

A Federal Freedom of Information Commissioner Looking behind the ALRC/ARC Final Report

After the comprehensive review of the administration of the Freedom of Information (Fol) system in 1995, the Australian Law Reform Commission and Administrative Review Council (ALRC/ARC) released a report recommending the establishment of an Fol Commissioner. The ALRC/ARC considered that the Fol Commissioner would overcome a major deficiency in the administration of Fol namely the lack of an independent, constant monitor of agencies' administration of, and compliance with, the *Fol Act 1982* (Cth).¹

This article concludes that the Fol Commissioner model envisaged by the ALRC/ARC Report has important merit in meeting some of the present deficiencies in Fol administration. However, this article further concludes, contrary to the ALRC/ARC Report, that the most desirable model is that of an Information Commissioner with determinative powers.² This conclusion has been reached after consideration of the following:

- proposal for an independent monitor;³
- reactions to the proposal in submissions responding to ALRC/ARC Discussion Paper No. 59 (DP 59);
- shortcomings in Fol administration as identified in DP 59 and the submissions, and how an Fol Commissioner may meet these shortcomings;
- criticisms of the AAT in relation to external review of Fol disputes; and
- review of the operation of the Information Commissioners in Queensland and West Australia.

The Coalition Government has not acted upon the recommendation of an Fol Commissioner. However, consideration of the proposal is significant as it represents a possible new approach in the federal administration of Fol that may address some of the present shortcomings in Australian Fol administration.

The proposal for an independent monitor

In 1994, 12 years after the enactment of the legislation in 1982, the Australian Law Reform Commission and the Administrative Review Council were asked to review the Fol legislation to determine whether the objectives of the *Freedom of Information Act* have been achieved. The objectives of the legislation included an increase in public scrutiny and accountability of government, an increase in the level of public participation in the processes of policy making and government, and provision of access to personal information.⁴

In the comprehensive ALRC/ARC review, several deficiencies were identified in the current Fol system that impact adversely on achieving the previously mentioned objectives. The principal overriding deficiency was the lack of an independent monitor overseeing the Act.

The key appeal in the Independent Monitor concept is that it addresses a major deficiency in Fol operation. Namely that it is largely self regulating and relies on agencies or governments to promote a device which can cause them inconvenience, bad publicity or threaten possible loss of office ...⁵

The proposed roles for the independent monitor included:

monitoring and reporting on agencies' administration of and compliance with the *Fol Act*. This role includes

- the collecting of statistics from agencies and preparing an annual report on Fol (proposal 3.5);
- facilitation between the parties (proposal 3.6);
- publicising and promoting the Act in the community (proposal 3.10);
- issuing guidelines on how to apply the Act (proposal 3.10);
- training agencies (proposal 3.10);
- providing legislative policy advice (proposal 3.10);
- a role in broader information issues (proposal 3.11).

The concept of an independent monitor and the proposed roles represented a radical new approach to the administration of Fol at the federal level in Australia.

Responses to the DP 59 proposal for an independent monitor

The Final Report, in commenting on the responses to the proposal for an independent monitor, stated that 'many submissions agree that there is a need for independent oversight and support the appointment of an independent person to perform this role'.⁶ An analysis of the responses to the proposal in DP 59 for the establishment of an independent monitor indicates that:

- of those submissions that considered the proposal most supported the concept;
- there was not a great deal of strong opposition to the proposal;
- there were conflicting views as to the exact roles the independent monitor should undertake.

The different group perspectives are as follows:

Table 1: Responses to proposal for independent monitor in DP 59

| Group | Supported an independent monitor | Did not support an independent monitor | No specific comment | Total |
|---------------------------------|----------------------------------|--|---------------------|-------|
| Govt agencies | 13 | 6 | 13 | 32 |
| Individuals | 6 | 0 | 17 | 23 |
| Associations | 7 | 1 | 21 | 29 |
| GBEs | 1 | 1 | 4 | 6 |
| Other (AAT, Cth Ombudsman etc.) | 4 | 0 | 0 | 4 |
| Confidential | | | | 6 |
| Total | 31 | 8 | 55 | 100 |

Government agencies

Government agencies supporting the concept of an independent monitor fell into four main groups. These agencies consisted of those State agencies experienced with the operation of an Fol monitor,⁷ those agencies with predominantly high personal requests and grant rates, those agencies with very small numbers of requests,⁹ and those agencies that were largely protected by exemptions under the *Fol Act*.¹⁰ The conclusion could be drawn

that for these agencies, Fol and, in particular, an independent monitor, did not pose a potential threat to their operations.

