LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY

(Reference: Freedom of Information Act 1989)

Members:

MRS V DUNNE (The Chair)
MR J HARGREAVES (The Deputy Chair)
MS M HUNTER

TRANSCRIPT OF EVIDENCE

CANBERRA

WEDNESDAY, 1 SEPTEMBER 2010

Secretary to the committee:
Dr B Lloyd (Ph: 6205 0137)

By authority of the Legislative Assembly for the Australian Capital Territory

WITNESSES

Privilege statement

The committee has authorised the recording, broadcasting and rebroadcasting of these proceedings.

All witnesses making submissions or giving evidence to an Assembly committee are protected by parliamentary privilege.

“Parliamentary privilege” means the special rights and immunities which belong to the Assembly, its committees and its members. These rights and immunities enable committees to operate effectively, and enable those involved in committee processes to do so without obstruction, or fear of prosecution. Witnesses must tell the truth, and giving false or misleading evidence will be treated as a serious matter.

While the committee prefers to hear all evidence in public, it may take evidence in-camera if requested. Confidential evidence will be recorded and kept securely. It is within the power of the committee at a later date to publish or present all or part of that evidence to the Assembly; but any decision to publish or present in-camera evidence will not be taken without consulting with the person who gave the evidence.

Amended 21 January 2009

The committee met at 10.33 am.

CORBELL, MR SIMON, Attorney-General, Minister for the Environment, Climate Change and Water, Minister for Energy and Minister for Police and Emergency Services
LEIGH, MS KATHY, Chief Executive Officer, Department of Justice and Community Safety
FERGUSON, MR DAVID, Senior Legal Policy Officer, Civil Law Group, Legislation and Policy Branch, Department of Justice and Community Safety
FIELD, MS JULIE, Executive Director, Legislation and Policy Branch, Department of Justice and Community Safety

THE CHAIR: Welcome to the public hearing of the Standing Committee on Justice and Community Safety inquiry into the Freedom of Information Act 1989. I welcome the Attorney-General, Mr Corbell, and officers of his department. The government has provided a detailed submission to the inquiry, for which the committee thanks the government.

We in the committee are of the view that freedom of information is an important part of our system of representative democracy. The act and its operation are integral to the proper operation of government and the rights of residents of the ACT. We thank you for appearing before the committee and assisting with its inquiry.

Everyone is familiar with the privilege card and the implications thereof. The usual rules apply. Before we proceed, minister, is there any opening statement you would like to make?

Mr Corbell: Thank you, Madam Chair and members of the committee, for the opportunity to give evidence this morning. My officers and I are pleased to be here and are happy to assist you with this inquiry. With your leave, Madam Chair, I might make a brief opening statement which sets out some of the principles in the government's submission.

The government is committed to transparency and accountability. Our submission to the inquiry stresses that open access to information is an essential right. The Human Rights Act 2004 recognises the right to seek information as part of the right of freedom of expression. Information about government enhances the community's participation in our democratic system.

The government continues to demonstrate its commitment to ensuring access to information and to improving the territory's freedom of information program. Monitoring the reforms of other jurisdictions, including the commonwealth, is part of the government's commitments outlined in the Canberra plan. The government has also agreed with the ACT Greens that the desirability of an independent information commissioner should be examined. The government is paying close attention to the reforms of the commonwealth, in particular the establishment of a commonwealth information commissioner when that office begins its operation in November this year.

It is important to stress that it has been the convention since self-government that there is a close relationship between the territory's freedom of information laws and

the laws of the commonwealth. Over the years, the territory has had regard to changes in commonwealth legislation and will continue to do so where appropriate. In that regard, I would welcome the committee's views as to the reforms at the commonwealth level and their implications for the territory's legislation.

In doing that assessment, however, the government would like to stress to the committee that the committee should consider the issue of resourcing required to give effect to its recommendations. For any recommended change there must be a careful and detailed assessment of the costs involved. We do this in light of the fact that the community already pays a substantial amount of money every year to administer the freedom of information scheme. The Auditor-General has estimated the yearly cost to be between $4½ million and $5 million. Any additional spending must be frankly and openly considered alongside the recommendations of the committee.

Turning to the issue of the relationship between the territory and the commonwealth schemes, this relationship has permitted the territory to take advantage of the wider experience of and benefits incurred by the commonwealth in administering their scheme and how it relates to our scheme. We have carefully monitored commonwealth reforms and supported those ideas that have improved the territory's legislation. For example, there has been universal agreement about the removal of conclusive certificates in response to all cases except those involving national security.

The government is also being proactive in its own administration of the scheme. I have recently determined a new set of fees and charges for freedom of information requests. These new fees will eventually be accompanied by guidelines to ensure best practice for determining when and how to access requests for an exemption.

The government maintains a policy of allowing for reasonable expenses to be recovered in relation to freedom of information requests. Particularly in the ACT, it is fair to expect applicants for information to share some of the costs involved. The community already gives more than $4 million per year to the administration of the scheme. Those who seek the benefits of that contribution should be asked, in certain circumstances, to share some of that burden.

As under the previous fee system, there are still opportunities for fees to be reduced or to be waived. For example, fees are waived for accessing information that would assist Aboriginal and Torres Strait Islander community members to search for their family histories.

On the grounds for waiving the fees, I would like to particularly highlight the government's views in relation to the public interest exemption. I recently asked my department to issue guidelines to clarify when fees may be remitted on the grounds of public interest. Public interest in the context of fees means that the release of information will benefit a substantial section of the community. Information requests that serve only one person's interests are not eligible for remission of fees on these grounds, although they may be eligible on other grounds.

It is important to note that, under our system of fees, applicants do not get special treatment based on their titles or occupations. In fact, the legislation prohibits that as a consideration. In particular, there is no convention or provision in our laws that, as

members of the Assembly, members get preferential treatment in regard to fees. Each request for a fee waiver under the FOI Act must be assessed on its own merits.

