



New South Wales

Information Commissioner Bill 2009

Explanatory note

This Bill is cognate with the *Open Government Information Bill 2009*.

Overview of Bill

The object of this Bill is to create the office of Information Commissioner, who is to have the functions conferred or imposed on the Commissioner by or under the *Open Government Information Act 2009 (the OGI Act)* and any other Act declared by the regulations to be an Information Act for the purposes of the proposed Act.

The functions of the Commissioner under the OGI Act include the following:

- (a) to promote public awareness and understanding of the OGI Act,
- (b) to provide information, advice, assistance and training to agencies and the public on any matters relevant to the OGI Act,
- (c) to review decisions of agencies in respect of applications for access to information under the OGI Act,
- (d) to investigate, audit and report on the exercise by agencies of their functions under, and compliance with, the OGI Act,
- (e) to make reports and provide recommendations to the Minister about proposals for legislative and administrative changes to further the object of the OGI Act.

The Bill also makes minor consequential amendments to other legislation.

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Outline of provisions

Part 1 Preliminary

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Clause 3 defines certain words and expressions used in the proposed Act. The term *agency* has the same meaning as in the OGI Act, and *Joint Committee* means the Committee on the Office of the Ombudsman and the Police Integrity Commission constituted under the *Ombudsman Act 1974* or such other joint committee of members of members of Parliament as may be appointed for the purposes of the proposed Act.

Part 2 Appointment of Information Commissioner

Clause 4 provides that the Governor may appoint an Information Commissioner (the *Commissioner*), who may hold office on a full-time basis for up to 5 years, and who may be re-appointed. Members of the NSW Parliament, or of the parliament of another State or Territory or of the Commonwealth, are not eligible to be appointed as Commissioner. **Clause 5** enables the Joint Committee to veto the appointment of a person as the Commissioner.

Clause 6 provides that the Commissioner is to be paid remuneration in accordance with the *Statutory and Other Offices Remuneration Act 1975* and travelling and subsistence allowances as determined by the Minister. **Clause 9** provides that the *Public Sector Employment and Management Act 2002* does not apply to the appointment of the Commissioner, and the holder of the office is not, as holder, subject to that Act.

Clause 7 sets out the circumstances in which the office of Commissioner becomes vacant and in which the Commissioner may be removed from office by the Governor.

Clause 8 provides that if the office of Commissioner becomes vacant, a person is to be appointed to fill the vacancy. **Clause 10** provides that the Minister may appoint an acting Commissioner during the illness or absence of the Commissioner or a vacancy in the office.

Clause 11 provides that the staff of the Commissioner are to be employed under Chapter 1A of the *Public Sector Employment and Management Act 2002*.

Clause 12 enables the Commissioner to delegate his or her functions, other than the power of delegation.

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Part 3 Functions of Commissioner

Division 1 General functions of Commissioner

Clause 13 provides for the functions of the Commissioner. **Clause 14** further provides that the Commissioner is to act in an informal manner as far as possible (including avoiding formal hearings), is to act according to the substantial merits of the case without undue regard to technicalities, is not bound by the rules of evidence and may determine procedures to be followed, including procedures for inquiries or investigations. **Clause 15** enables the Commissioner to engage the services of any person for the purpose of getting expert assistance.

Division 2 Complaints

Clauses 16–19 deal with complaints to the Commissioner. A person may complain to the Commissioner about the conduct of an agency in the exercise of its functions under an Information Act, including conduct that may constitute a contravention of an Information Act. The Commissioner may decide whether or not to investigate a complaint and must notify the complainant about the decision and how the complaint is to be dealt with. In dealing with a complaint, the Commissioner may provide information to the parties to the complaint, undertake discussions with the parties and facilitate the direct resolution of the complaint through informal processes such as conciliation. The Commissioner may also decide to investigate the complaint under Division 3.

Division 3 Investigations

Clause 20 provides that the Commissioner may investigate and report on the exercise of any functions of an agency under an Information Act, including the systems, policies and practices of an agency. The Commissioner must provide such a report to the Minister responsible for an agency to which the report relates and to the principal officer of an agency that is the subject of the report.

Clause 21 requires the Commissioner to notify a complainant of its decision to investigate or not investigate a complaint and must notify an agency if the Commissioner is to investigate a complaint about the agency.

Clause 22 provides that an investigation is to be conducted in private. Submissions to the Commissioner can be made by the complainant and, if practicable, by the agency concerned. Before making any adverse comments about a person in a report of an investigation, the Commissioner must, in so far as is practicable to do so, inform the person and give the person the opportunity to make submissions. Before publishing a report on an investigation that makes an adverse comment in respect of an agency, the Commissioner must inform the Minister responsible for the agency that the Commissioner proposes to publish such a report and must, at the request of that Minister, consult the Minister.

