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

MONDAY, 25 OCTOBER 2010

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

By authority of the Legislative Assembly for the Australian Capital Territory

WITNESSES

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Amended 21 January 2009

The committee met at 5.06 pm.

McMILLAN, PROFESSOR JOHN, Commonwealth Information Commissioner Designate
PILGRIM, MR TIMOTHY, Commonwealth Privacy Commissioner

THE CHAIR: I would like to thank you for coming today. What the committee is doing is inquiring into reforms of the ACT FOI Act. We welcome you today to talk about where you are in the context of the changes that have occurred in the commonwealth and the impact that has had in the creation of the information commissioner roles. We know that it is early days but we are very thankful that you have agreed to come and give us a briefing on where you are to date when you are just about to open your doors.

Prof McMillan: How about I give a briefing? As you know, the FOI Act has been around for nearly 30 years and the Privacy Act for over 20 years. For all of that time there has been a Privacy Commissioner but no FOI commissioner. The new model brings together the FOI functions, the privacy functions and a new set of functions for the Information Commissioner functions that I will define in a moment.

Those three functional areas are now located in a single office in a single scheme headed by three commissioners: the Australian Information Commissioner, and I am the CEO of the organisation; the Privacy Commissioner, an existing position that has merged into the office from next Monday, 1 November; and a new position, the Freedom of Information Commissioner. All the functions under both the FOI Act and the Privacy Act are conferred upon me as Information Commissioner, and then I can delegate them to the other two commissioners and, in some instances, other staff.

It is expected that the Freedom of Information Commissioner will largely discharge the FOI functions which are focused primarily on complaint handling and on merit review. The two existing complaint and merit review bodies, the Commonwealth Ombudsman and the Administrative Appeals Tribunal, retain their functions but it is expected that the Information Commissioner and particularly the FOI Commissioner will largely do that work. It is equally expected that the Privacy Commissioner will largely do the privacy work.

The third area is what is called the Information Commissioner functions, and that is a non-delegable area conferred solely on me. That role is to provide advice to government on information policy and practice and to do so with the assistance of a new committee, the Information Advisory Committee, that will comprise appointees from in and outside government. The way it will work is that I will spend quite a lot of time on that general information policy role and quite a lot of time on FOI promotion, in the early days at least.

Although there are those three functional areas and three commissioners, we are developing very much an integrated model. For example, Timothy, as Privacy Commissioner, will make decisions under the FOI Act, particularly if there is a personal affairs element. Perhaps the FOI Commissioner will occasionally discharge privacy functions. I will certainly be involved in both areas. As part of the integration, we are having one web, one telephone number, one letterhead and most of the staff

are already doing work in both areas.

In terms of workload and size, the Privacy Commission currently has close to 60 people, mostly located in Sydney, and for the moment they will remain in Sydney. The intention is that there will always be an office there. I expect the bulk of the privacy functions, particularly the private sector regulatory function, will be discharged from Sydney.

We have probably got about 25 new positions to pick up the FOI and the information policy functions. They will mostly be in Canberra. In total, we will have about 85 people. I think the combined budget, the new budget and the existing privacy budget, is probably just over $11 million.

Most of the work will be a continuation of the privacy work. In regard to new complaint handling and particularly merit review, we expect a fairly large increase in merit review in the FOI area but also in the information policy area. For example, one of the responsibilities is to supervise a new information publication scheme as agencies are required to publish more information. My policy section will spend quite a lot of time reviewing and monitoring the publication activities of agencies.

Next Monday, when we open, we have a publication coming up—I will make sure I send it across—called the "Guide to Australian Government information policy", which is a 50-page issues paper on all the developments in information policy generally at the national level in the last couple of years.

That is a brief description. I am happy to answer questions.

THE CHAIR: There are a couple of things, if I could. You say that the merit review and the complaint mechanisms are still maintained by the AAT and the Ombudsman respectively but at the same time the commissioner will have a role there. How do you see those interacting without cutting each other's grass?

Prof McMillan: The arrangement with the Ombudsman is spelt out in the act. It says that both the Ombudsman and the Information Commissioner have a complaint jurisdiction. But if the Ombudsman receives a complaint relating to an FOI matter, then the Ombudsman is to let us know and we are to make a decision on who is the most appropriate and effective body to handle it.