Turning very quickly—and thank you for your indulgence, Madam Chair—to the issue of commonwealth reforms, the government will continue to look closely at the latest developments at the commonwealth level. When the government made its submission to this inquiry, the commonwealth had introduced two bills to reform its freedom of information scheme. But these two bills have subsequently become law. They are the Australian Information Commissioner Act 2010 and the Freedom of Information Amendment (Reform) Act 2010. The new acts will be progressively implemented from November this year.

The commonwealth reforms substantially alter the way FOI operates in that jurisdiction. As you would probably be aware, a new statutory office will be created for the Australian information commissioner. The commissioner will have overall responsibility for creating and managing guidelines for agency decision makers, the oversight of the commonwealth's Privacy Act and reviewing decisions made by agencies in relation to FOI requests.

This significant change will allow for applicants to seek an initial review from the commissioner rather than from agencies themselves. The government will be watching closely as the information commissioner takes on the new role in November. It will be important to examine the progression of this reform for lessons that might be drawn in the territory's interests, and the appropriateness and feasibility of an information commissioner for the ACT should be investigated but, again, with those issues that I have put on the table—the resourcing implications as well as the potential benefits of the access to information.

It should be noted that the new statutory office and a new administrative review process require a significant contribution of resources. The costs and benefits will have to be carefully examined.

The commonwealth reforms also include changing the exemptions available to agencies to weight decisions further in favour of releasing information. This end is achieved by creating a new set of public interest rules that would apply to a wide range of exemptions. Where those factors do not clearly permit an agency to withhold information, the information will have to be released.

In principle, the idea of a new, more release-friendly public interest test would have merit in the territory's legislation. However, again, resources must be seriously considered as part of that deliberation.

Finally, can I quickly turn to the Auditor-General's recommendations on freedom of information. As the committee would have seen in the government's submission, the government largely agreed or agreed in principle to the recommendations of the Auditor-General. These recommendations involve studying and adopting best practice from other jurisdictions. Our submission makes clear that the government is seriously considering the examples in other jurisdictions and is working hard to improve our scheme.

There is only one area of disagreement with the Auditor-General's report, the issue of centralising FOI administration. By that I mean centralising decision making about releasing documents. I note the Auditor-General's submission supports the centralising of FOI reporting in the territory. The government maintains the view that this is the responsibility of individual agencies and individual ministers and, therefore, centralising the administration of the FOI Act in this regard would be a retrograde step. However, this government does believe that there is a stronger role for agencies such as my own, Justice and Community Safety, and, indeed, the Chief Minister's Department, to provide consistent advice and direction to agencies about the administration of the act.

Compliance programs, including training on advice given to agencies about freedom of information matters, are now being developed and delivered by my department. For example, the Government Solicitor's Office has held training sessions for FOI matters on request and has given advice on specific FOI matters. Two training sessions were also held by my department in the past year. This advisory function will continue into the future and I believe there are grounds for strengthening it further.

That is a brief outline of the key issues in the government submission and I would be happy to try to answer your questions.

THE CHAIR: Thank you. To start somewhere completely random, I would like to go back to the comments that were made, mainly in your introductory statement but also in the government's submission part 7, the information commissioner. You have highlighted on a number of occasions that reforms in freedom of information have resource implications. I would like to start with the resource implications and the notion of an information commissioner. Has the government done any costing on what particular model an information commissioner might look like and what it might cost?

Mr Corbell: No, we have not.

THE CHAIR: You do not have even a ballpark figure about an information commissioner?

Mr Corbell: No. The observation about resource implications highlights the assumption—the issue I am trying to address—that, if you have fewer FOI requests because you have an information commissioner and that is compelling or requiring more information to be pushed out rather than requested, it does not necessarily mean a reduction in costs. Whilst you might have fewer applications and therefore less cost associated with those, it does not mean that you have less cost overall, because agencies will still need to review documents, spend time reviewing and identifying the detail and content of the documents, determining them against the provisions of the legislation and then making them available.

The administration will continue. It is just that it will be shifted from response to requests to the legislative requirements to make more information available, and the administration of those requirements.

THE CHAIR: The government has not done any costing of one of the possible

structures you and all of us are looking at?

Mr Corbell: No, we have not.

THE CHAIR: What the various scenarios might look like?

Mr Corbell: No, not at this time.

MR HARGREAVES: Could I ask a question about that? In the context of the cost, presumably there is the actual cost of the administration which you have just described. There is also the cost of printing material. The charges are supposed to offset that. If we were to consider the resourcing issue, we would have to look at the cost of a commissioner and a support function versus the downturn, one would hope, in the number of items flowing through which, itself, is offset by the fact that you still have got to administer it and you still have to have the administration structure, whether you have got 3,000 or 2,000 requests. It is that quantum. We are not talking about something going down to the fives or 10s, which means we do not need to have so many people administering the scheme. I am assuming that is the idea.

In the context of the $4½ million to $5 million, is it possible to work out the decision-making component of that versus the amount of documents that are sent out to people? I am trying to get a handle on it.

Mr Corbell: Decision making versus logistical effort?

MR HARGREAVES: How much revenue is received in that context? We do have charges. What I am trying to get a handle on is whether or not the charge we are receiving is offsetting the amount of production that goes into the process. If a decision maker makes a decision on a particular item, it has then got to go through a whole tribe of officers before it is located and introduced.

Mr Corbell: In relation to the cost recovery, cost recovery has had a very marginal impact on the overall cost of the scheme. That has been partly, to be fair, due to inconsistent application of the provisions of the act. That is why I have asked my department to handle it. My department has issued guidelines on exemptions. That is also why I have made new fee determinations, to make it very clear there is a uniform set of considerations that all departments administer. The total level of cost recovery, I am advised, is less than one per cent of the total cost of the scheme.

MR HARGREAVES: That is fine. What I was trying to get my head around was the production costs. Once a person applies, it goes through a range of people?

Mr Corbell: Yes. On that other issue, I am not sure whether we can tell you that today.

MR HARGREAVES: I do not want it at this moment. Please do not think I want it right now. I do not know about my colleagues but I do not need to know a dollar value either. What I am trying to work out is—

THE CHAIR: The proportion.

