

FALK, Angelene

Subject: Meeting | Australian Information Commissioner and Privacy Commissioner
[SEC=OFFICIAL]

Location: MG-51, APH Canberra

Start: Mon 8/08/2022 10:30 AM

End: Mon 8/08/2022 11:00 AM

Recurrence: (none)

Meeting Status: Accepted

Organizer: Invitations And Requests - AGO

Please see attached directions for MG-51 (enter through MinWing car park, lifts to ground level, hard right out of lifts, end of hall).

-----Original Appointment-----

From: Invitations And Requests - AGO <invitations@ag.gov.au>

Sent: Tuesday, 19 July 2022 1:21 PM

To: Invitations And Requests - AGO; OAIC - Executive Assistant

Subject: Meeting | Australian Information Commissioner and Privacy Commissioner [SEC=OFFICIAL]

When: Monday, 8 August 2022 10:30 AM-11:00 AM (UTC+10:00) Canberra, Melbourne, Sydney.

Where: MG-51, APH Canberra

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OFFICIAL

Good morning,

Please accept this invitation on behalf of the Hon Mark Dreyfus, QC, MP, Attorney-General, in response to the incoming Government brief dated 8 June 2022.

Please extend this invitation to Ms Angelene Falk, Australian Information Commissioner and Privacy Commissioner, Ms Elizabeth Hampton, Deputy Commissioner, and Leo Hardiman PSM QC, Freedom of Information Commissioner.

Please do not hesitate to get in contact should you have any questions.

Kindest regards,

s22(1)(a)(ii)

s22(1)(a)(ii) | Executive Officer & Office Manager

Office of the Hon Mark Dreyfus QC MP

Attorney-General

Cabinet Secretary

T: s22(1)(a)(ii) M: s22(1)(a)(ii)



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From: [FALK, Angelene](#)
To: [s22\(1\)\(a\)\(ii\)](#)
Cc: [HAMPTON, Elizabeth](#)
Subject: File note AG phone call for the file please [SEC=OFFICIAL:Sensitive]
Date: Thursday, 6 October 2022 4:25:29 PM
Attachments: [Document1.docx](#)

OFFICIAL: Sensitive

OFFICIAL: Sensitive

T/F Attorney General Dreyfus at my request re Optus 3:20pm 6 October 2022

I advised:

1. Regulation permitting disclosure to financial institutions: final terms limited to the identifier, minimises impact on privacy; ACCC/OAIC letter to recipients setting out conditions, acceptance of which represents that the bank will comply, failure to comply with the conditions risks contravention of s18 ACL. ACCC/OAIC monitoring role through reports from financial institutions
2. Regulatory response: Preliminary enquiries on NDB and APPs (collection, security, retention / destruction). Information requests on APPs and NDB substantially conclude today. Information to be considered and assessed. s 47E(d)
[REDACTED]
3. Collaboration with ACMA: seek to ensure cover the field and coordinate regulatory response noting areas of intersection. Noted information sharing limitations and options.
4. Resources: I noted significant resource requirements and desirability of certainty on resources prior to commencing investigation if possible, appreciating processes need to be gone through. I expressed thanks for the assistance from AGD in working through options and noted a meeting between AGD and COS this afternoon.
5. AG appreciates receiving the information.

OAIC - Executive Assistant

From: s22(1)(a)(ii) @ag.gov.au>
Sent: Wednesday, 27 July 2022 5:42 PM
To: OAIC - Executive Assistant
Subject: RE: Meeting Request from Commissioner Falk, OAIC [SEC=OFFICIAL]

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OFFICIAL

Hi s22(1)(a)(ii),

Thank you for confirming, please advise the Commissioners I will meet them at the pass desk in the Main Hall at 1015 to sign them in and escort them through.

Have a lovely week,

s22(1)(a)(ii)

s22(1)(a)(ii) | Executive Officer & Office Manager

Office of the Hon Mark Dreyfus QC MP

Attorney-General

Cabinet Secretary

T: s22(1)(a)(ii) M: s22(1)(a)(ii)

We acknowledge the traditional custodians of this land and
celebrate their ongoing culture and contribution to society.

OFFICIAL

From: OAIC - Executive Assistant <executiveassistant@oaic.gov.au>
Sent: Wednesday, 27 July 2022 5:39 PM
To: s22(1)(a)(ii)@ag.gov.au>
Subject: RE: Meeting Request from Commissioner Falk, OAIC [SEC=OFFICIAL]

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H s22(1)(a)(ii)

Thank you for the offer to meet them at the public entrance and take them through, if we could kindly take you up on the offer this would be much appreciated.

The contact for the day is Deputy Commissioner Elizabeth Hampton, her mobile number is s 22(1).

I can confirm Commissioner Falk has a APH pass and we are in the process of renewing the Deputy Commissioner and FOI Commissioner's.

Kind regards

s22(1)(a)(ii)



s22(1)(a)(ii) | Interim Executive Assistant to Angelene Falk,
Australian Information Commissioner and Privacy Commissioner
Office of the Australian Information Commissioner
GPO Box 5218 Sydney NSW 2001 | [oaic.gov.au](https://www.oaic.gov.au)
s22(1)(a)(ii) | executiveassistant@oaic.gov.au

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From: s22(1)(a)(ii)@ag.gov.au>
Sent: Monday, 25 July 2022 10:28 AM
To: OAIC - Executive Assistant <executiveassistant@oaic.gov.au>
Subject: RE: Meeting Request from Commissioner Falk, OAIC [SEC=OFFICIAL]

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OFFICIAL

Good morning **s22(1)(a)(ii)**

Thank you for your follow-up email, please see attached directions for MG-51 (enter through MinWing car park, lifts to ground level, hard right out of lifts, end of hall). Alternatively, I am more than happy to meet them at the public entrance and take them through.

Could you please advise whether any attendees will require a temporary APH pass and confirm the best contact number for the attendees on the day.

Kind regards,

s22(1)(a)(ii)

s22(1)(a)(ii) | Executive Officer & Office Manager

Office of the Hon Mark Dreyfus QC MP

Attorney-General

Cabinet Secretary

T: **s22(1)(a)(ii)** M: **s22(1)(a)(ii)**



OFFICIAL

From: OAIC - Executive Assistant <executiveassistant@oaic.gov.au>

Sent: Monday, 25 July 2022 10:08 AM

To: **s22(1)(a)(ii)** <@ag.gov.au>

Subject: RE: Meeting Request from Commissioner Falk, OAIC [SEC=OFFICIAL]

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Good Morning **s22(1)(a)(ii)**

Thank you for sending across the Meeting Invite for Commissioner Falk to meet with the Attorney-General on 8 August.

Could you kindly advise guidance directions I can provide to Commissioner Falk on the location of MG-51, APH Canberra.

Many thanks

s22(1)(a)(ii)



s22(1)(a)(ii) Interim Executive Assistant to Angelene Falk,
Australian Information Commissioner and Privacy Commissioner
Office of the Australian Information Commissioner
GPO Box 5218 Sydney NSW 2001 | [oaic.gov.au](https://www.oaic.gov.au)
s22(1)(a)(ii) | executiveassistant@oaic.gov.au

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From: OAIC - Executive Assistant

Sent: Monday, 18 July 2022 3:10 PM

To: s22(1)(a)(ii) <[s22\(1\)\(a\)\(ii\)@ag.gov.au](mailto:s22(1)(a)(ii)@ag.gov.au)>

Subject: RE: Meeting Request from Commissioner Falk, OAIC [SEC=OFFICIAL]

Dear s22(1)(a)(ii)

Further to our e-mail below, I have attached Commissioner Falk's letter dated 8 June for reference.

May we please accept the offer for Monday, 8th of August.

Kind regards

s22(1)(a)(ii)



s22(1)(a)(ii) | Interim Executive Assistant to Angelene Falk,
Australian Information Commissioner and Privacy Commissioner
Office of the Australian Information Commissioner
GPO Box 5218 Sydney NSW 2001 | oaic.gov.au
s22(1)(a)(ii) | executiveassistant@oaic.gov.au

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From: OAIC - Executive Assistant

Sent: Friday, 15 July 2022 12:06 PM

To: s22(1)(a)(ii) <[s22\(1\)\(a\)\(ii\)@ag.gov.au](mailto:s22(1)(a)(ii)@ag.gov.au)>

Subject: RE: Meeting Request from Commissioner Falk, OAIC [SEC=OFFICIAL]

Good Afternoon s22(1)(a)(ii)

Thank you for your call and follow-up e-mail.

I will speak with Commissioner Falk regarding the dates proposed below and revert next week.

Have a lovely weekend.

Kind regards

s22(1)(a)(ii)



s22(1)(a)(ii) | Interim Executive Assistant to Angelene Falk,
Australian Information Commissioner and Privacy Commissioner
Office of the Australian Information Commissioner
GPO Box 5218 Sydney NSW 2001 | oaic.gov.au
s22(1)(a)(ii) | executiveassistant@oaic.gov.au

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From: s22(1)(a)(ii)@ag.gov.au>
Sent: Thursday, 14 July 2022 5:26 PM
To: OAIC - Executive Assistant <executiveassistant@oaic.gov.au>
Subject: RE: Meeting Request from Commissioner Falk, OAIC [SEC=OFFICIAL]

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Good afternoon s22(1)(a)(ii)

Thank you for your email. Could you please confirm the matter in question refers to the incoming Government brief?

The proposed date of next Tuesday, 26th July, coincides with the opening of Parliament. If the meeting is in regard to the above, may I please recommend either Monday the 8th or Tuesday the 9th of August; Mr Dreyfus will be in Canberra both days.

Please don't hesitate to call should you have any questions.

Kindest regards,

s22(1)(a)(ii)

Office Manager

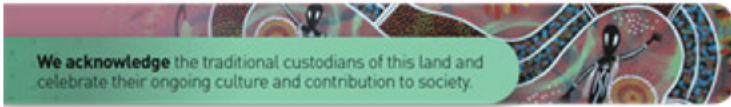
Office of the Hon Mark Dreyfus QC, MP

Attorney-General | Cabinet Secretary



s22(1)(a)(ii) | ✉ invitations@ag.gov.au

We acknowledge the traditional custodians of this land and celebrate their ongoing culture and contribution to society.



OFFICIAL

From: OAIC - Executive Assistant <executiveassistant@oaic.gov.au>
 Sent: Thursday, 14 July 2022 4:34 PM
 To: [s22\(1\)\(a\)\(ii\)](#) <[s22\(1\)\(a\)\(ii\)@ag.gov.au](mailto:s22(1)(a)(ii)@ag.gov.au)>
 Subject: Meeting Request from Commissioner Falk, OAIC

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Dear [s22\(1\)\(a\)\(ii\)](#)

The Australian Information Commissioner and Privacy Commissioner would like to propose a meeting with the Attorney-General following her letter dated 8 June 2022, to discuss the matters raised in that correspondence. We understand that the Attorney is often in Canberra on Tuesdays, and would like to propose 30 minutes on the morning of Tuesday 26 July if that is convenient? The Commissioner proposes to be accompanied by the Freedom of Information Commissioner Mr Leo Hardiman PSM QC and Deputy Commissioner Ms Elizabeth Hampton if that is suitable. We look forward to hearing from you.

Yours sincerely

[s22\(1\)\(a\)\(ii\)](#)



[s22\(1\)\(a\)\(ii\)](#) | Interim Executive Assistant to Angelene Falk,
 Australian Information Commissioner and Privacy Commissioner
 Office of the Australian Information Commissioner
 GPO Box 5218 Sydney NSW 2001 | oaic.gov.au
[s22\(1\)\(a\)\(ii\)](#) | executiveassistant@oaic.gov.au

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From: s22(1)(a)(ii)
To: FALK,Angelene; HARDIMAN,Leo; HAMPTON,Elizabeth
Subject: AG Meeting Brief
Date: Friday, 5 August 2022 4:48:01 PM
Attachments: AG Meeting Brief 8 August 2022.pdf
image001.jpg
image002.png
image003.png
image004.png
image005.png

Hi All

Please see attached Meeting Brief Pack for your meeting on Monday. This is currently being printed.

@FALK,Angelene s22(1)(a)(ii) will drop this off to you on the weekend.

s22(1)(a)(ii) will meet you at the public entrance and escort you to the room. Please remember your APH Passes.

If I can be of any further assistance, please let me know.

Thanks

s22(1)(a)(ii)



s22(1)(a)(ii) | Interim Executive Assistant to Angelene Falk,
Australian Information Commissioner and Privacy Commissioner
Office of the Australian Information Commissioner
GPO Box 5218 Sydney NSW 2001 | [oaic.gov.au](https://www.oaic.gov.au)
s22(1)(a)(ii) | executiveassistant@oaic.gov.au

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8 August 2022

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Australian Government

Office of the Australian Information Commissioner

The Hon Mark Dreyfus QC, MP
Attorney-General and Cabinet Secretary

By email: **s 22(1)**@ag.gov.au

Dear Attorney-General

Congratulations on your appointment as Attorney-General and Cabinet Secretary. I look forward to working with your office and Department to deliver for the Australian community in the public interest. As the Attorney-General with responsibility for information management, privacy and freedom of information there are real opportunities to ensure a strengthened regulatory regime that is fit for purpose and serves the community into the future.

The Australian and global privacy landscape is in an evolutionary phase, resulting from the domination of digital platforms in the global economy and increased consumer awareness of their privacy rights. I welcome the review of the Privacy Act as the means by which the Australian privacy framework can be recalibrated to address privacy risks that have emerged from the increased sharing of personal information through the digital economy and accelerated as a result of the COVID-19 pandemic. Applying our regulatory lens to proposed legislative amendments to establish a privacy regime for the next decade is work that motivates my staff.

The Office of the Australian Information Commissioner (OAIC) plays a critical role in relation to a number of other significant initiatives across the economy, including the Consumer Data Right, the Digital Identity and cyber security. The common thread of my advice and our role across all these initiatives is to ensure that government and businesses can innovate with confidence by accountably protecting personal information and affording individuals meaningful choice, control and transparency over the use of their personal information. We also seek global alignment to the extent possible, to support a flourishing domestic economy and protect Australians' information wherever it flows.

We continue to support integrity, transparency and accountability of government through year on year increases to the efficiency with which we acquit our responsibilities under the *Freedom of Information Act 1982*. However as you will see from the attached information, 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.

Please find **attached** an overview of the current strategic priorities of the OAIC.

I look forward to the opportunity to discuss the work of my office with you.

Yours sincerely

A handwritten signature in dark ink, appearing to read 'A. Falk', with a stylized, cursive script.

Angelene Falk
Australian Information Commissioner and Privacy Commissioner

8 June 2022

Encl.