So there is no presumption that it comes to us but we have had discussions with the Ombudsman's office and we have got a draft memorandum of understanding. They are very happy for us to take over most of the FOI complaint work. It is likely that they will only do FOI complaint work if it is just a small issue that is tied up with some other matter—a Centrelink payment or an immigration visa issue.

With the AAT, the arrangement is also spelt out in the act. The new review system is that, after persons have their primary FOI decision, they can still go to interval review but it is now optional. They can now come directly to the Information Commissioner. There are only two ways to get to the AAT. One, you can appeal a decision of the Information Commissioner to the AAT and both bodies undertake identical merit review. The other way is that the Information Commissioner can refer a matter to the

AAT for reasons that are not spelt out. That is why all the parties expect that most of the complaint review work will be done within the new office.

THE CHAIR: Is there a path by which a member of the public could end up at the AAT?

Prof McMillan: They have to first go to the Information Commissioner, yes. There is no direct right of appeal or access to the AAT.

THE CHAIR: And is internal review done away with completely or is that an optional step?

Prof McMillan: It is still there as an option. And that is a worry.

THE CHAIR: I suspect it will probably be circumvented. I think it will cease to be an option after a while because it will become redundant.

Prof McMillan: I think so. The government's view was that people really want to get the dispute heard externally and they do not want too much appeal fatigue; so let them go straight to the Information Commissioner. The agency's view tends to be that we want this thing resolved as soon as possible and, if getting it to the Information Commissioner is going to resolve it—I have some concerns because I am a strong believer that people should always exhaust the internal options first and I have a concern that we will be overloaded with the work.

The only way that we will try to counteract that is through the review scheme we have developed in draft, which is this: if a person approaches us directly without having gone through an internal review, we will do it in stages. So we will say to the agency, "In two weeks we want a list of the documents for which an exemption is claimed," referring to the section number. Two weeks after that we will say that we want a brief summary of the issues in dispute and where it is heading. After that, we will decide whether we want to look at the documents, whether we want a meeting.

Unlike the AAT, which tends to say, "Okay, an application has been lodged; lodge all your submissions; lodge all your documents and we will try to step it out," we will require that the agency responsible be signed off at the senior executive service level so that the dispute will have at least got to a senior level. So while it is a fairly formal review path that has to end in a determination, I am hoping that we can still negotiate a kind of an agreed solution. It is early.

THE CHAIR: It does seem that having two possible paths might be problematic. It is not necessarily clear which is the best path and it could be confusing for people who could say, "I have got two paths to choose." If they know that it does not matter what happens they are still going to end up in your office, they probably will cut out the middleman. Often, that matter could be resolved at an agency level.

Prof McMillan: Even in our draft guidelines we have said that the view of the Information Commissioner is that a person will be better served by seeking internal review before coming to us. Agencies have responded by saying, "Why?" They are not even playing ball with us.

My concern is the workload one. For example, the AAT currently gets about 140 FOI applications a year. I think it is easily foreseeable, given that there is no charge for us and it is informal, that we could get at least four times that number. If we had 500 applications a year, although there is a small review team, the formal decision must be done by the commissioner. It is non-delegable. Three commissioners could have a heavy review workload.

THE CHAIR: The thing is that if you have got a large volume of documents—and in my last difficult case there were between 3,000 and 4,000 documents which were exempted—that is a very hard decision to make.

Prof McMillan: Yes, I know, and that is my fear. You realise how large some of these disputes are. If there are thousands of documents, there is just the sheer amount of time it takes to go through them, let alone being careful. You have got to be very careful about the decision you make because you can do great damage if you inappropriately release something. So there are some large question marks about—

THE CHAIR: How it is all going to work.

Prof McMillan:—just how it is going to work.

THE CHAIR: Timothy, you have got the Privacy Commissioner role. You are a bit divided because you have got a public sector role and a private sector role.

Mr Pilgrim: That is correct.

THE CHAIR: How much do you divide your time between those currently?

Mr Pilgrim: It has been a rough estimate that 60 per cent of our case load is the private sector at the moment, and the balance is made up with mostly Australian government agency work and a very small amount of ACT government work. So well in excess of 60 per cent of our complaints investigations work is with the private sector.

