deemed refusals.⁴³
- 3.34 If information that is subject to a deemed refusal under review by the OAIC is subsequently released by the decision-making agency, the IC review would be recorded as having been finalised. Mr Hardiman described this as the 'throughput narrative', in which the volume of IC reviews being finalised was apt 'to create an impression that finalisation outcomes were better than they in fact were'.⁴⁴ In reality, he asserted, these reviews 'didn't involve a substantive IC review process'.⁴⁵ Mr Hardiman further stated:
- The throughput narrative was thus constructed in a way which distracted from engagement with the real issue of concern: that only a very small number of what I would term 'substantive' IC review applications were in fact being actively managed and that the backlog of those applications had grown, and continued to grow, beyond control.⁴⁶
- 3.35 It is noted that throughout this committee process many of the claims made by Mr Hardiman were heavily contested by Ms Falk whose responses were then (in many cases) equally contested by Mr Hardiman. In this case, the Information Commissioner, Ms Angelene Falk, disputed Mr Hardiman's characterisation of OAIC reporting, claiming IC review statistics had always included 'the full range of finalisation mechanisms', including decisions regarding deemed decisions.⁴⁷
- 3.36 In 2022–21, the OAIC received 1647 applications for review and finalised 1519 applications, of which 854 (52 per cent) were deemed refusals.⁴⁸
- 3.37 PIAC argued that due in part to the deemed refusal provisions of the FOI Act and extensive delays with IC reviews, agencies face few incentives to meet statutory timeframes. PIAC also cautioned that the threat of a decision being 'deemed' could mean that applicants face pressure to grant extension requests by decision-making agencies.⁴⁹
- 3.38 To address this issue, some submitters and witnesses recommended that, if an agency or minister fails to make a decision within the statutory timeframe, the

⁴³ Department of Home Affairs, *Submission 2*, p. 5.

⁴⁴ Statement made by Mr Leo Hardiman PSM KC at a public hearing on 29 August 2023, p. 6.

⁴⁵ Mr Leo Hardiman PSM KC, *Committee Hansard*, 29 August 2023, p. 10.

⁴⁶ Statement made by Mr Leo Hardiman PSM KC at a public hearing on 29 August 2023, p. 6.

⁴⁷ Office of the Australian Information Commissioner, answers to questions taken on notice at a public hearing on 29 August 2023 (received 11 October 2023), p. 45.

⁴⁸ Ms Angelene Falk, Information Commissioner, *Committee Hansard*, 29 August 2023, pp. 57 and 64.

⁴⁹ Public Interest Advocacy Centre, *Submission 4*, p. 14.

application be deemed to have been accepted ('deemed acceptance', 'deemed disclosure', or 'deemed release').

- 3.39 For example, Mr Geoffrey Watson from the Centre for Public Integrity proposed that the committee consider reforms that would require that decisions not made within the statutory timeframe be deemed to have been accepted—a proposal that he credited to Ms Courtney Law from the Grata Fund.⁵⁰ Under this proposal, a deemed grant of access would be stayed for seven days to permit a party to seek a court order preventing the information's release. Such an approach, Mr Watson argued, would *not* shift the onus of the FOI Act and would actually be consistent with the objectives of the Act.⁵¹ Ms Law similarly stated that the rationale behind the reverse presumption was to 'reflect the aims and objectives that are so loftily outlined in the FOI Act', and would likely reduce the OAIC's caseload by removing deemed refusal decisions.⁵²
- 3.40 The Australian Conservation Foundation similarly submitted that a deemed disclosure system would provide a necessary incentive for decision-making agencies to adhere to statutory timeframes, but argued for such decisions to be subject to appeal.⁵³ Dr George encouraged the committee to consider third parties which could be impacted by a decision if a presumptive release model were to be implemented.⁵⁴
- 3.41 On this matter, Mr Patrick argued that there would be little increased risk if the FOI regime were to operate on the basis of a presumptive release except where the Commonwealth successfully demonstrates that the documents in question are exempt. Under such conditions, Mr Patrick proposed that the Information Commissioner would make a decision, after which the decision-making agency would be required to either appeal the decision or hand over the documents.⁵⁵

IC review notifications

- 3.42 Whilst there is a statutory requirement that IC reviews are conducted in 'as timely a manner as is possible',⁵⁶ there is no requirement under the FOI Act for

⁵⁰ Mr Geoffrey Watson, Director, Centre for Public Integrity, *Committee Hansard*, 28 August 2023, p. 27.

⁵¹ Mr Geoffrey Watson, Director, Centre for Public Integrity, *Committee Hansard*, 28 August 2023, p. 31.

⁵² Ms Courtney Law, Strategic Litigation Solicitor, Grata Fund, *Committee Hansard*, 28 August 2023, p. 27.

⁵³ Australian Conservation Foundation, *Submission 14*, p. 5. See also Mr Adam Beeson, General Counsel, Australian Conservation Foundation Inc., *Committee Hansard*, 29 August 2023, p. 32.

⁵⁴ Dr Amanda-Jane George, *Committee Hansard*, 28 August 2023, p. 54.

⁵⁵ Mr Rex Patrick, *Committee Hansard*, 28 August 2023, p. 41.

⁵⁶ *Freedom of Information Act 1982*, para. 55(4)(c)

the OAIC to notify an agency of an appeal request within a specific timeframe after an IC review commences.⁵⁷

- 3.43 The OAIC submitted that it aims to notify decision-making agencies within four to six weeks of an appeal being lodged, but recognised that many IC review notifications fall outside these timelines. The OAIC stated that several steps occur prior to an IC review notification, including checking the application's validity, ensuring the application was made within time, and conducting preliminary inquiries to determine whether or not to undertake a review.⁵⁸
- 3.44 The ABC outlined to the committee its concerns with delays in notifying decision-making agencies of IC reviews, which it said could take between two and 14 months after the applicant applied for review.⁵⁹ The ABC submitted that it had received one notice of review 14 months after the appeal was lodged with the OAIC, and another with a nine-month delay.⁶⁰
- 3.45 The ABC noted that these notification delays could impact agencies that are first-level decision-makers by requiring that FOI staff invest time to refresh their understanding of a previously unsuccessful application. Or, in the case of staff turnover, new staff would need to familiarise themselves with an old FOI application under review.⁶¹
- 3.46 Home Affairs told the committee that notifications of IC reviews can come 'in bulk'⁶², but that there was 'no standard timeframe' during which such notifications occur.⁶³ Home Affairs noted that, if it were to receive notifications of IC reviews within a standard timeframe, it would 'support timely resolution of the review'.⁶⁴ This makes sense.

⁵⁷ Australian Broadcasting Corporation, *Submission 27*, p. 2.

⁵⁸ Office of the Australian Information Commissioner, *Submission 33.1*, p. 12.

⁵⁹ Ms Ingrid Silver, General Counsel, Australian Broadcasting Corporation, *Committee Hansard*, 28 August 2023, p. 5; and Australian Broadcasting Corporation, answers to questions taken on notice at a public hearing on 28 August 2023 (received 15 September 2023), p. 1.

⁶⁰ Australian Broadcasting Corporation, *Submission 27*, p. 2.

⁶¹ Australian Broadcasting Corporation, *Submission 27*, p. 2.

⁶² Ms Emily Brooks, Director, Freedom of Information, Department of Home Affairs, *Committee Hansard*, 29 August 2023, p. 49.

⁶³ Department of Home Affairs, answers to question on notice taken at a public hearing on 29 August 2023 (received 15 September 2023), p. 1.

⁶⁴ Department of Home Affairs, answers to question on notice taken at a public hearing on 29 August 2023 (received 15 September 2023), p. 2.

3.47 In response to this evidence, the OAIC told the committee that it has 'implemented measures to address the timeliness of triage, notification and assessment of the commencement of IC reviews'.⁶⁵

Measures to reduce the backlog of IC reviews

3.48 Ms Falk told the committee that the FOI branch within the OAIC has 'a culture of continuous improvement and has regularly reviewed its processes and procedures over recent years to improve efficiency and outputs'. She outlined the following measures that had been adopted by the OAIC to address the backlog of FOI reviews:

- external process reviews to maximise efficiency and process improvements;
- refinements to systems and processes;
- advocating with departments for greater proactive disclosure and administrative access;
- providing guidance to agencies; and
- internal reallocation of some functions and the provision of additional resources.⁶⁶

3.49 Mr Hardiman outlined for the committee a range of reforms within the OAIC over which he had presided to improve the quality and timeliness of decision-making. He also discussed his role in the development of technical FOI guidance, in streamlining work processes, and in restructuring the FOI team.⁶⁷

3.50 Additionally, Mr Hardiman told the committee that he had been encouraged by the Information Commissioner to streamline the FOI review process by, for example, relying on staff members to draft decisions.⁶⁸ Ms Falk refuted this claim, insisting that she had merely explored with Mr Hardiman 'whether a more streamlined approach to the drafting of statements of reasons could be adopted to reduce repetition, provide greater clarity and reduce the time for drafting'.⁶⁹

3.51 Mr Hardiman also told the committee that the Information Commissioner suggested that more use should be made of the FOI Commissioner's power to not undertake or not continue reviews in relation to the backlog of FOI reviews. Ms Falk also refuted this assertion, claiming that she had only indicated to Mr Hardiman that the early application of these discretionary powers was

⁶⁵ Office of the Australian Information Commissioner, *Submission 33.1*, p. 12.

⁶⁶ Office of the Australian Information Commissioner, answers to questions taken on notice at a public hearing on 29 August 2023, p. 47.

⁶⁷ Mr Leo Hardiman PSM KC, *Committee Hansard*, 29 August 2023, p. 2.

⁶⁸ Statement by made by Mr Leo Hardiman PSM KC at a public hearing on 29 August 2023, p. 13.

⁶⁹ Office of the Australian Information Commissioner, answers to questions taken on notice at a public hearing on 29 August 2023 (received 11 October 2023), p. 44.

necessary to enable applicants to go to the Administrative Appeals Tribunal (AAT) for further review, where appropriate.⁷⁰

- 3.52 Mr Hardiman appears to have understood the Information Commissioner to have instructed him not to involve himself in the structure and workflows of the FOI team.⁷¹ Ms Falk again disagreed with Mr Hardiman's characterisation of their discussions, claiming; 'I did not say anything to that effect'.⁷² Ms Falk told the committee that there had been 'a collegiate exchange of information around these matters'⁷³ and outlined a range of reforms that Mr Hardiman was said to have helped design and implement within the FOI team (see above).⁷⁴

The imposition of statutory timeframes for IC reviews

- 3.53 Given the delays detailed above, much of the evidence received by the committee pointed to the need for the imposition of a statutory timeframe for finalising FOI reviews. Professor Tarr, for example, told the committee that, given the evidence around FOI review delays, she saw 'little choice but to go down the prescribed time frame route'. Professor Tarr also argued that, in light of the outcome of *Patrick v Australian Information Commissioner* (see Chapter 2), in which the court found that delays in the handling of FOI reviews by the OAIC were 'not legally unreasonable' given its lack of resources, statutory timeframes may necessitate additional resources to be allocated:

...until a mechanism for triggering appropriate funding requirements is made on a consistent basis to support the FOI Act, the well-documented cycle of historical non-staffing backlogs and funding cuts will inevitably continue.⁷⁵

- 3.54 The Australian Conservation Foundation (ACF) similarly argued that the imposition of statutory timeframes for IC reviews would ensure that additional

⁷⁰ Office of the Australian Information Commissioner, answers to questions taken on notice at a public hearing on 29 August 2023 (received 11 October 2023), p. 44.

⁷¹ Mr Leo Hardiman PSM KC, *Committee Hansard*, 29 August 2023, p. 5.

⁷² Ms Angelene Falk, Australian Information Commissioner, *Committee Hansard*, 29 August 2023, p. 60.

⁷³ Ms Angelene Falk, Australian Information Commissioner, *Committee Hansard*, 29 August 2023, p. 60.

⁷⁴ See also Office of the Australian Information Commissioner, response to questions on notice at a public hearing on 29 August 2023 (received 10 October 2023), p. 44–45.

⁷⁵ Professor Julie-Anne Tarr, *Committee Hansard*, 28 August 2023, p. 47.

resources were allocated to the OAIC's FOI functions.⁷⁶ ACF also recommended that statutory timeframes be imposed on the AAT when deciding FOI reviews.⁷⁷

- 3.55 Ms Gray argued that the absence of a statutory timeframe had been a 'longstanding concern' that has added to uncertainty and frustrations among users of the FOI system. Ms Gray submitted that the introduction of a reasonable statutory timeframe would provide much-needed certainty to applicants and would assist the FOI Commissioner to prioritise and manage the backlog of appeals.⁷⁸
- 3.56 The Grata Fund recommended that timeframes be legislated for each stage of the review process, proposing that:
- the OAIC notify decision-making agencies within seven days of receiving an IC review application;
 - within 14 days of receiving an IC review notification, a decision-making agency provides all relevant documents concerning the application to the OAIC, and may request an extension of up to a further 14 days;
 - a decision is made by the OAIC within 60 days from receiving all relevant documents from the decision-making agency; and
 - when an IC review determines to release a document in whole or in part, a decision-making agency must release the information within 28 days.⁷⁹
- 3.57 Mr Michael McKinnon from ARTK strongly supported defined time limits for the appeal process, highlighting the importance of timely access to information to support democratic processes.⁸⁰ ARTK submitted that decision-making agencies should be required to file a statement of facts within 21 days of the FOI Commissioner receiving an application for review, with review decisions required to be made within 56 days of lodgement.⁸¹ Mr McKinnon also noted the use of defined appeal times in overseas jurisdictions (see Chapter 2).⁸²
- 3.58 Ms Megan Carter recommended that consideration be given to differing deadlines for IC reviews ranging from 30 days to 90 days to reflect the scale,

⁷⁶ Mr Adam Beeson, General Counsel, Australia Conservation Foundation Inc, *Committee Hansard*, 29 August 2023, p. 32.

⁷⁷ Australia Conservation Foundation, *Submission 14*, [p. 7].

⁷⁸ Ms Lauren Gray, *Submission 43*, [p. 4].

⁷⁹ Grata Fund, *Submission 5*, pp. 3 and 16.

⁸⁰ Mr Michael McKinnon, Member, Australia's Right to Know Coalition, *Committee Hansard*, 28 August 2023, p. 2.

⁸¹ Australia's Right to Know, *Submission 31*, p. 8.

⁸² Mr Michael McKinnon, Member, Australia's Right to Know Coalition, *Committee Hansard*, 28 August 2023, p. 2.

nature, and complexity of types of reviews.⁸³ Ms Carter also contended that statutory deadlines were only likely to positively impact FOI application timeframes if accompanied by adequate resources.⁸⁴

- 3.59 PIJI and CAJ similarly argued that a statutory time limit, in isolation from other reforms, was unlikely to lead to more efficient outcomes in terms of FOI application and review processing times.⁸⁵ The Law Council submitted that a statutory timeframe would not be effective without 'commensurate and appropriate funding' to enable OAIC compliance:

...it is inconceivable that a statutory timeframe, on its own, would meaningfully address the existing delays at the IC review stage unless there is a corresponding increase in resourcing which can directly decrease the processing times for FOI matters.⁸⁶

- 3.60 See Chapter 4 for a further discussion on the adequacy of resourcing of the FOI regime.
- 3.61 Mr Hardiman noted that the introduction of a statutory timeframe for the OAIC would be 'appropriate', recommending the timeframe be set at six months but subject to extensions and exemptions based on complexity.⁸⁷ He cautioned that, 'transitional issues' would need to be considered that recognised that the backlog of IC reviews could not be made compliant.⁸⁸ Mr Hardiman further recommended that the committee consider mechanisms to prevent 'gaming' of the timeframe and steps to ensure the review burden was not simply passed on to the next level of review (currently the AAT).⁸⁹
- 3.62 One submitter observed that, due to the varying complexity and volume of FOI requests, it was unlikely that a standard statutory timeframe could be imposed without impacting the quality of reviews. They recommended, however, that a statutory timeframe be imposed for the OAIC to notify decision-making agencies of IC reviews.⁹⁰
- 3.63 The ABC supported the introduction of a requirement that the OAIC notify an agency of a request for an IC review within 30 days of receipt to provide

⁸³ Ms Megan Carter, *Submission 16*, p. 3.

⁸⁴ Ms Megan Carter, *Submission 16*, p. 1.

⁸⁵ Public Interest Journalism Initiative and Centre for Advancing Journalism, University of Melbourne, *Submission 9*, p. 3.

⁸⁶ Law Council of Australia, *Submission 20*, p. 15.

⁸⁷ Statement made by Mr Leo Hardiman PSM KC at a public hearing on 29 August 2023, p. 16.

⁸⁸ Mr Leo Hardiman PSM KC, *Committee Hansard*, 29 August 2023, p. 3.

⁸⁹ Statement made by Mr Leo Hardiman PSM KC at a public hearing on 29 August 2023, p. 16.

⁹⁰ Name withheld, *Submission 30*, [p. 2].

certainty around next steps.⁹¹ The ABC also called for the OAIC to provide detailed reporting on the timeline for IC reviews and for a more structured timeline for OAIC reviews.⁹²

3.64 The issue of IC review notifications was raised also by Professor John McMillan AO, who outlined that early notification for agencies that an IC review had been lodged would be a procedural option to streamline FOI practice.⁹³

3.65 In response to this evidence, the OAIC submitted:

If legislative timeframes are introduced, this may require reconsideration of the review functions currently exercised by the Information Commissioner and require additional funding to implement. We submit that this proposal requires consideration of the nature of the review process and the procedural requirements in the FOI Act for specific exemption claims relating to national security, Cabinet or Parliamentary Budget Office documents, and whether an express timeframe may impact the ability of the decision-maker to make the appropriate decision in the circumstances.⁹⁴

3.66 The OAIC also told the committee that the imposition of statutory timeframes would also require 'consideration of the consequences' if an agency fails to meet the timeframe.

This proposal also requires consideration of the consequences of not meeting time frames, and resourcing impacts on the AAT if a failure to meet a statutory timeframe attracted an entitlement to seek AAT review.⁹⁵

3.67 The OAIC proposed that an alternative approach to introducing statutory timeframes for IC reviews would be to require agencies to publish time standards and to report on performance against those standards. The OAIC noted that it 'intends to proactively publish more information about timeframes on its website'.⁹⁶

Cultural and leadership concerns

3.68 A number of witnesses suggested that cultural issues across the APS are a significant contributor to the issues undermining the proper functioning of the FOI regime. Addressing cultural issues within the APS related to FOI was seen by some witnesses to be essential to improving its functioning. The Law Council,

⁹¹ Australian Broadcasting Corporation, *Submission 27*, pp. 2–3.

⁹² Australian Broadcasting Corporation, *Submission 27*, p. 43.

⁹³ Professor John McMillan AO, *Committee Hansard*, 29 August 2023, p. 24.

⁹⁴ Office of the Australian Information Commissioner, *Submission 33.1*, pp. 9–10.

⁹⁵ Office of the Australian Information Commissioner, *Submission 33.1*, p. 10.

⁹⁶ Office of the Australian Information Commissioner, *Submission 33.1*, p. 10.

for example, told the committee that, [i]f you get the culture right, the costs will drop'.⁹⁷

- 3.69 This section considers the cultural issues that may be affecting both decision-making agencies as well as the OAIC.

Culture within decision-making agencies

- 3.70 ARTK told the committee that, perversely, the higher the level of political importance of a document that is subjected to an FOI request, the harder it is to get a response from the decision-making agency.⁹⁸ Crikey similarly submitted that delays in processing FOI requests were often political.⁹⁹
- 3.71 The Grata Fund submitted that decision-making agencies and ministers rely excessively and inappropriately on exemptions to either refuse access or heavily redact documents.¹⁰⁰ Pointing to the high rate at which initial access refusal decisions made at the agency-level are set aside or varied following an IC review, the Grata Fund submitted that such consistent misapplication of the FOI Act indicates an overarching cultural problem with way in which agencies approach their duties under the FOI Act.¹⁰¹
- 3.72 Mr Browne from the Australia Institute told the committee that there is an absence of consequences for failures to finalise FOI applications in accordance with the FOI Act. As such, Mr Browne stated, 'FOI officers or those who influence FOI officers know that they can get away with delaying responses, with giving inadequate responses and never being called up and challenged on it'.¹⁰²
- 3.73 Ms Annica Schoo from the ACF pointed to the previous government's treatment of the AAT's decision on National Cabinet documents (in which it was determined that National Cabinet was not a Cabinet for the purposes of the FOI Act, and therefore documents produced by the National Cabinet were not

⁹⁷ Mr Graeme Johnson, Administrative Law Committee, Law Council of Australia, *Committee Hansard*, 29 August 2023, p. 21.

