

New South Wales

# **Freedom of Information Amendment (Open and Accountable Government) Bill 2000**

## **Explanatory note**

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

### **Overview of Bill**

The objects of this Bill are:

- (a) to amend the *Freedom of Information Act 1989* so as:
  - (i) to provide for the appointment and functions of a Freedom of Information Commissioner, and
  - (ii) to entitle members of the public to be present at all meetings of boards of management of statutory corporations, and
  - (iii) to allow external review proceedings to commence without the need for internal review procedures to have been followed, and
  - (iv) to enable the Ombudsman to give access to an agency's document to a person who has applied to the Ombudsman for a review of the agency's conduct in relation to an application for access made by the person, and

- (v) to make it clear that agencies have the burden of establishing that documents are exempt documents for the purposes of that Act, and
- (vi) to provide that the fees and charges that may be charged under that Act are to set by regulation rather than, as is presently the case, by the Minister administering that Act, and
- (b) to amend the *Ombudsman Act 1974* so as to enable the same person to hold office as both Ombudsman and Freedom of Information Commissioner, and
- (c) to amend the *Statutory and Other Offices Remuneration Act 1975* so as to provide for the remuneration of the Freedom of Information Commissioner to be appointed under the *Freedom of Information Act 1989*.

## Outline of provisions

**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 the date of assent.

**Clause 3** is a formal provision giving effect to the amendments to the *Freedom of Information Act 1989* set out in Schedule 1.

**Clause 4** is a formal provision giving effect to the amendments to the *Ombudsman Act 1974* set out in Schedule 2.

**Clause 5** is a formal provision giving effect to an amendment to the *Statutory and Other Offices Act 1975* set out in Schedule 3.

## **Schedule 1    Amendment of Freedom of Information Act 1989**

### **Freedom of Information Commissioner**

Proposed Part 1A (to be inserted by Schedule 1 [2]) contains provisions with respect to the appointment and functions of a Freedom of Information Commissioner (the *FOI Commissioner*).

**Proposed section 12A** enables the Governor to appoint an FOI Commissioner, and allows that office to be held by the Ombudsman.

**Proposed section 12B** states that the principal function of the FOI Commissioner is to supervise agencies in the fulfilment of their obligations under the Principal Act.

**Proposed section 12C** gives the FOI Commissioner the right to enter and inspect an agency's premises, and to inspect any document or thing on the premises.

**Proposed section 12D** allows the FOI Commissioner to give directions to agencies and their staff, and makes it an offence to refuse or fail to comply with such a direction.

**Proposed section 12E** allows the FOI Commissioner to submit reports to Parliament on any matter arising in connection with his or her functions under the Principal Act.

Section 6 (1) is consequentially amended by Schedule 1 [1].

#### **Access to agency meetings**

Proposed Part 1B (to be inserted by Schedule 1 [2]) contains a provision (proposed section 12F) that entitles members of the public to be present at all meetings of boards of management of statutory corporations.

#### **External review proceedings**

The amendments to sections 52 and 53 (to be made by Schedule 1 [3] and [5]) allow external review proceedings to commence without the need for internal review procedures to have been followed.

#### **Ombudsman may give access to agency's documents**

Proposed section 52 (8) (to be inserted by Schedule 1 [4]) enables the Ombudsman to give access to an agency's document to a person who has applied to the Ombudsman for a review of the agency's conduct in relation to an application for access made by the person.

#### **Burden of establishing that documents are exempt documents**

Proposed section 59C (to be inserted by Schedule 1 [6]) makes it clear that agencies have the burden of establishing that particular documents are exempt documents, or that particular matter is exempt matter, for the purposes of the Principal Act.

### **Fees and charges**

The amendment to section 67 (1) (to be made by Schedule 1 [7]) provides that the fees and charges that may be charged under the Principal Act are to be set by regulation rather than, as is presently the case, by the Minister administering that Act. Section 67 (2) is consequentially repealed by Schedule 1 [8].

### **Schedule 2 Amendment of Ombudsman Act 1974**

Schedule 2 amends the *Ombudsman Act 1974* so as to enable the same person to hold office as both Ombudsman and Freedom of Information Commissioner.

