



Submission by the Department of Veterans' Affairs

The following submission is provided in response to the draft revisions to the *'Direction as to certain procedures to be followed in Information Commissioner reviews'* (for agencies) published by the Office of the Australian Information Commissioner (OAIC) on 9 May 2023 (Draft Direction).

The OAIC invited comments from interested stakeholders (including Commonwealth agencies) on the content, practical implications, readability and accessibility of the Draft Direction.

The Department of Veterans' Affairs (DVA) welcomes the opportunity to make a submission in respect of the Draft Direction and appreciates the additional time afforded by the OAIC to do so.

The Draft Direction is intended to facilitate greater engagement between applicants and respondent agencies and ministers during the IC review process with a view to resolving IC reviews in a more timely and cost effective way.

DVA principally supports the proposed changes to the Direction and the objectives. However, the following comments are submitted for the Commission's consideration.

DVA's comments and recommendations in relation to the Draft Direction

1. Paragraph 4.3 of the Draft Direction – Requirement to engage with the applicant

DVA considers that adopting a trauma-informed approach when interacting with veterans (including when they seek information from the department) provides an opportunity to better support veterans and their families. We hold concerns that some aspects of the Draft Direction do not align with DVA's trauma-informed model of care.

In particular, Paragraph 4.3 of the Draft Direction in its current form does not contemplate, or account for, the following circumstances.

- a. **Vulnerable applicants** who may not be able to engage in the early resolution process without significant support, or at all. DVA has a large and diverse client base, which includes both veterans and their family members. A significant proportion of those clients are vulnerable persons. DVA has established special communication arrangements for such clients in order to better assist them to navigate the claims process and access services they are entitled to from the department. However, it is not always apparent when clients are vulnerable or have significant health conditions. In some cases, this can present later in the course of the department's interactions with the client. In order to facilitate quick and consistent contact with DVA, specific channels of communication have been implemented which enable clients and other relevant stakeholders to contact the department in a way that ensures efficiency and quality of service.
- b. **Applicants who wish to remain anonymous** and who may not want to provide their direct contact details to the department. DVA processes a number of anonymous FOI requests as well as those made through public forums (such as Right to Know). Without knowing the true identity of an applicant, it will be difficult for the department to confirm any special contact arrangements that may be in place, and to properly consider the appropriateness of engaging in a telephone or video conference with the individual.

c. Other considerations

The Administrative Appeals Tribunal's (AAT) Alternative Dispute Resolution (ADR) Guidelines outline general principles to consider when referring a matter to an ADR process, including, amongst others:

- the capacity of the parties to participate effectively
- cultural factors
- safety of the parties
- the context of an application including the history of past applications by the applicant
- relative cost to the parties of an ADR process and a determination.

The AAT Guidelines require referral for conferencing unless the District Registrar forms the view *'there are compelling reasons to deviate from this practice'*.

The department submits that it is likely that cases will arise where it may not be appropriate to require conferencing for compelling reasons, such as those noted above from the AAT Guidelines and the preceding paragraphs.

d. Resourcing and cost

In addition, DVA considers that significant additional resources would be required in order for the department to be able to facilitate conferences with applicants in every IC review.

A senior member of the department's FOI processing team estimated that it would take a member of the team approximately 12 hours to prepare for, and facilitate, an IC review conference. A breakdown of the estimated time for each task has been provided at **Annexure A** to this submission.

DVA holds concerns that the redirection of resources to facilitate compulsory conferences in every IC review will have an impact on the department's ability to manage its otherwise significant FOI workload.¹ DVA's high FOI processing volumes are reflective of its character as a service delivery agency that holds large amounts of personal and sensitive (health) information. This alone creates resourcing challenges for the department as a relatively small agency. It is likely that the proposed change requiring compulsory conferencing, without exception, will increase resourcing pressures for DVA.

e. Alternative model - exceptions

DVA is concerned to find the right balance between its obligation to ensure the health and safety of vulnerable applicants, with the objects of the FOI Act and facilitating timely and cost effective access to government-held information.

