

ESTIMATES BRIEF: OTHER

Subject: FOI Senate Committee Report

Type: Report

| Key details | | | |
|---|--|-------|----------------|
| When did OAIC learn of matter? | 28 March 2023 | | |
| Origin | Senate referred inquiry | | |
| Is there an issue in the public domain? | Public submission, report | | |
| Jurisdiction | FOI | | |
| Responsible Branch & team | Information Rights (FOI case management) and Regulatory Intelligence and Strategy: Guidance and Publications | | |
| Content author | s 22(1)(a)(ii) | Phone | s 22(1)(a)(ii) |
| Clearance by | Rocelle Ago | Phone | 02 99424205 |
| Brief current at | 12 March 2025 | | |

Brief overview of the FOI Senate Committee Report

- On 7 December 2023, the Senate's Legal and Constitutional Affairs References Committee reported on its inquiry into the operation of Commonwealth Freedom of Information laws.
- The majority [report](#) made 15 recommendations including legislative, structural and cultural change, together with operational and resourcing revision and capability uplift. Not all recommendations were for OAIC action. Labor Senators tabled a [dissenting report](#) with 3 recommendations.

Current action – Structural reform within the OAIC

- The OAIC's 2024–25 Corporate Plan sets out the OAIC's key activities and performance measures. Commissioner regulatory priorities guided the development of the plan.

- On 3 December 2024, the OAIC transitioned to a new structure to support its regulatory objectives. The new structure changes how the OAIC works and will drive the transition to a more effective, harm-focused regulator.
- The new structure brings together elements of privacy and FOI casework where practicable, while retaining and highlighting regulated area expertise.
- The number of IC reviews on hand has been reduced using the following strategies:
 - Implementing a whole of OAIC surge team to provide additional capacity for FOI regulatory functions, including IC review case management to allow FOI staff to work on older IC reviews.
 - Using data and reporting to identify and expedite priority cohorts, focussing on the OAIC's oldest IC reviews.
 - Lowering delegations to exercise particular powers (issuing directions, exercising discretion to decline to undertake an IC review) and greater use of compulsory powers.
 - Revising decision templates to capture key points from published decisions to promote consistency and more succinct decisions.
 - Reviewing letter templates, smartforms and guidance, including FOI Guidelines.
 - Establishing regular input meetings with FOI leadership team on specific cases.

- Focusing on uplifting agency capability through surveys, engagement, education e.g. published guidance, a 2024 series of webinars to FOI practitioners, a survey of FOI practitioners about their training needs and a new self-assessment tool for agencies.
- Emphasising team/branch targets (for example, 200 IC review decisions per year).
- See 'FOI IC Reviews' brief: [D2025/003142](#).

| |
|----------------------------|
| Recent developments |
|----------------------------|

- s 22(1)(a)(ii) [REDACTED]

ESTIMATES BRIEF: OTHER

Subject: FOI Senate Committee Report

Type: Report

| Key details | | | |
|---|--|-------|----------------|
| When did OAIC learn of matter? | 28 March 2023 | | |
| Origin | Senate referred inquiry | | |
| Is there an issue in the public domain? | Public submission, report | | |
| Jurisdiction | FOI | | |
| Responsible Branch & team | Information Rights (FOI case management) and Regulatory Intelligence and Strategy: Guidance and Publications | | |
| Content author | s 22(1)(a)(ii) | Phone | s 22(1)(a)(ii) |
| Clearance by | Rocelle Ago | Phone | 02 99424205 |
| Brief current at | 5 February 2025 | | |

Brief overview of the FOI Senate Committee Report

- On 7 December 2023, the Senate's Legal and Constitutional Affairs References Committee reported on its inquiry into the operation of Commonwealth Freedom of Information laws.
- The majority [report](#) made 15 recommendations including legislative, structural and cultural change, together with operational and resourcing revision and capability uplift. Not all recommendations were for OAIC action. Labor Senators tabled a [dissenting report](#) with 3 recommendations.

Current action – Structural reform within the OAIC

- The OAIC's 2024–25 Corporate Plan sets out the OAIC's key activities and performance measures. Commissioner regulatory priorities guided the development of the plan.

- On 10 October 2024, the OAIC transitioned to a new structure to support its regulatory objectives. The new structure changes how the OAIC works and will drive the transition to a more effective, harm-focused regulator.
- The new structure combines elements of privacy and FOI where practicable while retaining and highlighting regulated area expertise.
- The number of IC reviews on hand has been reduced using the following strategies:
 - Implementing a whole of OAIC surge team to provide additional capacity for FOI regulatory functions, including IC review case management to allow FOI staff to work on older IC reviews.
 - Using data and reporting to identify and expedite priority cohorts, focussing on the OAIC's oldest IC reviews.
 - Lowering delegations to exercise particular powers (issuing directions, exercising discretion to decline to undertake an IC review) and greater use of compulsory powers.
 - Revising decision templates to capture key points from published decisions to promote consistency and more succinct decisions.
 - Reviewing letter templates, smartforms and guidance, including FOI Guidelines.
 - Establishing regular input meetings with FOI leadership team on specific cases.
 - Focusing on uplifting agency capability through surveys, engagement, education e.g. published guidance, a 2024 series of webinars to FOI

practitioners, a survey of FOI practitioners about their training needs and a new self-assessment tool for agencies.

- Emphasising team/branch targets (for example, 200 IC review decisions per year).
- See 'FOI IC Reviews' brief: [D2025/000306](#).

Recent developments

- s 22(1)(a)(ii)

ESTIMATES BRIEF: OTHER

Subject: FOI Senate Committee Report

Type: Report

[May 2024 brief content: [D2024/010498](#)]

| Key details | | | |
|---|---------------------------|-------|----------------|
| When did OAIC learn of matter? | 28 March 2023 | | |
| Origin | Senate referred inquiry | | |
| Is there an issue in the public domain? | Public submission, report | | |
| Jurisdiction | FOI | | |
| Responsible Branch & team | FOI Branch | | |
| Content author | s 22(1)(a)(ii) | Phone | s 22(1)(a)(ii) |
| Clearance by | s 22(1)(a)(ii) | Phone | s 22(1)(a)(ii) |
| Brief current at | 15 October 2024 | | |

Brief overview of the FOI Senate Committee Report

- On 7 December 2023, the Senate's Legal and Constitutional Affairs References Committee reported on its inquiry into the operation of Commonwealth Freedom of Information laws.
- The majority [report](#) made 15 recommendations including legislative, structural and cultural change, together with operational and resourcing revision and capability uplift. Not all recommendations were for OAIC action. Labor Senators tabled a [dissenting report](#) with 3 recommendations.

Current action – Structural reform within the OAIC

- The OAIC's 2024–25 Corporate Plan sets out the OAIC's key activities and performance measures. Commissioner regulatory priorities guided the development of the plan.
- On 10 October 2024, the OAIC transitioned to a new structure to support its regulatory objectives. The new structure changes how the OAIC works and will drive the transition to a more effective, harm-focused regulator.

- The new structure combines elements of privacy and FOI where practicable while retaining and highlighting regulated area expertise.
- Change within the office will be supported by a Reform Office.
- The number of IC reviews on hand has been reduced using the following strategies:
 - Implementing a whole of OAIC surge team to provide additional capacity for FOI regulatory functions, including IC review case management to allow FOI staff to work on older IC reviews.
 - Using data and reporting to identify and expedite priority cohorts, focussing on the OAIC's oldest IC reviews.
 - Lowering delegations to exercise particular powers (issuing directions, exercising discretion to decline to undertake an IC review) and greater use of compulsory powers.
 - Revising decision templates to capture key points from published decisions to promote consistency and more succinct decisions.
 - Reviewing letter templates, smartforms and guidance, including FOI Guidelines.
 - Establishing regular input meetings with FOI leadership team on specific cases.
 - Focusing on uplifting agency capability through surveys, engagement, education e.g. webinars and provision of guidance.
 - Emphasising team/branch targets (for example, 200 IC review decisions per year).
- See 'FOI IC Reviews' brief: [D2024/025017](#).

| |
|----------------------------|
| Recent developments |
|----------------------------|

- s 22(1)(a)(ii)

| |
|----------------------------------|
| Expected next steps/dates |
|----------------------------------|

- Consideration of strategic review recommendations, development of self-assessment tool, and webinar on vexatious applicant declarations.

ESTIMATES BRIEF

FOI Senate Committee Report

On 28 March 2023, the Senate referred an inquiry into the operation of Commonwealth Freedom of Information (FOI) laws (**the Inquiry**) to the Legal and Constitutional Affairs References Committee. The referral followed the resignation of the former Freedom of Information Commissioner, Mr Leo Hardiman PSM KC, on 6 March 2023. The Committee tabled a majority report on 7 December 2023.

Key Points

- The Inquiry considered the operation of Commonwealth FOI laws, with reference to:
 - the resignation of the FOI Commissioner and the resulting impacts;
 - delays in the review of FOI appeals;
 - resourcing for responding to FOI applications and reviews;
 - the creation of a statutory time frame for completion of reviews; and
 - any related matters.
- The OAIC provided a submission to the Inquiry on 28 July 2023 and a supplementary submission on 14 November 2023.
- The Inquiry held public hearings on 28 August 2023 and 29 August 2023. The OAIC appeared before the Inquiry on 29 August 2023. We responded to questions taken on notice and other issues raised during the public hearings on 10 October 2023.
- The Australian Information Commissioner also wrote to the Committee on 8 November 2023 in response to a 'supplementary statement' Mr Hardiman provided to the Committee on 15 September 2023.
- The Committee tabled a majority report on 7 December 2023 and made 15 recommendations (**Attachment A**). Labor Senators did not support the recommendations in the majority report and issued a dissenting report with three recommendations (**Attachment B**).

| |
|------------------------------------|
| SUMMARY OF COMMITTEE REPORT |
|------------------------------------|

- The majority report concluded that the FOI system is not fit for purpose and made recommendations around FOI process, resourcing and culture. Proposed changes to the FOI Act and *Australian Information Commissioner Act 2010* included that:
 - full merits review should only be required at the AAT level
 - FOI regulatory functions are relocated to the Commonwealth Ombudsman, and
 - statutory timeframes for FOI reviews are introduced.

- The majority report also included commentary about the leadership and culture of the OAIC based on allegations made by Mr Hardiman.

CONSIDERATION OF REPORT

- **Attachment A** sets out the Committee's List of Recommendations. **Attachment B** sets out the recommendations in the Dissenting Report by Government Members. Our considerations concerning implementation is included where relevant.

Priorities for effective regulation, agency capacity building and mitigation of FOI backlog

- The OAIC welcomed the Government's decision to reinstate the three Commissioner model, which provides welcome specialisation and capacity to address the sustained, increasing and highly complex workload of the OAIC.
- The OAIC and implemented work allocation and process improvement to respond to external divers and internal resourcing issues. For example, in 2023 the FOI branch operated with a significant decisions team to apply expertise to the most complex cases, largely aged matters; and designed new checklists and decision making aids. These processes delivered some efficiencies. However further work is underway. This work includes revised guidelines and a new procedural direction focusing on inadequacy of reasons/deemed decisions by agencies.
- The May 2023 Budget provided the OAIC with funding for a strategic assessment. The Information Commissioner appointed Nous Group which delivered its report on 19 February 2024. This report sets out how we can best respond to the challenges the OAIC faces and our evolving operating environment.
- The OAIC has enhanced its regulatory and strategic governance to ensure that the 3 Commissioner model injects leadership and a proactive, proportionate approach to application of regulatory resources. Further work with the executive leadership team is underway including engagement of the Nous Group to complete supplementary work within the extant budgetary allowance to provide some assistance concerning matters related to culture and leadership and recommend ways to address any identified concerns.
- A strategic approach is being implemented to position the OAIC as an effective regulator, build agency capacity and address the operational and reputational impact of the FOI backlog. That work program includes internal and external priorities, including:
 - Cultural change to promote the object of the FOI Act, herald the need for robust first instance decisions by agencies, and harness the digital government agenda through direct engagement with agency heads: the FOI Commissioner has conducted 30 separate meetings with agency heads between 20 March and 20 May 2024. The Information

Publication Scheme Review will be finalised and published to promote proactive release of information.