Agencies that did not support the proposal for an independent monitor included the Australian Tax Office (ATO), Department of Finance, Department of Human Services, Department of Employment, Education and Training (DEET), Aboriginal and Torres Strait Islander Commission (ATSIC), and Department of Administrative Services. Most of these agencies agreed on the need for more adequate statistics,¹¹ with the exception of the ATO which did not consider the statistics would aid in monitoring.¹² Reasons for not supporting the proposal included the argument that facilitation already occurs,¹³ the establishment of the independent monitor would create further administrative burdens, delay and unnecessary expense,¹⁴ that there were existing bodies already carrying out these functions,¹⁵ and that this system is working well,¹⁶ or provides effective oversight.¹⁷ In the Final Report it was stated that these agencies 'are not convinced that a new position is necessary' and that they 'consider that agencies should be given more time to embrace the Act'.¹⁸

Individuals

The majority of the individuals who made submissions in response to DP 59 did not consider the proposal for the establishment of an independent monitor. This is most likely because the individuals' submissions were personal, relating to their experiences using Fol rather than to consideration of a new concept of an independent monitor.

Of the individuals who did consider the proposal for an independent monitor, all supported the concept. Reasons for the support of an independent monitor included the following: the Ombudsman has inadequate powers, no-one takes leadership or responsibility in the area of Fol, a pro-active role is required, uniformity is needed, there is a need for an independent advocate, facilitation is necessary, and the example provided by the positive experience with the Queensland Information Commissioner.¹⁹

Associations

Of those associations that considered the proposal for the establishment of an independent monitor, the majority supported the proposal. Reasons for support included that the statistics at present are meaningless,²⁰ that the tasks are too fragmented between the Attorney-General's Department, the Ombudsman and agencies,²¹ and that it may reduce costs and cause delays.²² The associations that considered the present administration of Fol represented public interest and policy groups which, in considering the interests of the public, saw a need for an independent monitor. The association that made the comment about costs and delays was the Federation of Community Legal Centres, based on their extensive experience with Fol and agencies while representing clients.

Opposed to the proposal was the Law Institute of Victoria which stated that the 'proposed promotional, training and guideline responsibilities are likely to elevate the role of the independent monitor potentially creating another bureaucratic and expensive "empire"'.²³ This perhaps indicates a low regard for bureaucracies, but the experience in Western Australia and Queensland negates such a view about empire building.

Government business enterprises (GBEs)

The majority of GBEs did not specifically comment on the proposal for an independent monitor. Telstra supported an independent monitor with roles limited to the collection of statistics and the preparation of an annual report. Australia Post did not support the concept, regarding current reporting arrangements as sufficient and effective. The focus of GBEs in their submissions appeared to be more towards the issues of the application of Fol to GBEs and the resulting resource implications rather than to consideration of the issue of an independent monitor in any depth.

Other

The AAT, Commonwealth Ombudsman, Privacy Commissioner and the Information Commissioner (Qld) all supported the creation of an independent monitor. These bodies have a current role in the Fol system and, in the case of the Privacy Commissioner, a role in overseeing an associated Act. Their operational experiences seem to underlie their views on the necessity for an independent monitor.

The AAT accepted the need for an examination of agencies' activities. The support of the Ombudsman was not surprising considering her investigative role in relation to complaints about agencies' administration and her criticisms in the Ombudsman's Annual Reports of agencies' administration of Fol.²⁴ The Information Commissioner (Qld) was a strong supporter of the proposal based on his practical experience in a similar role in the Queensland Fol system. The Privacy Commissioner also supported the proposal and considered that the monitoring position should meet some of the inadequacies in the current administration of Fol.

Conclusions drawn from submissions on proposal for an independent monitor

Submissions generally supported the concept of an independent monitor either from practical experience, or because an independent monitor posed no threat, and/or as some perceived an urgent need for an independent monitor.

The criticisms of the proposal were that:

- establishment of an independent monitor would create further administrative burden, delay and expense, or 'bureaucratic empire';
- existing bodies already carry out these type of functions;
- the present system works well or provides effective oversight;
- agencies should be given more time to embrace the Act.

The experience in Queensland and Western Australia, with the introduction of the Information Commissioners, has not seen the creation of further administrative burdens. On the contrary the Information Commissioners' practices have been found to result in savings of agencies' resources.²⁵ The WA Information Commissioner further rejects the argument of Fol being a burden on agencies' resources stating that 'accountability is never a cost to public administration, but should be an integral part of it'.²⁶

There may be existing bodies carrying out some of the recommended functions, but there is no extensive, constant oversight and the current ad hoc system is not

working effectively. This was evidenced by the need for the Review of FoI, the number of submissions, and from other literature that indicates extensive shortcomings in FoI.²⁷ The argument that there should be more time to embrace the Act is also questionable as the Act has been in operation for 12 years which is more than enough time for Australian agencies to adjust to an open government approach to public administration.

The proposed roles for the FoI Commissioner

The Final Report recommended the creation of a new statutory office of FoI Commissioner. The recommended roles are basically those proposed in DP 59. They included monitoring and reporting functions. The roles in relation to promoting the objectives of the Act and providing advice and assistance were expanded to highlight the FoI Commissioner as a public resource for agencies and individuals. In addition, the FoI Commissioner would issue guidelines on the Act for both agencies and applicants. The role of facilitator was further clarified as being a 'circuit breaker' to aid communication between parties, after concerns were expressed in a number of the submissions about independence and incompatibility with the role of monitoring.