⁹⁸ Mr Michael McKinnon, Member, Australia's Right to Know Coalition, *Committee Hansard*, 28 August 2023, p. 9.

⁹⁹ Crikey, *Submission 15*, p. 3.

¹⁰⁰ Grata Fund, *Submission 5*, p. 18.

¹⁰¹ Grata Fund, *Submission 5*, p. 19.

¹⁰² Mr William Browne, Director, Democracy & Accountability Program, The Australia Institute, *Committee Hansard*, 29 August 2023, p. 34.

exempt under the FOI Act)¹⁰³ was 'brazenly ignored'.¹⁰⁴ She argued that this treatment was reflective of deeper cultural issues underlying the administration of the FOI regime.¹⁰⁵

3.74 Mr Hardiman similarly told the committee that, in his view, there were deficiencies in the leadership and culture of the APS as they relate to administration of the FOI Act.¹⁰⁶ Mr Hardiman identified some such concerns as:

- a predisposition among departments to refuse access to requested documents;
- a tendency by departments to claim multiple exemptions to 'shore up access refusal decisions';
- decisions to exempt information from release without consideration of whether the information needed to remain confidential;
- a failure to properly engage with applicants to resolve requests; and
- the tendency to introduce new issues and exemptions as IC review applications progressed.¹⁰⁷

3.75 To address these perceived deficiencies, Mr Hardiman highlighted the need for a group of 'very senior public servants' to champion FOI and to promote a more 'pro-information access culture' across the APS.¹⁰⁸

3.76 Mr Hardiman also noted that too few people see FOI as a viable long-term career pathway within the APS, noting that there is no clear career stream for FOI staff.¹⁰⁹

3.77 In order to foster a more responsive FOI culture, the ABC described to the committee a number of steps it had taken in recent years that had enabled it to improve its timeframe compliance rates from 56 per cent two in 2021 to 93 per cent, today. These measures consisted of a 'multifaceted approach', including increasing staffing of the FOI function, conducting an internal

¹⁰³ Patrick and Secretary, *Department of Prime Minister and Cabinet (Freedom of Information)* [2021] AATA 2719 (5 August 2021) [11]; and Mr Rex Patrick, *Submission 3*, pp. 4–5.

¹⁰⁴ Ms Annica Schoo, Lead Investigator, Australian Conservation Foundation Inc, *Committee Hansard*, 29 August 2023, p. 36.

¹⁰⁵ Ms Annica Schoo, Lead Investigator, Australian Conservation Foundation Inc, *Committee Hansard*, 29 August 2023, p. 36.

¹⁰⁶ Statement made by Mr Leo Hardiman PSM KC at a public hearing on 29 August 2023, pp. 3 and 14.

¹⁰⁷ Statement made by Mr Leo Hardiman PSM KC at a public hearing on 29 August 2023, pp. 14–15.

¹⁰⁸ Statement made by Mr Leo Hardiman PSM KC at a public hearing on 29 August 2023, p. 15. See also Mr Leo Hardiman PSM KC, *Committee Hansard*, 29 August 2023, p. 3.

¹⁰⁹ Statement made by Mr Leo Hardiman PSM KC at a public hearing on 29 August 2023, p. 16.

education campaign on FOI, introducing mandatory FOI training, and establishing FOI 'champions' and contact people across the organisation.¹¹⁰

- 3.78 As detailed above, several submitters singled out Home Affairs for exhibiting a particularly poor culture with respect to its handling of FOI applications. Under the FOI Act, the Information Commissioner may investigate agencies in the performance of their functions or the exercise of their powers (see Chapter 2).¹¹¹ Two such reviews were conducted by the Information Commissioner in relation to Home Affairs: one formal review in 2020 and a second follow-up.¹¹²
- 3.79 Home Affairs told the committee that these reviews, as well as consultations with other sources, gave the department 'some very useful ideas'.¹¹³ The department claimed that, following the reviews, it had 'transformed' its approach to FOI applications over the last year, resulting in the backlog of FOI cases dropping significantly. By processing much of its FOI caseload under the *Privacy Act 1988* (Privacy Act, see below) rather than the FOI Act, Home Affairs was able to decrease its backlog by 73 per cent and reduce average processing times to 11 days.¹¹⁴ In parallel, Home Affairs increased its resourcing of the FOI section, implemented tools to streamline applications and case management, and established a senior-level working group on FOI matters.¹¹⁵ Home Affairs reported that feedback to the changes had been 'overwhelming positive' from clients.¹¹⁶
- 3.80 RACS acknowledged that there had recently been a positive 'culture shift' within the department. RACS told the committee; '[w]e very much welcome that we have that open dialogue with the Department of Home Affairs now more

¹¹⁰ Ms Ingrid Silver, General Counsel, Australian Broadcasting Corporation, *Committee Hansard*, 28 August 2023, p. 12,

¹¹¹ *Freedom of Information Act 1982*, SS 69(2).

¹¹² Mr Steve Biddle, Assistant Secretary, FOI and Records Management, Department of Home Affairs, Department of Home Affairs, *Committee Hansard*, 29 August 2023, p. 42.

¹¹³ Mr Steve Biddle, Assistant Secretary, FOI and Records Management, Department of Home Affairs, *Committee Hansard*, 29 August 2023, p. 47.

¹¹⁴ Ms Clare Sharp, Group Manager, Legal, Department of Home Affairs, *Committee Hansard*, 29 August 2023, p. 42.

¹¹⁵ Ms Clare Sharp, Group Manager, Legal, Department of Home Affairs, *Committee Hansard*, 29 August 2023, p. 42; and Mr Steve Biddle, Assistant Secretary, FOI and Records Management, Department of Home Affairs, *Committee Hansard*, 29 August 2023, p. 42.

¹¹⁶ Ms Clare Sharp, Group Manager, Legal, Department of Home Affairs, *Committee Hansard*, 29 August 2023, p. 42.

regularly and more robustly than perhaps we did in previous years', noting that the department's resourcing of its FOI functions remains a concern.¹¹⁷

Culture within the OAIC

3.81 Mr Hardiman raised with the committee a number of concerns related to the functioning of the OAIC, including what he described as a 'cultural bent away from the FOI functions', which he attributed to the leadership of the office by the Information Commissioner.¹¹⁸ Mr Hardiman also stated:

...it was clear to me, and to many others in the OAIC, that the FOI functions of the OAIC were in a day to day sense treated as secondary functions, of lesser importance than the Privacy functions.¹¹⁹

3.82 Again, Ms Falk strongly rejected this assertion, claiming it was 'not reflective of the culture or attitude of the OAIC and its staff'.¹²⁰

3.83 Mr Hardiman also told the committee that the Information Commissioner had told him that it was not the role of the FOI Commissioner to be involved in organisational and management issues within the OAIC, even as they related to IC review processes.¹²¹ Ms Falk again strongly disputed this characterisation of their discussion, telling the Senate Legal and Constitutional Affairs Legislation Committee that Mr Hardiman was involved in the restructure of the FOI branch in November 2022 and that she was not aware of further reforms that Mr Hardiman proposed be implemented.¹²²

3.84 Mr Hardiman told the committee that several staff members within the FOI branch displayed 'symptoms of unhealthy work stress and traumatisation'.¹²³ Ms Falk acknowledged that Mr Hardiman had raised 'a workplace relationship matter' with her and that they had subsequently discussed the matter on 'perhaps two' other occasions. However, Ms Falk stated that her understanding was that Mr Hardiman did not wish to pursue the matter

¹¹⁷ Ms Sarah Dale, Principal Solicitor and Centre Director, Refugee Advice and Casework Service, *Committee Hansard*, 28 August 2023, p. 23.

¹¹⁸ Statement made by Mr Leo Hardiman PSM KC at a public hearing on 29 August 2023, p. 2.

¹¹⁹ Statement made by Mr Leo Hardiman PSM KC at a public hearing on 29 August 2023, p. 13.

¹²⁰ Office of the Australian Information Commissioner's response to questions on notice, taken at a public hearing on 29 August 2023 (received 10 October 2023), p. 33.

¹²¹ Statement made by Mr Leo Hardiman PSM KC at a public hearing on 29 August 2023, p. 8.

¹²² Ms Angelene Falk, Australian Information Commissioner, *Senate Legal and Constitutional Affairs Committee Hansard*, 23 May 2023, pp. 121–122.

¹²³ Statement made by My Leo Hardiman PSM KC at a public hearing on 29 August 2023, p. 5.

any further.¹²⁴ Again, there is a strong divergence in the perspectives of Mr Hardiman and Ms Falk.

Requests for personal information

3.85 Several submitters and witnesses emphasised the importance of requests for personal information for their work and for their clients. However, The Australia Institute reported that personal requests are more likely to be finalised outside the statutory timeframe than non-personal FOI requests.¹²⁵

3.86 RACS told the committee that around 70 per cent of its legal assistance clients did not have substantive documents relating to their matter. RACS therefore relies on access to personal information through FOI requests to support its clients:

Without a comprehensive understanding of a client's legal situation and immigration history, we're necessarily limited in our ability to provide full, accurate and effective assistance. Clients are also, in turn, limited in their ability to provide instructions or make informed decisions about the options available to them.¹²⁶

3.87 Several submitters discussed Home Affairs' recent emphasis on the Privacy Act to process applications for personal information. Home Affairs told the committee that the vast majority of FOI requests it receives relate to personal information (see also Chapter 2). As the Privacy Act does not require detailed reasoning, Home Affairs stated that it was able to significantly reduce processing times by releasing personal information under the Privacy Act rather than the FOI Act. Applicants who are not satisfied with a decision under the Privacy Act may request the application be processed through the FOI Act and may refer the matter to the OAIC for review.¹²⁷

3.88 Home Affairs reported that for non-personal FOI requests, 78 per cent were finalised on time. This compares with 34 per cent of personal requests being processed on time under the FOI Act and 89 per cent finalised on time when processed under the Privacy Act.¹²⁸

3.89 Home Affairs noted that the varied assessment obligations and review rights for access to personal information across the Privacy and FOI Acts may

¹²⁴ Ms Angelene Falk, Australian Information Commissioner, *Committee Hansard*, 29 August 2023, p. 66.

¹²⁵ The Australia Institute, *Submission 23*, p. 6.

¹²⁶ Ms Mursal Rahimi, Policy and Casework Solicitor, Refugee and Advise and Casework Service, *Committee Hansard*, 28 August 2023, p. 16.

¹²⁷ Ms Clare Sharp, Group Manager, Legal, Department of Home Affairs, *Committee Hansard*, 29 August 2023, p. 42.

¹²⁸ Ms Clare Sharp, Group Manager, Legal, Department of Home Affairs, *Committee Hansard*, 29 August 2023, p. 45.

disadvantage applicants, depending on their chosen method of access or the mechanism preferred by agencies.¹²⁹

- 3.90 RACS (which predominantly makes personal requests)¹³⁰ raised some concerns regarding releases made under the Privacy Act. RACS noted that, for such releases, reasons are not provided by decision-making agencies, which may undermine the ability of applicants to seek an internal review if applicants are not satisfied with the outcome.¹³¹ RACS cautioned that for decisions made under the Privacy Act, it can be difficult to identify what documents have been released or not released when heavily redacted, and told the committee that it can be unclear what documents exist and which do not.¹³² RACS nevertheless acknowledged that it had limited experience with such releases as releases under the Privacy Act are 'a fairly new process'.¹³³
- 3.91 Professor McMillan recommended that consideration be given to removing personal information requests from the FOI scheme in their initial stages and processing them instead through the Privacy Act.¹³⁴ He pointed to advantages with encouraging applicants to use the Privacy Act, which he suggested was 'much more informal and negotiable' than the FOI scheme.¹³⁵ He also noted that applicants who were not satisfied with a decision under the Privacy Act could subsequently use the FOI scheme (recommending consideration of a 30 day delay before being permitted to do so).¹³⁶
- 3.92 The Attorney-General's Department submitted that stronger guidance on how to make and handle requests for personal information under the Privacy Act may result in fewer FOI requests, easing pressure on the system.¹³⁷

¹²⁹ Department of Home Affairs, *Submission 1*, p. 9.

¹³⁰ See Refugee Advice and Casework Service, answers to questions on notice taken at a public hearing on 28 August 2023 (received 15 September 2023), [p. 1].

¹³¹ Ms Sarah Dale, Principal Solicitor and Centre Director, Refugee Advice and Casework Service, *Committee Hansard*, 28 August 2023, p. 24.

¹³² Ms Mursal Rahimi, Policy and Casework Solicitor, Refugee and Advise and Casework Service, *Committee Hansard*, 28 August 2023, p. 20.

¹³³ Ms Sarah Dale, Principal Solicitor and Centre Director, Refugee Advice and Casework Service, *Committee Hansard*, 28 August 2023, p. 24.

¹³⁴ Professor John McMillan AO, *Committee Hansard*, 29 August 2023, p. 24

¹³⁵ Professor John McMillan AO, *Committee Hansard*, 29 August 2023, p. 26.

¹³⁶ Professor John McMillan AO, *Committee Hansard*, 29 August 2023, p. 24.

¹³⁷ Attorney-General's Department, *Submission 21*, p. 6. See also Mr Simon Newnham, Deputy Secretary, Integrity and International Group, Attorney-General's Department, *Committee Hansard*, 29 August 2023, p. 50.

3.93 Mr Hardiman also told the committee:

In my view, there is a serious question whether the FOI Act is an appropriate first port of call for access to certain kinds of personal information. There may, for example be merit in considering whether access to certain kinds of personal information—such as that related to migration or social security matters—would be better dealt with, at least in the first instance, through discrete and bespoke access regimes administered by the responsible agency or through applicable litigation processes where the information is being sought for litigation purposes.¹³⁸

3.94 The OAIC submitted that the proportion of requests for personal information as a proportion of the total number of FOI requests had fallen over recent years (see Chapter 2) as a result of proactive disclosure schemes (see Chapter 4) and the availability of documents on online portals.¹³⁹

Complexity and changing demands on the FOI system

3.95 Some evidence before the committee pointed not just to an increase in the volume of FOI applications over recent years, as detailed in Chapter 2, but also an increase in the level of complexity of requests and reviews. The OAIC described its FOI caseload as 'increasing and highly complex' and as 'increasingly complex'.¹⁴⁰ Ms Falk stated that 'the kinds of investigations that we're now undertaking are more complex'.¹⁴¹ The OAIC observed that the current context in which FOI applications are made is 'significantly different' from when the FOI Act was initially enacted in 1982, particularly with respect to the digitisation of government-held records: '[e]ach day, government produces vast amounts of information that informs decisions that impact individuals, communities and the public interest'.¹⁴²

3.96 One submitter also noted the increasing volume of information held by government agencies as a result of digitisation:

A result of this digital explosion in document creation has been an increase in the volume of documents that fall within the scope of each FOI request. The FOI Act has not kept up with the digital world. More records in more locations take longer to search for and process at every stage, including the review process.¹⁴³

¹³⁸ Statement made by Mr Leo Hardiman PSM KC at a public hearing on 29 August 2023, p. 15.

¹³⁹ Office of the Australian Information Commissioner, *Submission 33*, p. 13.

¹⁴⁰ Office of the Australian Information Commissioner, *Submission 33*, pp. 3 and 9.

¹⁴¹ Ms Angelene Falk, Australian Information Commissioner, *Senate Legal and Constitutional Affairs Legislation Committee Hansard*, 13 February 2023, p. 136.

¹⁴² Office of the Australian Information Commissioner, *Submission 33*, p. 9.

¹⁴³ Name withheld, *Submission 30*, [p. 2].

- 3.97 The submitter also claimed that the increase in requests for non-personal information had 'given rise to an increase in the proportion of complex requests', which may take longer to consider.¹⁴⁴
- 3.98 In parallel, ARTK submitted that the growth in privacy-related matters before the OAIC (resulting, in part, from a number of high-profile information breaches), has become a significant focus for the OAIC, at the cost of its FOI responsibilities.¹⁴⁵
- 3.99 The Attorney-General's Department similarly acknowledged that 'the FOI Act was developed over 40 years ago, in a context vastly different from the current digital age'.¹⁴⁶
- 3.100 As an illustration of the potential complexities associated with FOI requests, Home Affairs told the committee that it has 469 different systems containing personal information that may be subject to an FOI application.¹⁴⁷

¹⁴⁴ Name withheld, *Submission 30*, [p. 2].

¹⁴⁵ Australia's Right to Know, *Submission 31*, p. 10.

¹⁴⁶ Attorney-General's Department, *Submission 21*, p. 3.

¹⁴⁷ Ms Clare Sharp, Group Manager, Legal, Department of Home Affairs, *Committee Hansard*, 29 August 2023, p. 44.

Chapter 4

Challenges to the administration of the FOI regime and the resignation of the FOI Commissioner

- 4.1 This chapter explores the effectiveness of the administration of the freedom of information (FOI) regime, including the adequacy of resourcing FOI application and review functions, and the merits of imposing fees, costs, and charges on users or decision-making agencies. This chapter also outlines structural and legislative concerns related to the FOI regime, detailing evidence received by the committee on key areas in which legislative reform may be warranted. The chapter concludes with an overview of the circumstances surrounding the resignation of the former FOI Commissioner in March 2023 (see also Chapter 1).

Adequacy of resourcing

- 4.2 The committee received extensive evidence suggesting that the FOI regime was under-resourced.¹ Many submitters and witnesses reported that inadequate resourcing had led to extensive delays within the FOI system, as detailed in Chapter 3. This section outlines evidence related to the adequacy of resources for both decision-making agencies as well as the Office of the Australian Information Commissioner (OAIC).

Adequacy of resourcing within decision-making agencies

- 4.3 The Department of Home Affairs (Home Affairs) submitted that funding for its FOI functions is allocated from the core departmental budget. As such, the Department indicated that FOI funding does not automatically change according to demand (that is, the number of FOI applications received), and the FOI functions effectively 'compete' for funding with the department's other core functions. Home Affairs therefore proposed consideration of alternative funding models, including reviewing the current agency-led funding model for Commonwealth FOI programs; enabling a registration fee to be charged for internal and Information Commissioner (IC) review requests; and introducing a cost recovery mechanisms for personal access requests.²
- 4.4 The Law Council of Australia (Law Council) submitted that, given decisions not taken within the statutory timeframe are deemed refusals (see Chapter 3), 'it is

¹ See for example, Australian Conservation Foundation, *Submission 14*, p. 2; Law Council of Australia, *Submission 20*; NSW Council for Civil Liberties, *Submission 12*, p. 6.

² Department of Home Affairs, *Submission 1*, pp. 5–6 and 16–17.

critical that agencies have adequate resourcing, governance and systems of accountability in place to ensure compliance with statutory timeframes'.³

4.5 The Australian Financial Security Authority (AFSA) drew the committee's attention to the particular resourcing difficulties faced by smaller agencies related to scale.⁴

4.6 The Centre for Public Integrity described the FOI regime as 'plagued by chronic under-resourcing'.⁵ Ms Lauren Gray similarly submitted:

The issue of inadequate resourcing poses a significant challenge to the effective functioning of the FOI system in Australia. Insufficient resources directly impact the ability of government agencies to respond to FOI applications and the timely completion of reviews, further exacerbating the delays and backlog in the system.⁶

4.7 Ms Gray pointed to insufficient staffing, outdated technology, and limited training as contributing to delays in processing FOI applications, suggesting that these constraints may also result in agencies adopting a more conservative approach to the release of information: '[w]hen agencies are overwhelmed with a high volume of requests and have limited resources to allocate, they may resort to a conservative approach, releasing only the minimum amount of information required or withholding information altogether'.⁷

4.8 The Public Interest Journalism Initiative (PIJI) and Centre for Advancing Journalism (CAJ) submitted that the delay and backlog of FOI applications and reviews suggests that FOI teams are under-resourced, noting the challenges of standardising resourcing across agencies with different volumes and types of applications.⁸

4.9 The Public Interest Advocacy Centre (PIAC) called for increased agency funding for FOI functions to meet staffing ratios mandated by the OAIC (that is, a ratio of FOI staff per FOI request received).⁹ NSW Council for Civil Liberties also recommended that the OAIC be empowered to set minimum staffing ratios within decision-making agencies.¹⁰

³ Law Council of Australia, *Submission 20*, p. 12.