Clause 23 requires the Commissioner to report any conduct of an agency that constitutes a failure to exercise its functions properly in accordance with any

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provision of an Information Act to the Minister responsible for the agency, to the agency's principal officer and, if it is conduct of a person employed under the *Public Sector Employment and Management Act 2002*, to the head of the Department of Premier and Cabinet. Such a report may be given to the complainant (if any) and to the relevant agency, who must, if requested by the Commissioner, notify the Commissioner of any action taken or proposed in consequence of the report.

Division 4 Powers of Commissioner

Clause 24 enables the Commissioner to require an agency to provide specific information and records. **Clause 25** enables the Commissioner to enter and inspect premises used by an agency and inspect any record or thing on the premises. **Clause 26** limits these powers in certain situations related to a claim of privilege.

Clause 27 enables the Commissioner to apply to the Supreme Court for an injunction to prevent a contravention of any provision of an Information Act.

Clause 28 gives the Commissioner power to conduct formal inquiries, with specified powers of a Royal Commission under the *Royal Commissions Act 1923*.

Clause 29 prevents the Commissioner from having access to Cabinet information within the meaning of the OGI Act.

Division 5 Disclosure of information

Clause 30 enables the Commissioner to provide the Ombudsman with certain information that relates to conduct of an agency that could be the subject of a complaint under the *Ombudsman Act 1974*. **Clause 31** enables the Commissioner to provide certain information to the Director of Public Prosecutions or to the Independent Commission Against Corruption. **Clause 32** enables the Commissioner to provide certain information to an agency that the Commissioner obtained in relation to a complaint against the agency and to make comments to the agency. The Commissioner may, in certain circumstances, provide such information and make comments to another relevant agency. **Clause 33** enables the Ombudsman to provide certain information to the Commissioner that relates to conduct of any agency that could be the subject of a complaint under the proposed Act. **Clause 34** provides that the Commissioner must not, in the exercise of functions under the proposed Act, disclose any information for which there is an overriding public interest against disclosure, as provided by the OGI Act, except as authorised by the other provisions of the Division.

Part 4 Reports by Commissioner

Clause 35 requires the Commissioner to prepare and submit to Parliament an annual report about the Commissioner's work and activities, and a copy is to be provided to the Minister.

Clause 36 requires the Commissioner to prepare and publish an annual report on the operation of the OGI Act (generally, across all agencies) and to provide the report to Parliament. A copy of the report is to be provided to the Minister.

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Clause 37 allows the Commissioner to make, at any time, a special report on any matter relating to the Commissioner's functions to Parliament and a copy is to be provided to the Minister.

Clause 38 sets out the procedures for tabling reports in Parliament. If the Commissioner recommends that the report be made public, the Presiding Officer of a House of Parliament may make it public immediately.

Part 5 Miscellaneous

Clause 39 requires the Ombudsman to consult with the Commissioner about any complaint received by the Ombudsman that could be a complaint to the Commissioner under the proposed Act. If the Commissioner decides to deal with the complaint, the Ombudsman is not to investigate the matter any further (to the extent that it relates to conduct that could be the subject of a complaint under the proposed Act).

Clause 40 provides that neither the Commissioner nor a member of the Commissioner's staff is competent or compellable to give evidence or produce any document in certain legal proceedings in respect of any information obtained by the Commissioner or staff member in the course of the exercise of functions under the proposed Act or any other Act.

Clause 41 protects persons involved in the administration of the proposed Act, including the Commissioner, from personal liability (provided they were not acting in bad faith). Civil or criminal proceedings against such a person cannot be brought without leave of the Supreme Court.

Clause 42 makes it an offence with a maximum penalty of 10 penalty units (currently, \$1,100) for a person:

- (a) to obstruct or hinder the Commissioner or a member of the Commissioner's staff in the exercise of their functions under the proposed Act or any other Act, or
- (b) to refuse or fail to comply with any lawful requirement of the Commissioner under the proposed Act or any other Act, or
- (c) to falsely represent that the person is the Commissioner or a member of the Commissioner's staff.

It is an indictable offence, with a maximum penalty of 200 penalty units (currently, \$22,000) or 5 years imprisonment or both, to use, cause, inflict or procure any violence, punishment, damage, loss or disadvantage to any person because that person makes a complaint to the Commissioner, assists the Commissioner or gives evidence to the Commissioner.

It is an indictable offence, with a maximum penalty of 200 penalty units (currently, \$22,000) or 5 years imprisonment or both, for an employer to dismiss or prejudice an employee because the employee assists the Commissioner.

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Clause 43 sets out the functions of the Joint Committee, which include monitoring and reviewing the exercise of the Commissioner's functions, reporting to Parliament on certain matters, and examining any reports produced by the Commissioner.

Clause 44 protects persons involved in the administration of the proposed Act, including the Commissioner, from personal liability.

Clause 45 provides for how proceedings for an offence under the proposed Act are to be dealt with.

Clause 46 is a regulation-making power.

Clause 47 requires a review of the proposed Act to be undertaken in 5 years.

Schedule 1 Amendment of other Acts

Schedule 1 amends the Acts specified in the Schedule.