The Final Report did not change the position on determinative powers from that adopted in DP 59. The three reasons cited for not including determinative powers were: they were not compatible with the role proposed for the FoI Commissioner; there was no need to create another merits review mechanism due to the existence of the AAT; and, finally, the Review was confident that the AAT could adjust its current practices where necessary in order to provide effective review of FoI decisions.

The Final Report model for an FoI Commissioner: addressing the shortcomings?

The Final Report model for an FoI Commissioner may have, in many ways, addressed the shortcomings identified in DP 59 and in the submissions made in response to DP 59. The shortcomings identified in the submissions for each group are represented in Tables 2-6.

Key to Tables 2-6

- A Agency Administration**
Culture
Information management
Outcome a legal/adversarial contest
Abuse of FoI exemptions
- B No monitor of the Act**
- C Cost and time delays for the applicant**
- D Cost of administering for the agencies**
- E FoI Act**
Confusing and difficult to use
Exemption provisions unclear/ overwhelm purpose of Act
- F Current review mechanisms**
- G Uncertainty for the agency**
Including actions for defamation, breach of confidence and copyright
- H Uncertainty of application of FoI to GBES**
- I Tensions between FoI and privacy**
Including extending to private sector

Table 2: Government agencies — shortcomings of FoI Act

| DP 59 Submission no. | Name | A | B | C | D | E | F | G | H | I |
|----------------------|--|---|---|---|---|---|---|---|---|---|
| 14 | Australian Electoral Commission | | | | | | | | | |
| 17 | Australian Taxation Office | | | | * | | | | | |
| 21 | Office of National Assessments | | | | | | | | | |
| 24 | Dept of Veteran Affairs | | * | | | * | | | * | |
| 25 | Dept of Finance | * | | | * | * | | | | |
| 28 | Family & Comm. Services (SA) | | * | | * | * | * | | | |
| 31 | State Records (SA) | * | | | | | | | | * |
| 32 | Public Service Commission | | | | | | | | | * |
| 33 | I-G of Intelligence & Security | | | | | | | | | |
| 36 | Dept of the Parl Reporting Staff | | | | | | | | | |
| 42 | Trade Practices Commission | | | | * | | | | | |
| 47 | Merit Protection & Review Agency | | | | | | | | | |
| 48 | Nat. Pituitary Hormones Adv. Council | | | | | | | | | * |
| 49 | The Aust. Nat. University | | | | | | | | | |
| 57 | Aust. Securities Commission | | * | | | * | | | | |
| 60 | DEET | | | | * | * | | * | | * |
| 61 | Dept of the Parl. Library | | | | | | | | | |
| 62 | Dept of Primary Indust. & Energy | | | | | | | | | |
| 63 | National Library of Australia | | * | | | | | | | |
| 69 | Australian Archives | | * | | * | | | | | |
| 75 | ATSIC | | | | * | * | * | | | |
| 76 | Dept of Defence | | * | | | | | | * | |
| 77 | Attorney- General's Department | | * | | * | | | | | * |
| 78 | ASIO | | | | | | | | | |
| 80 | Dept of the Treasury | | * | | * | * | * | | | |
| 82 | Dept of PM & Cabinet | | * | * | * | * | | | | |
| 83 | Dept of Admin. Services | | | | * | | | | * | |
| 86 | Legal Aid Commission of Vic. | | * | * | | * | | | * | |
| 87 | Dept of Imm. & Ethnic Affairs | | * | | * | | | * | | |
| 92 | State Records (SA) | * | * | | | | * | | | |
| 97 | Cth Dept of Human Serv. & Health | | | | * | | | | | |
| 98 | Human Rights & Equal Opportunities Comm. | | | | | | | | | * |
| 100 | Adv. Council on Aust. Archives | | * | | | | | | | |

Table 3: Individuals — shortcomings of FoI Act

| DP 59 Submission no. | A | B | C | D | E | F | G | H | I |
|----------------------|---|---|---|---|---|---|---|---|---|
| 2 | | | * | | * | | | | |
| 3 | * | | | | | * | | | |
| 7 | | | | | | | | | * |
| 8 | | | | | | | | | |
| 10 | | | | | | | | | * |
| 12 | * | * | | | * | | | | |
| 16 | * | | | | * | | | | |
| 18 | | * | * | | * | | | * | * |
| 19 | | | | | | | | | * |
| 23 | * | | * | | * | * | | | |
| 27 | | | | | * | | | | |
| 35 | | | | | * | | | | |
| 43 | * | * | * | | * | | * | | |
| 51 | * | * | * | | * | * | | | |
| 52 | | * | | | | | | | * |
| 58 | | * | * | | * | * | * | * | * |
| 65 | * | | * | | * | | | | |
| 68 | | | | | * | | | | |
| 72 | * | | | | * | * | | | |
| 84 | * | | | | | * | | | |
| 94 | | | * | | | * | | | |
| 96 | | | | | | | | | |
| 99 | | | | | | | | | |

