

# Freedom of Information Amendment (Freedom of Information Commissioner) Bill 2011

## Introduction Print

### EXPLANATORY MEMORANDUM

#### Clause Notes

#### PART 1—PRELIMINARY

- Clause 1 sets out the main purposes of the Bill. The main purposes of the Bill are—
- to amend the **Freedom of Information Act 1982**—
    - to establish a Freedom of Information Commissioner; and
    - to improve the operation of that Act; and
  - to amend the **Parliamentary Committees Act 2003** to establish an Accountability and Oversight Committee of the Parliament; and
  - to make related and consequential amendments to other Acts.
- Clause 2 provides for the commencement of the Bill. The Bill has a default commencement date of 1 December 2012, unless proclaimed earlier.
- Clause 3 provides that the Principal Act means the **Freedom of Information Act 1982**.

**PART 2—AMENDMENTS TO THE FREEDOM OF  
INFORMATION ACT 1982**

- Clause 4 inserts into section 5(1) of the Principal Act the definition of Freedom of Information Commissioner as the Freedom of Information Commissioner appointed under Part IA of the Principal Act.
- Clause 5 inserts after section 6 of the Principal Act a new section 6AA, which provides that the Principal Act does not apply to documents—
- in the possession of the Freedom of Information Commissioner, his or her staff, contractors, agents or others acting for or on behalf of the Freedom of Information Commissioner; and
  - which would disclose information that relates to the Freedom of Information Commissioner's review and complaints functions.
- Clause 6 inserts after Part I of the Principal Act new Parts IA and IB. Part IA contains new sections 6B to 6K.
- Section 6B establishes a Freedom of Information Commissioner.
- Section 6C confers upon the Freedom of Information Commissioner the following functions—
- promote understanding and acceptance by agencies of the Principal Act and the object of the Principal Act;
  - conduct reviews of decisions by agencies on requests under the Principal Act;
  - receive and handle complaints about an agency's actions in relation to requests under the Principal Act and also about certain actions by Ministers in accordance with Part VIA of the Principal Act;
  - provide education, advice and guidance to agencies about professional standards prescribed by regulation and monitor compliance by agencies with those professional standards;
  - provide advice, education and guidance to agencies and the public about the Freedom of Information Commissioner's functions;

- prepare reports on the operation of the Principal Act;
- at the request of the Minister, provide advice to the Minister in relation to the operation and administration of the Principal Act; and
- do anything else conferred under the Principal Act or any other Act.

Section 6C further provides that the Freedom of Information Commissioner can do all things necessary and convenient to be done in performing his or her functions and must have regard to the object of the Principal Act in exercising his or her powers.

Section 6D provides for the appointment of the Freedom of Information Commissioner by the Governor in Council.

A person who is a member of the Parliament of any Australian jurisdiction or a member of a council (as defined in the Principal Act as having the same meaning as in section 3(1) of the **Local Government Act 1989**) is not eligible to be appointed as the Freedom of information Commissioner.

Section 6E establishes that the terms and conditions of the appointment of the Freedom of Information Commissioner will be set out in the instrument of appointment, subject to the term of appointment not exceeding 5 years. This section also provides that—

- the Freedom of Information Commissioner may be reappointed;
- the Freedom of Information Commissioner must not engage in other paid employment; and
- the **Public Administration Act 2004** does not apply to the Freedom of Information Commissioner in respect of his or her office except as provided for in section 16 of that Act.

Section 6F provides that the Freedom of Information Commissioner's remuneration is to be determined by the Governor in Council but cannot be reduced during a Freedom of Information Commissioner's period in office unless the Freedom of Information Commissioner consents.

Section 6G provides that the Freedom of Information Commissioner ceases to hold office if he or she—

- resigns;
- becomes an insolvent under administration;
- is convicted of an indictable offence or an equivalent offence in another jurisdiction;
- nominates for election for a Parliament of an Australian jurisdiction or as a municipal council member; or
- is removed from office under new section 6H.

