



## **Audit of the implementation of the Freedom of Information Act 1982 - the Department of the Attorney- General and the Office of the Australian Information Commissioner - Supplementary Submission**

We seek to make a supplementary submission to the above Audit focussing on evidence given at the Senate Estimates Committee hearing on 18 October 2016<sup>1</sup> about the Oaic and the nature and extent of the performance of its statutory functions and the announcement made by the Attorney- General at the hearing about the nature and extent of the terms of the appointment of Mr Pilgrim as the Information Commissioner and the Privacy Commissioner.

### 1. The FOI functions being carried out by the Oaic.

Both the Attorney-General and Commissioner Pilgrim spoke in strong general positive terms about the Oaic's performance of its functions but failed to specifically identify the actual performance of FOI functions other than the FOI review function and, to a lesser degree, the complaints function.

Sen Watt (p65) asked about the two appointments and sought confirmation that "the role of the freedom of information Commissioner remains vacant and has now been vacant for about 21months ? " Senator Brandis responded in a manner that indicated that nothing had changed as far as functions to be performed were concerned.

"I am not sure of the time but it has been quite some time, and the government proposes to leave that role vacant. The reason is that there is already, in the absence of a Freedom of Information Commissioner, a comprehensive architecture for freedom of information applications and review of such freedom of information decision-making..... There was something of a logjam of positions in relation to, essentially, the same policy space, and we are finding, and I think this is evident from Mr Pilgrim's statement, that now that his position has been regularised – and I am very happy about that and I want to congratulate him on his reappointment – that the whole issue of government information and privacy can be disposed of at less expense and much more efficiently."

We submit that, if evidence is needed, the statement by the Attorney-General together with his actions and other statements including those of Mr Pilgrim) at the hearing, confirm that the government intent continues to be to confine the FOI operation essentially to reviews of applications for access to information and complaints about responses by government agencies to such requests.

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<sup>1</sup> [http://parlinfo.aph.gov.au/parlInfo/download/committees/estimate/62329d4c-8d92-49bc-b22c-b9371dd27824/toc\\_pdf/Legal%20and%20Constitutional%20Affairs%20Legislation%20Committee\\_2016\\_10\\_18\\_4512.pdf;fileType=application%2Fpdf](http://parlinfo.aph.gov.au/parlInfo/download/committees/estimate/62329d4c-8d92-49bc-b22c-b9371dd27824/toc_pdf/Legal%20and%20Constitutional%20Affairs%20Legislation%20Committee_2016_10_18_4512.pdf;fileType=application%2Fpdf) ; p 64 ff

Prior to the above exchange, Senator Fawcett attempted to explore the wider responsibilities of the OAIC (page 65) when he asked Mr Pilgrim if the OAIC was

“... across the areas you are responsible for, including freedom of information, and you are happy that the management in government arrangements for that are adequate to deliver that oversight service to the Australian public?”

Commissioner Pilgrim replied

“I am confident that the office as we are currently undertaking our functions under both privacy and FOI are delivering some efficiency, certainly, in the area of our regulatory responsibilities”<sup>2</sup>

We submit that the reference to “regulatory responsibilities”, related to the review and complaints functions.

We submit that this is also consistent with Mr Pilgrim’s response to the question as to “whether the Canberra office would be reopened” (p66). He responded

“it is not our intention to reopen the office. The functions that we undertake in terms of IC reviews can be sufficiently carried out through the office in Sydney. Obviously, we receive most of our information electronically, and our work with the agencies is able to be undertaken in that way. So there is, in my view, not a need to reopen an office in Canberra.”

It is difficult to comprehend how all the statutory functions can be satisfactorily carried out from Sydney. For example, how can OAIC own motion reviews of the FOI performance of agencies or the OAIC proactive FOI role be carried out without at least an FOI Commissioner and the relevant staff in Canberra. Later (p66) Mr Pilgrim was asked by Senator Rhiannon if there were any “losses of roles with permanent closure”. He replied that

“all the fundamental operations under the FOI Act that were being carried out through the office that was in Canberra are being carried out by me and the staff in the Sydney office”.

We submit that the response interprets the question as directed to the situation in the Sydney office on the day the door was closed. Prior to that the losses of roles had substantially occurred.