THE CHAIR: That is, for the most part, unaffected by this because the changes to FOI and bringing you into this is all about access to government documents.

Mr Pilgrim: That is right. Within the Privacy Act, for the private sector there are access provisions for members of the community—individuals. They can seek access to their information held by a private sector company and if that is refused they can come to our office and lodge a complaint along similar lines to an FOI complaint but without a number of different processes.

MS HUNTER: And so that was part of the decision to have most of your workers stay in Sydney; is that right?

Mr Pilgrim: In part; I assume that you could put it that way, yes. The office has been established up there. We have obviously the usual administrative arrangements. We have co-located with the Human Rights Commission, who provide our corporate

services. We are in lease arrangements for premises up there and we have 60 staff who are established up there and doing the work. So it made sense to maintain that office, and also the links with the private sector whom we do get quite a lot of representation from—particularly the large corporates are regularly wanting to meet with us, and a number of them are based in Sydney—so it allows for that sort of interaction.

THE CHAIR: That makes sense.

MS HUNTER: So, Timothy, you are based in the ACT?

Mr Pilgrim: No. I am personally based in Sydney.

MS HUNTER: Okay. I was about to say that that would have made an extra complication, would not it?

Mr Pilgrim: Although I am down here quite regularly for meetings because we have always had both the ACT government regulatory role and the Australian government regulatory role, so I am usually down here at least once a week for meetings or whatever.

THE CHAIR: This is probably a bit suck it and see at this stage, but do you have any feel for how much of the workload was previously FOI related, people's access to their files? Is that the sort of thing that you would be taking on?

Mr Pilgrim: I would not think necessarily. There will be some, obviously, depending on how we end up seeing the work come in. At the moment, if you just leave aside the work that I do in the office as Privacy Commissioner before next week when we become the new office, we get, as I said, approximately 1,200 complaint investigations a year on privacy matters. We have also other own-motion investigation work we undertake, and we also have an audit function over ACT government agencies, commonwealth government agencies and credit providers. So there is that raft of compliance work that will need to continue on.

But I can foresee, and John and I have been discussing this, that there will be a number of review cases coming in; for example, where there may be an exemption claimed on the ground of privacy or personal information and whether that best sits coming into the Privacy Commissioner. There may be a good argument for picking up that workload. But there will be the three commissioners whereas at the moment in privacy there has only been me to do that process.

THE CHAIR: And who is the third commissioner?

Prof McMillan: I have not appointed that person yet. We are expecting an announcement later this week.

THE CHAIR: Leaving it till the last minute, yes.

MS HUNTER: In time for the opening next week.

Prof McMillan: In time for the opening next week.

THE CHAIR: Yes, soon, we hope.

Prof McMillan: We went through selection processes quite some time ago but, yes, the election interrupted the appointment of somebody. Just on that thing, it is often said that in analysing FOI requests to agencies up to 90per cent can be for personal affairs records. My sense—this is just impressionistic—is that the disputes or the review cases probably bear a different pattern. They tend to be ones where a firm, a company, an individual, a journalist or something is after something that does have a regulatory or policy role, or an individual who is in perpetual battle with an agency.

The personal affairs ones, though they are a high proportion of requests, tend to be fairly routine because most agencies just routinely hand over the personal file to somebody. Sometimes there is an annotation issue that causes a bit of work, but they are not time consuming issues to deal with.

Mr Pilgrim: That has been our experience as well, that agencies will tend to let someone have access to their own personal information, be it Centrelink or the other large agencies like that, without necessarily having to go through formal procedures.

MS HUNTER: And so that is a cultural change that has happened over time or—

Prof McMillan: Yes.

THE CHAIR: When I was an FOI officer—is it really 30 years ago?—at the time that the act commenced, which is very scary—

Prof McMillan: That is a proud boast.

THE CHAIR: It was actually an issue of considerable anxiety at the time: how would you deal with these?