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No. , 2009

A Bill for

An Act to create the office of Information Commissioner; and for other purposes.

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Clause 1 Information Commissioner Bill 2009

Part 1 Preliminary

The Legislature of New South Wales enacts:

Part 1 Preliminary

1 Name of Act

This Act is the *Information Commissioner Act 2009*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

3 Definitions

(1) In this Act:

agency has the same meaning as in the OGI Act.

Commissioner means the Information Commissioner appointed under this Act.

exercise a function includes perform a duty.

function includes a power, authority or duty.

Information Act means the OGI Act and any other Act that is declared by the regulations to be an Information Act for the purposes of this Act.

Joint Committee means the Committee on the Office of the Ombudsman and the Police Integrity Commission constituted under the *Ombudsman Act 1974* or such other joint committee of members of Parliament as may be appointed to exercise the functions of the Joint Committee under this Act.

OGI Act means the *Open Government Information Act 2009*.

(2) Notes included in this Act do not form part of this Act.

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Information Commissioner Bill 2009

Clause 4

Appointment of Information Commissioner

Part 2

Part 2 Appointment of Information Commissioner

4 Appointment of Information Commissioner

- (1) The Governor may appoint an Information Commissioner.
- (2) The Commissioner holds office for such term not exceeding 5 years as may be specified in the instrument of appointment, but is eligible (if otherwise qualified) for re-appointment.
- (3) A person is not eligible to be appointed as Commissioner or to act in that office if the person is a member of the Legislative Council or of the Legislative Assembly or is a member of a House of Parliament or legislature of another State or Territory or of the Commonwealth.
- (4) The office of Commissioner is a full-time office and the holder of the office is required to hold it on that basis, except to the extent permitted by the Governor.

5 Veto of proposed appointment of Commissioner

- (1) A person is not to be appointed as Commissioner until:
 - (a) a proposal that the person be so appointed has been referred to the Joint Committee under section 31BA of the *Ombudsman Act 1974*, and
 - (b) the period that the Committee has under that section to veto the proposed appointment has ended without the Committee having vetoed the proposed appointment or the Committee notifies the Minister that it has decided not to veto the proposed appointment.
- (2) A person may be proposed for appointment on more than one occasion.
- (3) In this clause, *appointment* includes re-appointment.

6 Remuneration

- (1) The Commissioner is entitled to be paid:
 - (a) remuneration in accordance with the *Statutory and Other Offices Remuneration Act 1975*, and
 - (b) such travelling and subsistence allowances as the Minister may from time to time determine.
- (2) The Commissioner is not, if a Judge of a New South Wales Court and while receiving remuneration as such a Judge, entitled to remuneration under this Act.

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Clause 7 Information Commissioner Bill 2009

Part 2 Appointment of Information Commissioner

7 Vacancy in office

(1) Vacancies

The office of Commissioner becomes vacant if the holder:

- (a) dies, or
- (b) completes a term of office and is not re-appointed, or
- (c) resigns the office by instrument in writing addressed to the Governor, or
- (d) is nominated for election as a member of the Legislative Council or of the Legislative Assembly or as a member of a House of Parliament or a legislature of another State or Territory or of the Commonwealth, or
- (e) becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with his or her creditors or makes an assignment of his or her remuneration for their benefit, or
- (f) becomes a mentally incapacitated person, or
- (g) is convicted in New South Wales of an offence that is punishable by imprisonment for 12 months or more or is convicted elsewhere than in New South Wales of an offence that, if committed in New South Wales, would be an offence so punishable, or
- (h) is removed from office under subclause (2).

(2) Removal from office

The Commissioner may be removed from office by the Governor for incapacity, incompetence or misbehaviour or on the address of both Houses of Parliament.

8 Filling of vacancy

If the office of Commissioner becomes vacant, a person is, subject to this Act, to be appointed to fill the vacancy.

9 Public Sector Employment and Management Act 2002

The *Public Sector Employment and Management Act 2002* does not apply to the appointment of the Commissioner, and the holder of the office is not, as holder, subject to that Act.

10 Appointment of acting Commissioner

- (1) The Minister may, from time to time, appoint a person to act in the office of the Commissioner during the illness or absence of the Commissioner or during a vacancy in the office of the Commissioner.

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Clause 11

Appointment of Information Commissioner

Part 2

The person, while so acting, has all the functions of the Commissioner and is taken to be the Commissioner.

- (2) The Minister may, at any time, remove a person from office as acting Commissioner.
- (3) An acting Commissioner is entitled to be paid such remuneration (including travelling and subsistence allowances) as the Minister may from time to time determine.

11 Staff of Commissioner

The staff of the Commissioner are to be employed under Chapter 1A of the *Public Sector Employment and Management Act 2002*.

12 Delegation

The Commissioner may delegate the exercise of any function of the Commissioner (other than this power of delegation) to:

- (a) any member of staff of the Commissioner, or
- (b) any person, or any class of persons, authorised for the purposes of this section by the regulations.