Table 4: Associations — shortcomings of FoI Act

| DP 59 Submission no | Name | A | B | C | D | E | F | G | H | I |
|---------------------|----------------------------------|---|---|---|---|---|---|---|---|---|
| 4 | Public Policy Assessment Society | | * | | | * | | | | |
| 5 | Cyclists Rights Action Groups | * | | * | | | * | | | |
| 6 | Qld Chamber of Commerce | | | * | | * | | | | |
| 9 | Qld Nurses Union | | | | | | | | | * |
| 11 | Trust Company of Australia Ltd | * | | | | | | | | |
| 13 | Aust. Corporate Lawyers Assoc. | | | | | | | | | |
| 15 | The NSW Bar Association | * | | | * | | | * | | |
| 22 | Minter Ellison | | | | | | | | | |
| 26 | Aust. Bankers Assoc. | | | | | | | | | |
| 30 | EDB Health Conciliation | | | | | * | * | | | |
| 34 | Public Interest Advocacy Centre | | * | | | | * | | | * |
| 39 | Australian Finance Conference | | | | | | | | | |
| 40 | Sydney Futures Exchange Limited | | * | | | | | | | |
| 54 | Vic. Employers Chamber of Comm. | | | | | | | | | |
| 55 | Aust. Consumers Assoc. | | * | * | | * | * | | * | * |
| 56 | State Chamber of Commerce (NSW) | | | | | | | | * | |
| 59 | Aust. Privacy Charter Council | | | | | | | | | * |

| DP 59 Submission no | Name | A | B | C | D | E | F | G | H | I |
|---------------------|---------------------------------|---|---|---|---|---|---|---|---|---|
| 64 | Country Women's Assn of NSW | | | * | | | | | | * |
| 66 | Health Consumers Network (Qld) | | | | | | | | | * |
| 67 | KPMG | | | | | | | | | |
| 71 | Consumers Health Advocacy | | | | | | | | | * |
| 73 | AVCARE | | | | | | | | | |
| 74 | Royal NSW Canine Council | | | | | | | | | |
| 79 | Fed. of Community Legal Centres | * | * | * | * | * | * | | * | * |
| 88 | Privacy Committee | | * | | | | * | | | * |
| 89 | Aust. Inst. of Co. Directors | | | | | | | | | * |
| 90 | Law Inst. of Vic. | | | | | | | * | * | |
| 91 | Law Society of NSW | * | * | * | | * | | | | |
| 93 | Business Council of Aust. | | | | | | | | | |

Table 5: GBEs — shortcomings of FoI Act

| DP 59 Sub no. | Name | A | B | C | D | E | F | G | H | I |
|---------------|-----------------------------|---|---|---|---|---|---|---|---|---|
| 1 | National Rail | | | | * | | | | | |
| 41 | Federal Airports Commission | | | | * | | | | | |
| 44 | Australia Post | | | | * | | | | | |
| 45 | Telstra | | * | | * | | | | | |
| 50 | Export Finance & Ins Corp | | | | | | | | | |
| 85 | ABC | | | | | | | | | |

Table 6: Others — shortcomings of FoI Act

| DP 59 Submission no. | Name | A | B | C | D | E | F | G | H | I |
|----------------------|---------------------------------|---|---|---|---|---|---|---|---|---|
| 20 | Administrative Appeals Tribunal | | * | | | | | | | |
| 37 | Office of Info Comm Qld | | * | * | * | * | * | * | | |
| 53 | Commonwealth Ombudsman | | * | | | * | | | | * |
| 81 | Privacy Commissioner | * | * | | | * | | | * | * |

(A) Agency Administration

Agency administration problems including agency culture, information management, and outcomes that are often a legal/adversarial contests.

Individuals, associations and the Privacy Commissioner considered agency administration to be of greater concern than did the government agencies themselves. This may reveal the differing perspectives of the groups in their dealings with each other, which may be aided through facilitation with the FoI Commissioner. Change to agency administration may also result through either the 'watchdog' role or through more positive means of training, promoting of objectives, guidelines etc.

(B) No monitor of the Act

Responses to this proposal were discussed earlier. Interestingly the government agencies, which were those most likely to be affected by the creation of an FoI Commissioner, viewed the lack of an independent monitor as more of a concern than individuals and associations.

(C) Cost and time delays for the applicant

Not surprisingly, individuals regarded cost and time delays to be of concern. The FoI Commissioner may help to overcome this shortcoming by providing advice and facilitating between the parties to prevent an adversarial battle that leads to further expense and delays. The FoI Commissioner will also have a role in monitoring costs and time responses of agencies.