Prof McMillan: Yes. There has been a dramatic shift in culture; there is no doubt about that. Agencies routinely happily provide most information and the cultural change is occurring even more. Just look at recent examples: Treasury and finance put the Red Book, the advice to the incoming government, up on the web. The Reserve Bank publish the bank minutes of meetings. Those things were just unthinkable, even in recent history, and there are examples of that across the board. There has been a huge pro-disclosure cultural change. But information disclosure issues are still hard fought.

THE CHAIR: Yes. That is right.

MS HUNTER: You were talking about the concerns around workload and how that will be managed, and the functions and what you are doing there. What is available around awareness raising and promotion of your office and its role—not just to the agencies, but also to citizens?

Prof McMillan: Yes. I have been deliberately trying to keep a bit of a low profile

prior to our launch because I did not want to deal with too many public inquiries that I could not satisfy. Our website is up now and it is www.oaic.gov.au, for Office of the Australian Information Commissioner, and we have got a couple of fact sheets up there and by the time we open we will have a lot more. We have got quite a large bulk of information ready to be published over about the next month. So that is one activity. I have been doing a lot of work meeting with agencies. I have probably met with the senior executive of about 10 or more agencies over the last few weeks.

THE CHAIR: They are your frequent flyers.

Prof McMillan: Yes, and by the time we open I will probably have addressed 500 or 600 of the top SES. We did a press briefing last week with about 20 journalists and are doing a briefing of ministerial staff this week. So we are kind of gradually stepping up the public relations activity.

THE CHAIR: So where are we in the time line? How much of the new act has commenced?

Prof McMillan: None. It is two stages. The office opens and all the FOI reforms commence next Monday, 1 November, and then the new publication requirements, which I will describe in a second, commence six months later, on 1 May, and they are of two kinds. One is the information publication scheme, which is an upgraded version of the current—

THE CHAIR: Section 8 statement.

Prof McMillan: section 8, yes, in the FOI act. Agencies are required to publish a bit more on the web, including an information publication plan. The other publication requirement that commences on 1 May next year is the disclosure log provision, that an agency or minister within 10 days of releasing documents under the FOI act has to publish them on the web or publish a link or a description, subject to some personal privacy exemptions.

I suppose the third change that commences on 1 January is the reduction in the archival period. The open access period under the Archives Act is being reduced from 30 years to 20 years over a 10-year period commencing on 1 January 2011. So next Monday is the big day.

THE CHAIR: I am trying to work out how you are moving every year—29, 28—it is going to take you 10 years to get back to—

Prof McMillan: To 2020, yes. I had not thought of that, but I think it works.

THE CHAIR: I think it probably does too. The information publication scheme is not just the log of items released under freedom of information but there is a general view that certain sorts of data sets and things we should be moving towards, a policy that certain sort of data sets should be made available because they are there and they may as well be up in some sort of way. Is that what we are talking about?

Prof McMillan: Yes. That is right.

THE CHAIR: Some of the states in the United States have moved down that path.

Prof McMillan: Yes. That is right. It is going to operate in three levels, three stages. Firstly, as you would know, the FOI act already requires every agency to publish in its annual report structure, organisation chart, functions. That is unchanged except that if you look across what agencies do there is no consistency or uniformity.

THE CHAIR: That is right. Yes.

Prof McMillan: I always look back on my Ombudsman stuff and ask whether it satisfies—and I think probably it has not really satisfied it for 20 years, but nobody ever raised the question. So even with that standard information, where there is no change, I think it is going to require a lot of work for agencies to get it up to scratch and get a consistent one.

Secondly, there are some additional areas of mandatory publication. For example, the current requirement to publish your manuals, say, on the Social Security Act, has been broadened a little, so the phrase that is now used is "operational information". You have got to publish operational information which is defined a little more broadly to pick up an administration of legislation schemes and so on.

And then, thirdly, agencies are encouraged to publish anything else, and that is where you get all the data sets that the US agencies have been doing. The idea is that the web will become a huge reservoir of agency documents, and there are a few examples around already. My School websites are probably a good example and the Bureau of Meteorology and bureau of stats websites are good examples. We will get a lot more of that.