Australian Government

Office of the Australian Information Commissioner

Overview of OAIC strategic priorities

Office of the Australian Information Commissioner



Angelene Falk

Australian Information Commissioner and Privacy Commissioner

8 June 2022

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Our role and priorities

The Office of the Australian Information Commissioner's (OAIC's) purpose is to promote and uphold privacy and information access rights. We operate as a contemporary regulator that strives to respond to community expectations through our strategic and regulatory priorities, enhancing our capability, managing risk effectively and cooperating and collaborating with other regulators domestically and internationally. We provide guidance to support voluntary compliance, respond to individual complaints and applications, as well as take action on our own initiative to increase compliance with privacy and FOI regimes.


Our privacy regulatory priorities¹ are also informed by our environment, including the ubiquitous, global and growing nature of the digital economy, which offers Australian consumers and businesses significant opportunities but also carries privacy risks. The OAIC takes regulatory action that seeks to hold organisations including global digital businesses to account.

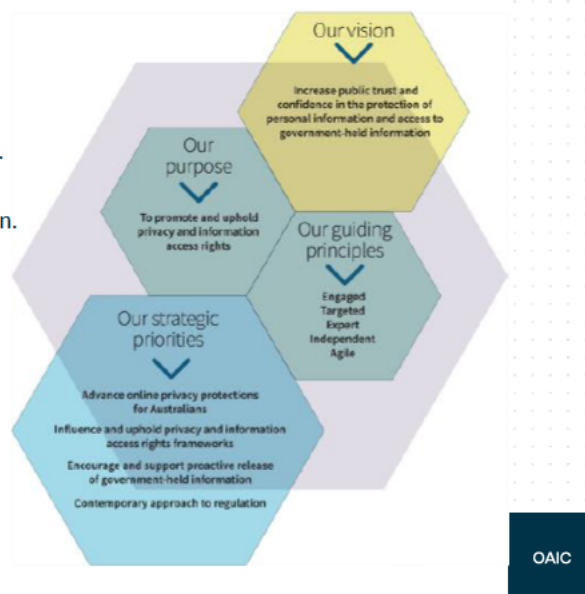
The OAIC is an integrity agency, supporting transparency and accountability of government through its FOI functions. The statutory independence of the office and the jurisdictional inclusion of most federal government agencies and ministers positions the OAIC alongside agencies such as the Commonwealth Ombudsman, ACLEI and the ANAO as part of an existing integrity framework for government. Our focus on proactive publication of government-held information has the potential to unlock whole-of-government efficiencies through reduced reliance on formal FOI mechanisms. In concert with the development of a more comprehensive pro-disclosure approach to government-held information, our promotion of the development of administrative access schemes supports the long-standing Open Government agenda, with a view to engendering greater trust in and transparency of government.

Our ambition

The OAIC has outlined our strategic priorities for 2021–2025, which we will pursue in line with our guiding principles.

Through this work, we will deliver on our purpose and achieve our long-term vision.

 @OAICgov



OAIC

¹ The OAIC's privacy regulatory priorities are: online platforms and social media and high privacy impact technologies, the security of personal information, particularly in the finance and health sectors, assurance and co-regulation of the Consumer Data Right, new personal information handling practices arising out of the COVID-19 pandemic.

What the community is concerned about


We seek to increase Australians' trust and confidence in the handling of personal information and access to government held information as principles that are fundamental to our human rights, democratic principles and underpin a trusted, innovative digital economy. The importance of these rights to Australians is reflected in the 3 yearly survey into Community Attitudes to Privacy, which informed our key regulatory priorities. In particular, the survey found that 70% of Australians say that privacy is a major concern and 87% want more control and choice over the collection of their personal information. Australians are increasingly questioning the purpose of data collection practices and privacy is the leading consideration when choosing an app or program to download, ahead of quality, convenience or price.

According to our 2020 community attitudes to privacy survey, trust in organisations and agencies with respect to their personal information handling practices is down 13% and 14% respectively since 2007. Community expectations regarding the transparency and accountability of Australian Government agencies are also reflected in a significant and increasing number of applications for review of FOI decisions.

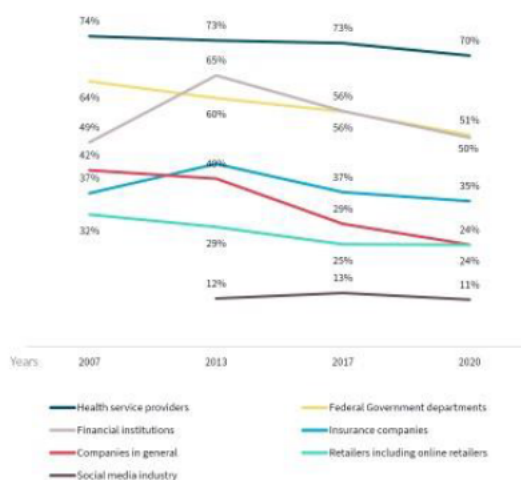
Trust in personal information handling

Since 2007, there has been a general downward trend in trust in the personal information handling of most organisation types:

- trust in federal government departments is down 14
- trust in companies in general is down 13

 @OAICgov

Proportion of Australians considering each organisation trustworthy from 2007 to 2020

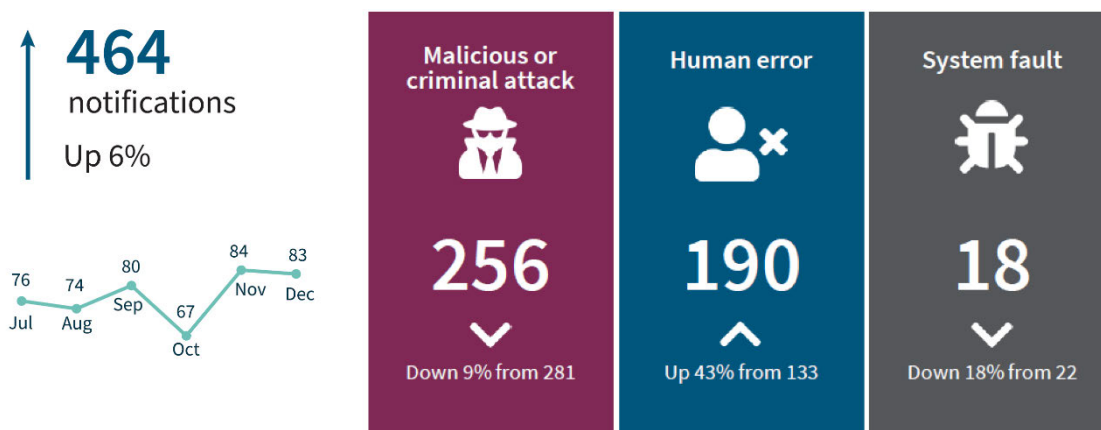


OAIC

In relation to the handling of personal information, Australian's are most concerned about data breaches, identity theft and fraud. The Notifiable Data Breaches (NDB) Scheme provides unprecedented visibility into how Australian entities are meeting the challenges associated with protecting personal information. Over the four years of the scheme's operation, the causes of data breaches have remained consistent, with approximately 34% attributable to human error, 61% to malicious or criminal attacks (including cyber) and 4% to systems faults. The sectors experiencing the greatest number of reportable breaches has also been broadly consistent, being health service providers followed by the finance sector. The OAIC produces bi-annual statistical reports about the NDB scheme, to ensure the causes of breaches are understood. We also work closely with other

agencies in relation to nascent or proposed domestic reporting regimes, including the notification of cyber incidents under the *Security Legislation Amendment (Critical Infrastructure Protection) Act 2022*, the *Data Availability and Transparency Act 2022*, and the Ransomware Action Plan.

Notifiable Data Breaches Report July to December 2021



Privacy law reform

Our research shows Australians want government to do more to protect them from harmful privacy practices, want more control and choice over the use of their personal information and increased rights, such as being able to ask businesses to delete their information, to seek compensation in the courts for a breach of privacy, to know when their personal information is used in automated decision-making, and to object to certain data practices while still being able to access and use the service.

We have drawn on our regulatory experience to make recommendations to the review of the Privacy Act² that seek to ensure Australia's privacy regime continues to operate effectively and promotes innovation and growth. Key recommendations include:

- *Organisational accountability*: enhancing organisational accountability to ensure regulated entities are confident to innovate and use data within the boundaries of the law, informed by community expectations
- *A contemporary approach to regulation*: establishing a regulatory framework that supports proactive and targeted regulation, strategic enforcement, efficient and more direct redress for individuals and appropriate deterrents for non-compliance
- *Enabling privacy self-management*: empowering consumers to exercise choice and control over their personal information through new rights and enhanced transparency
- *Global interoperability*: minimising friction to ensure consistency of protection across the economy and the protection of personal information wherever it flows.

² [Privacy Act Review – Discussion Paper \(oaic.gov.au\)](https://www.oaic.gov.au/privacy-act-review/discussion-paper)

We consider the review provides an opportunity to enhance effective regulation, and provide a fair and flexible privacy framework, capable of meeting the challenges of rapidly evolving, global digital markets – one that, consistent with community expectations, protects privacy rights, ensures entities are accountable for the personal information they hold, and builds public trust to support a successful economy.

The Privacy Legislation Amendment (Enhancing Online Privacy and Other Measures) Bill 2021 included some measures that would increase the OAIC's effectiveness and strengthen Australians' privacy protection: including draft provisions relating to alignment of the penalties under the Privacy Act with those under the Competition and Consumer Law, infringement notices, information sharing and simplified extraterritorial application of domestic privacy law. We seek an opportunity to meet with you about these and other procedural measures for consideration for introduction by government.

How we acquit our functions: international and domestic cooperation using the full range of regulatory tools

Strategically and operationally, the OAIC cooperates with other domestic and international regulators and Commonwealth, State and Territory agencies. Globally interoperable data protection laws and enforcement are increasingly important protections for all consumers online, while reducing unnecessary burdens on business. We collaborate to ensure that the Australian digital economy and innovation is supported through a strong foundation in privacy and data protection, while bracing Australia's data protection standing in relation to international trade agreements.

Key features of the OAIC's international strategy³ include:

Global Privacy Assembly

- I hold leadership positions in the global forum of data protection and privacy regulators – the Global Privacy Assembly (GPA) as a member of the [GPA Executive Committee](#) and the inaugural chair of the Strategic Direction Sub-Committee.
- The OAIC also co-chairs the GPA's Digital Citizen and Consumer Working Group, which is focussed on promoting regulatory cooperation between the privacy and consumer protection and competition regulatory spheres.
- The OAIC also provides leadership through the development and sponsorship of resolutions adopted by the GPA. Most recently the OAIC authored resolutions on [Facial Recognition Technology](#), [Notifiable Data Breach best practice](#), and [cross-regulatory cooperation with other regulators](#). These resolutions allow the OAIC to influence global debates to strengthen protections for Australians' personal information so that they may confidently participate in today's digital world
- The OAIC also participates in a number of GPA working groups, which facilitate collaboration with other GPA members on key policy areas and enforcement.

³ [OAIC international strategy 2020–2021 - Home](#)

Asia Pacific Privacy Authorities Forum

- The OAIC was a founding member of the [Asia Pacific Privacy Authorities Forum](#) (APPA), which is the regional network of privacy regulators in the Asia Pacific.

International Conference of Information Commissioners

- The OAIC participates in the [International Conference of Information Commissioners](#) (ICIC) which connects Information Commissioners, Ombudspersons and other bodies charged with overseeing the implementation of access to public information legislation, to foster the protection and promotion of access to public information.
- The OAIC authored the first resolution of the Conference, on [proactive publication of information relating to the COVID-19 pandemic](#).

Bilateral relationships

- Personal information data flows do not conform to geographical boundaries, and the OAIC has enhanced its global influence through MOUs with Singapore, the UK Information Commissioner's Office (ICO) and the Irish Data Protection Commission. The OAIC is also a member of international cross border enforcement arrangements, such as the [GPA Global Cross Border Enforcement Cooperation Arrangement](#), and the APEC Cross Border Privacy Enforcement Arrangement. These arrangements have supported joint regulatory initiatives including between the OAIC, Canada and the US Federal Trade Commission.
- The OAIC has recently finalised a joint investigation with the UK ICO into the information handling practices of Clearview AI Inc. This investigation was conducted under our MOU with the UK ICO and GPA Global Cross Border Enforcement Cooperation Arrangement.
- The OAIC also seeks to build the capacity of FOI regimes in the Asia Pacific through engagements with countries such as Samoa and the Philippines.

Key features of the OAIC's domestic collaboration include:

Domestically, the OAIC is a co-regulator of the Consumer Data Right (CDR) with the ACCC, and, working with ACCC, Treasury and the Data Standards Board, has supported its expansion and integrity through policy, advice, educative, compliance, monitoring and enforcement statutory roles.

We have strengthened our domestic collaboration and influence as founding members of the Digital Platforms Regulators Forum (DP-Reg), through which the OAIC, ACCC, ACMA and eSafety work together for the effective regulation of digital platforms⁴. We have close engagement with the Office of the National Data Commissioner through my role on the National Data Advisory Council as well as in relation to intersections between our offices resulting from the passage of the *Data Availability and Transparency Act 2022*. We have also been instrumental in the establishment of a Cyber Regulators Group, which facilitates cooperation of domestic regulators with a role in cyber resilience and enforcement.

⁴ [Addressing online harms central to Digital Platform Regulators Forum - Home \(oaic.gov.au\)](#)

The OAIC also engages with domestic privacy and information access regulators, to influence the development of policies, practices and regulatory activities to support consistent national privacy and information access rights for all Australians.

Regulatory posture:

The complexity of personal information flows in the digital economy and the significant information asymmetry between digital platforms and individuals necessitates less reliance on the traditional individual complaint-based mechanisms for addressing privacy risks and harms, requiring increased proactive investigation and enforcement activity. The OAIC has increased its capability for a stronger enforcement posture over the past three years through recruitment, training, restructure and operational support. This has resulted in increased regulation of the digital ecosystem, demonstrated through outcomes such as the commencement of civil penalty proceedings in the Federal Court against Facebook Inc and Facebook Ireland⁵ (for the first time in the OAIC's history), and binding determinations regarding global companies use of facial recognition technologies such as Clearview AI⁶ and 7-Eleven⁷. The changed enforcement posture and focus on global, digital and significant privacy risks and harms is more expensive than the traditional complaint-handling dispute resolution approach of the office. At the same time, there is consistently high engagement from the community in the OAIC's statutory privacy complaint handling functions.

Budget and staffing

There is an opportunity for government to consider the future capability and capacity required to position the federal privacy and information access regulator to meet community expectations within the domestic and international digital economy and the existing and foreshadowed Commonwealth integrity framework.

The OAIC's funding for privacy functions was increased from 2019-20 with additional funding provided for specific privacy regulatory programs through short-term, terminating measures. Significant funding pressure is expected with the cessation of terminating funding in 2022-23 and 2023-24, reducing the OAIC's budget in 2024-25 by 43% as compared to 2022-23.

