

TRANSCRIPT

STANDING COMMITTEE ON LEGAL AND SOCIAL ISSUES

Inquiry into the Freedom of Information Amendment (Office of the Victorian Information Commissioner) Bill 2016

Melbourne — 8 March 2017

Members

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Mr Gordon Rich-Phillips

Witness

Ms Fiona Spencer, barrister and member, human rights/charter of rights committee, Law Institute of Victoria.

The CHAIR — I want to welcome everybody who is attending this evening, including those who are watching. I would like to introduce the committee members who are here. The committee is hearing evidence today in relation to the inquiry into the Freedom of Information Amendment (Office of the Victorian Information Commissioner) Bill 2016. The evidence is being recorded. All evidence taken at this hearing is protected by parliamentary privilege; therefore you are protected against any action for what you say here today, but if you go outside and repeat the same things, those comments may not be protected by this privilege.

What we might do at this stage is if you wish to address the committee, we have asked that any opening statements are about 5 or 10 minutes, and then after that we might open it up to questions. Thank you for coming this evening, Ms Spencer.

Ms SPENCER — Thank you, and thank you for inviting the law institute to attend the hearing today to assist the committee. My name is Fiona Spencer, and I appear in the capacity of a member of the law institute's human rights/charter of rights committee. I propose to provide a short overview of some of the key issues that the LIV has raised in its submissions in relation to the bill before taking questions. I will note at the outset that my personal area of expertise lies around the area of section 194 of the IBAC act and the related amendments to the bill. Unfortunately the LIV's representatives who have been involved in the submissions on the other aspects of the bill were not available to appear today, so I will most likely be taking any questions on those aspects on notice, and the LIV will provide a written response.

The CHAIR — Thank you.

Ms SPENCER — The LIV's general comments about the FOI amendment bill in summary are that the LIV welcomes many of the amendments in the bill, particularly those that will enable the new commissioners to review FOI decisions made by ministers and principal officers and to review refusals to grant access on the basis that documents contain cabinet material. However, the LIV is also concerned about some of the amendments in terms of their practical application and effects, and I will turn to some of those concerns now.

The first concerns the terms and conditions of appointments of deputy commissioners. The recommendation that the LIV has put forward is that the terms should be fixed for five years to promote the independence of the commissioners by protecting them from real or perceived political interference, and obviously as presently drafted the bill allows for periods of up to five years in clause 6.

The second recommendation that I wish to highlight today is in respect of removal from office, and this again pertains to deputy commissioners. The recommendation is that deputy commissioners be provided with the same protections from removal from office as the information commissioner to reflect the importance of their respective roles within the integrity system. That would require amending clauses 6 and 80 of the present bill to provide that only Parliament could remove the deputy commissioners.

The third matter is consultation and review rights. The LIV's recommendation is that where the bill provides review rights relating to consultation to a third party, the bill should make it clear that until the party's review rights expire the agency should not release the documents. The LIV's position is that stating this expressly would avoid confusion or doubt about that issue that presently exists.

The next matter is the effect of delay by the commissioner. There is at present, in the LIV's view, uncertainty surrounding the legal consequences of delay on the part of the commissioner in making a relevant determination under the act. This uncertainty presently exists under the present regime, and the bill does not address it. So the recommendation is that section 49J of the FOI act should be amended to make it clear what the legal consequences are of delay by the relevant commissioner by adopting one of the positions set out in the LIV submission. Obviously there are some proposed amendments to 49J but they do not address that particular issue.

The next matter is the power to acquire a further search for documents. The LIV has identified concerns with the way that the future search for documents provisions in the bill as presently drafted would apply in practice, and they are set out in the submission provided. For example, one of the examples given is that a decision to refuse access under section 25A, subsections 1 and 5, occurs without the request being processed, and so the requirement therefore to undertake a search would seem to be imposing an additional requirement that is not presently required to be undertaken. So when the commissioner is called upon to determine whether a search has been adequate, no search would actually have been undertaken so there is no search to find whether it is

adequate or not. Our understanding is that the decision is made without any searches being done. That seems to be perhaps an anomaly in the present drafting, and the LIV suggests that, as presently drafted, in that context the proposed new section 49KA(1), would have no work to do.

The next matter is section 194 of the IBAC act, and I will address this slightly more fully as time permits. The LIV welcomes the government addressing the LIV's concerns with section 194 of the IBAC act and the way that it currently operates, which is to prevent the release of some Victoria Police investigation documents where IBAC has handled the complaint in some way, but we are concerned that the current wording of the amendments does not achieve the intended aims of the reform. The particular concern is this: the new, if I can put it that way, section 194(1)(b) actually is in the same form as it presently is, so there is no actual change to that aspect of the legislation. The difficulty is that, as presently interpreted, that provision has been interpreted so as to exempt from FOI Victoria Police investigation documents, even where there has been no IBAC investigation.

What it actually says is that:

The Freedom of Information Act 1982 does not apply to a document that is in the possession of any person or body to the extent to which the document discloses information that relates to —

...

(b) an investigation conducted under this Act ...

At first blush that would seem to perhaps mean an IBAC investigation, but it has not been interpreted that way. It has been interpreted so that if, for example, there is a complaint made to IBAC that is referred back to Victoria Police for investigation and then Victoria Police investigates, Victoria Police's investigation is actually an investigation under the IBAC act. So it is captured by (b) because it came back from IBAC.

