



## Freedom of Information Amendment (Reform) Bill 2009

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Law and Bills Digest Section

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## Freedom of Information Amendment (Reform) Bill 2009

**Date introduced:** 26 November 2009

**House:** House of Representatives

**Portfolio:** Cabinet Secretary

**Commencement:** Clauses 1 to 3 of the Bill commence on Royal Assent. The main amendments are dependent on passage of the *Information Commissioner Act 2010*. Schedules 1, 3 (excluding item 15), and 4 to 7 commence immediately after commencement of section 3 of the Information Commissioner Act.<sup>1</sup> Schedule 2 and item 15 of Schedule 3 (which deal with the agency publication scheme) commence six months after the commencement of section 3 of the Information Commissioner Act.

**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 purpose of the Freedom of Information Amendment (Reform) Bill 2009 (the Bill), together with the accompanying Information Commissioner Bill 2009, is to introduce a new regime for access to government information.

### Background

#### FOI

Freedom of information (FOI), or the statutory right of access to government documents, is justified on the grounds that it encourages transparency and political accountability and discourages corruption and other forms of wrongdoing. At the federal level, the *Freedom of Information Act 1982* (the FOI Act) formed part of a broader package of administrative law reforms in the 1970s and 1980s, and was the first national legislation of its kind to be introduced into a country with a Westminster-style system of government. In subsequent years, similar legislation was enacted in all Australian states, the Australian Capital Territory and the Northern Territory. These FOI Acts had certain major features in common:

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1. The Information Commissioner Bill 2009 is still before Parliament, but if these Bills pass, they will be updated to 2010.

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- government is obliged to publish information about its activities in general, and about whether it holds certain kinds of documents
- every person has a legal right to obtain access to information in documentary form, which is in the possession of ministers or government agencies, subject to the operation of specific exemptions and exclusions. Exemptions can apply to specified agencies (for example, ASIO), or to categories of documents (such as documents dealing with international relations and security)
- there is a personal privacy dimension, which enables a person who has gained access to a document held by government that relates to his or her personal affairs to:
  - request that the document be amended in some respect
  - appeal against a refusal to amend the document, and
  - even if the appeal is unsuccessful, request that an annotation be attached to accompany the record when it is shown to any person, and
- there is a right of review in relation to most decisions made under the Acts, both internal review within the agency and further review by a body external to the decision maker.

### Reviews of FOI at federal level—The *Open Government* report

While there have been only minor changes to the federal FOI Act since 1982, there have been a plethora of reviews. The major review was the [Open Government](#) report by the Australian Law Reform Commission (ALRC) and the Administrative Review Council (ARC) in 1996.<sup>2</sup> That report made 106 recommendations, some of the more important being:

- creation of a statutory FOI Commissioner to monitor and improve the administration of the FOI Act and to provide assistance, advice and education to applicants and agencies about how to use, interpret and administer the Act
- revision of the Act's objects clause to promote a pro-disclosure interpretation of the Act
- rationalisation of the exemption provisions, and publications of guidelines, so that information is only withheld where this is in the public interest, and
- FOI charges should be compatible with the objects of the Act—a scale of charges should be determined by the FOI Commissioner, and access to an applicant's personal information should be provided free of charge.

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2. Australian Law Reform Commission, *Open government: a review of the federal Freedom of Information Act 1982*, ALRC Report 77, 1996, viewed on 21 February 2010. It is subsequently referred to as the *Open Government* report.

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The Howard Government did not formally respond to the *Open Government* report. However, two private members' Bills introduced by Australian Democrats' Senator Andrew Murray in [2000](#)<sup>3</sup> and 2003 took up several of its key recommendations. These Bills subsequently lapsed.

On 24 September 2007, the then Attorney-General, Philip Ruddock MP, announced that the ALRC would again conduct a review of FOI laws and practice, although with more limited terms of reference than the 1996 *Open Government* report. The ALRC was asked to consider the possible harmonisation of state and federal FOI laws, and ways of removing the FOI administrative burden on agencies.<sup>4</sup> That review was suspended by the current Government. The rationale for suspension being that a more appropriate course of action is to review the FOI Act after the Government's reforms come into operation.<sup>5</sup>

### Basis of policy commitment

The Australian Labor Party's 2007 election policy document, *Government information: restoring trust and integrity in government information*, foreshadowed significant changes to FOI legislation. It stated that a Labor Government would abolish conclusive certificates and implement the recommendations of the *Open Government* report. It would appoint a Freedom of Information Commissioner designed to make review processes more efficient and cheaper. It would also create an independent statutory Information Commissioner to act as a whole-of-government clearing house for complaints, oversight, advice and reporting for FOI and privacy matters.<sup>6</sup>

Part of that election commitment relating to the abolition of conclusive certificates, was implemented through the *Freedom of Information (Removal of Conclusive Certificates and Other Measures) Act 2009*.<sup>7</sup> The removal of conclusive certificates was, however, a relatively minor and straightforward part of the bigger picture of FOI reform.

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3. Freedom of Information Amendment (Open Government) Bill 2000.
  4. P Ruddock MP (then Attorney-General), *Australian Law Reform Commission to examine FOI laws*, media release, 24 September 2007.
  5. Senator John Faulkner (then Cabinet Secretary and Special Minister of State), *Freedom of information reform*, media release, 22 July 2008.
  6. K Rudd MP and Senator J Ludwig, *Government information: restoring trust and integrity in government information*, Election policy document, October 2007, pp. 5–7.
  7. The conclusive certificate mechanism enabled a Minister or official to sign a certificate, certifying that matter within the scope of an FOI request is covered by a particular exemption. The major feature of the 'conclusive certificate mechanism' was the limited scope of review available once a certificate had been issued. For further background the reader is referred to: M A Neilsen, *Freedom of Information (Removal of Conclusive Certificates and Other Measures) Bill 2008*, Bills Digest, no. 105, 2008–09, Parliamentary

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The release of the more substantial reforms, addressing the Government's main FOI election objectives, occurred on 24 March 2009 when the then Cabinet Secretary and Special Minister of State, Senator John Faulkner released the draft Information Commissioner Bill 2009 and the draft Freedom of Information Amendment (Reform) Bill 2009 for public consultation. Shortly after the release the Minister also wrote to departmental secretaries and agency heads explaining the reforms and asking for agency support in adopting a pro-disclosure culture. The letter stated:

These [FOI] reforms focus on:

- ensuring that the right of access to documents under the FOI Act is as comprehensive as it can be, limited only where a stronger public interest lies in withholding access to documents;
- giving greater weight to the role that the FOI Act serves in the pro-active publication of government information; and
- introducing structural reforms, including creating a new Office of the Information Commissioner, designed to provide a platform for system wide information policy development across government.

The proposed objects for the FOI Act [...] provide a clear statement of the Government's goals for a revitalised FOI Act. The new objects clause makes clear the reasons why giving access to information in the possession of the Government is important to good governance. Significantly, the reform proposals also include a new framework for the pro-active publication of information by agencies through information publication schemes.

These reforms, although important, will not deliver the openness and transparency so essential to accountability and to a robust democracy, unless FOI decision-makers embrace the disposition towards disclosure which informs the FOI Act reforms.

In anticipation of these reforms, the Government is asking secretaries and agency heads to take a lead role in facilitating the Government's policy objective of enhancing a culture of disclosure across agencies. This includes making it clear to FOI decision makers in your department or agency that the starting point for considering FOI requests should be a presumption in favour of giving access to documents.<sup>8</sup>

The period of public consultation on the exposure draft Bills concluded on 15 May 2009 and on 26 November, some six months later, the Rudd Government introduced the Bills

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Library, Canberra, 2006, viewed 20 February 2010,  
<http://www.aph.gov.au/library/pubs/bd/2008-09/09bd105.pdf>

8. J Faulkner, *Open government and freedom of information: letter to departmental secretaries and agency heads*, 30 April 2009, viewed 20 February 2010  
[http://www.dpmc.gov.au/consultation/foi\\_reform/index.cfm](http://www.dpmc.gov.au/consultation/foi_reform/index.cfm)

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into Parliament. The Government also released a table detailing the changes between these Bills and the exposure drafts.<sup>9</sup>

## Recent FOI reform in the States

The changes proposed in this Bill and the accompanying Information Commissioner Bill 2009 coincide with FOI review in a number of States and are seen as part of a significant shift towards more effective 'second generation' FOI laws. Tasmania, Queensland and NSW have enacted new legislation,<sup>10</sup> although to date, only the Queensland legislation is in force. This new State legislation shifts the emphasis from reactive release of information in response to applications towards proactive release of information. The two federal FOI Bills follows the State models in many respects.