- Agency capability uplift through the development of an FOI practitioners survey to identify capability gaps and target with regulatory guidance, development of a self-assessment tool to build agency capacity to manage FOI requests and proactively release information and publication of agency data to drive improved governance and performance.
- Process reform, including the revision of Guidelines and directions for procedures for agencies and ministers to follow in IC reviews, which will streamline processes, set clear expectations and apply differential case management to expedite identified cohorts.

| | | |
|---|----------------------------|--------------------------------------|
| Update 'Current at' date below following each update | Cleared by: Rocelle Ago | Action officer: s 22(1)(a)(ii) |
| Current at: 22/05/24 | Phone number: 02 9942 4205 | Action officer number s 22(1)(a)(ii) |

FOI Inquiry 2023 - List of Recommendations

| Recommendation | For OAIC or AGD consideration | Consideration for implementation (if OAIC) |
|--|-------------------------------|--|
| <p>Recommendation 1</p> <p>5.8 The committee recommends that an independent investigation be undertaken, reporting to the Secretary of the Attorney-General's Department and not the Office of the Australian Information Commissioner (OAIC), to consider the matters raised by Mr Hardiman in relation to workplace behaviour within the OAIC, the impact on employees (past and present), and appropriate action which needs to be taken.</p> | AGD | |
| <p>Recommendation 2</p> <p>5.21 The committee recommends that the Australian government amends the <i>Freedom of Information Act 1982</i> and the <i>Australian Information Commissioner Act 2010</i> to provide that:</p> <ul style="list-style-type: none"> • reviews internal to decision-making agencies be abolished and resources reallocated to primary decision-making; • intermediate reviews are not required to provide procedural fairness or formal reasons for a decision; • a full merits review process is only required at the level of the Administrative Appeals Tribunal (or its replacement); and • FOI applicants may appeal directly to the Administrative Appeals Tribunal (or its replacement) at any time after a primary decision for a full merits review of their claim without having to wait for a decision at the intermediate level. | AGD | <p>While such legislative reform is a matter for the Australian Government, we note the following provisions by way of context concerning the current legislative framework.</p> <ul style="list-style-type: none"> • Section 55K of the FOI Act requires the Information Commissioner to make an IC review decision in writing, to include a statement of reasons for the decision, and to publish the decision. • Section 25D of the <i>Acts Interpretation Act 1901</i> provides that a person/body/tribunal subject to a requirement to give written reasons for a decision is also required – in the same instrument – to set out the findings on material questions of fact, and refer to the evidence or other material on which those findings were based. |

| Recommendation | For OAIC or AGD consideration | Consideration for implementation (if OAIC) |
|---|-------------------------------|---|
| <p>Recommendation 3</p> <p>5.24 The committee recommends that the Australian government amends the Australian Information Commissioner Act 2010 to separate out the FOI review and regulatory functions from the Office of the Australian Information Commissioner and to relocate the FOI Commissioner to the Office of the Commonwealth Ombudsman.</p> | AGD | |
| <p>Recommendation 4</p> <p>5.25 The committee recommends that the Australian government reallocates to the FOI Commissioner, newly located within the Office of the Commonwealth Ombudsman, all resources currently earmarked for the FOI functions of the Office of the Australian Information Commissioner and, going forward, provides the FOI Commissioner with adequate resources to perform its regulatory and review functions in a timely and efficient manner.</p> | AGD | |
| <p>Recommendation 5</p> <p>The committee recommends that the Australian government:</p> <ul style="list-style-type: none"> • consults with key stakeholders and implements appropriate statutory timeframes for FOI reviews (with the timeline proposed by the GrataFund as detailed in paragraph 3.56 of this report as an indicator), including consideration of provisions for extensions in exceptional circumstances due to the scale and complexity of an Information Commissioner review; and • amends the Freedom of Information Act 1982 to impose statutory timeframes for the finalisation of FOI reviews. Statutory timeframes should expressly include the notification of reviews to decision-making agencies. | AGD | <p>While implementation of such measures sits with the Australian government / AGD, we consider that any consideration of potential statutory timeframes should have regard to:</p> <ul style="list-style-type: none"> • the nature of the review process undertaken and the procedural requirements in the FOI Act • whether express timeframes impact the ability of a decision maker to make the appropriate decision in the circumstances • the consequences of not meeting any stipulated timeframe |

| Recommendation | For OAIC or AGD consideration | Consideration for implementation (if OAIC) |
|--|-------------------------------|--|
| | | <ul style="list-style-type: none"> the impact on AAT resourcing if a failure to meet a statutory timeframe attracted an entitlement to seek AAT review whether additional OAIC funding is required for implementation. |
| <p>Recommendation 6</p> <p>5.34 The committee recommends that the Australian government amends subsection 4(1) of the Freedom of Information Act 1982 to ensure that a change in minister does not impede the right to access documents under the FOI system.</p> | AGD | <p>This legislative reform is a matter for the Australian Government/AGD. By way of background, the OAIC's interpretation of subsection 4(1) defining 'official document of a Minister' is discussed below.</p> <p>In the decision of ACY and <i>Attorney-General (Freedom of information) [2023] AICmr 7</i> (22 February 2023), former FOI Commissioner Leo Hardiman PSM KC found that the current Attorney-General, the Hon Mark Dreyfus KC MP, does not have possession of any documents at issue, which meant that, for the purposes of that decision, any relevant document is no longer an 'official document of the Minister' to which the mandatory access rule in s 11A(3) of the FOI Act applies. The former FOI Commissioner found, therefore, that the current Attorney-General was not required to provide access to the parts of the document at issue, which the authorised officer had found to be exempt or deleted as irrelevant.</p> <p>The Australian Information Commissioner also considered this issue in <i>Rex Patrick and Attorney-</i></p> |

| Recommendation | For OAIC or AGD consideration | Consideration for implementation (if OAIC) |
|------------------|-------------------------------|---|
| | | <p><i>General (Freedom of information) [2023] AICmr 9</i> (28 February 2023), which involved a request for a letter of advice from the former Attorney-General to the former Prime Minister. The Information Commissioner found that the current Attorney-General was not in possession of the document at issue and that for the purpose of the IC review, any relevant document is no longer ‘an official document of a Minister’ to which the mandatory access rule under s 11A(3) of the FOI Act applies. This Information Commissioner decision was the subject of Federal Court proceedings in <i>Patrick v Attorney-General (Cth)</i> [2024] FCA 268. Justice Charlesworth allowed Mr Patrick’s appeal and ordered that the Information Commissioner’s decision be set aside, and Mr Patrick’s application for review of the decision of the Attorney-General made on 4 June 2020 be remitted to the Information Commissioner for determination according to law.</p> <p>Her Honour held that whether a document is an official document of a minister is to be assessed by reference to the facts and circumstances in existence <i>at the time an FOI request is lodged</i>, not some later review date after which the minister may have changed.</p> <p>The decision is currently subject to appeal.</p> |
| Recommendation 7 | AGD | |

| Recommendation | For OAIC or AGD consideration | Consideration for implementation (if OAIC) |
|---|-------------------------------|--|
| <p>5.36 The committee recommends that the Australian government amends subsection 8D(3) of the Freedom of Information Act 1982 to require that decision-making agencies make directly available for public download, either from the disclosure log or another website, all information that is released through an FOI request, subject to recognised technical constraints and privacy concerns.</p> | | |
| <p>Recommendation 8</p> <p>5.41 The committee recommends that the Australian government ensures that formal reporting obligations for both decision-making agencies and review bodies be expanded to ensure information is readily available regarding the timeliness and efficacy of FOI decision making.</p> | AGD | |
| <p>Recommendation 9</p> <p>5.47 The committee recommends that the Strategic Assessment of the Office of the Australian Information Commissioner (OAIC) specifically considers:</p> <ul style="list-style-type: none"> operational and resourcing requirements needed to rapidly resolve the current backlog of FOI reviews; the organisational culture of the OAIC, including its leadership, and its approach to the discharge of all its statutory functions; whether resources can and should be reallocated internally to bolster the FOI functions of the OAIC; ways to ensure the agency's reporting of FOI applications and reviews is transparent, fulsome, and explicitly accounts for the impact of deemed refusals on finalisation statistics; the key performance indicators adopted to assess the performance of the FOI function of the OAIC so that there is a clear and transparent | OAIC and AGD | As per previous reference to the Nous Strategic Review report, delivered in February 2024. |

| Recommendation | For OAIC or AGD consideration | Consideration for implementation (if OAIC) |
|--|-------------------------------|--|
| <p>reporting of the backlog of substantive Information Commissioner review matters (as opposed to the clearance of less substantive matters, such as the rectification of deemed refusals by the relevant agency which requires minimal review);</p> <ul style="list-style-type: none"> measures to support the agency to better adapt to the changing nature and scale of its FOI workload; and possible legislative changes that would improve the agency's functioning and improve outcomes for FOI applicants. | | |
| <p>Recommendation 10</p> <p>5.48 The committee recommends that the Australian government publishes the Strategic Assessment of the Office of the Australian Information Commissioner.</p> | OAIC and AGD | This is under consideration. |
| <p>Recommendation 11</p> <p>5.51 The committee recommends that amendments giving effect to the recommendations contained in this report should be enacted as soon as practical (following a consultation period) and that, within three years of implementing the reforms recommended above, the Australian government conducts and tables in the Parliament a review into the effectiveness of the operation of the FOI regime and proposes any further changes that may be warranted. The review should consider, among other issues:</p> <ul style="list-style-type: none"> whether reforms to the FOI regime have resulted in improved outcomes for applicants, in particular, whether the backlog of FOI reviews has been addressed and whether decision-making agencies are meeting statutory timeframes; the merits of introducing or maintaining fees, costs, and charges for FOI applications and FOI reviews; | AGD | |

| Recommendation | For OAIC or AGD consideration | Consideration for implementation (if OAIC) |
|--|-------------------------------|--|
| <ul style="list-style-type: none"> the merits of introducing a deemed disclosure regime; whether decision-making agencies and the Commonwealth's FOI review functions are adequately resourced to meet their statutory responsibilities; opportunities for increasing the use of proactive disclosures by decision-making agencies; opportunities for increasing the pathways for individuals and their representatives to access personal information outside the FOI regime; the merits of introducing a requirement for decision-making agencies to consider pro-actively releasing categories of information that have been subject to repeat successful FOI applications; whether adequate provisions and guidance are in place to support vexatious applicant declarations; potential reforms or initiatives to support smaller Commonwealth agencies to meet their FOI obligations; and how best to ensure that the documents of a minister remain within reach of the FOI Act for a specified period after the relevant minister leaves or changes office. | | |
| <p>Recommendation 12</p> <p>5.54 The committee recommends that the Strategic Assessment of the Office of the Australian Information Commissioner considers what additional funding is required to clear the chronic backlog of Information Commissioner review decisions and the funding reasonably required for the operation of the FOI system on an efficient and effective steady state basis.</p> | OAIC and AGD | <p>The terms of reference¹ for the strategic review address resourcing – in particular:</p> <ul style="list-style-type: none"> the extent to which resourcing is suitable to achieve the OAIC's purpose and future functionality |

¹ [D2023/020292](#)

| Recommendation | For OAIC or AGD consideration | Consideration for implementation (if OAIC) |
|---|-------------------------------|---|
| | | <ul style="list-style-type: none"> • how resource allocation can be optimised to maximise efficiency and support the OAIC's statutory functions. |
| <p>Recommendation 13</p> <p>5.58 The committee recommends that there be a whole of government campaign to encourage decision-making agencies to explore opportunities to create pathways to release personal information directly to the individuals to which the information pertains without requiring applicants to use the FOI regime.</p> | AGD | |
| <p>Recommendation 14</p> <p>5.59 The committee recommends that the Office of the Australian Information Commissioner prioritises efforts to develop guidance and build the capacity of decision-making agencies to strengthen pathways for people accessing personal information outside the FOI regime.</p> | OAIC | <p>The OAIC supports increased use of administrative release mechanisms. We publish a detailed agency resource on Administrative Access on our website including an Administrative access checklist.²</p> <p>Informal release of information can provide a quicker, more flexible and inexpensive alternative to the FOI process. The proportion of FOI requests for documents containing personal information – as a proportion of all FOI requests – decreased from 87% in 2015-16 to 74% in 2022-23.³ This may reflect increased availability of documents containing personal information via administrative access schemes. However these schemes can also introduce new requirements including building the capabilities of officers to</p> |

² <https://www.oaic.gov.au/freedom-of-information/freedom-of-information-guidance-for-government-agencies/proactive-publication-and-administrative-access/administrative-access>.

