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Access to Justice Arrangements  
Productivity Commission  
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Dear Commissioners,

### **Productivity Commission Draft Report on Access to Justice Arrangements**

Thank you for the opportunity to provide feedback on the Productivity Commission Draft Report on Access to Justice Arrangements (the draft report).

I have two observations to make in relation to Chapter 9 and ‘ombudsman-like bodies’ such as the Office of the Australian Information Commissioner (OAIC).

The first is in relation to the ‘cost per complaint’ figures on page 290 (Figure 9.2) and their accuracy. In my view, these figures are misleading. The draft report draws attention to the apparently high cost of processing disputes at privacy and freedom of information (FOI) regulators compared with other regulators. For example, the draft report cites the per case cost of complaints at the OAIC as approximately \$9000. By comparison, the Commonwealth Ombudsman processes complaints at an average cost of \$670. It is difficult to understand the wide discrepancy between these figures and how they have been calculated.

My assumption is that the Ombudsman figure has been derived from dividing the Ombudsman’s annual appropriation (\$27 million) by the total number of ‘approaches and complaints’ reported for that office in 2011-12 (40,477). In a similar vein, the OAIC’s cost per complaint of \$9000 appears to be this office’s total resourcing and payments for 2011-12 (\$17.4 million) divided by the number of complaints and reviews received (1939).

These figures do not compare like with like. The inclusion of ‘approaches’ with complaints in the Ombudsman figure encompasses enquiries.<sup>1</sup> The OAIC figure does not. If it did, the number of matters dealt with by the OAIC in 2011-12 would have been over 26,000. This results in a per case cost of approximately \$667 – the same as the Ombudsman.<sup>2</sup>

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<sup>1</sup> The Ombudsman’s five category system of approaches and complaints is explained in the glossary to the 2011-12 Annual Report (p 204).

<sup>2</sup> On a similar note, I would observe that the per case cost cited for the Western Australia Information Commissioner appears to be incorrect. That office’s 2012-13 annual report cites the average cost of external reviews finalized as \$9909 – not almost \$20,000 as reported in the draft report (p 27). And again, this figure does not include the cost of processing enquiries which would decrease the per case cost further.

And that is not the full picture. The OAIC has a range of other functions that are not easily accommodated in a breakdown of cost by dispute. A major aspect of the OAIC's work is in awareness-raising activities and policy development, including the development of guidelines, fact sheets, resources and reports to government.<sup>3</sup> A significant proportion of the OAIC's budget is allocated to those activities. Nor does the per case cost figure include other major activities of the OAIC such as the processing of requests from agencies for extensions to the statutory processing period for FOI requests.<sup>4</sup> These are activities that are not easy to compare across regulators.

On that basis, I think that the OAIC (and possibly other privacy and FOI regulators) should be in the same category as the Australian Competition and Consumer Commission which the draft report excluded from case/cost comparisons due to its wide range of regulatory responsibilities and the difficulty of separating out its complaints functions (see p 284 and p 285, Figure 9.1).

The second observation I wish to make is in relation to ombudsman-like bodies and their critical importance to access to justice outcomes. You will be aware that the OAIC is to close at the end of the year, in accordance with the Government's recent budget announcement. Notwithstanding this fact, the OAIC has, during the period of its operation, played a significant role in enhancing access to justice for FOI applicants and privacy complainants. Prior to the establishment of the OAIC in November 2010, the Administrative Appeals Tribunal (AAT) was the only avenue for external merit review of decisions of agencies and ministers on FOI requests. In 2009-10, the AAT received 110 applications for review of FOI decisions. In 2012-13, the OAIC received 507 applications for FOI merit review.

While some of this increase could have been due to the increased number of FOI requests received by ministers and agencies (an increase of 15% from 2009-10 to 2012-13), the more influential factors have been that a person can make a free application for review by the OAIC, and that legal representation is not required.

It is disappointing that the OAIC will close its doors. However, the OAIC's regulatory model, and that of ombudsmen more generally, is a sound one. The costs are low (comparative to the cost of processing disputes in tribunals and courts) and the benefits (as outlined in the draft report, pp 278-81) are many. In this regard, I hope that the Productivity Commission's final report makes a strong case for the important contribution that ombudsmen and similar bodies make to enhancing access to justice.

Yours sincerely

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Australian Information Commissioner  
20 May 2014

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<sup>3</sup> Over the past three years in FOI work the OAIC has published over 250 pages of FOI guidelines, 16 fact sheets for the public, over 30 detailed agency guides, and reports on FOI charges, FOI reform and information policy trends.

<sup>4</sup> In 2012-13, the OAIC processed 2290 requests for extensions of time.