⁴ Ms Ellyse Herrald-Woods, National Manager, Government Business, Australian Financial Security Authority, *Committee Hansard*, 29 August 2023, p. 40.

⁵ Centre for Public Integrity, *Submission 6*, p. 2.

⁶ Ms Lauren Gray, *Submission 43*, [p. 3].

⁷ Ms Lauren Gray, *Submission 43*, [p. 4].

⁸ Public Interest Journalism Initiative and Centre for Advancing Journalism, University of Melbourne, *Submission 9*, p. 4.

⁹ Public Interest Advocacy Centre, *Submission 4*, [p. 5].

¹⁰ NSW Council for Civil Liberties, *Submission 12*, p. 6.

- 4.10 The Law Council insisted that 'new funding is required' to address shortfalls within the FOI system, proposing that new agency staff be hired and trained for FOI functions within decision-making agencies at a scale that is proportionate to the volume of FOI requests they receive.¹¹ The Australian Conservation Foundation (ACF) recommended an increased resources for FOI processing, arguing for resourcing to be 'responsive to current FOI [key performance indicators]'.¹² And Australia's Right to Know Coalition (ARTK) recommended that consideration be given to allocating resources to the FOI function within departments on a pro rata basis against the total number of FOI applications that agency receives.¹³
- 4.11 AGD noted that the strategic assessment of the OAIC (see Chapter 2) would consider resourcing and submitted that '[t]he department continues to work with the Information Commissioner and other agencies to understand resourcing requirements'.¹⁴

Adequacy of resourcing within the OAIC

- 4.12 Funding for the OAIC is provided through an annual appropriation within the Commonwealth Budget. This appropriation is generally discretionary core funding that enables the OAIC to undertake its range of functions across all of its branches.¹⁵ The 2021–22 Commonwealth Budget allocated around \$1 million annually for the appointment of an FOI Commissioner and three additional staff.¹⁶ As detailed in Table 4.1, below, the OAIC's budget in 2022–23 was \$33 million, rising to \$47 million in the May 2023 Budget. However, this increase was primarily to fund a privacy review process, and the May 2023 Budget contained no additional funding for the OAIC's FOI core functions. The OAIC's budget is expected to fall to \$24 million in the 2025–26 financial year, representing a more-than 25 per cent decrease from the 2022–23 budget.

¹¹ Law Council of Australia, response to questions on notice taken at a public hearing on 29 August 2023 (received 28 September 2023), p. 3.

¹² Australian Conservation Foundation, *Submission 14*, p. 4.

¹³ Mr Michael McKinnon, Member, Australia's Right to Know Coalition, *Committee Hansard*, 28 August 2023, p. 15.

¹⁴ Attorney-General's Department, *Submission 21*, p. 6.

¹⁵ Office of the Australian Information Commissioner, Affidavit of Elizabeth Hampton, 5 August 2022, paras 40–44 (tabled).

¹⁶ Office of the Australian Information Commissioner, Affidavit of Elizabeth Hampton, 5 August 2022, paras 47–48 (tabled).

Table 4.1 OAIC budget

Financial year	Budget (\$ millions)
2022–23	33
2023–24	47
2024–25	31
2025–26	24

Source: Office of the Australian Information Commissioner, Budget Estimates Hansard, 23 May 2023, p. 125.

- 4.13 In an affidavit given by OAIC Deputy Commissioner Ms Elizabeth Hampton in connection with *Patrick v Australian Information Commissioner*, Ms Hampton stated that she had undertaken work in October 2019 to estimate the number of additional staff required by the FOI branch of the OAIC to respond to the increased caseload of Information Commissioner reviews (IC reviews). On the assumption that the OAIC would receive an increase of 15 per cent in the number of FOI reviews each year, Ms Hampton estimated that an additional nine full-time equivalent staff would be required in the 2019-20 financial year, in addition to the 19 full-time equivalent staff employed by the OAIC at that time to handle FOI matters (28 total). On this same basis, Ms Hampton estimated that a total of 35 full-time equivalent staff would be required in 2021–22, and 28 full-time equivalent staff would be required in 2022–23. In 2021–22, however, the OAIC received 60 per cent more IC reviews than the previous year; well above the estimated 15 per cent increase.¹⁷
- 4.14 During Supplementary Budget Estimates in 2019, the Australian Information Commissioner, Ms Angelene Falk, pointed to a gap between the volume of FOI reviews and the staffing levels of the OAIC's FOI functions, calling for a 50 per cent increase in staff to manage the increased workload.¹⁸
- 4.15 On 8 June 2022, Ms Falk wrote to the Attorney-General in relation to the functions and the resourcing of the OAIC. Ms Falk stated in the letter, 'we are unable to keep up with the incoming work with less funding for this function than we received in 2014–15, owing to the increased volume and complexity of the work'.¹⁹

¹⁷ Office of the Australian Information Commissioner, Affidavit of Elizabeth Hampton, 5 August 2022, para 49 (tabled).

¹⁸ Ms Angelene Falk, Information Commissioner, *Senate Legal and Constitutional Affairs Legislation Committee Hansard*, 22 October 2019, pp. 121 and 126.

¹⁹ See Order of 22 March 2023 (183) relating to the resignation of the Freedom Information Commissioner, [pp. 7–8], available at aph.gov.au/Parliamentary_Business/Tabled_Documents/1625 (accessed 20 October 2023).

4.16 During Budget Estimates on 23 May 2023, Ms Falk supported the view that additional resources were needed for the OAIC, telling the Senate Legal and Constitutional Affairs Legislation Committee: 'I have sought to try to enable that to the extent that I can within my control'.²⁰

4.17 Ms Falk insisted in evidence to the committee that additional resources were needed to resolve the backlog of FOI appeals, stating that government funding had historically been 'insufficient to adequately acquit' the FOI functions of the OAIC.²¹ Ms Falk told the committee that she had been 'acutely aware' of the OAIC's lack of resources, stating:

I have made eight budget bids in the five years I have been in this role, met with ministers, and written numerous letters in relation to this issue. I am very acutely aware of the need for resources.²²

4.18 Ms Falk also told the committee that a large number of privacy measures had impacted the OAIC's ability to 'create efficiencies to reallocate funding for other purposes'.²³ The Information Commissioner further stated:

While I have intentionally allocated additional funds to the FOI function beyond what has been specifically appropriated by the government for FOI, I have not been in a position to apply further additional funding at a level that would be sufficient to address the volume and complexity of incoming FOI work.²⁴

4.19 In supplementary evidence provided to the committee, Ms Falk outlined steps she had taken to direct additional resources to the OAIC's FOI functions.²⁵

4.20 Since 2016, the OAIC's only FOI-specific funding allocation was \$3.9 million over four years in the 2021–22 budget, with around \$1 million allocated per year thereafter. This funding was for the appointment of an FOI Commissioner and three additional staff to assist with the FOI functions of the OAIC.²⁶

4.21 On this matter, AGD submitted:

²⁰ Ms Angelene Falk, Information Commissioner, *Senate Legal and Constitutional Affairs Legislation Committee Hansard*, 23 May 2023, p. 122.

²¹ Australian Information Commissioner, answers to questions taken on notice at a public hearing on 29 August 2023 (received 11 October 2023), p. 5.

²² Ms Angelene Falk, Information Commissioner, *Committee Hansard*, 29 August 2023, p. 62.

²³ Australian Information Commissioner, answers to questions taken on notice at a public hearing on 29 August 2023 (received 11 October 2023), p. 6.

²⁴ Australian Information Commissioner, answers to questions taken on notice at a public hearing on 29 August 2023 (received 11 October 2023), p. 6. See also Ms Angelene Falk, Information Commissioner, *Committee Hansard*, 29 August 2023, p. 64.

²⁵ Office of the Australian Information Commissioner's response to questions on notice, taken at a public hearing on 29 August 2023 (received 10 October 2023), pp. 10–12.

²⁶ *Patrick v Australian Information Commissioner (No 2) [2023] FCA 530*, 26 May 2023, para 90.

The department notes recent public statements regarding challenges in OAIC funding...[and] continues to work with the Information Commissioner and other agencies to understand resourcing requirements.²⁷

- 4.22 Many of the submissions received by the committee pointed to the OAIC's lack of resourcing as a significant factor in delays across the FOI regime.²⁸ The Law Council, for example, called for additional funding for the OAIC to support training and support for departmental and ministerial staff engaged in FOI decision-making.²⁹
- 4.23 Mr Rex Patrick also called for additional funding for the OAIC, and submitted that the OAIC had seen 'a dramatic increase in the number of IC review applications with no funding increases'.³⁰ However, Mr Patrick suggested that whilst the OAIC may need additional resources, cultural change and a change in the way FOI reviews are conducted may be more beneficial.³¹ Mr Geoffrey Watson, Director of the Centre for Public Integrity, told the committee that providing additional resources to the OAIC was 'counterproductive', arguing that reforms were needed to the structure of the FOI regime or to the processes by which IC reviews are conducted (see below), but that the establishment of the OAIC had resulted in years of delays.³²
- 4.24 Dr Joyce Noronha-Barrett cautioned that decision-making agencies may take advantage of the lack of resourcing within the OAIC to avoid scrutiny.³³ Ms Carter similarly stated:

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.³⁴

The 'resourcing narrative'

- 4.25 In evidence to the committee, Mr Leo Hardiman PSM KC agreed that it was 'abundantly clear' that 'more resources were needed if the very large backlog in

²⁷ Attorney-General's Department, *Submission 21*, p. 6.

²⁸ NSW Council of Civil Liberties, *Submission 12*, pp. 5–6; Grata Fund, *Submission 5*, p. 18; and The Australia Institute, *Submission 23*, p. 24.

²⁹ Law Council of Australia, response to questions on notice taken at a public hearing on 29 August 2023 (received 28 September 2023), p. 3. See also generally, Law Council of Australia, *Submission 20*.

³⁰ Mr Rex Patrick, *Submission 3*, [p. 11].

³¹ Mr Rex Patrick, *Committee Hansard*, 28 August 2023, p. 40.

³² Mr Geoffrey Watson, Director, Centre for Public Integrity, *Committee Hansard*, 28 August 2023, p. 28.

³³ Dr Joyce Noronha-Barrett, *Submission 39*, p. 2.

³⁴ Ms Megan Carter, *Submission 16*, p. 1.

IC review applications was to be resolved in any satisfactory way'. However, he asserted that only funding formally earmarked for the OAIC's FOI functions was actually allocated for these purposes, despite his understanding that appropriations were made at the departmental rather than administrative level; meaning additional funding *could* be allocated to the various functions of the OAIC at the discretion of the agency head, the Information Commissioner: '[t]here was accordingly at least the potential for some of the OAIC's appropriated departmental funds to be spent on additional resources for the performance of the FOI functions', he stated.³⁵ Mr Hardiman also told the committee, 'I think [the Information Commissioner] had some capacity at least to allocate further resources to the FOI functions, if she had desired to do so'.³⁶

4.26 Mr Hardiman described this as the 'resourcing narrative', that is, the suggestion that the only reason for the resourcing deficiencies within the FOI functions of the OAIC were due to the government failing to provide sufficient funding.³⁷

4.27 Mr Hardiman told the committee that the 'resourcing narrative' was central to the OAIC's line of argument in *Patrick v Australian Information Commissioner*,³⁸ in which the presiding judge ultimately ruled that delays were not legally unreasonable given the OAIC's lack of resources (see Chapter 2). The ACF argued that the Federal Court decision in *Patrick v Australian Information Commissioner* drew a clear connection between resourcing and delays in the processing of FOI appeals.³⁹

4.28 Ms Falk told the committee that, as the respondent, she was 'ultimately responsible for the conduct of the Patrick matter',⁴⁰ however, Mr Hardiman was authorised to instruct on *Patrick v Australian Information Commissioner*,⁴¹ and he was 'actively involved' in the matter.⁴² Mr Hardiman insisted that:

...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 [Information Commissioner] was very

³⁵ Statement made by Mr Leo Hardiman PSM KC at a public hearing on 29 August 2023, pp. 2 and 10.

³⁶ Mr Leo Hardiman PSM KC, *Committee Hansard*, 29 August 2023, p.12.

³⁷ Statement made by Mr Leo Hardiman PSM KC at a public hearing on 29 August 2023, p. 6.

³⁸ Supplementary statement made by Mr Leo Hardiman PSM KC, received 15 September 2023, p. 1.

³⁹ Australian Conservation Foundation, *Submission 14*, p. 4.

⁴⁰ Office of the Australian Information Commissioner's response to questions on notice, taken at a public hearing on 29 August 2023, received 28 September 2023, p. 30.

⁴¹ Office of the Australian Information Commissioner, correction of evidence provided during a public hearing on 29 August 2023, received 11 October 2023, pp. 1–2.

⁴² Office of the Australian Information Commissioner's response to questions on notice, taken at a public hearing on 29 August 2023, received 28 September 2023, p. 30.

clear that as the respondent to the proceedings she would provide that sign off...⁴³

4.29 Mr Hardiman also told the committee that:

...it became increasingly apparent to me that the IC, following a communication with the former government, had decided that she would never in any substantial sense allocate additional OAIC resources to the performance of the FOI functions...only appropriated funds which had been formally earmarked by the government of the day for FOI purposes would be allocated to the performance of the FOI functions.⁴⁴

4.30 Mr Hardiman also expressed concern at what he perceived to be decisions to allocate internal resources for corporate support and discretionary privacy policy functions, in preference to core FOI functions.⁴⁵

4.31 Again, Mr Hardiman's claims were heavily contested by Ms Falk.⁴⁶

Adequacy of resourcing within the Administrative Appeals Tribunal

4.32 Several submitters and witnesses recommended only one layer of merits review, with the Administrative Appeals Tribunal (AAT) taking on an expanded role in managing FOI appeals. Other submitters and witnesses recommended that applicants be permitted to bypass the OAIC and seek reviews directly from the AAT, as detailed below. In response to such proposals, Mr Michael Hawkins, Registrar at the AAT told the committee that 'we have no capacity to take on additional work without additional resources'.⁴⁷

Fees, costs, and charges

4.33 The committee received some evidence that suggested that administration fees and charges would serve to deter voluminous and vexatious FOI applications whilst enabling agencies to recover some of the costs associated with overseeing the FOI regime. Professor John McMillan AO told the committee:

Fees and charges have always been a vexed issue in the FOI scheme. They can be used by agencies as a cost barrier to thwart FOI access. On the other hand, charges can play a useful role in supporting agencies to initiate

⁴³ Supplementary statement made by Mr Leo Hardiman PSM KC, received 15 September 2023, p. 2.

⁴⁴ Mr Leo Hardiman PSM KC, *Committee Hansard*, 29 August 2023, p. 2. See also Supplementary statement made by Mr Leo Hardiman PSM KC, received 15 September 2023, p. 2.

⁴⁵ Statement made by Mr Leo Hardiman PSM KC at a public hearing on 29 August 2023, pp. 2 and 6.

⁴⁶ See Office of the Australian Information Commissioner's response to questions on notice, taken at a public hearing on 29 August 2023 (received 10 October 2023).

⁴⁷ Mr Michael Hawkins, Registrar, Administrative Appeals Tribunal, *Committee Hansard*, 28 August 2023, p. 57.

discussion with applicants about reducing broad requests to a more manageable level.⁴⁸

- 4.34 Home Affairs told the committee that the use of charges should be considered as one possible method to help manage repeat applicants, noting the difficulty of having applicants declared 'vexatious' (see above).⁴⁹
- 4.35 Other evidence suggested that fees would disincentivise engagement with the FOI regime and would disadvantage the most vulnerable applicants, working in opposition to the objectives of the FOI act. Civil society representatives were broadly critical of the proposal to introduce fees.
- 4.36 ACF, for example, noted that decision-making agencies routinely charge lower actual fees than those originally quoted to applicants, cautioning that, consistent overestimating of charges could have a deterrent effect and may discourage users of the FOI system from pursuing information that is in the public interest to access.⁵⁰
- 4.37 PIAC similarly told the committee that fees would disincentivise their clients from making FOI applications. Even if a fee waiver could be sought, PIAC cautioned that the administrative burden on both the applicant and the department would likely be counterproductive:
- If our goal here is to create an FOI system that is efficient and streamlined, having fees is not the way to do that.⁵¹
- 4.38 RACS also advocated strongly against the use of administrative fees for personal information, telling the committee that such fees would disincentivise applications, thereby hindering and working in opposition to the objectives of the FOI Act.⁵² RACS told the committee that many of its clients faced severe economic hardship and would be unable to cover any costs imposed on them to access their personal information through FOI applications.⁵³ RACS further argued that:

⁴⁸ Professor John McMillan AO, *Submission 7*, p. 4.

⁴⁹ Ms Clare Sharp, Group Manager, Legal, Department of Home Affairs, *Committee Hansard*, 29 August 2023, p. 45.

⁵⁰ Australian Conservation Foundation, *Submission 14.1*, p. 26.

⁵¹ Mr Jonathan Hall Spence, Principal Solicitor, Public Interest Advocacy Centre, *Committee Hansard*, 28 August 2023, p. 26.

⁵² Ms Mursal Rahimi, Policy and Casework Solicitor, Refugee Advice and Casework Service, *Committee Hansard*, 28 August 2023, pp. 17 and 24.

⁵³ Ms Mursal Rahimi, Policy and Casework Solicitor, Refugee Advice and Casework Service, *Committee Hansard*, 28 August 2023, p. 24.

For a functioning system of democracy and administrative law, individuals must be able to access their personal information held by government agencies with as minimal barriers as possible.⁵⁴

- 4.39 The Law Council told the committee that, in its view, people should not be charged for access to their personal information.⁵⁵
- 4.40 Alternatively, some witnesses recommended that government agencies be required to contribute to the costs of review. Mr Hardiman proposed that such an approach could provide a financial incentive for decision-making agencies to resolve FOI disputes more efficiently and effectively.⁵⁶ However, the Law Council argued that new funding is required, cautioning that making decision-making agencies pay a fee for matters referred to the OAIC would have limited benefits: 'resourcing pressures cannot be solved solely by measures that simply move existing Commonwealth money between agencies', it argued.⁵⁷
- 4.41 Ms Megan Carter conceded that fees may reduce the number of appeals and therefore the backlog of FOI applications, but she argued against the introduction of a charging fee for IC reviews, arguing, 'experience with the AAT has shown that it can become a matter of justice only for the wealthy'.⁵⁸

Proposed structural and legislative reforms

- 4.42 This section outlines structural and legislative reforms proposed by submitters and witnesses.

Governance of the FOI regime

- 4.43 Some evidence before the committee pointed to the need to strengthen the current FOI structures that exist across the Commonwealth public service—both at the application and review stages—as detailed throughout this chapter. Other evidence, however, suggested that the structure itself, and the legislation underpinning the FOI regime, were part of the problem and required reform, as detailed below.
- 4.44 The Centre for Public Integrity (CPI), for example, proposed that consideration be given to the question of whether the agency holding the information that is

⁵⁴ Ms Mursal Rahimi, Policy and Casework Solicitor, Refugee Advice and Casework Service, *Committee Hansard*, 28 August 2023, p. 17.

⁵⁵ Mr Luke Murphy, President, Law Council of Australia, *Committee Hansard*, 29 August 2023, p. 21.

⁵⁶ Mr Leo Hardiman PSM KC, *Committee Hansard*, 29 August 2023, p. 3.

