



## *Express law* fast track information for clients

25 March 2009

### Major freedom of information reforms announced

Yesterday the Cabinet Secretary and Special Minister of State, Senator the Hon. John Faulkner, announced details of proposed major reforms to the *Freedom of Information Act 1982* (FOI Act) and released the draft Freedom of Information Amendment (Reform) Bill and Information Commissioner Bill for public comment.

The Bills, if enacted, would honour an election commitment of the Government to establish an Office of the Information Commissioner and result in numerous significant changes to the FOI Act. The Government is also proposing changes to the *Archives Act 1983*, the most significant of which would be that documents would be available for release to the general public 20 years after their creation instead of 30 years after, as is the case now. Cabinet notebooks would be available after 30 years instead of the current 50 years.

The Government is seeking submissions from the public in relation to the draft Bills before introducing the final Bills into Parliament later this year. The [Bills and a comprehensive guide to the proposed changes](#) are available on the Department of the Prime Minister and Cabinet website. What follows is a summary of some of the more significant proposed FOI changes.

#### *Establishment of the Office of Information Commissioner*

The Information Commissioner would head the Office of the Information Commissioner, have overall responsibility for FOI and privacy, and be supported by a new Freedom of Information Commissioner and the existing Privacy Commissioner.

FOI applicants would have the right at no cost to ask the Information Commissioner to review FOI internal review decisions made by agency officers, following which the applicant or the agency could seek review in the Administrative Appeals Tribunal or appeal to the Federal Court. The Information Commissioner's functions would also include:

- reporting to the Minister on matters relating to the Government's information management policies: for this function, it is proposed that the Information Commissioner would be assisted by an advisory committee comprised of senior officers across key government agencies
- investigating and making recommendations concerning the FOI practices of agencies, including in response to a complaint
- issuing guidelines in relation to various aspects of FOI practice and decision making
- considering requests for extending the time within which FOI decisions must be made (for voluminous or complex requests)

- collecting statistics, reporting to the Minister and issuing an annual report.

### ***New information publication requirements***

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A new publication scheme, replacing the provisions currently dealing with publication of information, would be introduced. The scheme involves the publication of certain mandatory information and also permits the publication of discretionary information. In determining what information to publish, agencies are directed to have regard to the objects of the Act and to guidelines issued by the Information Commissioner. It would be a function of the Information Commissioner to assist agencies in publishing information under the scheme.

The mandatory information includes a requirement to publish information such as details of statutory appointments, information routinely provided to the Parliament and operational information on its website or, if a charge applies, details of how to obtain the documents. Significantly, each agency will be required to ensure information it publishes is accurate, up to date and complete.

Agencies would also be required to publish information released in response to an access application on their website or, if a charge applies, details of how to obtain the information within 10 business days after giving access to the FOI applicant. Personal and business affairs information related to the FOI applicant would not need to be published.

### ***Amendments to the FOI Act exemption provisions***

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A major reorganisation of exemption provisions is proposed. There would be a single public interest test for 'conditional exemptions', with access required to be given to a document unless access at that time would, on balance, be contrary to the public interest. Public interest conditional exemptions would be:

- exemptions for which there is currently a public interest test, namely deliberative documents, Commonwealth–State relations, financial or property interests, and operations of agencies, and
- exemptions for which the public interest test would be added, namely, personal privacy, business affairs and research and the (reformulated) national economy exemption.

Certain public interest factors would not be able to be taken into account, including that access could result in the applicant misinterpreting or misunderstanding the document or in confusion or unnecessary debate, embarrassment to the Government, and the seniority of the document's author.

There would be some other changes. Significantly, the Cabinet documents exemption would be reformulated and a 'dominant purpose' test introduced. Cabinet documents would include drafts, Cabinet submissions proposed but not yet submitted to Cabinet and briefing notes for ministers in relation to Cabinet submissions.

### ***Other measures***

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#### **Documents held by contractors**

Agencies would be required to take contractual measures to ensure they have access to documents held by contracted service providers and subcontractors in order to perform a

function under the FOI Act. This would ensure such documents are accessible under the FOI Act.

### **Vexatious applicants**

The Information Commissioner would be empowered to make a declaration that a particular FOI applicant is a vexatious applicant. If so, the person concerned could be subject to restrictions imposed by the Information Commissioner, such as not being able to make an FOI request without the Information Commissioner's permission.

### **Release of documents otherwise than under the FOI Act**

The scope of the provisions in the Act which provide immunity to officers and ministers from certain legal actions would be extended to cover the release of documents, including exempt documents, in good faith in the belief that the release is required or permitted otherwise than under the FOI Act.

### **Amendments to the objects of the FOI Act**

A proposed new objects clause would give added emphasis to the rationale underpinning the FOI Act and no longer contain any reference to limitations to access arising from the exemption provisions.

### **Discretion to release business documents without consultation**

The requirement to consult a business before releasing information about its commercial affairs would be relaxed, enabling agencies to release non-sensitive business information without consultation.

### **Fees and charges**

All application fees would be abolished, and no fee is proposed for making an application for review to the Information Commissioner. Amendments to the charges regulations are foreshadowed which would introduce a 'first hour free' rule (first five hours for journalists and not-for-profit organisations) and abolish all charges for individuals seeking access to their own personal information. A future comprehensive review of the charges regime is also planned.

*For further information and advice concerning the implications of the proposals for Commonwealth agencies, please contact:*

Justin Hyland  
Senior Executive Lawyer  
T 02 6253 7417 F 02 6253 7380  
[justin.hyland@ags.gov.au](mailto:justin.hyland@ags.gov.au)

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