He was also asked whether the role of the OAIC on freedom of information matters was “now effectively confined to its review of refusals of requests to access information?” Mr Pilgrim’s response was “ (P 66)

No. That is certainly one of the functions. Under the Freedom of Information Act, I am able to undertake<sup>3</sup> complaints about the administration of FOI matters. Someone could bring in an issue, for example, about the timeliness of or otherwise of an

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<sup>2</sup> We note that he had responded to an earlier question by concluding that he was “confident that the focus of the OAIC is placing on advice, education, conciliation as well as our achievements in improving the access and efficiency of privacy and FOI system, will continue to provide effective delivery of our responsibilities to uphold both the FOI and Privacy Act”. He did not elaborate. He did not here or elsewhere refer to the function of promoting the FOI Acts.

<sup>3</sup> Italics added for this submission.

agency's handling, and that could be handled under the complaints procedures. As you point out, there is the ability for someone to seek review of an access decision or refusal of an access decision under the Information Commissioner Review provisions, and that still exists. I have the ability to undertake<sup>4</sup> an own motion investigation if I believe I need to look at the activities of an agency as well. So those functions are still being undertaken. The whole of the functions under the FOI Act that sit with the Information Commissioner are being undertaken.

We note the repeated use of the word "undertake". It does not carry any implication that undertaking has been, is being or will be performed— rather, at most, it suggests an intention to carry out a task in the future.

There was also here an opportunity not taken to give examples of the performance of others of the 11 FOI statutory functions - including "promoting awareness and understanding of the FOI Act", "monitoring, investigating and reporting on compliance by agencies" or the state of progress on the May 2016 proposal of updating the 2014 guidelines.<sup>5</sup>

This approach maintains the substantial retreat from, and rejection of, the purposes of the 2010 legislative Reforms by the Government, and, as a result, the OAIC. It began with the Bill to abolish the OAIC. The OAIC has had no choice in the matter, it being denied the resources needed – financial and human<sup>6</sup>.

We submit that this material confirms that what has occurred since May 2014 has not been the implementation of the FOI Legislation by the Department of the Attorney-General and the OAIC.

Instead the Department and the Attorney-General have decided not to implement that legislation and have taken a prolonged series of different actions to make it impossible for the OAIC to implement the legislation, to try to formalise it with the new appointments and to oblige it to confine itself in the FOI area, solely to the regulatory functions spelt out in that legislation.

We are unable to point to any precedents for such action by the Executive Branch and, as previously mentioned, they have chosen to go down a very different path to that laid down by the Parliament in its legislation, one that rejects Parliament's enacted proposal and plan.

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<sup>4</sup> Italics added for this submission.

<sup>5</sup> Note in a speech in May, the Commissioner spoke of an intention to revise the FOI guidelines. At p 68, Mr Pilgrim said that "... Office is currently working to update the FOI guidelines to assist agencies and individuals alike.".. That speech about the work and activities of the OAIC also reveals far more activity on Privacy work than the FOI work.

<sup>6</sup> See e.g. the second Reading speech in the Senate of Senator Sherry [http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=BillId\\_Phrase%3Ar4164%20Title%3A%22second%20reading%22%20Content%3A%22I%20move%22%7C%22and%20move%22%20Content%3A%22be%20now%20read%20a%20second%20time%22%20\(Dataset%3Ahansard%20%7C%20Dataset%3Ahansards\);rec=1](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=BillId_Phrase%3Ar4164%20Title%3A%22second%20reading%22%20Content%3A%22I%20move%22%7C%22and%20move%22%20Content%3A%22be%20now%20read%20a%20second%20time%22%20(Dataset%3Ahansard%20%7C%20Dataset%3Ahansards);rec=1) and see discussion in CHs 1,2,3 of the Dr Hawke 2013 Report. [http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=BillId\\_Phrase%3Ar4164%20Title%3A%22second%20reading%22%20Content%3A%22I%20move%22%7C%22and%20move%22%20Content%3A%22be%20now%20read%20a%20second%20time%22%20\(Dataset%3Ahansard%20%7C%20Dataset%3Ahansards\);rec=1ch](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=BillId_Phrase%3Ar4164%20Title%3A%22second%20reading%22%20Content%3A%22I%20move%22%7C%22and%20move%22%20Content%3A%22be%20now%20read%20a%20second%20time%22%20(Dataset%3Ahansard%20%7C%20Dataset%3Ahansards);rec=1ch)

## 2. Appointment of Commissioners

The Attorney General announced at the Estimates Hearing that Mr Pilgrim had been appointed from 19 October 2016 for two years as Australian Information Commissioner and Privacy Commissioner. These details were not announced in the earlier media release.<sup>7</sup>

Nothing appears to have been said publicly as to why Mr Pilgrim was not also appointed for two years as the Freedom of Information Commissioner. It has also not been explained why another person was not appointed to that position.