MR HARGREAVES: Yes. Once you have made a decision, you say to the line officer, "Yes, you have to do it." They have to run away and find all the files again, duplicate them, send them out in the mail or someone has to come in and get them. You have a decision-making component and then you have a production component?

Mr Corbell: Yes.

MR HARGREAVES: If I could get an educated proportion, I would be happy with that.

Ms Leigh: To the extent that fees and charges are levied, they are broken down into the components that you identify—the actual search, the decision making and then the provision of the documents. So there is some capture of that information. But given the significant number of categories where there are exemptions, and then the thresholds which also allow for no fees up to a certain threshold in each case, it would be very difficult to extrapolate that information into accurate information about the cost of the scheme as a whole and a breakdown of that cost.

MR HARGREAVES: In that case, if you have got a given fee—and let us pick a figure: $50—and you can tell me that roughly this is the proportion that makes up that 50 bucks, if you have that sort of thing available, could you give us a range of five different items and those proportions; that would be quite enough for me.

Ms Leigh: We will have a look at what information we can provide that would actually be useful in terms of providing some real content.

MR HARGREAVES: I think you understand what I am trying to get at. I am really trying to get a mindset. I do not want to get an actual—

Mr Corbell: Sure.

Ms Leigh: Yes, okay.

MR HARGREAVES: Thank you.

MS HUNTER: Just back on the model, I am understanding, Mr Corbell, that there has not been any work done on different models that could apply around, say, an information commissioner. No work has been undertaken to date?

Mr Corbell: No, the government has taken the view that the Assembly has asked for this inquiry process, to look at issues and to suggest a way forward. So we are taking the view that we will await the outcomes of this inquiry before doing further work about particular models or the particular cost-benefit of particular models. That is really something on which we are wanting to get some indication from the Assembly, through this committee, as to what sort of direction they want to head in.

MS HUNTER: Minister, at the moment, as far as the Ombudsman is concerned, we have that arrangement where we have the Commonwealth Ombudsman and the ACT Ombudsman. I am putting forward that that could be part of investigating models, if

there is going to be an information commissioner federally. I guess it comes back to that point you were making about consistency. You believe it is very important that what the ACT puts in place has some consistency with the commonwealth.

Mr Corbell: I think it is a relevant consideration. I do not think we are bound completely to every policy setting that the commonwealth determines. There would be no point in having our own act if we adopted that view. But it is important that we have regard to the broader aspects of how the commonwealth administers its scheme. That has been used particularly to inform decision making for review and appeal of decisions through our various tribunals as they have existed over time, and we have drawn on the jurisprudence of the commonwealth, AAT and so on, in how decisions are made around those types of matters. So it has been very useful to have that broader context rather than just a very small, limited ACT experience.

You are right to identify that we do, in a number of other instances, particularly with the Ombudsman, and indeed with the Privacy Commissioner, engage on a contract basis commonwealth statutory officers and ask them to administer those relevant sections of our legislation. That is obviously a model that could be considered for the territory. Again, it is not a free option. We pay those statutory officers to deliver those services and that is a negotiation that we undertake every couple of years. But, in principle, it is certainly an option, if it was determined that an information commissioner was appropriate for the territory.

THE CHAIR: Could I go back to a threshold question. Minister, you touched on it in relation to the Auditor-General's proposal for a centralised agency. Could we have a brief discussion about the merits and demerits. Your submission says that the government has come down as being opposed to that idea. There seemed to be two schools of thought—that an individual agency making decisions on its own documents has something of a conflict of interest which may militate against release, which would be somewhat obviated by a central agency doing that, and then there are problems with perhaps not quite understanding the policy issues and the public interest issues because you are a central agency and not the line agency that has an understanding. How did you come to the view that a central agency was not the way to go?

Mr Corbell: I think it comes down to the fact that individual agencies and individual ministers have to report annually on their administration of the act as far as it relates to their agency. Therefore, there is an issue of accountability there about how these documents are managed. These are documents held by individual departments. So the responsibility for the management of those documents is the responsibility of the relevant chief executive, and they are accountable to their minister for that.

In some ways it is a moot point. On balance, we feel that it is appropriate to have, as you say, that context issue about what is in the public interest, what are the issues surrounding a particular document, taken into account in determining whether or not it should be released. Those are best addressed by the agency involved. However, any issues about conflict of interest, as you put it, I think can be effectively mitigated by strong guidance from the centre about the types of documents or what your considerations are around public interest. So that is why, for example, my department has recently issued guidelines that spell out very clearly how public interest should be

determined and what factors are relevant and what factors are not relevant in doing that.

I note that in the commonwealth's new scheme, and indeed in other schemes around the country, there is particular guidance now given about relevant and irrelevant factors. In the commonwealth scheme there is also guidance about what types of documents would be routinely expected to be made available as a matter of course. So to the extent that people perceive there might be a conflict of interest on the part of individual agencies, they can be well and truly overcome by strong guidance from the centre, either through the form of guidelines or through statutory requirement as set out in legislation about what sorts of documents and what sorts of factors and considerations should be taken into account. I think that is quite a reasonable way of managing that issue.

THE CHAIR: Could I ask, minister, for the committee to obtain a copy of the new guidelines that have been promulgated by your department?

Mr Corbell: Yes, I am happy to provide that.

THE CHAIR: And also the fee determination.

Mr Corbell: The fee determination has been tabled in the Assembly.

THE CHAIR: Okay; that is on the legislation register. You said there were guidelines about fees but they have not been finalised?

Mr Corbell: No, there is—

Ms Leigh: The general guidelines about fees have not yet been finalised, but the guidelines in relation to the public interest waiver of fees are the guidelines that the minister was just referring to that we are happy to provide.

THE CHAIR: Okay, thanks.

MS HUNTER: You have just put the case as to why the decentralised decision making about FOI would go down to line agencies. But I am wondering about a centralised review and whether that can also be a consideration by you and the government, around whether an information commissioner, for example, could conduct a review of that rather than having internal line agency or departmental reviews.