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Clause 13 Information Commissioner Bill 2009

Part 3 Functions of Commissioner

Part 3 Functions of Commissioner

Division 1 General functions of Commissioner

13 General functions

The Commissioner has such functions as may be conferred or imposed on the Commissioner by or under this or any other Act.

14 General procedures of Commissioner

The Commissioner:

- (a) is to act in an informal manner (including avoiding conducting formal hearings) as far as possible, and
- (b) is to act according to the substantial merits of the case without undue regard to technicalities, and
- (c) may determine the procedures to be followed in exercising the Commissioner's functions under this Act, including the procedures to be followed at an inquiry or investigation conducted by the Commissioner, and
- (d) is not bound by the rules of evidence and may inform himself or herself on any matter in any way that the Commissioner considers to be just.

15 Expert assistance

For the purposes of the exercise of any of the Commissioner's functions, the Commissioner may engage the services of any person for the purpose of getting expert assistance.

Division 2 Complaints

16 Making of complaint

Any person may complain to the Commissioner about the conduct (including action or inaction) of an agency in the exercise of functions under an Information Act, including conduct that is alleged by the person to constitute a contravention of an Information Act.

Note. A decision of an agency that is reviewable under the OGI Act (s.84) cannot be the subject of a complaint to the Commissioner (even if the person is out of time to apply for review of the decision).

17 Decision to deal with complaint

- (1) The Commissioner may decide to deal with a complaint or to decline to deal with a complaint.

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Clause 18

Functions of Commissioner

Part 3

- (2) The Commissioner may make preliminary inquiries for the purposes of deciding how to deal with a complaint and may request further information from the complainant.

18 How complaints are dealt with

- (1) The Commissioner deals with a complaint by taking appropriate measures to assist in the resolution of the complaint, including (but not limited to) any of the following measures:
- (a) providing information to the parties to the complaint,
 - (b) undertaking discussions concerning the complaint with the parties to the complaint,
 - (c) facilitating the direct resolution of the complaint between the parties to the complaint (including by conciliation or other informal process).
- (2) The Commissioner can also deal with a complaint by investigating the complaint under Division 3.

19 Notice to complainant

The Commissioner must give notice to the complainant of the Commissioner's decision on whether to deal with the complaint and (if the Commissioner decides to deal with the complaint) how the complaint is to be dealt with.

Division 3 Investigations

20 Investigation of agency systems, policies and practices

- (1) The Commissioner may investigate and report on the exercise of any functions of one or more agencies under an Information Act, including the systems, policies and practices of agencies (or of agencies generally) that relate to functions of agencies under an Information Act.
- (2) The Commissioner is to give a report under this section:
- (a) to the Minister responsible for any agency to which the report relates, and
 - (b) to the principal officer of an agency that is the subject of the report.

21 Investigation of complaints

- (1) If the Commissioner decides to investigate a complaint, the Commissioner must give notice to the complainant of its decision to investigate or not to investigate the complaint and must give notice to

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Clause 22 Information Commissioner Bill 2009

Part 3 Functions of Commissioner

an agency of the Commissioner's decision to investigate a complaint about the agency.

- (2) The Commission may discontinue an investigation of a complaint at any time and is to give notice of the discontinuation of an investigation to the complainant and the agency concerned.

22 Procedure for investigations

- (1) An investigation under this Act is to be made in the absence of the public.
- (2) In an investigation under this Act, the Commissioner must give an opportunity to make submissions on the matter the subject of the investigation:
 - (a) if practicable, to the agency whose conduct is the subject of investigation, and
 - (b) in the case of an investigation of a complaint—to the complainant.
- (3) Where, in an investigation under this Act, the Commissioner considers that there are grounds for adverse comment in respect of any person, the Commissioner, before making any such comment in any report, must, in so far as it is practicable to do so:
 - (a) inform that person of the substance of the grounds of the adverse comment, and
 - (b) give the person an opportunity to make submissions.
- (4) Before publishing a report on an investigation that makes an adverse comment in respect of an agency, the Commissioner must inform the Minister responsible for the agency that the Commissioner proposes to publish such a report and must, at the request of that Minister, consult the Minister.

23 Report on compliance with Information Act

- (1) Where, in an investigation under this Act, the Commissioner finds that any conduct of an agency the subject of the investigation is conduct that constitutes a failure to exercise its functions properly in accordance with any provision of an Information Act, the Commissioner must report the matter:
 - (a) to the Minister responsible for the agency, and
 - (b) to the principal officer of the agency, and
 - (c) where the conduct concerns the conduct of a person employed under the *Public Sector Employment and Management Act 2002*, to the head of the Department of Premier and Cabinet.

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- (2) The Commissioner may give a copy of the report:
 - (a) where the investigation arises out of a complaint to the Commissioner, to the complainant, and
 - (b) to the agency to whose conduct the report relates.
- (3) An agency to whose conduct the report relates who is given a copy of the report may, and on request by the Commissioner must, notify the Commissioner of any action taken or proposed in consequence of the report.

