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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

INFORMATION COMMISSIONER BILL 2009

EXPLANATORY MEMORANDUM

(Circulated by authority of the Cabinet Secretary,
Senator the Hon Joe Ludwig)

INFORMATION COMMISSIONER BILL 2009

General Outline

The primary purpose of the Information Commissioner Bill 2009 is to establish three independent statutory office holders and the Office of the Information Commissioner. The Office will comprise:

- the Information Commissioner (a new statutory office holder);
- the Freedom of Information (FOI) Commissioner (a new statutory office holder);
- the Privacy Commissioner (an existing statutory office holder); and
- staff engaged under the *Public Service Act 1999*.

The Office of the Information Commissioner will bring together the functions for independent oversight of the *Freedom of Information Act 1982* (FOI Act) and the *Privacy Act 1988* (the Privacy Act), consistent with the Government's 2007 election commitments set out in the policy statement *Government information: restoring trust and integrity*.

The functions of the Office will be threefold:

- the FOI functions - which are about giving the Australian community access to information held by the Government in accordance with the FOI Act;
- the privacy functions - which are about protecting the privacy of individuals in accordance with the Privacy Act and other Acts; and
- the information commissioner functions - which are strategic functions concerning advice to Government on information management.

The Information Commissioner, which is a new position, will be the head of the Office (including for the purposes of the *Public Service Act 1999* and the *Financial Management and Accountability Act 1997*). The Information Commissioner will be able to perform all of the functions of the Office. To ensure a workable governance arrangement, the Information Commissioner will be head of the Office both strategically and administratively. Provision is made in the Bill to ensure that no duplication arises in carrying out functions between the three Commissioners and to ensure that no disagreement arises in the discharge of those functions.

The FOI Commissioner, which is also a new position, will mainly perform the FOI functions. For flexibility, the FOI Commissioner will also be able to perform the privacy functions.

The Privacy Commissioner is an existing position established under the Privacy Act. However, the Privacy Commissioner will be appointed under this Bill. The Privacy Commissioner will mainly perform the privacy functions. For flexibility, the Privacy Commissioner will also be able to perform the FOI functions. It is proposed that the existing Office of the Privacy Commissioner will be amalgamated into the Office of the Information Commissioner.

The Information Commissioner Bill 2009 is complemented by the Freedom of Information Amendment (Reform) Bill 2009, which will amend the FOI Act to establish a number of FOI functions that will be performed by the Information Commissioner (and the FOI Commissioner). These include functions of undertaking merits review of FOI decisions, undertaking investigations related to action taken by agencies in handling FOI matters (including upon complaint), and promoting the objects of the FOI Act.

The privacy functions are those functions currently performed by the Privacy Commissioner under the Privacy Act and under other legislation that confers privacy related functions on the Privacy Commissioner.

The information commissioner functions reflect the capacity for the structural reforms to deliver coordinated policy advice to the Government on government information management matters (beyond privacy and FOI). The Information Commissioner is solely responsible for that function.

Financial Impact Statement

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

Regulation Impact Statement

No regulation impact statement is required for the measures contained in this Bill.

Notes on Clauses

List of abbreviations used

Acts Interpretation Act	<i>Acts Interpretation Act 1901</i>
FOI	Freedom of Information
FOI Act	<i>Freedom of Information Act 1982</i>
Privacy Act	<i>Privacy Act 1988</i>
Public Service Act	<i>Public Service Act 1999</i>

Part 1 – Preliminary

Clause 1: Short title

Clause 1 is a formal clause which provides the citation of the Bill.

Clause 2: Commencement

The table in Clause 2 sets out when provisions in the Bill will commence. The table provides that sections 1 and 2 (and anything else not covered in the table) will commence on the day on which the Act receives the Royal Assent.

Sections 3 to 36 will commence on a date to be fixed by Proclamation. However, if any of the provisions do not commence within 6 months after Royal Assent they will commence on the day after the end of that period.

Clause 3: Definitions

Clause 3 defines a number of terms used throughout the Bill.

Part 2 – Office of the Information Commissioner

Division 1 – Introduction

Clause 4: Guide to this Part

This clause provides a guide to understanding Part 2 of the Bill.