Section 6H establishes the grounds and procedures upon which the Freedom of Information Commissioner can be suspended or removed from office.

Section 6H(1) provides that the Governor in Council may suspend the Freedom of Information Commissioner from office if satisfied that the Freedom of Information Commissioner is unfit to hold office. Under section 6H(2), the Minister must present a full statement of the grounds for suspension to each House of Parliament within 7 sitting days of that House after the suspension.

Section 6H(3) provides that the Freedom of Information Commissioner must be removed from office by the Governor in Council if each House of Parliament within 20 sitting days after the day when the statement is presented to it, declares by resolution that the Freedom of Information Commissioner ought to be removed from office.

Under section 6H(4), if the declaration under section 6H(3) is not made within the required time, the Governor in Council must restore the Freedom of Information Commissioner to office.

Section 6H(5) provides that if suspended from office, the Freedom of Information Commissioner is taken not to be the Commissioner during that period.

Section 6I provides that the Governor in Council may appoint a qualified person to act as the Freedom of Information Commissioner during a vacancy in that office or where the Freedom of Information Commissioner is absent from duty or is unable to perform the duties of the office. An Acting Freedom of Information Commissioner can be appointed for a period not exceeding 6 months and may be reappointed. The Governor in

Council can remove the acting Freedom of Information Commissioner at any time. A person appointed as Acting Freedom of Information Commissioner has all the powers and must perform all the duties of that office and is entitled to the same remuneration and allowances as the Freedom of Information Commissioner.

Section 6J provides that the Freedom of Information Commissioner may employ under Part 3 of the **Public Administration Act 2004** any employees that are necessary for the purposes of the Commissioner's functions under the Principal Act. The Freedom of Information Commissioner may also engage any contractor or other person to assist the Freedom of Information Commissioner in the performance of his or her functions.

Section 6K provides that the Freedom of Information Commissioner may delegate any function or power to an employee or a person engaged under section 6J(6) excluding: his or her power to make a decision on a review or recommendations arising out of a complaint; the power to report to Parliament; or the Accountability and Oversight Committee; and the power of this delegation.

Part IB contains new sections 6L and 6M, which are about the development of, and compliance with, professional standards.

Section 6L provides that the Minister may develop professional standards relating to the conduct of agencies in performing functions under the Principal Act as well as the administration of the Principal Act in relation to agencies and the operation of this Act by agencies.

The professional standards must not be inconsistent with the Principal Act and may include standards for the processing of FoI requests, including standards for providing assistance for applicants in making a request; the identification of relevant documents; consultation; clear communication with applicants; and timely decision-making.

The Minister may recommend that regulations be made to prescribe the professional standards.

Section 6M provides that the principal officer of an agency and any employee or officer of an agency concerned in the operation of the Principal Act must comply with any professional standards prescribed by regulation under the Principal Act.

Additionally, the principal officer of an agency is required to ensure that any officer or employee of the agency concerned in the operation of the Principal Act complies with any professional standards that are prescribed by regulation under the Principal Act.

- Clause 7 substitutes a new section 12(3)(b), which requires the principal officer of an agency to inform a person of their appeal rights to the Victorian Civil and Administrative Tribunal (Tribunal) where the principal officer of an agency makes a decision under section 12(2) that is adverse to the person's claim.
- Clause 8 inserts a new section 23(1)(b), which enables a document requested under the Principal Act to be given to a person by publishing that document on an Internet site established by the Minister for that purpose in accordance with the regulations.
- Clause 9 removes section 25A(8), (9) and (10) from the Principal Act as they relate to the Ombudsman who will no longer have functions under the Principal Act.
- Clause 10 substitutes references in sections 27(1)(da) and 27(1)(db) of the Principal Act to new provisions in Part VI to remove references to the existing internal review process contained in section 51 of the Principal Act, and replace them with the process of review of the Freedom of Information Commissioner.
- This clause also amends section 27(1)(e) by substituting references to the "Ombudsman" with "Freedom of Information Commissioner" in relation to decisions by agencies.
- Clause 11 substitutes references in sections 28(5) and 29A(3) of the Principal Act to "Ombudsman" with "Freedom of Information Commissioner".
- Clause 12 substitutes references to the rights of appeal to the Tribunal to reflect the changes to section 50 of the Principal Act.