³ OAIC, Annual Report 2022-2023, p 141: <https://www.oaic.gov.au/about-the-OAIC/our-corporate-information/oaic-annual-reports/annual-report-2022-23>.

| Recommendation | For OAIC or AGD consideration | Consideration for implementation (if OAIC) |
|---|-------------------------------|---|
| | | traverse 2 systems and the development, monitoring and implementation of different processes and systems. |
| Recommendation 15 5.61 The committee recommends that the Office of the Australian Information Commissioner develops streamlined guidance and conducts training for decision-making agencies on applications for vexatious applicant declarations. In addition, if necessary to streamline processes and promote efficiency, consideration should be given to making amendments to the relevant legislation. | OAIC and AGD | In terms of existing resources, Part 12 of the FOI Guidelines explain the legislative and procedural framework for vexatious applicant declarations. ⁴ These Guidelines are complemented by the OAIC's resource Vexatious Applicant Declarations. ⁵ The OAIC will consider the issues raised in the Senate Committee when next updating the Part 12 Guidelines and in delivering webinar information sessions to government agencies. |

Attachment B

FOI Inquiry 2023 – Dissenting Report by Government Members Recommendations

| Recommendation | For OAIC or AGD consideration | Consideration for implementation (if OAIC) |
|--|-------------------------------|--|
| Recommendation 1 1.38 Labor Senators recommend that the government carefully considers the findings of the Strategic Assessment of the Office of the Australian Information Commissioner (OAIC) and that further consideration is given to appropriate funding models for the OAIC as part of implementation of the government's response to the Privacy Act Review. | AGD | |
| Recommendation 2 | AGD | While implementation of such measures sit with the Australian government / AGD, the OAIC |

⁴ www.oaic.gov.au/freedom-of-information/freedom-of-information-guidance-for-government-agencies/foi-guidelines/part-12-vexatious-applicant-declarations

⁵ <https://www.oaic.gov.au/freedom-of-information/freedom-of-information-guidance-for-government-agencies/foi-guidelines/part-12-vexatious-applicant-declarations>.

| Recommendation | For OAIC or AGD consideration | Consideration for implementation (if OAIC) |
|--|-------------------------------|---|
| <p>1.39 Labor Senators recommend that the government carefully considers the issues raised during the course of this inquiry and recommendations from previous reviews to identify appropriate options for reform to ensure the effective operation of the FOI system.</p> | | <p>generally supports the consideration of reforms to improve efficiencies and outcomes in the FOI system.</p> <p>In addition to this Inquiry, we note that significant work has previously been undertaken to consider and recommend improvements to the Commonwealth FOI framework. Notably, the Review of the <i>Freedom of Information Act 1982</i> and <i>Australian Information Commissioner Act 2010</i>, prepared in 2013 by Dr Allan Hawke AC, set out 40 recommendations for reform tailored to the Commonwealth context.⁶ The OAIC made submissions to this review also setting out options for FOI reform.⁷ Additionally, a 2012 review by the then-Information Commissioner on charges under the FOI Act may also present potential reforms for consideration.⁸</p> |
| <p>Recommendation 3</p> <p>1.40 Labor Senators also recommend that the government gives consideration to a comprehensive and independent review of the FOI Act.</p> | AGD | <p>As per our consideration of Recommendation 2 of the Dissenting Report above, we support the consideration of FOI Act reform, and note the significant historical work undertaken in this regard.</p> |

⁶ Review of the Freedom of Information Act 1982 and Australian Information Commissioner Act 2010 (Final report, July 2013)

⁷ Office of the Australian Information Commissioner, Review of freedom of information legislation: submission to the Hawke Review (2012).

⁸ Office of the Australian Information Commissioner, Review of charges under the Freedom of Information Act 1982 – Report to the Attorney-General (February 2012):

<https://www.oaic.gov.au/freedom-of-information/information-commissioner-decisions-and-reports/foi-reports/review-of-charges-under-the-freedom-of-information-act-1982-report-to-the-attorney-general>.

HOT TOPIC BRIEF**OAIC-05****Inquiry into the operation of Commonwealth FOI laws****PA-Office of the Australian Information Commissioner**

On 28 March 2023, the Senate referred an inquiry into the operation of Commonwealth Freedom of Information (FOI) laws (**the Inquiry**) to the Legal and Constitutional Affairs References Committee. The referral followed the resignation of the former Freedom of Information Commissioner, Mr Leo Hardiman PSM KC, on 6 March 2023. Mr Hardiman commenced in the role on 19 April 2022 and his resignation took effect on 19 May 2023. The Committee tabled its report on 7 December 2023.

Key Points

- The Inquiry considered the operation of Commonwealth FOI laws, with reference to:
 - the resignation of the FOI Commissioner and the resulting impacts;
 - delays in the review of FOI appeals;
 - resourcing for responding to FOI applications and reviews;
 - the creation of a statutory time frame for completion of reviews; and
 - any related matters.
- The OAIC provided a submission to the Inquiry on 28 July 2023 and a supplementary submission on 14 November 2023.
- The Inquiry held public hearings on 28 August 2023 and 29 August 2023. The OAIC appeared before the Inquiry on 29 August 2023 and provided a response to questions taken on notice and other issues raised during the public hearings on 10 October 2023.
- Government agencies, media stakeholders, civil society groups, academics and individuals also made submissions to the Inquiry and appeared as witnesses during the public hearings.
- The Committee tabled a majority report on 7 December 2023 and made 15 recommendations. Labor Senators did not support the recommendations in the majority report.

| |
|-------------------------|
| COMMITTEE REPORT |
|-------------------------|

- The majority report concluded that the FOI system is not fit for purpose and made recommendations around FOI process, resourcing and culture. Proposed changes to the FOI Act and *Australian Information Commissioner Act 2010* included that:
 - full merits review should only be required at the AAT level
 - FOI regulatory functions are relocated to the Commonwealth Ombudsman, and
 - statutory timeframes for FOI reviews are introduced.
- The OAIC continually challenges itself to be as effective as possible in delivering to the Australian people, within its resources. The OAIC has undertaken a number of internal reviews and implemented structural and process improvements. However, the growth in the number and complexity of IC review applications, complaints, resourcing constraints, the impact of the pandemic, and a challenging labour market are central issues that impact the OAIC's work.
- In relation to a statutory timeframe for IC reviews, the OAIC's submission of 28 July 2023 noted that consideration would need to be given to the consequences of not meeting any stipulated timeframe, and the impact on AAT resourcing if a failure to meet a statutory timeframe attracted an entitlement to seek AAT review.
- It suggested that the effective functioning of the FOI system requires a multi-faceted approach, and is dependent on agency and OAIC resourcing, expertise and a commitment by agencies and ministers to fulfilling the objects of the FOI Act.
- The OAIC welcomed the Government's decision to reinstate the three Commissioner model, which will provide specialisation and capacity to address the sustained, increasing and highly complex workload of the OAIC.
- The majority report also included commentary about the leadership and culture of the OAIC based on allegations made by Mr Hardiman.
- The Australian Information Commissioner rejects allegations made by Mr Hardiman and his characterisation of events that occurred during his tenure as stated in his evidence to

the Committee. The Australian Information Commissioner has acted in good faith and in accordance with all legal requirements.

STRATEGIC REVIEW

- In the context of the Privacy Act Review, the May 2023 Budget provided the OAIC with funding to engage external expertise to undertake a strategic assessment. This process is expected to ensure the OAIC is appropriately positioned to meet the challenges of the future.
- The Strategic Review report was delivered to the Australian Information Commissioner and the Secretary of the Attorney-General's Department on 19 February 2024.
- FOI functions are a core regulatory focus and priority for the OAIC. The strategic assessment provides an important opportunity to identify strategies and further adapt the OAIC's regulatory structure and practices across its regulatory functions.
- See also Hot Topic Brief 07, Strategic Review of the OAIC.

| | | |
|------------------------|----------------------------|-------------------------------------|
| Version: 1 | Cleared by: Elizabeth Tydd | Action officer: Sarah Ghali |
| Current at: 03/05/2024 | Phone number: 02 9246 0436 | Action officer number: 02 9942 4208 |

ESTIMATES BRIEF

FOI Senate Committee Report

On 28 March 2023, the Senate referred an inquiry into the operation of Commonwealth Freedom of Information (FOI) laws (**the Inquiry**) to the Legal and Constitutional Affairs References Committee. The referral followed the resignation of the former Freedom of Information Commissioner, Mr Leo Hardiman PSM KC, on 6 March 2023. The Committee tabled a majority report on 7 December 2023.

Key Points

- The Inquiry considered the operation of Commonwealth FOI laws, with reference to:
 - the resignation of the FOI Commissioner and the resulting impacts;
 - delays in the review of FOI appeals;
 - resourcing for responding to FOI applications and reviews;
 - the creation of a statutory time frame for completion of reviews; and
 - any related matters.
- The OAIC provided a submission to the Inquiry on 28 July 2023 and a supplementary submission on 14 November 2023.
- The Inquiry held public hearings on 28 August 2023 and 29 August 2023. The OAIC appeared before the Inquiry on 29 August 2023 and provided a response to questions taken on notice and other issues raised during the public hearings on 10 October 2023.
- The Australian Information Commissioner also wrote to the Committee on 8 November 2023 in response to a 'supplementary statement' Mr Hardiman provided to the Committee on 15 September 2023.
- Government agencies, media stakeholders, civil society groups, academics and individuals also made submissions to the Inquiry and appeared as witnesses during the public hearings.
- The Committee tabled a majority report on 7 December 2023 and made 15 recommendations (**Attachment A**). Labor Senators did not support the

recommendations in the majority report and issued a dissenting report with three recommendations (**Attachment B**).

SUMMARY OF COMMITTEE REPORT

- The majority report concluded that the FOI system is not fit for purpose and made recommendations around FOI process, resourcing and culture. Proposed changes to the FOI Act and *Australian Information Commissioner Act 2010* included that:
 - full merits review should only be required at the AAT level
 - FOI regulatory functions are relocated to the Commonwealth Ombudsman, and
 - statutory timeframes for FOI reviews are introduced.
- The majority report also included commentary about the leadership and culture of the OAIC based on allegations made by Mr Hardiman.