With the exception of approximately \$1M funding provided in the 2020-21 Budget for the FOI Commissioner and 3 staff, the OAIC's FOI funding has remained relatively static since 2017-18. During the same period the OAIC experienced significant yearly increases to the volume of FOI work. Prior to the proposed disbandment of the OAIC in 2014-15, the FOI funding was \$4.7M and we received 373 IC review applications. In 2021-22 the OAIC has \$3.5M in FOI funding and expects to receive in excess of 1800 IC review applications.

Statistics - FOI

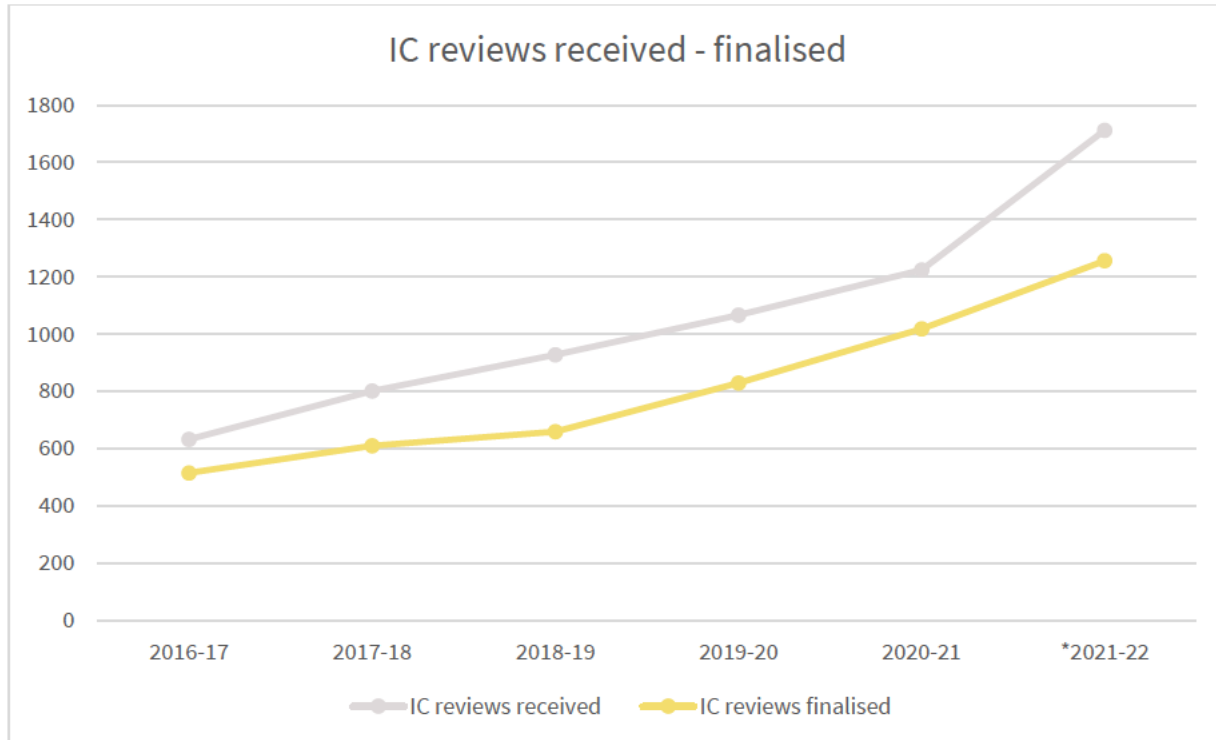
The OAIC's most critical budget pressure relates to its FOI functions. The office continues to receive year-on-year increases in the number of Information Commissioner (IC) reviews requested. Over the

⁵ [Commissioner launches Federal Court action against Facebook - Home \(oaic.gov.au\)](https://www.oaic.gov.au/press-releases/2021/05/commissioner-launches-federal-court-action-against-facebook)

⁶ [Commissioner initiated investigation into Clearview AI, Inc. \(Privacy\) \[2021\] AICmr 54 \(14 October 2021\) \(austlii.edu.au\)](https://www.austlii.edu.au/au/other/dfat/special/privacy/commissioner-initiated-investigation-into-clearview-ai-inc-privacy-2021-10-14)

⁷ [Commissioner initiated investigation into 7-Eleven Stores Pty Ltd \(Privacy\) \(Corrigendum dated 12 October 2021\) \[2021\] AICmr 50 \(29 September 2021\) \(austlii.edu.au\)](https://www.austlii.edu.au/au/other/dfat/special/privacy/commissioner-initiated-investigation-into-7-eleven-stores-pty-ltd-privacy-2021-10-12)

same period, and without additional resources, we increased IC review finalisations. As at 1 May 2022, we have finalised 1187 IC reviews in 2021-22. While the majority (70%) of these matters are finalised within 120 days, the number of IC reviews on hand over 12 months old continues to increase (from 81, or 14% in 2017-18 to 667, or 52% in 2020-21). Older matters are those that cannot be resolved through early resolution processes, and generally progress to a decision under s 55K of the FOI Act.



*The 2021-22 figures were from 1 June 2021 to 24 May 2022.

The number of FOI complaints has also increased. In 2016-17 the OAIC received 36 FOI complaints and finalised 18. In 2020-21 we received 151 FOI complaints and finalised 174. As at 1 May 2022, we have received 172 complaints this financial year.

Since the proposed disbandment of the OAIC in 2014-15, while operating the function on a significantly reduced budget, the IC review caseload has increased by a factor of 5 and the FOI complaint caseload by a factor of more than 6.6.

The OAIC has implemented, and will continue to implement, efficiencies to further improve productivity and address the volume of incoming work, within the resources available to us. However, efficiencies cannot keep pace with the continuing rise in the volume and complexity of the work, nor can efficiency measures effectively manage the entrenched and complex matters that are not resolved through early resolution processes.

The OAIC continues to prioritise the prevention of harm to Australians and support of the privacy and information access rights that underpin a vibrant democracy and economy. We have pivoted to a stronger enforcement posture in response to the increased risk to Australians' data resulting from our engagement in the global digital economy, and leveraged our international standing to protect Australians' data wherever it flows. Our ability to continue to have domestic and international impact in relation to policy, education, compliance and to take enforcement action through the courts which can take a number of years, is, however, impacted by our current baseline funding position.

Overview of relevant speeches, media releases and opinion pieces since 2019

Speech	Topics/key points
<p>Media release: ‘Appointment as Attorney-General of Australia’, June 2022</p> <p>Keywords: priorities for AG portfolio</p>	<ul style="list-style-type: none"> • Discusses priorities including: <ul style="list-style-type: none"> ○ ‘first and foremost is the need to repair and strengthen the keystone of our democratic system – the rule of law ○ ‘legislating before the end of this year Labor’s commitment to the establishment of a powerful, transparent and independent national anti-corruption commission ○ ‘restoring integrity to the process of appointments’ in the portfolio by returning to the transparent, merit-based system we practiced when last in government, including for positions such as those on the Administrative Appeals Tribunal and the Australian Human Rights Commission ○ working closely with Indigenous Affairs Minister Linda Burney to put a Voice to Parliament in the Constitution.’
<p>Speech: Australian Bar Association Conference 2022, April 2022</p> <p>Keywords: National Anti-Corruption Commission; Labor election promises</p>	<ul style="list-style-type: none"> • Vision for the future – noted priorities as: <ul style="list-style-type: none"> ○ ‘restoring integrity to the process of appointments in the portfolio by returning to the transparent, merit-based system for appointments we practiced when last in government, including for positions on the AAT and for commissioners of the Australian Human Rights Commission ○ ‘getting on the with the work of implementing the recommendations of Sex Discrimination Commission Kate Jenkins’ Respect@Work Report, including a positive duty on employers to prevent sexual harassment in their workplaces ○ ‘working to strengthen the legal assistance sector, in part with respect to its resourcing, but also in seeking to reduce the administrative and bureaucratic burdens the sector appears to have been increasingly mired in over recent years ○ ‘returning to the process of law reform in other areas which have been neglected, including native title, copyright, privacy, whistleblower

	<p>protection, defamation and freedom of information</p> <ul style="list-style-type: none"> ○ 'progressing a referendum to put a Voice to Parliament in the Constitution and establishing a Makarrata Commission to work with the Voice to Parliament on a national process for Treaty and Truth-telling ○ 'establishing a National Anti-Corruption Commission.'
<p>Media release: 'Morrison's move to cloak National Cabinet in secrecy exposed', September 2021</p> <p>Keywords: National Cabinet, freedom of information</p>	<ul style="list-style-type: none"> • Senate inquiry into the COAG Legislation Amendment Bill 2021 • 'the Australian people have every right to be kept informed about what the federal government is doing in their name, and with their money'
<p>Opinion piece: 'A thousand days since Morrison's promise, there's still no Anti-Corruption Commission', <i>The New Daily</i>, September 2021</p> <p>Keywords: National Anti-Corruption Commission</p>	<ul style="list-style-type: none"> • 'Labor, in government, will establish a powerful, transparent and independent national anti-corruption commission.' • 'Labor's National Anti-Corruption Commission will operate as a standing Royal Commission into serious and systemic corruption in the federal government. It will have a broad jurisdiction to investigate and hold to account Commonwealth ministers, public servants, statutory office holders, government agencies, parliamentarians, personal staff of politicians and other Commonwealth public officials.'
<p>Speech: 'Adjournment Speech - National Archives', June 2021</p> <p>Media release: 'Australia's precious heritage disappearing as Morrison dithers on Archives', June 2021</p> <p>Keywords: National Archives funding; transparency</p>	<ul style="list-style-type: none"> • The Australian Government's delayed release of the Tune Review report • The need for funding to 'preserve our nation's irreplaceable historical records' • 'Labor welcomes the campaign by over 150 leading Australian writers, researchers and thinkers calling for the National Archives of Australia to be saved from the Morrison Government's wanton neglect.'
<p>Media release: 'Media freedom still at risk as hopeless government again fails to act', May 2021</p> <p>Keywords: media freedom</p>	<ul style="list-style-type: none"> • Conclusion of Senate Inquiry into Press Freedom that existing Australian law does not adequately protect freedom of the press • 'A strong and independent media is vital to holding governments and oppositions to account and to inform the Australian public.' • 'Labor will continue to fight to defend and strengthen press freedom and the public's right to know.'

<p>Media release: ‘Ombudsman’s report highlights the need for greater oversight’, April 2021</p> <p>Keywords: Telecommunications (Interception and Access) Act</p>	<ul style="list-style-type: none"> Findings that ACT Policing have had ‘a cavalier approach to exercising telecommunications data powers’ highlight the need for the government to urgently act on changes to metadata laws, as recommended by the bipartisan Intelligence and Security Committee Labor called on the government to implement the Committee’s bipartisan recommendations, including by ensuring that: <ul style="list-style-type: none"> ‘only officers who have completed a compulsory training program and who have the requisite experience, knowledge and skills should be authorised to access telecommunications data ‘significant improvements are made to record-keeping and reporting requirements ‘there are national guidelines on the operation of the metadata laws by law enforcement agencies to ensure greater clarity, consistency and security in relation to requests for – and the collection and management of – telecommunications data.’
<p>Media release: ‘Labor asks Information Commissioner to investigate data breach’, September 2020</p> <p>Keywords: data breach; OAIC resourcing and powers</p>	<ul style="list-style-type: none"> Labor requests the OAIC investigate reports that the personal information of more than 35,000 Australians [referred to as held by Zhenhua Data] has been scraped from social media accounts and other sources for potential use by foreign intelligence services ‘The Morrison Government must ensure that the Information Commissioner and her office has the necessary resources and powers to undertake this important task.’
<p>Media release: ‘It’s time for a Royal Commission into Robodebt’, June 2020</p> <p>Keywords: Robodebt</p>	<ul style="list-style-type: none"> Labor calls for a Royal Commission into Robodebt
<p>Speech: ‘Privacy Amendment (Public Health Contact Information) Bill 2020’, May 2020, House of Representatives</p> <p>Media release: ‘COVIDSafe App Privacy Bill’, May 2020</p> <p>Opinion piece: ‘Strong safeguards essential for contact tracing app’, <i>The Australian</i>, April 2020</p>	<ul style="list-style-type: none"> ‘...to be a valuable tool ... Australians must have complete confidence that their privacy is protected and that the data collected by the app will never be used for any purpose other than contact tracing during the current health crisis’ Attorney-General’s privacy-enhancing amendments in response to concerns raised by Labor

Keywords: privacy; COVIDSafe; OAIC resourcing	<ul style="list-style-type: none"> • Resourcing of the OAIC – ‘there is no question in my mind that additional funding is urgently required’ (these comments were made in relation to the OAIC’s ability to fulfil its new COVIDSafe oversight responsibilities) • The need for the government to appoint a full-time and properly resourced privacy commissioner.
<p>Speech: ‘The assault on truth and accountability in Australian politics’, January 2020, delivered at The Wheeler Centre</p> <p>Keywords: accountability</p>	<ul style="list-style-type: none"> • Decline in trust and respect for both politicians and Australia’s political institutions • Discusses extension of contempt for parliamentary accountability mechanisms to FOI laws • Discusses need to strengthen freedom of the press and ‘fight to restore the Australian public’s right to know what their government is up to with their money and their rights and freedoms behind closed doors’
<p>Speech: ‘Telecommunications (Interception and Access) Amendment (Assistance and Access Amendments Review) Bill 2019’, November 2019, House of Representatives</p> <p>Keywords: Telecommunications (Interception and Access) Act</p>	<ul style="list-style-type: none"> • The opportunities presented by compliance with the US CLOUD Act and concerns that the Assistance and Access Bill did not afford ‘robust, substantive and procedural protections’. • Labor’s belief that the Attorney-General or a senior police officer should not be given the power to compel an innocent person including a law-abiding Australian technology company unconnected to an investigation to provide technical assistance to a government agency without a warrant.
<p>Speech: ‘PJCIS Report - Identity-matching Services Bill 2019’, November 2019</p> <p>Keywords: Identity-matching Services Bill 2019</p>	<ul style="list-style-type: none"> • PJCIS report declines to recommend the passage of the Identity-Matching Services Bill 2019, in part due to insufficient limitations and safeguards • Notes ‘the potential implications of these two new facilities for the privacy of all Australians are profound’ and concerns raised about ‘the potential for such a service to be used for mass or blanket surveillance’ • Calls for amendments to the bill to ensure that the services cannot be used for mass surveillance activities
<p>Speech: ‘Time’s up: Why Australia needs a National Integrity Commission’, September 2019, delivered at National Press Club</p>	<ul style="list-style-type: none"> • Labor’s commitment to establishing a National Integrity Commission ‘with the independence, powers and resources of a