Division 2 – Establishment

Clause 5: Establishment

This clause establishes the Office of the Information Commissioner, consisting of the information officers (the Information Commissioner, the FOI Commissioner and the Privacy Commissioner) as well as staff engaged under the Public Service Act (see Part 3 of the Bill). The Office constitutes a statutory agency for the purposes of the Public Service Act and the Information Commissioner is designated as head of the statutory agency for that purpose.

Clause 6: Definition of *information officers*

Clause 6 provides that the Information Commissioner, FOI Commissioner and Privacy Commissioner are each an information officer. The term information officer is used throughout the Bill to refer collectively to the commissioners.

The Information Commissioner and the FOI Commissioner are new statutory positions. The Privacy Commissioner position is established under an existing provision in the Privacy Act. Clause 14 provides for the appointment of the Privacy Commissioner in this Bill.

Consequential amendments to repeal provisions in the Privacy Act which establish the Privacy Commissioner and the Office of the Privacy Commissioner are proposed in Schedule 5 of the Freedom of Information Amendment (Reform) Bill.

Division 3 – Functions and powers of the information officers

Clause 7: Definition of *information commissioner functions*

The Information Commissioner, as head of the Office which will be in day to day contact with Australian Government agencies in relation to the FOI and privacy functions, will be in a unique position to generate strategic advice to the Minister on broader government information management policy, extending beyond privacy and FOI. The information commissioner functions are directed to that purpose, and are intended to allow for the Information Commissioner to provide strategic advice to the Government on a wide range of issues associated with government information. This could include, for example, advice on how the Government could utilise emerging technologies to improve public access to government information, or achieving more coordinated approach on government information policy and practice across all aspects of information management and at all stages of the information life-cycle.

Proposed paragraph 7(b) clarifies that future amendment to the Act (or other Acts or instruments) can confer additional functions on the Information Commissioner which extend beyond the FOI or privacy functions.

The Information Commissioner has sole responsibility for the performance of these functions (they are not functions given to the Privacy Commissioner or FOI Commissioner). In carrying out the information commissioner functions, the Information Commissioner will be assisted by an Information Advisory Committee which is proposed to be established under clause 27.

Clause 8: Definition of *freedom of information functions*

This clause defines the FOI functions. Proposed paragraph 8(a) gives the Information Commissioner a role in promoting awareness and understanding of the FOI Act and its objects, among both agencies and the public. The intention is that the Office of the Information Commissioner be a resource for agencies as well as for the public. In carrying out this function, it is also intended that the Information Commissioner and the FOI Commissioner will have a key responsibility in driving a pro-disclosure culture shift across government.

Proposed paragraphs 8(b) and (c) are related to the proposed Information Publication Scheme, which would replace the existing Part II of the FOI Act (see Schedule 2 to the Freedom of Information Amendment (Reform) Bill). Under that proposal, the Information Commissioner is given a function of assisting agencies to publish information in accordance with the Information Publication Scheme (the function referred to in paragraph 8(b)). The Information Commissioner is also given a function of reviewing the operation of the Information Publication Scheme in each agency (in conjunction with the agency), investigating compliance by agencies with the Information Publication Scheme, and otherwise monitoring, investigating and reporting on the operation of the scheme (the function referred to in paragraph 8(c)).

Proposed paragraph 8(d) builds on the Information Commissioner's role in promoting the FOI Act. It is intended that the Information Commissioner and the FOI Commissioner will provide assistance and training to both agencies and members of the public.

Proposed paragraph 8(e) is related to the Information Commissioner's power to issue guidelines under proposed section 93A of the FOI Act (see item 57 of Schedule 4 to the Freedom of Information Amendment (Reform) Bill). Under proposed subsection 11(4) of this Bill, the performance of this function by the FOI Commissioner (or the Privacy Commissioner) is subject to approval by the Information Commissioner. This is intended to ensure consistency in policy advice, and in case of disagreement, that the Information Commissioner's view prevails.

Proposed paragraph 8(f) enables the Information Commissioner to report, or recommend proposals, to the Minister for change to the FOI Act or administrative action related to the operation of the FOI Act. Under proposed subsection 11(4) of this Bill, the performance of this function by the FOI Commissioner (or the Privacy Commissioner) is subject to approval by the Information Commissioner. This is intended to ensure consistency in policy advice and, in the event of disagreement, that the Information Commissioner's view prevails.

