



COMMONWEALTH OF AUSTRALIA

PARLIAMENTARY DEBATES



HOUSE OF REPRESENTATIVES

**FREEDOM OF INFORMATION
AMENDMENT (REFORM) BILL 2009**

Second Reading

SPEECH

Thursday, 26 November 2009

BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES

SPEECH

Date Thursday, 26 November 2009
Page 12971
Questioner
Speaker Byrne, Anthony, MP

Source House
Proof No
Responder
Question No.

Mr BYRNE (Holt—Parliamentary Secretary to the Prime Minister and Parliamentary Secretary for Trade) (9.33 am)—I move:

That this bill be now read a second time.

The main purpose of the Freedom of Information Amendment (Reform) Bill 2009 is to amend the Freedom of Information Act 1982 to usher in a new regime for access to government information.

When Labor was elected to government, we committed to reforming Australia's freedom of information laws. We committed to driving a cultural shift across the bureaucracy to promote a pro-disclosure attitude. The bill implements this important election commitment, and marks the second stage of the government's plan to undertake the most significant overhaul of the FOI Act since its commencement in 1982.

The government delivered the first stage of reform earlier this year, introducing and passing new legislation to remove the power to issue conclusive certificates in the FOI Act and the Archives Act 1983.

This bill, together with the Information Commissioner Bill 2009, meets the Rudd government's remaining FOI election commitments, which are designed to restore trust and integrity in the handling of government information.

The two bills introduced today are the product of a participatory process. The government consulted a number of stakeholders and then released exposure drafts of each bill for public comment in March this year.

Proposals in the Freedom of Information Amendment (Reform) Bill are also drawn in part from the key findings of the 1995 joint Australian Law Reform Commission and Administrative Review Council *Open government* report. The report's key findings have been updated and supplemented by other measures to deliver better access to government information.

The bill is intended to deliver more effective and efficient access to government information and promote a culture of disclosure across government.

In pursuit of the FOI Act's objective to give the Australian community access to government held information, the existing limited publication requirements under part II of the act are to be replaced. The bill provides for a new framework which will require proactive publication of information by agencies. This new publication scheme will require agencies to actively consider the types of information they have which can and should be made available to the public. This measure represents a significant shift away from the current system that is predominantly reactive; responding only to requests that have been made.

The publication of information, which will be primarily web based, needs to be structured, informative and user friendly. The Information Commissioner, an office which will be created by the Information Commissioner Bill 2009, will be responsible for ensuring this occurs. The Information Commissioner will be responsible for issuing guidance to agencies on how they can ensure optimal publication. Agencies will also be required to develop plans showing what information they will publish to further the objectives of the act.

Our system of government remains responsible and accountable to the people it serves. This bill amends the objects clause of the FOI Act to expressly refer to the important role that access to government information serves in promoting Australia's representative democracy.

The bill proposes many changes to improve the effectiveness of the FOI application system. The changes are closely entwined with the structural reforms proposed by the Information Commissioner Bill 2009. The aim of these measures is to ensure that the public interest in disclosure remains at the forefront of decision making, and that the right of access to documents is not unduly restricted by liberal application of exemption criteria.

A new, single form of public interest test weighted towards disclosure will be introduced and the test will be applied to more exemption categories than is currently the case. The public interest test is to be added to the economy, research and personal information exemptions and is to be partially applied to the business affairs exemption. In response to public consultation, the public interest test will not be applied to that part of the business affairs exemption which relates to documents disclosing trade secrets or commercially valuable information.

Decision makers will be required to address the public interest factors taken into account in their reasons for the decision. The bill does not seek to exhaustively define public interest factors. It has long been recognised that the categories of public interest are not closed. The public interest will vary depending on the subject matter.

Certain factors which are not conducive to open and accountable government, including arguments solely concerned with political sensitivity, will not be able to be argued as factors supporting non-disclosure of documents. This extends to arguments ordinarily associated with the deliberative documents exemption—for example, that disclosure would cause a loss of confidence in the government or cause embarrassment to the government. In keeping with the intention of the reforms to promote disclosure, the bill lists some pro-disclosure factors but does not list factors against disclosure.

The bill will repeal exemption categories for Executive Council documents, documents arising out of companies and securities legislation and documents relating to the conduct by an agency of industrial relations.

The bill also proposes two limited exclusions from the operation of the FOI Act for certain intelligence related information. The public interest in maintaining confidence in the information must clearly outweigh the public interest in access to that information. The nature of intelligence agencies' functions and some programs which operate to ensure Australia's strategic defence are such that those intelligence functions would be compromised by public dissemination of that information. These functions cannot be carried out with the same level of transparency ordinarily expected of administrative action. This is recognised by the special accountability systems in place for the intelligence agencies through the Parliamentary Joint Committee on Intelligence and Security and the Inspector-General of Intelligence and Security.

