

## Chapter 2

### Proposed reforms to freedom of information laws

2.1 The Freedom of Information Amendment (Reform) Bill 2009 (FOI Bill) and Information Commissioner Bill 2009 (IC Bill) are intended to be complementary, each forming part of the government's proposed reform of Australia's freedom of information (FOI) laws.

2.2 The government's stated purpose for introducing the amendments to the *Freedom of Information Act 1982* (FOI Act) contained in the bills is 'to promote a pro-disclosure culture across government and to build a stronger foundation for more openness in government'.<sup>1</sup>

2.3 The FOI Bill contributes to this aim by:

- amending the objects of the FOI Act;
- introducing an information publication scheme;
- decreasing the open access periods for Commonwealth records and Cabinet notebooks;
- amending the public interest test for exemptions;
- adding a new level of external review of FOI decisions;
- providing that the Information Commissioner can investigate the conduct of agencies in FOI matters;
- introducing a process for declaring a person to be a 'vexatious applicant';
- removing the requirement for FOI application fees; and
- providing for a process by which an agency's time to respond to a request may be increased.

2.4 The IC Bill proposes to establish two new statutory offices: the Information Commissioner; and the Freedom of Information Commissioner. The Office of the Information Commissioner is intended to 'bring together the functions for independent oversight' of the FOI Act and the *Privacy Act 1988*.

2.5 This chapter sets out the key provisions of each of the bills.

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1 Explanatory Memorandum, FOI Bill, p. 1.

## **Freedom of Information Amendment (Reform) Bill 2009**

### *Objects*

2.6 Schedule 1 of the FOI Bill repeals the existing objects in section 3 of the FOI Act, and replaces it with an objects clause which emphasises that Parliament's intention is to ensure open access to government documents and information in order to enable public participation in and scrutiny of government.<sup>2</sup>

2.7 Subsection 3 of the proposed objects clause highlights that government information is a 'national resource', and should be managed accordingly. The Explanatory Memorandum notes that proposed subsection 3:

...responds to recommendation 4 of the *Open government report* that the object clause should acknowledge that the information collected and created by public officials is a national resource.<sup>3</sup>

### *Publication of information*

#### *Publication scheme*

2.8 Part two of Schedule 2 to the FOI Bill introduces a new information publication scheme. The proposed scheme would require Commonwealth departments and agencies to publish information and documents:

- detailing its organisational structure;
- explaining its functions;
- setting out statutory appointments;
- contained in annual reports;
- explaining how the public may comment on specific policy proposal;
- that are routinely provided to Parliament in response to requests and orders; and
- containing operational information, which is defined in proposed section 8A of Schedule 2 as:

information held by the agency to assist the agency to perform or exercise the agency's functions or powers in making decisions or recommendations affecting members of the public (or any particular person or entity or class of persons or entities).

2.9 Proposed section 8A sets out an example of what may constitute 'operational information', which includes rules, guidelines, practices and precedents.

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2 FOI Bill, Schedule 1, section 3.

3 Explanatory Memorandum, FOI Bill, p. 5.

2.10 In addition, agencies and departments are required to publish 'information in documents to which the agency routinely gives access in response to requests under [the Act]' other than personal information, information about the business, commercial, financial or professional affairs of any person or other information that the Information Commissioner determines is exempt.<sup>4</sup> Agencies are also not required to publish exempt information.<sup>5</sup> The Explanatory Memorandum states that:

The intention is that information in which there has been a demonstrated level of interest from the community by way of access request should be pro-actively made available to the public (without requiring – or at least limiting the need for – applications to be made).<sup>6</sup>

2.11 The provision allowing the Information Commissioner to determine that certain information or documents are exempt from the publication requirement is intended to address situations where there are high resource implications of proactively publishing certain information on an agency's website.<sup>7</sup> In addition, the Information Commissioner would play a role in assisting agencies to comply with the publication scheme<sup>8</sup> and in reviewing and investigating agencies' compliance with the scheme.<sup>9</sup>

2.12 Agencies are under an obligation to ensure that information published under proposed section 8 is up-to-date, complete and accurate.<sup>10</sup> Information is to be published 'to members of the public generally',<sup>11</sup> and to specific groups of people if appropriate,<sup>12</sup> on the agency's website.<sup>13</sup>

2.13 The government has argued that the purpose of the proposed publication scheme is:

to allow the FOI Act to evolve as a legislative framework for giving access to information through agency driven publication, rather than as a scheme that is only reactive to requests for documents.<sup>14</sup>

2.14 Under the proposed publication scheme agencies would also be required to develop and publish a plan which shows what information it intends to publish to

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4 FOI Bill, Schedule 2, paragraph 8(2)(g).