Clause 13 inserts new Divisions 1 and 2 into Part VI of the Principal Act. Division 1 contains new sections 49A to 49P which relate to the Freedom of Information Commissioner's review function.

Section 49A(1) provides that an applicant may apply to the Freedom of Information Commissioner for review of—

- a decision of an agency refusing to grant access to a document in accordance with a request;
- a decision under section 24 of the Principal Act by an agency deferring the provision of access to a document; or
- a decision of any agency not to waive or reduce an application fee under section 17 of the Principal Act.

Section 49A(2) provides that a person (or if deceased, their next-of-kin) who is the subject of information in a document referred to in section 39 of the Principal Act may apply to the Freedom of Information Commissioner for a review of a decision by an agency not to amend that document pursuant to section 39 of the Principal Act.

Section 49A(3) provides that an application under section 49A cannot be made for review of a decision of a Minister or the principal officer of an agency.

Section 49A(4) provides that an application under section 49A cannot be made to the Freedom of Information Commissioner for review of a decision of an agency refusing to grant access to a document on the basis that it is claimed to be exempt under section 28 or 29A of the Principal Act.

Section 49A(5) applies to a decision of an agency which includes a refusal to provide access to one or more documents on the basis that they are exempt under section 28 (Cabinet documents) or 29A (documents affecting national security, defence or international relations) of the Principal Act as well as a refusal to provide access to other documents. An agency may apply to the Freedom of Information Commissioner for a review of this type of decision only to the extent that it relates to the other documents.

Section 49B(1) provides that an application to the Freedom of Information Commissioner under section 49A must be made within 28 days after the day on which notice in writing of the agency's decision is given to the applicant. However, section 49B(2) extends this period to 70 days if the application for review relates to a decision to refuse to grant a person access to a document containing health information on the ground referred to in section 36 of the **Health Records Act 2001**.

Section 49C requires an application for review under section 49A to—

- be in writing;
- identify the agency concerned as well as the decision to be reviewed; and
- include any other information prescribed by the regulations.

Section 49D provides that the Freedom of Information Commissioner must notify the principal officer of the agency concerned of the application for review.

Section 49E provides that the parties to an application for review are the applicant and the agency whose decision is being reviewed.

Section 49F provides that the Freedom of Information Commissioner may review a decision of an agency upon an application under section 49A.

Sections 49G(1) and (2) confer discretion upon the Freedom of Information Commissioner not to accept an application for review under section 49A or to dismiss a review at any stage if—

- the application is frivolous, vexatious, misconceived, lacking in substance or not made in good faith;
- the applicant has failed to co-operate with the review without reasonable excuse;
- the Freedom of Information Commissioner considers that the review would be more appropriately dealt with by the Tribunal;
- the Freedom of Information Commissioner considers that the review is not appropriate in the circumstances;

- the Freedom of Information Commissioner is unable to contact the applicant following reasonable attempts to do so; or
- with the written agreement of the applicant.

Section 49G(3) requires the Freedom of Information Commissioner to notify the applicant of a decision under section 49G(1) to dismiss a review, unless the review is being dismissed because the applicant cannot be contacted. Section 49G(4) requires the notice to also set out the reasons for the decision to dismiss the review.

Section 49H sets out the procedure for the review conducted by the Freedom of Information Commissioner. Section 49H(1) provides that the review must be conducted in a timely, efficient and fair manner, with as little formality and technicality as possible. Sections 49H(2) and (3) provide that the Freedom of Information Commissioner—

- must give each party to the review a reasonable opportunity to make submissions in writing; and
- is bound by the rules of natural justice, subject to this section.

Section 49I provides that agencies must assist the Freedom of Information Commissioner to undertake the review.