Mr Corbell: That is certainly something that has been dealt with in the commonwealth scheme and in a number of state schemes. The government has an open mind as to that issue.

THE CHAIR: Minister, you said that there seems to have been a renewed—I may be verballing you here—emphasis on educating FOI officers in line departments about their responsibilities and you talked about what the Government Solicitor is doing. When did this renewed interest in informing people commence?

Mr Corbell: As I understand it, most of that work has occurred this year.

THE CHAIR: One of the criticisms has been—I will fess up it is one of my criticisms, but I am not alone in this—that hitherto there has been a very patchy and inconsistent application of the act across agencies. Before this spurt of activity this year, what was done either in individual agencies or centrally to ensure the education and training of FOI officers—speaking as a former FOI officer who had a lot of training when the act commenced? Twenty or 30 years down the track, what sort of training is provided to FOI officers?

Mr Corbell: It is the nature of the administration of the FOI Act that those agencies that get a lot of FOI requests are much more familiar and proficient with dealing with those requests than agencies that get fewer or more seldom applications. In that respect, application can be patchy because of the relative experience and level of activity that agencies undertake. Generally speaking, agencies have undertaken their own training for their officers and have established their own processes for identifying people suitable to perform that role. That has been supplemented more recently by a more concerted effort from the centre to provide greater consistency and guidance to all FOI officers.

THE CHAIR: So who would you recognise as perhaps the frequent flyers in terms of the quantity of requests or the volume of requests, and has that changed over time?

Mr Corbell: I do not believe it has significantly changed, but I am happy to get some further data on that. From my understanding, the large agencies tend to get a large volume of requests. Health and Education, for example, get a lot of requests. A lot of that is for personal information or employment information, or is related to employment-related disputes and so on. Then there are other agencies, such as the planning authority, the Land Development Agency and those perhaps more contested areas of public administration that also get large numbers of requests.

THE CHAIR: Coming back to the large agencies where there might be a lot of requests for personal information, what thinking has the government had about better ways of handling that, rather than through the somewhat costly means of the Freedom of Information Act?

Mr Corbell: There is an exemption for the release of personal information at the moment, so the cost to applicants is minimised through that process.

THE CHAIR: But it is still costly to the agency.

Mr Corbell: The cost of administration, sure—

THE CHAIR: I mean costly in general terms.

Mr Corbell: I would have to defer to officers about that.

Mr Ferguson: One of the reforms at the commonwealth level is looking at including all issues of personal information in the Privacy Act. That is one of the options that we have examined at the department level.

THE CHAIR: Can you expand on how that might operate, Mr Ferguson—how you see it operating at the federal level and what you might learn from that?

Mr Ferguson: The Privacy Act reform will not be in place for at least another two years, so the details of that will not be fleshed out, but it is an idea that we are exploring.

THE CHAIR: Is there an understanding or a breakdown of the proportion of requests that are in pursuit of personal/employment information—so an individual making a request about their own individual status—and people who are making requests that might relate to broader policy issues? I just want to get a feel for what proportion of people are making personal inquiries.

Mr Ferguson: You do not get that data for annual reports, in terms of what kinds of FOI requests you want, but we do keep data on amendments to personal records. There have been none of those in the past five years. In terms of the substantive requests for information about a person, we cannot tell from the data that we get how many relate to personal information versus policy or general.

THE CHAIR: Does that indicate that we do not have a very good handle on—it would seem to me, and you can put up a counterargument—the things that motivate people to have access to the Freedom of Information Act? Therefore, are there ways of better addressing people's need that it be at a lower cost?

Ms Field: I think the commonwealth have certainly gone that way with their amendments because they have taken personal information out of the FOI context completely.

THE CHAIR: Or they are proposing to take it out.

Ms Field: I think the legislation is through but it just has not commenced yet. Is that right?

Mr Ferguson: For the FOI Act? For the Privacy Act.

Ms Field: I am sorry, for the Privacy Act. Really, it is saying, "This is a different kind of information and people have a right to have information about themselves, subject to some exemptions." We already treat some information in that way. If you look at the Health Records (Privacy and Access) Act, we already treat people as having a right to some of their health records, subject to certain exceptions. I think that the government is already moving towards that approach. I do not have the data on hand, but I would expect that agencies that get a lot of these kinds of requests are geared up to deal with them more effectively. So that would be Education and Health, I would expect.

THE CHAIR: Correct me if I am wrong—and it is a long time since I have done this work—but my recollection is that data is collected at the federal level. The federal agencies collect data on the basis of whether it is access to personal files or access to what might be called policy files. Do you know whether that is the case?

Ms Leigh: Mrs Dunne, I believe that you may be correct about that. I think also there is a general point about access to personal information, that in many ways it is often less costly for agencies to administer those requests because the most likely reason not to release it would be that it includes personal information about other people, so you have to take into account the privacy considerations of other people. But often personal records do not raise any of the sensitivities that may require a department to carefully consider whether the documents need to be exempt or partly exempt. Departments that handle large amounts of personal information often are very experienced in handling those requests and can handle them quite efficiently.

THE CHAIR: One of the things, I presume, with the health records is that requests to the department of health would, in certain categories, automatically activate a shift from one stream to another—if somebody made a request through the FOI Act that they would be automatically—

Mr Corbell: From my previous experience, yes. It is my understanding that the statutory obligations would kick in around the provision of information—for example, health records and so on.

THE CHAIR: Thank you.

MS HUNTER: Just on the Privacy Act—if we can just go back: Mr Ferguson, you were saying that there were changes but they will not come in for some time.

Mr Ferguson: There are planned changes. There is a review underway and the commonwealth is working on amendments to the Privacy Act. The new information commissioner will sit over the Freedom of Information Commissioner and the Privacy Commissioner. The idea is to have an integrated system with privacy and freedom of information both under the same regulatory scheme. We will not know what the Privacy Act amendments will look like until they are drafted. That review is underway and is on a longer time frame than freedom of information, which will commence in November.