## Committee consideration

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

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

Submissions to the Senate inquiry are referred to throughout this Bills Digest.

## Financial implications

The Explanatory Memorandum states that the amendments in this Bill will have minimal financial impact on Government revenue.<sup>11</sup> However an amount of \$19.5 million over four years has been allocated for the establishment and funding for the Office of the Information Commissioner. In addition, the resources for the existing Office of the Privacy Commissioner will be transferred to the Office of the Information Commissioner.<sup>12</sup>

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9. Department of Prime Minister and Cabinet, *Summary of main changes between the exposure draft and introduced FOI reform Bills*, November 2009. Some of these differences are referred to below, for example pp. 13, 18 and 23 of the Digest.
  10. The new legislation is also retitled: *Right to Information Act 2009* (Qld), *Government Information (Public Access) Act 2009* (NSW), *Government Information (Information Commissioner) Act 2009* (NSW) and *Right to Information Act 2009* (Tas).
  11. Explanatory Memorandum, Freedom of Information Amendment (Reform) Bill 2009, p. 3.
  12. Explanatory Memorandum, Information Commissioner Bill 2009, p. 2.

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## Key issues and position of significant interest groups

This Bill and the Information Commissioner Bill have generally been well received and supported, with many submissions to the Senate inquiry agreeing that the package contains an important set of reforms which address many of the key deficiencies in the current FOI Act and its administration.

For example the submission from **Australia's Right to Know**<sup>13</sup> states it supports the significant FOI reforms and is confident they will significantly improve the Australian public's access to Government information.<sup>14</sup>

The **Australian Law Reform Commission** also supports the bulk of the provisions of both Bills. In its view, the amendments represent a very positive step toward open and accountable government, and substantially implement the recommendations of the *Open Government* report.<sup>15</sup>

The **Commonwealth Ombudsman**, Professor John McMillan, states that the changes such as the new objects clause, the creation of the independent statutory Office of Information Commissioner, together with the new information publication scheme will shift the ground rules for information disclosure and publication. Professor McMillan believes 'we are about to enter a new and different phase in public administration'.<sup>16</sup>

The **Press Council** states that it is gratified to see that the Bill contains a number of positive aspects that foster greater access to information. Its submission praises the objects clause, and notes that the introduction of an information publication scheme, the new public interest test to be applied in regard to exemptions, plus the repeal of some of the categories of exemptions are welcome changes. It also notes that other changes that advance the cause of FOI include:

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13. The [Australia's Right To Know](#) (ARTK) campaign was launched in May 2007 by a coalition of 12 media organisations, including News Limited, the ABC, Fairfax, SBS, and AAP. The campaign's aim was to draw public attention to the tightening of restrictions on journalists and free speech in Australia. As part of its campaign, the ARTK commissioned an audit report into the state of free speech, which concluded that FOI performance is patchy across all governments.
  14. Australia's Right to Know, *Submission to the Standing Committee on Finance and Public Administration Legislation: Inquiry into Freedom of Information Amendment (Reform) Bill 2009 and Information Commissioner Bill 2009*, 2010.
  15. Australian Law Reform Commission, *Submission to Senate Standing Committee on Finance and Public Administration inquiry into the Freedom of Information Amendment (Reform) Bill (Cth) and the Information Commissioner Bill 2009 (Cth)*, 2010.
  16. J McMillan (Commonwealth Ombudsman), *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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- that private sector providers of services to the Commonwealth will come within the scope of the legislation<sup>17</sup>
- that applicants are no longer required to apply for internal review of their application prior to applying for external review and can seek review after 30 days' deemed refusal, and
- that the public interest test makes it an irrelevant consideration that any person may misinterpret or not understand the document.

Other submissions also welcomed these specific reforms.

However, despite this generally positive reaction, a number of submissions from FOI advocates have also questioned some aspects of the Bill and suggest that in some areas the reforms do not go far enough.

Some of the more common concerns relate to the exemptions and exclusions and these are referred to below. Further comment on specific provisions is included in the Main Provisions section of the Digest. Comment on the new Information Commissioner role is provided in the Bills Digest for the Information Commissioner Bill 2009.

## Exemptions

In 1996, the *Open Government* report concluded that 'the exemption provisions [in the FOI Act] are unclear, open to misuse by agencies and, because of their prominence, tend to overwhelm the purpose of the Act'.<sup>18</sup>

The Bill makes significant amendments relating to the access and exemption provisions of the FOI Act. For example, the Bill makes it clear that the starting point for considering FOI requests is the general rule that documents should be disclosed unless they are (i) exempt documents or (ii) conditionally exempt documents and it is contrary to the public interest for the documents to be disclosed. Other important changes to this part of the FOI Act included in the Bill are the introduction of a list of public interest factors favouring disclosure, the repeal of three exemption categories, and the recasting of a number of blanket exemptions as conditional exemptions.<sup>19</sup>

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17. Note there are limits on this extension. See p. 34 below.

18. Australian Law Reform Commission, *Open Government* report quoted in the New South Wales Council for Civil Liberties, *Submission of the New South Wales Council for Civil Liberties to the Senate Finance and Public Administration Committee Inquiry into the Freedom of Information Amendment (Reform) Bill 2009 and the Information Commissioner Bill 2009*, p. 4.

19. The main provisions section of this Digest provides more information.

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## Comment

The **New South Wales Council of Civil Liberties** (CCL) and other submissions suggest that ideally the public interest test should be applied to all exemptions in the Bill. CCL states:

Incorporating a single overarching public interest test into all exemptions would provide greater clarity, and foster a rethinking by government agencies about the tension between the public interest in disclosure and the concerns that are reflected in exemptions.

It is true that in some cases it is obvious that the public interest supports exemptions. But it should not be thought that this justifies making the exemptions absolute. For making all exemptions subject to an overarching public interest test delivers a symbolic benefit, making it clear that the key issue is not whether an exemption applies, but where the balance of public interest lies. To use a popular phrase, it sends a message.<sup>20</sup>

**Professor Moira Paterson**, Law Faculty, Monash University, comments that redesign of the exemption regime has a number of very positive features, although it arguably does not go far enough to address issues that inhibit the FOI Act's potential to make government agencies more accountable for their activities. In relation to the absolute exemption for Cabinet documents, Professor Paterson (and others) suggest that this exemption provision should be subject to some form of public interest test (as is the case in the United Kingdom and New Zealand) which serves to ensure that documents are not withheld for longer than necessary to protect the mechanism of collective responsibility.<sup>21</sup> Failing that, she suggests it would be appropriate to include a time limit of 10 years as is currently used in other FOI legislation. In Paterson's view, the de facto time limit of 20 years (resulting from the proposed changes to the open access period in the *Archives Act 1983*) is excessively long.<sup>22</sup>

## Other exclusions—Schedule 2 agencies, parliamentary departments

In addition to exempt documents, there are also some agencies that are currently exempt from the FOI Act entirely (for example ASIO and ASIS) and other agencies that are exempt in relation to some material (for example, Telstra is exempt in respect of documents relating to commercial activities).<sup>23</sup>

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20. New South Wales Council for Civil Liberties, op. cit., p. 4.

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

22. Ibid. See pp. 16–17 of the Digest for the amendments to the Archives Act.

23. See section 7 and Schedule 2 to the FOI Act.

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## Comment

The list of exempt agencies (as set out in Schedule 2 of the FOI Act) remains essentially untouched by the Bills and indeed has been slightly expanded.<sup>24</sup> Many submissions argued that these Schedule 2 agencies should be pared back in some way.

For example **CCL** submits that agencies currently listed in the Schedule should be required to explain why their exclusion is warranted, and why conditional exemptions and the public interest test would not protect documents which should be kept confidential.<sup>25</sup>

The **ALRC** submission notes that the *Open Government* report had recommended that the intelligence agencies should remain in Schedule 2 but that all other agencies listed should be required to demonstrate to the Attorney-General within 12 months that they merited exclusions from the operation of the Act. The ALRC states that it is not aware that this happened.<sup>26</sup>

**Professor Moira Paterson** agrees that Schedule 2 exclusions need reform:

I would argue as a matter of principle that it is preferable to redraft or expand exemption provisions to provide appropriate exemption for documents that need to be withheld from access rather than excluding specific bodies from the Act either totally or in relation to specified documents.

Removing a body entirely from coverage under the Act has the consequence that all aspects of its activities are removed from public scrutiny irrespective of whether or not their disclosure is likely to cause harm.