⁵⁷ Law Council of Australia, response to questions on notice taken at a public hearing on 29 August 2023 (received 28 September 2023), p. 3.

⁵⁸ Ms Megan Carter, *Submission 16*, p. 2.

subject to an FOI request should be the primary decision-maker. CPI suggested that one may be 'proceeding from a false basis' with such an approach.⁵⁹

- 4.45 Citing *Patrick v Australian Information Commissioner* (see Chapter 2), Dr Amanda-Jane George supported a considered overhaul of the FOI framework in light of the 'unquestionable shortage of resources' experienced by the OAIC.⁶⁰
- 4.46 ARTK submitted that the OAIC had a privacy focus, arguing that the Commonwealth's FOI functions should be independent rather than subordinate to the Information Commissioner.⁶¹
- 4.47 Professor Tarr noted that the alignment of FOI and privacy functions within the OAIC was 'superficially attractive', but told the committee that the two areas were 'not the same thing' and should be 'freestanding'.⁶² Mr Hardiman similarly described the three Commissioner model as an 'oddity', arguing that there was 'very little practical synergy between the' privacy and FOI regimes.⁶³ Mr Hardiman recommended a 'holistic review' of the FOI Act, including consideration of whether privacy and FOI functions should be the subject of discrete governance arrangements.⁶⁴
- 4.48 Several witnesses and submitters proposed that the FOI review functions of the OAIC be relocated into a separate entity. Professor McMillan suggested that consideration be given to locating these functions within the office of the Commonwealth Ombudsman.⁶⁵ The Australia Institute similarly proposed that the model of an Ombudsman be considered at the Federal level, as is in place for South Australia (see Chapter 2).⁶⁶ In answers to questions on notice, The Australia Institute provided the following views on moving the FOI review function to the Commonwealth Ombudsman:

While it could improve things to make an ombudsman responsible for FOI reviews (as in South Australia and as discussed in our submission), I am concerned more generally that the Commonwealth Ombudsman is being assigned many and varied accountability responsibilities by both the federal

⁵⁹ Mr Geoffrey Watson, Director, Centre for Public Integrity, Committee Hansard, 28 August 2023, p. 27.

⁶⁰ Dr Amanda-Jane George and Dr Julie-Anne Tarr, *Submission 17*, p. 3.

⁶¹ Australia's Right To Know, *Submission 31*, p. 10.

⁶² Professor Julie-Anne Tarr, *Committee Hansard*, 28 August 2023, p. 52.

⁶³ Statement made by Mr Leo Hardiman PSM KC at a public hearing on 29 August 2023, pp. 16–17.

⁶⁴ Statement made by Mr Leo Hardiman PSM KC at a public hearing on 29 August 2023, pp. 16–17.

⁶⁵ Professor John McMillan AO, *Committee Hansard*, 29 August 2023, p. 24.

⁶⁶ Mr William Browne, Director, Democracy & Accountability Program, The Australia Institute, *Committee Hansard*, 29 August 2023, p. 38. See also The Australia Institute, *Submission 23*, p. 17.

and [Australian Capital Territory] governments, which may stretch it too thinly or split its focus.

Before FOI review responsibilities were placed with the Ombudsman, I would recommend considering whether the Ombudsman has accumulated non-core functions that would be better placed with other accountability bodies (and whether such bodies already exist or would need to be established).⁶⁷

- 4.49 RACS advocated for the establishment an independent commissioner, separate from the OAIC.⁶⁸ PIAC proposed a slightly different model in which the FOI regime would be placed under parliamentary oversight.⁶⁹ ARTK also told the committee that, to ensure independence and effectiveness, the Commonwealth's FOI review function should report to parliament and potentially have its budget set by parliament.⁷⁰
- 4.50 Mr Patrick cautioned against removing FOI functions from the OAIC, but told the committee that there were circumstances in which it may be preferable to apply for review directly to the AAT.⁷¹
- 4.51 The Law Council recommended that consideration be given to relocating the IC review functions to the AAT or its replacement body (see Chapter 2).⁷² However, the Law Council suggested that 'some adjustments' would have to be made if the AAT were to take on these functions, including the provision of further resources as well as legislative change to enable the AAT to decide matters on the papers rather than conduct a full merits review of each case.⁷³
- 4.52 The Australian Broadcasting Corporation (ABC) disagreed that the structure of the OAIC was a significant factor in the operation of the FOI system, arguing that resourcing was the key issue.⁷⁴

⁶⁷ The Australia Institute, answers to questions on notice taken at a public hearing on 29 August 2023 (received 22 September 2023).

⁶⁸ Ms Sarah Dale, Principal Solicitor and Centre Director, Refugee Advice and Casework Service, *Committee Hansard*, 28 August 2023, p. 21.

⁶⁹ Mr Jonathan Hall Spence, Principal Solicitor, Public Interest Advocacy Centre, *Committee Hansard*, 28 August 2023, p. 26.

⁷⁰ Mr Michael McKinnon, Member, Australia's Right to Know Coalition, *Committee Hansard*, 28 August 2023, p. 7.

⁷¹ Mr Rex Patrick, *Committee Hansard*, 28 August 2023, p. 39.

⁷² Mr Luke Murphy, President, Law Council of Australia, *Committee Hansard*, 29 August 2023, p. 18.

⁷³ Mr Graeme Johnson, Member, Administrative Law Committee, *Committee Hansard*, 29 August 2023, pp. 19 and 22.

⁷⁴ Ms Ingrid Silver, General Counsel, Australian Broadcasting Corporation, *Committee Hansard*, 28 August 2023, p. 5.

- 4.53 The OAIC submitted that there are 'essential differences' between the Commonwealth FOI regime and those regimes established in other jurisdictions in Australia. As such, the OAIC cautioned; '[c]onsideration of provisions in state legislation in isolation from their broader legislative framework may lead to unintended consequences in the Commonwealth setting'.⁷⁵

Legislative reform

The committee received extensive evidence related to shortfalls in the current legislation underpinning the FOI regime. Mr Hardiman observed that the *Freedom of Information Act 1982* 'is now relatively old', stating:

It was enacted in the context of a paper-based rather than digital world where the volume of government-held information, and the capacity to manage and manipulate data digitally, were far less. The Act is arguably overly complex and the exemptions regime would benefit from review.⁷⁶

- 4.54 Ms Megan Carter similarly argued that 'a thorough review of the Act as a whole is due'.⁷⁷
- 4.55 Four specific areas that witnesses and submitters highlighted as being in need of reform included streamlining review requirements, access to the documents of a minister, the publication of information released under FOI, and the inclusion of anti-avoidance measures. Each of these areas is discussed below.

Merits reviews

- 4.56 Mr Hardiman recommended that consideration be given to whether to retain a full merits review function at the regulatory level, stating:

...the current full merits review function is not a simple or quick function. It requires the affording of procedural fairness, a proper consideration of all submissions made by parties and all legal issues, and the drafting of appropriately framed decisions demonstrating those activities of consideration and the outcomes of them.⁷⁸

- 4.57 Mr Hardiman told the committee that, in his view, it would be more appropriate to have only one level of full merits review, which he recommended be conducted by the AAT (or its successor).⁷⁹
- 4.58 Mr Watson from the CPI told the committee that the Information Commissioner's decision-making role in the FOI regime constituted an

⁷⁵ Office of the Australian Information Commissioner, *Submission 33.1*, p. 7.

⁷⁶ Statement made by Mr Leo Hardiman PSM KC at a public hearing on 29 August 2023, p. 16.

⁷⁷ Ms Megan Carter, *Submission 16*, p. 3.

⁷⁸ Statement made by Mr Leo Hardiman PSM KC at a public hearing on 29 August 2023, p. 17.

⁷⁹ Mr Leo Hardiman PSM KC, *Committee Hansard*, 29 August 2023, p. 3.

intermediate decision. As such, he asserted that the Information Commissioner may not be required to give reasons for a decision, merely to make a decision.⁸⁰

- 4.59 The Law Council similarly recommended that the FOI review process within the OAIC should be made 'quicker, simpler and cheaper', noting that applicants could appeal to the AAT to have a full-blown hearing.⁸¹ PIAC told the committee that the provision of explanations around decisions was secondary to documents being released and the effective functioning of an independent oversight mechanism.⁸² Grata Fund similarly emphasised the importance of decisions to release documents rather than the provision of detailed reasoning.⁸³
- 4.60 ACF told the committee that IC reviews were conducted as part of a 'pseudo judicial process', with the effect that outcomes are significantly delayed. It recommended that the decision-making process be streamlined.⁸⁴ The ACF also noted that although access to requested documents should be the highest priority of the FOI system, a reasoned decision could be valuable if it holds 'quasi precedential value'. Nevertheless, the ACF cautioned that the utility of these decisions would be limited if decision-making agencies did not consider and apply them to future decisions and practices.⁸⁵
- 4.61 Some witnesses claimed that existing legislation already enabled the FOI Commissioner to undertake less comprehensive reviews than is the current practice. Mr Watson, for example, told the committee that as the role of the OAIC was one of 'intermediate appeal', there was no requirement for the Information Commissioner to give procedural fairness to parties to a review or must provide reasons for an IC review decision. Mr Patrick similarly suggested that, as the OIAC review is at an intermediate stage, it was likely possible to shorten the IC review process.⁸⁶ Mr Patrick also submitted that simple reviews or reviews involving a strong precedent should be made rapidly, along the lines

⁸⁰ Mr Geoffrey Watson, Director, Centre for Public Integrity, *Committee Hansard*, 28 August 2023, p. 28.

⁸¹ Mr Graeme Johnson, Member, Administrative Law Committee, *Committee Hansard*, 29 August 2023, p. 20.

⁸² Mr Mitchell Skipsey, Senior Solicitor, Strategic Litigation, Public Interest Advocacy Centre, *Committee Hansard*, 28 August 2023, p. 29.

⁸³ Mr Mohammad Omar, Acting General Counsel, Grata Fund, *Committee Hansard*, 28 August 2023, p. 29.

⁸⁴ Mr Adam Beeson, General Counsel, Australian Conservation Foundation Inc., *Committee Hansard*, 29 August 2023, p. 36.

⁸⁵ Ms Annica Schoo, Lead Investigator, Australian Conservation Foundation Inc, *Committee Hansard*, 29 August 2023, p. 36.

⁸⁶ Mr Rex Patrick, *Committee Hansard*, 28 August 2023, p. 40.

adopted by the South Australian Ombudsman (see Chapter 2), whilst more complex reviews could be referred to the AAT.⁸⁷

4.62 Mr Watson argued that IC reviews should be provided on the basis of no reasons and no hearings, requiring only a decision from the Information Commissioner. Mr Watson noted that FOI reviews before the AAT would continue to require procedural fairness and the provision of reasons as part of a full merits review process.⁸⁸

4.63 According to evidence given by Mr Hardiman, the Information Commissioner proposed consideration of faster and less risk-averse approaches to finalising IC review decisions. Mr Hardiman characterised these as 'tick and flick' decisions that would be prepared by staff members rather than full reasoned decisions of the FOI and Information Commissioners.⁸⁹ Mr Hardiman rejected the merits of such an approach:

On any properly educated understanding of the general quality of the draft decisions being produced, this was simply an untenable proposition and one likely to create more work in other parts of the review system. Not to mention an inappropriate abdication of decision-making responsibility.⁹⁰

4.64 The Information Commissioner told the committee that she 'started a conversation with Mr Hardiman as to whether a more streamlined approach to the drafting of statements of reasons could be adopted to reduce repetition, provide greater clarity, and reduce the time for drafting', and subsequently drafted a template for discussion. The Information Commissioner understood that Mr Hardiman had sought advice from the Australian Government Solicitor on whether a more streamlined approach to statements of reasons would comply with statutory requirements, and Ms Falk was verbally advised that the approach would not be sufficient.⁹¹

4.65 Some witnesses argued that legislative change is required to simplify the FOI review process. The Law Council, for example, told the committee that under the *Acts Interpretations Act 1901* (which establishes rules for interpreting Australian Acts and other legislation), the use of the word 'reasons' within the *Freedom of Information Act 1982* (FOI Act) required that IC reviews consider all the evidence or all the material findings of fact, necessarily requiring a somewhat lengthy process. It therefore cautioned that, without legislative

⁸⁷ Mr Rex Patrick, *Submission 3*, [p. 10].

⁸⁸ Mr Geoffrey Watson, Director, Centre for Public Integrity, *Committee Hansard*, 28 August 2023, pp. 28–29.

⁸⁹ Statement made by Mr Leo Hardiman PSM KC at a public hearing on 29 August 2023, p. 13.

⁹⁰ Statement made by Mr Leo Hardiman PSM KC at a public hearing on 29 August 2023, p. 13.

⁹¹ Office of the Australian Information Commissioner's response to questions on notice, taken at a public hearing on 29 August 2023 (received 10 October 2023), p. 44.

change, if IC reviews were to become less comprehensive, the Information Commissioner would run the risk of having decisions challenged in Federal Court.⁹²

- 4.66 Professor McMillan similarly cautioned that the requirements of the FOI Act, as currently drafted, inevitably promote lengthy consideration of IC reviews. He therefore recommended that the FOI Act be modified to make clear that the IC review process not be a full merits review process but would instead provide a rapid decision, for which reasons would not be required. Dissatisfied parties could then appeal to the second layer of merits review (currently the AAT).⁹³
- 4.67 Mr Hardiman supported the view that efforts to reduce the complexity of IC reviews would require legislative change, stating that 'a full merits review function really requires a decision that reflects consideration of submissions'.⁹⁴
- 4.68 The OAIC drew the committee's attention to section 55K of the FOI Act, requiring IC decisions to be made in writing and include a statement of reasons for the decision. The OAIC noted, '[i]mplementation of a process that does not provide reasons would require amendment to the FOI Act'.⁹⁵
- 4.69 The Hawke Review recommended amending section 55 of the FOI Act to clarify that IC reviews may be finalised by agreement, and that in such circumstances, written decisions of the Information Commissioner are not required.⁹⁶ The OAIC submission to the Hawke Review noted 'informal resolution is generally quicker and more affordable than adjudication'.⁹⁷
- 4.70 Internal OAIC correspondence provided to the committee shows the regulator was considering legislative amendments which could improve IC review procedures and processes in February 2023.⁹⁸ Amendments to Part VII of the FOI Act as recommended by the Hawke Review were canvassed as a mechanism to 'assist in more efficient finalisation of IC reviews'.⁹⁹

⁹² Mr Graeme Johnson, Member, Administrative Law Committee, *Committee Hansard*, 29 August 2023, p. 10.

⁹³ Professor John McMillan AO, *Committee Hansard*, 29 August 2023, pp. 24 and 28.

⁹⁴ Mr Leo Hardiman PSM KC, *Committee Hansard*, 29 August 2023, p. 17.

⁹⁵ Office of the Australian Information Commissioner, *Submission 33.1*, p. 11.

⁹⁶ Allan Hawke, [Review of the Freedom of Information Act 1982 and Australian Information Commissioner Act 2010](#), 1 July 2013, pp. 9 and 90–93.

⁹⁷ OAIC Submission to the Hawke Review, December 2012, p. 30.

⁹⁸ Office of the Australian Information Commissioner internal legislative change recommendations, February 2023.

⁹⁹ Office of the Australian Information Commissioner internal legislative change recommendations, February 2023, p. 1.

Documents of a minister

- 4.71 Access to documents of a minister is covered under subsection 4(1) of the FOI Act. However, the OAIC has interpreted this section to potentially exclude documents of a *former* minister, even in cases where the application was lodged whilst the minister was still in office (see Chapter 2).
- 4.72 The Grata Fund and The Australia Institute noted that, due to lengthy delays in processing FOI applications and reviews (see above), the relevant minister may have moved or may have left office before a decision is reached, at which time the documents in question may no longer be available to the applicant.¹⁰⁰ The Australia Institute submitted that this 'loophole' means that 'documents can be destroyed when ministers are no longer in office'.¹⁰¹ The Grata Fund submitted that the Information Commissioner's interpretation of subsection 4(1) 'leads to the absurd consequence that a minister and the government can escape scrutiny through ministerial reshuffles'.¹⁰²
- 4.73 The NSW Council for Civil Liberties recommended that subsection 4(1) be amended to expressly include documents of a former minister, submitting that the Information Commissioner's interpretation is 'inconsistent with the objectives of open government' and 'provides loopholes for scandal-plagued ministers to avoid scrutiny'.¹⁰³ The PIAC and the Grata Fund similarly called for subsection 4(1) to be amended such that a 'document of a minister' be defined as a document in the possession of the minister at the time of the FOI application.¹⁰⁴ The Australia Institute recommended that the FOI Act be amended to require, in the event of a change of minister, that the documents of the former minister be retained and kept within the reach of FOI law'.¹⁰⁵ PIAC proposed that documents that may be subject to an FOI request be transferred to the OAIC until a decision is reached.¹⁰⁶
- 4.74 The OAIC noted that Federal Court proceedings are underway to test the Information Commissioner's interpretation of this matter.¹⁰⁷

¹⁰⁰ Grata Fund, *Submission 5*, p. 21; and The Australia Institute, *Submission 23*, p. 14.

¹⁰¹ The Australia Institute, *Submission 23*, p. 22.

¹⁰² Grata Fund, *Submission 5*, p. 21.

¹⁰³ NSW Council of Civil Liberties, *Submission 12*, p. 8.

¹⁰⁴ Public Interest Advocacy Centre, *Submission 4*, p. 3; and Grata Fund, *Submission 5*, p. 4. See also Mr Mohammad Omar, Acting General Council, Grata Fund, *Committee Hansard*, 29 August 2023, p. 30.

¹⁰⁵ The Australia Institute, *Submission 23*, p. 21.

¹⁰⁶ Mr Jonathan Hall Spence, Principal Solicitor, Public Interest Advocacy Centre, *Committee Hansard*, 28 August 2023, p. 37.

¹⁰⁷ Office of the Australian Information Commissioner, *Submission 33.1*, p. 14.

Publication of released information

- 4.75 As detailed in Chapter 2, a decision-making agency must make available information released under an FOI request, either directly (for example through a link on its website) or through the provision of an email address from which the information may be requested.¹⁰⁸ Dr George summarised the effect of this section of the FOI Act which allows agencies to provide details of *how* the information may be obtained, rather than actually making it available.¹⁰⁹
- 4.76 The Law Council described these provisions as a 'barrier' and an 'unnecessary hurdle' that may prevent members of the public from accessing information that has already been determined to be in the public interest to release.¹¹⁰
- 4.77 The OAIC provided the following guidance on the matter:

The Information Commissioner is of the view that consistent with better practice, agencies and ministers should seek to make all documents released in response to FOI requests available for download from the disclosure log or another website...subject to applicable exceptions, unless it is not possible to upload documents due to a technical impediment, such as file size, the requirement for specialist software to view the information, or for any other reason of this nature. This approach is consistent with the objects of the FOI Act.¹¹¹

Vexatious applicants

- 4.78 The Information Commissioner may declare a person to be a 'vexatious applicant' if they are perceived to have repeatedly engaged in an abuse of the FOI process, such as harassing or intimidating staff, unreasonably interfering with an agency's operations, or using the FOI Act to circumvent access restrictions imposed by a court.¹¹² Such a declaration may limit the applicant's ability to have further FOI applications or reviews considered.¹¹³
- 4.79 The OAIC FOI guidance for government agencies includes an 18-page chapter on vexatious applicant declarations.¹¹⁴ Active vexatious applicant declarations

¹⁰⁸ *Freedom of Information Act 1982*, SS. 11C(3).

¹⁰⁹ Dr Amanda-Jane George, *Committee Hansard*, 28 August 2023, p. 50.

¹¹⁰ See Law Council of Australia, *Submission 20*, pp. 17–18; Mr Luke Murphy, President, Law Council of Australia, *Committee Hansard*, 29 August 2023, p. 18; and Mr Graeme Johnson, Member, Administrative Law Committee, *Committee Hansard*, 29 August 2023, p. 19.

¹¹¹ Office of the Australian Information Commissioner, [Freedom of Information guidance for government agencies](#), part 14, p. 3.