Keywords: National Integrity Commission; open government	<p>standing royal commission into corruption in the federal public sphere'</p> <ul style="list-style-type: none"> • Labor's commitments in government to improving Commonwealth integrity partnerships, including signing up Australia to the Open Government Partnership, introduction of the Public Interest Disclosure Act and reforms to strengthen FOI laws
<p>Speech: 'The political challenges of reform', August 2019, delivered at Summit for Press Freedom</p> <p>Keywords: media freedom; freedom of information</p>	<ul style="list-style-type: none"> • Labor's commitment to upholding the freedom of the press and the public's right to know 'as fundamental principles underpinning Australia's democracy' • Need for reform in area of press freedom
<p>Speech: 'Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018', February 2019, House of Representatives</p> <p>Key words: Telecommunications (Assistance and Access) Act; national security; intelligence</p>	<ul style="list-style-type: none"> • Amendments to Access Bill following Intelligence Committee recommendations • Called for new powers introduced by the Access Act to be subject to greater judicial oversight • 'We believe that strong and effective oversight does not undermine our national security. It enhances it. Public trust and confidence in our security and intelligence agencies are best ensured through strong and rigorous oversight and scrutiny.'
<p>Speech: 'Why Australia needs a National Integrity Commission', January 2019, delivered to Queensland University of Technology Brisbane</p> <p>Keywords: National Integrity Commission</p>	<ul style="list-style-type: none"> • Labor's plan for a National Integrity Commission and the question of corruption in Australian public life more generally



Memorandum

To	Elizabeth Hampton
From	s22(1)(a)(ii)
Copies	[Copies]
File ref	D2022/016269
Date	2 August 2022
Subject	Speaking notes for meeting with AGO on 4 August 2022

Key messages/talking points

Privacy Act Review

- Our recommendations to the Privacy Act Review were aimed at strengthening the privacy framework to ensure fair information handling and prevent harm in the digital age, protect fundamental human rights, and build public trust to support a successful data-driven economy.
- At the centre of this are three key reforms:
 1. An overarching standard that personal information handling is fair and reasonable
 2. Enhanced organisational accountability requirements
 3. An enforcement framework that supports strategic and proportionate regulation

Fair and reasonable

[Note to Libby: Refer to fair and reasonable infographic: [D2021/022136](#)]

- An overarching standard that personal information handling is fair and reasonable would establish a positive duty on entities to proactively ensure their activities are appropriate and raise the standard of data handling across the economy
- We consider that this new obligation would help to remove the privacy burden from individuals by providing the same assurances to people who share their personal data as those provided through well-established workplace and consumer safeguards.
- This will allow individuals to engage with products and services with confidence that – like a safety standard – privacy protection is a given.

- It would also prevent consent being used to legitimise the handling of personal information in a manner that, objectively, is unfair or unreasonable.
- To provide greater guidance for regulated entities about the information handling practices that will meet regulatory and community standards we recommended the introduction of a restricted and prohibited practices regime
 - The restricted practice regime would require entities that engage in certain activities set out in the Act to take reasonable steps to identify privacy risks associated with the act or practice, such as by conducting a thorough PIA, and then implemented measures to mitigate those risks.
 - Where an entity is able to identify the privacy risks associated with a restricted practice and mitigate them to a reasonable extent, this activity will be fair and reasonable.
 - We've also proposed that entities undertaking a restricted practice should be required to conduct a periodic independent audit to ensure that they have identified the privacy risks associated with these activities and taken appropriate steps to mitigate those risks.
 - The prohibited practices regime would prohibit certain practices entirely, subject to appropriate public interest exceptions, for example, the commercial use of automated biometric identification systems.

Organisational accountability

- We also recommended enhancing the existing accountability requirements under the Act by introducing express obligations to
 - implement a risk-based privacy management program
 - adopt a privacy by design approach
 - appoint a privacy officer or officers
 - provide the Commissioner, on request, with evidence of the steps taken to ensure compliance with the APPs and any registered APP code.
- These measures will help entities to have the necessary structures, policies and procedures in place to properly identify and assess the impacts of their information handling for the purposes of considering whether they are fair and reasonable.

Enforcement framework

- Our recommendations in relation to the OAIC's enforcement framework equip the Commissioner with the regulatory tools and resources to enable them to take a more enforcement-focused approach to regulation, in line with community expectations.
- Key to this is a simpler civil penalties regime with a single civil penalty for an interference with privacy which facilitates a more flexible approach to privacy enforcement. This should be supported by infringement notices for an interference with privacy as a quick and cost-effective way to stamp out non-compliant behaviour and have a deterrent effect without the need for court proceedings.

Broader reforms

- *[Note to Libby: Refer to infographic with overview of recommendations: [D2021/022133](#)]*

- These key reforms are part of the broader 113 recommendations we have made to the Privacy Act Review. A summary of the recommendations can be found at Attachment A.
- The recommendations in our submission to the Discussion Paper can be grouped into four key themes to ensure our privacy framework is efficient and effective at protecting privacy in an increasingly digitised world:
 - Increased accountability for regulated entities
 - Higher standards of personal information handling to support privacy self-management
 - A contemporary regulatory framework
 - Harmonisation and global interoperability to ensure our laws continue to connect around the world.
- We've already discussed the key aspects of **increased accountability for regulated entities** through the fair and reasonable and organisational accountability measures
- These support **higher standards of personal information handling** that gives individuals ongoing control of their information including
 - recommendations to enhance notice and consent requirements of the Privacy Act
 - proposals to introduce rights to object to certain handling of personal information and rights to erasure.
- Linked to this are greater access to justice options for individuals who have experienced a privacy interference including the introduction of a direct right of action and statutory tort for serious invasions of privacy.
- The **contemporary regulatory framework** will be achieved through the enforcement framework changes described above as well as enhanced legislative flexibility to provide greater clarity and certainty where required. To this end, we recommend enhancing code-making powers while maintaining the existing principles-based approach to the Australian Privacy Principles.
- Finally, our recommendations promote harmonisation and global interoperability through:
 - a clear framework for overseas data flows to ensure data is protected wherever it flows, with a seamless process for entities to protect Australian's data offshore including the development of standard contractual clauses and certification
 - consistent protections across the economy that align with overseas laws so that Australian businesses can receive personal information from overseas companies and remain competitive
 - greater alignment of core concepts internationally and domestically.



Organisational accountability

FOIREQ23/00023 034

Actions and controls implemented to comply, and demonstrate compliance, with the privacy regulatory framework. It is essential that entities establish internal privacy management processes to effectively identify, assess and mitigate current and emerging privacy risks and harms associated with their personal information handling activities.



APP obligations

Compliance with APP obligations, including that the information handling is fair and reasonable

Restricted practices

Practices identified as having higher privacy risk where reasonable steps must be taken to:

Identify privacy risks through a PIA

Implement measures to mitigate risks – informed by OAIC guidelines or required by codes

Undertake independent audits to ensure the effectiveness of the measures

Prohibited practices

Practices identified as having privacy risks that are generally unable to be adequately mitigated.

Practice can only be undertaken within the relevant public interest exception and in the manner prescribed by regulations

Point at which privacy risk unable to be mitigated

Low privacy risk

High privacy risk

OAIC

Submission to Privacy Act Review Discussion Paper



-  key elements
-  Organisational accountability
-  A contemporary approach to regulation
-  Enabling privacy self-management
-  Global interoperability

OAIC view on the regulation of FRT and Ed Santow's proposed model laws

- Ed Santow has sent to the OAIC:
 - a draft report on the regulation of FRT ('ERG Draft Review Sections'): [D2022/014935](#)
 - flowcharts that summarise the operation of the draft model law ('FRIA and review flowcharts'): [D2022/014934](#)
- These are not yet released publicly and have been provided to the OAIC for early consideration.
- The report provides an outline of a model law, it does not set out draft legislation. The goals of the report are to address the risks of harm associated with FRT, while providing a legal framework that encourages positive innovation
- The FRT model law project is funded via a [partnership with Microsoft](#) – "The Responsible Technology Project - Facial recognition: towards a model law".
- The model law proposed a risk-based approach, involving two steps:
 - assess the relative level of risk associated with the FRT application, by reference to a range of factors that assist in evaluating the likely human rights impact
 - apply a set of legal requirements, which are calibrated to the assessed risk level of the particular FRT application
- The model law's mechanism for undertaking this two-step process requires FRT developers and users to undertake and register, and/or agree to be bound by, the outputs of a facial recognition impact assessment (FRIA).
- For each risk level – base, elevated and high – attaching to a permissible FRT application, a set of specific legal requirements will apply. These legal requirements will apply via existing law, such as the Privacy Act, as well as new provisions set out in the model law itself.
- A more detailed summary of the FRT model law proposal can be found here [D2022/014826](#) and at Attachment B.

Key points

- Overall, the OAIC is supportive of the project, and we consider that aspects of the FRT model law align with our position on privacy law reform and could usefully be incorporated into the Privacy Act.
- We consider there may be a risk that the model law project, in addition to the other ongoing regulatory processes such as the Privacy Act review, could lead to the perception of a crowded regulatory landscape.
- This narrative may provide space for industry and others to push back against various efforts to address the risks and harms associated with these technologies.
- To help mitigate this risk, we consider there is the opportunity to leverage and align with the terminology in the Privacy Act and the direction of the broader privacy reforms.
- Finding these possible areas of alignment may assist to reduce duplication and ensure consistency and clarity for regulated entities and the community.
- We provided comments to Professor Santow and his team addressing three key issues:
 1. Intersection with Privacy Act Review proposals
 2. Leveraging existing frameworks and processes
 3. Regulator's approval role.

Intersection with Privacy Act Review proposals

- In the [OAIC's submission](#) to the review, we were supportive of the introduction of a requirement to handle personal information fairly and reasonably, and a restricted and prohibited practices regime.
- A requirement to handle personal information fairly and reasonably will require entities to proactively ensure their activities are appropriate. It will set a baseline standard of information handling that is flexible and able to adapt as circumstances and technology changes.
- We can see that the proposed restricted practices regime has parallels with the proposed FRT model law framework in that first entities need to take reasonable steps to identify risks and then implement measures to mitigate those risks (e.g. conduct an initial PIA and then periodically after that).
- Similarly, we have recommended that the prohibited practices regime ban the commercial use of automated biometric identification systems and include the ability to prescribe additional prohibitions by regulation.
- These proposed reforms acknowledge some of the limitations with the consent model. These mechanisms are limited in their ability to restrain harmful activities like the inappropriate use of FRT.
- It is also important to note that we envision these requirements would apply regardless of whether a particular act or practice is required or authorised by law. Entities would still need to ensure the proposed use of FRT is still fair and reasonable in the circumstances, and to comply with the requirements of the restricted and prohibited practices regimes.

Leveraging existing frameworks and processes

- We consider the proposed Facial Recognition Impact Assessment (FRIA) process could potentially be incorporated into other assessment frameworks or risk management processes. For instance, the same outcome may be able to be achieved through the existing PIA process.
- There would potentially need to be an educative piece or legal requirement to consider specific FRT matters as part of the PIA to ensure that the particularity for the FRT context is not lost.

Regulator's approval role

- We have some concerns regarding the role of the regulator in the proposed risk assessment process.
- The requirement to register assessments with the regulator could potentially be seen as implicit endorsement or approval if the regulator does not identify and raise concerns with the registered assessment.
- There is also the possibility of the perception of bias should concerns be raised or complaints be brought in the future.
- The model law also proposes that the regulator should have the authority to authorise "high-risk" FRT applications if the FRT user demonstrates that potential human rights restrictions can be managed effectively.
- This would be a significant shift in the position the OAIC has taken in relation to certification-type mechanisms in the past. This may provide assurance to regulated entities, but we consider the regulator should not perform a certification or approval role in this process to maintain independence.
- To reduce the impost on both industry and the regulator, alternative mechanisms that may provide a level of transparency and assurance could include requirements

Attachment A:

Review of the Privacy Act

- The Attorney-General's Department (AGD) is conducting a review of the Privacy Act.
- On 25 October, AGD released a Discussion Paper seeking more specific feedback on preliminary outcomes, including possible options for reform and consultation closed on 10 January.
- The discussion paper raises important issues including what additional protections should be present in our Privacy Act, including a requirement for collection, use and disclosure of personal information to be fair and reasonable, the scope of the Privacy Act and the powers of the Information Commissioner to respond to breaches of privacy.
- AGD have published 206 submissions in response to the discussion paper, including our submission. AGD are currently developing potential recommendations for reform with a view to providing a report to Government later this year. We understand AGD are also planning to undertake further targeted consultation where necessary while formulating these recommendations.
- We made a 230-page [submission](#) to the Privacy Act Review that made 113 recommendations

Fair and reasonable, and prohibited and restricted practices recommendations

Recommendation 33 – Adopt proposal 10.1 to amend APP 3 and APP 6 to require that the collection, use or disclosure of personal information must be fair and reasonable in the circumstances.

Recommendation 34 – Adopt proposal 10.2 to introduce legislated factors relevant to whether a collection, use or disclosure of personal information is fair and reasonable in the circumstances.

Recommendation 35 – Include the following legislated factors:

- Whether an individual would reasonably expect the personal information to be collected, used or disclosed in the circumstances
- The kinds, sensitivity and amount of personal information being collected, used or disclosed
- Whether an individual is at foreseeable risk of unjustified adverse impacts or harm as a result of the collection, use or disclosure of their personal information
- Whether the collection, use or disclosure is reasonably necessary to achieve the functions and activities of the entity
- Whether the individual's loss of privacy is proportionate to the benefits
- If the personal information relates to a child, whether the collection, use or disclosure of the personal information is in the best interests of the child

- Whether the collection, use or disclosure of personal information is lawful
- Whether the collection, use or disclosure of personal information will have a foreseeable impact on the public interest in privacy.

Recommendation 36 – Include the following issues in the explanatory memorandum to this amendment as relevant when considering the factor about ensuring the individual's loss of privacy is proportionate to the benefits:

- whether the collection, use or disclosure intrudes to an unreasonable extent upon the personal affairs of the affected individual
- whether there are less intrusive means of achieving the same ends at comparable cost and with comparable benefits
- any actions or measures taken by the entity to mitigate the impacts of the loss of privacy on the individual.

Recommendation 37 – Adopt proposal 10.1 alongside the existing APP 3.1, 3.2 or 6.2(a) requirements.

Recommendation 38 – Subsume APP 3.5 within the overarching fair and reasonable requirement of proposal 10.1.

Recommendation 39 – Ensure that proposal 10.1 applies to collections, uses and disclosures of personal information.

Recommendation 40 – Clarify that the fair and reasonableness test applies in addition to where an individual has consented to the specific information handling under APPs 3.3 and 6.1(a).

Recommendation 41 – Adopt proposal 10.3 to include an additional requirement in APP 3.6 to the effect that where an entity does not collect information directly from an individual, it must take reasonable steps to satisfy itself that the information was originally collected from the individual in accordance with APP 3.