CONSIDERATION OF REPORT

- **Attachment A** sets out the Committee's List of Recommendations. **Attachment B** sets out the recommendations in the Dissenting Report by Government Members. Our considerations concerning implementation is included where relevant.

Challenges with IC review

- The OAIC continually challenges itself to be as effective as possible in delivering to the Australian people, within its resources. The OAIC has undertaken a number of internal reviews and implemented structural and process improvements.
- However, the growth in the number and complexity of IC review applications, increases in complaints, resourcing constraints, the impact of the pandemic, and a challenging labour market are central issues that continue to impact the OAIC's work.
- In relation to a statutory timeframe for IC reviews, the OAIC's submission of 28 July 2023 noted that consideration would need to be given to the

consequences of not meeting any stipulated timeframe, and the impact on AAT resourcing if a failure to meet a statutory timeframe attracted an entitlement to seek AAT review.

Effective functioning of the FOI system and the OAIC

- It suggested that the effective functioning of the FOI system requires a multi-faceted approach, and is dependent on agency and OAIC resourcing, expertise and a commitment by agencies and ministers to fulfilling the objects of the FOI Act.
- The OAIC welcomed the Government's decision to reinstate the three Commissioner model, which will provide welcome specialisation and capacity to address the sustained, increasing and highly complex workload of the OAIC.

Strategic assessment of the OAIC

- In the context of the Privacy Act Review, the May 2023 Budget provided the OAIC with funding to engage external expertise to undertake a strategic assessment.
- The scope of the review is defined by terms of reference set by the Information Commissioner and the secretary of the Attorney-General's Department. The terms of reference require the reviewer to examine a range of issues which include:
 - OAIC organisational capabilities, structures, governance and resourcing
 - OAIC growing statutory workloads
 - environmental factors, like changing technology and the growth of the digital economy.
- In November 2023, the Information Commissioner appointed Nous Group to conduct the strategic review.
- On 19 February 2024, Nous Group delivered its report to the OAIC and the review's steering committee (which includes the Attorney-General's Department and the Department of Finance).

- In response to the majority and dissenting reports' recommendations in relation to the strategic assessment, the OAIC has instructed Nous Group to complete supplementary work within the extant budgetary allowance to provide some assistance concerning matters related to culture and leadership. and recommend ways to address any identified concerns.

OAIC FOI Steering Group

- FOI functions are a one of the core regulatory priorities for the OAIC.

OAIC FOI Surge Team

- One of the strategies implemented was the establishment of a whole of OAIC FOI surge team pilot between October and December 2023 to provide support to the FOI Branch across a range of FOI regulatory functions, including IC reviews, FOI complaints, extension of decisions and guidance functions.
- During, a surge team involved approximately 17 staff across the OAIC who worked on an overtime basis for several hours at a time.
- Outputs included managing over 99 extension of time requests made by agencies, case management to progress matters leading to the FOI team's finalisation of a number of reviews.
- Further surge team sessions are anticipated.

| | | |
|----------------------|----------------------------|---------------------------------------|
| Version: | Cleared by: Rocelle Ago | Action officer: s 22(1)(a)(ii) |
| Current at: 15/03/24 | Phone number: 02 9942 4205 | Action officer number: s 22(1)(a)(ii) |

FOI Inquiry 2023 - List of Recommendations

| Recommendation | For OAIC or AGD consideration | Consideration for implementation (if OAIC) |
|--|-------------------------------|--|
| <p>Recommendation 1</p> <p>5.8 The committee recommends that an independent investigation be undertaken, reporting to the Secretary of the Attorney-General's Department and not the Office of the Australian Information Commissioner (OAIC), to consider the matters raised by Mr Hardiman in relation to workplace behaviour within the OAIC, the impact on employees (past and present), and appropriate action which needs to be taken.</p> | AGD | |
| <p>Recommendation 2</p> <p>5.21 The committee recommends that the Australian government amends the <i>Freedom of Information Act 1982</i> and the <i>Australian Information Commissioner Act 2010</i> to provide that:</p> <ul style="list-style-type: none"> • reviews internal to decision-making agencies be abolished and resources reallocated to primary decision-making; • intermediate reviews are not required to provide procedural fairness or formal reasons for a decision; • a full merits review process is only required at the level of the Administrative Appeals Tribunal (or its replacement); and • FOI applicants may appeal directly to the Administrative Appeals Tribunal (or its replacement) at any time after a primary decision for a full merits review of their claim without having to wait for a decision at the intermediate level. | AGD | <p>While such legislative reform is a matter for the Australian Government, we note the following provisions by way of context concerning the current legislative framework.</p> <ul style="list-style-type: none"> • Section 55K of the FOI Act requires the Information Commissioner to make an IC review decision in writing, to include a statement of reasons for the decision, and to publish the decision. • Section 25D of the <i>Acts Interpretation Act 1901</i> provides that a person/body/tribunal subject to a requirement to give written reasons for a decision is also required – in the same instrument – to set out the findings on material questions of fact, and refer to the evidence or other material on which those findings were based. |

| Recommendation | For OAIC or AGD consideration | Consideration for implementation (if OAIC) |
|---|-------------------------------|---|
| <p>Recommendation 3</p> <p>5.24 The committee recommends that the Australian government amends the Australian Information Commissioner Act 2010 to separate out the FOI review and regulatory functions from the Office of the Australian Information Commissioner and to relocate the FOI Commissioner to the Office of the Commonwealth Ombudsman.</p> | AGD | |
| <p>Recommendation 4</p> <p>5.25 The committee recommends that the Australian government reallocates to the FOI Commissioner, newly located within the Office of the Commonwealth Ombudsman, all resources currently earmarked for the FOI functions of the Office of the Australian Information Commissioner and, going forward, provides the FOI Commissioner with adequate resources to perform its regulatory and review functions in a timely and efficient manner.</p> | AGD | |
| <p>Recommendation 5</p> <p>The committee recommends that the Australian government:</p> <ul style="list-style-type: none"> • consults with key stakeholders and implements appropriate statutory timeframes for FOI reviews (with the timeline proposed by the GrataFund as detailed in paragraph 3.56 of this report as an indicator), including consideration of provisions for extensions in exceptional circumstances due to the scale and complexity of an Information Commissioner review; and • amends the Freedom of Information Act 1982 to impose statutory timeframes for the finalisation of FOI reviews. Statutory timeframes should expressly include the notification of reviews to decision-making agencies. | AGD | <p>While implementation of such measures sits with the Australian government / AGD, we consider that any consideration of potential statutory timeframes should have regard to:</p> <ul style="list-style-type: none"> • the nature of the review process undertaken and the procedural requirements in the FOI Act • whether express timeframes impact the ability of a decision maker to make the appropriate decision in the circumstances • the consequences of not meeting any stipulated timeframe |

| Recommendation | For OAIC or AGD consideration | Consideration for implementation (if OAIC) |
|--|-------------------------------|--|
| | | <ul style="list-style-type: none"> the impact on AAT resourcing if a failure to meet a statutory timeframe attracted an entitlement to seek AAT review whether additional OAIC funding is required for implementation. |
| <p>Recommendation 6</p> <p>5.34 The committee recommends that the Australian government amends subsection 4(1) of the Freedom of Information Act 1982 to ensure that a change in minister does not impede the right to access documents under the FOI system.</p> | AGD | <p>This legislative reform is a matter for the Australian Government/AGD. By way of background, the OAIC's interpretation of subsection 4(1) defining 'official document of a Minister' is discussed below.</p> <p>In the decision of ACY and <i>Attorney-General (Freedom of information) [2023] AICmr 7</i> (22 February 2023), former FOI Commissioner Leo Hardiman PSM KC found that the current Attorney-General, the Hon Mark Dreyfus KC MP, does not have possession of any documents at issue, which meant that, for the purposes of that decision, any relevant document is no longer an 'official document of the Minister' to which the mandatory access rule in s 11A(3) of the FOI Act applies. The former FOI Commissioner found, therefore, that the current Attorney-General was not required to provide access to the parts of the document at issue, which the authorised officer had found to be exempt or deleted as irrelevant.</p> <p>The Australian Information Commissioner also considered this issue in <i>Rex Patrick and Attorney-</i></p> |

| Recommendation | For OAIC or AGD consideration | Consideration for implementation (if OAIC) |
|---|-------------------------------|---|
| | | <p><i>General (Freedom of information) [2023] AICmr 9</i> (28 February 2023), which involved a request for a letter of advice from the former Attorney-General to the former Prime Minister. The Information Commissioner found that the current Attorney-General was not in possession of the document at issue and that for the purpose of the IC review, any relevant document is no longer ‘an official document of a Minister’ to which the mandatory access rule under s 11A(3) of the FOI Act applies. This Information Commissioner decision is the subject of Federal Court proceedings in <i>Rex Lyall Patrick v Attorney General of the Commonwealth of Australia</i> (SAD40/2023). Judgment in this proceeding is currently reserved.</p> |
| <p>Recommendation 7</p> <p>5.36 The committee recommends that the Australian government amends subsection 8D(3) of the Freedom of Information Act 1982 to require that decision-making agencies make directly available for public download, either from the disclosure log or another website, all information that is released through an FOI request, subject to recognised technical constraints and privacy concerns.</p> | AGD | |
| <p>Recommendation 8</p> <p>5.41 The committee recommends that the Australian government ensures that formal reporting obligations for both decision-making agencies and review bodies be expanded to ensure information is readily available regarding the timeliness and efficacy of FOI decision making.</p> | AGD | |
| <p>Recommendation 9</p> | OAIC and AGD | <p>An OAIC strategic review is due to report in February 2024. It is being conducted in</p> |

| Recommendation | For OAIC or AGD consideration | Consideration for implementation (if OAIC) |
|---|-------------------------------|--|
| <p>5.47 The committee recommends that the Strategic Assessment of the Office of the Australian Information Commissioner (OAIC) specifically considers:</p> <ul style="list-style-type: none"> operational and resourcing requirements needed to rapidly resolve the current backlog of FOI reviews; the organisational culture of the OAIC, including its leadership, and its approach to the discharge of all its statutory functions; whether resources can and should be reallocated internally to bolster the FOI functions of the OAIC; ways to ensure the agency's reporting of FOI applications and reviews is transparent, fulsome, and explicitly accounts for the impact of deemed refusals on finalisation statistics; the key performance indicators adopted to assess the performance of the FOI function of the OAIC so that there is a clear and transparent reporting of the backlog of substantive Information Commissioner review matters (as opposed to the clearance of less substantive matters, such as the rectification of deemed refusals by the relevant agency which requires minimal review); measures to support the agency to better adapt to the changing nature and scale of its FOI workload; and possible legislative changes that would improve the agency's functioning and improve outcomes for FOI applicants. | | <p>accordance with terms of reference settled by the Secretary of Attorney-General's department, the acting FOI Commissioner, and the Australian Information Commissioner. The terms were prepared by a committee consisting of senior staff from AGD, the Department of Finance and OAIC.</p> <p>The terms of reference¹ require the reviewer to look at matters including OAIC's current structure, governance and resourcing; how resources can be best allocated to maximise efficiency; and how OAIC can respond to its growing workload and changing environment.</p> <p>Additionally, the OAIC's FOI Steering Group aims to ensure a 'whole of OAIC' response to developing and implementing strategies to reduce the current IC Review backlog.</p> |
| Recommendation 10 | OAIC and AGD | This is under consideration. |