The exclusion of bodies based on national security concerns has assumed greater significance in light of the recent increases in the powers of security bodies post September 11 and the attendant importance of ensuring accountability for their activities. [...] Increases in the surveillance powers of security and law enforcement bodies add to the imbalance in power between citizens and their governments and it is therefore especially important that such bodies are subject to scrutiny to ensure that they are not abusing their powers.<sup>27</sup>

The **ALRC** and other submissions also question why parliamentary departments have not been brought within the scope of the FOI Act. As the ALRC notes, the *Open Government* report recommended that parliamentary departments should be brought within the scope of

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24. See p. 36 of this Bills Digest.

25. New South Wales Council for Civil Liberties, *op. cit.*, p. 4.

26. Australian Law Reform Commission, *Submission*, *op. cit.*, p. 6.

27. M Paterson, *Submission*, *op. cit.*

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the FOI Act on the basis that documents that warrant protection would be adequately protected by the exemption provisions (for example section 46, parliamentary privilege).<sup>28</sup>

The ALRC also notes that the *Open Government* report recommended that the secrecy provisions exemption<sup>29</sup> be removed and that this has not happened.<sup>30</sup>

### Exemption relating to trade secrets and commercially valuable information

The Bill, unlike the exposure draft, proposes that documents containing trade secrets or commercially valuable information should be unconditionally exempt, that is, not subject to the public interest test (**proposed section 47**).<sup>31</sup> Many submissions were critical of this change. For example, Nigel Waters from the **Cyberspace Law and Policy Centre** states that while a case could perhaps be made for a very strictly defined category of trade secrets, the other concept of ‘commercially valuable information’ is far too imprecise to be the grounds for a blanket exemption, and invites abuse both by commercial entities mentioned in government documents and by agencies seeking excuses not to release requested information.<sup>32</sup> The submission continues:

The prevalence of outsourcing and of private-public partnerships means that ‘commercially valuable information’ will routinely be included in government documents which should, for accountability reasons, be at least potentially accessible. The qualification in s. 47 that the commercial value of the information would have to ‘be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed’ is an insufficient protection against inappropriate application. By definition, the value of any commercial information may be diminished by exposure – that in itself should not be grounds for unconditional exemption.<sup>33</sup>

The **Law Council** also argues that an absolute exemption may go too far. It points to Queensland and NSW FOI models and recommends that the Bill should require that documents which reveal trade secrets and/or valuable commercial information should not

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28. Australian Law Reform Commission, Submission, op. cit., p. 6.

29. Contained in Schedule 3 of the FOI Act.

30. Australian Law Reform Commission, Submission, op. cit., p. 8.

31. By comparison, the exemption in the exposure draft was not absolute, and trade secret/commercially valuable information could be disclosed in the public interest. The Government’s rationale is that the change was made in response to submissions on the exposure draft Bill. Department of Prime Minister and Cabinet, *Summary of main changes between the exposure draft and introduced FOI reform Bills*, November 2009, p. 3. Available on the Senate inquiry website.

32. 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. 8.

33. Ibid.

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be released unless it can be shown that, on balance, it is in the public interest to disclose the relevant documents or information.<sup>34</sup>

## Main provisions

### Schedule 1—Objects of the FOI Act

**Item 1** repeals and replaces the objects clause in the FOI Act. The new objects clause (**proposed subsection 3(1)**) states that the objects of the Act are to give the Australian community access to information held by the Commonwealth Government by:

- requiring agencies to publish the information, and
- providing for a right of access to documents.

The rationale for this access is:

- to promote representative democracy by:
  - increasing public participation in government processes with a view to promoting better-informed decision-making, and
  - increasing scrutiny, discussion, comment and review of government activity, and
- to increase recognition that government information is to be managed for public purposes and is a national resource (**proposed subsections 3(2)** and **3(3)**).

Access to government information under the FOI Act is to continue to be provided promptly and at the lowest reasonable cost (**proposed subsection 3(4)**).

**Proposed section 3A** confirms the existing situation that the Act does not limit or prevent disclosure of government information and documents. In other words, an agency may disclose information without a request under the FOI Act, including information which would be exempt under the Act.<sup>35</sup> This provision replaces **existing section 14** which is repealed by **item 2**.

### Schedule 2—Publication of Australian Government information

**Item 3** of Schedule 2 to the Bill repeals and replaces **Part II** of the FOI Act and introduces a new information publication scheme for Commonwealth agencies that are subject to the FOI Act.

**Proposed section 8** sets out the information that must be published. Each agency must prepare and publish a plan showing how it proposes to implement its publication scheme

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34. 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. 5.

35. Explanatory Memorandum, p. 5.

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(**proposed subsection 8(1)** and **paragraph 8(2)(a)**). Like the existing scheme, an agency must publish a range of information, including details of the structure and functions of the agency and information contained in annual reports. There are also new types of information that must be published. For example, details of statutory appointments must be published (other than APS employees) (**paragraph 8(2)(d)**), operational information<sup>36</sup> of an agency must be published (**paragraph 8(2)(j)**), and agencies are required to publish information in documents to which access is routinely given through FOI requests (**paragraph 8(2)(g)**). This last requirement is qualified, so that publishing is not required if it is considered unreasonable to publish any of the following:

- personal information about any individual
- information about the business or professional affairs of any person, or
- any other information of a kind determined by the Information Commissioner through a legislative instrument.

In relation to these qualifications, the Government's stated rationale is:

Around 85-90 percent of FOI requests made annually relate to requests for access to personal information. In many cases the applicant will be given access to their own personal or business information but that information would not be released to third parties. An applicant may also receive access to another person's personal or business information because that person consents to disclosure to the applicant. These are examples where it will normally be unreasonable to publish the information even though the information is in a class that is regularly disclosed. A discretionary power is given to the Information Commissioner to exclude other classes of information from this aspect of the publication scheme requirements if it would be unreasonable to publish the information.<sup>37</sup>

**Proposed section 8D** sets out how and to whom information must be published. There is a new requirement for agencies to publish information on their websites, by either making the information available for downloading, by providing links to other websites, or by providing details on the website of how the information may be obtained (**proposed subsection 8D(3)**). Charges can only be imposed where the information is not directly accessible by downloading it from the agency's website (or another website) and the charge is to reimburse the agency for specific reproduction or incidental costs (**proposed subsection 8D(4)**). A note reiterates that documents made available through individual

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36. 'Operational information' is defined in **proposed section 8A** as information held by the agency to assist the agency to perform or exercise its functions or powers in making decisions or recommendations affecting members of the public—for example, the agency's rules, guidelines, practices and precedents. Proposed section 8A equates to existing subsection 9(1).

37. Department of Prime Minister and Cabinet, Summary of main changes, op cit., p. 3.

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FOI requests (with some exceptions)<sup>38</sup> must then be made available to the general public through the agency's website.

The new Information Commissioner is to have a role in assisting agencies with their publishing obligations (**proposed section 8E**) and also in reviewing and monitoring agencies' compliance with the information publication scheme (**proposed section 8F**). Agencies and the Information Commissioner must work together to review the operation of the scheme from time to time and at least every five years.

**Proposed section 9A** requires agencies to have regard to the objects of the Act and to Information Commissioner guidelines in meeting their publishing obligations.

### Schedule 3—Exemptions

#### Part 1—*Archives Act 1983*—Open access period and exemptions

The *Archives Act 1983* has been drafted to dovetail with the FOI Act. Like the FOI Act, it contains detailed exemption provisions, and rights to seek review by the Administrative Appeals Tribunal (AAT).<sup>39</sup>

Under the *Archives Act 1983*, the National Archives of Australia is responsible for providing that all Commonwealth records, other than exempt records, are to be made available to the public when they are in the open access period. Records other than Cabinet notebooks are in the open access period when a period of 30 years has elapsed since they came into existence. The open access period for Cabinet notebooks is 50 years after they came into existence. **Part 1** of Schedule 3 of the Bill proposes changes to these time frames.

**Item 2** repeals and replaces **subsection 3(7)** substituting a new definition for when a record is in the 'open access period'. It is set out in table form and its effect is that the open access period is brought from 30 years to 20 years for most Commonwealth records after a 10 year transition period commencing from 1 January 2011 and ending 31 December 2020.

**Item 3** repeals and replaces **subsection 22A(1)** substituting a new definition for when a record that is a Cabinet notebook is in the 'open access period'. The effect is to bring forward the open access period for Cabinet notebooks from 50 years to 30 years after a 10 year transition period commencing from 1 January 2011 and ending 31 December 2020.

**Items 4 to 6** are consequential amendments to the proposal to bring forward the open access period for most records from 30 years to 20 years. For example, **item 4** amends

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38. The exceptions are set out in **proposed section 11C**.

39. M. Paterson, *Freedom of Information and Privacy in Australia*, LexisNexis Butterworths, 2005, p. 234.

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**paragraph 26(1)(a)** so that it is an offence to alter a record that has been in existence for more than 15 years (instead of 25 years). The reduction by 10 years is consistent with the proposal to bring forward the open access period by 10 years at item 2.