MS HUNTER: So at the commonwealth level—just so I am across this—as to the disclosure of personal information or personal records, that change has not been made yet or that change has been made?

Mr Ferguson: That has not been made yet.

MS HUNTER: It has not been made yet.

Mr Ferguson: They have announced clearly that it will be made. The new system will place most of the management of personal records under the Privacy Act in future.

MS HUNTER: Minister, is that something that the ACT could move on sooner rather than later, to make that shift as well, so that it is not just about health records but it is about personal information going under the Privacy Act and being dealt with there, whereas FOI would be about government documents?

Mr Corbell: It is certainly an option, Ms Hunter, but again it comes down to what the overall design of the scheme is going to be. It comes down to how you are going to design the freedom of information scheme moving forward, what mechanisms you are going to have in it, whether you are going to have statutory officers involved in deciding or reviewing decisions or setting particular guidelines or requirements for agencies to meet. So it really comes down to that broader architecture of the scheme.

THE CHAIR: Could I go back to a fundamental question which stems from the line of questioning from Ms Hunter. At the outset, minister, you referred to the government's view that access to information was a right and this was underpinned by the human rights legislation.

Mr Corbell: Yes.

THE CHAIR: In the government's thinking about how you might move for reform of the Freedom of Information Act, have you contemplated the interaction between the protectors of the Human Rights Act like the human rights commissioner and any oversight of the administration of the Freedom of Information Act and how you would see that interplay?

Mr Corbell: We certainly do not see a role for the human rights commissioner in the administration of the scheme.

THE CHAIR: I think I was asking a higher level question than that. How do you see the interplay between the overall umbrella of protection of rights and the protection of rights in the application and reform of the freedom of information legislation?

Mr Corbell: I think I can only answer that in the terms I just did, which is that the human rights commissioner is there to oversight compliance with the principles of the act and the human rights commissioner has the powers to investigate and audit compliance of any part of government, or indeed some other agencies as well, with the act. They can draw deficiencies to the attention of the minister and the Assembly if they believe there are problems with it. So I would not see how that would be any different in relation to a new or a revised freedom of information scheme. The same sort of approach would apply. Their role is a watchdog role in terms of adherence with the principles of the act and the obligations under that act. They are not there to try and administer schemes in detail, whether that is how the prison operates or how the Freedom of Information Act operates. That is a level of detail that is below their broader oversight role.

THE CHAIR: Could I go to a broad question about the statement that we want to be a pro-disclosure regime and to ask this: what thinking has the government done about being an agent in favour of disclosure of information beyond the Freedom of Information Act—the issues that might relate to making available a range of information before it is asked for, essentially, and perhaps circumventing the need to ask for information? I noticed your comments in the government submission about an approach to cabinet documents post cabinet meetings and about what may or may not be released, but I was actually thinking of things broader than that—datasets held by government agencies which might be put on the public record.

Mr Corbell: There are some useful models to look at—the so-called "push" model. There are a range of mechanisms but the one that is in my mind is one that is in legislative form. So it says, "These are the types of documents that should be routinely made available without the need for a request." And there are a broad range of documents that different jurisdictions, nationally and internationally, have identified as suitable for release. Some of these can be very mundane. I was having a discussion prior to this hearing about, for example, releasing all documents relating to appointments made by government to different boards and committees. That is something which all territory governments have done as a matter of course. They have announced who they have appointed, and we have indeed got that oversight process with Assembly committees, so that there is a much broader level of knowledge about who is being proposed to be appointed to government boards and committees. So that is one example.

There are a range of other types of information. Under the commonwealth or Queensland legislation, they identify that, where it is likely that a request would be made, because it is a matter of public interest, that document should be pushed out the door rather than waiting for the request to be made. So where there is public interest in a debate about a matter, that becomes a ground for considering whether or not the document should be made available proactively. That could capture, potentially, any type of document or information, subject to whatever the exemptions regime would be.

I am aware also that Wales is a self-governing entity now in the United Kingdom and has a very strong "push" model. For a small jurisdiction, it pushes a lot of information out the door, and it is specified in its legislation that there is a whole range of government documents and information that should be routinely made available without the need for a request. So that is certainly something which the government is interested in exploring.

Again, we are cognisant of the resource implications of that, but it is something that I think could be very useful in allowing citizens to see that there is a much more open regime about information that government holds, and that it is available without the need to specifically request it.

THE CHAIR: Has there been any analysis or thinking about the relationship between pushing documents out and diminishing the number of requests that would come?

Mr Corbell: Has there been any analysis—

THE CHAIR: Has there been any analysis? It might be more a question for JACS: when you have been looking at these models, are you aware of research that may have been done that points to a correlation between pushing documents out and reducing the number of formal requests that agencies might have to deal with?

Mr Ferguson: We are aware of the argument that once the information is out there, there will be fewer requests. But we have not looked at any quantitative analysis yet of just how many fewer requests you get per document published, or anything that would allow us to put a number on the situation as to what we can estimate.

THE CHAIR: I am not asking for a definitive answer, but are you aware of whether

there has been any research, or are you just working on the hypothesis that more information will result in fewer requests?

Mr Ferguson: The most relevant scheme that we are looking at at the commonwealth level has not commenced yet, so there is no research available on that model, and that is where we will be watching for the most relevant analysis in the ACT.

THE CHAIR: Why do you say that is the most relevant analysis?

Mr Ferguson: Because the commonwealth FOI scheme is so similar to the ACT's FOI scheme at present.

Mr Corbell: It is the most relevant point of comparison.

MS HUNTER: Surely, also, it goes back to Mrs Dunne's frequent flyer question, if you like, around having some analysis of where most documents are—you mentioned planning and a few others—and then, if that was on your list, there would be an analysis about whether requests would go down because that information would automatically go out into the public arena.

Mr Corbell: As David says, it is a matter that we are going to need to see. To give you a more definitive answer, we are going to need to see how the new scheme in other places operates. It also comes back, though, to this question about the nature of the requests and, if there are a large number of requests, say, that involve personal information, the commonwealth are addressing that, as Mr Ferguson outlined, through another mechanism involving Privacy Act considerations.