¹ The OAIC's most recent [annual report](#) reports that in 2021-2022 the department received 1,785 FOI requests and ranked 4th overall in the number of requests received by an Australian Government Agency or Minister (it received the 3rd highest number in 2020-2021 with 1,927 requests).

Submission by the Department of Veterans' Affairs

The department submits that the OAIC consider including an exception to the requirement to engage with an applicant in a compulsory IC review conference in the following circumstances:

Circumstances where holding an IC review conference with an applicant may not be appropriate	
1. Vulnerable applicants	Who may not be able to engage in the early resolution process either without significant support, or at all. This may include veterans on special contact arrangements with the department, or applicants who may not be able to participate in a conference because of their health conditions.
2. Where an agency or minister has engaged in a similar process with an applicant at an earlier stage	We note that the Draft Direction currently contains an exception to the requirement to undertake a compulsory conference where an agency or minister has engaged in a similar process at an earlier stage. However, we recommend making it clearer what a 'similar process' is and for this to be included in the body of the Direction.
3. Other circumstances where there are compelling reasons to deviate from the standard practice	DVA submits that it would be prudent to consider an approach with a degree of flexibility, similar to that of the AAT, which allows for a departure from the standard practice of conferencing where there are compelling reasons to do so.

Where an agency or minister seeks an exception to the requirement to engage in the compulsory IC review conference, DVA suggests that the agency or minister could provide submissions/evidence to the OAIC outlining why it is not appropriate to hold a conference as part of the s 54Z response.

It is submitted that in these circumstances, the matter could then proceed to the next stage of the IC review process, including for example a teleconference between the parties facilitated by the OAIC² or that the matter be assigned to a review adviser for substantive review and case management.

Recommendation in relation to paragraph 4.3 of the Draft Direction

DVA submits that there should be an exception to the requirement to engage with an applicant through a compulsory IC review conference where it would not be appropriate to hold a conference without OAIC engagement. In circumstances where an agency or minister seeks an exception to the requirement to engage in a compulsory IC review conference, with evidence or reasons in support of an exception, such matters should proceed to the next stage in the IC review process.

² The [FOI Guidelines](#) issued under s 93A of the FOI Act provide at [10.53] that '*the IC review officer can also facilitate a teleconference between the parties if this would aid in resolving the matter*'.

2. Paragraph 4.4 of the Draft Direction - Timeframe to engage with applicants and provide response to the OAIC

The Draft Direction states that agencies and ministers will generally have eight (8) weeks to respond to the Information Commissioner's s 54Z notice (including by engaging in a compulsory IC review conference with an applicant) and that it is not expected that agencies or ministers will require any additional time. It is understood that extensions to this timeframe will only be approved by the Information Commissioner in '*extenuating circumstances*'.

DVA holds concerns that the eight-week timeframe to engage with applicants and provide a response to the OAIC does not provide sufficient time for consideration, in the first instance, whether it is appropriate to directly engage with applicants. It is noted that, in the case of the department (as a service delivery agency with a large number of vulnerable clients within the client base) this will require a comprehensive assessment involving not only the FOI team but also potentially case managers, clinicians and specialist care providers.

For these reasons, the department submits that consideration should be given to extending the timeframe to provide a response to the s 54Z notice to twelve (12) weeks in order to:

- a. Allow sufficient time for agencies and ministers to consider in the first instance whether it is appropriate to directly engage with applicants, noting that this may require a comprehensive assessment involving multiple business areas, and
- b. Reduce the likelihood of extension of time requests being made to the OAIC.

Recommendation in relation to paragraph 4.4 of the Draft Direction

That the timeframe to engage with applicants and provide a response to the OAIC be extended from eight (8) to twelve (12) weeks.