Under the *Archives Act 1983*, the types of records that can be exempt are numerous and are set out in section 33. They include, for example, information or matters communicated in confidence by a foreign government to the Commonwealth Government, and disclosure would constitute a breach of that confidence (**paragraph 33(1)(b)**). **Item 35** repeals and replaces this paragraph so that where a foreign entity advises that the document is still confidential, the decision-maker (the Archives) must be satisfied that a reasonable basis exists for maintaining the confidence of the information in order to invoke the exemption.

## Part 2—FOI Act—Main exemption amendments

### Overview

**Part 2 of Schedule 3** makes amendments relating to the access and exemption provisions of the FOI Act. The amendments include:

- a new single form of public interest test which is weighted towards disclosure
- the new public interest test is to be applied to additional exemption provisions, specifically the economy, research and personal information exemptions and in part to the business affairs exemption
- repeal of three exemption categories—Executive Council documents, documents arising out of companies securities legislation, and documents relating to the conduct by an agency of industrial relations, and
- re-organisation of Part IV of the FOI Act into two categories: exemptions and conditional exemptions. The conditional exemptions are subject to a public interest test, other exemptions are not.

### Access requests for documents and the public interest test

**Item 14** inserts **proposed sections 11A and 11B** and is a key amendment.

**Proposed section 11A** sets out the rule that where a valid request for a document has been made and the relevant charges have been paid, an agency or Minister must give access to the document except if the document is an exempt document. **Proposed subsections 11A(1) to 11A(4)** essentially replicate the existing rule in section 18 (which is to be repealed by **item 16**). However **proposed subsection 11(5)** is new and introduces a single form of public interest test that applies to ‘conditional exemptions’. It provides that an agency or Minister must give the person access to the document if it is conditionally exempt at a particular time unless access to the document at that time would, on balance, be contrary to the public interest.

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**Proposed section 11B** sets out the public interest test to be applied to conditionally exempt documents. Factors *favouring* access include whether the document would:

- promote the objects of the Act
- inform debate on matters of public importance
- promote effective oversight of public expenditure, or
- allow a person to access his or her own personal information (**proposed subsection 11B(3)**).

Factors that must *not* to be taken into account include:

- whether access to the document would result in embarrassment to the Commonwealth Government, or cause a loss of confidence to the Government
- access to the document could result in any person<sup>40</sup> misinterpreting or misunderstanding the document
- the author of the document is or was of high seniority in the agency to which the request for access is made, or
- access to the document could result in confusion or unnecessary debate (**proposed subsection 11B(4)**).

Both lists are non-exhaustive, meaning other relevant factors may be considered (**proposed subsection 11B(2)**).

In working out whether access to any document would on balance be contrary to the public interest, an agency or Minister must have regard to any Information Commissioner guidelines (**proposed subsection 11B(5)**). The Information Commissioner will have power to issue guidelines under **proposed section 93A (item 57, Schedule 4)**.

The Bill does not list factors which would favour not giving access for the purposes of the public interest test. However, as the Explanatory Memorandum explains, some public interest conditional exemptions include criteria which require a finding of harm, such as disclosure would, or could reasonably be expected to, cause damage to certain interests, or would have a substantial adverse effect on certain interests, or would or could reasonably be expected to, prejudice certain interests. Where a decision-maker is satisfied that an initial harm threshold is met, that finding will be a factor against giving access to a document.<sup>41</sup>

**Item 15** inserts **proposed section 11C**. It requires an agency or Minister to publish information which has been disclosed in response to an FOI request, within 10 working

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40. Note that the exposure draft Bill was narrower and referred only to *the applicant* misinterpreting or misunderstanding the document. The variation implements a suggestion in a submission.

41. Explanatory Memorandum, pp. 13–14.

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days from when a person is given access to the document. The requirement does not apply when the information that is given to a person is:

- personal information about any person, if it would be unreasonable to publish the information
- information about the business, commercial, financial or professional affairs of any person, if it would be unreasonable to publish the information, or
- other information of a kind determined by the Information Commissioner if it would be unreasonable to publish the information.

These limitations on publication align with the limitations that apply under the information publication scheme.<sup>42</sup> There is an additional limitation (**proposed paragraph 11C(d)**) which recognises that in some cases it will not be reasonably practicable to publish because of the extent to which personal or business information has been deleted (whether because of the resource implications or because the end result may not hold sufficient public interest).<sup>43</sup> The charges and web publication requirements are similar to those under the publication scheme. The provision will also commence at the same time as the Part II publication scheme—six months after commencement of the Information Commissioner Act.

**Item 18** amends section 25, which deals with the right to neither confirm nor deny the existence or non-existence of certain documents that would be exempt. Such a right currently exists in relation to documents affecting national security, defence or international relations and documents affecting relations with States. **Item 18** amends **section 25** with the effect that this right would no longer exist in relation to exempt documents affecting relations with States.<sup>44</sup>

**Items 19 and 20** insert **proposed paragraph 26(1)(aa)** imposing an additional notice requirement when refusing an FOI request. If access to a conditionally exempt document is to be refused the written notice of the decision must include the public interest factors taken into account in making the decision to refuse access. These items implement recommendation 39 of the *Open Government* report.

### **Consultation with third parties for documents affecting Commonwealth-State relations, business affairs and personal affairs**

Under the FOI Act there are a number of circumstances where consultations with third parties are required to occur before the release of documents. In particular, State Governments, commercial organisations and private individuals must be consulted where

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42. see p. 14–16 above.

43. Department of Prime Minister and Cabinet, Summary of main changes, op cit., p. 4.

44. The Explanatory Memorandum at p. 15 states that this item implements recommendation 42 of the *Open Government* report.

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their interests may be affected by the release of documents (sections 26A, 27 and 27A).

**Item 21** repeals and replaces these sections in the following ways:

- **proposed section 26A** (consultation requirements regarding documents likely to affect Commonwealth-State relations) and **proposed section 27A** (consultation requirements regarding documents affecting a third party's personal affairs) are to be redrafted to make them consistent with the new terminology of conditional exemption and the single public interest test. The substance of the provisions is not changed, and
- **proposed section 27** (dealing with consultation requirements relating to documents affecting a third party's business affairs) is modified more substantially. It provides that consultation with relevant third parties is required where it appears to the agency or Minister that the business *might reasonably wish* to argue that the document is exempt under the that the trade secrets exemption or conditionally exempt under business affairs exemption. In contrast, the wording of existing section 27 makes consultation with third parties almost mandatory.<sup>45</sup> **Proposed subsection 27(3)** provides a non-exhaustive list of matters to be considered in deciding whether to consult. These qualifications already exist in section 27A in relation to consultation where a third party's personal affairs might be affected.

#### **Amendments to the Part IV exemption provisions**

Part IV of the FOI Act sets out the exemption provisions and is amended by **items 22 to 33** of Schedule 3 of the Bill.

**Item 22** inserts a **new Division 1** into Part IV of the FOI Act containing **proposed sections 31A and 31B**.

**Proposed section 31A** contains a table providing a summary on how the FOI Act applies to documents that are exempt, conditionally exempt or contain exempt matter under the Act.

**Proposed section 31B** defines when a document is 'exempt' for the purposes of Part IV of the FOI Act. A document is 'exempt' if:

- it is an exempt document under Division 2, or
- it is conditionally exempt under Division 3, and access to the document would, on balance, be contrary to the public interest for the purposes of subsection 11A(5).

**Items 24 to 33** rearrange the exemptions in Part IV so that exemptions *not* subject to the proposed single public interest test are grouped together into Division 2 exemptions, and exemptions that *are* subject to the test are grouped together into Division 3 public interest

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45. The Explanatory Memorandum at p. 16 explains that under the existing provision, consultation is necessary even for a decision to give access to simple payment receipts, such as taxi receipts.

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conditional exemptions. These items also repeal a small number of exemptions and increase the number of conditional exemptions that are subject to the public interest test.

### **Commonwealth-State relations exemption**

**Section 33A**, containing the exemption for documents affecting relations with States is repealed (**item 26**) and becomes **proposed section 47B (item 33)**. It is a conditional public interest exemption and so fits within Division 3.