Proposed paragraph 8(g) gives the Information Commissioner a general function of monitoring, investigating and reporting on compliance with the FOI Act by agencies. This function is separate to the functions at proposed paragraphs 8(h) which is a formal review function and 8(i) which is a formal investigation function.

Proposed paragraph 8(h) is related to the proposal to give the Information Commissioner the function of undertaking merits review of FOI decisions under proposed Part VII of the FOI Act (see item 34 of Schedule 4 to the Freedom of Information Amendment (Reform) Bill).

Proposed paragraph 8(i) is related to the proposal to give the Information Commissioner the function of undertaking investigations (upon complaint or the Information Commissioner's initiative) under proposed Part VIIB of the FOI Act (see item 49 of Schedule 4 to the Freedom of Information Amendment (Reform) Bill).

Proposed paragraph 8(j) gives the Information Commissioner a function of collecting information and statistics from agencies and Ministers about the FOI matters specified in proposed section 31 of the Bill. These matters are to be included in the Office of the Information Commissioner annual report (under proposed section 30 of the Bill).

Proposed paragraphs 8(k) and (l) allow for the future amendment of the FOI Act or another Act (or instruments) to confer additional functions on the Information Commissioner in relation to FOI, which are expressed to be a freedom of information function.

Clause 9: Definition of *privacy functions*

This clause defines the privacy functions. The definition is intended to capture all privacy-related functions currently undertaken by the Privacy Commissioner. Proposed subsection 9(1) provides a general definition. The Freedom of Information Amendment (Reform) Bill (Schedule 5) proposes consequential amendments to Acts that currently confer functions on the Privacy Commissioner so that references to 'Privacy Commissioner' are replaced with 'Information Commissioner' for those functions.

The table in proposed subsection 9(2) specifies, in a non-exhaustive list, some privacy-related functions conferred by legislation on the Privacy Commissioner.

Clause 10: Functions and powers of the Information Commissioner

This clause has the effect of vesting the Information Commissioner with the information commissioner functions (defined in proposed section 7), the FOI functions (defined in proposed section 8) and the privacy functions (defined in proposed section 9). Only the Information Commissioner will be able to perform the information commissioner functions.

Proposed subsection 10(2) gives the Information Commissioner the power to do all things necessary or convenient for or in connection with the information commissioner functions, the FOI functions and the privacy functions.

Clause 11: Functions and powers of the Freedom of Information Commissioner

This clause provides for the functions and powers of the FOI Commissioner. Proposed subsection 11(1) provides that the FOI Commissioner has the FOI functions (which are defined in proposed section 8). The Information Commissioner also has these functions (proposed subsection 10(1)), as does the Privacy Commissioner for flexibility (proposed subsection 12(2)). However, it is anticipated that in practice the FOI Commissioner will mainly perform the FOI functions.

Proposed subsection 11(2) allows the FOI Commissioner to perform the privacy functions. This is to ensure flexibility within the Office of the Information Commissioner. However, it is not intended that the FOI Commissioner would regularly perform privacy functions.

Proposed subsection 11(3) gives the FOI Commissioner the power to do all things necessary or convenient for or in connection with the FOI functions or the privacy functions.

Proposed subsection 11(4) reflects the role of the Information Commissioner as head of the Office of the Information Commissioner for all purposes. The functions of issuing guidelines under the FOI Act and recommending changes to the FOI Act are largely concerned with implementation of policy. Where these functions are performed by the Privacy Commissioner or the FOI Commissioner they will need to be performed with the approval of the Information Commissioner. This is intended to ensure consistency in policy advice and, in case of disagreement, that the Information Commissioner's view prevails.

