



Commissioner for
Better Regulation
Red Tape Commissioner

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4 February 2019

Mr Toby Hemming
General Counsel
Department of Premier and Cabinet
1 Treasury Place,
EAST MELBOURNE VIC 3002

Dear Mr Hemming

REGULATORY IMPACT STATEMENT FOR THE FREEDOM OF INFORMATION REGULATIONS 2019

I would like to thank your staff at the Department of Premier and Cabinet, for working with our team on the preparation of the Regulatory Impact Statement (RIS) for the Freedom of Information Regulations 2019 (the Regulations).

As you know, the Commissioner for Better Regulation is required to provide independent advice on the adequacy of analysis provided in all RISs in Victoria according to the *Victorian Guide to Regulation* (the Guide). To be adequate, the Guide requires that a RIS be logical, draw on relevant evidence, be transparent about any assumptions made, and be proportionate to the proposal's expected effects.

I am pleased to advise that the final version of the RIS received by us on 31 January 2019 meets the adequacy requirements of the *Subordinate Legislation Act 1994*.

Background

In the RIS, the Department notes that the *Freedom of Information Act 1982* (FOI Act) encourages government accountability and transparency by establishing a framework for the public to access government documents. The objective is to provide people with a right to seek access to documents which are held by government departments and agencies.

The Department explains in the RIS that the FOI Act makes certain types of government entities automatically subject to it, but there are other public purpose bodies that are directly or indirectly controlled by government and not automatically subject to FOI. Such bodies may be prescribed to be subject to the FOI Act by the Regulations.

If those bodies were not subject to FOI, the Department notes that members of the public could seek personal information from these bodies under privacy laws, but there would be no formal or consistent mechanism by which the public could seek a broader range of information.

The Department explains in the RIS that there are certain statutory offices that are automatically subject to the FOI Act, but which need to exercise their functions in an independent and confidential manner and can be exempted from the FOI Act through the

Regulations. In these cases, being subject to the FOI Act could impede the statutory office holder's functions by undermining actual or perceived confidentiality and independence. This could discourage vulnerable people from providing information.

The Regulations:

- prescribe bodies that are not automatically subject to FOI to be subject to the FOI;
- exempt a limited number of statutory office holders from FOI; and
- prescribe persons and bodies to which the Information Commissioner may refer matters.

Options considered, and their assessment

The Department states in the RIS that the objectives of the proposed Regulations are that:

- public bodies will be subject to public openness and accountability;
- there is a well-understood mechanism for people to seek access to personal information;
- people can access sufficient information to enable scrutiny of government decisions; and
- the provision of information does not compromise the integrity and confidentiality of certain statutory office holders.

The Department has attempted to quantify the impacts of the proposed regulations and provides estimates for the impacts on agencies. However, given the difficulty in measuring these costs accurately, the qualitative analysis approach which the Department has used is appropriate.

Prescribed bodies

The options considered for prescribed bodies are:

1. retain the current regulations prescribing denominational hospitals (the vast majority of FOI requests for prescribed bodies), TAFEs and various commissions with only minor modifications where agencies have changed name or been restructured (preferred option);
2. prescribe fewer agencies (option 1 but excluding TAFE institutes because of the high processing costs to TAFEs of recent FOI requests); and
3. voluntary compliance with the FOI Act for bodies not automatically subject to FOI.

Option 1 is preferred because the Department considers it best supports openness, accountability and citizen participation. The minor modifications are to update the list of prescribed bodies to include organisations that have been formed in the past decade, and to remove bodies (such as water corporations) that have been restructured in a way that means they automatically fall under the FOI Act, or bodies that are defunct.

The Department explains in the RIS that costs to government agencies are difficult to quantify because: they vary considerably depending on the complexity of the request; many prescribed bodies have very few FOI requests; and agencies vary as to whether they have dedicated FOI officers. The estimated total cost of processing FOI requests for prescribed agencies was \$692,082 in 2017-18. In the same year, the total amount of fees paid by the public for FOI requests of prescribed bodies was \$65,735.

The Department also explains in the RIS that it was not possible to quantify the benefits of the proposed Regulations so these benefits are discussed in qualitative terms, and the Department explains why it considers these benefits outweigh the costs.

Exempt Offices

In the RIS, the Department explains that retaining the three current exemptions (the Solicitor-General, the Director of Public Prosecutions and the Public Advocate) is the preferred option. Exempting additional offices was considered, but the Department argues that the benefits related to these offices exercising their functions in an independent and confidential manner would be outweighed by the costs of reduced accountability and transparency.

Referral Powers

The Department explains why it does not examine this function because there are no burdens on the public and there are benefits to the public by ensuring the appropriate bodies investigate matters.

Implementation and Evaluation

The Department notes in the RIS that it will continue to review the Regulations on a regular basis and will conduct a full review before the Regulations sunset. The Department also notes that it will consult with the Office of the Victorian Information Commissioner regularly to help assess how the proposed Regulations are working in practice.

Should you wish to discuss any issues raised in this letter, please do not hesitate to contact my office on (03) 9092 5800.

Yours sincerely



Anna Cronin
Commissioner for Better Regulation