But I think that is where the real change will come over time because, although there is a distinction between mandatory and voluntary, mandatory and discretionary, agencies are being encouraged not to think in those terms but to put up as much as they can, and the objects clause of the act now declares that information held by government is a national resource. So in my briefings with agencies what I say is: "Go back and look at what's on your intranet and ask yourself why it isn't on the web. And don't say it is because nobody would be interested. Somebody will be." If information you hold is a national resource and you could press a button and flick it from the intranet to the web, then the expectation is you will now do it.

Again I reflected on my Ombudsman's office. We had a whole range of instructions, guidelines and manuals and the only reason they were not on the web was that nobody ever thought of putting it there and we would have been embarrassed because it was not quite up to date or you actually could not download it; you just had to work around it. But I kept saying that from 1 May next year that has to change. This will happen over the year; there will be a huge transfer of information from the intranet to the web is my expectation.

MS HUNTER: So is this being resourced down at that departmental level to look through, see what information can be put out?

Prof McMillan: No. Government has always said that agencies are not getting any extra resources; they have to build it into their existing administrative budgets. That is causing a bit of concern. Sometimes the response is fairly glib. They say, "Well, technology opens up opportunities for savings and efficiency and if you voluntarily publish it then you will save time in dealing with FOI requests."

MS HUNTER: Which might be fine into the future because documents might be created in the right format that can easily be put up, but if you are going back to what is already there that is probably an issue.

Prof McMillan: Yes. There will be a workload for agencies; there is no doubt about that. I think a lot of them will cope with it fairly well. My expectation, and this is really idle speculation, is that the areas that will be hit worst are, for example, the commercial regulatory bodies, ASIC and so on, because of the big law firms, and probably the tax office. If you are facing an operation, a Wickenby prosecution—and a couple of years in jail and a penalty tax of $30 million—you will probably want to use FOI. Equally, AFP and probably some areas of foreign affairs are areas that will really feel the pain.

THE CHAIR: I was at a conference in the United States where one of these issues came up and the classic story was that by analysis of data sets published by the administration for Washington DC they sort of set people a task—what was the most innovative thing you can do with the data sets?—and they actually came up with a way to run a pub crawl by public transport where you avoided being beaten up, by putting together public transport data with the data from the police about assaults. When I was discussing it with various people, the AFP said, "We couldn't possibly do that."

Prof McMillan: Right.

THE CHAIR: And I suspect there is a lot of cultural—

Prof McMillan: Yes.

THE CHAIR: For some agencies which have a culture of not releasing information, and if large slabs of the AFP are not subject to that sort of scrutiny it will be difficult for them.

Professor McMillan: Yes. A lot of agencies see the advantage, because sometimes the only reason agencies will not release something is that their minister is telling them not to: they do not want it out there. Some agencies are certainly of the view that it is going to lead to a fairly heated but easier conversation with the minister if they just say, "Well, we've got to; there's no option. It's got to go out." So I suspect they are sensing some advantages there as well.

I think that for most things people will embrace and welcome the change. They will see that actually the web makes it inevitable. With technology, people expect agencies to put everything up on their web. Agencies like the feedback. But the problem is that the difficulty is still those individual FOI requests if somebody wants all the emails, all the documents and all the drafts and you really get into a grinding, slow job.

THE CHAIR: In terms of where someone wants to establish the paper trail.

Professor McMillan: Going through it page by page. That is where the pain will still come. One of the issues is about what role we can play in trying to defuse those or get a sensible result at an earlier stage.

THE CHAIR: But I suppose you are about to step into the unknown.

Professor McMillan: Yes.

THE CHAIR: Because you really do not know what the workload will be.

Professor McMillan: Yes.

THE CHAIR: And the risk is that agencies will say, "It's not our responsibility any more so we'll say no"—so that you end up with them.

Professor McMillan: To give an example, in Western Australia at the moment there is a one-year delay on Information Commissioner reviews because of the backlog, particularly of requests from opposition members of parliament. A thinking agency would think, "If we get this onto the Information Commissioner, we've just bought a year's delay. It will be a year before we even have to think about it again." They will not be slow to see this. So there are some real unknowns.

MS HUNTER: Have they been discussing in WA some solution to this, some better way to deal with this?

Professor McMillan: No. It has spiralled into the political arena. It is opposition members of parliament making requests, particularly of ministers' offices. I think that is one of the areas where we will get an increase. Ministers' offices have always been subject to the FOI Act, but I do not think that a lot of people are aware of that—not least ministers' offices—and there is probably a tendency—

THE CHAIR: I think they are here, because they do it often.