¹¹² *Freedom of Information Act 1982*, S. 89L.

¹¹³ *Freedom of Information Act 1982*, S. 89M.

¹¹⁴ Office of the Australian Information Commissioner, [FOI Guidelines](#), November 2023, part 12.

are listed on the OAIC website,¹¹⁵ with full cases available on the AustLII database.¹¹⁶

- 4.80 Despite this guidance, AFSA told the committee that the process to have an applicant declared 'vexatious' was lengthy, unclear, and resource-intensive—a position supported by Home Affairs.¹¹⁷ AFSA noted that the limited availability of past declarations made it difficult for agencies to identify a clear threshold for when applicants have become vexatious, and to work this through in an application for a declaration.¹¹⁸
- 4.81 AFSA considered that the OAIC should provide more support and comprehensive guidance, particularly for smaller agencies, on how to manage applicants who may be vexatious.¹¹⁹ Additionally, it was noted that the introduction of a proforma for FOI submissions across government would help guide applicants on how to 'conduct themselves in a manner that is consistent with the intent of the FOI regime'.¹²⁰
- 4.82 The Hawke Review recommended that the FOI Act be amended to permit agencies to decline to handle a repeat or vexatious request or requests that are an abuse of process, without impacting on the applicant's ability to make other requests or remake the request that was not accepted. It was envisioned the applicant would be able to appeal against such a decision to the OAIC.¹²¹ This approach would remove the requirement for agencies to seek a declaration from the Commissioner. This recommendation was supported by the OAIC submission to the review.¹²²

¹¹⁵ Office of the Australian Information Commissioner, *Vexatious applicant declarations*, [oaic.gov.au/freedom-of-information/information-commissioner-decisions-and-reports/vexatious-applicant-declarations](https://www.oaic.gov.au/freedom-of-information/information-commissioner-decisions-and-reports/vexatious-applicant-declarations) (accessed 15 November 2023).

¹¹⁶ AustLII, *Australian Information Commissioner (AICmr) series*, www8.austlii.edu.au/cgi-bin/viewdb/au/cases/cth/AICmr/ (accessed 15 November 2023).

¹¹⁷ Ms Ellyse Herrald-Woods, National Manager, Government Business, Australian Financial Security Authority, *Committee Hansard*, 29 August 2023, pp. 38–39; and Ms Clare Sharp, Group Manager, Legal, Department of Home Affairs, *Committee Hansard*, 29 August 2023, p. 45.

¹¹⁸ Ms Ellyse Herrald-Woods, National Manager, Government Business, Australian Financial Security Authority, *Committee Hansard*, 29 August 2023, pp. 39–40.

¹¹⁹ Australian Financial Security Authority, *Submission 2*, p. 3.

¹²⁰ Ms Ellyse Herrald-Woods, National Manager, Government Business, Australian Financial Security Authority, *Committee Hansard*, 29 August 2023, p. 40.

¹²¹ See Recommendation 32, Allan Hawke, *Review of the Freedom of Information Act 1982 and Australian Information Commissioner Act 2010*, 1 July 2013, pp. 9 and 90–93.

¹²² OAIC Submission to Hawke Review, December 2012, pp. 55–56; Professor John McMillan AO, *Submission 7*, p. 5.

- 4.83 Part 12 of the FOI guidelines on vexatious applicant declarations was last revised in October 2021. The OAIC has indicated that it intends to take into account evidence received by the committee regarding the complexity of applications for vexatious applicant declarations when next updating these guidelines.¹²³

Proactive disclosure and administrative access

- 4.84 A number of submitters argued that the use of proactive disclosures could and should be more fully integrated across the Australian Public Service (APS). Professor McMillan, for example, submitted that it was anticipated that, as part of the 2010 FOI regime reforms, proactive disclosures would have become 'more dynamic over time', potentially limiting the FOI caseload across the APS.¹²⁴
- 4.85 The OAIC currently provides guidance on disclosure logs and the Information Publication Scheme (IPS) to support agencies engaging in proactive disclosure of government held information.¹²⁵ However, Professor McMillan noted that there was an absence of policy in this area. He recommended that the OAIC consider how 'proactive disclosure and disclosure by design can operate in a practical manner'.¹²⁶
- 4.86 Professor McMillan suggested areas in which more could be done could include the automatic publication of ministerial diaries and legislative change to impose a time limit on certain categories of conditional exemptions.¹²⁷ The Australia Institute similarly pointed to ministerial diaries, Cabinet documents not involving national security, and representations to government by interest groups as some areas for automatic proactive disclosure.¹²⁸
- 4.87 The OAIC submitted that proactive disclosure across government is a 'key mechanism' to provide quicker, more flexible, and less costly access to information, and to reduce pressure on the FOI system. Moreover, the OAIC

¹²³ Office of the Australian Information Commissioner, *Submission 33.1*, p. 6.

¹²⁴ Professor John McMillan AO, *Submission 7*, p. 4.

¹²⁵ Office of the Australian Information Commissioner, *FOI Guidelines*, November 2023, parts 13 and 14.

¹²⁶ Professor John McMillan AO, *Committee Hansard*, 29 August 2023, p. 24.

¹²⁷ Professor John McMillan AO, *Submission 7*, p. 4; and Professor John McMillan AO, *Committee Hansard*, 29 August 2023, p. 31.

¹²⁸ The Australia Institute, *Submission 23*, pp. 22 and 24. See also Mr William Browne, Director, Democracy & Accountability Program, The Australia Institute, *Committee Hansard*, 29 August 2023, p. 37.

argued that proactive disclosure 'demonstrates a pro-release culture that builds public trust'.¹²⁹ The Australia Institute supported this position, submitting:

Proactive disclosure of government documents, where feasible, would increase transparency and reduce the need for FOI requests. It would also set a cultural expectation that government information should be publicly available where possible.¹³⁰

- 4.88 The Law Council recommended that decision-making agencies be properly resourced to 'build a culture of proactive disclosure', for example through the development of guidance material and training to agency staff.¹³¹
- 4.89 PIJI and CAJ also supported the proactive release of documents outside the FOI Act to free up resources within decision-making agencies, and called for better systems and processes to make agency staff and the public aware of what information had been released and where to find it.¹³²
- 4.90 ARTK cautioned that information that is made available through proactive release generally consists only of documents which paint the government in a positive light.¹³³
- 4.91 The OAIC advised that it will be undertaking a statutory review of the IPS in consultation with all Australian government agencies in 2023 to determine compliance with the scheme's obligations, and inform future educative approaches to proactive publication.¹³⁴

Consideration of a review of the FOI regime

- 4.92 Evidence before the committee diverged on the question of whether or not a review of the FOI system was necessary. On the one hand, the Australian Press Council advocated for the FOI regime to be subject to a comprehensive review, arguing that such a review be conducted by a broad-based and independent panel to examine the extent to which the current system is fit-for-purpose. The Australian Press Council further suggested the review

¹²⁹ Office of the Australian Information Commissioner, *Submission 33*, p. 13; and Ms Angelene Falk, Australian Information Commissioner and Privacy Commissioner, Office of the Australian Information Commissioner, *Committee Hansard*, 29 August 2023, p. 58. See also Ms Lauren Gray, *Submission 43*, [p. 4].

¹³⁰ The Australia Institute, *Submission 23*, p. 24. See also Local Government Elected Members Association, *Submission 35*, p. 1.

¹³¹ Law Council of Australia, response to questions on notice taken at a public hearing on 29 August 2023 (received 28 September 2023), p. 2.

¹³² Public Interest Journalism Initiative and the Centre for Advancing Journalism, *Submission 9*, p. 6.

¹³³ Mr Michael McKinnon, Member, Australia's Right to Know Coalition, *Committee Hansard*, 28 August 2023, p. 6.

¹³⁴ Office of the Australian Information Commissioner, *Submission 33.1*, p. 5.

define appropriate timeframes for FOI applications and reviews, explore whether to impose statutory timeframes, and examine resourcing of the FOI regime.¹³⁵

- 4.93 In support of this position, the Country Press Association recommended that a review should be conducted 'at arms length' from the government.¹³⁶
- 4.94 On the other hand, the CPI told the committee that 'the last thing in the world we need is some sort of further review into the FOI scheme'. Similarly, the NSW Council for Civil Liberties stated that many of the necessary reforms to the FOI regime were already clear, and as such a further review is not required.¹³⁷

Resignation of the FOI Commissioner

- 4.95 The reason for the resignation of the FOI Commissioner was clearly articulated in the evidence provided to the committee by the former FOI Commissioner, Mr Leo Hardiman. At the hearing on 29 August 2023, Mr Hardiman said:

Mr Hardiman: ...With respect to term of reference (a), in the statement I made on 6 March 2023 announcing my resignation I said that the powers necessary to make further changes to ensure the timeliness of IC reviews, Information Commissioner reviews, were not within those conferred on me as FOI Commissioner. The powers I was referring to were powers relating to the resourcing of the OAIC's FOI functions and powers relating to broader agency management matters affecting the performance of those functions. Those powers were within the sole remit of the Information Commissioner, who I'll refer to as the IC. Immediately upon commencing my appointment in April 2022 and in the months afterwards, I encountered a large number of significant issues concerning or affecting the performance of the FOI functions which required close consideration and attention. I set those issues out in some detail in my more detailed statement, but broadly described they included serious staff and resourcing issues, a significant lack of appropriate focus on the main problems in the performance of the FOI functions, particularly the IC review function, a lack of sufficient engagement with FOI technical issues even when staff were seeking that engagement, unproductive relationships with regulated agencies, a diversion of staff away from core FOI work for the purpose of making constant process changes which did not in any significant sense deal with the real problems in the performance of the FOI functions, and an associated feeling of complete overwhelm amongst the more senior staff members of the OAIC's FOI Branch, a shifting of responsibility for failures to the staff of the FOI Branch, together with a culture of the OAIC's FOI functions being of secondary importance to its privacy functions, cycles of panic at the most

¹³⁵ Ms Yvette Lamont, Chief Executive Officer and Executive Director, Australian Press Council, *Committee Hansard*, 28 August 2023, pp. 2–3.

¹³⁶ Mr Peter Kennedy, Executive Officer, Country Press Association, *Committee Hansard*, 28 August 2023, p. 3.

¹³⁷ NSW Council for Civil Liberties, answers to questions on notice taken at a public hearing on 28 August 2023 (received 15 September 2023), p. 1.

senior level particularly around Senate estimates appearances and critical stages of the Patrick unreasonable delay litigation, a lack of commitment to the three-commissioner model established by the Australian Information Commissioner Act, and a practice at the most senior level of developing narratives designed to present the OAIC's performance of the FOI functions in the best possible light while distracting from engagement with important issues affecting their performance...¹³⁸

I pushed on, and significant structural changes with a much greater focus on the active management of IC reviews were implemented on 1 February 2023. As at the cessation of my appointment three or so months later that restructure had begun to result in increased progression of substantive IC review matters. However, it was abundantly clear that, in addition to these structural changes, more resources were needed if the very large backlog in IC review applications was to be resolved in any satisfactory way...¹³⁹

Resignation was an incredibly difficult—in fact, the most difficult—decision of my career to contemplate, but I could not with the necessary sense of integrity play the game of maintaining the status quo. Change was desperately required, and it was not going to occur if I continued on...¹⁴⁰

- 4.96 As detailed above, the former FOI Commissioner, Mr Hardiman, had formed the view that the Information Commissioner would not allocate additional resources for the FOI functions of the OAIC and that only funding specifically earmarked by the government for such purposes would be allocated to FOI functions. Mr Hardiman told the committee that he foreshadowed his potential resignation with the Information Commissioner around mid-September 2022, when he indicated that he may have 'no option but to resign' if more resources were not allocated to the FOI functions of the OAIC.¹⁴¹
- 4.97 The Information Commissioner, Ms Falk, told the Senate Legal and Constitutional Affairs Legislation Committee in May 2023 that she was unaware of Mr Hardiman's intention to resign prior to the announcement via social media: '[he] did not raise matters with me prior to his resignation, nor foreshadow his resignation'.¹⁴² However, in evidence to the committee on 29 August 2023, the Information Commissioner stated: 'I do recall him

¹³⁸ Mr Leo Hardiman PSM KC, *Committee Hansard*, 29 August 2023, pp. 1–2.

¹³⁹ Mr Leo Hardiman PSM KC, *Committee Hansard*, 29 August 2023, p. 2.

¹⁴⁰ Mr Leo Hardiman PSM KC, *Committee Hansard*, 29 August 2023, pp. 1–2.

¹⁴¹ Statement made by Mr Leo Hardiman PSM KC at a public hearing on 29 August 2023, p. 8. See also Mr Leo Hardiman PSM KC, *Committee Hansard*, 29 August 2023, p. 4.

¹⁴² Ms Angelene Falk, Australian Information Commissioner, *Senate Legal and Constitutional Affairs Legislation Committee Hansard*, 23 May 2023, p. 122.

referencing the possibility of resignation in the context of preparing for the May budget bid'.¹⁴³

- 4.98 On 23 February 2023, Mr Hardiman and the IC met with officials from the AGD, including the Secretary, Ms Katherine Jones PSM, and Deputy Secretary, Mr Simon Newnham. During the meeting, Mr Hardiman recounted that the Secretary conveyed 'in absolute terms' that no additional funding would be allocated to the FOI functions of the OAIC during the then-upcoming May 2023 budget, nor was it likely, Mr Hardiman understood, that additional funding would be made available in subsequent budgets.¹⁴⁴ Mr Hardiman told the committee that he concluded that:

...in the absence of some re-allocation of resources within the OAIC, there was simply no possibility of additional staff and no way forward in satisfactorily or sufficiently resolving the IC reviews backlog and increasing timeliness of IC review decisions in future.¹⁴⁵

- 4.99 Mr Hardiman told the committee that, following the 23 February meeting, he came to the view that it was 'untenable' for him to continue in the role of FOI Commissioner:

I could not continue to accept significant remuneration from the public purse when, in effect, I was prevented from performing the FOI functions in a way which I considered would properly give effect to the objects of the FOI Act and further the accountability of government in the way the Parliament had intended.¹⁴⁶

- 4.100 Mr Newnham confirmed to the committee that the 23 February meeting occurred as described by Mr Hardiman and that the substance of the meeting broadly conformed to Mr Hardiman's summary.¹⁴⁷

- 4.101 Ms Falk stated that Mr Hardiman did not raise with her 'in any substantive way' the issues and allegations outlined in his statement to the committee:

Many of these [issues] were not raised with me at all. Nor did he convey that they were of such magnitude that he would take the serious step of resigning less than 12 months into a five-year term.¹⁴⁸

¹⁴³ Ms Angelene Falk, Australian Information Commissioner, *Committee Hansard*, 29 August 2023, p. 62.

¹⁴⁴ Statement made by Mr Leo Hardiman PSM KC at a public hearing on 29 August 2023, p. 11.

¹⁴⁵ Statement made by Mr Leo Hardiman PSM KC at a public hearing on 29 August 2023, p. 11.

¹⁴⁶ Statement made by Mr Leo Hardiman PSM KC at a public hearing on 29 August 2023, p. 14. See also Mr Leo Hardiman PSM KC, *Committee Hansard*, 29 August 2023, pp. 2 and 15.

¹⁴⁷ Mr Simon Newnham, Deputy Secretary, Attorney-General's Department, *Committee Hansard*, 29 August 2023, p. 55.

¹⁴⁸ Office of the Australian Information Commissioner's response to questions on notice, taken at a public hearing on 29 August 2023 (received 10 October 2023), p. 2.

4.102 On 5 March 2023, Mr Hardiman announced his resignation via social media, citing his lack of power to implement necessary changes to the IC review process (see Chapter 1). More specifically, Mr Hardiman told the committee that he lacked the powers necessary to either address the lack of resourcing within the OAIC or to address the broader management and organisation of the OAIC with a view to improving the performance of its FOI functions.¹⁴⁹ He also pointed to a range of cultural and structural issues within the OAIC as contributing to his resignation. 'These issues...left my position untenable', asserted Mr Hardiman, who also told the committee that he concluded that he would 'not be able to sufficiently repair the consequences of the very substantial deficiencies which had occurred in the performance of the FOI functions [of the OAIC]'.¹⁵⁰

4.103 Mr Hardiman described the decision to resign as:

...incredibly difficult—in fact, the most difficult—decision of my career to contemplate, but I could not with the necessary sense of integrity play the game of maintaining the status quo. Change was desperately required, and it was not going to occur if I continued on.¹⁵¹

4.104 Ms Falk told the committee that Mr Hardiman declined to discuss the reasons for his resignation with her.¹⁵² Ms Falk had previously advised the Senate Legal and Constitutional Affairs Legislation Committee during Senate Estimates on 23 May 2023 that Mr Hardiman had not outlined changes that were needed within the OAIC in relation to his resignation.¹⁵³

4.105 On 10 March 2023, Mr Hardiman met with Mr Newnham. Mr Newnham told the committee that Mr Hardiman had asked that the conversation remain confidential, but outlined the purpose of the meeting as follows:

It was a high level conversation. It went to basically seeking advice on what was behind the resignation. We were surprised and thrown a bit by that resignation so we wanted to check on the wellbeing of Mr Hardiman and his team and seek advice on what we, as a department, could do to support the final stages, including thinking about the finishing date for Mr Hardiman and the commencement date for an interim FOI commissioner. I sought knowledge about what he thinks is most important in the role going forward.¹⁵⁴

¹⁴⁹ Statement made by Mr Leo Hardiman PSM KC at a public hearing on 29 August 2023, p. 2.

¹⁵⁰ Statement made by Mr Leo Hardiman PSM KC at a public hearing on 29 August 2023, p. 2.

¹⁵¹ Mr Leo Hardiman PSM KC, *Committee Hansard*, 29 August 2023, p. 2.

¹⁵² Ms Angelene Falk, Information Commissioner, *Committee Hansard*, 29 August 2023, p. 62.

¹⁵³ Ms Angelene Falk, Information Commissioner, *Senate Legal and Constitutional Affairs Legislation Committee Hansard*, 23 May 2023, p. 121.

¹⁵⁴ Mr Simon Newnham, Deputy Secretary, Attorney-General's Department, *Committee Hansard*, 29 August 2023, p. 53.

4.106 The committee requested from Mr Newnham the notes and minutes of the 10 March meeting with Mr Hardiman. Mr Newnham indicated that the document was subject to a prior Public Interest Immunity (PII) claim by the minister representing the Attorney-General and took on notice to consider providing the minute of the meeting to the committee.¹⁵⁵

4.107 On 21 September 2023, AGD responded to the committee's request for the 10 March meeting minute:

The minister representing the Attorney-General has been consulted and will not be revoking his public interest immunity claim for the reasons laid out in the letter from Senator Watt on behalf of the Attorney-General to the President of the Senate dated 27 March 2023.¹⁵⁶

4.108 The PII claim in relation to documents, inclusive of the 10 March 2023 meeting minute, is appended in full at Appendix 4. The claim raised the grounds of confidentiality of Cabinet processes and an unreasonable invasion of privacy. The committee reflects on the validity and merits of this claim in the following chapter.

Impact of the resignation of the FOI Commissioner

4.109 The Law Council submitted that it was concerned that Mr Hardiman's resignation was:

...a symptom of an FOI regime that is unable to properly give effect to its legislative objectives. Specifically...the FOI scheme's functionality has been undermined by systemic issues, in which the under-resourcing of the OAIC and delays at the agency level are heavily contributing factors.¹⁵⁷

4.110 Ms Gray submitted that Mr Hardiman's resignation would have both immediate and long-term impacts on public sector transparency and the right of the public to access government information. Specifically, Ms Gray speculated that, with the position of FOI Commission vacant (as it was at the time of her submission), the FOI regime would likely experience further delays and government agencies may be 'more inclined to withhold information, knowing that there is no FOI Commissioner in place to review and potentially overturn their decisions'.¹⁵⁸ Ms Gray further claimed that '[t]his power imbalance shifts the balance in favour of government obfuscation and undermines the public's right to know'.¹⁵⁹

¹⁵⁵ See Order of 22 March 2023 (183) relating to the resignation of the Freedom Information Commissioner, available at aph.gov.au/Parliamentary_Business/Tabled_Documents/1625 (accessed 20 October 2023).