(D) Cost of administering FoI for the agencies

The GBEs were mainly concerned at the cost of administering FoI if they were made subject to the Act. Similarly the agencies viewed FoI to be costly within their limited resources. The FoI Commissioner could prove to be an important resource for agencies in training their staff on the objectives and legal requirements of the Act, providing advice and helping to facilitate so as to prevent protracted legal contests with applicants, and limiting expenses during appeals. These roles would potentially limit the resources spent on FoI by agencies.

(E) The FoI Act

Individuals and government agencies both found the *FoI Act* to be difficult and confusing to use. The Act is considered as confusing and difficult to use, exemption provisions are unclear and overwhelm the purpose of the Act, and no guidelines exist.

The production of guidelines, training and the general role of being a public resource performed by the FoI Commissioner may help alleviate this problem.

(F) Current review mechanisms

The current review mechanisms appear to be of concern to most of the groups. The FoI Commissioner was not allocated a role in this regard except to hopefully prevent the need for appeals through training and facilitation.

(G) Uncertainties for agencies

Uncertainties for agencies about the tension between responsible government and direct accountability, and the possibility of actions for defamation etc.

Surprisingly government agencies do not view this identified shortcoming with much concern. It appears that the other submitting groups view this as a reason for the

reluctance of agencies to adopt a more pro-disclosure approach. The FoI Commissioner through training and promoting the objectives of the Act may help overcome this shortcoming.

(H) Uncertainties of application to GBEs and outsourcing

The FoI Commissioner may have a role to play in the provision of legislative advice about these uncertainties.

(I) Tensions between FoI and privacy

The FoI Commissioner, it was envisaged, would liaise with the Privacy Commissioner on matters in this area.

Summary

Overall, the recommended roles for the FoI Commissioner would go some way to alleviating some of the problems currently existing in the administration of FoI. Success would be dependent on other factors such as resources available to the FoI Commissioner, the willingness of agencies to adopt change and embrace a different culture, and the negotiating ability of the FoI Commissioner.

However, the question arises as to whether the Final Report model is the most efficacious model to meet the shortcomings of the Commonwealth FoI system. A further question is whether the FoI Commissioner would be able to fulfil the recommended roles without determinative powers.

The Commonwealth Ombudsman cites the main disadvantage with an FoI Commissioner not having determinative powers as the lack of sanctions, thus allowing agencies to disregard recommendations.²⁸ The experience of the NSW Ombudsman also led to his recommendation that an Information Commissioner having determinative powers be established in NSW.²⁹ Furthermore the criticisms of the AAT model raised in many of the submissions did not seem to be adequately dealt with by the Review.

Criticisms of the AAT

Criticisms in the literature about the AAT and FoI relate to costs, delays, formality and the poor quality of decisions. The AAT implemented various procedures to improve handling of FoI appeals in 1994. Despite these changes, the AAT continued to be subject to criticism, including criticism about the quality of decisions.³⁰

The Final Report stated that 'Submissions' support for the Queensland and Western Australian Information Commissioner model seems to stem largely from dissatisfaction with the AAT'. The following table demonstrates the number of submissions expressing specific comments about the AAT that are either favourable or unfavourable.

Table 7: Comments on the AAT

| Group | Unfavourable comment in relation to the AAT | Favourable comments in relation to the AAT |
|--------------------------------|---|--|
| Govt agencies | 1 | 2 |
| Individuals | 7 | 3 |
| Associations | 4 | 0 |
| GBEs | 0 | 0 |
| Other (AAT, Cth Ombudsman etc) | 1 | 0 |
| Total | 13 | 5 |

The relatively small number of unfavourable comments in specific regard to the AAT is surprising considering the coverage in the literature. As individuals are most likely to appeal to the AAT, the small number of unfavourable comments possibly reflects the fact that individuals are deterred from appealing and, therefore, not many have had experience with the AAT.

The submissions of those individuals who had appealed to the AAT reveal the following main criticisms of the AAT.

1. The approach of AAT members

On a personal level one individual took offence at some of the statements of AAT members at conferences,³¹ another considered that the approach was very adversarial,³² and another considered that the AAT member had already formed an opinion resulting in a biased conference.³³ Other individuals expressed frustration at AAT members failing to observe their own practice directions³⁴ and quite different approaches taken by different AAT members.³⁵

2. Problems at being unrepresented

The formal, adversarial approach of the AAT resulted in several individuals not being satisfied with the AAT. Those individuals who had appeared before the tribunal without representation expressed the view that they were treated unsatisfactorily, that their concerns were not given proper consideration,³⁶ or their arguments were misunderstood,³⁷ that they were given scant assistance,³⁸ or felt that the AAT only relied on the respondents' documents.³⁹

The following quotes demonstrate the problems encountered by unrepresented individuals:

... spent so much time and resources to present it myself and the AAT member dismissed it ...⁴⁰

... not being a lawyer, I have to say that I was treated as a troublesome idiot who was presumed to know nothing of the law and what I was doing. I found this demeaning.⁴¹

3. Difficulties understanding decisions

The difficulties some applicants encountered in understanding the decisions of the AAT⁴² perhaps reflect a lack of explanation and assistance to individuals throughout the adversarial process.