### **Executive Council documents exemption**

**Item 26** also repeals **section 35**, the Executive Council documents exemption. This exemption is *not* replaced in the Bill, the justification for repeal being that Executive Council documents that warrant exemption can be withheld under other exemption provisions such as the exemption for personal privacy or the exemption for international relations.<sup>46</sup>

### **Exemption for documents arising out of companies and securities legislation**

The exemption for documents arising out of companies and security legislation found in existing section 47 is repealed (**item 32**). There is no replacement provision.<sup>47</sup>

### **Exemption for documents affecting financial or property interests of the Commonwealth**

The exemption addressed in **section 39** (documents affecting financial or property interests of the Commonwealth) is repealed and reintroduced in **proposed section 47D (item 33)** in Division 3. It remains subject to a public interest test.

### **Exemption for documents concerning certain operations of agencies**

**Section 40** (documents concerning certain operations of agencies) is repealed by **item 27** and becomes **proposed section 47E (item 33)**. It is a conditional public interest exemption so fits within Division 3. It is also modified slightly in that one ground for exemption is removed, namely where disclosure would, or could reasonably be expected to have a substantial adverse effect on the conduct by or on behalf of the Commonwealth or an agency of industrial relations. The rationale for this removal is that other exemptions would be available if protection from disclosure is needed.<sup>48</sup>

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46. The Explanatory Memorandum states that this implements recommendation 50 of the *Open Government* report.

47. This implements recommendation 72 of the *Open Government* report.

48. *Open Government* report, quoted in the Explanatory Memorandum, p. 20.

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### Exemptions for documents affecting personal privacy

**Section 41**, containing an exemption for documents affecting personal privacy, is also repealed by **item 27**. It is reintroduced as **proposed section 47F (item 33)** and is modified to become a conditional public interest exemption within Division 3. **Proposed subsection 47F(2)** provides a non-exhaustive list of matters to be considered before disclosure.

### Exemption for documents relating to research

**Section 43A**, the exemption for documents relating to research which can be claimed by the Commonwealth Scientific and Industrial Research Organisation and the Australian National University in certain circumstances, is repealed by **item 29**. It becomes **proposed section 47H (item 33)** and is modified to become a conditional exemption subject to the public interest test.

### Internal working documents exemption (deliberative processes exemption)

**Section 36**, containing the internal working documents exemption, is repealed (**item 26**) and becomes **proposed section 47C (item 33)**. It is a conditional public interest exemption so fits within Division 3. It is also renamed the deliberative processes exemption.

### Exemption for documents affecting the economy

The exemption for documents affecting the economy (existing **section 44**) is repealed and reinserted as **proposed section 47J** in Division 3 (**item 33**). It is modified to be made a conditional exemption subject to the public interest test and the wording is also updated. A document is conditionally exempt under this provision if its disclosure under the Act would, or could be reasonably expected to, have a substantial adverse effect on Australia's economy by:

- influencing a decision or action of a person or entity, or
- giving a person (or class of persons) an undue benefit or detriment in relation to his or her business by providing premature knowledge of proposed or possible action or inaction of a person or entity.

### Legal professional privilege exemption

**Item 28** amends the exemption for documents covered by legal professional privilege contained in section 42. **Proposed subsection 42(2)** introduces a new qualification and

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has the effect of confirming that the legal professional privilege exemption is not available if privilege has been waived.<sup>49</sup>

### **Exemption for documents relating to business affairs, trade secrets and commercially valuable information**

Existing section 43 contains an exemption for:

- documents that would disclose trade secrets or any other information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed, or
- documents related to business affairs.

**Item 29** repeals **section 43**. These exemptions are retained but split into two new and different provisions namely:

- **proposed section 47G (item 33)** which retains the exemption for documents dealing with business affairs. The business affairs exemption becomes a conditional exemption subject to the public interest test, and
- **proposed section 47 (item 32)** which retains the exemption for documents that would disclose trade secrets or commercially valuable information. These would be blanket exemptions not subject to the public interest test and therefore are slotted into Division 2.

#### Comment

Note that the trade secrets and commercially valuable information exemptions were to be conditional exemptions in the exposure draft Bill. The Government states that the variation implements a suggestion made in submissions on the draft Bill,<sup>50</sup> although some submissions to the current Senate Committee inquiry query this change. Professor Moira Paterson, for example, states there are very good reasons for retaining the original version in the draft model Bill and she rejects the argument that trade secrets always warrant protection from disclosure even where there are strong public interest factors favouring their disclosure.<sup>51</sup> Professor Paterson provides examples to indicate that the blanket exemption could have the effect of potentially operating to protect information of a trivial character in circumstances where the agency has an interest in non-disclosure.<sup>52</sup> The Law

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49. The Explanatory Memorandum at p. 18 states that this implements recommendation 67 of the *Open Government* report.

50. Department of Prime Minister and Cabinet, Summary of main changes, op cit., p. 4.

51. M Paterson, Submission, op cit.

52. Ibid.

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Council also notes that while it had recommended change to this provision, it is concerned that it has become a blanket exemption.<sup>53</sup>

### Cabinet documents exemption

**Item 26** also repeals and replaces **section 34**, the Cabinet documents exemption provision. The new exemption remains as a blanket exemption but is narrower in scope due to the introduction of a dominant purpose test. **Proposed section 34** will apply the exemption to:

- Cabinet submissions or submissions that are proposed for submission to Cabinet but are never submitted (**subparagraph 34(1)(a)**)
- official records of Cabinet (**subparagraph 34(1)(b)**)
- a document that is a briefing prepared for a Minister on a Cabinet submission (**proposed paragraph 34(1)(c)**), and
- a document that is a draft of a Cabinet submission, official record of the Cabinet or a briefing prepared for a Minister on a Cabinet submission (**proposed paragraph 34(1)(d)**).

However, A Cabinet submission will only be exempt if it was brought into existence for the *dominant purpose* of submission to the Cabinet for its consideration. A briefing will only be exempt if it was brought into existence for the *dominant purpose* of briefing a Minister on a Cabinet submission. **Proposed subsection 34(4)** further clarifies this limitation by stating that a document is not an exempt document because it is attached to a Cabinet submission, briefing or document containing information that would reveal a Cabinet deliberation or decision.

Other parts of the Cabinet exemption provision remain the same as in the present exemption. For example, copies or extracts of exempt documents will be exempt (**proposed subsection 34(2)**), official publications of decisions of Cabinet (eg media releases) will not be exempt (**proposed subsection 34(5)**) and purely factual information will not be exempt unless disclosure of the information would reveal an undisclosed Cabinet deliberation or decision (**proposed subsection 34(6)**).

## Schedule 4—Review of decisions and Information Commissioner amendments

### Overview

**Schedule 4** amends the FOI Act and inserts new provisions dealing with review of decisions. Amongst other things it:

- amends the provisions dealing with internal agency review and reorganises them into a separate **new Part VI**

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53. Law Council of Australia, Submission, op cit., p. 5.

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- introduces a new layer of external merits review to be undertaken by the Information Commissioner (**new Part VII**)
- makes internal agency review optional, meaning internal review will not be a pre-requisite to external review by the Information Commissioner
- reorganises the provisions dealing with AAT review into a **new Part VIIA, and**
- gives the Information Commissioner the function of investigating actions by an agency relating to the handling of FOI matters under the Act (**new Part VIIB**).

### ‘Access refusal decisions’ and ‘access grant decisions’

**Item 34** introduces new terms to describe the types of decisions that are subject to review. These terms are relied on in the provisions dealing with internal review, Information Commission review and AAT review.

**Proposed section 53A** defines an ‘*access refusal decision*’ and is concerned with the review rights for applicants whose FOI requests have been refused. The types of decisions that can be reviewed are essentially the same as in the existing provisions,<sup>54</sup> including for example, decisions refusing to give access, decisions to give only partial access and decisions refusing to amend or annotate records of personal information in accordance section 48 applications.

**Proposed section 53B** defines an ‘*access grant decision*’ and is concerned with the review rights for certain third parties affected by a decision to give access to a document.<sup>55</sup> ‘Access grant decisions’ are decisions where there is a right of review by a State concerning a decision to give access to State-related information; right of review by a person or organisation concerning a decision to give access to business information; and right of review by a person concerning a decision to give access to personal information.

### Internal review of decisions—New Part VI

Section 54, the existing provision dealing with internal agency review, is repealed (**item 34**). The replacement provisions (**proposed sections 54 to 54E**) are reworded and re-organised but have substantially the same effect with some modifications to take account of the new role for the Information Commissioner in reviewing decisions and dealing with complaints.

**Proposed section 54** allows applicants to apply for agency review of access refusal decisions. **Proposed section 54A** allows affected third parties to apply for agency review of access grant decisions.

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54. Existing subsection 54(1) which is also repealed by **item 34**.

55. **Proposed section 53C** defines ‘affected third parties’.