Professor McMillan: Are they? And there is a tendency sometimes just to flick it to the department.

THE CHAIR: There is a big tendency to do that.

Professor McMillan: I think the ministers' offices are more likely to receive requests and have to deal with a higher proportion. We have got a fact sheet coming up later this week on FOI and ministers' offices; I have got a briefing with ministers' offices later this week, so it will be interesting to see how that goes.

THE CHAIR: I think the tendency here is, for the most part, to flick it to the department. Also, from my experience of working in a minister's office, you tend not to keep much because you do not have mechanisms for keeping it.

Professor McMillan: Yes. That may be the other solution—just not to keep it in the office.

THE CHAIR: Get it back to the—

Professor McMillan: Get it back there straight away.

THE CHAIR: Are there any other things from committee members?

MS HUNTER: No. I do not think I have any other questions at the moment other than to wish you well.

Professor McMillan: Thank you.

THE CHAIR: What sort of reporting time is it? You will be reporting in the annual report cycle next year?

Professor McMillan: Yes. We have got the annual report. We will be required within one year to do a review of charges. That is going to be a ministerial reference, but I think that will come out in the next couple of weeks. We are required within the first two years to do a review of the act, so it will be a very interesting report. Then we are required in the first five years to do a review of every agency's compliance with the information publication scheme. That is 220 agencies.

THE CHAIR: You will be busy.

Professor McMillan: And then we can, of course do our own-motion reports and monitoring at any time.

THE CHAIR: In your spare time.

Professor McMillan: Yes.

MS HUNTER: Again, has that been built into your future staffing?

Professor McMillan: It kind of has. Timothy has been closer to this than I have, but the moment you drill down into them there is not a lot of science.

Mr Pilgrim: That is right. The figures allow for basically an organisation combining both existing privacy staff and new staff of around 80 or 85 people—it looks like. Time will tell. If we do start to get the numbers that John is thinking we might, you can assume that there might be a fair bit of pressure on the organisation. What we will probably have to do in the shorter term is look at how we can allocate the resources we have got across the different functions to deal with it.

THE CHAIR: What is the total budget of the commission?

Professor McMillan: Just over $11 million.

Mr Pilgrim: That is combined.

THE CHAIR: That is the combined budget.

Professor McMillan: Per year.

THE CHAIR: I thought that was the privacy budget; sorry.

Mr Pilgrim: No; that is the combined budget.

Professor McMillan: Just as a side observation, the money was first allocated 18 months or so ago, and in that time we have been subject to the efficiency dividend.

MS HUNTER: Before you even open your doors.

Professor McMillan: Before we have even opened our doors.

THE CHAIR: Yes.

Professor McMillan: You will have to tell me what the rationale of that is.

THE CHAIR: Yes. The government gives and the government takes away.

Professor McMillan: We have already fired some opening shots and said, "We could have real budgetary issues." And some of them are. A simple example is that the new IT system that has to combine the offices in Canberra and Sydney needs security protections at both ends. That has cost us about three times more than the initial estimate of the cost. It is hard to know what the real cost of this is, but it certainly will not be less than we have been allocated.

THE CHAIR: Just as an example of how you might be travelling—how long has the WA commission been operating?

Professor McMillan: It has been going for over 20 years, I think.

THE CHAIR: Really?

Professor McMillan: They have had an FOI commissioner there for a long while.

THE CHAIR: Have they?

Professor McMillan: It has always been a very small office. I think they have only got about seven or eight. The national arrangement is that WA and Queensland have always had FOI or information commissioners.

THE CHAIR: I did not know about WA.

Professor McMillan: The WA one has not changed much. The Queensland one has had a substantial revamp.

THE CHAIR: Post Solomon.

Professor McMillan: Post the Solomon report. The Northern Territory has always had a combined FOI-privacy commissioner; that is a small office of about three or four. New South Wales now has an Information Commissioner for the first time; they commenced on 1 July. The New South Wales one has the curiosity that, unlike all the others, it does not have determinative powers; it only has the recommendatory ombudsman role. And then in Tasmania and South Australia the Ombudsman has determinative powers in FOI matters. So the Ombudsman in South Australia is really an information commissioner. The odd one out now is Victoria.

