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## Information Commissioner Bill 2009

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Law and Bills Digest Section

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## Information Commissioner Bill 2009

**Date introduced:** 26 November 2009

**House:** House of Representatives

**Portfolio:** Cabinet Secretary

**Commencement:** Clauses 1 and 2 commence on Royal Assent. Clauses 3 to 36 commence either 6 months after Royal Assent or earlier by Proclamation.

**Links:** The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

### Purpose

The primary purpose of the Information Commissioner Bill 2009 (the Bill) is to create two new independent statutory office holders, the Information Commissioner and the Freedom of Information Commissioner. It also makes provision for the Privacy Commissioner, currently appointed under the *Privacy Act 1988*, to be appointed under the proposed Information Commissioner Act.

### Background

For background, the reader is referred to the Background section of the Bills Digest for the Freedom of Information Amendment (Reform) Bill 2009.<sup>1</sup>

### Committee consideration

This Bill, together with the Freedom of Information Amendment (Reform) Bill 2009 (the FOI Reform Bill), has been referred to the Senate Finance and Public Administration Committee for inquiry and report by 16 March 2010 (the Senate inquiry). Details of the inquiry are at:

[http://www.aph.gov.au/senate/committee/fapa\\_ctte/foi\\_ic/info.htm](http://www.aph.gov.au/senate/committee/fapa_ctte/foi_ic/info.htm)

Submissions to the Senate inquiry are referred to both in this Bills Digest and the Digest for the FOI Reform Bill.

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1. M A Neilsen, *Freedom of Information Amendment(Reform) Bill 2009*, Bills Digest, no. 115, 2009–10, Parliamentary Library, Canberra.

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## Financial implications

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 four years is additional to resources for the existing Office of the Privacy Commissioner, which will be transferred to the Office of the Information Commissioner.<sup>2</sup>

## Position of significant interest groups

In general, submissions to the Senate inquiry welcomed the creation of the new role of Information Commissioner. As **Professor Moira Paterson** states, there has long been a need for an oversight body which can play an active role in publicising the FOI Act's existence, monitor compliance with its provisions and initiate actions to remedy factors which inhibit its effective operation.<sup>3</sup>

**Nigel Waters** from the **Cyberspace Law and Policy Centre** also welcomes the creation of the Office of the Information Commissioner and states he has no difficulty in principle with the Information Commissioner having overall responsibility for both privacy and FOI. He notes that this is a model which appears to work satisfactorily in the United Kingdom and some Canadian provinces and the one which has now been adopted in Queensland.<sup>4</sup>

However, several submissions commented on the drafting of the Bill, suggesting the relationship between the Information, FOI and Privacy Commissioners is not clearly set out. The **Law Council** argues that each Commissioner should have a discrete role, functions and responsibilities:

A regime where the Information Commissioner can duplicate the functions of the FOI and Privacy Commissioners and where the FOI and Privacy Commissioners can duplicate each other's functions, despite each office holder being required to possess specialised qualifications and skills is not appropriate.<sup>5</sup>

**Professor Paterson**, commenting on the drafting of the Bill, suggests that while the powers to be exercised independently by the Privacy and FOI Commissioners are nominally conferred on the Information Commissioner, in fact the offices of the FOI Commissioner and Privacy Commissioner are each independent statutory offices. This

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2. Explanatory Memorandum, Information Commissioner Bill 2009, p. 2.

3. M Paterson, *Submission on the Freedom of Information Amendment (Reform) Bill 2009 and Information Commissioner Bill 2009*, January 2010.

4. N Waters, *Commonwealth FOI amendments shouldn't miss the opportunity for real reform: submission on the Freedom of Information Amendment (Reform) Bill 2009 and Information Commissioner Bill 2009*, 2010, p. 2.

5. Law Council of Australia, *op. cit.*, p. 11.

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appears to be assured by paragraphs 11(5)(a) and 12(5)(a)<sup>6</sup> of the Bill. Professor Paterson does, however, acknowledge that the drafting of these provisions is likely to create confusion in the minds of the public, especially in relation to the *Privacy Act 1988*. That Act is to be amended so that references to the Privacy Commissioner are replaced with references to the Information Commissioner.<sup>7</sup>

**Nigel Waters** also questions the drafting of these provisions suggesting that subclause 12(4) requiring Information Commissioner approval for specified actions under privacy functions appears inconsistent with subclause 12(5) which suggests that the Privacy Commissioner or FOI Commissioner exercising *all* privacy functions must use their own judgement.