¹ [D2023/020292](#)

| Recommendation | For OAIC or AGD consideration | Consideration for implementation (if OAIC) |
|--|-------------------------------|--|
| <p>5.48 The committee recommends that the Australian government publishes the Strategic Assessment of the Office of the Australian Information Commissioner.</p> | | |
| <p>Recommendation 11</p> <p>5.51 The committee recommends that amendments giving effect to the recommendations contained in this report should be enacted as soon as practical (following a consultation period) and that, within three years of implementing the reforms recommended above, the Australian government conducts and tables in the Parliament a review into the effectiveness of the operation of the FOI regime and proposes any further changes that may be warranted. The review should consider, among other issues:</p> <ul style="list-style-type: none"> • whether reforms to the FOI regime have resulted in improved outcomes for applicants, in particular, whether the backlog of FOI reviews has been addressed and whether decision-making agencies are meeting statutory timeframes; • the merits of introducing or maintaining fees, costs, and charges for FOI applications and FOI reviews; • the merits of introducing a deemed disclosure regime; • whether decision-making agencies and the Commonwealth's FOI review functions are adequately resourced to meet their statutory responsibilities; • opportunities for increasing the use of proactive disclosures by decision-making agencies; • opportunities for increasing the pathways for individuals and their representatives to access personal information outside the FOI regime; | AGD | |

| Recommendation | For OAIC or AGD consideration | Consideration for implementation (if OAIC) |
|--|-------------------------------|---|
| <ul style="list-style-type: none"> the merits of introducing a requirement for decision-making agencies to consider pro-actively releasing categories of information that have been subject to repeat successful FOI applications; whether adequate provisions and guidance are in place to support vexatious applicant declarations; potential reforms or initiatives to support smaller Commonwealth agencies to meet their FOI obligations; and how best to ensure that the documents of a minister remain within reach of the FOI Act for a specified period after the relevant minister leaves or changes office. | | |
| <p>Recommendation 12</p> <p>5.54 The committee recommends that the Strategic Assessment of the Office of the Australian Information Commissioner considers what additional funding is required to clear the chronic backlog of Information Commissioner review decisions and the funding reasonably required for the operation of the FOI system on an efficient and effective steady state basis.</p> | OAIC and AGD | <p>The terms of reference² for the strategic review address resourcing – in particular:</p> <ul style="list-style-type: none"> the extent to which resourcing is suitable to achieve the OAIC’s purpose and future functionality how resource allocation can be optimised to maximise efficiency and support the OAIC’s statutory functions. |
| <p>Recommendation 13</p> <p>5.58 The committee recommends that there be a whole of government campaign to encourage decision-making agencies to explore opportunities to create pathways to release personal information directly to the individuals to which the information pertains without requiring applicants to use the FOI regime.</p> | AGD | |

² [D2023/020292](#)

| Recommendation | For OAIC or AGD consideration | Consideration for implementation (if OAIC) |
|--|-------------------------------|---|
| <p>Recommendation 14</p> <p>5.59 The committee recommends that the Office of the Australian Information Commissioner prioritises efforts to develop guidance and build the capacity of decision-making agencies to strengthen pathways for people accessing personal information outside the FOI regime.</p> | <p>OAIC</p> | <p>The OAIC supports increased use of administrative release mechanisms. We publish a detailed agency resource on Administrative Access on our website including an Administrative access checklist.³</p> <p>Informal release of information can provide a quicker, more flexible and inexpensive alternative to the FOI process. The proportion of FOI requests for documents containing personal information – as a proportion of all FOI requests – decreased from 87% in 2015-16 to 74% in 2022-23.⁴ This may reflect increased availability of documents containing personal information via administrative access schemes. However these schemes can also introduce new requirements including building the capabilities of officers to traverse 2 systems and the development, monitoring and implementation of different processes and systems.</p> |
| <p>Recommendation 15</p> <p>5.61 The committee recommends that the Office of the Australian Information Commissioner develops streamlined guidance and conducts training for decision-making agencies on applications for vexatious applicant declarations. In addition, if necessary to streamline processes and</p> | <p>OAIC and AGD</p> | <p>In terms of existing resources, Part 12 of the FOI Guidelines explain the legislative and procedural framework for vexatious applicant declarations.⁵ These Guidelines are complemented by the OAIC's resource Vexatious Applicant Declarations.⁶ The OAIC will consider the issues</p> |

³ <https://www.oaic.gov.au/freedom-of-information/freedom-of-information-guidance-for-government-agencies/proactive-publication-and-administrative-access/administrative-access>.

⁴ OAIC, Annual Report 2022-2023, p 141: <https://www.oaic.gov.au/about-the-OAIC/our-corporate-information/oaic-annual-reports/annual-report-2022-23>.

⁵ www.oaic.gov.au/freedom-of-information/freedom-of-information-guidance-for-government-agencies/foi-guidelines/part-12-vexatious-applicant-declarations

⁶ <https://www.oaic.gov.au/freedom-of-information/freedom-of-information-guidance-for-government-agencies/foi-guidelines/part-12-vexatious-applicant-declarations>.

| Recommendation | For OAIC or AGD consideration | Consideration for implementation (if OAIC) |
|---|-------------------------------|---|
| promote efficiency, consideration should be given to making amendments to the relevant legislation. | | raised in the Senate Committee when next updating the Part 12 Guidelines and in delivering webinar information sessions to government agencies. |

Attachment B

FOI Inquiry 2023 – Dissenting Report by Government Members Recommendations

| Recommendation | For OAIC or AGD consideration | Consideration for implementation (if OAIC) |
|--|-------------------------------|--|
| Recommendation 1 1.38 Labor Senators recommend that the government carefully considers the findings of the Strategic Assessment of the Office of the Australian Information Commissioner (OAIC) and that further consideration is given to appropriate funding models for the OAIC as part of implementation of the government's response to the Privacy Act Review. | AGD | |
| Recommendation 2 1.39 Labor Senators recommend that the government carefully considers the issues raised during the course of this inquiry and recommendations from previous reviews to identify appropriate options for reform to ensure the effective operation of the FOI system. | AGD | <p>While implementation of such measures sit with the Australian government / AGD, the OAIC generally supports the consideration of reforms to improve efficiencies and outcomes in the FOI system.</p> <p>In addition to this Inquiry, we note that significant work has previously been undertaken to consider and recommend improvements to the Commonwealth FOI framework. Notably, the Review of the <i>Freedom of Information Act 1982</i> and <i>Australian Information Commissioner Act 2010</i>, prepared in 2013 by Dr Allan Hawke AC, set out 40 recommendations for reform tailored to</p> |

| Recommendation | For OAIC or AGD consideration | Consideration for implementation (if OAIC) |
|---|-------------------------------|--|
| | | the Commonwealth context. ⁷ The OAIC made submissions to this review also setting out options for FOI reform. ⁸ Additionally, a 2012 review by the then-Information Commissioner on charges under the FOI Act may also present potential reforms for consideration. ⁹ |
| Recommendation 3 1.40 Labor Senators also recommend that the government gives consideration to a comprehensive and independent review of the FOI Act. | AGD | As per our consideration of Recommendation 2 of the Dissenting Report above, we support the consideration of FOI Act reform, and note the significant historical work undertaken in this regard. |

⁷ Review of the Freedom of Information Act 1982 and Australian Information Commissioner Act 2010 (Final report, July 2013)

⁸ Office of the Australian Information Commissioner, Review of freedom of information legislation: submission to the Hawke Review (2012).

⁹ Office of the Australian Information Commissioner, Review of charges under the Freedom of Information Act 1982 – Report to the Attorney-General (February 2012):

<https://www.oaic.gov.au/freedom-of-information/information-commissioner-decisions-and-reports/foi-reports/review-of-charges-under-the-freedom-of-information-act-1982-report-to-the-attorney-general>.

HOT TOPIC BRIEF**OAIC 07****Strategic Review of the OAIC****PA-Office of the Australian Information Commissioner**

The 2023-24 Budget provided funding for a strategic review of the OAIC. The review will provide recommendations to support the OAIC to deliver its functions as privacy and information access regulator into the future.

Key Points

- In the May 2023 Budget, the Government provided \$1 million of funding for a strategic review of the Office of the Australian Information Commissioner (OAIC).
- The strategic review is being conducted by an external consultancy, Nous Group. Nous Group was selected through a competitive procurement process.
- The Strategic Review is being overseen by a Strategic Review Steering Group, consisting of officers from the Attorney-Generals' Department, the Department of Finance, and the OAIC.
- The Strategic Review is intended to make recommendations to ensure OAIC is best positioned to deliver on its functions as the national privacy and information access regulator and respond to future challenges.
- The Strategic Review report is expected to be delivered to the Australian Information Commissioner and the Secretary of the Attorney-Generals' Department in February 2024. The Review Steering Group will advise the Information Commissioner and the Secretary on how best to respond to the recommendations in the review report.

Interplay with Senate Report into Operation of Commonwealth FOI laws

- The majority (Australian Greens and the opposition) report of the Senate Legal and Constitutional Affairs Reference Committee's inquiry into *The Operation of Commonwealth Freedom of Information (FOI) laws* (7 December 2024) raised a number of concerns about the OAIC. It recommended that the Strategic Review consider a number of specific matters (Recommendation 9), including:
 1. operational and resourcing requirements to rapidly resolve the OAIC's backlog of FOI reviews

2. OAIC organisational culture and leadership
 3. whether resources should be allocated internally to bolster OAIC's FOI functions
 4. reporting of FOI review applications
 5. suitable key performance indicators
 6. measures to support OAIC's ability to adapt to its changing workload
 7. possible legislative changes.
- The reviewer has advised OAIC that of the items in this list 1, 3, and 6 were in scope of the review's terms of reference, and that item 2 (culture and leadership) was partially in scope. Items 4, 5 and 7 are not in scope of the review and due to the late stage of the review when the Senate Inquiry handed down its report, could not be brought within scope without diverting the review from other lines of inquiry.
 - The minority (ALP) report identified a number of opportunities for the Strategic Review including considering culture and leadership at the OAIC, and OAIC's approach to delivering on its statutory functions.
 - The OAIC has asked the reviewer to commence supplementary work to assess the OAIC's culture and leadership. This work will occur in February and March 2024 so as not to delay the completion of the review and to allow this issue to be appropriately considered in a measured way.

| | | |
|-----------------------------|------------------------------|---------------------------------------|
| Version: 1 | Cleared by: Angelene Falk | Action officer: Annan Boag |
| Current at: 22 January 2024 | Phone number: s 22(1)(a)(ii) | Action officer number: s 22(1)(a)(ii) |

ESTIMATES BRIEF: REGULATORY PRIORITY

Subject: FOI IC reviews

Type: Functions and background

| Key details | | | |
|---------------------------|---|-------|----------------|
| Responsible Branch & team | Freedom of Information, Significant Decisions | | |
| Content author | s 22(1)(a)(ii) | Phone | s 22(1)(a)(ii) |
| Clearance by | Rocelle Ago | Phone | |
| Brief current at | 6 February 2025 | | |

Brief overview of regulatory priority

- Increasing OAIC FOI regulatory and case management effectiveness and uplifting agency capabilities are key regulatory priorities for 2024/25.
- The OAIC is committed to delivering a timely IC review process, informed by the principles of informality, responsiveness and proportionality. The OAIC is working through a significant volume of IC reviews on hand, many of which are over 12 months old.