### **Schedule 3 Amendment of Statutory and Other Offices Remuneration Act 1975**

Schedule 3 amends the *Statutory and Other Offices Remuneration Act 1975* so as to provide for the remuneration of the Freedom of Information Commissioner to be appointed under the *Freedom of Information Act 1989*.

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# Freedom of Information Amendment (Open and Accountable Government) Bill 2000

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New South Wales

# Freedom of Information Amendment (Open and Accountable Government) Bill 2000

No. , 2000

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## A Bill for

An Act to amend the *Freedom of Information Act 1989* with respect to the appointment and functions of a Freedom of Information Commissioner, and for other purposes.

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<b>The Legislature of New South Wales enacts:</b>	1
<b>1 Name of Act</b>	2
This Act is the <i>Freedom of Information Amendment (Open and Accountable Government) Act 2000</i> .	3 4
<b>2 Commencement</b>	5
This Act commences on the date of assent.	6
<b>3 Amendment of Freedom of Information Act 1989 No 5</b>	7
The <i>Freedom of Information Act 1989</i> is amended as set out in Schedule 1.	8 9
<b>4 Amendment of Ombudsman Act 1974 No 68</b>	10
The <i>Ombudsman Act 1974</i> is amended as set out in Schedule 2.	11
<b>5 Amendment of Statutory and Other Offices Remuneration Act 1975 (1976 No 4)</b>	12 13
The <i>Statutory and Other Offices Remuneration Act 1975</i> is amended as set out in Schedule 3.	14 15

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<b>Schedule 1</b>	<b>Amendment of Freedom of Information Act 1989</b>	1
		2
	(Section 3)	3
<b>[1]</b>	<b>Section 6 Definitions</b>	4
	Insert in alphabetical order in section 6 (1):	5
	<i>FOI Commissioner</i> means the Freedom of Information Commissioner referred to in section 12A.	6
		7
<b>[2]</b>	<b>Parts 1A and 1B</b>	8
	Insert after Part 1:	9
	<b>Part 1A Freedom of Information Commissioner</b>	10
	<b>12A Freedom of Information Commissioner</b>	11
	(1) The Governor may appoint a Freedom of Information Commissioner.	12
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	(2) The Freedom of Information Commissioner has and may exercise the functions conferred on the Commissioner by or under this or any other Act.	14
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	(3) Nothing in this or any other Act or law prevents the Freedom of Information Commissioner from also holding the office of Ombudsman under the <i>Ombudsman Act 1974</i> .	17
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	<b>12B FOI Commissioner to supervise agencies' compliance with FOI obligations</b>	20
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	(1) The principal function of the FOI Commissioner is to supervise agencies in their fulfilment of the obligations imposed on them by this Act.	22
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	(2) The FOI Commissioner may do such things as are necessary or incidental to the exercise of the function referred to in subsection (1).	25
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<b>12C</b>	<b>FOI Commissioner may exercise powers of entry and inspection</b>	1
	For the purpose of exercising his or her functions, the FOI Commissioner may, at any time:	2
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	(a) enter and inspect any premises occupied or used by an agency, and	4
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	(b) inspect any document or thing on the premises.	6
<b>12D</b>	<b>FOI Commissioner may give directions as to agencies' compliance with FOI obligations</b>	7
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	(1) The FOI Commissioner may give directions to an agency, or to a person employed within the agency, in relation to the agency's fulfilment of the obligations imposed on it by this Act.	9
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	(2) In particular, the FOI Commissioner may direct an agency to number or otherwise identify its documents in such a way as to make it readily apparent if any document, or any part of a document, is unaccounted for in any response made by the agency to an application under Part 3 or 4 or to any review under Part 5.	12
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	(3) An agency or person to whom a direction is given under this section must not, without reasonable excuse, refuse or fail to comply with the direction.	18
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	Maximum penalty: 20 penalty units.	21
<b>12E</b>	<b>FOI Commissioner may report to Parliament</b>	22
	(1) The FOI Commissioner may inspect the records of an agency at any time for the purpose of establishing whether or not the requirements of this Act are being complied with.	23
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	(2) The FOI Commissioner must also keep under scrutiny the systems established within each agency for dealing with applications under this Act and, for that purpose, may require each agency to provide information about those systems and their operation.	26
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- (3) The FOI Commissioner: 1
- (a) may, at any time, make a special report to the Presiding Officer of each House of Parliament on any matter arising in connection with the exercise of his or her functions under this Act, and 2  
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- (b) in that event, must provide the Minister with a copy of the report. 6  
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- (4) In the case of an agency that has failed to comply with the requirements of this Act, the FOI Commissioner may identify in such a report those individuals within the agency that have been the cause of that failure. 8  
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- (5) The FOI Commissioner may include in such a report a recommendation that the report be made public as soon as practicable. 12  
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- (6) Sections 30 (2) and 31AA of the *Ombudsman Act 1974* apply to a report prepared by the FOI Commissioner under this section in the same way as they apply to an annual report prepared by the Ombudsman under section 30 of that Act. 15  
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## **Part 1B Access to agency meetings** 19