The **Commonwealth Ombudsman**, Professor John McMillan, while not commenting on the actual drafting of the Bill, does have a view about the relationship between the three Commissioners. He says a major challenge for the new Office of the Information Commissioner, headed by three commissioners and administering both the Privacy and FOI Acts will be to grapple with that tension and imbalance that currently favours privacy protection. Nevertheless, he is optimistic about the reforms, noting that a major shortcoming of the current federal FOI scheme is that it lacks an FOI champion who is independent of government, has a dedicated role and powers, adequate funding and a secure power-base. Professor McMillan, like many FOI advocates, is hopeful that the creation of the Office of Information Commissioner heralds a major shift. Combined with the reforms in the accompanying FOI Bill he believes there will be a new and different phase in public administration.<sup>8</sup>

## Main provisions

### Office of the Information Commissioner

**Clause 5** establishes the Office of the Information Commissioner. It is to consist of:

- three information officers who are the Information Commissioner, the Freedom of Information Commissioner (FOI Commissioner) and the Privacy Commissioner, and
- staff of the Office of the Information Commissioner engaged under the *Public Service Act 1999*.

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6. These paragraphs are described below at pp. 6 and 7.

7. M Paterson, op. cit. These amendments are in Schedule 5 of the Freedom of Information Amendment (Reform) Bill 2009.

8. J McMillan, *Submission by the Commonwealth Ombudsman: Senate Finance and Public Administration Legislation Committee, Freedom of Information Amendment (Reform) Bill and the Information Commissioner Bill 2009*, 2010.

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**Subclause 5(3)** states that the Office is a statutory agency for the purposes of the *Public Service Act 1999* and the Information Commissioner is designated as head of the agency.

Functions and powers of the three information officers— Information Commissioner, FOI Commissioner and Privacy Commissioner

**Clauses 7 to 12** set out the powers and functions of the three information officers.

### Information Commissioner functions

The Information Commissioner functions are:

- to report to the Minister on government policy and practices regarding:
  - the collection, use, disclosure, management, administration, storage or accessibility of information held by the Government, and
  - the systems or proposed systems for these activities, and
- any other function conferred by legislation beyond the privacy and the FOI functions (**clause 7**).

The Information Commissioner has power to perform these functions and also FOI functions and privacy functions (**clause 10**).

### FOI functions

The FOI functions are defined in **clause 8** as:

- promoting awareness and understanding of the *Freedom of Information Act 1982* (FOI Act) and its objects
- assisting agencies in their information publishing schemes and reporting on these schemes
- assisting and advising on FOI training programs
- collecting FOI statistics for inclusion in the annual reports
- monitoring, investigating and reporting on compliance by agencies with the FOI Act
- reviewing FOI decisions under Part VII of the FOI Act<sup>9</sup>
- undertaking investigations under Part VIIB of the FOI Act<sup>10</sup>

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9. Part VII of the FOI Act is to be inserted by the FOI Reform Bill and deals with review of decisions by the Information Commissioner.

10. Part VIIB of the FOI Act is to be inserted by the FOI Reform Bill and deals with investigations and complaints undertaken by the Information Commissioner and the Ombudsman.

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- issuing FOI guidelines
- making reports and recommendations to the Minister about proposals for legislative change and administrative action, and
- any other function conferred on the Information Commissioner by the FOI Act or other legislation.

### Privacy functions

The privacy functions are defined in **clause 9** and essentially cover all privacy-related functions currently undertaken by the Privacy Commissioner. **Subclause 9(2)** provides a non-exhaustive list of legislation containing provisions that include privacy functions including the *Privacy Act 1988*, *Crimes Act 1914*, *Data-matching Program (Assistance and Tax) Act 1990*, *National Health Act 1953* and the *Telecommunications Act 1997*.

### FOI Commissioner functions and powers

The FOI Commissioner has power to perform FOI functions and may also perform privacy functions (**subclauses 11(1) and (2)**). However, the Explanatory Memorandum states that it is intended that that the FOI Commissioner will mainly perform FOI functions.<sup>11</sup>

Some FOI actions may only be taken by the FOI Commissioner with the approval of the Information Commissioner. These include the issuing of FOI guidelines and the making of recommendations to the Minister regarding FOI legislative and administrative changes (**subclause 11(4)**).

**Proposed subsection 11(5)** sets out the relationship between the FOI Commissioner and Information Commission when performing functions and exercising power. It clarifies that when the FOI Commissioner performs a function or exercises a power expressed by an Act are to be conferred on the Information Commissioner, the FOI Commissioner must perform the function or exercise the power ‘upon his or her own belief or state of mind’ even though the function or power is taken to have been performed or exercised by the Information Commissioner. The Explanatory Memorandum states this provision is consistent with other Commonwealth legislation (for example, the Commissioner and Second Commissioners of Taxation under the *Taxation Administration Act 1953*).<sup>12</sup>

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11. Ibid, p. 6.

