



New South Wales

Government Information (Information Commissioner) Bill 2009

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

This Bill is cognate with the *Government Information (Public Access) 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 *Government Information (Public Access) Act 2009* (the **GIPA 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 GIPA Act include the following:

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

The Bill also makes minor consequential amendments to other legislation.

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 GIPA 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 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 legislature 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 7 sets out the circumstances in which the office of Commissioner becomes vacant.

Clause 8 provides that the Commissioner may be removed from office by the Governor on the address of both Houses of Parliament and provides a process for the Governor to suspend the Commissioner on certain grounds pending a decision by the Houses of Parliament on the question of removal from office.

Clause 9 provides that if the office of Commissioner becomes vacant, a person is to be appointed to fill the vacancy.

Clause 10 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 11 provides that the Minister may appoint an acting Commissioner during the illness or absence of the Commissioner or a vacancy in the office.

Clause 12 provides that the staff of the Commissioner are to be employed under Chapter 1A of the *Public Sector Employment and Management Act 2002*.

Clause 13 enables the Commissioner to delegate his or her functions, other than the power of delegation.

Part 3 Functions of Commissioner

Division 1 General functions of Commissioner

Clause 14 provides for the functions of the Commissioner. **Clause 15** 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 16** enables the Commissioner to engage the services of any person for the purpose of getting expert assistance.

Division 2 Complaints

Clauses 17–20 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 21 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 22 requires the Commissioner to notify a complainant of its decision to investigate a complaint and must notify an agency if the Commissioner is to investigate a complaint about the agency.

Clause 23 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 24 requires the Commissioner to report any conduct of an agency that constitutes a failure to exercise its functions properly in accordance with any 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, which 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 25 enables the Commissioner to require an agency to provide specific information and records. **Clause 26** enables the Commissioner to enter and inspect premises used by an agency and inspect any record or thing on the premises. **Clause 27** limits these powers in certain situations related to a claim of privilege.

Clause 28 enables the Commissioner to apply to the Supreme Court for an injunction to prevent a contravention of any provision of an Information Act.

Clause 29 gives the Commissioner power to conduct formal inquiries, with specified powers of a Royal Commission under the *Royal Commissions Act 1923*.

Clause 30 prevents the Commissioner from having access to Cabinet information within the meaning of the GIPA Act.

Division 5 Disclosure of information

Clause 31 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 32** enables the Commissioner to provide certain information to the Director of Public Prosecutions, the Independent Commission Against Corruption or the Police Integrity Commission. **Clause 33** 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 34** 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 35** 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 GIPA Act, except as authorised by the other provisions of the Division.

Part 4 Reports by Commissioner

Clause 36 requires the Commissioner to prepare and submit to Parliament an annual report about the Commissioner's work and activities. A copy of the report is to be provided to the Minister.

Clause 37 requires the Commissioner to prepare and publish an annual report on the operation of the GIPA Act (generally, across all agencies) and to provide the report to Parliament. A copy of the report is to be provided to the Minister.

Clause 38 allows the Commissioner to make, at any time, a special report on any matter relating to the Commissioner's functions to Parliament. A copy of the report is to be provided to the Minister.

Clause 39 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 40 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 41 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 42 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 43 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.

Clause 44 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 45 protects persons involved in the administration of the proposed Act, including the Commissioner, from personal liability.

Clause 46 provides for how proceedings for an offence under the proposed Act are to be dealt with.

Clause 47 is a regulation-making power.

Clause 48 requires a review of the proposed Act to be undertaken after 5 years.

Schedule 1 Amendment of Acts

Schedule 1 amends the Acts specified in the Schedule.