Mr. Pilgrim, also stated (p 65) at the Estimates hearing that he had done something similar to the UK in creating two Deputy Commissioner positions. He said he had appointed one of the officers of the OAIC, Ms Falk, to the position of Deputy Commissioner. The other position had not been filled but he also mentioned that he had an "Assistant Commissioner." He described this as being done to "support me".

As to Mr. Pilgrim's possible appointment as FOI Commissioner, it appears that he cannot be appointed FOI Commissioner because the relevant Act requires that person to have legal qualifications.

We submit that, looking back, this lack of an FOI Commissioner raises another concern for the performance of the OAIC because, since the departure of Prof McMillan in 2015, there has not only been no FOI Commissioner, Acting or otherwise, but there has been no one in the statutory Commissioner positions with legal qualifications.

We submit that from 18 October this year, while the cessation of the practice of appointing Acting Commissioner's was a positive step, making the appointments to the Information Commissioners and Privacy Commissioner but not the FOI Commissioner is further evidence of the focus of the Attorney-General and his Department on continuing the promotion of the Privacy functions of the OAIC and a further downgrading, and so a weakening, of the statutory FOI role of the OAIC. It also suggests that the Attorney-General and his Department intend that their present approach to the FOI statutory functions of the OAIC and their resourcing and performance will continue for the next 2 years.

As to the two Commissioner appointments made involving Mr. Pilgrim, why are they only for two years? Why not five years? That appears to have been the period used initially for the Commissioner appointments. While the two year appointments may bring a little less uncertainty than the three month appointments to the position of Commissioner, a two-year appointment still carries into the future a considerable degree of uncertainty. Why select two years rather than 5 years? Will the shorter period help to give the Attorney-General and his Department more de facto control of the OAIC?

We submit that the reality is that the Attorney-General has, since he intervened in 2014, effectively become closely involved in the operation of the OAIC, notwithstanding the legislation by which Parliament created it as an independent statutory body. This raises a further issue – the extent to which the performance of the independent statutory role of the OAIC has been compromised by the steps taken by the Attorney-General and his Department in their attempts to first abolish the OAIC, and, having failed in that attempt, to

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<sup>7</sup> See the A-G's Department media will release <https://www.attorneygeneral.gov.au/Mediareleases/Pages/2016/ThirdQuarter/Appointment-of-Australian-Information-Commissioner-and-Privacy-Commissioner.aspx> ;

achieve their primary objective of limiting the OAIC to performing FOI functions that are described as “regulatory”.

In addition to removing the public and democratic benefits flowing from the OAIC’s independent active involvement in monitoring and advancing open and accountable government, the methods employed by the Attorney-General and his Department, such as the matters referred to above, have given rise to, and add to, the serious ongoing issues referred to in our original submission that are yet to be addressed<sup>8</sup>: the issues of breaches of

- the ethical and common-law public office public trust principle that applies to all holders of public office;
- the fundamental constitutional principles on which our Democracy is based - the separation of powers and the rule of law, and
- Australia’s obligations as a participating member of the Open Government Partnership.

We submit that these have continued to arise with each action taken by the Attorney-General and his Department over the last two years. As noted, it also appears that they intend to continue with their program for the next 2 years.

Bearing in mind the fact that Dr Hawke’s 2013 Report on the performance of the OAIC had been positive about the operation and application of the legislation, and recommended a review of some specific matters, the above principles and obligations would have been best served by the Attorney - General and his Department by establishing an independent review as had been recommended and , in the meantime, enabling the OAIC to continue to operate as Parliament had laid down. As a consequence, that review has been delayed nearly 3 years.

We thank the Auditor-General and his Office for the opportunity to contribute further to the audit of these important accountability functions.



Hon Tim Smith QC  
Chair Accountability Round Table  
4. November 2016

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<sup>8</sup> See text, <https://www.accountabilityrt.org/audit-of-the-implementation-of-the-freedom-of-information-act-1982/> para 3, p 11 and fn 22-29 below; See also Website Department of Attorney- General <https://www.oaic.gov.au/media-and-speeches/speeches/office-of-the-australian-information-commissioner-update> where it is stated --- “ Our department has primary responsibility for supporting the Australian Government in protecting and promoting the rule of law. The rule of law underpins the way Australian society is governed. Everyone—including citizens and the government—is bound by and entitled to the benefit of laws”.