Recommendation 42 – Consider alternative solutions for meeting the objectives of proposal 10.4, including adopting:

- the OAIC's recommendation to include a new provision that would require APP entities to have regard to any guidelines issued by the Commissioner when carrying out their functions and activities under the Privacy Act
- the OAIC's recommendation to amend APP 3 to expressly require entities to determine, at or before the time of collection, each of the known specific purposes for which the information is to be collected, used or disclosed and to record those purposes
- proposal 10.1
- the additional enforcement powers proposed in the Discussion Paper and recommended in Part 24 of this submission.

Recommendation 43 – Adopt option 1 of proposal 11.1 to introduce a restricted practice regime that requires APP entities that engage in proscribed practices to take reasonable steps to identify privacy risks and implement measures to mitigate those risks.

Recommendation 44 – Introduce requirements for APP entities undertaking restricted practices to seek a periodic independent audit of the privacy risks identified in relation to the activity and measures implemented to mitigate those risks.

Recommendation 45 – Introduce the power for the Commissioner to create an APP code clarifying the steps required to mitigate risks for specific restricted practices, modelled on proposal 3.1 which allows the Commissioner to make an APP code on the direction of the Attorney-General.

Recommendation 46 – Adopt the following restricted practices:

- Direct marketing, including online targeted advertising
- The collection, use or disclosure of sensitive information on a large scale
- The collection, use or disclosure of children’s personal information on a large scale
- The collection, use or disclosure of location data on a large scale
- The sale of personal information
- The collection, use or disclosure of personal information for the purposes of online personalisation and delivering targeted advertising
- The collection use or disclosure of personal information for the purposes of automated decision making with legal or significant effects
- Any collection, use or disclosure that is likely to result in a high privacy risk or risk of harm to an individual.

Recommendation 47 – Introduce prohibited practices into the Privacy Act, subject to appropriate public interest exceptions including in relation to:

- Profiling, online personalisation and behavioural advertising using children’s personal information
- Inappropriate surveillance or monitoring of an individual through audio or video functionality of the individual’s mobile phone or other personal devices
- The collection, use or disclosure of personal information that is unlawful
- The commercial use of automated biometric identification systems
- Personal information scraping from online platforms

Recommendation 48 – Introduce prohibited practices in relation to the scraping of personal information through a requirement that online platforms and other appropriate websites must proactively take reasonable steps to prevent it.

Recommendation 49 – Introduce the ability to prescribe additional prohibitions by regulation.

Organisational accountability recommendations

Recommendation 74 – Amend APP 1 to expressly require APP entities to:

- implement a risk-based privacy management program

- implement a 'privacy by design' approach
- appoint a privacy officer or privacy officers
- provide the Commissioner, on request, with evidence of the steps taken to ensure compliance with the APPs and any registered APP code.

Recommendation 75 – Include a note in the explanatory memorandum that will accompany the amending Bill that PIAs are central to facilitating a 'privacy by design' approach.

Recommendation 76 – Amend APP 3 to expressly require entities to determine, at or before the time of collection, each of the known specific purposes for which the information is to be collected, used or disclosed and to record those purposes.

Enforcement recommendations

Recommendation 88 – Adopt a modified version of proposal 24.1 that:

- introduces a single civil penalty under s 13 with a maximum fine commensurate with the increased penalties proposed in schedule 2 of the exposure draft of the OP Bill.
- repeals s 13G
- introduces a broader infringement notice power for any interference with privacy containing a tiered approach to penalty amounts, commensurate with the infringement notice framework of the ACCC.

[Note to Libby: If this recommendation is not adopted, we expressed support for proposal 24.2 in principle (a tiered model of civil penalties) but suggest removing the 'repeated' threshold from s 13G and support incorporating further guidance on what is a 'serious' interference with privacy into the legislation.]

Recommendation 89 – Adopt proposal 24.3 to make civil penalty provisions in the Privacy Act subject to investigation under Part 3 of the Regulatory Powers Act in addition to the Commissioner's current investigation powers.

Recommendation 90 – Make assessments under the Privacy Act subject to monitoring under Part 2 of the Regulatory Powers Act in addition to the Commissioner's current assessment powers.

Recommendation 91 – Adopt proposal 24.4 to allow the Commissioner to undertake public inquiries and reviews into specified matters.

Recommendation 92 – Adopt proposal 24.5 to amend paragraph 52(1)(ii) and 52(1A)(c) to require an APP entity to identify, mitigate and redress actual or reasonably foreseeable loss.

Recommendation 93 – Adopt proposal 24.6 to give the Federal Court the express power to make any orders it sees fit.

Recommendation 94 – Adopt proposal 24.7 to introduce an industry funding model for the OAIC that is supported by appropriate supplementary budget appropriations for functions and activities not funded by a levy.

Recommendation 95 – Adopt proposal 24.8 to amend the AIC Act to increase transparency about the outcome of all complaints lodged including numbers dismissed under each ground.

Recommendation 96 – Adopt elements from each of the options in proposal 24.9 to amend the current regulatory framework to enable the OAIC to shift to a more strategic, proactive regulator, subject to the considerations outlined in this submission.

Recommendation 97 – Amend s 40(1) to replace the words ‘shall investigate’ with ‘may investigate’ and clarify in the Explanatory Memorandum that this change is to allow the Commissioner to exercise discretion to investigate based on factors such as the Commissioner’s regulatory policies and priorities, whether the resources needed to investigate a complaint are proportionate to the likely outcome or remedy available and whether the substance of the complaint is about matters that fall under the Privacy Act.

Recommendation 98 – Expand s 41(dc) to instances where a complaint has already been adequately dealt with by an EDR scheme.

Recommendation 99 – Ensure that the Commissioner has appropriate powers to decline to investigate a complaint or representative complaint, or continue to investigate a complaint or representative complaint, where the matter is more appropriately dealt with by the courts.

Attachment B:

Summary of draft report on FRT model law

- The report provides an outline of a model law, it does not set out draft legislation.
- The goals of the report are to address the risks of harm associate with FRT, while providing a legal framework that encourages positive innovation

Operation of risk-based model law

- The model law proposed a risk-based approach, involving two steps:
 - o assess the relative level of risk associated with the FRT application, by reference to a range of factors that assist in evaluating the likely human rights impact
 - o apply a set of legal requirements, which are calibrated to the assessed risk level of the particular FRT application
- The model law's mechanism for undertaking this two-step process requires FRT developers and users to undertake and register, and/or agree to be bound by, the outputs of a facial recognition impact assessment (FRIA).
- For each risk level – base, elevated and high – attaching to a permissible FRT application, a set of specific legal requirements will apply. These legal requirements will apply via existing law, such as the Privacy Act, as well as new provisions set out in the model law itself.

Independent review

- The model law will provide for two forms of independent review of the self-assessment of FRT developers and users
 - o The first form of review will be via the regulator.
 - o The second form of review could be initiated by an affected individual or another party lodging a complaint regarding an FRT application with the regulator.

Risk assessment

- The model law requires factors such as purpose, effect and context to be considered individually and in combination to produce an overall human rights risk assessment.
- When an FRT developer or user has completed a FRIA, the following steps then apply:
 - o Where an FRT application is assessed as base-level risk, the relevant FRIA risk assessment must be registered with the regulator.
 - o Where an FRT application is assessed as elevated or high risk, a second part of the FRIA must be completed by the FRT developer and any FRT user, and ultimately both parts of the FRIA must be lodged with the regulator.

Relevant factors

- The model law provides an inclusive, rather than an exhaustive, list of the factors that are relevant in this risk assessment. The factors expressly referred to in the model law are:
 - o the spatial context for the FRT application
 - o the functionality of the FRT application
 - o whether the use of FRT creates, or contributes to, an AI-informed decision with a legal or similarly significant effect for an individual or group
 - o whether the FRT application is part of an AI-informed decision that is wholly or partially automated
 - o whether affected individuals can provide free and informed consent, or withhold such consent, prior to the use of the FRT application.
- The model law has developed frameworks for assessing risks as moderate, significant or extreme.
- Each risk assessment process would conclude with one of the following outcomes:
 - o If a review of factors indicates the persistence of *moderate* vulnerabilities to rights restrictions, the FRT application should be considered *base risk*.
 - o If a review of factors indicates the persistence of *significant* vulnerabilities to rights restrictions, the FRT application should be considered *elevated risk*.
 - o If a review of factors indicates the persistence of *extreme* vulnerabilities to rights restrictions, the FRT application should be considered *high risk*.

Additional legal requirements

- If an FRT application presents a *base-level risk*, the base legal requirements will apply. These base legal requirements are the minimum legal requirements that apply to all FRT applications used in Australia.
 - o Requirement to complete or register a FRIA, and civil penalties and injunctions available for non-compliance
 - o All FRT applications used in Australia must comply with *Privacy Act*, notwithstanding any other exceptions or exemptions (e.g. small business, political parties). Also notes that this would include universities; public schools; all businesses, including small business operators; media organisations; and political parties.
 - o creation of a technical standard in respect of FRT applications in Australia (FRT Standard) (as subordinate legislation)
- If the FRT application is assessed as an *elevated risk*, the FRT user and developer are each responsible for ensuring adherence to the base legal requirements as well as a set of additional legal requirements. These additional legal requirements aim to address the additional level of human rights risk associated with this particular FRT application.

- FRT users, in addition to FRT developers, will be required under the model law to undertake and register a two-part FRIA. This is critical for transparency and accountability.
- If the FRT application is assessed to be *high risk*, its use would be prohibited unless special or exceptional circumstances exist. High-risk use contexts, where exceptional circumstances can exist, include law enforcement use cases and academic research. Where a relevant exception applies, FRT users and developers are each responsible for ensuring adherence to special legal requirements specific to the type of high-risk use case.

Restriction on human rights

- Even if an FRT application restricts human rights, this could still be justified if the following criteria are satisfied:
 - 1. Does the FRT application restrict only non-absolute rights? Human rights are either absolute or non-absolute. Absolute rights can never be restricted or limited. The right to be free from torture is an example of an absolute right. Non-absolute rights can be restricted in certain circumstances, to accommodate other human rights and legitimate interests. The right to privacy is a non-absolute right, and can be restricted in a number of situations.
 - 2. Is the restriction of a non-absolute right in pursuit of a legitimate aim? Non-absolute rights, such as the right to privacy, may be restricted where the restriction is needed to achieve another legitimate aim – such as to protect freedom of expression or uphold community safety.
 - 3. Is the rights restriction reasonable, necessary and proportionate to achieving the legitimate aim? It would be necessary to show that this particular FRT application, and the way it is used, are an appropriate way of achieving the aim. If, for example, there are clearly other ways of effectively promoting community safety, which do not involve restricting privacy through the use of the FRT application, it would not satisfy this criterion.

Meeting brief

Responsible Asst Commissioner	Rocelle Ago
Responsible Director	s22(1)(a)(ii)
Prepared by	s22(1)(a)(ii)
File ref	D2022/015777
Subject	Meeting with the Hon Mark Dreyfus QC MP, Attorney-General

Meeting details

Day and Date	Monday, 8 August 2022
Time	10.30am
Location	Office of the Hon Mark Dreyfus QC MP
Contact person	s22(1)(a)(ii) Executive Officer & Office Manager
Contact number	s22(1)(a)(ii)

Attendees

[Name of external organisation]

Name	Position
The Hon Mark Dreyfus, QC	MP - Attorney General

OAIC

Name	Position
Angelene Falk	Australian Information Commissioner and Australian Privacy Commissioner
Leo Hardiman	Freedom of Information Commissioner
Elizabeth Hampton	Deputy Commissioner

FOI - Key messages

Key messages/points

1. The OAIC continue to support **integrity, transparency and accountability** of government through:
 - year on year increases to the efficiency with which we acquit our responsibilities under the *Freedom of Information Act 1982* and
 - its work in promoting the proactive disclosure of government information, including through giving access through self-service portals, administrative release schemes and publication of policies and data sets on websites, and taking an Open by Design approach right from the start when developing projects, services and programs (see **Proactive disclosure**).
2. The OAIC also continues to promote mechanisms within the FOI Act to foster greater openness and transparency in government through the **Information Publication Scheme** (IPS), which requires agencies to publish specific categories of information online and encourages agencies to proactively release other information to the public wherever possible. (see **Topic 1: Proactive disclosure**).
3. The OAIC is also planning a series of online and in-person events to engage with the community to mark International Access to Information Day (IAID) held on 28 September 2022 and to also commemorate the 40th anniversary of the FOI Act. The OAIC would like to invite the Attorney-General to provide a short introduction to the webinar panel, or alternatively, if the Attorney-General is unavailable for this event, we suggest requesting his participation in IAID by releasing a statement that confirms his commitment to the principles of open government and the objectives of the FOI Act and encourages agencies and ministers to improve their compliance with the Act (see **Topic 2: IAID**).
4. The OAIC has seen a greater demand for its FOI regulatory functions compared to previous years, in particular, an increase in Information Commissioner (IC) reviews and deemed access refusals. System and process improvements have helped to finalise more matters, particularly in relation to IC reviews, complaints and extension of time decisions. In relation to IC reviews, in 2021-22, 1,384 IC reviews were finalised, which was a 205% increase on the numbers finalised in 2015-16. There is however, a significant, ongoing, growth in IC reviews progressing to decision which must be managed within our existing resource allocation. The OAIC is 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 (see **Topic 3: FOI workload** and **Topic 4: System and process improvements**) .

Topic 1: Proactive disclosure of information

Key messages

1. The OAIC continues to promote the proactive disclosure of government information and have given messages that agencies can take practical steps such as:
 - promoting disclosure in different ways, including through giving access to personal information through self-service portals, administrative release schemes and publication of policies and data sets on websites
 - taking an Open by Design approach right from the start when developing projects, services and programs
 - the appointment of an Information Champion to provide leadership, oversight and accountability necessary to promote and operationalise compliance by an agency with the FOI Act.
2. The OAIC also has promoted the use of particular mechanisms under the FOI Act to foster greater openness and transparency in government, including:
 - The **Information Publication Scheme** (IPS), which requires agencies to publish specific categories of information online and encourages agencies to proactively release other information to the public wherever possible.
 - The OAIC is currently reviewing Part 13 of the FOI Guidelines relating to the Information Publication Scheme.
 - The publication of a **disclosure log** on an agency or minister's website, makes available to the world at large, information that has been requested under the FOI Act. A disclosure log reduces the need for repeated access requests under the Act.
 - In September 2021, the OAIC published a [Disclosure Log Desktop Review Report](#) which examined 38 government agencies to assess their disclosure log compliance and practices.
 - The review found that while most agencies are largely compliant with their disclosure log obligations, some agencies require people to contact them for access to the documents listed on their disclosure log.
 - Our report recommended that agencies and ministers make documents available for direct download from their websites.
 - The OAIC has also used the findings of the review to reissue Part 14 of the FOI Guidelines relating to disclosure logs.