Regardless of whether or not requests go down, the issue of cost still needs to be kept in mind, because obviously, even if there are a much larger number of documents being made available proactively, there is still a need to administer that and to identify those documents, assess them according to whatever legislative criteria there are, and then decide whether or not to make them available. So there is still a significant administrative task that has to be kept in mind. With respect to the cost of applications, the number of applications might lead to a reduction in cost there, but it might just be shifted somewhere else.

THE CHAIR: If you were envisaging a "push" model, would you—and again the question arises—see that the initial decision making about releasing documents proactively would be made at an agency level or an overseeing level?

Mr Corbell: The government has not come to a particular view about that, so it is a bit hypothetical. If you wanted me to express my personal view as minister responsible for the act, I would say that it would be desirable for agencies to administer it in the first instance because they understand the context of the documents and where they sit in terms of whatever legislative criteria they would have to address in determining whether or not they should be made available. They would be best placed to do that, but with an oversight by a central body—a capacity to change a decision by a central body. I think that is probably the best way to do it.

THE CHAIR: What would the government's attitude be to the releasing of

substantial datasets? I am thinking of examples that were put to me recently at a conference—things like road crash data. For instance, Washington DC publishes road crash data and assault data, which identifies where assaults take place, for instance. What would the government's attitude be to the release of that sort of data, which really is compiled data and datasets which the government has, or should have, which is not currently publicly available?

Mr Corbell: I would not want to pre-empt a government decision about what documents should or should not be released, but what I would say in general terms is that if you were going to have a "push" model then you would have to give consideration to the release of that type of information.

MS HUNTER: I wanted to go to page 17 of your submission. It talks about disclosure logs. This is also mentioned in the Solomon report. The question was: do you support a publicly available release register for FOI documents? Do you also support a non-disclosure register, which would also set out why requests have been refused? I am also thinking that, if the current situation remains, where line agencies are making those decisions, having a disclosure log and a non-disclosure log could be a useful resource in terms of looking at why decisions were made and whether they were in favour of releasing documents or not and to get some consistency.

Mr Corbell: The government has not determined a view on that, Ms Hunter. We simply highlighted it as an issue that should be considered.

MS HUNTER: I guess it brings me to the question of timing, because a lot of this is around "We're waiting for commonwealth processes to be underway and so forth". We have the committee inquiry, as you have pointed out, to come up with some suggestions or recommendations. Have you got any view on the sort of timing that we might be looking at? There seems to be a willingness from government to be—

Mr Corbell: It depends on when you report. The government has been very up-front about this. Our position is that the Assembly has said there needs to be a look at how FOI is administered. We had a very robust debate in the Assembly about that and this inquiry and these terms of reference have been established. Our position is that we want to see the committee inquiry run its course and we want to see what the committee recommends. We see this inquiry as the primary vehicle for informing what the next steps are.

THE CHAIR: I am going to ask a question that has a personal tinge to it. I notice that the commonwealth, after its decision to do away with conclusive certificates, instituted a process of reviewing documents that were subject to conclusive certificates with a view to releasing them. Has the territory considered such a course?

Mr Corbell: You mean previous matters where conclusive certificates have been issued?

THE CHAIR: Yes.

Mr Corbell: No, the government has not given consideration to that, but that is a matter that I am sure, if the committee has a view, it will express in its report.

THE CHAIR: I suppose the other option for organisations, agencies or people that had previously made requests and come up against certificates would be to reactivate those requests. What would happen then?

Mr Corbell: If they made a new application under new law?

THE CHAIR: Yes.

Mr Corbell: It would depend on what that new law provided for.

THE CHAIR: The current regime in the ACT where we have done away with conclusive certificates.

Mr Corbell: I see.

MR HARGREAVES: Was it retrospective or was it prospective?

Mr Corbell: If you make a new application—

THE CHAIR: You would make a new application.

MR HARGREAVES: The matter was actually determined with the issue of a conclusive certificate at a point in time, which had a legal framework at a point in time. The abolition of conclusive certificates, I presume, was a prospective thing because very rarely do we ever issue retrospective legislation.

THE CHAIR: No, but I suppose the question is: have certificates expired by virtue of—

MR HARGREAVES: The question is: does the—

THE CHAIR: It seems to be affected by virtue of the changed legislation in 2009.

Mr Corbell: I think any such application would require some fairly close legal advice as to how the law should be applied in those circumstances.

THE CHAIR: Don't tempt me!

MR HARGREAVES: I think we are being tempted enough, but we have got faith in your ability to resist these things, Madam Chair.

THE CHAIR: I think I can probably resist that temptation. It would be an interesting question of law, but it may not be—

MR HARGREAVES: We may even test it at some other time.

THE CHAIR: Minister, you talked previously about the issue of cost in relation to a "push" model. The experience in other jurisdictions has been that a lot of those documents are already electronically captured and it is a matter of making a decision

about them and posting them on a website somewhere so that they are available. Have you done any costings in relation to various grades of "push" model?

Mr Corbell: No, we have not. Can I just clarify the concern around costs? It is not about photocopying documents. It is about the qualitative process of identifying which documents exist, whether or not they are captured by obligations to push information out to the public, and then the decision making around those documents. That is where the time is. It is not about an officer standing in front of a photocopier photocopying things. Yes, you are right. Most of these documents are in electronic form, but it is about identifying them, making sure that you know what you have got and then making decisions about them. That is the time-consuming factor in that process.

THE CHAIR: Yes, the decision making process, the identification—

Mr Corbell: Yes, identification and decision making.

THE CHAIR: I suppose that if we went down a "push" model route, it would be an iterative process of identifying documents from then on, which would require a certain degree of education of people handling documents to flag with themselves whether this was document that fell into a category that could be released and having those identified up the line.

Mr Corbell: Yes. Obviously, over time, agencies would develop familiarity—

THE CHAIR: There would be a substantial education—

Mr Corbell: with what their obligations were under any such scheme. That is true.