Division 4 Powers of Commissioner

24 Agencies to give information etc

- (1) For the purposes of or in connection with the exercise of any function of the Commissioner, the Commissioner may require an agency:
 - (a) to give the Commissioner a statement of information, or
 - (b) to produce to the Commissioner any record or other thing, or
 - (c) to give the Commissioner a copy of any record.
- (2) A requirement under this section must be in writing, must specify or describe the information, record or thing required, and must fix a time and specify a place for compliance.

25 Entry on premises

For the purposes of any investigation under this Act, the Commissioner may, at any time:

- (a) enter and inspect any premises occupied or used by an agency, and
- (b) inspect any record or thing in or on the premises.

26 Limits on coercive powers because of privilege etc

- (1) The Commissioner must not exercise a coercive entry power and must set aside any requirement imposed under a coercive investigative power if it appears to the Commissioner that any person has a ground of privilege, whereby, in proceedings in a court of law, the person might resist a like requirement or the exercise of a like power, unless:
 - (a) the privilege is a privilege of an agency, or
 - (b) it appears to the Commissioner that the person has waived the privilege.

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Clause 27 Information Commissioner Bill 2009

Part 3 Functions of Commissioner

- (2) However, the Commissioner may exercise a coercive entry or investigative power despite (and is not required to set aside any requirement imposed under a coercive investigative power merely because of):
- (a) any rule of law that, in proceedings in a court of law, might justify an objection to compliance with a like requirement or the exercise of a like power on grounds of public interest, or
 - (b) any duty of secrecy or other restriction on disclosure applying to an agency.
- (3) In this section:
- coercive entry power*** means a power to inspect any premises or any record or thing on premises.
- coercive investigative power*** means a power to:
- (a) require any person to give any statement of information, or
 - (b) require any person to produce any record or other thing, or
 - (c) require any person to give a copy of any record, or
 - (d) require any person to answer any question.

27 Powers to prevent contravention of Information Act

- (1) If a person has engaged, is engaged or is proposing to engage in any conduct that constituted, constitutes or would constitute a contravention of any provision of an Information Act, the Supreme Court may, on the application of the Commissioner, grant an injunction restraining the person from engaging in that conduct and, if in the opinion of the Court it is desirable to do so, requiring that person to do any act or thing.
- (2) If a person has refused or failed, is refusing or failing, or is proposing to refuse or fail, to do any act or thing that the person is required to do by or under an Information Act, the Supreme Court may, on the application of the Commissioner, grant an injunction requiring the person to do that act or thing.
- (3) If an application is made to the Court for an injunction under subsection (1), the Court may, if in its opinion it is desirable to do so, before considering the application, grant an interim injunction restraining a person from engaging in the conduct concerned pending the determination of the application.
- (4) The Court may rescind or vary an injunction granted under this section.
- (5) The Commissioner has standing to bring proceedings by way of judicial review in connection with the exercise of the functions of an agency under the OGI Act.

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Clause 28

Functions of Commissioner

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- (6) The Commissioner does not have the function of bringing proceedings for an offence under an Information Act.

28 Formal inquiries

- (1) The Commissioner may make or hold inquiries for the purposes of an investigation that the Commissioner conducts under this Act.
- (2) For the purposes of any inquiry under this section, the Commissioner has the powers, authorities, protections and immunities conferred on a commissioner by Division 1 of Part 2 of the *Royal Commissions Act 1923* and that Act (section 13 and Division 2 of Part 2 excepted) applies to any witness summoned by or appearing before the Commissioner in the same way as it applies to a witness summoned by or appearing before a commissioner, but section 11 (2) of that Act is to have effect subject to section 26 (Limits on coercive powers because of privilege etc) of this Act.
- (3) A witness appearing before the Commissioner is to be paid such amount as the Commissioner determines, but not exceeding the amount that would be payable to such a witness if he or she were a Crown witness subpoenaed by the Crown to give evidence.

29 Cabinet proceedings

- (1) This Act does not enable the Commissioner:
- (a) to require any person:
 - (i) to give any statement of information, or
 - (ii) to produce any record or other thing, or
 - (iii) to give a copy of any record, or
 - (iv) to answer any question,
if compliance with the requirement would disclose information that is Cabinet information, or
 - (b) to inspect any such record or thing.
- (2) A certificate of the Director-General or Deputy Director-General (General Counsel) of the Department of Premier and Cabinet that any information, record or thing or the answer to any question comprises, contains or would reveal Cabinet information is conclusive of that fact for the purposes of this section.
- (3) In this section:
Cabinet information means information that is Cabinet information under clause 2 of Schedule 1 to the OGI Act.

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Clause 30 Information Commissioner Bill 2009

Part 3 Functions of Commissioner

Division 5 Disclosure of information

30 Commissioner may furnish information to Ombudsman

- (1) The Commissioner may, at any time, furnish to the Ombudsman information obtained by the Commissioner in discharging functions under this or any other Act if the Commissioner is of the opinion that the information relates to conduct of an agency that could be the subject of a complaint under the *Ombudsman Act 1974*.
- (2) However, the Commissioner must not disclose information that could not otherwise be disclosed under this Act or could not be obtained by the Ombudsman under the *Ombudsman Act 1974* or any other Act.