¹⁵⁶ Attorney-General's Department, answers to questions taken on notice at a public hearing on 29 August 2023 (received 21 September 2023), p. 2.

¹⁵⁷ Law Council of Australia, *Submission 20*, p. 9.

¹⁵⁸ Ms Lauren Gray, *Submission 43*, [p. 2].

¹⁵⁹ Ms Lauren Gray, *Submission 43*, [p. 2].

4.111 Ms Gray submitted that the impact of Mr Hardiman's resignation on the FOI regime would be to deter public engagement and erode public confidence in government decisions.¹⁶⁰

¹⁶⁰ Ms Lauren Gray, *Submission 43*, [p. 2].

Chapter 5

Committee views and recommendations

The resignation of the former FOI Commissioner

- 5.1 The committee accepts the reasons provided by Mr Leo Hardiman PSM KC, the former Freedom of Information (FOI) Commissioner, as detailed in Chapter 4 as the reasons for his resignation. Ultimately, in all the circumstances, Mr Hardiman was not prepared to continue in the position of FOI Commissioner where he considered he did not have the power to discharge his obligations, in particular, to progress material resolution of the substantial backlog of Information Commissioner reviews (IC reviews—see table 3.3 for details of the case backlog). For Mr Hardiman, this was a matter of integrity. Given he believed that he would not be provided the requisite resources to discharge his obligations as FOI Commissioner and that he did not have the power to make substantial change to organisational culture and structure within the Office of the Australian Information Commissioner (OAIC) under the Three Commissioner Model, he made the decision to resign. He was not prepared to be passive under the status quo. The committee considers this to be a position of integrity.
- 5.2 The committee further considers that the resignation of Mr Hardiman as FOI Commissioner is a symptom of a dysfunctional and broken FOI system. In the committee's view, Mr Hardiman genuinely attempted to fulfill the duties of his appointment to the best of his ability for as long as he was able. At no doubt great personal cost to Mr Hardiman, his resignation has had the effect of shining a bright light on the failings of the current system. This committee inquiry is a direct result of his actions.
- 5.3 By early 2023, it appears that Mr Hardiman had formed the view that it was not within his power to meaningfully address the backlog of FOI reviews within his office. In light of the evidence received by the committee, particularly with respect to resourcing, this view appears to have had a very solid foundation. Concerned at the ethical implications of continuing in the role under these circumstances, and in an attempt to encourage further efforts to address the systemic deficiencies he faced, Mr Hardiman resigned. The committee is strongly of the view that it should not have come to this.
- 5.4 The committee was very impressed with the professional way in which Mr Hardiman discharged his role as FOI Commissioner. This was exemplified in the decision he made to travel by bus between Canberra and Sydney to attend meetings as an expression of his will to preserve funds for the discharge of his core FOI obligations. This evidence was provided to the committee during the following exchange at the public hearing on 29 August 2023:

CHAIR: I've got two quick questions and then Senator Shoebridge will have some questions. We are going a little bit over time, Deputy Chair, but I think this is very important. Mr Hardiman, I wrote down what you said because it struck me at the time. As to the interaction that occurred when you announced your resignation in the context of an interaction between you and the Information Commissioner, could you please tell the committee what occurred?

Mr Hardiman: I had COVID in the week leading up to my announcement. I was quite unwell that week and the weekend when I was preparing all of that stuff. The announcement was made on 6 March. I couldn't go to Sydney on 6 March, but I was mindful of wanting to be there to support the team. This is ridiculous, but in an effort to save funding—and suggest it to be put towards FOI—I was catching the bus to and from Sydney every time I went there.

CHAIR: Sorry. Let me get this clear. In the effort to preserve funds so they could be applied to discharging the FOI function within the OAIC, you were catching the bus from Canberra to Sydney?

Mr Hardiman: Yes, there's an email communication about that I had with the Information Commissioner, who wanted me to attend an international conference. I said that I wasn't prepared to and that the money should be put towards the FOI functions. I also determined that I would then take the lowest cost possible travel to and from Sydney when I was attending.¹

- 5.5 The committee considers it extremely unfortunate that a senior public servant of the calibre of Mr Hardiman should consider himself compelled to resign as a matter of integrity in these circumstances. This should serve as a wakeup call to the Parliament that the current parlous situation with respect to the Commonwealth FOI system is unacceptable. It needs to be addressed as a matter of urgency.
- 5.6 Prior to the committee providing its views and recommendations with respect to the measures which need to be taken to address the current situation, the committee considers itself obliged to consider the disturbing evidence received by the committee that employees (past and present) within the OAIC have suffered due to the work environment. It is noted that the OAIC and the Information Commissioner, Ms Angelene Falk, sought to counter many of the allegations which had been made by Mr Hardiman and referred to the internal processes of the OAIC to deal with such issues and the recent improvement in employee survey results. The committee notes that the existence of policies and procedures to deal with employee issues is not a guarantee that they will be utilised; especially in circumstances where employees may be fearful of the impact of making a complaint on future employment prospects.
- 5.7 It is not the role of this committee to be the final adjudicator in relation to the competing evidence received by Mr Hardiman and Ms Falk. However, when a

¹ Exchange between Senator Paul Scarr and Mr Leo Hardiman PSM KC at a Canberra Public Hearing on 29 August 2023. See *Committee Hansard*, 29 August 2023, p. 14.

former senior official of the standing of Mr Hardiman makes such allegations with conviction and clarity, there is an obligation to act. Accordingly, in all the circumstances, the committee is of the unanimous view that there needs to be an urgent independent investigation undertaken by a party external to the OAIC and reporting to the Attorney-General's Department to consider the matters raised by Mr Hardiman in relation to workplace behaviour within the OAIC, any impact this has had on employees past and present, and appropriate action which needs to be taken. Every effort should be made to engage with employees both past and present to obtain evidence. The committee does not come to this conclusion lightly but is deeply concerned with the wellbeing of employees of the OAIC both past and present.

Recommendation 1

- 5.8 The committee recommends that an independent investigation be undertaken, reporting to the Secretary of the Attorney-General's Department and not the Office of the Australian Information Commissioner (OAIC), to consider the matters raised by Mr Hardiman in relation to workplace behaviour within the OAIC, the impact on employees (past and present), and appropriate action which needs to be taken.**

The Commonwealth FOI system is not fit for purpose

- 5.9** It is clear that the Commonwealth Freedom of Information (FOI) system is not working effectively and for some time has not functioned as it was intended. A series of interrelated factors outlined in the preceding chapters have rendered the operation and the administration of the FOI regime inefficient and ineffective, undermining the important objectives of the *Freedom of Information Act 1982* (FOI Act) itself. The backlog of active IC reviews within the OAIC—with a material and growing number of cases unresolved for years (see Table 3.3)—is symptomatic of a broken system that is not fit for purpose with current levels of funding. These shortcomings have discouraged the use of the FOI system and have undermined the public's trust in government. It is incumbent upon the Parliament and the leadership of the Australian Public Service (APS) to reflect on this state of affairs, and to commit to taking the necessary action to resolve the situation.
- 5.10** Despite the best intentions of the architects, proponents, and many of the operators of the FOI regime, its structure requires a re-think. The Three Commissioner Model of privacy, information, and FOI embedded within a shared office has not delivered as intended—at least not in terms of FOI functions. Instead, since the establishment of the OAIC in 2010, delays in finalising both FOI applications and FOI reviews have swelled.
- 5.11** Australia's FOI regime must strike the right balance between ensuring the public's right to access information whilst also protecting the government's

ability to obtain frank and fearless advice to maintain confidentiality where there are legitimate grounds. This is not happening. It is the committee's view that the legislation underpinning the FOI regime as well as its structure are no longer fit to deliver on the aspirations of the FOI Act—especially with existing resource levels. It is also the committee's view that there needs to be a recalibration of the culture across much of the APS so that transparency and accountability within the framework of the FOI regime are promoted.

- 5.12 It is the committee's expectation that officials within the APS should approach FOI requests with an open, transparent, and pro-release mindset. Only that which is genuinely in the public interest to withhold should be kept from public scrutiny. The mindset needs to be one which is pro-disclosure (including on a proactive basis) unless there are legitimate substantial reasons recognised under the FOI regime not to disclose, rather than a mindset of first resisting disclosure and seeking to justify such non-disclosure through whatever means available. Given organisational culture is determined by its leadership, the committee considers that this is, in large part, a leadership issue—both within the APS, but also at a ministerial and broader parliamentary level. The necessary commitment is required across the board.
- 5.13 The committee's recommendations with respect to these issues, as well as its views on other aspects of the FOI regime, are detailed below.

Reforming the FOI regime

- 5.14 Evidence received during the course of this inquiry has clearly demonstrated that the current FOI regime is not functioning as intended. It is costly and cumbersome, and has resulted in years of delays before many FOI applications are finalised. These delays have undermined public trust in government and must urgently be reversed.
- 5.15 In the committee's view, apart from the provision of increased funding, the greatest improvements in the efficiency of the FOI regime will result from a reconsideration of the intermediate review layer; currently the FOI Commissioner embedded within the OAIC. At the moment, there are two processes of full merits review (putting aside the question of internal review within the original agency)—one at the OAIC and the other at the Administrative Appeals Tribunal (AAT). This is creating a bottleneck. The committee sees considerable merit in accelerating the process adopted at the OAIC such that it does not replicate the process within the AAT. However, the right balance must be struck so that reforms at the OAIC do not then simply push the problem onto the AAT (or its successor body which is currently the subject of consideration by the government). In order to achieve the best results, reform must consider the three elements of: process, resourcing, and culture. All these need to be correctly calibrated for the FOI system to be fit for purpose.

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- 5.16 It is more than a decade since the passage of the *Australian Information Commissioner Act 2010* (AIC Act). The chronic unacceptable backlog of IC reviews evidences that the current system is not working. The current FOI system is not fit for purpose.
- 5.17 It is therefore time for a rethink. More specifically, it is time to reassess the process and structures in place. This is in the context where the workload and responsibilities in relation to the privacy related functions of the OAIC have grown to an extent that would not have been envisaged by the Parliament at the time of the passage of AIC Act. The growing responsibilities of the OAIC with respect to privacy related matters was made manifestly clear in the evidence provided by Ms Falk and the OAIC. As at 2023, those responsibilities are sufficient to justify the existence of a standalone agency just dealing with those important issues.
- 5.18 An objective assessment of the current situation (where there is such a backlog of IC reviews within the OAIC) also begs the question as to whether there is any continuing material merit or utility in having two layers of full merits review. In the committee's view, there is little value to this structure. It is inefficient and leads to high costs and unjustifiably long delays. Instead, the committee recommends that the FOI Act be amended to require only a limited review function (ombudsman-like) at the intermediate level, with a full merits review reserved for the AAT (or its replacement, the Administrative Review Tribunal). Consequently, it is the committee's view that there should be no requirement to provide procedural fairness and formal decisions at the intermediate review stage. Based on evidence received by the committee, this would require legislative reform.
- 5.19 Relatedly, evidence received by the committee indicates that internal reviews within decision-making agencies may delay the finalisation of FOI applications rather than offer meaningful recourse for applicants. As such, it is the committee's view that internal reviews be abolished, with unsatisfied applicants able to immediately progress matters to external review. Resources currently dedicated to internal review should be reallocated to lifting the quality and speed of initial decision making.
- 5.20 In parallel, the AAT should continue to offer an avenue for full merits review, to which applicants may appeal at any stage during the review of an FOI application (not only after an unsuccessful IC review). The AAT should be resourced accordingly to enable it to fulfil this expanded role without leading to further delays and bottlenecks across the system.

Recommendation 2

5.21 The committee recommends that the Australian government amends the *Freedom of Information Act 1982* and the *Australian Information Commissioner Act 2010* to provide that:

- reviews internal to decision-making agencies be abolished and resources reallocated to primary decision-making;
- intermediate reviews are *not* required to provide procedural fairness or formal reasons for a decision;
- a full merits review process is only required at the level of the Administrative Appeals Tribunal (or its replacement); and
- FOI applicants may appeal directly to the Administrative Appeals Tribunal (or its replacement) at any time after a primary decision for a full merits review of their claim without having to wait for a decision at the intermediate level.

5.22 Moreover, it is the committee's view that further consideration should be given to the continuation of the Three Commissioner Model. With the recent appointment of a new FOI Commissioner and Privacy Commissioner and the term of the existing Information Commissioner coming to an end, there are legitimate questions to be asked in relation to whether or not the Three Commissioner Model is the optimal structure. Again, we refer to the growing responsibilities and obligations relating to the privacy function and the need to ensure that funding flows through to each of the functions in appropriate amounts. The evidence received by the committee in the course of this inquiry highlights the issues that arise under the Three Commissioner Model. Moreover, there is a clear need for the FOI function and system to be given the attention and focus that it deserves; especially, in light of the unacceptable backlogs. The issues which have been referred to in this report indicate that there is a strong case to separate the function from the OAIC.

5.23 In the view of the committee, based on the evidence received during the course of this inquiry, there is benefit in separating the FOI function out of the OAIC. As such, and in accordance with the above recommendation that a streamlined intermediate review process be established, the committee recommends that the FOI Commissioner be relocated to the Office of the Commonwealth Ombudsman with the power to take on all Commonwealth intermediary FOI review and regulatory functions, similar to what is already in place in some states (see Chapter 2). Given the nature of the work of the Commonwealth Ombudsman, including its role with respect to review of FOI decisions at an ACT government level, the committee identifies potential synergies in the FOI Commissioner being co-located with and sharing services with the Office of the Commonwealth Ombudsman. We emphasise that the FOI Commissioner and its supporting functions must be adequately resourced if it is to overcome the deficiencies of the OAIC.

Recommendation 3

- 5.24** The committee recommends that the Australian government amends the *Australian Information Commissioner Act 2010* to separate out the FOI review and regulatory functions from the Office of the Australian Information Commissioner and to relocate the FOI Commissioner to the Office of the Commonwealth Ombudsman.

Recommendation 4

- 5.25** The committee recommends that the Australian government reallocates to the FOI Commissioner, newly located within the Office of the Commonwealth Ombudsman, all resources currently earmarked for the FOI functions of the Office of the Australian Information Commissioner and, going forward, provides the FOI Commissioner with adequate resources to perform its regulatory and review functions in a timely and efficient manner.

Other legislative reforms

- 5.26** In parallel to the structural changes recommended above, the committee considers that other amendments are warranted to the legislation underpinning the FOI regime. Whilst, in the committee's view, the core tenets of the FOI Act remain relevant today, it has become outdated in some critical respects. These failings must be addressed if the FOI Act is to deliver a modern and efficient FOI regime that strikes a more appropriate balance between promoting transparency and accountability, whilst protecting the ability of the government to provide frank and fearless advice.
- 5.27** In particular, amendments to the FOI Act are warranted that would impose a statutory timeframe for the finalisation of FOI reviews; ensure that the documents of a minister remain within the reach of FOI laws when there is a change of minister; and to require that documents released through FOI requests are published, as detailed below.

Statutory timeframes for FOI reviews

- 5.28** Many of the submissions and witnesses in this inquiry called for statutory timeframes to be introduced for FOI reviews. The committee is persuaded of the merits of this approach and agrees that statutory timeframes should be introduced to ensure delays in finalising FOI reviews are never again allowed to grow to the length or volume that they have reached today. The committee also considers that the imposition of statutory timeframes for FOI reviews would help to ensure that adequate resources are allocated by the government of the day.
- 5.29** Statutory timeframes for FOI reviews should include a requirement for review notifications to be made to decision-making agencies so that they can take appropriate action to resolve issues as efficiently as possible. The committee

considers that it is unreasonable for there to be a delay of months before an agency is notified of a request by an applicant to have a decision reviewed. Delays in review notifications lead to unnecessary inefficiencies within decision-making agencies as FOI officers are forced to revisit their decisions in relation to applications they believed to have been finalised or new FOI officers are assigned and must start the work afresh.

- 5.30 The committee has considered the various proposals put forward by relevant stakeholders with respect to timeframes. Whilst further consultation will be required, the timeline proposed by the Grata Fund in paragraph 3.56 is indicative of the timeframes which the committee considers reasonable. Consideration could be given to matters requiring additional time due to complexity and volume; however, departure from usual statutory timelines should be limited to exceptional circumstances.
- 5.31 The committee acknowledges that statutory timeframes will have little impact unless and until the current review backlog has been significantly reduced and appropriate resourcing provided. As such, these changes should be implemented in conjunction with a plan to reduce the quantum of outstanding FOI reviews. Additionally, further consideration should be given to whether the streamlining of the intermediate review process as proposed by this committee should apply retrospectively to the current backlog through appropriate transition provisions. This would be a matter requiring detailed legal advice and policy consideration.

Recommendation 5

5.32 The committee recommends that the Australian government:

- **consults with key stakeholders and implements appropriate statutory timeframes for FOI reviews (with the timeline proposed by the Grata Fund as detailed in paragraph 3.56 of this report as an indicator), including consideration of provisions for extensions in exceptional circumstances due to the scale and complexity of an Information Commissioner review; and**
- **amends the *Freedom of Information Act 1982* to impose statutory timeframes for the finalisation of FOI reviews. Statutory timeframes should expressly include the notification of reviews to decision-making agencies.**

Documents of a minister

- 5.33 The committee shares the view put forward by many witnesses and submitters to this inquiry that a change of minister should not prevent documents from being released where it would otherwise be in the public interest to do so, as outlined in Chapter 4. A change of minister should have no bearing on whether a document is released under the FOI regime. In fact, the circumstances relating

to the change in a minister may be such as to trigger the making of FOI applications in the public interest. As such, it is the committee's recommendation that the FOI Act be amended to ensure such documents remain within the reach of FOI laws.

Recommendation 6

5.34 The committee recommends that the Australian government amends subsection 4(1) of the *Freedom of Information Act 1982* to ensure that a change in minister does not impede the right to access documents under the FOI system.

Publication of released information

5.35 The committee notes that decision-making agencies are not required to directly publish information released under FOI and may instead merely provide details on how to obtain that information, for example by way of an email requesting the document. The committee considers it to be in the spirit of the FOI Act for information deemed to be in the public interest to be published directly by the decision-making agency and recommends therefore that the legislation be amended to reflect this requirement. However, the committee notes that in some circumstances this may be impractical due to technical impediments, such as file size or the need for specialist software to view the document, as noted in OAIC guidance (see Chapter 4).

Recommendation 7

5.36 The committee recommends that the Australian government amends subsection 8D(3) of the *Freedom of Information Act 1982* to require that decision-making agencies make directly available for public download, either from the disclosure log or another website, all information that is released through an FOI request, subject to recognised technical constraints and privacy concerns.

Deemed disclosures

5.37 The committee considered arguments made in favour of a deemed disclosure regime to be persuasive (see Chapter 3). The committee was also sympathetic to assertions that such an approach would better represent the aspirations of the FOI Act than the approach currently in place, in which FOI applications may be refused merely because a decision-making agency has not considered the matter in time (a 'deemed refusal'). Indeed, if the Australian government elects not to implement the reforms recommended above or if these reforms do not produce the improvements intended, then the merits of a deemed disclosure regime should be seriously considered. However, given the breadth of changes recommended by the committee to the structure and the legislation underpinning the FOI regime, the committee considers that the introduction of

a deemed disclosure regime should be considered as part of a potential second wave of reform that takes into account the (hopefully) positive improvements flowing from the recommendations contained in this report.