The same thing can happen if Victoria Police gets the complaint first, sends it to IBAC and IBAC sends it back — it is still captured. It can also be caught where IBAC undertakes a random audit, for example, of matters and then it is somehow been infected by IBAC, if I can put it that way, and the documents again become captured by this provision.

Mr RICH-PHILLIPS — Basically if the document has been in the possession of IBAC, it is deemed by Victoria Police as not to be available under FOI.

Ms SPENCER — In effect that seems to be the way that the provision has been so broadly interpreted on behalf of those bodies and by VCAT. I should also mention that one of the VCAT cases went on appeal and was upheld on appeal, so we have actually got a Court of Appeal decision upholding that interpretation of VCAT. So if that provision is not changed, the risk, the LIV says, or the most likely outcome is that the same interpretation will be applied and therefore the stated aims of amending the act to remove the unintended capturing of Victoria Police documents, if I can put it that way, will not be effective because that provision will remain.

The LIV has recommended two alternative ways that this could be addressed. The first is that new section 31A is proposed, which is a new exemption for IBAC documents to be inserted into the FOI act. In the LIV's submission that is a comprehensive exemption which directly targets the intention of section 194, which is to protect from disclosure sensitive documents that may disclose investigatory methods of IBAC and so on. That targeted provision is apt to do that, and so it begs the question whether there is actually any need now for section 194 to remain when section 31A is so precisely targeted to that particular need.

In the alternative, the LIV has recommended that there be amendment to section 191, subsection 1B, to make it clear that it only applies to investigations conducted by IBAC and not by Victoria Police. The LIV's urging is that the first recommendation be adopted because, even if it is inserted, for example, 'investigation by IBAC', there is a concern, given the way it has been interpreted in the past, that it still could be interpreted that a Victoria Police investigation somehow falls within the ambit of that provision, unless of course the drafting was extremely clear.

Thank you again to the committee for inviting us to provide this presentation. The LIV, I should mention, is also in the process of putting together a further submission concerning some additional matters, concerning the drafting of the bill in particular, and that will be provided, the LIV hopes, to the committee later this week.

The CHAIR — Thank you, Ms Spencer, for that overview that you have provided. It is really useful. I will open up to questions now, and I am conscious that we will have to be fairly succinct.

Mr RICH-PHILLIPS — Ms Spencer, thank you for your presentation this evening, indeed for the LIV's written submission and indeed earlier written advice during an earlier consultation stage on the bill. They have been particularly helpful. I will not go back over the material you have just covered because the LIV's position is quite clear. But just on your latter comments about LIV having some views on the drafting of the bill, are you able to put a broad framework around that now?

Ms SPENCER — My understanding is that there will be certain further submissions provided in relation to certain aspects of particular drafting of certain clauses. Really, given that the submissions are anticipated to be provided later this week, I would probably rather leave it at that if I can, and the LIV can follow up in its written submissions.

Mr RICH-PHILLIPS — I think certainly your oral and written submissions thus far are very clear, so I am happy to leave it there.

Ms PATTEN — Ms Spencer, it was very interesting where you touched upon section 25A and the proposed section 49KA about the searching of documents that made that section completely ineffective. Could you just elaborate on that again?

Ms SPENCER — Yes, I can. I will just run through again what I said.

Ms PATTEN — Yes, almost explain it to me again.

Ms SPENCER — Sure. The new section 49KA(1) relates to providing the information commissioner effectively with powers to require that a search be conducted — sorry, enables the commissioner to determine whether a search that has been conducted is adequate or not adequate. The concern is that when you have a decision to refuse access pursuant to section 25A(1) and (5) — —

Ms PATTEN — There has been no search.

Ms SPENCER — There is no search, yes. The decision is just made that it is going to be too onerous and so on to process the FOI request and it stops at that point, the LIV understands, so no searches are actually undertaken, so there is nothing for the commissioner to review.

Ms PATTEN — So you would suggest that we just delete that section?

Ms SPENCER — That is one option that has been proposed by the LIV. The other option that has been proposed is to change the wording to focus on the adequacy of the decision-making by the agency or minister rather than the adequacy of the search itself, because there would not have been a search.

Ms PATTEN — Okay. So if there had been a refusal, it would be to review the adequacy of that refusal?

Ms SPENCER — Of that refusal, that it was too onerous and so on to process the FOI request, which would be something meaningful that the information commissioner could actually review.

Ms PATTEN — Thank you. That is helpful.

Mr MULINO — One of the organisational changes that this bill will put into place is to merge the two functions under one organisational structure. I am just wondering, does the LIV have a view as to the merits of that organisational change, bringing us into line with some other jurisdictions?

Ms SPENCER — That is a matter I will have to take on notice. I am not currently briefed with a position on that.

Mr MULINO — I have just one quick follow-up. Given that there will be two functions under that one organisational umbrella, you have recommended that the removal-from-office provisions be strengthened for the two officers under the information officer.

Ms SPENCER — Yes.

Mr MULINO — Do you think there is a risk, were those removal-from-office procedures to be strengthened, that it might cause difficulties if there were differences of opinion or difficulties in working together amongst those three officers?

Ms SPENCER — Again that is not something that I believe the LIV has got a position on, so again I would have to take that on notice.

Ms HARTLAND — What you have presented is actually really comprehensive. You have already answered all of my questions in the submission. I really appreciate this, thank you.

The CHAIR — Is there anything further that you would like to tell the committee?

Ms SPENCER — No, thank you.

The CHAIR — Like Ms Hartland, I would like to thank you for the submission that has been made and for coming along this evening to provide some further explanations to us. It has been enormously useful.

Witness withdrew.