Topic 2: International Access to Information Day

Key Messages

1. We are currently planning a series of online and in-person events to mark International Access to Information Day (IAID) held on 28 September 2022.
2. One of these events is a webinar panel, to be led by the Information Commissioner and FOI Commissioner, discussing a particular topic with various panel members. The topic and panel members are yet to be confirmed.
3. We would like to invite the Attorney-General to provide a short introduction to the webinar panel.
4. Alternatively, if the Attorney-General is unavailable for this event, we suggest requesting his participation in IAID by releasing a statement that confirms his commitment to the principles of open government and the objectives of the FOI Act and encourages agencies and ministers to improve their compliance with the Act.
5. If the Attorney-General is willing to participate, either by providing an introduction to the webinar or making a public statement, we can liaise with his Office and provide further details.

Background

6. The 2022 IAID campaign objectives include:
 - promoting the importance of access to government-held information to support public participation in democracy and build trust in government
 - promoting the role and responsibilities of Australian Government agencies in managing government-held information as a national resource
 - building community awareness of information access rights
 - aligning relevant messaging with the UNESCO 2022 theme
 - supporting a coordinated national approach to marking the day, including sharing campaign materials with other states and territories where relevant
 - introducing the new FOI Commissioner.
7. In a recent [interview on ABC Radio National](#), the Attorney-General discussed the FOI Act and indicated that:
 - Whilst he does not think that reforms to the FOI Act are necessary, he considers that there needs to be a different approach to the implementation of the existing provisions within the FOI Act. This should start with a direction to government to make information as widely available as possible.

- When the Information Commissioner makes a ruling, rather than appealing this to the AAT or the Federal Court, the more appropriate response from government would be to simply accept the ruling because the Information Commissioner has often looked very hard at where the appropriate balance is struck.
- Rather than looking at how little information can be given out, instead agencies should look at how to maximise the amount of government information made available to the public.

Topic 3: FOI workload

Key messages/points

8. There has been considerable increase in the FOI review workload compared to previous years, in particular, an increase in Information Commissioner (IC) reviews and deemed access refusals.
9. System and process improvements have helped to finalise more matters, particularly the early finalisation of IC reviews. In 2021-22, 1,384 IC reviews were finalised, which was a 205% increase on the numbers finalised in 2015-16.
10. There is however, a significant, ongoing, growth in IC reviews progressing to decision which has to be managed within our existing resource allocation.
11. 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.
12. A summary of the increase in the IC workload and FOI complaints workload is at **Attachment A**.

Background

Information Commissioner reviews

IC review applications RECEIVED

13. The increase in **IC review applications received** from 2015-16 to 2021-22 was **283%**

2015-16	2016-17	2017-18	2018-19	2019-20	2020-21	2021-22
510	632	801	928	1,066	1,224	1,955

IC review applications FINALISED

14. The increase in **IC review applications finalised** from 2015-16 to 2021-22 was **205%**

2015-16	2016-17	2017-18	2018-19	2019-20	2020-21	2021-22
454	515	610	659	829	1,018	1,384

IC review applications ON HAND

15. The **number** of IC reviews **on hand** has steadily increased.

<i>As at 30/6/19</i>	<i>As at 30/6/20</i>	<i>As at 31/12/20</i>	<i>As at 30/4/21</i>	<i>As at 30/6/21</i>	<i>As at 25/7/21</i>
850	1,088	1,218	1,291	1,295	1,953

IC reviews – deemed access refusals
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16. The Information Commissioner may also review decisions that are deemed to have been made by an agency or minister where the statutory timeframe was not met.

17. The OAIC has experienced a noticeable trend of increasing numbers of deemed access refusals since 2019-2020. The numbers have nearly tripled from 348 applications in 2019-2020 to 1,105 applications 2021-2022.

18. The Department of Home Affairs (the Department) accounts for the majority of deemed refusal applications. As at 30 June 2022, the OAIC had received 1,022 IC reviews related to the Department of Home Affairs. 884 applications were for review of deemed access refusal applications (nearly 87%).

IC review applications made by Parliamentarians and journalists
--

19. The OAIC continues to receive a number of applications from Parliamentarians and journalists. As at 2 August 2022, the OAIC currently has on hand approximately 46 IC reviews made by current or former Parliamentarians and 249 IC review applications made by journalists.

Age of IC reviews

20. The **age** of IC reviews on hand has steadily increased between 2014-2021 and significant increased between 2021-2022:

Fiscal Year	Open less than 12 Months	Open between 12 and 18 Months	Open Between 18 and 24 Months	Open Between 24 and 36 Months	Open more than 36 Months	Total Open
2014-2015	182	10	11	7	6	216
2015-2016	258	14	-	-	-	272
2016-2017	372	17	1	-	-	390
2017-2018	501	59	17	5	-	582

2018-2019	601	166	68	16	-	851
2019-2020	630	166	175	112	6	1089
2020-2021	630	224	180	200	61	1295
2021-2022	957	224	192	327	169	1869

FOI Complaints

21. The number of FOI complaints received and finalised has also increased.

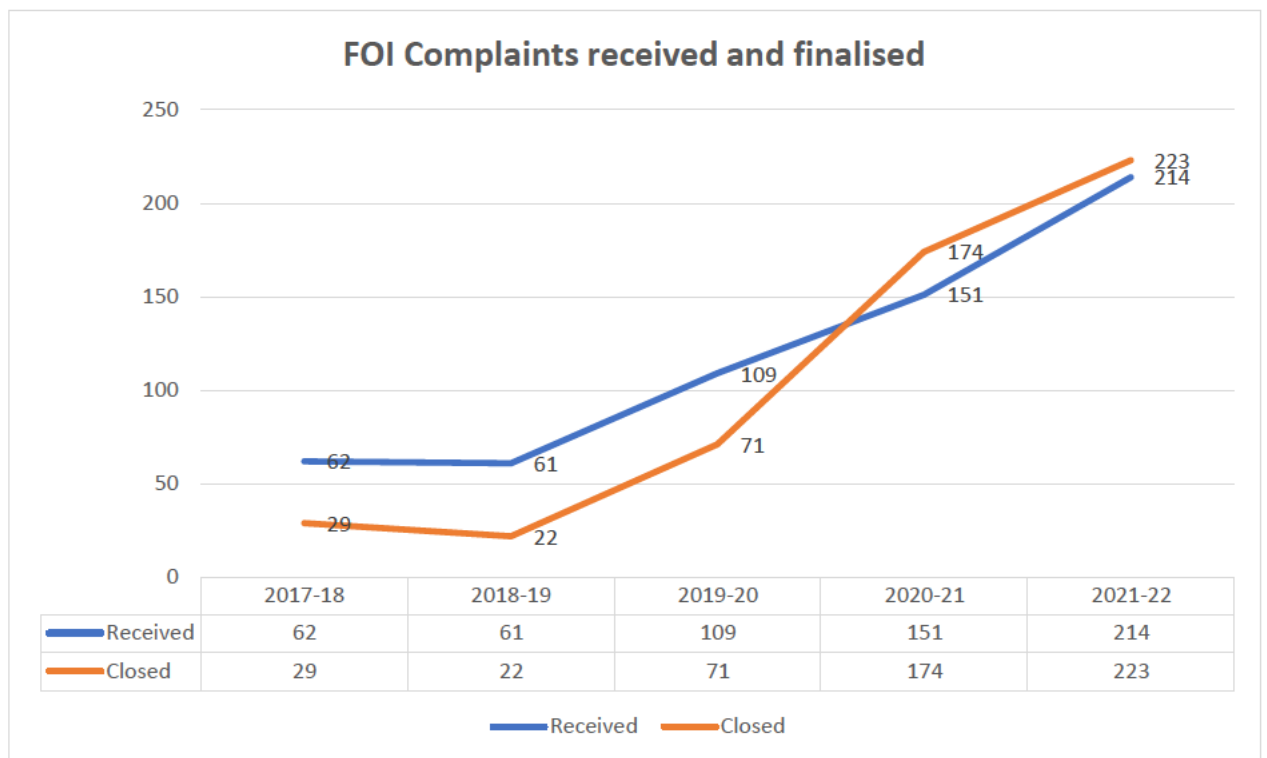
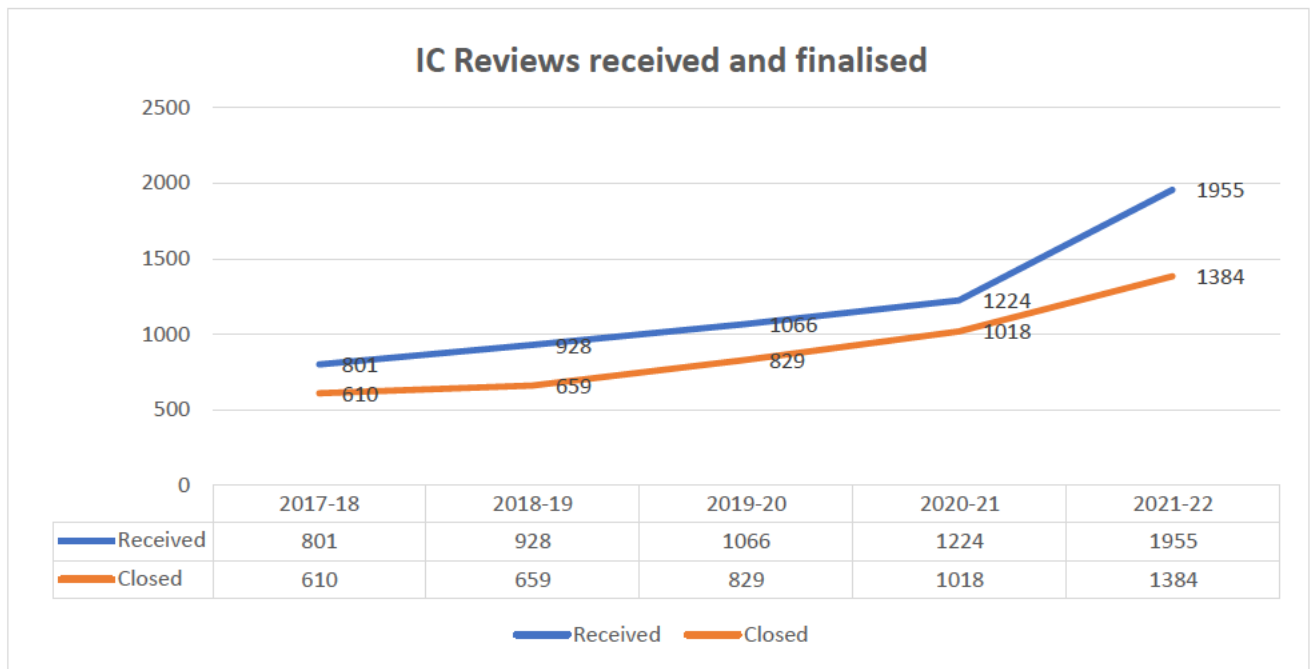
FOI Complaints	2107-18	2018-19	2019-20	2020-21	2021-22
Received	62	61	109	151	214
Finalised	29	22	71	174	223

Topic 4: FOI process and system improvements

Key messages

1. The OAIC has made numerous changes to its processes to increase efficiencies. These include:
 - increased use of technology, such as automated communication, standardised electronic forms, and standardised correspondence
 - an increased focus on early resolution – in 2020–21, we finalised 964 IC reviews without a formal decision being made under s 55K (95%)
 - batching complaints and IC reviews raising similar issues or which are about the same respondent/applicant
 - conducting FOI complaint investigations with a focus on making recommendations that assist agencies to comply with statutory timeframes and highlight FOI as a whole-of-agency responsibility
 - publishing the [outcomes](#) of recent FOI complaint investigations which provides an opportunity for agencies to proactively make improvements to their internal process and procedures
 - using our formal powers to require provision of a statement of reasons when a person seeks review of a deemed refusal.

Attachment A – FOI Statistics – IC reviews and FOI complaints



s22(1)(a)(ii)

From: HAMPTON,Elizabeth
Sent: Friday, 5 August 2022 4:15 PM
To: FALK,Angelene; HARDIMAN,Leo; **s22(1)(a)(ii)**
Subject: FOI costings [SEC=OFFICIAL]
Attachments: D2022 003843 DR lessons learned - spreadsheet.XLSX

Commissioners (**s 22(1)**) – can you please add this email to the pack?)

I've costed this as follows:

- On hand – **s 47E(d)**
[Redacted]
[Redacted]
[Redacted]
- Incoming work – **s 47E(d)**
[Redacted]
[Redacted]
[Redacted]

Outcome:

s 47E(d)
[Redacted]

Workings attached.

Cheers

L



Elizabeth Hampton | Deputy Commissioner
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s22(1)(a)(ii)

From: HAMPTON,Elizabeth
Sent: Wednesday, 3 August 2022 3:58 PM
To: HAMPTON,Elizabeth
Subject: FW: AGO [SEC=OFFICIAL]

Funding

March budget – needs confirmation in October budget:

- Privacy/ social media - \$8.7M (AGD)
- CDR future directions - \$0.364M (PMC)
- Digital identity - \$0.912M

FOI most critical:

- s 47E(d)
- s 47E(d)

Privacy:

- NDB not funded – s 47E(d)

s 47E(d)

Funding cliff:

- Currently falling away in 24/25 – changes from approx. \$24M to approx. \$15M pa – maintain as ongoing and roll into base.

PA review and OP Code

- Given the timing, we're comfortable with the Code-related provisions of the OP Code being held in abeyance until after the PA review
- Some critical issues for us where early legislation would be beneficial:
 - Information sharing – s 29
 - amending s 29 of the AIC Act to ensure the Commissioner is able to disclose information acquired in the course of her privacy functions
 - enabling the Commissioner to share information with law enforcement bodies, an alternative complaint body, and state, territory or foreign privacy regulators, and
 - enabling the Commissioner to disclose information (such as information about ongoing investigations) if satisfied on reasonable grounds that it is in the public interest.
 - civil penalties
 - Increase the maximum civil penalty for a serious/and or repeated interference with privacy to align with the maximum penalties under the Australian Consumer Law.
 - Extraterritoriality – to put beyond doubt
 - Amendments to s 5B to clarify the extraterritorial application of the Privacy Act by repealing the requirement that an organisation has to collect or hold personal information from sources inside of Australia.
- Other areas where we'd like changes:
 - Amendments to s 25 of the AIC Act to enable the Commissioner to delegate her powers in relation to investigating and declining to investigate FOI complaints, in Information Commissioner review matters, and to make determinations under s 52 of the Privacy Act.