Proposed subsection 11(5) introduces some general principles which are relevant to the exercise of delegated powers. The Bill does not confer functions on the FOI Commissioner by delegation from the Information Commissioner. The manner in which the Bill confers functions is consistent with other Commonwealth legislation (for example, the Commissioner and Second Commissioners of Taxation under the *Taxation Administration Act 1953* and the Director and Associate Director of Public Prosecutions under the *Director of Public Prosecutions Act 1983*). Although intended to work like a delegation, these schemes do not require specific delegations by the principal office holder to associated office holders. In these schemes, principles relevant to the exercise of delegable powers are nevertheless applied to clarify the effect of the conferral of the function or power on associated office holders so that, for example, duplication in decision making does not arise.

- Proposed paragraph 11(5)(a) has the effect of section 34A of the Acts Interpretation Act, which essentially expresses that a person to whom a power is delegated in pursuance of an express power of delegation must exercise the delegated power by

applying their own discretion. The Information Commissioner cannot direct the FOI Commissioner in the exercise of the FOI Commissioner's discretion.

- Proposed paragraph 11(5)(b) has the effect of paragraph 34AB(c) of the Acts Interpretation Act, so that where the FOI Commissioner performs a function or exercises a power it is deemed to have been performed or exercised by the Information Commissioner. In this way, for example, if the FOI Commissioner makes a decision on an FOI review, it could not be 'remade' by the Information Commissioner (or by the Privacy Commissioner) as the Information Commissioner is taken to have already made the decision.
- Proposed paragraph 11(5)(c) has the effect of paragraph 34AB(d) of the Acts Interpretation Act, which recognises that the fact that the FOI Commissioner has performed a function (or exercised a power) also given to the Information Commissioner and the Privacy Commissioner does not prevent the latter Commissioners from performing that function or exercising that power on another occasion for a different matter. This provision ensures all Commissioners can, for example, make an FOI review decision (but it does not mean that the Information Commissioner can remake a decision that has been determined by either the FOI Commissioner or the Privacy Commissioner).

Clause 12: Functions and powers of the Privacy Commissioner

This clause provides for the functions and powers of the Privacy Commissioner. Proposed subsection 12(1) provides that the Privacy Commissioner has the privacy functions (which are defined in proposed section 9). The Information Commissioner also has these functions (proposed subsection 10(1)), as does the FOI Commissioner for flexibility (proposed subsection 11(2)). However, in practice, it is anticipated that the Privacy Commissioner will mainly perform the privacy functions.

Proposed subsection 12(2) allows the Privacy Commissioner to perform the FOI functions. This is to ensure flexibility within the Office of the Information Commissioner, but it is not intended that the Privacy Commissioner would regularly perform FOI functions.

Proposed subsection 12(3) gives the Privacy Commissioner the power to do all things necessary or convenient for or in connection with the privacy functions or the FOI functions.

Proposed subsection 12(4) reflects the role of the Information Commissioner as head of the Office of the Information Commissioner for all purposes. The functions addressed in this subsection are largely concerned with implementation of policy. Where these functions are performed by the Privacy Commissioner, or the FOI Commissioner, they will need to be performed with the approval of the Information Commissioner. This is intended to ensure consistency in policy advice and, in the case of disagreement, that the Information Commissioner's view prevails.

Proposed subsection 12(5) introduces some general principles which are relevant to the exercise of delegated powers. The Bill does not confer functions on the Privacy Commissioner by delegation from the Information Commissioner. The manner in which the Bill confers functions is consistent with other Commonwealth legislation (for example, the Commissioner and Second Commissioners of Taxation under the *Taxation Administration Act 1953* and the Director and Associate Director of Public Prosecutions under the *Director of Public Prosecutions Act 1983*). Although intended to work like a delegation, these schemes do not require specific delegations by the principal office holder to associated office

holders. In these schemes, principles relevant to the exercise of delegable powers are nevertheless applied to clarify the effect of the conferral of the function or power on associated office holders so that, for example, duplication in decision making does not arise.