3. Paragraph 1.5 of the Draft Direction - Implementation of the revised Direction from 1 July 2023

It is contemplated that the revised Direction will have effect from 1 July 2023, subject to OAIC's confirmation regarding a potential extension to this timeframe.

DVA will require sufficient time to be able to establish processes and resources to enable compliance with the Draft Direction. Given the nature of DVA's client base, and that many of those clients are vulnerable persons who may be on specialised communication arrangements, the department holds concerns about its ability to comply with the revised Direction in its current form from 1 July 2023.

DVA submits that consideration should be given to delaying the implementation of the Direction by at least three (3) months on the basis that:

1. The timeframe for providing submissions has been extended to 7 July 2023 and the OAIC will need sufficient time to consider any submissions received in response to the consultation and finalise the Direction.
2. Agencies and ministers will require sufficient time to implement processes and procedures to support any revisions made to the Direction. For the department, this will likely include setting up policies, frameworks, scripts and processes with relevant case management and triage and connect teams to manage vulnerable persons. These workflows will take some time to develop and implement.

Submission by the Department of Veterans' Affairs

Relevantly, on 28 March 2023, the Senate referred an inquiry into the operation of Commonwealth Freedom of Information laws, to the Legal and Constitutional Affairs References Committee. The department understands that the Committee is due to release its report and any recommendations by 7 December 2023. To date, the Committee has received 23 submissions from interested stakeholders to the inquiry.³

The department notes that the OAIC may wish to consider delaying implementation of the revised Direction until after the Legal and Constitutional Affairs References Committee releases its report, noting that this comprehensive inquiry will consider issues closely aligned with the proposed revisions to the Direction and may recommend further changes to the Information Commissioner Review process.

Recommendation in relation to paragraph 1.5 of the Draft Direction

That the revised Direction implementation date be extended to at least 1 October 2023.

Conclusion

DVA values the important regulatory work of the OAIC in advancing the objectives of the FOI Act to promote timely access to government-held information, and is cognisant of the growing number of IC reviews received by the Commission.⁴

DVA's comments in response to the Draft Direction are intended to strike the right balance between meeting the objectives of the FOI Act with regard to facilitating timely, efficient and cost effective access to government-held information, while also ensuring the wellbeing of vulnerable applicants.

DVA is committed to working with the OAIC and applicants to resolve IC reviews in a way which meets the Act's objectives with respect to efficiency. However, DVA holds concerns that the requirement to undertake compulsory IC review conferences in every IC review, without the availability of appropriate exceptions, may expose vulnerable applicants and frontline DVA staff to risks of harm, as well as resulting increased resourcing and financial cost for DVA. Such impacts could have a detrimental effect the department's ability to process its already demanding FOI workload, which in turn may adversely impact applicants.

DVA remains open to exploring revisions to the Direction with the FOI and Information Commissioners and would be willing to engage in further discussions on this important issue.

³ Submissions to the Senate Inquiry into the Operation of Commonwealth Freedom of Information Laws can be accessed [here](#). Accessed by the Department on 21 June 2023.

⁴ The OAIC's most recent [annual report](#) reports a 60% increase in the number of IC reviews received by the Commission in 2021-2022 (1,956) compared to 2020-2021 (1,224).

Annexure A – Estimated time to prepare for, and undertake, compulsory IC review conference

1. Consider whether it is appropriate to engage in a compulsory IC review conference with the applicant - 1 hour (noting this may be longer if the FOI team is required to engage with other business areas in order to make this assessment)
2. Liaise with applicant regarding appropriate time for conference – up to an 1 hour
3. Schedule meeting – 10 minutes
4. Review FOI decision/s (Primary and Internal Review (IR)), including locating emails/search results/documents relevant to request – 4 - 5 hours
5. Discuss decision/s with original decision maker (if available to do so) – 1 hour
6. Liaise with Information Law team on request and possible approach – 2 hours
7. Liaise with relevant business area/s to clarify how primary and/or IR request were processed – 2 hours
8. Host video or telephone conference with applicant – 1-2 hours