Current action

- To deliver a timelier IC review process and to support parties to understand the expectations and steps of the IC review process, revised procedure directions and Part 10 of the FOI Guidelines commenced on 1 July 2024. Key changes to the procedure directions include:
 - a requirement that respondents engage, or attempt to engage, with the applicant during the IC review, with a view to resolve or narrow the matters at issue
 - a requirement that applicants and respondents send submissions to each other at the same time as they send them to the OAIC, and

- specific procedures for certain types of IC reviews, including reviews of deemed access refusal decisions, and access refusal decisions that are made on the basis that documents cannot be found or do not exist, designed to deliver adequate first instance decisions.
- requiring the provision of information and production of documents under s 55R of the FOI Act where an agency or minister fails to provide information and documents within the required timeframe. Failure to comply with a notice to produce under s 55R is punishable by six months imprisonment. The OAIC has observed that agencies have been responsive to forward notices indicating a s 55R notice will be issued following non-compliance with the IC's Direction as to certain procedures to be followed by agencies and ministers in Information Commissioner reviews.

Recent developments

- The OAIC finalised 1,748 Information Commissioner (IC) reviews in 2023–24, a 15% increase compared to 2022–23, when we finalised 1,518.
- We finalised 63% of IC reviews (1,108) within 12 months of receipt, compared to 78% in 2022–23 (1,179). The average time taken to finalise an IC review increased from 9.8 months in 2022–23 to 15.5 months in 2023–24. This reflects a focus on finalising legacy matters more than 12 months old, with 641 (36%) of IC reviews finalised pertaining to matters more than 12 months old and a significant increase in the number of decisions made under s 55K. Since the beginning of 2024, we have finalised all matters lodged in 2018, 2019 and 2020.

- As at 31 December 2024, we have reduced the number of IC reviews on hand to 1,825.
- In 2024/25, the OAIC has finalised more IC reviews (1,258) than we have received (1,057). This has been achieved despite a 33% increase in the number of IC reviews received compared to the same period last year.
- IC reviews on hand were reduced through a combination of strategies which facilitated improved finalisation rates including through:
 - The implementation of a whole of OAIC surge team, providing additional capacity and enabling FOI staff to work on older IC reviews.
 - Improved data capability to identify and expedite priority cohorts including access grants, charges, searches, practical refusals, ministers' matters and secrecy provisions.
 - Lowering delegations to exercise powers such as issuing directions, exercising discretion to decline to review applications and greater use of compulsory powers to facilitate case management.
 - Revision of decision templates, capturing key points and standard words or approaches from decided matters to promote consistency, and more efficient and succinct decision-making.
 - Review of correspondence templates, smartforms and guidance, including FOI Guidelines which agencies and ministers must have regard to when exercising a function under the FOI Act.
 - Establishment of case input meetings with FOI leadership team.

s 22(1)(a)(ii)

- Engagement with agency and ministerial staff, including senior staff, through external meetings, webinars, to clarify expectations and inform our priorities.
- Emphasis on team/branch targets (e.g, 200 decisions per year).
- A significant increase in the number of s 55K decisions continues:
 - 207 55K decisions were made in 2023-24 compared to 68 in the previous year. For the 2024 calendar year, we made 258 s 55K decisions.
 - the rate of matters set aside or varied in 2023-24 was 70% (60% set aside, 10% varied) compared to 74% (61% set aside, 13% varied) this financial year.
- The OAIC is currently considering the recent decision of the full Federal Court in *Bachelard v Australian Federal Police* [2025] FCAFC 5 and whether it has implications for case management practice in IC reviews, particularly in relation to relevant procedural fairness steps regarding the application of exemptions that have been raised during the course of the IC review but have not been specifically raised in relation to a particular document. The OAIC's process for conducting IC reviews are set out in [Part 10 of the FOI Guidelines](#) and in the [Direction as to certain procedures to be followed by agencies and ministers in Information Commissioner reviews](#).

Background relevant to IC review timeframes: public matters only

- In 2024-25 to 31 October, 63% IC review applications derive from 3 agencies Department of Home Affairs (approx. 52%); Department of Veterans Affairs (6%) and Department of Defence (approx. 5%)

s 22(1)(a)(ii)

s 22(1)(a)(ii)

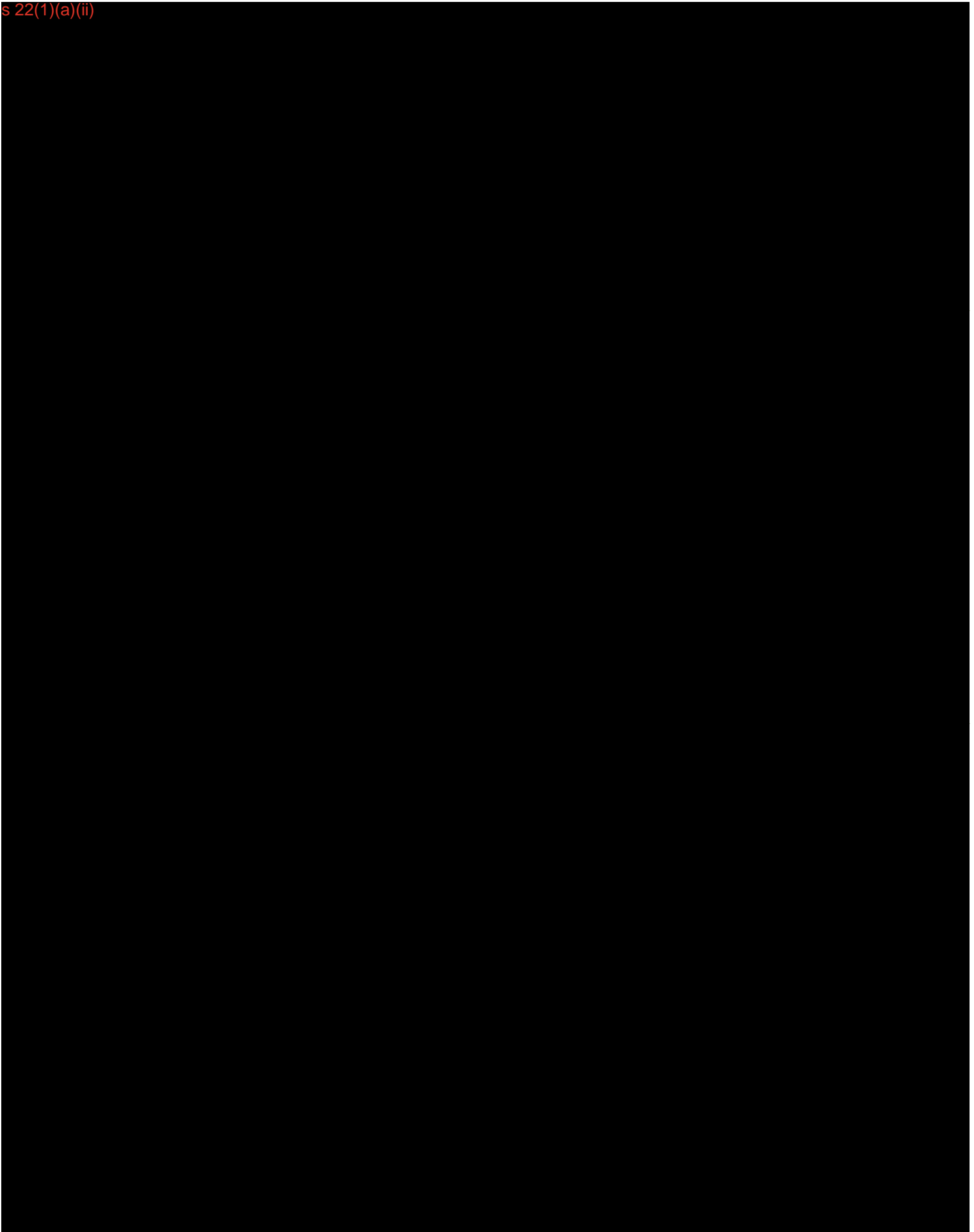
- IC review timeframes comparison between inquiry report¹ and 31 October 2024:

| | As at 30 June 2023 | As at 29 February 2024 | As at 31 March 2024 | As at 31 October 2024 | As at 6 February 2025 |
|--------------------------------------|--------------------|------------------------|---------------------|-----------------------|-----------------------|
| Greater than 48 months old (4 years) | 86 | 85 | 81 | 34 | 4 |
| Between 36 and 48 months (3-4 years) | 227 | 229 | 243 | 212 | 216 |
| Between 24 and 36 months (2-3 years) | 342 | 428 | 426 | 350 | 329 |
| Between 12 and 24 months (1-2 years) | 561 | 595 | 587 | 403 | 414 |
| Total over 1 year | 1,216 | 1,337 | 1,336 | 999 | 963 |

¹ Commonwealth, Parliamentary Debates, Senate, 7 December 2023:
[Senate_2023_12_07_Official.pdf;fileType=application/pdf \(aph.gov.au\)](#)

On the first page of the brief, under the heading 'Key statistics', are the ages of information commissioner reviews. Those are reviews of original decisions, quite often decisions not to release documents, ongoing at the period close. The date of this table is as at 30 June 2023. And listen to these statistics. This is a system that is broken, and this is exhibit A of a broken system: age of IC reviews ongoing at period close, greater than 48 months that is more than four years 86; between 36 and 48 months, which is three to four years, 227; between 24 and 36 months, which is between two and three years, backlogged in the system, 342; and between 12 and 24 months, 561. That is 1,216 information commission review applications that have been stuck in the system for more than one year. How many documents could have been released under those applications? But disclosure was refused and the appeals are stuck in the system. This is exhibit A of a broken system. These statistics need to be made public. They should be given prominence in the annual report of the Office of the Australian Information Commissioner. They should be on the first page of that report. We shouldn't have to go through estimates process and an inquiry process in order to extract those key statistics. These key statistics tell the story of the state of health of our FOI system. It isn't fit for purpose. Urgent reform is required.

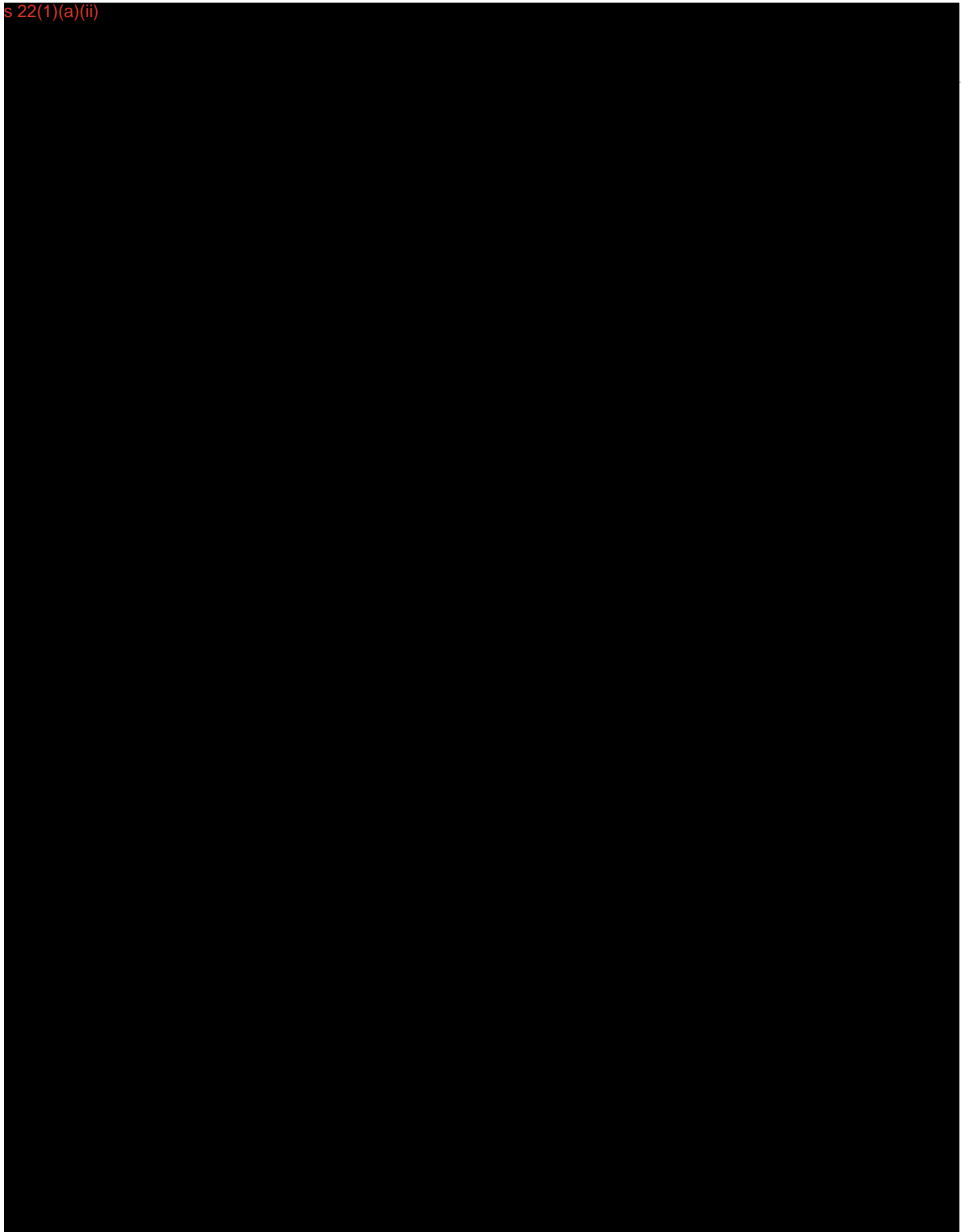
s 22(1)(a)(ii)



...