Those individuals who submitted favourable comments about the AAT referred to the efficient and professional handling of their appeal.⁴³ One individual was satisfied due to the release of significantly more information than previously.⁴⁴ Unfavourable comments by associations related to cost, delays, formality and the quality of AAT decisions. The associations making these comments were those with community interests as their principal agenda.⁴⁵ The one government agency not in support of the AAT was State Records (SA) which expressed concern at the quality of decisions in comparison to the South Australian Ombudsman:

South Australia has found determinations, made by the States with such structures, better than those granted by the AAT which has much more diverse functions. Specialisation has proved to be of considerable help in getting good judgements.

The ATO and ATSIIC were the two government agencies satisfied that the AAT was operating effectively.

Given the level of criticism of the AAT in the literature and the low number of appeals to the AAT, it is surprising that the majority of submissions supported the retention of the AAT. *Table 8* shows how many specifically stated

their support of the AAT and those who stated preference for an independent monitor with determinative powers:

Table 8: Support for AAT or independent monitor

| Group | Supported retention of AAT | Supported independent monitor with determinative powers | No specific comment | Total |
|--------------------------------|----------------------------|---|---------------------|-------|
| Govt agencies | 9 | 3 | 20 | 32 |
| Individuals | 4 | 1 | 18 | 23 |
| Associations | 6 | 2 | 21 | 29 |
| GBEs | 2 | 0 | 4 | 6 |
| Other (AAT, Cth Ombudsman etc) | 2 | 2 | 0 | 4 |
| Confidential | | | | 6 |
| Total | 23 | 9 | 63 | 100 |

Table 8 suggests that the majority of submissions did not specifically comment in favour of the AAT or independent monitor having determinative powers. This generally reflects other more serious concerns with the FoI system prior to the appeals stage. The reasons cited by the majority of submissions in favour of the AAT retaining determinative powers over FoI included:

- the AAT was working effectively;⁴⁶
- there were expected improvements after the implementation of new procedures;⁴⁷
- the AAT could address the present problems;⁴⁸
- the AAT was the appropriate review body;⁴⁹
- the independence of the AAT;⁵⁰
- having only one review body prevents forum shopping;⁵¹
- an independent monitor with determinative powers is neither necessary nor desirable;⁵²
- concerns that an Information Commissioner would have no system of working through applications in order.⁵³

Overall the submissions were in favour of retaining the status quo regarding determinative powers. Many submissions were in favour of waiting to view the impact of other procedural changes or were concerned at the independence and other workings of an independent monitor. The reasons advanced in support of the AAT, however, did not promote the AAT as being the superior external review mechanism. A comparison with the Information Commissioner model that operates in Western Australia and Queensland is indicative of that model being a superior external review mechanism.

The Information Commissioner model: The Qld and WA experience

The Information Commissioner model, as it operates in Queensland and West Australia, seems to indicate the advantages of this type of review mechanism over judicial review or AAT type of review mechanisms. The concerns expressed in the submissions to the ALRC/ARC in relation to an independent monitor have not resulted in those outcomes in Queensland and Western Australia. The

Queensland and Western Australian models further demonstrate that determinative powers are not incompatible with other functions of the Information Commissioner and may very well assist in furthering the aims of FoI.

The functions of the Information Commissioners

The Queensland Information Commissioner is an independent external review authority that has the power to investigate and review decisions of agencies and Ministers in relation to FoI decisions.⁵⁴ The goal of the Office of the Information Commissioner is to 'provide a specialised and expert dispute resolution service ... that is speedier, cheaper for participants, more informal and more user-friendly than the court system, or tribunals which follow court-like procedures'.⁵⁵

The West Australian Information Commissioner is a similar model to Queensland. The functions of the WA Information Commissioner are divided into two sub-programs to ensure independence. The first is that of Review and Complaint Resolution, which deals with the resolution of FoI disputes emphasising informal resolution processes, where appropriate, and also including determinative functions. The process is designed to be speedy, accessible and informal. The second sub-program is Advice and Awareness which involves the provision of a more intensive public awareness program and advice to agencies than the Queensland model.

The success of the Information Commissioners

A brief review of the operation of the Information Commissioners is indicative of the success of these specialist external reviewers in substantially meeting the objectives of the Western Australian and Queensland FoI Acts. The success of the Information Commissioners can be seen in terms of the number of applications, the accessibility, and the expertise of decisions of the Information Commissioners.

The number of applications to the Information Commissioners

The number of applications received by the Queensland Information Commissioner exceeded early expectations. *Table 9* demonstrates the greater percentage of formal review applications in the Queensland jurisdiction in comparison to the formal review applications to the AAT in the Commonwealth jurisdiction.