- Proposed paragraph 12(5)(a) has the effect of section 34A of the Acts Interpretation Act, which essentially expresses that a person to whom a power is delegated in pursuance of an express power of delegation must exercise the delegated power by applying their own discretion. The Information Commissioner cannot direct the Privacy Commissioner in the exercise of the Privacy Commissioner's discretion.
- Proposed paragraph 12(5)(b) has the effect of paragraph 34AB(c) of the Acts Interpretation Act, so that where the Privacy Commissioner performs a function or exercises a power it is deemed to have been performed or exercised by the Information Commissioner. In this way, for example, if the Privacy Commissioner makes a determination following investigation of a privacy complaint, it could not be 'remade' by the Information Commissioner (or by the FOI Commissioner) as the Information Commissioner is taken to have already made the decision.
- Proposed paragraph 12(5)(c) has the effect of paragraph 34AB(d) of the Acts Interpretation Act, which recognises that the fact that the Privacy Commissioner has performed a function (or exercised a power) also given to the Information Commissioner and the FOI Commissioner does not prevent the latter Commissioners from performing that function or exercising that power on another occasion for a different matter. This provision ensures all Commissioners can, for example, make a determination under section 52 of the Privacy Act (but it does not mean that the Information Commissioner can re-make a decision that has been determined by the Privacy Commissioner).

Part 3 – Appointments and staffing for the Office of the Information Commissioner

Division 1 – Introduction

Clause 13: Guide to this Part

This clause provides a guide to assist with understanding Part 3 of the Bill.

Division 2 – The information officers

Clause 14: Appointment

Clause 14 provides for the appointment of the Information Commissioner, the FOI Commissioner and the Privacy Commissioner. Each Commissioner (the information officers) is to be appointed by the Governor-General by written instrument. It is intended that they are appointed as independent office holders. An information officer may be reappointed. Under proposed subsection 14(3), the FOI Commissioner is to have a qualification in the nature of a degree or similar after studies in the field of law. Performance of the FOI review function could be expected to be enhanced from the possession of legal knowledge because of the need to routinely apply precedents and to interpret legislative provisions in the FOI Act in order to make review decisions. The Information Commissioner and Privacy Commissioner are not required to have a qualification of this kind, even though they may perform the FOI review function. This is because, in practice most reviews will be performed by the FOI Commissioner. To impose an equivalent condition for the Information Commissioner and Privacy Commissioner may unduly limit potential candidates for these statutory positions, who will have other functions that do not necessitate a legal background.

Clause 15: General terms and conditions of appointment

This clause provides for the terms and conditions of employment for the information officers.

Clause 16: Restriction on outside employment

This clause requires the Minister's approval before an information officer may engage in paid employment outside the duties of his or her office.

Clause 17: Remuneration

Clause 17 provides for the Remuneration Tribunal to determine the level of remuneration for the information officers. The clause also allows for the regulations to prescribe the level of remuneration if no determination is in operation. The regulations may also prescribe allowances that are to be paid to an information officer.

Clause 18: Leave of absence

This clause deals with leave entitlements for an information officer.

Clause 19: Resignation

This clause deals with the resignation of an information officer.

Clause 20: Termination of appointment

This clause deals with the termination of the appointment of an information officer.

Clause 21: Acting appointments

Clause 21 permits the Minister to appoint a person to act as an information officer during vacancy or absences. The requirement for a qualification under proposed subsection 14(3) applies to an acting appointment to the position of FOI Commissioner.

Clause 22: Disclosure of interests

This clause requires the information officers to disclose all interests that conflict or could conflict with the performance of their functions.

Division 3 – Staff, consultants and delegations**Clause 23: Staff**

Clause 23 provides that the staff of the Office of the Information Commissioner must be engaged under the Public Service Act. The staff of the Office do not include the information officers (who are appointed under proposed Division 2).

Clause 24: Consultants

This clause permits the Information Commissioner to engage consultants to assist in the performance of the functions and the exercise of the powers of the Information Commissioner. However, functions or powers that cannot be delegated to staff under proposed section 25 cannot be performed or exercised by a consultant.

Clause 25: Delegation by the Information Commissioner

This clause allows the Information Commissioner to delegate, in writing, functions to a member of staff of the Office of the Information Commissioner. Only the Information Commissioner (not the FOI Commissioner or the Privacy Commissioner) may delegate functions or powers to a member of staff. The proposed section specifies a number of

functions and powers that cannot be delegated to a member of staff. These matters are reserved for performance by the information officers.

Part 4 – Information Advisory Committee

Clause 26: Guide to this Part

This clause provides a guide to understanding Part 4 of the Bill.