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Other aspects of the new internal review provisions include:

- no internal review applications can be made for decisions made by a Minister or made personally by a principal officer of an agency (**proposed subsections 54(1) and 54A(1)**)
- **proposed section 54B** deals with the application for review— the requirement to pay an application fee for internal review is not preserved.
- a decision on an internal review is to be made within 30 days after the application was received by an agency (**proposed subsection 54C(3)**)
- an agency is deemed to have affirmed the original decision if the agency has not given notice of a decision on an internal review application within 30 days of receiving the application (**proposed section 54D**). A deemed affirmation decision means that an applicant may directly make an application for Information Commissioner review (**proposed section 54Y**)
- the Information Commissioner is given discretionary power to extend the period for making an internal review decision, upon application from an agency (**proposed subsections 54D(3) to (5)**), and
- in contrast to the existing provisions, an applicant does not have to apply for internal review before applying for external review by the Information Commissioner— the stated rationale being that agencies should be encouraged to make the best decision at first instance.<sup>56</sup>

Existing **section 56** which deals with applications to the AAT regarding delayed decisions and **section 57** which deals with complaints to the Ombudsman are both repealed by **item 34**. The repeal is a consequence of the proposal to give the Information Commissioner the functions of reviewing FOI decisions and investigating complaints about the handling of FOI requests.<sup>57</sup>

### Review of decisions by the Information Commissioner—New Part VII

**Proposed Part VII**, also inserted by **item 34**, sets up the process for enabling review of decisions by the Information Commissioner.

#### Information Commissioner reviewable decisions

**Proposed section 54L** establishes the right for an applicant (who has requested access to a document) to apply to the Information Commissioner for review in respect of the access refusal decisions listed in **proposed subsection 54L(2)**. Information Commissioner

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56. Explanatory Memorandum, p. 27.

57. The new provisions are described below at p. 31–32.

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review is generally available for all decisions that are currently amenable to AAT review under subsection 55(1) of the FOI Act.

#### Optional internal review

In contrast to the existing Act, an applicant is not required to apply to an agency for internal review before making an application for review by the Information Commissioner (**proposed paragraph 54L(2)(a)**) Optional internal review was inserted following submissions made on the exposure draft Bill.<sup>58</sup> Submissions to the Senate inquiry have commented favourably on this change.

**Proposed section 54M** establishes the right for certain third parties (who are affected by a decision to give access to a document) to apply for Information Commissioner review. The access grant decisions which are amenable to Information Commissioner review listed in **proposed subsection 54M(2)** are the same decisions that are presently subject to AAT review.<sup>59</sup> Internal review is not a pre-requisite for Information Commissioner review.

#### Review applications to the Information Commissioner

**Proposed section 54N** sets out the content required for Information Commissioner review applications. Amongst other things, the applicant is required to include a copy of the decision made by an agency or Minister (**proposed subsection 54N(1)**), and the Office of the Information Commissioner is to provide assistance to an applicant to prepare a valid application (**proposed subsection 54N(3)**).

**Proposed section 54P** requires an agency or Minister to notify affected third parties if an FOI applicant seeks review of a decision to refuse access to the third party information. However, an agency or Minister is not required to notify the affected third party if the Information Commissioner orders that it is not appropriate to do so in the circumstances. **Proposed section 54Q** sets out these circumstances, which include prejudicing the conduct of a criminal investigation.

#### Time-frames

**Proposed section 54S** deals with the time periods within which an application must be made for Information Commissioner review—60 days from the time of receiving notice of a decision to refuse an FOI request; or in the case of affected third parties, 30 days from the date of the decision or 30 days of receiving notice that an agency or Minister proposes to give access to a document containing information related to the third party.

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58. Department of Prime Minister and Cabinet, Summary of main changes, op cit.

59. See existing sections 58F, 59 and 59A which are proposed for repeal by **item 40**.

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**Proposed section 54T** gives the Information Commissioner discretionary power to extend the time for making an application for Information Commissioner review if the Commissioner is satisfied that it is reasonable to do so in all the circumstances.

Information Commissioner decision to review

**Proposed sections 54U to 54Y** deal with the decision to undertake a review. Under **proposed section 54W**, the Information Commissioner has a discretion not to undertake a review or not to continue a review, in certain limited circumstances, namely where the application is misconceived or vexatious; the review applicant is uncooperative or cannot be contacted; where the Information Commissioner is satisfied the reviewable decision should be reviewed by the AAT; or where the applicant fails to comply with a direction of the Information Commissioner (**proposed paragraphs 54W(a) to 54W(c)**).

Procedure in Information Commissioner review

**Proposed sections 54Z to 55J** deal with Information Commissioner review procedures. **Proposed section 55** is a central provision and establishes that the Information Commissioner may review a decision by considering the documents or other material lodged without holding a hearing; may conduct a review in whatever way considered appropriate (for example dispute resolution processes); and is to use as little formality and technicality as possible. While a hearing is not required, one can be conducted and the parties to a review can also request one (**proposed section 55B**). It is intended that most applications will be determined on the papers (without a hearing).<sup>60</sup> Parties to proceedings are the review applicant, the principal officer of the agency or the Minister, and affected third parties, including those third parties who have special approval from the Commissioner under **proposed subsection 55A(3)**. A party may be represented by another person at a hearing (for example, a legal representative) (**proposed section 55C**).

The effect of **proposed section 55F** is that the Information Commissioner has discretion to resolve an application, in whole or in part, by giving effect to terms reached in agreement between the parties.

Under **proposed section 55H**, the Information Commissioner may at any time during a review refer a question of law to the Federal Court for determination.

Information Commissioner decision on review

**Proposed sections 55K to 55Q** deal with the decision-making powers of the Information Commissioner. **Proposed section 55K** establishes the power for the Information Commissioner to determine review applications—the Commissioner can make a fresh decision, affirm the decision or vary the decision of the agency or Minister. These are full

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60. Explanatory Memorandum, p. 32.

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merits review powers and are similar to the powers of the AAT under subsection 43(1) of the *Administrative Appeals Tribunal Act 1975* (AAT Act).

**Proposed section 55L** provides that upon finding a document to be exempt, the Information Commissioner has no power to order that access be given to the exempt material. A similar restriction is placed on the AAT under existing subsection 58(2) of the FOI Act. The stated rationale for this provision is that it would defeat the purpose of the exemption rules if the Information Commissioner could order that access be given notwithstanding that a document is found to be exempt.<sup>61</sup> This is in contrast to subsection 18(2) of the FOI Act that enables the original decision-maker to release a document found to be exempt.

#### Comment

The Law Council considers that there is no reason why an independent merits review tribunal of considerable experience should not possess all the powers and functions of the original decision-maker in reviewing FOI matters:

It is a fundamental principle of proper and effective merits review generally that the reviewing authority be empowered to stand in the shoes of the decision maker [*Shi v Migration Agents Registration Authority* (2008) 235 CLR 286].<sup>62</sup>

#### Information gathering powers of the Information Commissioner

**Proposed sections 55R to 55Z** set out the Information Commissioner's information gathering powers in relation to a review. These are similar to the existing powers of the AAT in FOI review proceedings. They include the power to compulsorily require production of information and documents (**proposed section 55R**) and the power to require persons to appear and answer questions (**proposed section 55W**). Failure to comply is an offence subject to a maximum penalty of 6 months' imprisonment.<sup>63</sup>

**Proposed section 55T** gives the Information Commissioner a power to require production of a document claimed to be exempt for the purposes of determining whether the document is exempt. In the case of a national security or Cabinet exemption claim, the Commissioner can only require production of the document if not satisfied on affidavit or other evidence that the document is exempt (**proposed section 55U**).<sup>64</sup>

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61. Ibid, p. 34.

62. Law Council, op. cit., p. 9.

63. It is similarly an offence to fail to comply with a summons to produce issued by the AAT (see sections 40 and 61 of the *Administrative Appeals Tribunal Act 1975*).

64. This provision replicates the effect of existing section 58E of the FOI Act which applies to AAT review proceedings and which was inserted by the *Freedom of Information (Removal of Conclusive Certificates and Other Measures) Act 2009*.

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### Inspector-General of Intelligence and Security role

**Proposed sections 55ZA to 55ZD** relate to the giving of evidence by the Inspector-General of Intelligence and Security (the Inspector-General) in proceedings involving review of a decision relating to a national security exemption. Before making a determination that a document is *not exempt* the Information Commissioner would be required to request the Inspector-General to appear personally and give evidence on the possible damage that would or could reasonably be expected to be caused should such an exempt document be released (**proposed subsection 55ZB(2)**). The Inspector-General must comply with such requests unless of the opinion that he/she is not appropriately qualified to give such evidence (**proposed section 55ZC**). The Information Commissioner is not bound by any opinion of the Inspector-General (**proposed subsection 55ZB(4)**).<sup>65</sup>

### Appeal to the Federal Court

**Proposed sections 56 and 56A** deal with appeal rights to the Federal Court. Parties to a review may appeal to the Federal Court on a question of law from a decision of the Information Commissioner.