Culture

Transparency and accountability

- 5.38 Earlier in this chapter, we discussed our expectations with respect to the pro-disclosure mindset required by the APS (with the support of ministers, and indeed all members of Parliament) in implementing the FOI system. If the culture is not right, it does not matter what the process or however much the funding, the FOI system will not operate as intended. The committee welcomes positive trends that were evident within the Department of Home Affairs (Home Affairs) and the Australian Broadcasting Corporation, both of which have seen marked improvements in the ways in which they handle FOI applications. These changes, particularly in the case of Home Affairs, appear to have significantly improved the finalisation of FOI applications within statutory timeframes.
- 5.39 However, the committee believes that continued improvement of FOI processes, both within decision-making agencies and any regulatory body, will require transparency of key performance indicators. Whilst the FOI Act currently requires annual reporting on FOI matters and administration, the committee does not believe that these provisions adequately enable clear and fulsome analysis of the FOI system. Timely reporting on numbers of FOI applications and reviews, as well as the timeframes for decision making, numbers of decisions subject to review processes, numbers of deemed refusals, the age of cases, and cases resolved as a proportion of total applications on-hand, will provide clarity on the performance of the FOI system as a whole. In particular, the committee is firmly of the view that statistics such as those provided by the OAIC and contained in Table 3.3 of this report relating to backlogs of IC reviews should be easily accessible in annual reports so that stakeholders can see the success or otherwise of efforts to make the FOI system fit for purpose. Moreover, stakeholders should have the information required to assess the performance of individual agencies and departments in dealing with FOI applications.
- 5.40 The committee considers that improved transparency will be a key enabler of accountability of FOI decision-making across the APS. Improved reporting will set a clear standard for agencies and will help ensure the objectives of the FOI regime are upheld.

Recommendation 8

- 5.41 The committee recommends that the Australian government ensures that formal reporting obligations for both decision-making agencies and review bodies be expanded to ensure information is readily available regarding the timeliness and efficacy of FOI decision making.**

Proactive disclosure

- 5.42 The committee remains hopeful that, if its reforms outlined above are implemented, an increasingly pro-disclosure culture may take hold across the Commonwealth. In parallel, it is vital that the regulator—the newly-established Deputy Commonwealth Ombudsman (FOI)—works to instil a pro-disclosure culture in which a commitment to transparency and accountability is renewed at the highest levels of the APS.
- 5.43 In the committee's view, Commonwealth agencies and departments can and should release more information proactively. Decision-making agencies should consider proactively publishing information that is in the public interest to release—particularly documents that would be released under FOI. At a minimum, agencies should consider proactively releasing categories of information that have been subject to repeat successful FOI applications.
- 5.44 The committee recognises the resource implications of agencies and departments making greater use of proactive disclosures, but considers that overall, this approach would be less resource-intensive than handling large volumes of FOI requests and appeals. The committee also considers proactive disclosure to be in keeping with the aspirations of the FOI Act.

Opportunities for the Strategic Assessment of the OAIC

- 5.45 The committee notes that the changes proposed in this report will take some time to refine and to implement. As such, the committee welcomes the Australian government's commitment to continuing a Strategic Assessment of the OAIC, and the committee considers it necessary and timely.
- 5.46 In the committee's view, the Strategic Assessment should consider the culture and leadership of the OAIC, and should examine the OAIC's approach to delivering on its statutory functions. The Strategic Assessment should explicitly explore opportunities to immediately address the unacceptable backlog of IC reviews. The committee believes the Strategic Assessment should consider the level of resourcing required to rectify current issues in the FOI system, and support FOI functions going forward. Experts conducting the Strategic Assessment should also make use of the evidence presented in this inquiry to inform their findings. The assessment should be made public.

Recommendation 9

5.47 The committee recommends that the Strategic Assessment of the Office of the Australian Information Commissioner (OAIC) specifically considers:

- **operational and resourcing requirements needed to rapidly resolve the current backlog of FOI reviews;**
- **the organisational culture of the OAIC, including its leadership, and its approach to the discharge of all its statutory functions;**
- **whether resources can and should be reallocated internally to bolster the FOI functions of the OAIC;**
- **ways to ensure the agency's reporting of FOI applications and reviews is transparent, fulsome, and explicitly accounts for the impact of deemed refusals on finalisation statistics;**
- **the key performance indicators adopted to assess the performance of the FOI function of the OAIC so that there is a clear and transparent reporting of the backlog of substantive Information Commissioner review matters (as opposed to the clearance of less substantive matters, such as the rectification of deemed refusals by the relevant agency which requires minimal review);**
- **measures to support the agency to better adapt to the changing nature and scale of its FOI workload; and**
- **possible legislative changes that would improve the agency's functioning and improve outcomes for FOI applicants.**

Further, the assessment should be made public.

Recommendation 10

5.48 The committee recommends that the Australian government publishes the Strategic Assessment of the Office of the Australian Information Commissioner.

5.49 On a related matter, the committee requested from the Attorney-General's Department minutes of a meeting between a senior officer of the department and Mr Hardiman (see Chapter 4). The committee understands that the reasons for Mr Hardiman's resignation may have been canvassed during the meeting and considers that the minute of the meeting may therefore contain information relevant to this inquiry. The committee notes that the document in question was included in a series of documents that are subject to a Senate order, against which the minister representing the Attorney-General has made a Public Interest Immunity (PII) claim (see also Appendix 4). However, the Attorney-General's Department was advised that the committee expects that a PII claim be made that responds to the specific circumstances of this request. The Attorney-General has neither made such a claim, nor has the Attorney-General provided the document in question. The committee considers the response by the Attorney-General to its request for the minute of the 10 March 2023 meeting to be

unsatisfactory. The committee is of the firm view that the document should be provided to the committee.

Consideration of a review of the FOI regime

5.50 In the committee's view, many of the issues and gaps across the FOI regime have been well established, as laid out in the preceding chapters of this report and in extensive reviews of the system. As such, the committee does not consider that a further review is necessary to undertake the reforms recommended here. In the committee's view, what is needed is the prompt preparation of draft amendments to legislation giving effect to the recommendations contained in this report and publication of those amendments for public consultation. Once feedback is considered, the resultant amendments should then be introduced into parliament for enactment as soon as practical. The committee considers that a review into the operation of the FOI regime should be conducted and tabled in the Parliament within three years of these reforms being enacted.

Recommendation 11

5.51 The committee recommends that amendments giving effect to the recommendations contained in this report should be enacted as soon as practical (following a consultation period) and that, within three years of implementing the reforms recommended above, the Australian government conducts and tables in the Parliament a review into the effectiveness of the operation of the FOI regime and proposes any further changes that may be warranted. The review should consider, among other issues:

- whether reforms to the FOI regime have resulted in improved outcomes for applicants, in particular, whether the backlog of FOI reviews has been addressed and whether decision-making agencies are meeting statutory timeframes;
- the merits of introducing or maintaining fees, costs, and charges for FOI applications and FOI reviews;
- the merits of introducing a deemed disclosure regime;
- whether decision-making agencies and the Commonwealth's FOI review functions are adequately resourced to meet their statutory responsibilities;
- opportunities for increasing the use of proactive disclosures by decision-making agencies;
- opportunities for increasing the pathways for individuals and their representatives to access personal information outside the FOI regime;
- the merits of introducing a requirement for decision-making agencies to consider pro-actively releasing categories of information that have been subject to repeat successful FOI applications;
- whether adequate provisions and guidance are in place to support vexatious applicant declarations;

- **potential reforms or initiatives to support smaller Commonwealth agencies to meet their FOI obligations; and**
- **how best to ensure that the documents of a minister remain within reach of the FOI Act for a specified period after the relevant minister leaves or changes office.**

Other matters

Resourcing

- 5.52 It is clear to the committee that the government's FOI functions have suffered from underfunding across the APS. If legislative reform is to be undertaken and the FOI regime restructured, as proposed here, existing resources will go further. However, that will not deal with the chronic backlog of matters which need to be finalised so that the system is placed on an even keel.
- 5.53 The ability of decision-making agencies to meet statutory timeframes will serve as one indicator of whether an agency's FOI functions have been adequately resourced. The introduction of statutory timeframes for reviews of FOI applications, as recommended above, would provide a similar indicator for the Commonwealth's FOI review and regulatory functions. The committee considers that the Strategic Assessment of the OAIC should consider the OAIC's resourcing, including whether additional resources are needed, and whether existing resources can be reallocated internally, to bring down the backlog of reviews to a manageable level, as recommended above. It is also likely that the AAT will require additional resources if it is to become the only layer of full merits review, as is also recommended above.

Recommendation 12

- 5.54 **The committee recommends that the Strategic Assessment of the Office of the Australian Information Commissioner considers what additional funding is required to clear the chronic backlog of Information Commissioner review decisions and the funding reasonably required for the operation of the FOI system on an efficient and effective steady state basis.**

Fees, costs, and charges

- 5.55 The committee notes the potential for fees and charges to deter vexatious applicants and to reduce the number of applications and reviews. However, the committee considers that fees and charges serve to disincentivise engagement with the FOI system and therefore run counter to the spirit of the FOI Act. It is also the committee's view that, on principle, people should not be charged for access to personal information held by government. Further, the management of fees and waivers of fees would be resource intensive and may therefore increase demands on the Commonwealth for further resources.

- 5.56 The committee does not consider that applying charges to Commonwealth agencies for failing to meet statutory timeframes would provide a sufficient incentive to substantially improve outcomes for FOI applicants.

Personal information

- 5.57 The committee welcomes steps taken by some decision-making agencies to make personal information available outside the FOI system, for example through the *Privacy Act 1988*. This approach has the potential to reduce demands on the FOI regime and may provide better outcomes for applicants. Nevertheless, the committee considers it necessary that applicants who seek personal information from the Commonwealth can still avail themselves of the FOI system whether or not they are satisfied with the outcome of using alternative pathways to access their information.

Recommendation 13

- 5.58 The committee recommends that there be a whole of government campaign to encourage decision-making agencies to explore opportunities to create pathways to release personal information directly to the individuals to which the information pertains without requiring applicants to use the FOI regime.**

Recommendation 14

- 5.59 The committee recommends that the Office of the Australian Information Commissioner prioritises efforts to develop guidance and build the capacity of decision-making agencies to strengthen pathways for people accessing personal information outside the FOI regime.**

Vexatious applicant declarations

- 5.60 To ensure the effective use of Commonwealth resources, the committee considers it necessary for decision-making agencies to have fair and efficient processes for obtaining vexatious applicants declarations. The committee notes that the OAIC has developed guidance on this matter. However, some evidence before the committee suggested that this guidance is lengthy and complex, and that decision-making agencies may face difficulties using provisions in the legislation that are designed to protect the Commonwealth from vexatious applicants. This appears to be particularly problematic for smaller agencies, which may lack the resources and experience to make a claim for a vexatious applicant declaration. Again, the committee identifies an opportunity for reform to promote greater efficiency in this regard. The committee refers to the discussion at paragraph 4.82 and the recommendation contained in the Hawke Review for a potential path forward.

Recommendation 15

- 5.61** The committee recommends that the Office of the Australian Information Commissioner develops streamlined guidance and conducts training for decision-making agencies on applications for vexatious applicant declarations. In addition, if necessary to streamline processes and promote efficiency, consideration should be given to making amendments to the relevant legislation.

Senator Paul Scarr

Chair

Liberal Senator for Queensland

Dissenting Report by Government Members

- 1.1 Labor Senators strongly support Australians' right to obtain information through Freedom of Information (FOI) laws.
- 1.2 An effective FOI regime, or a statutory right of access to government documents, is essential to Australia's democracy.
- 1.3 Freedom of information laws encourage transparency and accountability by giving Australians and the media access to information about the elected government.
- 1.4 The terms of reference provided the opportunity to develop practical recommendations to improve this system.
- 1.5 Instead, recommendations of the majority report fail to reflect the Liberal Party's longstanding attempts to weaken freedom of information in Australia, including through the elimination of the FOI Commissioner.
- 1.6 Despite the Greens Party previously supporting the three Commissioner model of the Office of the Australian Commissioner (OAIC), it now also seeks to dismantle this model.
- 1.7 This inquiry has been a squandered opportunity.
- 1.8 Labor Senators cannot support the majority report.

Commitment to an Effective OAIC

- 1.9 Labor Senators are committed to an effective FOI system and a strong OAIC.
- 1.10 Australia was the first nation with a Westminster-style democracy to introduce FOI legislation in 1982 following the reforming vision of Gough Whitlam.
- 1.11 In 2009 and 2010, the Rudd Labor government, introduced significant FOI changes where a key feature of these improved laws was the establishment of the OAIC. This office was created to provide independent oversight of the FOI regime and to champion freedom of information across government.
- 1.12 The 2010 legislation included a statutory requirement that there be a review of the 2010 reforms two years after implementation.
- 1.13 As the majority report indicates, in 2013, Mr Allan Hawke AC conducted a review (Hawke Review) into the *Freedom of Information Act 1982* (FOI Act), the *Australian Information Commissioner Act 2010* (AIC Act), and the extent to which those Acts continued to prove effective in granting access to government information. The Hawke Review made 40 recommendations for improving the FOI system, including that a comprehensive review of the FOI Act be undertaken.

1.14 Regrettably, the former Liberal government never responded to the Hawke Review and it certainly did not request a more comprehensive review of the FOI Act be undertaken.

1.15 Instead, it announced the abolition of the OAIC in the 2014–15 Budget, and with a great deal of similarity to recommendations in this majority report, indicated a preference for the Commonwealth Ombudsman to handle FOI complaints. This legislation was never passed by the Parliament. The relevant Budget measure provided:

From 1 January 2015 the OAIC's status as an agency under the *Financial Management and Accountability Act 1997* will cease and funding for ongoing functions will be transferred to other agencies. The new arrangements for privacy and FOI regulation are forecast to produce a saving of \$10.2 million over four years.

From 1 January 2015 an Office of the Privacy Commissioner will be established as an independent statutory position within the Australian Human Rights Commission. It will be responsible for the exercise of statutory privacy functions.

External merits review of FOI decisions, which are currently conducted by the OAIC, will transfer to the Administrative Appeals Tribunal (AAT). A total of \$1.8 million will be transferred to the AAT over four years to assist with the processing of FOI reviews.

Other Information Commissioner functions related to FOI guidelines and FOI statistics will be administered by the Attorney-General's Department. Complaints about FOI administration will be directly dealt with by the Commonwealth Ombudsman.¹

1.16 In relation to the former Liberal government's proposal to abolish the position of the FOI Commissioner in 2014, Professor John McMillan AO stated:

The then FOI Commissioner, James Popple, moved to the Administrative Appeals Tribunal. The Privacy Commissioner remained. I stayed on in the position as Information Commissioner even though it was formal government policy to abolish the position. I essentially stayed on for reasons of principle; that I think it's undesirable that executive action is taken to undermine the operation of an office that's been created by statute. I accept that if the parliament abolishes an office that's the right of parliament. But as a matter of principle I did not accept that it was appropriate for the executive, by all the means and the levers that are known to be available, to undermine a statutory creation.²

1.17 As is evident from the majority report's recommendations, the Liberal Party's position on abolishing the FOI Commissioner role and relocating complaints

¹ Parliamentary Library, [Bills Digest: Freedom of Information Amendment \(New Arrangements\) Bill 2014](#), 27 October 2014 p. 5.

² Professor John McMillan AO, private capacity, *Committee Hansard*, 29 August 2023, p. 25.

about FOI administration to the Commonwealth Ombudsman now repeats itself.

- 1.18 Given the Greens Party's historical opposition to this position, it is disappointing that Greens Senators now appear to support this position.
- 1.19 Unlike the Coalition, which sought to abolish the OAIC and refused to appoint standalone commissioners, the government supports the FOI system.
- 1.20 The government has delivered on its election commitment to fully restore the OAIC with the appointment of a standalone Freedom of Information Commissioner.
- 1.21 As the Attorney-General, the Hon Mark Dreyfus KC MP has indicated, 'for the first time since 2015 the OAIC will have a standalone FOI Commissioner, Privacy Commissioner and Information Commissioner, as Parliament originally enacted'.³
- 1.22 The Australian Information Commissioner, Ms Angelene Falk, subsequently welcomed the appointments of a standalone Privacy Commissioner and a new FOI Commissioner, noting:

This is a significant and welcome step for the Office of the Australian Information Commissioner and the Australian community as we move to a three-commissioner model at a time when access to information and the protection of privacy has never been more important.

The new commissioners will bring considerable expertise to promote and uphold privacy and information access rights. These are both areas that impact all Australians in our daily life across the economy and our democracy. It is exciting to consider how the background and experience of the new commissioners will contribute to our purpose and meet the regulatory challenges of the future.

I look forward to working with the new commissioners in serving the Australian community.⁴

Strategic Assessment of the OAIC

- 1.23 Prior to the commencement of the committee's inquiry, the government had already provided funding for a Strategic Assessment of the OAIC as part of the Federal Budget 2023–2024.
- 1.24 This is in stark contrast to the former Liberal government that tried to abolish the OAIC and defunded it for several years creating the situation we have today of backlogs in the FOI system.

³ The Hon Mark Dreyfus KC MP, ['Freedom of Information Commissioner and Privacy Commissioner appointments'](#), *Media release*, 27 November 2023.

⁴ Office of the Australian Information Commissioner, ['OAIC says appointment of new commissioners a significant step'](#), *Media release*, 27 November 2023.

- 1.25 The Strategic Assessment of the OAIC will ensure the OAIC is well positioned to deliver on its statutory functions as the national information access and privacy regulator into the future.

Sustainability of the OAIC

- 1.26 The government's establishment of a Strategic Assessment of the OAIC is in addition to its commitment to examine sustainable resourcing for the OAIC as part of its response to the Attorney-General's Department's Privacy Act Review Report 2022. Importantly, the government response provides:

To ensure the OAIC is resourced sustainably, the Government agrees in-principle that further work should be done to investigate the feasibility of an industry funding model for the OAIC (proposal 25.7) and further consideration be given to establishing a contingency litigation fund for costs orders against the OAIC, and an enforcement special account to fund high cost litigation (proposal 25.8). These reforms will be complemented by a strategic assessment of the OAIC, which will include consideration of its resourcing requirements.⁵

- 1.27 Proposal 25.7 of the Privacy Act Review Report 2022 was that 'further work should be done to investigate the effectiveness of an industry funding model for the OAIC'. The Report states that:

Further extensive consultation and analysis would need to occur before it would be possible to determine whether an industry funding model would be suitable for the OAIC. Although this could take some time, there would be benefit in undertaking this work. These investigations would include working with the Department of Finance and Treasury and involve:

- preparing a service catalogue of all of the OAIC's activities and determining whether there is a basis for cost recovery of any of these activities
- determining whether certain industries are more problematic and costly to regulate
- determining which type of fees/levies may be appropriate or whether a combination of cost recovery levies, cost recovery fees and statutory levies would be feasible, and
- undertaking further consultation with stakeholders on an industry funding model, before deciding on any proposed model.⁶

Options for Reform

- 1.28 Labor members acknowledge evidence to the committee regarding the delays in the FOI system and the need for reform.

⁵ Commonwealth of Australia, [Government Response: Privacy Act Review Report](#), 2023, p. 20.

⁶ Commonwealth of Australia, [Privacy Act Review Report](#), 2022, p. 266.

1.29 Mr Michael McKinnon, Member, Australia's Right to Know Coalition, stated:

I'd like to make the observation that Australia, as one of the oldest and most stable democracies in the world, can do much better on FOI. At the moment, as our submission points out, the system is broken and badly broken. Integral to those flaws is the up to five years in delays occurring with appeals and the fact that the system is basically measured against the ability of applicants to gain access. An open and transparent government is a good government. A secret government hides failures, hides mistakes and hides corruption. Recent royal commissions, as our submission points out, show the real cost to the Australian taxpayer from secrecy between bureaucrats and politicians.⁷

1.30 Ms Mursal Rahimi, Policy and Casework Solicitor, Refugee Advice and Casework Service, also stated that:

...it's our experience that the current operation of the FOI scheme has been plagued by issues, including persistent and unreasonable delays, an overreliance on exemptions and a culture against the disclosure of information. The impact of this slow and constrained FOI scheme is sharply felt by our clients. Delays in particular can leave our clients to languish in a prolonged state of uncertainty about their legal situation. It limits the legal advice and assistance that can be provided to them. It risks exacerbating other issues related to their legal status, such as extended family separation and financial insecurity. These impacts are magnified in circumstances where clients have a critical legal deadline and an urgent need to access their information.⁸

1.31 As the Attorney-General's Department's submission to the inquiry indicates, since the significant FOI reforms in 2009–2010 there have been several independent reviews of the FOI framework.