A substantial change which will significantly increase accessibility to information will be reducing the term during which the FOI Act governs public access to government information, and accelerating the application of the Archives Act. The bill amends the Archives Act to bring forward the open access period for all records (other than cabinet notebooks and census information) from 30 years to 20 years. The open access period for cabinet notebooks is to be brought forward from 50 years to 30 years. These measures will make government information available earlier under the Archives Act.

The bill also amends section 33(1)(b) of the Archives Act to address concerns with the current application of the provision. Decisions made by the Australian government on section 33 exemptions will be made consistent with past practice and our international obligations, and will be based on the national interest and based on the views of partner governments.

The government recognises that the promise of better information disclosure requires structural reforms. The establishment of an Information Commissioner and an FOI Commissioner, as independent officers, will address a long-standing lacuna in effective FOI administration. In addition to promotional, monitoring and guidance functions, the commissioners will directly participate in the process by reviewing access decisions made by agencies and ministers. Review of a decision by the Information Commissioner will not replace review by the Administrative Appeals Tribunal (AAT). A party can still apply for AAT review after the Information Commissioner review, if needed. Both forums will offer full independent merits review, unfettered by the limiting effects of conclusive certificates. Retaining an option of review by the AAT, an experienced review body, will be particularly important for highly contested FOI matters.

Information Commissioner review will be characterised by reduced formality and adversarial contest, with most applications determined on the papers. The commissioners will be able to dispose of an application where an agreement is reached between the parties or by determination if no compromise is reached.

Following public consultation on the exposure draft, the applicant will have the option of seeking an internal review or going directly to the Information Commissioner for review of an initial FOI decision. By making internal review optional, agencies should be encouraged to make the best possible access decision in the first instance.

There is potential for a substantial resource impost in the maintenance of an effective FOI system. That impost in part exists because not all government information can properly be released, and so it can take time for agencies to work out what information can be released and what cannot. The broad range of FOI functions to be vested in the Information and FOI Commissioners are designed to ensure the objects of the act are achieved with as minimal contest, and therefore cost, as possible. That includes fostering a pro-disclosure culture among agencies. To manage access requests that are manifestly unreasonable, the Information Commissioner is given a power to restrict an applicant's access rights by declaring them to be vexatious. Provision is also made to enhance consultation provisions for dealing with onerous or vague requests for documents.

The Information Commissioner will also take over the bulk of the role of the Ombudsman in investigating complaints about handling of FOI requests. However, the Ombudsman will still have capacity to investigate complaints which relate to FOI where it would be more appropriate or effective for the Ombudsman to do so.

One aspect of the current law which has restricted the public's access to information is cost. Cost should not deter reasonable requests for access to information. The bill, together with amendments proposed to regulations, removes all application fees, including for internal review.

No costs will apply for access to a person's own information. The first five hours of decision-making time for applications from journalists and not-for-profit organisations will be free, and for all other applications the first hour of decision-making time will be free. Some of these measures will be implemented through amendment to regulations. The regulations will also be amended so that, if there is a failure to comply with a statutory time period, any charges will be waived. The Information Commissioner will be tasked with reviewing all charges within 12 months of the commissioner's appointment.

The government is allocating \$19.5 million over four years for the establishment and running of the Office of the Information Commissioner, in addition to the existing resources for the Office of the Privacy Commissioner.

Whilst the Privacy Act 1988 largely regulates the handling of personal information by Commonwealth agencies, access to and correction of a person's own information is currently enforced through the FOI Act. Around 85 per cent to 90 percent of FOI requests annually are for personal information. The government proposes to amend the Privacy Act so that it is the principal legislation which provides for an enforceable right of access to and correction of an individual's own information. That proposal will be addressed in draft legislation covering broader reforms to the Privacy Act expected to be released for public comment early in 2010.

The government believes that the legislation now before the parliament comprises a strong package of measures to enhance access to information for the Australian public. To ensure the reform package delivers effective change, provision is made in the bill for the act to be reviewed two years after the commencement of the reforms. The government will also consider further improvements and will ask the Australian Law Reform Commission to inquire into whether the FOI Act or another disclosure regime should apply to the private sector.

This government recognises that transparent and open government is a key component of a healthy and vibrant democracy. When the Rudd government was elected, Labor committed to significantly reform freedom of information laws, and these bills fulfil the government's promise to the Australian public.

Debate (on motion by **Mr Lindsay**) adjourned.