Section 49J deems certain decisions to have been made by the Freedom of Information Commissioner in the same terms as the decision of the agency if the Freedom of Information Commissioner has not dismissed a review or not completed a review within 30 days after the application is received by the Freedom of Information Commissioner or any longer period agreed to in writing by the applicant. This enables an applicant to apply directly to the Tribunal under the new section 50 for review of the decision.

Section 49K provides that the Freedom of Information Commissioner may make preliminary inquiries and consult with the parties to the review to determine the material facts and issues in relation to a review and whether the matter can be resolved by agreement between the parties.

Section 49L establishes a process for the Freedom of Information Commissioner to refer matters back to the agency in certain circumstances.

Section 49L(1) provides that the Freedom of Information Commissioner may, after making preliminary inquiries, refer a matter which is the subject of a review back to the agency for reconsideration if it appears reasonably likely that the agency will be able to make a fresh decision in a way that is satisfactory to the applicant and in accordance with the law.

Section 49L(2) limits the period in which an agency may make a fresh decision to 45 days of the referral under section 49L(1) unless otherwise agreed in writing by the agency and the Freedom of Information Commissioner. Under section 49L(3), the required period in which the Freedom of Information Commissioner must complete the review is suspended during this time.

Sections 49L(4) and (5) require an agency which makes a fresh decision to revoke the earlier decision and notify the Freedom of Information Commissioner of the fresh decision within 3 business days after the end of the period specified in section 49L(2). However, if the agency has failed to make a fresh decision within the time period specified in section 49L(2), it must notify the Freedom of Information Commissioner that the fresh decision has not been made within 3 business days after the end of that period.

Under section 49L(6), the Freedom of Information Commissioner must dismiss the review if the agency has made a fresh decision and the applicant has agreed in writing with that decision.

Section 49L(7) provides that the Freedom of Information Commissioner must recommence the review if the agency makes a fresh decision and the applicant does not agree with the decision. The time period for the Freedom of Information Commissioner to complete the review is extended to the date which is 30 days after notice about the agency's decision was given to the Freedom of Information Commissioner, or if no notification is given, 30 days from the last date that notification ought to have been given.

Section 49L(8) provides that the Freedom of Information Commissioner must recommence the review if the agency does not make a fresh decision within the time period referred to in

section 49L(2). The time period for the Freedom of Information Commissioner to complete the review is extended to the date which is 14 days after notice about the failure to make a decision was given to the Freedom of Information Commissioner, or if no notification is given, 14 days from the last date that notification ought to have been given.

Section 49L(9) limits the Freedom of Information Commissioner's jurisdiction to recommence the review if the agency's fresh decision is a decision to refuse access to a document on the basis that the document is claimed to be exempt under section 28 or 29A of the Principal Act. In this circumstance, the Freedom of Information Commissioner will not be able to recommence the review and the applicant, to the extent that the agency's fresh decision relies on exemptions under section 28 (Cabinet documents) or 29A (documents affecting national security, defence or international relations), may apply directly to the Tribunal to review the decision.

Section 49M provides that an agency may revoke and make a fresh decision at any time during a review, otherwise than under section 49L. Section 49M(2) requires the agency to notify the Freedom of Information Commissioner in writing of a fresh decision and section 49M(3) requires the Freedom of Information Commissioner to dismiss the review if the applicant agrees with the decision.

Section 49M(4) provides that, where an agency has made a fresh decision that the applicant does not agree with, the Freedom of Information must complete the review on the basis of the fresh decision and the required period to complete the review under section 49J is taken to commence from the date on which the agency notifies the Freedom of Information Commissioner in writing of the fresh decision.

Section 49M(5) limits the Freedom of Information Commissioner's jurisdiction to continue the review if the agency's fresh decision is a decision to refuse access to a document on the basis that the document is claimed to be exempt under section 28 (Cabinet documents) or 29A (documents affecting national security, defence or international relations) of the Principal Act. In this circumstance, the Freedom of Information Commissioner will not be able to continue the review on the basis of the fresh decision and the applicant, to the extent that the agency's fresh

decision relies on exemptions under section 28 or 29A, may apply directly to the Tribunal to review the decision.