31 Commissioner may furnish information to ICAC and DPP

- (1) The Commissioner may, at any time, furnish information obtained by the Commissioner in discharging functions under this or any other Act to the Director of Public Prosecutions or to the Independent Commission Against Corruption.
- (2) However, the Commissioner must not disclose information that could not otherwise be disclosed under this Act or could not:
 - (a) in the case of the Director of Public Prosecutions—be obtained by the Director under the *Director of Public Prosecutions Act 1986* or any other Act, or
 - (b) in the case of the Independent Commission Against Corruption—be obtained by the Commission under the *Independent Commission Against Corruption Act 1988* or any other Act.

32 Commissioner may furnish information to agency

- (1) The Commissioner may, at any time:
 - (a) furnish to an agency information obtained by the Commissioner in discharging functions under this Act with respect to a complaint against or relating to the agency, and
 - (b) make such comments to the agency with respect to the complaint as the Commissioner thinks fit.
- (2) The Commissioner may also furnish any or all of the information referred to in subsection (1) to any other agency, and may make such comments (if any) to that agency as the Commissioner considers appropriate, if:
 - (a) the Commissioner is satisfied that the information concerned is relevant to the functions, policies, procedures or practices of that other agency, and

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- (b) the information does not disclose any personal information (within the meaning of the *Privacy and Personal Information Protection Act 1998*).

33 Ombudsman may furnish information to Commissioner

- (1) The Ombudsman may at any time furnish to the Commissioner information obtained by the Ombudsman in discharging functions under the *Ombudsman Act 1974* or any other Act if the Ombudsman is of the opinion that the information relates to conduct of an agency that could be the subject of a complaint to the Commissioner under this Act.
- (2) However, the Ombudsman must not disclose information that could not otherwise be disclosed under the *Ombudsman Act 1974* or could not be obtained by the Commissioner under this or any other Act.

34 Restriction on disclosure of information by Commissioner

The Information Commissioner must not, in the exercise of functions under this Act, disclose any information for which there is an overriding public interest against disclosure, as provided by the OGI Act, unless the disclosure is authorised under this Division.

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Clause 35 Information Commissioner Bill 2009

Part 4 Reports by Commissioner

Part 4 Reports by Commissioner

35 Annual report

- (1) The Commissioner is, as soon as practicable after 30 June in each year, to prepare a report of the Commissioner's work and activities for the 12 months preceding that date and is to furnish the report to the Presiding Officer of each House of Parliament.
- (2) A copy of the report is to be provided to the Minister.
- (3) The *Annual Reports (Departments) Act 1985* is, in its application to the annual reports of the Commissioner, modified as follows:
 - (a) letters of submission under that Act are to be made to the Presiding Officer of each House of Parliament and not to the appropriate Minister,
 - (b) the annual report is to be submitted to the Presiding Officer of each House of Parliament and not to the appropriate Minister,
 - (c) provisions of that Act relating to the presentation of annual reports to the appropriate Minister and to the public availability of annual reports do not apply to the Commissioner.
- (4) Section 38 (Procedure for reporting) applies to the annual report of the Commissioner as if it were a report made or furnished under this Part.

36 Report on operation of OGI Act

- (1) The Commissioner is, as soon as practicable after 30 June in each year, to prepare and publish a report on the operation of the OGI Act (generally, across all agencies) for the 12 months preceding that date and is to furnish the report to the Presiding Officer of each House of Parliament.
- (2) A copy of the report is to be provided to the Minister.

37 Special report to Parliament

- (1) The Commissioner may, at any time, make a special report on any matter relating to the functions of the Commissioner to the Presiding Officer of each House of Parliament and must also provide the Minister with a copy of the report.
- (2) The Commissioner may include in a report under this section a recommendation that the report be made public immediately.

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Information Commissioner Bill 2009

Clause 38

Reports by Commissioner

Part 4

38 Procedure for reporting

(1) Tabling

A copy of a report made or furnished to the Presiding Officer of a House of Parliament under this Part must be laid before that House on the next sitting day of that House after it is received by the Presiding Officer.

(2) Public reports

If a report includes a recommendation by the Commissioner that the report be made public forthwith, the Presiding Officer of a House of Parliament may make it public whether or not that House is in session and whether or not the report has been laid before that House.

(3) Privileges and immunities

A report that is made public by the Presiding Officer of a House of Parliament before it is laid before that House attracts the same privileges and immunities as it would if it had been laid before that House.

(4) Report procedures

A Presiding Officer need not inquire whether all or any conditions precedent have been satisfied as regards a report purporting to have been made or furnished in accordance with this Act.