THE CHAIR: That is a substantial departure from the current FOI model where you have a group of specialists who go out searching for documents when the need arises and the decision makers tend to be advised by somebody who ideally has some sort of training and expertise in the area, whereas a "push" model is a much more proactive agency by agency, work unit by work unit, process which requires a different level of education and training in those areas.

Mr Corbell: Yes.

THE CHAIR: Which all have resource implications, none of which the government has really considered at this stage.

Mr Corbell: Not in terms of putting a dollar figure on it. As I say, there are a range of models out there. Their application to the territory would be something that would be looked more closely once there was a clear indication of what direction we were potentially heading in. Essentially, the government is just willing to put on the record today that, in the context of the committee's deliberations, costs should be a consideration. Whilst we are not able to provide you with a dollar figure, I think it is not unreasonable to say that if you require a greater range of documents to be reviewed and determined for release, it has a cost implication.

THE CHAIR: At this stage it is an open-ended, unknown cost by the government and, therefore, by this committee.

Mr Corbell: Indeed. I think the point simply being made by the government is that, whatever approach you believe is appropriate and wish to recommend, we would ask you to have regard to what would be the broad implications of cost associated with that—that is, do not make a decision about the preferred model in the absence of that consideration. It is not the only consideration. I think it would be fair to say it is not the ultimate consideration either around the right to information, but it is a consideration. I guess it is incumbent on the government to make that point to you.

MS HUNTER: Going hand in hand with that is the need to have, I guess, the electronic data and records management system in place. Where is the ACT government in terms of having a system in place already, or has it not got one? Would that be something that would also need to be developed, which would have a cost implication?

Mr Corbell: The territory records act places obligations on agencies about the retention and storage of documents and information. There is already a clear legal framework for the management of those documents. Agencies have a range of systems to manage those documents, depending on the nature of them. ACT Health has a much bigger task than the environment department has. Their systems vary, depending on the type of information they are having to capture and manage.

THE CHAIR: Can I just go back to the question of costings. Minister, are you aware of costings and costing models that may have been developed through the work done by other jurisdictions who are ahead of us on this? The commonwealth has come up with a particular model. Are you aware of what costing process it may have gone through to identify the course of action that it might take?

Mr Corbell: I would anticipate that certainly at the commonwealth level the commonwealth Treasury would have advised the government as to what the cost implications were of the model that they have adopted. I do not know whether they have disclosed what that is. We just do not know.

THE CHAIR: Is the department aware of—

Mr Corbell: That is perhaps one of those ironies. It is perhaps one of those pieces of information that have not been made public.

THE CHAIR: At some stage, presumably—

Mr Corbell: Presumably they have done so, yes. Once they know the specifics of their scheme they will seek to estimate what the impost is on administrative budgets and how it will be paid for.

THE CHAIR: Is the department aware of any of that work being done in other jurisdictions, in the research that you have done?

Mr Ferguson: No. All the schemes are fairly new and those that go with an

information commissioner, who is independent. From the past year, in Queensland and New South Wales particularly, no, we have not got that information yet.

THE CHAIR: What you are saying, Mr Ferguson, is that after they have been in operation for a year or so you would have some idea about what the cost might be.

Mr Corbell: They are going to have budgets. They are going to have annual reports.

THE CHAIR: They will have budgets et cetera.

Mr Corbell: We are going to be able to see those, yes.

THE CHAIR: But you are not aware of what costings were done prior to the establishment of those?

Mr Ferguson: No.

Mr Corbell: There is a good reason for that. Those are the processes of other governments and other cabinets. Presumably, they would have their own processes around the cost assessment of particular proposals that come before cabinet which may not have been made public.

THE CHAIR: Ironically.

Mr Corbell: The irony of this inquiry.

THE CHAIR: Yes.

MR HARGREAVES: The message that I am receiving is that nobody around the place has actually got a dollar figure that they are sharing—if they have got it at all yet because everything is so new. All of the signs are that if you go to the "push" model, it is going to cost you some extra, full stop.

Mr Corbell: It would certainly be the government's anticipation that there would be an increase in cost.

MR HARGREAVES: That is certainly the message I have got.

MS HUNTER: Yes, I agree there would be—

MR HARGREAVES: It is a question of the netting of it off.

MS HUNTER: particularly when you are going back to look at documents, but if it was built into your system when documents were developed and put together that part of that process was to make that decision at that point about whether or not it would be put out there, then it is not a matter of going back to search a document and doing that process; it is part of your development of a document.

MR HARGREAVES: Except to say, though, that from what I heard earlier on, the cost of production is the minor part of the process. If you expand the deliberative and

contemplative part of the process, you are going to get an additional cost. It is just a question of how big that is going to be. The actual effect of reducing the production costs is going to be marginal, with the increase as it is with the current set of costs.

THE CHAIR: Some of those, it seems, minister, would be hard to quantify. If we decided there would be a change of culture in that we would pursue a "push" model so that it becomes part of the modus operandi of every department to say, "Should this just be posted on the internet somewhere?", with some of those issues, as you develop a sophisticated approach, it seems that the costs would become a minimal part of the cost of production of a particular document, report or dataset. So it becomes part of the process and, over time, it seems that those costs would diminish.

MR HARGREAVES: Over time, it would just be part of the administrative cost of the department or a particular agency. The question, of course, is: what is the start-up? What is going to be the immediate impact? We need to be cognisant that there will be—

THE CHAIR: It seems that no-one is able to quantify that at this stage.

MR HARGREAVES: Yes, but we do know there will be an immediate impact which would be, by definition, addressed by budget cabinets going forward.

Mr Corbell: There is also the question of all the records currently held by the territory. So it is not just documents created subsequent to a new scheme; it is all the documents already held, and whether there should be a process of retrospective assessment of those documents and making them available. How far back do you go and so on? These would all be considerable decisions to take and would have resourcing implications. Certainly, prospectively, for the creation of new documents, yes, you would expect that over time agencies will become familiar with what types of information would normally be expected to be released. Indeed, in the way they produce documents, they would have regard to that.