...

s 22(1)(a)(ii)



ESTIMATES BRIEF: REGULATORY PRIORITY

Subject: FOI IC reviews

Type: Functions and background

| Key details | | | |
|---------------------------|--|-------|----------------|
| Responsible Branch & team | Freedom of Information Case Management | | |
| Content author | s 22(1)(a)(ii) | Phone | s 22(1)(a)(ii) |
| Clearance by | Rocelle Ago | Phone | |
| Brief current at | 18 March 2025 | | |

Brief overview of regulatory priority

- Increasing OAIC FOI regulatory and case management effectiveness and uplifting agency capabilities are key regulatory priorities for 2024/25.
- The OAIC is committed to delivering a timely IC review process, informed by the principles of informality, responsiveness and proportionality. The OAIC is working through a significant volume of IC reviews on hand, many of which are over 12 months old.
- As at 13 March 2025, we have reduced the number of IC reviews on hand to 1,806.
- In 2024/25, the OAIC has finalised more IC reviews (1,551) than we received (1,330). This has been achieved despite a 25% increase in the number of IC reviews received compared to the same period last year.
- Since the beginning of 2024, we have finalised all matters lodged in 2018, 2019 and 2020.

s 22(1)(a)(ii)

- IC review timeframes comparison between inquiry report¹ and 18 March 2025:

| | As at 30 June 2023 | As at 29 Feb 2024 | As at 31 Mar 2024 | As at 31 Oct 2024 | As at 6 Feb 2025 | As at 28 Feb 2025 |
|---|-----------------------------|-------------------------|-------------------------|-------------------------|------------------------|----------------------|
| Greater than 48 months old (4 years) | 86 | 85 | 81 | 34 | 4 | 13 |
| Between 36 and 48 months (3-4 years) | 227 | 229 | 243 | 212 | 216 | 196 |
| Between 24 and 36 months (2-3 years) | 342 | 428 | 426 | 350 | 329 | 327 |
| Between 12 and 24 months (1-2 years) | 561 | 595 | 587 | 403 | 414 | 409 |
| Total over 1 year | 1,216 | 1,337 | 1,336 | 999 | 963 | 945 |

s 22(1)(a)(ii)

Current action

- To deliver a timelier IC review process and to support parties to understand the expectations and steps of the IC review process, revised procedure directions and Part 10 of the FOI Guidelines commenced on 1 July 2024. Key changes to the procedure directions include:

¹ Commonwealth, Parliamentary Debates, Senate, 7 December 2023:
[Senate_2023_12_07_Official.pdf;fileType=application/pdf \(aph.gov.au\)](#)

On the first page of the brief, under the heading 'Key statistics', are the ages of information commissioner reviews. Those are reviews of original decisions, quite often decisions not to release documents, ongoing at the period close. The date of this table is as at 30 June 2023. And listen to these statistics. This is a system that is broken, and this is exhibit A of a broken system: age of IC reviews ongoing at period close, greater than 48 months that is more than four years 86; between 36 and 48 months, which is three to four years, 227; between 24 and 36 months, which is between two and three years, backlogged in the system, 342; and between 12 and 24 months, 561. That is 1,216 information commission review applications that have been stuck in the system for more than one year. How many documents could have been released under those applications? But disclosure was refused and the appeals are stuck in the system. This is exhibit A of a broken system. These statistics need to be made public. They should be given prominence in the annual report of the Office of the Australian Information Commissioner. They should be on the first page of that report. We shouldn't have to go through estimates process and an inquiry process in order to extract those key statistics. These key statistics tell the story of the state of health of our FOI system. It isn't fit for purpose. Urgent reform is required.

- a requirement that respondents engage, or attempt to engage, with the applicant during the IC review, with a view to resolve or narrow the matters at issue
 - a requirement that applicants and respondents send submissions to each other at the same time as they send them to the OAIC, and
 - specific procedures for certain types of IC reviews, including reviews of deemed access refusal decisions, and access refusal decisions that are made on the basis that documents cannot be found or do not exist, designed to deliver adequate first instance decisions.
- requiring the provision of information and production of documents under s 55R of the FOI Act where an agency or minister fails to provide information and documents within the required timeframe. Failure to comply with a notice to produce under s 55R is punishable by six months imprisonment. The OAIC has observed that agencies have been responsive to forward notices indicating a s 55R notice will be issued following non-compliance with the IC's *Direction as to certain procedures to be followed by agencies and ministers in Information Commissioner reviews*.

| |
|----------------------------|
| Recent developments |
|----------------------------|

- IC reviews on hand were reduced through a combination of strategies which facilitated improved finalisation rates including through:
 - The implementation of a whole of OAIC surge team, providing additional capacity and enabling FOI staff to work on older IC reviews.

- Improved data capability to identify and expedite priority cohorts including access grants, charges, searches, practical refusals, ministers' matters and secrecy provisions.
- Lowering delegations to exercise powers such as issuing directions, exercising discretion to decline to review applications and greater use of compulsory powers to facilitate case management.
- Revision of decision templates, capturing key points and standard words or approaches from decided matters to promote consistency, and more efficient and succinct decision-making.
- Review of correspondence templates, smartforms and guidance, including FOI Guidelines which agencies and ministers must have regard to when exercising a function under the FOI Act.
- Establishment of case input meetings with FOI leadership team.
- Engagement with agency and ministerial staff, including senior staff, through external meetings, webinars, to clarify expectations and inform our priorities.
- Emphasis on team/branch targets (e.g, 200 decisions per year).
- A significant increase in the number of s 55K decisions continues:
 - 207 s5K decisions were made in 2023-24 compared to 68 in the previous year. For the 2024 calendar year, we made 258 s 55K decisions.

- the rate of matters set aside or varied in 2023-24 was 70% (60% set aside, 10% varied) compared to 74% (61% set aside, 13% varied) this financial year.
- For the 2024-25 financial year, the OAIC is currently focusing on:
 - IC review applications received 2020 and 2021
 - IC reviews applications involving deemed access refusals (where an agency has not provided a decision within the statutory processing timeframe)
 - IC reviews where the sole access refusal reason relates to:
 - adequacy of searches (s 24A)
 - imposition of a charge (s 29)
 - practical refusal (s 24)
 - access grants
 - IC reviews where the respondent is a Minister
- The OAIC has published key statistical information about the [OAIC's freedom of information regulatory work](#) on its website. This includes a summary of the OAIC's FOI caseload as well as focus areas and caseload reports for IC reviews and FOI complaints.
- The OAIC is currently considering the recent decision of the full Federal Court in *Bachelard v Australian Federal Police* [2025] FCAFC 5 and whether it has implications for case management practice in IC reviews, particularly in relation to relevant procedural fairness steps regarding the application of exemptions that have been raised during the course of the IC review but have not been specifically raised in relation to a particular document. The OAIC's process for conducting IC reviews are set out in [Part 10 of the FOI](#)

Guidelines and in the Direction as to certain procedures to be followed by agencies and ministers in Information Commissioner reviews. |

Commented [RA10]: Justin - please include dot point on publication of FOI regulatory statistics and focus areas

Commented [JL11R10]: Actioned

Background relevant to IC review timeframes: public matters only

- In 2024-25 to 31 October, 63% IC review applications derive from 3 agencies Department of Home Affairs (approx. 52%); Department of Veterans Affairs (6%) and Department of Defence (approx. 5%) |

s 22(1)(a)(ii)

2023-24 Stats

- The OAIC finalised 1,748 Information Commissioner (IC) reviews in, a 15% increase compared to 2022–23, when we finalised 1,518.
- We finalised 63% of IC reviews (1,108) within 12 months of receipt, compared to 78% in 2022–23 (1,179). The average time taken to finalise an IC review increased from 9.8 months in 2022–23 to 15.5 months in 2023–24. This reflects a focus on finalising legacy matters more than 12 months old, with 641 (36%) of IC reviews finalised pertaining to matters more than 12 months old and a significant increase in the number of decisions made under s 55K.

From: [DRAYTON, Melanie \(DEPARTED\)](#)
To: [FALK, Angelene \(EAN\)](#); [PIRANI, Toni \(EAN\)](#); [s 22\(1\)\(a\)\(ii\)](#) [GHALI, Sarah](#)
Subject: Fwd: FOI inquiry report [SEC=OFFICIAL]
Date: Friday, 8 December 2023 8:12:05 AM
Attachments: [Talking points - 7 December 2023.DOCX](#)

Good morning

FYI

Thanks

Mel

From: [s 22\(1\)\(a\)\(ii\)](#)
Sent: Thursday, December 7, 2023 6:38 pm
To: DRAYTON, Melanie
Cc: [s 22\(1\)\(a\)\(ii\)](#)
Subject: FOI inquiry report [SEC=OFFICIAL]

OFFICIAL

Dear Mel

FYI, please find attached the working talking points we have provided AGO following the release of the FOI inquiry report.

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

Director
Information Law Branch
Attorney-General's Department
3-5 National Circuit | BARTON ACT 2600
Ph [s 22\(1\)\(a\)\(ii\)](#) | Mbs [s 22\(1\)\(a\)\(ii\)](#)
[s 22\(1\)\(a\)](#) [@ag.gov.au](#)

OFFICIAL

Senate Legal and Constitutional Affairs References Committee Inquiry into the operation of Commonwealth Freedom of Information laws – Report

Talking points

- The OAIC plays an important role as Australia's independent national regulator for privacy and freedom of information.
- The Government will consider the issues raised in the Senate Inquiry's report, together with the Strategic Review of the Office of the Australian Information Commissioner (OAIC), which will report in February.
- The Government has provided \$1 million for the Strategic Review to ensure the OAIC is well-positioned to deliver on its functions.
 - This review is currently considering the OAIC's organisational capability, structure, governance and resourcing.
- This year, the Australian Government invested over \$53 million in the OAIC over four years for specific privacy functions as well as additional ongoing funding to put the OAIC on a sustainable footing.
- The Government has restored the OAIC's three-commissioner model, with new stand-alone Privacy and FOI Commissioners set to commence early in the new year.
 - This will be the first time since 2015 that the OAIC will have three stand-alone commissioners, as Parliament originally intended.
 - Reinstating the three-commissioner model will ensure the OAIC is better able to undertake its functions.
- Ms Liz Tydd will be the new FOI Commissioner and Ms Carly Kind will be the new Privacy Commissioner. They will both start in February 2024.