THE CHAIR: Yes, and the ACT.

Professor McMillan: It has neither an information commissioner nor an ombudsman with determinative powers. And some of them do not have privacy commissioners either.

Mr Pilgrim: Victoria has a Privacy Commissioner who has access powers for government agencies. If someone wants to seek access to their personal information only, they can do that through their Privacy Commissioner.

THE CHAIR: I suppose the challenge for us, in recommending possible reforms to the Assembly, is how we, as the little old ACT which has had a traditional relationship with the Ombudsman and with the Privacy Commissioner, move ahead. Is it appropriate to continue those sorts of relationships? And would the commonwealth want to take on the role that it has traditionally provided through the Ombudsman's Office and the Privacy Commissioner?

Professor McMillan: Yes, and that is ultimately a decision that Prime Minister and Cabinet at the national level makes—the policy department. But as I say, for what it is worth, my initial thinking is that it would be harder for the national information commissioner to take on an ACT commissioner role than it was for the national Ombudsman to take on an ACT ombudsman role. I think those two fitted together—and equally the privacy thing. My feel for the role at the moment is that it is so much focused on national government and national government policy that it would—you can always add another function, but it would not sit as neatly.

THE CHAIR: You might get lost.

Professor McMillan: Yes. The option, if the ACT is to have an information commissioner, is whether it can follow a Northern Territory model where privacy and information are combined. Indeed, given that in some states the ombudsman handles information, maybe there is even a possibility of now having a single ombudsman-information-privacy commissioner. Those things all fit together.

As you may know, when I was Ombudsman I always said that I did not think the ACT Ombudsman function fitted with the human rights bodies. I think that the strong advocacy role of human rights made it difficult to combine with the ombudsman role. That is why I always said that it was better to leave the ombudsman function with the commonwealth Ombudsman. But economies of scale may work differently now.

There was not enough work to justify an ACT ombudsman as a stand-alone body, but if you combine ombudsman, FOI and privacy it may be that you could have a small unit—an office of two or three people—that is viable. They are all compatible functions, I think. I am not trying to undermine the former commonwealth Ombudsman's office

THE CHAIR: It is actually about whether that model continues to be appropriate.

Professor McMillan: Yes.

THE CHAIR: And if we decide to reform the Freedom of Information Act. We have always been fairly closely linked to the commonwealth FOI Act, so there is some imperative to do that.

Professor McMillan: Yes.

Mr Pilgrim: I was going to add something, if I may. One of the other changes that you might like to keep in mind as well is that at the moment there is a major reform of the Privacy Act going on at the commonwealth level—to make some significant changes. One of the changes that has been proposed and is now in the draft new privacy principles is the removal of the right of access under the FOI Act from the commonwealth FOI Act—into the Privacy Act. For personal information access issues, the first port of call will no longer be through the FOI Act; it will be through the Privacy Act—if those reforms go through in the next 12 months.

THE CHAIR: It does make a lot of sense really.

Professor McMillan: Yes, it does.

Mr Pilgrim: So that will be another slight potential difference.

THE CHAIR: Yes.

Mr Pilgrim: The other thing I would add quickly is that, as I understand it, the Privacy Act as it applies in the ACT at the moment is an act that was frozen in time in 1994.

THE CHAIR: Yes.

Mr Pilgrim: At the time of self-government. So you are also dealing with an act that has not necessarily picked up the other reforms that have happened in the commonwealth—to the commonwealth act.

THE CHAIR: Yes.

Professor McMillan: There is discussion about transitional provisions at the moment to take account of the creation of this new arrangement, because the privacy commission does not exist and privacy and all the functions are now mine after next Monday.

THE CHAIR: It has long been in the back of my mind that those sorts of access issues will fit more appropriately with the privacy commissioner than using the exemption provision of the FOI Act, which is really about access to government information which is more policy or program oriented.

Professor McMillan: Yes.

THE CHAIR: That has given us something to think about.

MS HUNTER: Yes.

Professor McMillan: Thank you.

The committee adjourned at 6.09 pm.