THE CHAIR: I suppose the advantage of being a fairly new jurisdiction—

Mr Corbell: So that would move forward. But the number of documents held by the territory is not small, even for a small jurisdiction, and there is that question.

MR HARGREAVES: A complication of that, I would assume, is that, from what I can gather, there are a couple of classes of documents. We can say that we have total jurisdiction over ACT documents produced from about 1988 onwards, but going back from that, there may very well be a commonwealth view on whether something should be pushed or not.

Mr Corbell: No, I do not think so. Records that are—

THE CHAIR: The records of the territory are the records of the territory.

Mr Corbell: The records of the territory are the records of the territory. If they are in our custody and form the body of the work of the territory, then, regardless of whether they were produced by self-government or not, I do not think that would be a

consideration. There may be exceptions to that, but generally speaking, that would be—

THE CHAIR: Minister, could you reflect on the nature of the jurisdiction and whether there are substantial qualitative differences in the sorts of documentation that we in the ACT might be called upon to consider in a "push" model from what, say, the commonwealth or a state government might do, simply because we are a two-tiered jurisdiction and there is a lot of material which is municipal in nature? Perhaps the proportion of documentation is—

Mr Corbell: I am happy to give some thought to that. It is not an issue I have given thought to, but I am happy to give you a more considered comment on that.

THE CHAIR: It would be useful to have some consideration and feedback on that, because I think there may be empirically different sorts of documentation.

MR HARGREAVES: The question that comes to mind is whether or not the Gulargambone municipal council has an FOI act that it must comply with which is local in nature rather than state in nature. Therefore, the same thing would apply here.

Mr Corbell: I think the state FOI acts apply to local governments.

MR HARGREAVES: The issue is the administration of it, because I suggest that the Gulargambone municipal council might be a bit short of an FOI officer and their education might be a little lacking, with due respect to that council, whereas we are in fact in a more advantageous position than those many councils around the country.

Mr Corbell: That may be the case.

MS HUNTER: I want to ask about the idea of an integrity branch of government. I know we had discussions with the Labor Party before the agreement came into play. In fact, there is mention in our agreement of the idea of an integrity branch. Minister, have you or the ACT government got some vision around how that could best be promoted or supported?

MR HARGREAVES: With the caveat, however, that we will need to address the reason why the committee is actually here today, and that is to consider the freedom of information perspective.

Mr Corbell: With the committee's indulgence, I think the—

MS HUNTER: It goes to the idea also of an information commissioner.

Mr Corbell: Sure. With respect to the integrity branch of government, personally, I find the term "branch" a bit of a misnomer because it is not a single entity. Unlike the executive or, indeed, the judiciary or the legislature, it is not a single, identifiable entity. It is a diverse series of entities, statutory officers and so on, who each operate within their own legislative framework. So with that sort of rider, the key to the effective development and implementation of an integrity branch of government is to ensure that they have the ability to do their job, to have the resources that they need

within the obvious constraints of the public purse overall, that they have the ability to voice their concerns about resources openly and to be able to do that without fear or favour, and, most importantly, to be able to report publicly and openly and, again, have access to information that they require to do their jobs without hindrance, so that they can undertake the work that they are required to do under statute.

I think it is the environment in which they operate which is most important to their effectiveness, and I think the government has demonstrated that we are committed to that. The human rights commissioner, the Human Rights Commission, can come to this place and tell the Assembly that they do not feel they get enough resources. That is appropriate; that is as it should be. The government always wishes to provide sufficient resources to these statutory officers, but that is within the overall constraint that the government faces in terms of the management of its budget. But at least those views are able to be put in a public forum by those officers without interference from the executive arm, and that is as it should be. Equally, their access to information and their ability to report on issues should not be hindered. I think we have a very robust framework. For a small city-state jurisdiction, I think we have a very robust integrity framework through our Auditor-General, through our Human Rights Commission, through our Ombudsman, for example. We have a very well developed architecture compared to many other places, both in Australia and internationally.

THE CHAIR: I have a concluding question which goes to a particular point in your submission. On page 14, paragraph 3.31 is with respect to the removal of conclusive certificates, and you would understand my interest in this matter. Would the government like to reflect upon paragraph 3.31 and see whether that is an accurate reflection of what actually happened in the debate. It says:

> The two Bills—

that is, the private member's legislation, my freedom of information amendment bill, and the government's freedom of information bill—

> were debated concurrently and received unanimous support …

That is not strictly correct. The private member's bill was passed with some amendment from the government. The government's bill was voted down and the government attempted two tranches of amendments to the private member's bill, one of which succeeded and one of which did not. I am wondering whether the government would like to reflect on the accuracy of that statement.

Mr Corbell: I think the point being made in this submission is that the proposition to remove conclusive certificates was supported unanimously by all parties in the place. I am very happy to cede, Mrs Dunne, as indeed the submission does, that it was your bill that was supported by the Assembly.

THE CHAIR: No, the thing is that the two bills did diverge, and not all of the matters in both bills received unanimous support, and some of them were not supported.

MR HARGREAVES: But isn't this about the conclusive certificate elements of that?

Mr Corbell: I just draw your attention to paragraph 3.30:

> Both Bills sought to achieve essentially the same major objective: to amend the FOI Act to remove the ability of … ministers to issue conclusive certificates …

And that is what both bills did attempt to do, albeit down slightly different avenues, but that was the same key objective. That is the point that is being made.

THE CHAIR: Thank you, minister and officials, for your time this morning.

Mr Corbell: Thank you very much.

THE CHAIR: There are some things that you said you would provide to the committee. It is all right to get back to the secretary at another time, shortly, with those things.

Mr Corbell: The fee determination and the guidelines are what you asked for. Yes, we will make those available.

THE CHAIR: You said that you would reflect on the differences in relation to the sorts of documentation that you might deal with.

Mr Corbell: Municipal and state; yes, I am happy to give you some comment on that.

THE CHAIR: It may be that, in going back over the *Hansard*, there are some other matters. Certainly, other questions may arise on which we might communicate with you.

The committee adjourned at 11.48 am.