Clause 27: Establishment and functions

Clause 27 establishes the Information Advisory Committee. The Committee is to assist and advise the Information Commissioner in matters relating to the performance of the information commissioner functions (as defined in proposed section 7). That function involves the delivery of coordinated advice to the Government on broad government information management matters (beyond privacy and FOI). The Committee does not have a function of advising the Information Commissioner on the FOI functions or the privacy functions (as defined in proposed sections 8 and 9 respectively). However, matters upon which the Committee advise the Information Commissioner may relate to those functions.

Under proposed subsection 27(2), the Committee will consist of the Information Commissioner as Chair, agency representatives nominated by the Minister (with portfolio responsibility for the Office of the Information Commissioner) in consultation with relevant Ministers, and other persons outside government with suitable qualifications or experience who are appointed by the responsible Minister. This could include, for example, persons with experience in the fields of information technology, records management or intellectual property.

Members of the Committee from outside government are entitled to be paid travel allowance in accordance with the regulations (proposed subsection 27(3)). These members are not entitled to remuneration or allowances other than travel allowance (proposed subsection 27(4)).

Part 5 – Miscellaneous

Clause 28: Guide to this Part

This clause provides a guide to understanding Part 5 of the Bill.

Clause 29: Unauthorised dealing with information

Clause 29 provides a maximum penalty of 2 years imprisonment for the unauthorised recording, disclosure or use of information acquired by a person performing functions or exercising powers in connection with the functions and powers of the Office of the Information Commissioner. Proposed subsection 29(2) allows for the recording, use or disclosure of the information in certain circumstances. In these circumstances the person does not commit an offence. Proposed subsection 29(3) prohibits disclosure of the information to a court, or the production of a document containing the information to a court, in the circumstances outlined in the proposed subsection, unless the disclosure or production is necessary for the purposes of the Information Commissioner Act.

Clause 30: Annual report

The Information Commissioner is given the function of preparing an annual report on the operations of the Office of the Information Commissioner. The report must be provided to

the Minister and tabled in both Houses of the Parliament. The report replaces the annual report on the operation of the FOI Act, which is prepared by the Minister with responsibility for administering the FOI Act. It also replaces the annual report of the Office of the Privacy Commissioner, which is prepared by the Office of the Privacy Commissioner and tabled by the Minister with responsibility for administering the Privacy Act.

Under proposed subsection 30(3), the annual report must contain the freedom of information matters (as defined in proposed section 31) and the privacy matters (as defined in proposed section 32).

Clause 31: Definition of the *freedom of information matters*

This clause provides a definition of the freedom of information matters to be included in the Office of the Information Commissioner annual report under proposed subparagraph 30(3)(a). Ministers and agencies are required to provide this information to the Information Commissioner under section 93 of the FOI Act (as amended by item 57 of Schedule 4 to the Freedom of Information Amendment (Reform) Bill).

Clause 32: Definition of the *privacy matters*

This clause provides a definition of the privacy matters to be included in the Office of the Information Commissioner annual report under proposed paragraph 30(3)(b). This replaces requirements previously in subsections 97(2) and 97(2A) of the Privacy Act.

Clause 33: Review of operation of Act

This clause requires the Minister responsible for the Information Commissioner Act to cause a Government review to be undertaken of the operation of the Act two years after the commencement of this provision. The period of two years should allow sufficient time for the effectiveness of the Act to be assessed. The report must be completed within six months and a copy of the report is to be tabled in the Parliament. Provision is also made in the FOI Amendment (Reform) Bill at proposed section 93B (item 57 of Schedule 4) for review of the FOI Act. It is the Government's intention for both reviews to be undertaken at the same time.

Clause 34: Privileges and immunities of the Crown

Clause 34 provides that the Office of the Information Commissioner has the privileges and immunities of the Crown.

Clause 35: Information officer etc. not to be sued

Clause 35 provides immunity from legal proceedings to the Information Commissioner, the FOI Commissioner, the Privacy Commissioner or a person acting under the direction or authority of one of these Commissioners, in relation to exercising an information commissioner function, an FOI function or a privacy function.

Clause 36: Regulations

This clause provides for the Governor-General to make regulations in relation to the Bill.