Table 9: FoI applications a Commonwealth and Queensland comparison

| Year | Formal applications | | Total applications | | Percentage | |
|------|---------------------|-----|--------------------|------|------------|------|
| | AAT | Qld | Cth | Qld | Cth | Qld |
| 1 | 69 | 120 | 5702 | 4988 | 1.21 | 2.41 |
| 2 | 203 | 274 | 19390 | 8275 | 1.05 | 3.3 |
| 3 | 310 | 223 | 33213 | 7602 | 0.93 | 2.93 |
| 4 | 267 | 209 | 36277 | 8542 | 0.73 | 2.45 |

NB: Year 1: 1982/3 Cth; 1992/3 Qld

Similarly, in Western Australia, the figures are indicative that individuals are far more likely to appeal to an Information Commissioner model than the AAT. The figures are demonstrated in the *Table 10*.

Table 10: FoI applications — a Commonwealth and WA comparison

| Year | Formal applications | | Total applications | | Percentage | |
|------|---------------------|-----|--------------------|------|------------|------|
| | AAT | WA | Cth | WA | Cth | WA |
| 1 | 69 | 61 | 5702 | 2128 | 1.21 | 2.87 |
| 2 | 203 | 123 | 19390 | 3323 | 1.05 | 3.7 |
| 3 | 310 | 214 | 33213 | 4341 | 0.93 | 4.93 |
| 4 | 267 | 212 | 36277 | 4336 | 0.73 | 4.89 |

NB: Year 1: 1982/3 Cth; 1993/4 WA

The figures in the tables demonstrate that complainants are (approximately) over three times likely to appeal to the Queensland Information Commissioner and six times more likely to appeal to the WA Information Commissioner, than the AAT. The figures for appeals to the AAT have declined further in the last few years, ranging from 0.35% to 0.30% of all FoI applicants appealing an adverse decision.⁵⁶

Accessibility

In terms of cost, time, and user-friendliness the Information Commissioners offer a more accessible external review than the AAT. The cost of appealing to the Information Commissioners is kept to a minimum. No charge is payable on seeking review, and expenses are only incurred in the review proceedings. The inquisitorial procedures of the Information Commissioners result in better preparation of cases for external review. Legal representation is not regarded as integral to successfully presenting a case for external review unlike the AAT.

The unexpected demand for appeals to the Information Commissioner in Queensland led to a substantial backlog of cases preventing the timely review of cases. The Queensland Information Commissioners in their annual reports have pointed to the imbalance of resources to meet the unexpected demand. In Western Australia this problem has not eventuated due to the more adequate level of resources allocated to the Information Commissioner in light of the Queensland experience. The Information Commissioners have the discretion to conduct proceedings to suit each individual case. The benefit of such informality has been to increase accessibility.⁵⁷

Expertise and quality of decisions

The quality of the Information Commissioners' decisions has been recognised in the Commonwealth FoI Annual Report 1994–95 which stated (at para. 7.33):

... the quality of the decisions of the Information Commissioner in Western Australia remains high and undiminished. The Office of the Information Commissioner continues to exemplify the various capacities, strengths and advantages of that mode of external review which it embodies.

Between 1992–96, no formal determinations of the Queensland Information Commissioner were overturned for legal error and there was only one appeal which was withdrawn before hearing. Of the appeals from the WA Information Commissioners, the majority have been not pursued, discontinued or dismissed. In 1995–96 one appeal was upheld and remitted to the Information Commissioner for reconsideration; however the complainant withdrew the complaint.

The Queensland Information Commissioner has stated that the formal decisions have contributed an educative and normative role by providing detailed explanations of

key provisions of the *Fol Act*.⁵⁸ Evidence of the success of the Information Commissioners in achieving a specialised and expert dispute resolution service can be shown in the following comments of the Queensland Information Commissioner in his 1994–95 Annual Report:

From my examination of agency decisions ... it is clear that most agencies are obtaining assistance from my formal decisions, and referring to them to explain and justify to applicants the stance which an agency has taken in a particular case.

and in relation to increases in the complexity of cases received compared to previously:

This reflects the increased experience and expertise of the full-time Fol administrators in agencies ... and the extent to which some basic principles in the administration of the Fol Act have been settled through acceptance ... of some of my earlier formal decisions.

In practice, these jurisdictions demonstrate the benefits of an Information Commissioner model in achieving accessibility and quality decisions. The Information Commissioners also demonstrate that, contrary to the ALRC/ARC Review's finding that the roles recommended for the Fol Commissioner would not be compatible with the determinative powers, these roles can be successfully combined to further the objectives of Fol.

Conclusions

The *Freedom of Information Act 1982* was enacted with the objectives of achieving accountability of government and increasing the level of public participation in the processes of government. This new system of open government was largely left to government agencies and officers to implement. Fol at a Commonwealth level was given no advocate, 'watchdog' or person to oversee the Act, its operations and implementation. The resulting process, that has evolved over the past 15 years, for an individual and non-government organisation is costly, time-consuming, potentially frustrating and confusing.