### Review by the Administrative Appeals Tribunal—New Part VIIA

**Proposed Part VIIA** deals with review of FOI decisions by the AAT. The existing provisions are re-organised (and in some cases redrafted) to take account of the proposal to interpose Information Commissioner review before AAT review. In most other respects, AAT review powers and procedures are not altered.

### AAT review and onus of proof

**Proposed section 57A** establishes a right of review to the AAT, the effect being that the AAT may review any decision that is amenable to review by the Information Commissioner. Review would involve a full reconsideration of the Information Commissioner decision in a merits review. The person who applies for review (either the applicant, the agency or the Minister) has the onus of establishing that the Information Commissioner made the wrong decision (**item 42, proposed subsection 61(1)**).

### Comment

Some submissions to the Senate inquiry are critical of this reversal of the existing onus of proof and note that this is contrary to existing provisions and also contrary to the exposure draft bill. **Australia's Right to Know** argues this is contrary to the new objects of the Act

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65. These provisions replicate the effect of existing section 60A which applies to AAT review proceedings. Section 60A was inserted by the *Freedom of Information (Removal of Conclusive Certificates and Other Measures) Act 2009*.

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centred on giving the Australian community access to information held by the government:

[...]A new central principle of the FOI regime is that government documents are presumed to be available to the public unless good reason is shown to the contrary.

In light of this, agencies should be required to justify and prove the reasons for secrecy by withholding release. They should be required to provide the evidence relevant to their claims.

It should not be the responsibility of an applicant to disprove a refusal to release particularly when the applicant is faced with the expert, government-funded legal teams typically used in that jurisdiction on appeals.<sup>66</sup>

### Investigations and complaints— New Part VIIB

**Item 49** inserts **Part VIIB** into the FOI Act which deals with investigations by and complaints to the Information Commissioner and the Ombudsman. **Division 2** sets out the system for investigations by the Information Commissioner.

The effect of **proposed subsection 69(1)** is to give the Information Commissioner the power to investigate complaints about an action taken by an agency in the performance of functions, or the exercise of powers, under the FOI Act. The Information Commissioner may also at his/her own initiative undertake such investigations (**proposed subsection 69(2)**).

**Proposed section 73** gives the Information Commissioner a discretionary power not to investigate, or not to continue to investigate, a complaint in certain circumstances, for example where there are other more suitable avenues of action;<sup>67</sup> where the complaint is frivolous or vexatious; where there has been insufficient time for the relevant agency to address the complaint; or where the complainant does not have sufficient interest in the matter. **Proposed section 74** permits the Information Commissioner to transfer a complaint to the Ombudsman in certain circumstances, for example where the complaint is about the way in which the Information Commissioner has dealt with an Information Commissioner review. Note also that while the powers of the Ombudsman in dealing with FOI complaints are specifically preserved (**proposed section 89F**), the Explanatory Memorandum states that the intention is that most complaints will be dealt with by the Information Commissioner rather than the Ombudsman.<sup>68</sup>

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66. Australia's Right to Know, op. cit.

67. If the proper remedy is for a person to seek review of the merits of an FOI decision, it is intended that the Information Commissioner would not investigate the matter under Part VIIB. Explanatory Memorandum, p. 40.

68. Explanatory Memorandum, p. 40 and 43.

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**Proposed sections 76 to 85** deal with investigation procedures. Many of the provisions replicate the investigation procedures for FOI review, for example the power to compulsorily require production of information and documents (**proposed section 79**), the power to require persons to appear and answer questions (**proposed section 82**), and the power to require production of exempt documents (**proposed section 81**). In addition, **proposed section 77** empowers persons authorised by the Information Commissioner (and authorised officers) to enter premises occupied by an agency (or a contracted service provider in certain circumstances) for the purposes of an investigation. The power is conditional upon the consent of the relevant authority who in most cases would be the principal officer of the agency (**proposed subsection 77(3)** and **section 78**).

#### Outcome of Information Commissioner investigation

Upon completing an investigation, the Information Commissioner is required by **proposed section 86** to notify the agency of the outcome of the investigation and the Commissioner's recommendations (if any). The Commissioner must also give a copy of the notice to the complainant.

If the Information Commissioner makes an investigation recommendation (within the meaning of proposed section 88), the Commissioner *may* subsequently report to the Minister responsible for the agency, and to the Minister responsible for the FOI Act, if the Commissioner is not satisfied that the agency has taken adequate action to implement the recommendation (**proposed section 89A**). The Minister responsible for the FOI Act is required to table a report of this kind before each House of the Parliament (**proposed subsection 89A(5)**).

**Proposed section 89E** provides immunity to a complainant from civil proceedings, provided that the person made the complaint under **proposed section 70** in good faith.

#### Vexatious applicants

**Item 50** inserts **proposed sections 89K to 89N** which deal with vexatious applicants. Under **proposed section 89K**, the Information Commissioner may by written instrument declare a person to be a vexatious applicant, either upon the Commissioner's own motion or upon application by an agency or Minister. **Proposed section 89L** sets out the grounds on which a declaration may be made, including where the person has repeatedly engaged in access actions that involve an abuse of process. Before making a declaration, the Information Commissioner is required to give the person an opportunity to make submissions (**proposed subsection 89L(3)**) and a person who is declared vexatious may apply to the AAT for review of that decision (**proposed section 89N**).

#### Protection against civil and criminal liability

**Proposed section 90** extends the immunity given to officers and Ministers from certain *civil* actions. Immunity would extend to cover:

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- discretionary disclosure outside the FOI Act
- disclosure of exempt documents, and
- disclosures made in relation to the information publication scheme

where these disclosures are made in good faith (**proposed subsection 90(1)**).

**Item 56** repeals existing section 92 and substitutes a **new section 92** that extends the immunity given to officers and Ministers from *criminal* offences. Immunity would extend to cover:

- discretionary disclosure outside the FOI Act
- disclosure of exempt documents, and
- disclosures made in relation to the information publication scheme

where these disclosures are made in good faith (**proposed subsection 92(1)**).

#### Comment

Submissions to the Senate Committee inquiry welcomed these amendments. Professor Moira Paterson stated that it is long overdue aspect of reform which removes an important disincentive to the provision of informal access and the exercise of discretion which resides in FOI officers to provide access to documents which may be technically exempt in circumstances where disclosure is unlikely to result in any harm.<sup>69</sup>

#### FOI Commissioner guidelines

**Proposed section 93A (item 57)** gives the Information Commissioner a discretionary power of issuing guidelines for the purposes of the FOI Act and agencies. Persons (including Ministers) exercising powers or functions under the Act must have regard to any such guidelines.

#### Review of the FOI Act

**Proposed section 93B (item 57)** requires a Minister to cause a review to be undertaken of the operation of the FOI Act two years after the commencement of the reform measures in the Bill. There is also provision for similar review of the Information Commissioner Act at clause 33 of the Bill for that Act.

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69. M Paterson, Submission, op. cit.

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## Schedule 5—Amendments consequential on the establishment of the Information Commissioner

Most of the items in **Schedule 5** are amendments consequential on the establishment of the Office of the Information Commissioner and, the proposal to bring the Privacy Commissioner and the Office of the Privacy Commissioner into the Office of the Information Commissioner. Many items remove references to the Privacy Commissioner in existing legislation and substitute references to the Information Commissioner (for example **items 3–9, 20–26, 46–53, 57–63, and 64–69**).

Several submissions to the Senate inquiry are critical of this change arguing that it is both unnecessary and unhelpful.<sup>70</sup>

**Item 54** repeals Division 1 of Part IV of the *Privacy Act 1988*, which establishes the Office of the Privacy Commissioner. This Division would become redundant in light of the proposal to bring the Office of the Privacy Commissioner into the Office of the Information Commissioner and to appoint the Privacy Commissioner under the proposed Information Commissioner Act.

**Item 56** repeals other sections of the *Privacy Act 1988* dealing with the non-disclosure of private information, preparation of an annual report and a delegation power. These sections relate to the operation of the Office of the Privacy Commissioner and will become redundant in light of the new arrangements under the proposed Information Commissioner Act.

## Schedule 6—miscellaneous amendments

### Access to Commonwealth contracts

**Item 19** of Schedule 6 inserts **proposed section 6C** into the FOI Act. **Proposed subsection 6C(2)** requires an agency to take contractual measures to ensure it receives a document held by a contracted service provider (or subcontractor) relating to the performance of the Commonwealth contract when the agency receives an FOI request. Its effect is 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 persons in the community.