12. Ibid.

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## Privacy Commissioner functions and powers

The Privacy Commissioner has privacy functions and may also perform FOI functions (**subclause 12(5)**). However, the Explanatory Memorandum states that it is intended that that the Privacy Commissioner will mainly perform privacy functions.<sup>13</sup>

Some actions may only be taken by the Privacy Commissioner with the approval of the Information Commissioner. For example,

- issuing the Code of Conduct
- approving a privacy code
- the preparation, and publication of guidelines
- reporting to the Minister regarding legislative change or administrative action, and
- the making of a determination for the purposes of paragraph 28A(1)(d) of the *Privacy Act 1988* (**subclause 12(4)**).

**Proposed subsection 12(5)** sets out the relationship between the Privacy Commissioner and Information Commissioner when performing functions and exercising power. It clarifies that when the Privacy Commissioner performs a function or exercises a power expressed by an Act as being conferred on the Information Commissioner, the Privacy Commissioner must do it upon his or her own belief or state of mind even though the function or power is taken to have been performed or exercised by the Information Commissioner. The Explanatory Memorandum states this provision is consistent with other Commonwealth legislation (for example, the Commissioner and Second Commissioners of Taxation under the *Taxation Administration Act 1953*).<sup>14</sup>

## Appointments and staffing of the Office of the Information Commissioner

All three information officers are to be appointed by the Governor-General by written instrument for a period not exceeding five years. All are eligible for re-appointment (**clauses 14 and 15**).

Under **subclause 14(3)** it is a requirement for the FOI Commissioner (but not the other two Commissioners) to have a university degree or an educational qualification of a similar standing, after studies in the field of law. The Explanatory Memorandum states the rationale for this legal qualification requirement is that performance of the FOI review function could be enhanced from the possession of legal knowledge because of the need to routinely apply precedents and to interpret legislative provisions in the FOI Act in order to make review decisions. The Information Commissioner and Privacy Commissioner are not required to have such a qualification, as in practice most reviews will be performed by the

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13. Ibid, p. 7.

14. Ibid.

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FOI Commissioner.<sup>15</sup> The Law Council argues there is an anomaly in that the same requirement is not necessary for the Privacy Commissioner when performing the freedom of information functions.<sup>16</sup>

Remuneration and leave entitlements are to be determined by the Remuneration Tribunal (**clauses 17 and 18**).

**Clause 20** sets out the reasons why appointments could be terminated. The reasons are to do with bankruptcy, absence without leave, undertaking outside work without permission, and failure to disclose potential conflicts of interest according to **clause 22**.

The Minister may appoint a person to act as an information officer for a period of up to 12 months in certain cases (**clause 21**).

### Staff and consultants

**Clause 23** provides that the staff of the Office of the Information Commissioner must be engaged under the *Public Service Act 1999*. The Information Commissioner may also engage consultants, however functions or powers that cannot be delegated to staff cannot be performed or exercised by a consultant (**clause 24**).

### Delegation by the Information Commissioner

Under **clause 25** the Information Commissioner may delegate all or any functions to staff of the Office of the Information Commissioner, apart from the functions listed in **paragraphs 25(a) to 25(i)**. Functions that cannot be delegated include:

- reporting to the Minister
- preparing the annual report
- issuing FOI and privacy guidelines
- making a decision on an Information Commissioner review or correcting errors in such a review
- using the discretion not to investigate a complaint regarding FOI
- issuing implementation notices and reports following an investigation regarding FOI, and

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15. Ibid, p. 8.

16. Law Council of Australia, *Freedom of Information Amendment (Reform) Bill 2009 and Information Commissioner Bill 2009: submission to Senate Finance and Public Administration Committee*, 2010, p. 8.

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- making determinations for the purposes of section 52 of the *Privacy Act 1988*.

### Information Advisory Committee

**Clause 27** establishes the Information Advisory Committee to assist and advise the Information Commissioner in the performance of the Information Commissioner functions. The Committee is to consist of the Information Commissioner as Chair; senior officers of agencies nominated by the Minister (the Cabinet Secretary) in consultation with other relevant Ministers; and such other persons as the Cabinet Secretary thinks fit, and who in the Minister's opinion hold suitable qualifications or experience. There is no remuneration for these positions other than travelling allowance.

### Annual report

**Clause 30** requires the Information Commissioner to prepare an annual report to be given to the Minister and tabled in Parliament. The report will replace the existing annual report on the operation of the FOI Act and the annual report prepared by the Privacy Commissioner. The FOI matters and the privacy matters that must be included in the Information Commissioner's annual report are set out in **clauses 31** and **32** respectively.

### Review of the Act

**Clause 33** requires a review to be undertaken of the proposed Act two years after commencement. There is provision for review of the FOI Act along similar lines at proposed section 93B of the FOI (Reform) Bill.

### Miscellaneous provisions

There are also standard provisions that provide for:

- the making of regulations (**clause 36**)
- penalties for the unauthorised use, and disclosure of information (**clause 29**)
- protection from legal proceedings for the three information officers and persons acting under their direction or authority (**clause 35**).

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