5 FOI Bill, Schedule 2, subsection 8C(1).

6 Explanatory Memorandum, FOI Bill, p. 6.

7 Explanatory Memorandum, FOI Bill, p. 7.

8 FOI Bill, Schedule 2, section 8E.

9 FOI Bill, Schedule 2, section 8F.

10 FOI Bill, Schedule 2, section 8B.

11 FOI Bill, Schedule 2, paragraph 8D(2)(a).

12 FOI Bill, Schedule 2, paragraph 8D(2)(b).

13 FOI Bill, Schedule 2, section 8D(3).

14 Explanatory Memorandum, FOI Bill, p. 6.

comply with the scheme and how and to whom it proposes to publish that information.<sup>15</sup>

2.15 The proposed publication scheme will not apply to ministers.

#### *Publication of documents disclosed under the Act*

2.16 The publication scheme is complemented by proposed section 11C, which provides that if a minister or agency gives a person access to documents under the Act, then they must publish those documents on a website within 10 working days of the applicant being given access. The provision does not apply to documents:

- which contain personal information about the applicant;
- about the business, commercial, financial or professional affairs of any person if it would be unreasonable to publish that information;
- determined by the Information Commissioner to be unreasonable to publish; or
- that are not reasonably practicable to be published because of the extent of modifications needed to exclude the above information.

2.17 The agency may impose a charge for accessing these documents, if the agency incurs specific costs in reproducing the documents.<sup>16</sup> The provision does not specify how long information must remain on the minister or agency's website.<sup>17</sup>

#### *Decreasing open access periods*

2.18 Schedule 3 to the FOI Bill amends various sections of the FOI Act and the *Archives Act 1983*. The cumulative effect of the proposed amendments is to bring forward the 'open access period' for most government records. The 'open access period' is the time after which a record is made available for public access on request under the Archives Act.

2.19 The FOI Bill reduces the open access period for most Commonwealth records (all those except Cabinet notebooks, records containing Census information and exempt records under section 33 of the Archives Act) from 30 years to 20 years. The Bill also reduces the open access period for Cabinet notebooks from 50 years to 30 years.

#### *New public interest test*

2.20 Part 2 of Schedule 3 to the FOI Bill also proposes a new public interest test to apply to all those exemptions which are proposed to involve a public interest test. The

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15 FOI Bill, Schedule 2, subsection 8(1).

16 FOI Bill, Schedule 3, subsections 11C(4) and (5).

17 Explanatory Memorandum, FOI Bill, p. 15.

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exemptions that the Bill proposes this general test will apply to are set out in proposed Division 3 of Part IV, and are called 'public interest conditional exemptions'.

*Conditionally exempt documents (exemption conditional on satisfying public interest test)*

2.21 Proposed Division 3 of Part IV is at item 33 of Schedule 3 to the Bill, and sets out the categories of documents 'conditionally exempt' from disclosure, which are those which if disclosed:

- would, or could reasonably be expected to, damage Commonwealth-State relations or divulge information communicated in confidence by a State to the Commonwealth (proposed section 47B);
- would disclose a deliberative matter – i.e. opinion, advice or recommendations prepared for the deliberative processes involved in the functions of an agency or minister. However, this exemption does not apply to report of experts or agency bodies, or to records or formal statements of reasons for final decisions given in the exercise of an adjudicative function (proposed section 47C);
- would have a substantial adverse effect on the financial or property interests of the Commonwealth or an agency (proposed section 47D);
- would, or could reasonably be expected to, prejudice the effectiveness or the attainment of objects of tests, examinations or audits being conducted by an agency, have a substantial adverse effect on the management or assessment of personnel by the Commonwealth or an agency, or have a substantial adverse effect on the proper and efficient conduct of an agency (proposed section 47E);
- would involve an unreasonable disclosure of personal information about any person (proposed section 47F);
- would disclose information concerning a person or organisation in respect of his/her/its business or professional affairs and would, or could, reasonably be expected to unreasonably affect the person or organisation in conducting their affairs, or could reasonably be expected to prejudice the future supply of information to the Commonwealth. This exemption does not apply to trade secrets. The trade secrets exemption is not conditional on the fulfilment of a public interest test (proposed section 47G);
- would disclose information about research being, or to be, conducted by an officer of an agency, which would unreasonably expose the agency or officer to disadvantage (proposed section 47H); or
- would or could reasonably be expected to have a substantial adverse effect on Australia's economy by influencing a decision, or giving a person undue benefit (proposed section 47J).

2.22 Proposed subsection 11A(5) provides that:

The agency or Minister must give the person access to the document if it is conditionally exempt at a particular time unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest.