Freedom of information laws

- A well-functioning FOI system promotes open government and advances our system of representative democracy.

- In August 2013 Dr Allan Hawke AC reported on the operation of the Commonwealth FOI system.
 - The majority of the report's recommendations remain relevant today.
- The Government will give consideration to the issues raised in the Senate Inquiry's report, together with Dr Hawke's review and other reviews pertaining to the FOI system, when considering any future reform options.
- The former Government did not respond to Dr Hawke's review of the FOI Act.¹

OAIC – background to three-commissioner model

- The OAIC was established in 2010 with a three-commissioner model. In introducing the Bill to institute the OAIC, the Minister² noted:
 - 'the nature of the FOI functions and privacy functions are too extensive for one office holder to effectively manage'.

New Commissioners

On 27 November, the Government announced the following:

- Ms Elizabeth Tydd has been appointed as the **Freedom of Information (FOI) Commissioner** for a five-year term.
- Ms Tydd's appointment will commence on 19 February 2024.
- Ms Tydd has been the Information Commissioner and CEO of the NSW Information and Privacy Commission since 2013. Prior to this, Ms Tydd was the Executive Director, Office of Liquor Gaming and Racing, Department of Communities from 2009 to 2013. Between 1997 and 2009, Ms Tydd held a number of senior roles at the New South Wales Department of Fair Trading including Assistant Commissioner,

¹ [Review of the Freedom of Information Act 1982 and Australian Information Commissioner Act 2010 report | Attorney-General's Department \(ag.gov.au\)](#)

² 2nd reading speech, Parliamentary Secretary to the Prime Minister and Parliamentary Secretary for Trade: [ParlInfo - INFORMATION COMMISSIONER BILL 2009 : Second Reading \(aph.gov.au\)](#)

Compliance and Legal Group and Deputy Chairperson, Consumer Trade and Tenancy Tribunal.

- Ms Carly Kind has been appointed as a standalone **Privacy Commissioner**. Ms Kind brings to the Privacy Commissioner role expertise in data protection; AI policy, practice and governance; privacy; and technology law and policy.
- Ms Kind will commence on 26 February 2024. Ms Angelene Falk, the Australian Information Commissioner, will continue as Privacy Commissioner until that time.
- Ms Kind has held the role of inaugural Director of the London-based Ada Lovelace Institute since 2019. Between 2015 and 2019 she was an independent consultant to a number of human rights organisations, trusts and foundations, international organisations and the private sector. She has provided advice on legal, ethical and practical issues at the intersection of technology and human rights.

Attachments

Attachment A: Majority and dissenting report recommendations

Attachment B: OAIC Strategic Review Terms of Reference

Majority report recommendations

- **Recommendation 1** - The committee recommends that an independent investigation be undertaken, reporting to the Secretary of the Attorney-General's Department and not the Office of the Australian Information Commissioner (OAIC), to consider the matters raised by Mr Hardiman in relation to workplace behaviour within the OAIC, the impact on employees (past and present), and appropriate action which needs to be taken.
- **Recommendation 2** - The committee recommends that the Australian government amends the Freedom of Information Act 1982 and the Australian Information Commissioner Act 2010 to provide that:
 - reviews internal to decision-making agencies be abolished and resources reallocated to primary decision-making;
 - intermediate reviews are not required to provide procedural fairness or formal reasons for a decision;
 - a full merits review process is only required at the level of the Administrative Appeals Tribunal (or its replacement); and FOI applicants may appeal directly to the Administrative Appeals Tribunal (or its replacement) at any time after a primary decision for a full merits review of their claim without having to wait for a decision at the intermediate level.
- **Recommendation 3** - The committee recommends that the Australian government amends the Australian Information Commissioner Act 2010 to separate out the FOI review and regulatory functions from the Office of the Australian Information Commissioner and to relocate the FOI Commissioner to the Office of the Commonwealth Ombudsman.
- **Recommendation 4** - The committee recommends that the Australian government reallocates to the FOI Commissioner, newly located within the Office of the Commonwealth Ombudsman, all resources currently earmarked for the FOI functions of the Office of the Australian Information Commissioner and, going forward, provides the FOI Commissioner with adequate resources to perform its regulatory and review functions in a timely and efficient manner.
- **Recommendation 5** - The committee recommends that the Australian government:
 - consults with key stakeholders and implements appropriate statutory timeframes for FOI reviews (with the timeline proposed by the Grata Fund as detailed in paragraph 3.56 of this report as an indicator), including consideration of provisions for extensions in exceptional circumstances due to the scale and complexity of an Information Commissioner review; and
 - amends the *Freedom of Information Act 1982* to impose statutory timeframes for the finalisation of FOI reviews. Statutory timeframes should expressly include the notification of reviews to decision-making agencies.
- **Recommendation 6** - The committee recommends that the Australian government amends subsection 4(1) of the *Freedom of Information Act 1982* to ensure that a change in minister does not impede the right to access documents under the FOI system.
- **Recommendation 7** - The committee recommends that the Australian government amends subsection 8D(3) of the *Freedom of Information Act 1982* to require that decision-making agencies make directly

available for public download, either from the disclosure log or another website, all information that is released through an FOI request, subject to recognised technical constraints and privacy concerns.

- **Recommendation 8** - The committee recommends that the Australian government ensures that formal reporting obligations for both decision-making agencies and review bodies be expanded to ensure information is readily available regarding the timeliness and efficacy of FOI decision making.
- **Recommendation 9** - The committee recommends that the Strategic Assessment of the Office of the Australian Information Commissioner (OAIC) specifically considers:
 - operational and resourcing requirements needed to rapidly resolve the current backlog of FOI reviews;
 - the organisational culture of the OAIC, including its leadership, and its approach to the discharge of all its statutory functions;
 - whether resources can and should be reallocated internally to bolster the FOI functions of the OAIC;
 - ways to ensure the agency's reporting of FOI applications and reviews is transparent, fulsome, and explicitly accounts for the impact of deemed refusals on finalisation statistics;
 - the key performance indicators adopted to assess the performance of the FOI function of the OAIC so that there is a clear and transparent reporting of the backlog of substantive Information Commissioner review matters (as opposed to the clearance of less substantive matters, such as the rectification of deemed refusals by the relevant agency which requires minimal review);
 - measures to support the agency to better adapt to the changing nature and scale of its FOI workload; and
 - possible legislative changes that would improve the agency's functioning and improve outcomes for FOI applicants.

Further, the assessment should be made public.

- **Recommendation 10** - The committee recommends that the Australian government publishes the Strategic Assessment of the Office of the Australian Information Commissioner.
- **Recommendation 11** - The committee recommends that amendments giving effect to the recommendations contained in this report should be enacted as soon as practical (following a consultation period) and that, within three years of implementing the reforms recommended above, the Australian government conducts and tables in the Parliament a review into the effectiveness of the operation of the FOI regime and proposes any further changes that may be warranted. The review should consider, among other issues:
 - whether reforms to the FOI regime have resulted in improved outcomes for applicants, in particular, whether the backlog of FOI reviews has been addressed and whether decision-making agencies are meeting statutory timeframes;
 - the merits of introducing or maintaining fees, costs, and charges for FOI applications and FOI reviews;
 - the merits of introducing a deemed disclosure regime;

OFFICIAL

- whether decision-making agencies and the Commonwealth's FOI review functions are adequately resourced to meet their statutory responsibilities; opportunities for increasing the use of proactive disclosures by decision-making agencies;
 - opportunities for increasing the pathways for individuals and their representatives to access personal information outside the FOI regime;
 - the merits of introducing a requirement for decision-making agencies to consider pro-actively releasing categories of information that have been subject to repeat successful FOI applications;
 - whether adequate provisions and guidance are in place to support vexatious applicant declarations;
 - potential reforms or initiatives to support smaller Commonwealth agencies to meet their FOI obligations; and
 - how best to ensure that the documents of a minister remain within reach of the FOI Act for a specified period after the relevant minister leaves or changes office.
- **Recommendation 12** - The committee recommends that the Strategic Assessment of the Office of the Australian Information Commissioner considers what additional funding is required to clear the chronic backlog of Information Commissioner review decisions and the funding reasonably required for the operation of the FOI system on an efficient and effective steady state basis.
 - **Recommendation 13** – The committee recommends that there be a whole of government campaign to encourage decision-making agencies to explore opportunities to create pathways to release personal information directly to the individuals to which the information pertains without requiring applicants to use the FOI regime.
 - **Recommendation 14** - The committee recommends that the Office of the Australian Information Commissioner prioritises efforts to develop guidance and build the capacity of decision-making agencies to strengthen pathways for people accessing personal information outside the FOI regime.
 - **Recommendation 15** - The committee recommends that the Office of the Australian Information Commissioner develops streamlined guidance and conducts training for decision-making agencies on applications for vexatious applicant declarations. In addition, if necessary to streamline processes and promote efficiency, consideration should be given to making amendments to the relevant legislation.

Dissenting report recommendations

- **Recommendation 1** - Labor Senators recommend that the government carefully considers the findings of the Strategic Assessment of the Office of the Australian Information Commissioner (OAIC) and that further consideration is given to appropriate funding models for the OAIC as part of implementation of the government's response to the Privacy Act Review.
- **Recommendation 2** - Labor Senators recommend that the government carefully considers the issues raised during the course of this inquiry and recommendations from previous reviews to identify appropriate options for reform to ensure the effective operation of the FOI system.
- **Recommendation 3** - Labor Senators also recommend that the government gives consideration to a comprehensive and independent review of the FOI Act.

OFFICIAL

OAIC Strategic Review: Terms of Reference

A strategic review of the Office of the Australian Information Commissioner (OAIC) will ensure the OAIC is well positioned to deliver on its statutory functions as the national privacy and information access regulator into the future.

Scope

The reviewer should consider, report, and make recommendations about how the OAIC can ensure it is best positioned to deliver on its functions as the national privacy and information access regulator and respond to future challenges. Recommendations should cover:

1. the extent to which the OAIC's
 - organisational capability,
 - structure,
 - governance, and
 - resourcingare suitable to achieve the OAIC's purpose and future functionality, or require amendment;
2. how resource allocation can be optimised to maximise efficiency and support the OAIC's statutory functions;
3. how OAIC can best respond to the likely continuing growth to the volume and complexity of its core statutory workload;
4. how to ensure the effectiveness of the OAIC as a regulator in responding to changing technology, the growth of the digital economy and increasing cybercrime; and
5. the role of the OAIC in providing advice and reports to government about privacy, information access and information management.

Contextual information

The reviewer must have regard to relevant contextual matters, about which the OAIC will provide the reviewer with relevant background, including:

- A. potential changes to the functions of the OAIC arising from the Government's response to the Privacy Act Review;
- B. the operation of FOI laws;
- C. evolving community expectations about privacy and information access, and expectations that OAIC will take a strong enforcement posture.

Recommendations

The reviewer must identify recommendations that can be implemented within the existing legislative framework, but may make recommendations that require legislative change where the reviewer considers necessary.

Activities

As a minimum, the reviewer should examine relevant documents and data, conduct interviews with OAIC executives, staff, and key external stakeholders, and examine the capabilities and arrangements of a selection of analogous agencies in Australia and elsewhere.

OFFICIAL

Timeframe

Interim report by **15 January 2024**. Final report by **5 February 2024**.

OFFICIAL