1.32 Labor members consider that the findings of these reviews, including the Hawke Review, should be carefully considered to identify appropriate options for reform.

1.33 This should occur in addition to consideration of culture and resourcing matters that are already occurring as part of the Strategic Assessment of the OAIC and implementation of the government response to the Privacy Act Review.

1.34 Consideration should be given to an independent and comprehensive review following the Hawke Review's recommendation. Support for an independent review was provided by witnesses such as Ms Yvette Lamont, Chief Executive Officer and Executive Director, Australian Press Council, who stated:

I do, however, wish to draw the committee's attention to our recommendation that the existing FOI regime should be subject to a

⁷ Mr Michael McKinnon, Member, Australia's Right to Know Coalition, *Committee Hansard*, 28 August 2023, p. 1.

⁸ Ms Mursal Rahimi, Policy and Casework Solicitor, Refugee Advice and Casework Service, *Committee Hansard*, 28 August 2023, p. 16.

comprehensive independent review. We do not believe the current arrangements, which have been in place for some years, are meeting the needs of the news media sector. Our submission also lays out what we believe should be important elements in the terms of reference to an independent review.⁹

Conclusion

- 1.35 As set out above, Labor Senators cannot support the recommendations in the majority report. The majority report does not fully engage with the various issues raised during the course of this inquiry.
- 1.36 The majority report does not properly acknowledge the impact of the former Liberal government's decision to defund the OAIC on the backlog of FOI matters. It does not properly contend with their failure to carefully examine the many recommendations put forward over the years by previous reviews for improvements to the FOI system.
- 1.37 Regrettably, the majority report is just another attempt by the Liberal Party to abolish the Office of the Australian Information Commissioner.

Recommendation 1

- 1.38 Labor Senators recommend that the government carefully considers the findings of the Strategic Assessment of the Office of the Australian Information Commissioner (OAIC) and that further consideration is given to appropriate funding models for the OAIC as part of implementation of the government's response to the Privacy Act Review.**

Recommendation 2

- 1.39 Labor Senators recommend that the government carefully considers the issues raised during the course of this inquiry and recommendations from previous reviews to identify appropriate options for reform to ensure the effective operation of the FOI system.**

Recommendation 3

- 1.40 Labor Senators also recommend that the government gives consideration to a comprehensive and independent review of the FOI Act.**

⁹ Ms Yvette Lamont, Chief Executive Officer and Executive Director, Australian Press Council, *Committee Hansard*, 28 August 2023, p. 2.

Senator Nita Green
Deputy Chair

Senator Helen Polley

Appendix 1

Submissions and Additional Information

Submissions

- 1 Department of Home Affairs
- 2 Australian Financial Security Authority
- 3 Mr Rex Patrick
 - 3.1 Supplementary to submission 3
- 4 Public Interest Advocacy Centre
- 5 Grata Fund
- 6 Centre for Public Integrity
- 7 Professor John McMillan AO
- 8 Refugee Advice and Casework Service
- 9 Public Interest Journalism Initiative and Centre for Advancing Journalism, University of Melbourne
- 10 Australian Press Council
- 11 Office of the Information Commissioner (Qld)
- 12 NSW Council for Civil Liberties
- 13 Country Press Australia
- 14 Australian Conservation Foundation
 - Attachment 1
- 15 Crikey
- 16 Ms Megan Carter
- 17 Dr Amanda-Jane George and Dr Julie-Anne Tarr
- 18 Mr Robert Heron
- 19 Mr Paul Hayes
- 20 Law Council of Australia
- 21 Attorney-General's Department
- 22 Administrative Appeals Tribunal
- 23 The Australia Institute
 - Attachment 1
- 24 Shooting Industry Foundation Australia
- 25 Mr Peter Timmins
- 26 C Pope & Associates
- 27 Australian Broadcasting Corporation
 - 27.1 Supplementary to submission 27
- 28 Dr Douglas Quarry and Mr Mike Berwick AM
 - Attachment 1
 - Attachment 2
 - Attachment 3

- Attachment 4
 - Attachment 5
 - Attachment 6
- 29 *Name Withheld*
- 30 *Name Withheld*
- 31 Australia's Right To Know
- Attachment 1
 - Attachment 2
- 32 Confidential
- 33 Office of the Australian Information Commissioner
- 33.1 Supplementary to submission 33
- 34 *Name Withheld*
- 35 Local Government Elected Members Association (LGEMA)
- 36 Mr Frank Pane
- 37 Mr Bruce Francis
- 38 Professor Peter Tregear OAM
- 39 Dr Joyce Noronha-Barrett
- 40 *Name Withheld*
- 41 Dr Chris Lewis
- 41.1 Supplementary to submission 41
- 42 *Confidential*
- 43 Ms Lauren Gray

Additional Information

- 1 Journal article: AJ George, Julie-Anne Tarr, Susan Bird, 'Forty Years of FOI: Accountability, Policy-making and The National Innovation and Science Agenda' (2021)
- 2 Affidavit in Patrick v Australian Information Commissioner, RA Dowsett, 22 August 2022.
- 3 Affidavit in Patrick v Australian Information Commissioner, E.Hampton, 5 August 2022
- 4 Affidavit in Patrick v Australian Information Commissioner, RA Dowsett, 6 March 2023.
- 5 Office of the Australian Information Commissioner internal legislative change recommendations, February 2023.
- 6 OAIC Submission to Hawke Review, December 2012.
- 7 OAIC supplementary submission to Hawke Review, February 2013.
- 8 Office of the Information Commissioner, correction of evidence provided during a public hearing on 29 August 2023, received 11 October 2023.
- 9 Supplementary statement made by Mr Leo Hardiman PSM KC, received 15 September 2023.

- 10 Australia Information Commissioner, letter to committee, received 8 November 2023

Answer to Question on Notice

- 1 Attorney-General's Department, response to written questions on notice (received 23 June 2023).
- 2 Office of the Australian Information Commissioner, response to written questions on notice (received 28 July 2023).
- 3 Grata Fund, answer to questions taken on notice at a public hearing on 28 August 2023 (received 13 September 2023).
- 4 Department of Home Affairs, answers to question on notice taken at a public hearing on 29 August 2023 (received 15 September 2023).
- 5 Refugee Advice and Casework Service, answers to questions on notice taken at a public hearing on 28 August 2023 (received 15 September 2023).
- 6 Public Interest Advocacy Centre, answer to question taken on notice and correction of evidence at a public hearing on 28 August 2023.
- 7 NSW Council for Civil Liberties, answers to questions on notice taken at a public hearing on 28 August 2023 (received 15 September 2023).
- 8 Australian Broadcasting Corporation, answers to questions taken on notice at a public hearing on 28 August 2023 (received 15 September 2023).
- 9 Administrative Appeals Tribunal, answers to questions taken on notice at a public hearing on 28 August 2023 (received 15 September 2023).
- 10 Australian Financial Security Authority, response to questions on notice taken at public hearing on 29 August 2023 (received 27 September 2023).
- 11 Australia Institute, answers to questions on notice taken at a public hearing on 29 August 2023 (received 22 September 2023).
- 12 Australian Press Council, answers to questions on notice taken at a public hearing on 28 August 2023 (received 4 October 2023).
- 13 Administrative Appeals Tribunal responses to questions on notice 5 and 7, taken at a public hearing on 28 August 2023 (received 15 September and 12 October 2023).
- 14 Office of the Australian Information Commissioner's response to questions on notice, taken at a public hearing on 29 August 2023 (received 10 October 2023).
- 15 Australian Conservation Foundation, response to questions on notice taken at a public hearing on 29 August 2023, (received 28 September 2023).
- 16 Law Council of Australia, response to questions on notice taken at a public hearing on 29 August 2023 (received 28 September 2023).
- 17 Attorney-General's Department, answers to questions taken on notice at a public hearing on 29 August 2023 (received 21 September 2023).
- 18 Dr Amanda-Jane George, response to spoken questions on notice taken at a hearing on 28 August 2023 (received 13 September 2023).
- 19 Mr Rex Patrick, answer to question taken on notice at a public hearing on 28 August 2023 (received 29 August 2023)

- 20 Attorney-General's Department, revised answers to questions taken on notice at a public hearing on 29 August 2023 (received 24 November 2023).

Tabled Documents

- 1 Statement made by Mr Leo Hardiman PSM KC at a public hearing on 29 August 2023.
- 2 Information Commissioner Review Statistics, tabled by the Office of the Australian Information Commissioner at a public hearing on 29 August 2023.
- 3 Affidavit of M Dreyfus in *Patrick v Australian Information Commissioner* (8 October 2022), tabled by Mr Rex Patrick at a public hearing on 28 August 2023
- 4 Opening statement made by the Attorney-General's Department at a public hearing on 29 August 2023.
- 5 Decision to grant an extension of time under s 15AB of the FOI Act 1982 (13 June 2023), tabled at a public hearing on 29 August 2023.
- 6 Decision to decline an extension of time application under s 15AB of the FOI Act 1982 (31 July 2023), tabled at a public hearing on 29 August 2023.
- 7 Media Article - The Age - "The wait goes on: Dreyfus' department dodges disclosures" (27 July 2023), tabled at a public hearing on 29 August 2023.

Appendix 2

Public Hearings

Monday, 28 August 2023

Barossa Room

Novotel Sydney on Darling Harbour

100 Murray Street

Darling Harbour

Australian Press Council

- Ms Yvette Lamont, CEO and Executive Director

Country Press Australia

- Mr Peter Kennedy, Executive Officer

Australian Broadcasting Corporation

- Ms Ingrid Silver, General Counsel

Australia's Right To Know Coalition

- Mr Michael McKinnon, Representative

Refugee Advice and Casework Service

- Ms Sarah Dale, Principal Solicitor and Centre Director
- Ms Mursal Rahimi, Policy & Casework Solicitor

NSW Council for Civil Liberties

- Mr Stephen Blanks, Executive Member

Public Interest Advocacy Centre

- Mr Johathan Hall Spence, Principal Solicitor
- Mr Mitchell Skipsey, Senior Solicitor, Strategic Litigation

Grata Fund

- Ms Isabelle Reinecke, Executive Director
- Mr Mohammad Omar, Acting General Counsel
- Ms Courtney Law, Strategic Litigation Solicitor
- Mr Geoffrey Watson SC

Mr Rex Patrick, Private capacity

Dr Amanda-Jane George, Private capacity

Professor Julie-Anne Tarr, Private capacity

Administrative Appeals Tribunal

- Mr Michael Hawkins AM, Registrar
- Ms Alison Nesbitt, Executive Director, Review Support

Tuesday, 29 August 2023

Committee Room 2S3

Parliament House

Canberra

Mr Leo Hardiman PSM KC, Private capacity

Law Council of Australia (via videoconference)

- Mr Luke Murphy, President
- Mr Graeme Johnson, Member, Administrative Law Committee
- Mr John Farrell, Senior Policy Advisor

Professor John McMillan AO, Private capacity

Australian Conservation Foundation (via videoconference)

- Mr Adam Beeson, General Counsel
- Ms Annica Schoo, Lead Investigator

The Australia Institute

- Mr William Browne, Director, Democracy & Accountability Program

Department of Home Affairs

- Ms Clare Sharp, Group Manager, Legal
- Mr Steve Biddle, Assistant Secretary, FOI and Records Management
- Ms Emily Brooks, Director, Freedom of Information

Australian Financial Security Authority

- Ms Elyse Harrald-Woods, National Manager Government Business
- Mr Matthew Osborne, Principal Legal Officer

Attorney-General's Department

- Mr Simon Newnham, Deputy Secretary, Integrity & International Group
- Ms Catherine Fitch, Assistant Secretary, Information Law Branch
- Ms Elizabeth Brayshaw, A/g First Assistant Secretary, Integrity Frameworks Division

Office of the Australian Information Commissioner

- Ms Angelene Falk, Australian Information Commissioner and Privacy Commissioner
- Ms Toni Pirani, Acting Freedom of Information Commissioner

Appendix 3

Legislative changes considered by the Office of the Australian Information Commissioner

Figure 5.1 Office of the Australian Information Commissioner internal legislative change recommendations

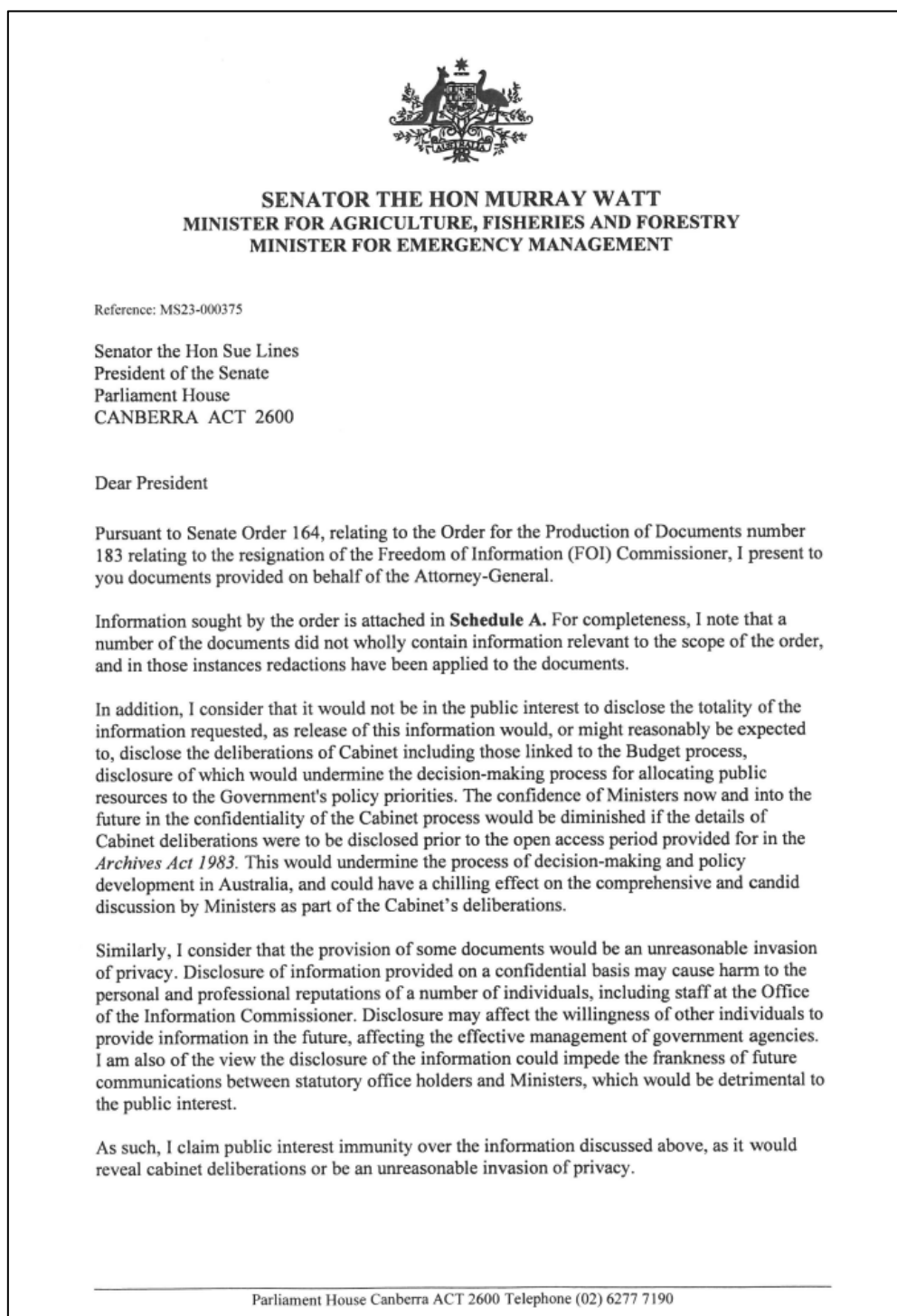
FOI Act Amendments				
Item	Issue	Context	Provision	Amendment requested
1.	Making an IC review application	To assist in the more efficient triage and early resolution of matters, we encourage applicants to lodge their applications through an online form which is integrated into the OAIC's case management database. We request an amendment that would encourage the use of the online form. This could be achieved through amending s 54N(4)(c) by removing to an electronic address	Section 54N sets out the requirements for making an IC review application. In particular, s 54N(4) prescribes the method in which the IC review application may be delivered to the OAIC: (a) delivery to the Information Commissioner at the address of the Information Commissioner specified in a current telephone directory; (b) postage by pre-paid post to an address mentioned in paragraph (a); (c) sending by electronic communication to an electronic address specified by the Information Commissioner	Amend s 54N(4)(c) to remove the reference to an electronic address and include the power for the Information Commissioner to specify the electronic method to receive the IC review application
2.	Resolution of IC review by agreement (Part VII Review by Information Commissioner)	The Hawke Review recommended that: <i>Recommendation 5 – Resolution of Applications by Agreement</i> <i>The Review recommends the FOI Act be amended to make it clear that an agreed outcome finalises an Information Commissioner review and, in these circumstances, a written decision of the Information Commissioner is not required.</i> This amendment would assist in more efficient finalisation of IC reviews and provide greater clarity regarding the finalisation of an FOI request/process	Part VII	Amend the FOI Act to provide for the resolution of IC review applications by agreement without requiring a formal IC review decision
3.	Concurrent internal and external review (Part VII Review by Information Commissioner – Division 3)	Applicants on occasion have applied for both internal and external review after receiving the primary FOI decision. This results in confusion, double handling, and inefficiencies in undertaking both internal and IC reviews. We request an amendment that streamlines the review process and makes it clear that while an applicant has the choice of seeking internal review or IC review, the applicant cannot seek IC review where an internal review process is on hand	Part VII – Div 3	Amend the FOI Act to provide that a valid IC review application cannot be made while an internal review process remains on foot or until an internal review process is complete
4.	Evidence of Inspector-General of Intelligence and Security for s 33 exempt documents – (Part VII Review by Information Commissioner)	Section 33 provides an exemption to disclosure under FOI for documents affecting national security, defence or international relations. Division 9 of Part VII sets out a process by which the Inspector-General of Intelligence and Security (IGIS) must give evidence in relation to a document over which the exemption is claimed. Section 33(1)(c) is the most commonly applied subsection of s 33. However, it has been the experience of the OAIC that the IGIS will advise, under s 55ZAC, that they are not appropriately qualified to give evidence on such matters	ss 33, 55ZA, 55ZB, 55ZC, 55ZD	Amend Division 9 of Part VII of the FOI Act so that evidence is only required to be sought from the Inspector-General of Intelligence and Security when the documents under review are subject to s 33(1)(a) and (b) (security of the Commonwealth and defence of the Commonwealth) of the FOI Act. Provide the Information Commissioner with a discretion to request the IGIS to give evidence if the exempt documents are subject to ss 33(1)(c) and 33(b), and to consult IGIS as she sees fit

Extract from Office of the Australian Information Commissioner internal legislative change recommendations, February 2023, available in full on the [committee's website](#) under Additional documents.

Appendix 4

Public Interest Immunity claim in relation to a Senate Order for the production of documents

Figure 4.1 Public Interest Immunity claim in relation to Senate Order for the production of documents



The Government will continue to work closely with the Office of the Australian Information Commissioner to understand resourcing requirements to ensure their effective operation. In the 2022-23 financial year, the Albanese Government provided the Office of the Australian Information Commissioner with \$29.6 million in funding. This funding included \$5.5 million to support an investigation into the Optus data breach, and enable the Office of the Australian Information Commissioner to provide support to effected Australian individuals.

The Government thanks Mr Hardiman PSM KC for his significant and longstanding contribution to Commonwealth public service, particularly in his roles at the Australian Government Solicitor and as Freedom of Information Commissioner, and wishes him well for the future.

Yours sincerely

SENATOR THE HON MURRAY WATT

27 / 3 / 2023

Encl. FOI Commissioner documents

Source: See Order of 22 March 2023 (183) relating to the resignation of the Freedom Information Commissioner, available at aph.gov.au/Parliamentary_Business/Tabled_Documents/1625 (accessed 20 October 2023)

Public Interest Immunity Claim tabled on 27 March 2023 in response to Senate Order for the production of documents No. 183 on 22 March 2023.