2.23 Proposed section 11B sets out factors to be taken into account by agencies and ministers in determining whether the disclosure of conditionally exempt documents would, on balance, be contrary to the public interest. It sets out 'factors favouring access', and 'irrelevant factors', and also provides any guidelines on the issue by the Information Commissioner must also be taken into account.

2.24 The 'factors favouring access' are, if disclosure of the document would:

- promote the objects of the Act;
- inform debate on a matter of public importance;
- promote effective oversight of public expenditure; or
- allow a person to access his or her own personal information.

2.25 'Irrelevant factors' that must not be taken into account are that:

- access to the document could result in embarrassment to the Commonwealth Government or cause loss of confidence in the Commonwealth Government;
- access to the document could result in a person misinterpreting or misunderstanding the document;
- the author of the document is of high seniority in the agency to which the request for access to the document was made; and
- access to the document could result in confusion or unnecessary debate.

*Exempt documents (not conditional on satisfying public interest test)*

2.26 The public interest test does not apply to those exemptions set out in proposed Division 2 of Part IV, which are:

- documents the disclosure of which would, or could reasonably be expected to, cause damage to national security, defence or international relations;
- Cabinet documents;
- documents the disclosure of which would or could reasonable be expected to prejudice law enforcement or the protection public safety; and
- documents to which secrecy provisions apply.

*External review by the Information Commissioner*

2.27 Schedule 4 to the FOI Bill provides for certain FOI functions of the proposed Information Commissioner. Key amongst these functions is the Information Commissioner's review function.

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2.28 A number of proposed provisions remove the existing requirements for internal review (review of the merits of a decision within the agency) to take place prior to an applicant being able to appeal an FOI decision externally.<sup>18</sup> The Explanatory Memorandum states that:

By making internal review optional, agencies should be encouraged to make the best decision at first instance.<sup>19</sup>

2.29 Proposed new Part VII of the FOI Act sets up a system for review of decisions by the Information Commissioner. Under the part, persons whose application under the FOI Act has been refused, deemed to have been refused because of no decision having been made within the requisite timeframes, or partially refused, as well as some interested third parties, have a right to seek review of the decision by the Information Commissioner. The Information Commissioner performs merits review in the same way as the AAT, which involves 'standing in the shoes of the original decision maker' and reconsidering the decision based on all the available facts.<sup>20</sup>

2.30 Proposed Part VII provides for how applications for review are to be made, notification requirements to affected third parties, time limits, assistance by the Information Commissioner, the conduct of the Information Commissioner's review and other procedural aspects of the Information Commissioner review process.

2.31 Proposed section 55F allows the parties to a review by the Information Commissioner to reach agreement between themselves.

2.32 In conducting reviews, the Information Commissioner will have the powers to require the production of documents, including those claimed to be exempt, except national security or cabinet documents. It is an offence to fail to comply with an order for documents by the Information Commissioner.<sup>21</sup> The Commissioner only has the power to require the production of Cabinet and national security documents if he or she is not satisfied on affidavit or other evidence that the document is exempt.<sup>22</sup> The Information Commissioner will not have the power to order that a person be given access to documents he or she finds to be exempt.

2.33 The Commissioner will have the powers to order an agency to undertake further searches for a document, and to compulsorily require people to answer questions.<sup>23</sup> However, legal professional privilege is retained before the Information Commissioner.<sup>24</sup>

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18 Including proposed section 51DA; paragraphs 54L(2)(a) and 54M(2)(a)

19 Explanatory Memorandum, FOI Bill, p. 27.

20 Explanatory Memorandum, FOI Bill, p. 34.

21 FOI Bill section 55R(5).

22 FOI Bill, section 55U.

23 FOI Bill, sections 55V and 55W respectively.

24 FOI Bill, section 55Y.

2.34 The Explanatory Memorandum states that:

It is intended that Information Commissioner review will provide a simple, expedient and cost efficient system for external merits review. To achieve this, the Information Commissioner is authorised to conduct a review in whatever way considered appropriate (proposed subsection 55(2)) and to use as little formality and technicality as possible (subsection 55(4)).<sup>25</sup>

2.35 Division 5 of proposed Part VII provides that the Information Commissioner may decide not to undertake a review if he or she is satisfied that the application is frivolous, vexatious, misconceived, lacking in substance or not made in good faith. The Information Commissioner can also decline to undertake a review if the applicant has not been cooperative, the Commissioner believes review is more suitably undertaken by the Administrative Appeals Tribunal (AAT), or the applicant refuses to comply with the Commissioner's directions. If the Information Commissioner declines to undertake a review, notice must be provided to both parties, and either party may seek review of that decision by the AAT.