- Enable the Commissioner to conduct assessments of compliance with the NDB scheme and issue a notice to produce information or a document relevant to an assessment.
- Create a new infringement notice provision for an interference with privacy. (**Note: this is broader than the OP Code infringement**).
- Expand the types of declarations that the Commissioner can make in a determination at the conclusion of an investigation by:
 - formalising the legal basis on which the Commissioner could require a respondent to engage an independent and suitably qualified adviser to ensure conduct constituting an interference with privacy is not repeated or continued, and
 - introducing a new determination power to require a respondent to prepare a statement about the conduct that led to the interference with privacy and steps they have or will take to remediate the contravention, and to publish the statement and/or provide a copy to the complainant.
-

IAID

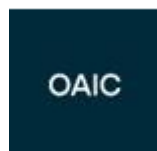
- On 28 Sept – would the AG be minded to do a keynote? Send letter to agency heads (in conjunction with PM??) in relation to proactive disclosure culture? First piece of cultural shift.
- Unfortunate that it's the day after the hearing on the Patrick litigation – which is likely to be widely reported and will bring the funding deficits into sharp relief.
- Similarly, the NACC / integrity agenda is important and we see that transparency in govt of an effective FOI regime as a critical component. Is it possible to have FOI funding considered as part of that regime? Undertaking from govt to fund?

FRT model law

- Working cooperatively with Ed and team
- Alignment with strengthened protections he's seeking, but can see a different way to get there, leveraging PA review and existing law:
 - Risk assessment – we think this can be covered by strengthened PIA requirements, PA review concepts of 'restricted and prohibited practices' proposals, and potentially further specific guidance through a Code. Additional process adds complexity.
 - Independent review – PA review includes requirement for independent audit of some practices; existing assessment and investigation powers
 - Moving the review to the regulator transfers the risk (accountability and compliance should rest with the entity) and potentially impacts regulatory independence.
 - Prohibition on some practices – can be dealt with through restricted and prohibited practices; also relevant is fair and reasonable test proposal.
- Talking to Ed about the gap between PA review recommendations and FRT model law – we suspect they might be minimal, and could be addressed through PA review (or Code).
- Broader benefit of regulating other high privacy impact tech – FRT is one, but there are others – including other biometrics.

Protocol

- Wont discuss matters under active consideration – would they like a protocol?
- Does he want to be advised for short term leave etc?



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s22(1)(a)(ii)

From: HAMPTON,Elizabeth
Sent: Friday, 5 August 2022 6:21 AM
To: HARDIMAN,Leo
Subject: Follow up email to AGO - for your consideration
Attachments: Draft Protocol - OAIC and AGO - 5 August 2022.docx

Good morning Leo

Following is a 'follow up' email to the AGO following yesterday's meeting. Please let me know if you have any concerns/ would like to discuss. I'd like to send it today if possible.

In addition, attached is a protocol which was sent to the former AGO after being reviewed by AGD. It has been slightly amended to include your position/ you (the earlier draft only referenced the AIC). While it just states the obvious, it might provide clarity around the OAIC's different engagements with the AG and AGO. It was developed following a request from the former AGO, but was not signed by the former AG.

Grateful for your views on the attached draft.

With thanks and happy to discuss.

Cheers

L

START

Dear s22(1)(a)(ii)

Thanks for your time yesterday. As discussed, I've included some information below and attached that might be helpful as you settle into your new role.

IAID

I've reached out to our Communications team about International Access to Information Day (IAID) (28 September). They've advised that we're likely to launch a webinar on IAID featuring the two Commissioners, and it would be great if the Attorney might participate in some way – perhaps by introducing the theme, or, if he has time, providing a keynote address. They have also flagged the idea of a statement about the importance of freedom of information and proactive release of information.

Consideration of a letter from Attorney to coincide with IAID

In relation to a potential letter to agency heads and Ministers from the Attorney (or Attorney and Prime Minister) to coincide with IAID, this would build on the consistent and repeated advice from our office that proactive disclosure of government-held information is consistent with both the objects of the FOI Act and a vibrant participative democracy. This advice is explicit in the FOI Guidelines, to which agencies and ministers must have regard, but also in various training materials published by the OAIC to assist decision makers. We also prepared the [first substantive resolution](#) of the International Conference of Information Commissioners (ICIC) in relation to the proactive publication of information relating to the COVID-19 pandemic, which was co-sponsored by seven other domestic commissioners and adopted by the ICIC in June 2021. And, in concert with other domestic access to information commissioners and ombudsmen, we created a '[Statement of Principles](#)' to support proactive disclosure of government-held information.

Proactive publication of information giving access to Australians without the need for a formal request under the FOI Act is also likely to reduce the administrative impact of the numbers of requests made to agencies and ministers (34,797 in 2020-21) and FOI processing costs to government (\$61.48M in 2020-21).

The OAIC's advice might be strengthened if the Attorney were to write to agency heads and ministerial colleagues in relation to his expectation that government-held information is made available to the public through proactive publication and that the exemptions under the FOI Act should be used only where necessary, consistent with the objects of the FOI Act. Consideration may also be given to whether correspondence could be co-signed with the Prime Minister?

Budget

In addition to the base funding and existing measures for which we only received partial funding under the Supply bill, following is the funding that was committed in the March Budget that we need affirmed/ provided in the October Budget:

High level overview of NPP's/measures applicable in 22/23 requiring affirmation in October 22 Budget					Forward estimates						
	22/23	Parts			FY23/24	FY24/25	FY25/26				
	\$'000		\$'000		\$'000	\$'000	\$'000		Total	SES/ Stat	Non-SES
Privacy/social media	8,711	Equity	500	ICT infrastructure - incl litigation case mgt system	8,242	-	-				
		Revenue	250	Consultancy							
		Revenue	2,980	External litigation & Advice							
		Revenue	120	Public education and awareness							
		Revenue	4,861	Reduce backlog of complaints & other					27.5	2.0	25.5
CDR Future directions	364	Revenue	364	Builds on existing funding to roll out the CDR scheme	1,092	1,092	1,092	Yr1	2.3	-	2.3
								Later yrs	7.0	-	7.0
Expanding Digital Identity	912	Equity	130	ICT for case & records Mgt system upgrades	-	-	-				
		Revenue	70	Education, publications & awareness							
			90	External legal advice							
			40	Consultants & advice							
			582	Employee costs					3.5	-	3.5
Total measures	9,987	Equity	630								
		Revenue	9,357								

Our Finance officer can provide more information about these if you need it, and grateful for your assistance in confirming that this funding is likely to be agreed in October.

Funding generally

s 47E(d)

- In 2024-25 funding received for privacy complaints and regulation of the digital economy will terminate, reducing the OAIC's funding from approximately \$24M to around \$15M.

Protocol

I've attached a draft protocol that may assist with clarifying the different arrangements applying to the engagement between the Attorney and either Commissioner under various statutes. Of course, I'm happy to discuss and amend following your consideration.

Adequacy

The team is locating earlier briefs on adequacy issues that might provide you with some helpful background to the issues. I'll send them across separately.

Thanks again for your time and please let me know if there is anything you need.

Regards

Libby



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Australian Government

Office of the Australian Information Commissioner

Protocol between the Attorney-General and Australian Information Commissioner

This protocol sets out how the Attorney-General, the Australian Information Commissioner (the Commissioner) and the Freedom of Information Commissioner (FOI Commissioner) will engage in relation to the Information Commissioner's powers and functions under the *Australian Information Commissioner Act 2010* (AIC Act), the *Freedom of Information Act 1982* (FOI Act) and the *Privacy Act 1988* (Privacy Act) and the FOI Commissioner's powers and functions under the FOI Act.

Background

1. The Attorney-General has responsibility for law and justice, including the administration of the Privacy Act and FOI Act.
2. The Attorney-General's portfolio comprises the Attorney-General's Department (AGD) and a number of statutory and non-statutory bodies.
3. The Office of the Australian Information Commissioner (OAIC) is a statutory agency within the Attorney-General's portfolio.
4. Section 10 of the AIC Act confers information commissioner, freedom of information and privacy functions on the Commissioner as well as the power to do all things necessary and convenient to be done for or in connection with those functions. Section 11 of the AIC Act confers freedom of information functions and powers on the FOI Commissioner.
5. The Commissioner's information commissioner functions are set out in s 7 of the AIC Act and include reporting to the Attorney-General on any matter that relates to the Commonwealth Government's policy and practice with respect to:
 - the collection, use, disclosure, management, administration or storage of, or accessibility to, information held by the Government and
 - the systems used, or proposed to be used, for the above activities.
6. The Commissioner's and FOI Commissioner's freedom of information functions are set out in section 8 of the AIC Act and include:
 - reviewing decisions under Part VII of the FOI Act

- undertaking investigations under Part VIIB of the FOI Act
 - providing information, advice, assistance and training on matters relevant to the operation of the FO Act
 - promoting awareness and understanding of the FOI Act and its objects
 - issuing guidelines under section 93A of the FOI Act
 - assisting agencies under section 8E of the FOI Act to publish information in accordance with the information publication scheme
 - reviewing the operation of the information publication scheme in each agency, as well as investigating compliance and monitoring and reporting on the operation of the scheme
 - making reports and recommendations to the Attorney-General about proposals for legislative change to the FOI Act or administrative action necessary or desirable in relation to the operation of the FOI Act
 - monitoring, investigating and reporting on compliance by agencies with the FOI Act
 - collecting information and statistics from agencies and Ministers about freedom of information matters for inclusion in the OAIC's annual reports
 - any other functions conferred on the Information Commissioner by the FOI Act or any other Act (or instrument under another Act) and expressed to be a freedom of information function.
7. The Commissioner's privacy functions are those that relate to the privacy of an individual, not limited to those functions mentioned in the tables at s 9(2) of the AIC Act. They include the investigation of complaints about interferences with privacy, investigation of potential interferences with privacy on the Commissioner's own initiative, and a range of responses to established interferences with privacy.
8. As a Minister, the Attorney-General is subject to the Commissioner's and FOI Commissioner's regulatory powers and functions in relation to his or her privacy or freedom of information responsibilities. All the powers provided to the Commissioner and FOI Commissioner through various statutes apply to the Attorney-General and his or her office as with any Minister when the Commissioner of FOI Commissioner is fulfilling his or her regulatory functions. The Commissioner's and FOI Commissioner's interaction with the Attorney-General, or his or her office, in relation to these functions and powers is consistent with that of all other Ministers.
9. However, under ss 7 and 8(f) of the AIC Act and s 28B(1)(c) of the Privacy Act, the Commissioner and FOI Commissioner have a separate advisory role and may report to the Attorney-General on a range of matters relating to his or her role as

information commissioner, privacy commissioner or freedom of information commissioner. Such advice is provided to the Attorney-General pursuant to the specific legislative mandate to do so and is separate and distinct from the Commissioner's or FOI Commissioner's regulatory functions outlined in paragraph 8.

Purpose of protocol

10. This protocol has been developed to articulate the interactions between the Commissioner and the FOI Commissioner and the Attorney-General in relation to both:
 1. the Commissioner's or FOI Commissioner's regulatory responsibilities in relation to his or her information commissioner, privacy and freedom of information functions, and
 2. the Commissioner's or FOI Commissioner's reporting and advisory functions outlined in s 7 and 8(f) of the AIC Act and s 28B(1)(c) of the Privacy Act.

Operation of protocol

Regulatory privacy or freedom of information functions

11. When an information access decision made by the Attorney-General or the Attorney-General's office is the subject of review by the Commissioner or FOI Commissioner under Part VII of the FOI Act, all contact with the Attorney-General's office will be undertaken in accordance with operational policies and procedures of the OAIC in accordance with standard case management practice which may include contact by the case officer in the first instance (including with the Attorney-General's Chief of Staff). This contact may include, but is not limited to:
 - issuing notices under s 54Z of the FOI Act (general notice requirement)
 - requiring the provision of further information, exempt matter and submissions in relation to the reviewable decision
 - requiring a statement of reasons to be provided (s 55E of the FOI Act)
 - requiring information or documents to be produced under s 55R of the FOI Act
 - requiring the production of certain exempt documents under s 55T of the FOI Act

- obliging persons to appear to answer questions for the purposes of an Information Commissioner review (s 55W of the FOI Act).
12. Should a matter need to be escalated within the OAIC, contact with the Attorney-General's office will be made by an SES officer of the OAIC.
 13. The OAIC may decide to refer an FOI matter to the Administrative Appeals Tribunal (the Tribunal) in accordance with s54W(b) of the FOI Act where satisfied that the interests of the administration of the Act make it desirable that the Commissioner reviewable decision be considered by the Tribunal.
 14. When the OAIC receives a privacy complaint about the Attorney-General or the Attorney-General's office, that matter will be investigated, and resolution attempted, in accordance with operational policies and procedures of the OAIC.
 15. Should a matter need to be escalated within the OAIC, contact with the Attorney-General's office will be made by an SES officer of the OAIC.
 16. Unlike the FOI Act, there is no ability for the Commissioner to refer a privacy complaint to the Tribunal under the Privacy Act.
 17. Where the Commissioner commences an investigation on his or her own initiative under s 40(2) of the Privacy Act into acts or practices undertaken by the Attorney-General or his or her office, the Commissioner will write to the Attorney-General to so advise him or her of the commencement of that investigation as required by s 43(1) of the Privacy Act. All investigative powers available to the Commissioner under the Privacy Act will be utilised as necessary for the efficient and effective investigation of the matter.
 18. Should a matter within the investigation need to be escalated within the OAIC, contact with the Attorney-General's office will be made by an SES officer of the OAIC.

Statutory reporting and advisory functions

19. The Commissioner or FOI Commissioner will, as he or she considers appropriate, contact the Attorney-General or his or her office for the purposes of fulfilling their functions under ss 7 and 8(f) of the AIC Act or s 28B(1)(c) of the Privacy Act. That contact can be in writing or in person, as required.

20. The Attorney-General and the Commissioner and the FOI Commissioner agree that they will maintain a clear separation between the Commissioner's or FOI Commissioner's regulatory functions and his or her advisory functions. To that end, they agree that the Commissioner or FOI Commissioner will not discuss any privacy or freedom of information regulatory matters involving the Attorney-General or his or her office, in particular:
- a. FOI requests made to the Attorney-General, or the conduct of any FOI Commissioner review in which the Attorney-General is the respondent.
 - b. FOI decisions made by the Attorney-General or his or her office, whether those decisions are, have been, or may be subject to review by the FOI Commissioner.
 - c. Complaints about and investigations into interferences with privacy made in relation to the Attorney-General or his or her office.
 - d. Investigations into potential interferences with privacy commenced by the Commissioner on his or her own initiative, involving the Attorney-General or his or her office.