### **12F Members of public entitled to be present at certain agency meetings** 20 21

- (1) This section applies to an agency that is a statutory corporation. 22
- (2) Despite any other Act or law, but subject to the regulations under this Act, all persons are entitled to be present (but not to be heard) at any meeting held by the board of management (however described) of an agency to which this section applies. 23  
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### **[3] Section 52 Review by the Ombudsman** 27

Omit section 52 (2) (a) and (b). 28

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Schedule 1 Amendment of Freedom of Information Act 1989

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<b>[4] Section 52 (8)</b>	1
Insert after section 52 (7):	2
(8) If, as a consequence of investigating an agency’s determination of an application for access to a document held by the agency, the Ombudsman comes into possession of, or otherwise obtains access to, the document, the Ombudsman may give the applicant access to the document in accordance with Part 3 in the same way as if the Ombudsman were the agency.	3 4 5 6 7 8
<b>[5] Section 53 Right to make a review application</b>	9
Omit section 53 (2) (a) and (b).	10
<b>[6] Section 59C</b>	11
Insert after section 59B:	12
<b>59C Agencies have burden of establishing that documents are exempt documents</b>	13 14
(1) In any proceedings in which an agency claims that a particular document is an exempt document, or that particular matter is exempt matter, the burden of establishing the claim lies on the agency.	15 16 17 18
(2) In particular, if a party to any such proceedings claims that a particular document is not an exempt document, or that particular matter is not exempt matter, by virtue of an exception or qualification set out in Schedule 1, the agency that claims that the document is an exempt document, or that the matter is exempt matter, has the burden of establishing that the exception or qualification does not apply.	19 20 21 22 23 24 25
<b>[7] Section 67 Fees and charges</b>	26
Omit “The Minister may, by order published in the Gazette,” from section 67 (1).	27 28
Insert instead “The regulations may”.	29
<b>[8] Section 67 (2)</b>	30
Omit the subsection.	31

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<b>Schedule 2</b>	<b>Amendment of Ombudsman Act 1974</b>	1
	(Section 4)	2
<b>[1]</b>	<b>Section 6 Office of Ombudsman</b>	3
	Insert “ except as provided by section 6B,” before “if” in section 6 (4) (b).	4
<b>[2]</b>	<b>Section 6B</b>	5
	Insert after section 6A:	6
	<b>6B Same person may be both Ombudsman and FOI Commissioner</b>	7
	Nothing in this or any other Act or law prevents the Ombudsman from also holding the office of Freedom of Information Commissioner under the <i>Freedom of Information Act 1989</i> .	8 9 10 11

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Schedule 3      Amendment of Statutory and Other Offices Remuneration Act 1975

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<b>Schedule 3</b>	<b>Amendment of Statutory and Other Offices Remuneration Act 1975</b>	1
		2
	(Section 5)	3
<b>Schedule 2 Public offices</b>		4
Insert at the end of Part 1 of Schedule 2:		5
	Freedom of Information Commissioner under the <i>Freedom of Information Act 1989</i>	6
		7