Related to this provision is **item 33**, which repeals and replaces **section 24A**. It currently deals with requests that may be refused on the grounds that documents cannot be found or do not exist. The new provision is expanded to enable an agency or Minister to refuse a request if all reasonable steps have been taken to obtain a relevant document in exercise of

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70. For example, M Paterson, Submission, op cit.

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a contractual right and the document has not been received by the agency from the contracted service provider (or subcontractor).

Amendments relating to Commonwealth contracts apply only to those contracts entered into at or after the commencement of these provisions (**item 40**).

#### Comment

**Professor Moira Paterson** comments that this is a positive feature of the Bill, given the extent of outsourcing of government functions, including the provision of core government services and facilities such as welfare services.<sup>71</sup> However she suggests that the Bill should go further to provide added incentives (such as informing the Information Commissioner) where the agency has failed to implement the required contractual measures or where it is unable to recover a document from a contractor despite taking reasonable steps to do so.<sup>72</sup>

#### Timeframes for processing FOI requests

**Item 30** inserts new provisions relating to the extensions of processing periods for FOI requests. **Proposed section 15AA** permits an agency or Minister to extend the initial period for making a decision by 30 days if the written agreement of the applicant is obtained. The Information Commissioner must be notified of such an extension. **Proposed section 15AB** relates to large or complex FOI requests and would allow an agency or Minister to apply to the Information Commission for a further extension beyond this additional 30 days.<sup>73</sup> The effect of **proposed section 15AC** is that an agency or Minister is deemed to have refused access to a document if the agency or Minister has not given notice of a request for access within 30 days of receiving the request (or the agreed extended period). A deemed refusal decision means that an applicant may directly make an application for Information Commissioner review. **Proposed subsections 15AC(4)-15AC(6)** give the Information Commissioner a discretionary power to extend the period for making a decision on an FOI request upon application from the agency or Minister. The Information Commissioner may also impose conditions on such an extension.

Existing section 24 permits an access request to be refused if the work involved in processing the request would substantially and unreasonably divert the resources of an agency, or would substantially and unreasonably interfere with the performance of a Minister's agency. **Item 32** repeals **section 24** and replaces it with **proposed sections 24, 24AA** and **24AB**. The new provisions have the same scope as existing section 24 but are extended so that multiple requests seeking access to the same or substantially the same documents may also be refused on the grounds of diverting resources or interfering with

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71. M Paterson, Submission, op. cit.

72. Ibid.

73. See existing subsection 15(5) of the FOI Act

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performance (**proposed subsection 24(2)**). The proposed amendments also enhance the consultation scheme so that onerous requests may be narrowed (**proposed section 24AB**).

### FOI fees and charges

**Items 17, 24, 34 and 35** of Schedule 6 make amendments removing references to application fees. Application fees are proposed to be abolished for all applications under the FOI Act (other than for applications to the AAT).

**Item 37** removes words from existing **section 94** (the regulation-making power) which limit the ability for regulations to be made that vary charges according to whether the applicant is in a particular class. This is in line with the Government's announcement that the first five hours of decision-making time for journalists and not-for profit community groups would be free of charge.<sup>74</sup>

### Exemptions relating to security and defence organisations

**Items 20 and 21** deal with exemptions for documents produced by exempt agencies and propose two new exemptions. As noted above,<sup>75</sup> subsection 7(1) and Part II of Schedule 2 provide that certain agencies (that is ASIS, ASIO, the Auditor-General, the Aboriginal Land Councils and Land Trusts etc) are exempt from the operation of the FOI Act. A further exclusion is provided in subsections 7(2A) and 7(2B) which provide that agencies and Ministers in possession of documents originating with or received from ASIS, ASIO, the Office of National Assessments, the Defence Intelligence Organisation, the Defence Signals Directorate or the Inspector-General of Intelligence and Security are exempt in respect of those documents. **Items 20 and 21** extend the exemption to cover documents that contain a summary or extract of such documents.

Related to these amendments is **item 38**, which provides that Department of Defence is be excluded from the operation of the FOI Act for documents in respect of its collection, reporting or analysis of operational intelligence and special access programs under which a foreign government provides restricted access to technologies. **Item 21** would extend this exemption so that agencies and Ministers in possession of such documents or summaries or extracts of such documents) would also be excluded.

### Comment

The Public Interest Advocacy Centre (PIAC) opposes these amendments for the same reasons that it strongly opposed the related reforms, introduced only last year that excluded all 'intelligence agency' documents in the hands of the Minister.<sup>76</sup> The Bills

74. Explanatory Memorandum, p. 56.

75. See pp. 11–12 of the Digest.

76. Public Interest Advocacy Centre, *Freedom of information repackaged: submission to the Senate Finance and Public Administration Committee on the Freedom of Information*

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Digest for the Freedom of Information (Removal of Conclusive Certificates and Other Measures) Bill 2008 quotes PIAC:

The Public Interest Advocacy Centre (PIAC) considers that entirely excluding a new category of documents, not presently excluded from the operation of the FOI Act, is contrary to the principle of open and transparent government and winds back, in relation to defence and security documents, the advances of this principle made by the abolition of conclusive certificates. PIAC argues the proposed amendments fail to leave open any avenue to distinguish between documents the disclosure of which might pose a genuine threat to security or to the national interest, and those that merely have the potential to embarrass an agency, or the government of the day. The submission continues:

The Haneef case and subsequent visa revocation turning as they did on inconsistencies between reports and threat assessments issued by the Australian Security and Intelligence Organisation (ASIO) and the Australian Federal Police respectively, and the extent of awareness at Ministerial level of those inconsistencies, demonstrate the importance of retaining a potential avenue for disclosure of such documents under the FOI Act.<sup>77</sup>

## Schedule 7—Privacy Commissioner transition

**Schedule 7** contains amendments to address transitional issues for the new Office of the Information Commissioner, including bringing the Office of the Privacy Commissioner into the new Office.

## Concluding comments

Both this Bill and the accompanying Information Commissioner Bill 2009 have generally been well received and supported, with many key FOI advocates agreeing that the package contains an important set of reforms which address many of the key deficiencies in the current FOI Act and its administration. As Professor Paterson states, provided they are accompanied by a pro-disclosure cultural shift within agencies, the reforms have the

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*Amendment (Reform) Bill 2009 and the Information Commissioner Bill 2009*, January 2010, p. 16.

77. M A Neilsen, *Freedom of Information (Removal of Conclusive Certificates and Other Measures) Bill 2008*, Bills Digest, op. cit., p. 9. As a follow-up, it is of interest that the *Australian* very recently reported that the Department of Prime Minister and Cabinet is invoking the FOI national security provisions to fight a decision by the Administrative Appeals Tribunal which last year granted Dr Haneef access to a range of documents related to his arrest and detention. S Elks, 'Mohamed Haneef papers blocked', *Australian*, 23 February 2010.

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potential to substantially invigorate the Act's operation and better enable it to achieve its democratic objectives.<sup>78</sup>

However, there is also argument that in a number of areas the reforms do not go far enough. A common theme in submissions to the Senate inquiry is that while the Bill repeals a small number of exemptions, it retains an almost entirely untouched list of excluded agencies and documents held by certain agencies listed in Schedule 2 to the FOI Act.

The two Bills are not the end of the story. In relation to two key aspects of the FOI Act, namely access to and amendment of one's own personal information and the imposition of processing charges for FOI requests, the Government has promised further reform.<sup>79</sup> Some argue that leaving these two key aspects out of this round, may undermine the 'sea change' that the reforms are intended to create.<sup>80</sup>

Despite these reservations, the reforms are substantial. There is general optimism that the creation of the new role of Information Commissioner, together with the new rules of disclosure and publication, will go some way to improving the culture of FOI and possibly ushering in a new and different phase in public administration.<sup>81</sup>

For those not completely satisfied with the Bills, they too seem keen that the two Bills progress. As noted at the outset, despite a plethora of reviews, there have been only minor changes to the FOI Act since 1982. There is, therefore, a sense that this opportunity should not be lost—that it is important to hasten to ensure these reforms are implemented before the completion of this Parliament.

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78. M Paterson, Submission, op. cit.

79. J Faulkner, *Freedom of information (FOI) reform: companion guide*, Australian Government, March 2009, p. 7; and Department of Prime Minister and Cabinet, *Freedom of information (FOI) reform*, viewed on 23 February 2010, [http://www.dpmc.gov.au/consultation/foi\\_reform/index.cfm](http://www.dpmc.gov.au/consultation/foi_reform/index.cfm)

80. Public Interest Advocacy Centre, op. cit.

81. J McMillan, op. cit.

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