2.36 The FOI Bill provides a right of review from decisions of the Information Commissioner to the AAT (which currently conducts external reviews directly from agencies). The AAT can make decisions directly from agencies if the Information Commissioner determines that is the most appropriate course of action.<sup>26</sup>

2.37 Item 42 of Schedule 4 to the Bill makes some significant changes to the AAT's jurisdiction when reviewing decisions of the Information Commissioner. Proposed new section 61 of the FOI Act provides that both agencies and applicants will have a right to appeal decisions of the Information Commissioner. Subsection 61(1) sets out that whichever party appeals to the AAT will bear the onus of proof.

2.38 Proposed new section 61A makes further amendments to the AAT's jurisdiction, in effect providing that the Information Commissioner is not to 'defend' his or her decisions in the AAT, but instead the relevant department or agency will take on that role.

### ***Investigations by the Information Commissioner***

2.39 Proposed Part VIIB of the FOI Act would give the Information Commissioner the function of investigating actions by an agency relating to the handling of FOI matters. The part sets out the investigation powers of the Commissioner and the investigation process.

2.40 The Information Commissioner may conduct investigations in response to complaints, as well as on his or her own motion, in a similar way to the

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25 Explanatory Memorandum, FOI Bill, p. 32.

26 FOI Bill, section 57A.



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Commonwealth Ombudsman. Like the Ombudsman, the Commissioner can only investigate the actions of agencies, not ministers.<sup>27</sup>

2.41 The Commissioner is empowered to transfer matters to the Ombudsman if appropriate.<sup>28</sup> The Ombudsman's powers to conduct investigations under the FOI Act are preserved by the Bill, however, the Explanatory Memorandum states that:

While the Ombudsman may still investigate complaints concerning action under the FOI Act, it is intended that the Information Commissioner will deal with most complaints of this kind. The Ombudsman will have capacity to investigate FOI complaints where the Ombudsman could more effectively or appropriately deal with a complaint (for example, where the FOI complaint forms one aspect of a wider grievance concerning agency action or relations to action by the Information Commissioner in dealing with an FOI request).<sup>29</sup>

2.42 Professor John McMillan, the Commonwealth Ombudsman discussed the way he envisages the Ombudsman and Information Commissioner managing this overlapping jurisdiction:

The Ombudsman can still receive complaints about freedom of information and privacy matters. That is important because in my experience FOI and privacy matters can often be a small component of a larger administrative problem that a person has with an agency. On the other hand, I have followed the principle that if the Parliament establishes a specialist body similar in all respects to the Ombudsman's office then we should defer to the expertise of that body and to its primary role in overseeing a particular area. So it would be my intention early on to hold discussions with the Information Commissioner and possibly to sign a memorandum of understanding for transfer of cases between us.<sup>30</sup>

### ***Declaring vexatious applicants***

2.43 Proposed section 89K gives the Information Commissioner discretionary power to declare a person a 'vexatious applicant'. This can be done at the request of an agency or minister, or on the Commissioner's own motion.

2.44 The joint Australian Law Reform Commission (ALRC) and Administrative Review Council (ARC) *Open government report* considered such a power for agencies and recommended against it on the basis that it may be misused.<sup>31</sup> The Explanatory Memorandum states:

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27 Explanatory Memorandum, FOI Bill, p. 40.

28 FOI Bill, section 74

29 Explanatory Memorandum, FOI Bill, p. 46.

30 Professor John McMillan, Commonwealth Ombudsman, *Proof Committee Hansard*, 5 February 2010, p. 2.

31 ALRC and ARC, *Open government: a review of the federal Freedom of Information Act 1982*, ALRC Report 77, 1995, paragraph 7.18.

Under [the Bill], the power is exercised by the Information Commissioner who is an independent statutory office holder. If an agency or Minister makes an application to the Information Commissioner the effect of proposed subsection 89K(3) is that the agency or Minister bears the onus of establishing that the Commissioner should make the declaration.<sup>32</sup>

2.45 Proposed section 89L sets out the grounds on which the Information Commissioner may declare a person a 'vexatious applicant', which are that:

- the person has repeatedly engaged in access actions and the repeated engagement involves an abuse of the process for the access action;
- a particular access action in which the person engages involves an abuse of the process for that access action; or
- a particular access action in which the person engages would be manifestly unreasonable.

2.46 Proposed subsection 89L(2) defines 'access actions' as:

- making an FOI request;
- making an application for amendment of records;
- making an application for internal review; and
- making an Information Commissioner review application.