While the Government has not acted on the recommendation of the establishment of an Fol Commissioner, the recommendation can be seen to be a much needed reform for the present Fol system if the Act is to ever achieve its objectives. The roles of auditing, monitoring, facilitation and the Fol Commissioner being a resource for both agencies and the public, would potentially alleviate many deficiencies with the present system.

However, the shortcomings in current review mechanisms, and specifically the AAT, were not adequately canvassed by the Review. The Information Commissioners in Queensland and Western Australia represent a superior review mechanism to the AAT in terms of user-friendliness, cost, time, expertise and quality of decisions. For this reason it is my conclusion that an Information Commissioner model would be the most desirable model to oversee the *Freedom of Information Act 1982*.

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References

1. Australian Law Reform Commission/Administrative Review Council, Fol Discussion Paper 59, 1995, at para. 2.16.
2. This is the same conclusion as reached in Lorkin & Palios, 'A Commonwealth Information Commissioner — Lifting the profile of Fol?', 1996 (TAS) 59 PPL, undergraduate research study held at the University of Tasmania Law School.
3. The concept was first raised in ALRC/ARC Fol Discussion Paper 59 and was termed an 'independent monitor'.
4. As identified in ALRC/ARC Fol Discussion Paper 59, at p.8 citing the Senate Standing Committee on Legal and Constitutional Affairs, 1979.
5. Sheridan and Snell, Submission 58 to Discussion Paper 59.
6. ALRC, 'Open Government: A Review of the Federal Freedom of Information Act 1982', Report No.77 and ARC Report No. 40, p.62.
7. Family and Community Services (SA) and State Records (SA).
8. Dept of Veteran Affairs, which received in 1995–96 12,221 Fol requests representing 31.07% of all Fol requests and granted 99.6% of these requests in full, and the Dept of Immigration & Ethnic Affairs which received 6764 Fol requests representing 17.2% of all requests and granted in full 67.7% and in part 26.4% of requests.
9. This includes the Australian Archives (1 Fol request in 1994–95), the National Library (1 Fol request in 1993–94), and the Advisory Council on Australian Archives.
10. The Dept of Defence and Dept of Treasury are exempt in relation to certain documents under Part II of Sch.2. The Dept of PM & Cabinet has the exemption of cabinet documents.
11. For example the Dept of Finance Submission 25, Dept of Human Services Submission 97.
12. ATO Submission 17.
13. ATO Submission 17, referring to the practices within this Department.
14. ATO Submission 17, DEET Submission 60, Dept of Human Services Submission 97.
15. DEET Submission 60.
16. ATSIC Submission 75.
17. Dept of Human Services Submission 97 and Australia Post Submission 44.
18. ALRC, above, Report No.77 and ARC Report No. 40, p.62.
19. Submissions 12, 18, 43, 51, 52 and 58.
20. Public Policy Assessment Submission 4.
21. Public Interest Advocacy Centre Submission 34.
22. Federation of Community Legal Centres Submission 79.
23. Submission 90.
24. For example in the 1995–96 Cth Ombudsman Annual Report.
25. Office of the Information Commissioner (Queensland) 1st Annual Report, p.28.
26. Office of the Information Commissioner (Western Australia) 1994–95 Annual Report.
27. Examples of literature citing the problems with Fol include articles by the editors and writers in *Fol Review*, the NSW Ombudsman and the Canadian Information Commissioner, as stated by Snell & Sheridan, 'A Few Significant Steps Towards Open Government: ALRC/ARC Discussion Paper 59: A Summary and Comments' (1995) 60 *Fol Review* 90.
28. Submission 68 to Issue Paper 12.
29. NSW Ombudsman, *Fol: The Way Ahead*, 1995, pp.5-6.
30. For earlier criticism of quality of decisions refer to Cth Fol Annual Report 1993–94 at p.22-3, Cth Fol Annual Report 1994–95 at p.23, and later in Cth Fol Annual Report 1995-6 at p.34.
31. Submission 23.
32. Submission 51.
33. Submission 72.
34. Submission 94.
35. Submission 51.
36. Submission 51.
37. Submission 72.
38. Submission 72.
39. Submission 72.
40. Submission 51.
41. Submission 72.
42. Submission 3.
43. Submissions 2 and 12.
44. Submission 68.
45. Including the PIAC, ACA, Federation of Community Legal Centres and Privacy Committee.
46. Submissions 17, 75, 97, 6.
47. Submission 76.
48. Submission 86.
49. Submission 57.
50. Submission 86.
51. Submission 34.
52. Submission 25.
53. Submission 12.
54. Section 71(1) of the *Freedom of Information Act 1992* (Qld).
55. Queensland Information Commissioner, First Annual Report 1992–93 pp.4-5.
56. In 1993–94 there were 129 appeals to the AAT and 36,547 Fol requests, in 1994–95 the ratio was 113/37,367 and in 1995–96 the ratio was 118/39,327.
57. As outlined in ARC Report *Better Decisions*, 1995 at p.25.
58. The Queensland Information Commissioner, 3rd Annual Report 1994–95.