(5) Reference to Presiding Officer

In this Part, a reference to a Presiding Officer of a House of Parliament is a reference to the President of the Legislative Council or the Speaker of the Legislative Assembly. If there is a vacancy in the office of President, the reference to the President is taken to be a reference to the Clerk of the Legislative Council and, if there is a vacancy in the office of Speaker, the reference to the Speaker is taken to be a reference to the Clerk of the Legislative Assembly.

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Clause 39 Information Commissioner Bill 2009

Part 5 Miscellaneous

Part 5 Miscellaneous

39 Ombudsman required to consult

- (1) If the Ombudsman receives a complaint under the *Ombudsman Act 1974* about conduct of an agency that it appears could be the subject of a complaint to the Commissioner under this Act, the Ombudsman is to consult with the Commissioner on the matter.
- (2) If the Commissioner decides to deal with the matter as a complaint under this Act:
 - (a) the complaint is (to the extent that it relates to conduct that could be the subject of a complaint under this Act) to be transferred to the Commissioner and dealt with as a complaint made to the Commissioner under this Act, and
 - (b) the Ombudsman is not to investigate the matter (and is to discontinue any investigation already commenced) to the extent that it relates to conduct that could be the subject of a complaint under this Act.

40 Commissioner, officer or expert as witness

- (1) Neither the Commissioner nor a member of staff of the Commissioner is competent or compellable to give evidence or produce any document in any legal proceedings in respect of any information obtained by the Commissioner or member of staff in the course of the exercise of functions under this or any other Act.
- (2) Subsection (1) does not apply to any legal proceedings:
 - (a) under section 26 (Limits on coercive powers because of privilege etc), 41 (Immunity of Commissioner and others) or 42 (Offences), or
 - (b) under Part 3 of the *Royal Commissions Act 1923*, or
 - (c) under Part 4 of the *Special Commissions of Inquiry Act 1983*.
- (3) This section applies to a person whose services are engaged under section 15 in the same way as it applies to a member of staff of the Commissioner.

41 Immunity of Commissioner and others

- (1) Neither the Commissioner nor a member of staff of the Commissioner is liable, whether on the ground of want of jurisdiction or on any other ground, to any civil or criminal proceedings in respect of any act, matter or thing done or omitted to be done for the purpose of executing this or any other Act unless the act, matter or thing was done, or omitted to be done, in bad faith.

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Information Commissioner Bill 2009

Clause 42

Miscellaneous

Part 5

- (2) Civil or criminal proceedings in respect of any act or omission referred to in subsection (1) cannot be brought against the Commissioner or a member of staff of the Commissioner without the leave of the Supreme Court.
- (3) The Supreme Court is not to grant leave under subsection (2) unless it is satisfied that there is substantial ground for the contention that the person to be proceeded against has acted, or omitted to act, in bad faith.

42 Offences

- (1) A person must not:
 - (a) without lawful excuse, wilfully obstruct, hinder or resist the Commissioner or a member of staff of the Commissioner in the exercise of functions under this or any other Act,
 - (b) without lawful excuse, refuse or wilfully fail to comply with any lawful requirement of the Commissioner under this or any other Act, or
 - (c) wilfully make any false statement to or mislead, or attempt to mislead, the Commissioner or a member of staff of the Commissioner in the exercise of functions under this or any other Act.

Maximum penalty: 10 penalty units.

- (2) A person must not directly or indirectly:
 - (a) falsely represent that he or she is the Commissioner or acting Commissioner, or
 - (b) falsely represent that he or she is a member of staff of the Commissioner.

Maximum penalty: 10 penalty units.

- (3) For the purposes of subsection (2), a person represents that a state of affairs exists if the person does or says anything, or causes, permits or suffers anything to be done or said, whereby it is represented, or whereby a belief may be induced, that the state of affairs exists.
- (4) A person who uses, causes, inflicts or procures any violence, punishment, damage, loss or disadvantage to any person for or on account of:
 - (a) his or her making a complaint to the Commissioner, or
 - (b) his or her assisting the Commissioner, or

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Clause 43 Information Commissioner Bill 2009

Part 5 Miscellaneous

(c) any evidence given by him or her to the Commissioner, is guilty of an indictable offence.

Maximum penalty: 200 penalty units or imprisonment for 5 years, or both.

(5) An employer who dismisses any employee from his or her employment, or prejudices any employee in his or her employment, for or on account of the employee assisting the Commissioner is guilty of an indictable offence.

Maximum penalty: 200 penalty units or imprisonment for 5 years, or both.

(6) In any proceedings for an offence against subsection (5), it lies on the employer to prove that any employee shown to have been dismissed or prejudiced in his or her employment was so dismissed or prejudiced for some reason other than the reasons mentioned in subsection (5).

(7) In this section, a reference to a person assisting the Commissioner is a reference to a person who:

- (a) has appeared, is appearing or is to appear as a witness before the Commissioner, or
- (b) has complied with or proposes to comply with a requirement under section 24 (Agencies to give information etc), or
- (c) has assisted, is assisting or is to assist the Commissioner in some other manner.