Publication of this Protocol

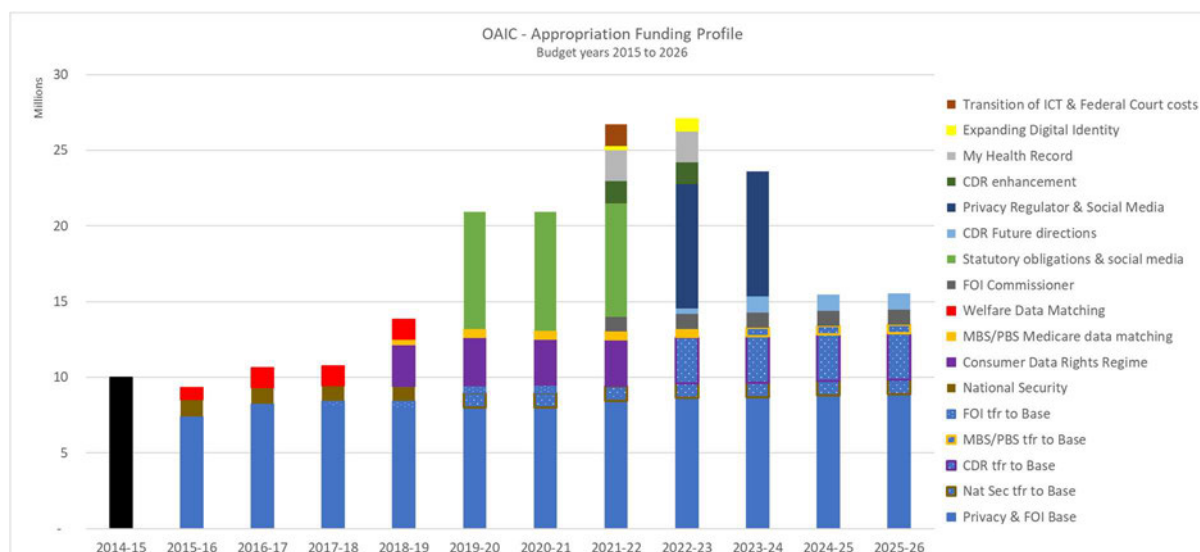
21. This Protocol will be published on the AGD and OAIC websites within 10 days of it coming into effect.

Agreement to the Protocol

22. Agreement to the Protocol may be settled by signature or an exchange of e-mails.

Agreed: [DATE]

OAIC Funding Graph



Measure descriptions

- National Security
 - Regulatory oversight of privacy implications arising from the Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014 and the Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015.
 - Started as non-terminating measure called “National Security Privacy Oversight”.
- Customer Data Rights (CDR) regime
 - Complaint-handler and oversight of the privacy aspects of the CDR regime. CDR regime is co-regulated by the OAIC and Australian Competition and Consumer Commission (ACCC). OAIC/ACCC work closely to deliver a consumer education campaign and to publish guidance for consumers and industry.
 - Started as a non-terminating measure called “National Consumer Data Right”.
- MBS/PBS Medicare data matching
 - Regulatory oversight of the revised MBS/PBS scheme including complaints handling and enquiries related to privacy breaches as well as strategic regulatory functions.
 - Started as a non-terminating measure called “Medicare Provider Compliance expansion of data matching”.
- CDR Enhancement
 - Supplementary funding for the OAIC’s component of the CDR Regime.
 - Is a 2 year terminating measure called “Digital Economy Strategy, Consumer Data Rights – OAIC Component”.
- CDR Future Directions
 - Supporting implementation of the Government’s response to the Inquiry into the Future Directions for the Consumer Data Right (CDR).
 - Is a 4 year terminating measure called “Digital Economy Strategy – CDR Future Directions”.
- Welfare Data Matching
 - Regulatory oversight of privacy implications arising from increased welfare compliance by Department of Human Services arising from Data Matching NPP.

- Was a 4 year terminating measure extending a previously terminating measure called “New Data Matching Oversight”
- FOI Commissioner
 - Provision for FOI Commissioner plus supporting staff.
 - Is a 4 year non-terminating (?) measure called ‘Freedom of Information Commissioner’.
- Statutory Obligations & Social Media
 - To process privacy complaints and enhance the OAIC's capacity to take regulatory action for breaches of privacy, such as litigation against social media platforms.
 - Is a 2 year terminating measure called “Increased Funding for Statutory Obligations and Social Media”.
- Privacy Regulator & Social Media
 - Support for ongoing operations of OAIC for two years. To reduce backlog of privacy complaints, enhance regulatory capability in relation to social media and implement amendments to the Privacy Act.
 - Is a 2 year terminating measure called “Funding for Australia’s privacy regulator”.
- My Health Record
 - Continuation of regulatory functions around My Health Record.
 - It is a 2 year terminating measure called “Digital Economy Strategy - My Health Record”, previously funded under a MOU between OAIC and Health.
- Expanding Digital Identity
 - Initial funding to undertake 2 audits of DTA’s digital identity program and develop guidance material. Added to in the second year to fund expanding regulatory responsibilities around the digital identity strategy.
 - Was a 1 year terminating measure called “Digital Identity OAIC privacy role” and was added to by a further 1 year terminating measure called “Funding for privacy regulatory functions under the Digital Identity System”.
- Transition of ICT & Federal Court costs
 - To support the OAIC to meet its operating costs including transitions support and costs in relation to federal court proceedings.
 - Was a 1 year terminating measure called “OAIC – financial health NPP”.

From: [Invitations And Requests - AGO](#)
To: [HARDIMAN,Leo](#)
Subject: Automatic reply: Meeting | Australian Information Commissioner and Privacy Commissioner [SEC=OFFICIAL]
Date: Tuesday, 19 July 2022 1:38:07 PM

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CAUTION: This email originated from outside of the organisation. Do not click links or open attachments unless you recognise the sender and know the content is safe.

Thank you for your invitation/request to meet with the Attorney-General, The Hon Mark Dreyfus QC, MP.

This automatic reply is to confirm that your email has been received and will be processed by the office.

Please note that the Attorney-General's Office receives a significant volume of requests and that it may take some time for you to receive a response.

Your patience during this process would be greatly appreciated.

Kind regards,

Office of the Attorney-General
The Hon Mark Dreyfus QC, MP
invitations@ag.gov.au

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From: [HARDIMAN,Leo](#)
To: [Invitations And Requests - AGO](#)
Subject: Accepted: Meeting | Australian Information Commissioner and Privacy Commissioner [SEC=OFFICIAL]

From: [HAMPTON,Elizabeth](#)
To: [s22\(1\)\(a\)\(ii\)@ag.gov.au](#)
Subject: Litigation commenced by then Senator Patrick
Date: Monday, 8 August 2022 4:56:00 PM
Attachments: [image001.jpg](#)

Dear [s22\(1\)\(a\)\(ii\)](#)

Following this morning's meeting with the Attorney-General, I'm writing to provide the following information about the litigation commenced by former Senator Rex Patrick against the Information Commissioner.

Senator Patrick lodged Federal Court proceedings on 9 September 2021 in relation to delays in conducting reviews of his 23 IC review applications under the *Freedom of Information Act 1982*.

Senator Patrick lodged an amended concise statement with the Federal Court on 10 December 2021, limiting the legal question referred to the Federal Court to 9 of the 23 applications listed.

Those proceedings were commenced in the Federal Court pursuant to s 7 of the *Administrative Decisions (Judicial Review) Act 1977* (AD(JR) Act).

Subsection 7(1) of the AD(JR) Act provides for a person aggrieved by a failure to make a decision to apply to the Court for an order of review in respect of such a failure, on the ground that there has been unreasonable delay in making the decision. In relation to such a failure, s 16(3) of the AD(JR) Act empowers the Court to make orders including an order directing that the decision be made.

The relief sought by the applicant is:

- Pursuant to s 16(3)(a) of the AD(JR) Act, an order that the Commissioner make a decision on each of the IC review applications which were lodged 6 months or more prior to 1 September 2021 within 30 days or such alternative timeframe as the court deems appropriate.
- Further and in the alternative, pursuant to s 16(3)(b) of the AD(JR) Act, that the court declare that the delay in finalising those matters that were lodged 6 months or more prior to 1 September 2021 is 'contrary to the interests in the administration of the *Freedom of Information Act 1982*'.
- Further pursuant to s 16(3)(b) of the AD(JR) Act, that the court declare that the delay in considering those matters that were lodged less than 6 months prior to 1 September 2021 is 'contrary to the interests in the administration of the *Freedom of Information Act 1982*'.

In our reporting to OLSC (4 July 2022) we noted that the following decisions may be relevant to the court's consideration in this matter:

- *AFX17 v Minister for Home Affairs* [2020] FCA 807
- *BMF16 v Minister for Immigration and Border Protection* [2016] FCA 1530
- *AQM18 v Minister for Immigration and Border Protection* [\[2019\] FCAFC 27](#); (2019) 268 FCR 424

Please feel free to call me if you need further information. There has been regular reporting to OLSC for this matter.

Regards

Libby



Elizabeth Hampton | Deputy Commissioner
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+61 2 9942 4137 | elizabeth.hampton@oaic.gov.au

From: [HAMPTON, Elizabeth](#)
To: [s22\(1\)\(a\)\(ii\)](#)
Cc: [Brayshaw, Elizabeth](#); [Galluccio, Julia](#)
Subject: Correspondence to Attorney-General from Commissioner Falk
Date: Tuesday, 16 August 2022 11:57:00 AM
Attachments: [Correspondence to AttorneyGeneral re legislative amendments 160822.pdf](#)
[image001.jpg](#)

Good morning [s22\(1\)\(a\)\(ii\)](#)

During last week's meeting with the Attorney-General the Commissioners mentioned some minor legislative amendments where consideration by Parliament this calendar year would be of assistance in their roles.

Attached is a letter from Commissioner Falk in relation to those legislative amendments briefly discussed during the meeting, seeking the Attorney-General's agreement for the Department to seek policy approval for these changes.

The OAIC doesn't have a version of PDMS, but please let me know if you would prefer that I ask the Department to send this to you through their system. Otherwise, would you please bring this to the attention of the Attorney-General's correspondence manager? And as always, happy to discuss.

With thanks

Libby



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Australian Government

Office of the Australian Information Commissioner

The Hon Mark Dreyfus QC, MP
Member for Isaacs
Attorney General and Cabinet Secretary

By email via: **s22(1)(a)(ii)**@ag.gov.au

Legislative amendments for consideration

Dear Attorney-General

Thank you for the opportunity to meet on 8 August 2022 to discuss matters of importance to the operation of the Office of the Australian Information Commissioner (OAIC).

I am writing in relation to our discussion of a number of legislative amendments to support effective and efficient regulation by the OAIC.¹ I understand you have instructed your Department to seek policy approval for amendments that will enhance the OAIC's ability to share information, including through amendments to s 29 of the *Australian Information Commissioner Act 2010* (AIC Act), and clarify the extraterritorial application of the *Privacy Act 1988* (the Privacy Act).

These amendments were previously included in an Exposure Draft of the Privacy Legislation Amendment (Enhancing Online Privacy and Other Measures) Bill 2021 (the OP Bill) and their early consideration by Parliament will be of assistance in the exercise of my regulatory role.

As briefly discussed in our meeting, I also proposed some other legislative amendments where consideration by Parliament this calendar year would be of assistance. I am writing to seek your in-principle agreement to those amendments to facilitate the inclusion of these further amendments in the Department's policy approval process.

Delegation of powers

There are a range of powers that are non-delegable under s 25 of the AIC Act. Those non-delegable powers include:

¹ I have advice related functions under s 28B of the *Privacy Act 1988*, which include providing reports and recommendations to the Minister in relation to any matter concerning the need for, or desirability of, legislative or administrative action in the interests of the privacy of individuals.

- making an IC review decision under s 55K of the *Freedom of Information Act 1982* (the FOI Act)
- exercising the discretion not to investigate an FOI complaint under s 73 of the FOI Act
- making a determination under s 52 of the Privacy Act.

The volume of matters that may require the exercise of these non-delegable powers is significant. For example, in 2021-22 the OAIC:

- received approximately 1,955 applications for IC review compared to 1,224 in 2020-21 (an increase of 60%). Of the approximately 1960 IC reviews currently on hand, 960 were lodged more than 12 months ago, and the OAIC's early resolution processes have been applied and have not resolved the matter between the parties
- received 214 FOI complaints
- received 2544 privacy complaints.

The ability to delegate these powers to a limited number of senior officers would result in operational and administrative efficiencies.

The delegation of the s 55K IC review power will also be critical in the event the OAIC obtains additional short-term funding in the May 2022 Budget to address over 960 IC review applications that have been open for more than 12 months.

The delegation of these powers to those senior officers would be supported through business rules.

In seeking the legislative authority to delegate these functions to a limited number of senior officers, Commissioner focus could be dedicated to those matters that are more significant, systemic, complex or that explore new interpretations of the relevant legislation while overseeing consistency in the application of the law across case loads.

The legislative adjustments required to enable the Information Commissioner to delegate these functions would involve the repeal of ss 25(e), 25(g) and 25(l) of the AIC Act.

Increase to penalties

The Australian Competition and Consumer Commission's (ACCC's) Digital Platforms Inquiry Final Report recommended that the maximum penalties for an interference

with privacy under the Privacy Act should be increased to mirror the penalties for breaches of the Australian Consumer Law.²

Consistent with that recommendation, the OP Bill included a draft provision that increased the maximum civil penalty for serious and repeated interference with privacy for a natural person to 2,400 penalty units (\$532,800), and for a body corporate, an amount not exceeding the greater value of:

- \$10,000,000
- three times the value of the benefit obtained by the body corporate from the conduct constituting the serious and repeated interference with privacy; or
- if the value cannot be determined, 10% of their domestic annual turnover.

s 47E(d)



I look forward to your consideration of these issues and am able to provide any further assistance as required.

Yours sincerely



Angelene Falk
Australian Information Commissioner and Privacy Commissioner

16 August 2022

² See recommendation 16(f) of the ACCC's [Digital Platforms Inquiry Final Report](#), pp 35, 456.

From: [HAMPTON, Elizabeth](#)
To: [s22\(1\)\(a\)\(ii\)](#)
Cc: [Brayshaw, Elizabeth](#); [Galluccio, Julia](#)
Subject: International Access to Information Day
Date: Wednesday, 17 August 2022 10:45:00 AM
Attachments: [s 22\(1\)](#)
[image001.jpg](#)

Dear [s22\(1\)\(a\)\(ii\)](#)

I am writing following the discussion between the Attorney-General and the OAIC Commissioners last week regarding the 40th anniversary of International Access to Information Day (IAID) on 28 September.

I undertook to come back to the Attorney-General's office with some more information about the Attorney-General's potential involvement in that day, for consideration.

As briefly discussed, there is an opportunity for the Attorney-General to provide an opening address at a virtual event, hosted by the OAIC on 28 September, for FOI practitioners working within government. The OAIC convenes bi-annual meetings of this group which has been held virtually since the start of the COVID-19 pandemic. Our experience is that while there are advantages to in-person engagement, we have had higher degree of participation in the virtual events because of the flexibility it provides for practitioners located outside Canberra to attend. In the event the Attorney-General would prefer to engage with an in-person event, we can adjust the delivery method.

[s 22\(1\)](#)



s 22(1)



As always, happy to discuss

Regards

Libby



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