2.47 A declaration that a person is a vexatious applicant has the effect of enabling an agency or minister to refuse to consider requests and applications by the person. Declarations may be subject to any terms and conditions that the Information Commissioner sees fit.<sup>33</sup>

2.48 Decisions to declare a person a vexatious applicant may be reviewed by the AAT.

### ***Removal of fees***

2.49 The Explanatory Memorandum explains that:

Upon releasing the exposure draft of this Bill, the Government announced that the first five hours of decision-making time for journalists and not-for-profit community groups would be free of charge.<sup>34</sup>

2.50 Paragraph 94(2)(a) of Schedule 6 to the Bill amends existing restrictions on the ability of the regulations to apply different charges to different classes of applicants.

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32 Explanatory Memorandum, FOI Bill, p. 44.

33 FOI Bill, section 89M.

34 Explanatory Memorandum, FOI Bill, p. 56.

2.51 In terms of the financial impact of this change, the Financial Impact Statement in the Explanatory Memorandum states that:

The amendments in this Bill will have minimal financial impact on Government revenue. While the requirement for FOI application fees is proposed to be removed, the total amount of application fees collected (only \$150,771 in 2007-08) represents a very small fraction of the total cost of administering the FOI Act (approximately 0.5% in 2007-08).<sup>35</sup>

### ***Extending FOI to contractors***

2.52 Schedule 6 to the Bill proposes to extend the scope of the FOI Act so that requests for access may be made for documents held by contracted service providers, and subcontractors, delivering services for or on behalf of an agency to the community. The Explanatory Memorandum explains that:

The proposal is tied to recommendation 99 of the *Open government report* which was concerned with 'the trend towards government contracting with private sector bodies to provide services to the community' on the basis that it 'poses a potential threat to the government accountability and openness'.<sup>36</sup>

2.53 The proposed amendments will require agencies to take contractual measures requiring contracted service providers to provide copies of documents subject to an FOI request on the request of the contracting agency. A document provided under this measure may still be exempt from disclosure if an exemption applies under the Act, however the onus will be on the government agency to make that determination.

2.54 Proposed section 24A provides that a minister or agency may refuse a request if all reasonable steps have been taken to obtain a relevant document in the exercise of a contractual right and the document has not been provided by the contractor.

### **Information Commissioner Bill 2009**

2.55 The IC Bill establishes the Office of the Information Commissioner, which will comprise of the existing Privacy Commissioner plus the new statutory office of Freedom of Information Commissioner, both overseen by the new statutory office of Information Commissioner.

2.56 The Explanatory Memorandum notes that:

The functions of the Office will be threefold:

- the FOI functions – which are about giving the Australian community access to information Held by the Government in accordance with the FOI Act;
- the privacy functions – which are about protecting the privacy of individuals in accordance with the Privacy Act and other Acts; and

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35 Explanatory Memorandum, p. 3.

36 Explanatory Memorandum, FOI Bill, p. 52.

- the information commissioner functions – which are strategic functions concerning advice to Government on information management.<sup>37</sup>

2.57 Each Commissioner will be appointed by the Governor-General as independent office holders for a term of up to five years. Each may be reappointed.<sup>38</sup> Under subclause 14(3), the FOI Commissioner is to have legal qualifications. Neither the Information Commissioner nor the Privacy Commissioner is required to have legal qualifications.

2.58 The Information Commissioner will be the head of an office for the purposes of the *Public Service Act 1999* and the *Financial Management and Accountability Act 1997*. The Information Commissioner will be empowered to perform all of the functions of both the FOI Commissioner and the Privacy Commissioner, and each of those offices will be also empowered to perform the other's functions.

2.59 Key powers and functions given to the Information Commissioner under the IC Bill include:

- promoting awareness and understanding of the FOI Act and its objects (clause 8);
- assisting agencies to comply with, and reviewing, the information publication scheme under the FOI Bill (subclauses 8(b) and (c));
- issuing guidelines under the FOI Act (subclause 8(d));
- monitoring, investigating and reporting on compliance with the FOI Act (subclause 8(h));
- undertaking investigations under the FOI Act (subclause 8(j)); and
- conducting all the existing functions of the Privacy Commissioner (clause 9).

2.60 The Financial Impact Statement in the Explanatory Memorandum states that:

Funding for the Office of the Information Commissioner was provided in the 2009–10 Budget. An amount of \$19.5 million over 4 years (post MYEFO) is additional to resources for the existing office of the Privacy Commissioner, which will be transferred to the office of the Information Commissioner.<sup>39</sup>

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37 Explanatory Memorandum, IC Bill, p. 1.

38 IC Bill, clause 14.

39 Explanatory Memorandum, IC Bills p. 2.