43 Oversight of Commissioner's functions by Joint Committee

(1) The Joint Committee has the following functions under this Act:

- (a) to monitor and review the exercise by the Commissioner of the Commissioner's functions,
- (b) to report to both Houses of Parliament, with such comments as it thinks fit, on any matter appertaining to the Commissioner or connected with the exercise of the Commissioner's functions to which, in the opinion of the Joint Committee, the attention of Parliament should be directed,
- (c) to examine each annual and other report of the Commissioner and report to both Houses of Parliament on any matter appearing, or arising out of, any such report,
- (d) to recommend to both Houses of Parliament any changes to the functions of the Commissioner that the Joint Committee thinks desirable,

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Clause 44

Miscellaneous

Part 5

- (e) to inquire into any question in connection with its functions which is referred to it by both Houses of Parliament, and report to both Houses on that question.
- (2) Nothing in this section authorises the Joint Committee:
 - (a) to investigate a matter relating to any particular conduct, or
 - (b) to reconsider any decision to investigate, not to investigate or to discontinue investigation of any particular matter, or
 - (c) to reconsider the findings, recommendations or other decisions of the Commissioner in relation to any particular matter.
- (3) The provisions of Part 4A of the *Ombudsman Act 1974* apply in relation to the Joint Committee's functions under this Act in the same way as they apply in relation to the Joint Committee's functions under that Act.

44 Personal liability of Commissioner and others

A matter or thing done (or omitted to be done) by the Commissioner, a member of the staff of the Commissioner or a person acting under the direction of the Commissioner does not, if the matter or thing was done (or omitted to be done) in good faith for the purpose of executing this Act or any other Act, subject the Commissioner, the member of staff or the person so acting personally to any action, liability, claim or demand.

45 Proceedings for offences

- (1) Except where otherwise expressly provided by this Act, proceedings for an offence against this Act are to be dealt with summarily before a Local Court constituted by a Magistrate sitting alone.
- (2) If an offence against this Act is an indictable offence, a Local Court may nevertheless hear and determine the proceedings in respect of such an offence if the court is satisfied that it is proper to do so and the defendant and prosecutor consent.
- (3) If, in accordance with subsection (2), a Local Court convicts a person of such an offence, the maximum penalty that the court may impose is:
 - (a) in the case of an individual—the smaller of:
 - (i) a fine of 50 penalty units or imprisonment for 2 years, or both, or
 - (ii) the maximum penalty otherwise applicable to the offence when committed by an individual, or
 - (b) in the case of a corporation—the smaller of:
 - (i) a fine of 100 penalty units, or
 - (ii) the maximum penalty otherwise applicable to the offence when committed by a corporation.

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Clause 46 Information Commissioner Bill 2009

Part 5 Miscellaneous

46 Regulations

The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

47 Review of Act

- (1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.
- (2) The review is to be undertaken as soon as possible after the period of 5 years from the date of assent to this Act.
- (3) A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years.

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Information Commissioner Bill 2009

Amendment of other Acts

Schedule 1

Schedule 1 Amendment of other Acts

1.1 Defamation Act 2005 No 77

[1] Schedule 1 Additional publications to which absolute privilege applies

Insert after clause 2:

2A Matters relating to Information Commissioner

Without limiting section 27 (2) (a)–(c), matter that is published:

- (a) to or by the Information Commissioner or an acting Information Commissioner in his or her capacity as the Information Commissioner or an acting Information Commissioner, or
- (b) to any member of staff of the Information Commissioner in his or her capacity as such a member, or
- (c) in a report under section 37 (Special report to Parliament) of the *Information Commissioner Act 2009*, or
- (d) in a copy of a report previously made public under section 37 of the *Information Commissioner Act 2009* where the copy of the report is published under the authority of the Minister for the time being administering that Act.

1.2 Ombudsman Act 1974 No 68

[1] Section 31A Constitution of Joint Committee

Insert “the *Information Commissioner Act 2009*,” after “*Police Integrity Commission Act 1996*,” in section 31A (2).

[2] Section 31BA Power to veto proposed appointments

Insert “Information Commissioner,” after “Prosecutions,” in section 31BA (1).

[3] Section 31BA (5) (b1)

Insert after section 31BA (5) (b):

- (b1) in the context of an appointment of Information Commissioner, a reference to the Minister administering section 5 of the *Information Commissioner Act 2009*, and

[4] Schedule 1A Agencies

Insert in alphabetical order:

Information Commissioner

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Information Commissioner Bill 2009

Schedule 1 Amendment of other Acts

1.3 Public Sector Employment and Management Act 2002 No 43

[1] Schedule 1 Divisions of the Government Service

Insert in alphabetical order of Divisions in Part 1:

Office of the Information Commissioner * Information Commissioner

[2] Schedule 2 Executive positions (other than non-statutory SES positions)

Insert "Information Commissioner," after "Ombudsman," in Part 1.

1.4 Statutory and Other Offices Remuneration Act 1975 (1976 No 4)

Schedule 1 Public offices

Insert at the end of the Schedule:

Information Commissioner