Section 49M(6) restricts the applicants right to make a fresh decision under section 49M(1) to only once during a review.

Section 49N provides that the Freedom of Information Commissioner may facilitate an agreement between the parties in relation to a decision that is the subject of a review by the Freedom of Information Commissioner. Any agreement reached between the applicant and agency must be in writing and the Freedom of Information Commissioner may make a decision on the review on the basis of that agreement.

Section 49O provides that if the Freedom of Information Commissioner identifies a matter arising out of or in relation to a review as being within the jurisdiction of an authority prescribed by the regulations, the Freedom of Information Commissioner, after consulting with the authority, may refer that matter to that authority if he or she considers it appropriate to do so. A referral under this section does not affect the role of the Freedom of Information Commissioner in conducting a review. The Freedom of Information Commissioner is required to notify the applicant in writing of a referral of a matter if the matter affects the interests of the applicant.

Section 49P sets out provisions about decisions on review.

Section 49P(1) provides that the Freedom of Information Commissioner after reviewing an agency's decision must make a fresh decision on the original application. Section 49P(2) provides that a fresh decision of the Freedom of Information Commissioner has the same effect as a decision of an agency.

Section 49P(3) requires the Freedom of Information Commissioner to give the parties notice in writing of the Freedom of Information Commissioner's decision. The notice must include the reasons for the decision and inform the parties of their right to apply to the Tribunal for review of the decision of the Freedom of Information Commissioner.

Section 49P(4) provides that a decision by the Freedom of Information Commissioner requiring an agency to release documents is not effective until 60 days after the notice under section 49P(3) is given or, if an application is made to the Tribunal, until the Tribunal makes a decision.

Section 49P(5) applies in circumstances where the Freedom of Information Commissioner has made a decision to disclose a document that the agency had refused to disclose under section 33 or section 34 of the Principal Act. This section requires the Freedom of Information Commissioner to notify any person or undertaking who has a right to make an application for review under section 50(3) or 50(3A) of the existence of that right.

Division 2 contains new section 49Q, which sets out provisions about conciliation by the Health Services Commissioner. Section 49Q(1) applies if a person has a right to apply for a review under section 49A of a decision of an agency in relation to a document containing health information relating to the person.

Section 49Q(2) provides that a person may apply to the Health Services Commissioner for conciliation under Division 3 of Part 6 of the **Health Records Act 2001** instead of making an application under section 49A of the Principal Act.

Section 49Q(5) provides that this application must be made within 70 days, in the case of a decision which relates to a refusal to grant access to a document on a ground referred to in section 36 of the **Health Records Act 2001** (i.e. providing the individual with access to their health information would pose a serious threat to the life or health of the individual), or 28 days, in any other case.

Section 49Q(3) provides that Division 3 of Part 6 of the **Health Records Act 2001** applies to the conciliation contemplated by section 49Q(2) as if it were a conciliation of a complaint under that Act.

Section 49Q(4) provides that an application may be made under this section in relation to a document that is an exempt document under section 32, 33 or 38 of the Principal Act but not in relation to any other exempt document.

Section 49Q(6) provides that if the Health Services Commissioner has attempted unsuccessfully to conciliate the complaint, he or she must give notice about this in writing to the applicant and the principal officer of the agency concerned and the Freedom of Information Commissioner.

Clause 14 inserts a new Division heading into the Principal Act.

Clause 15 inserts "Applications for review by the Tribunal" as a heading for section 50 and substitutes for section 50(2) of the Principal Act a new section 50(1) to (3H).

Section 50(1) provides that an applicant may apply to the Tribunal for review of—

- a decision of the principal officer of an agency or a Minister refusing to grant access to a document in accordance with a request or deferring the provision of access to a document;
- a decision of the Freedom of Information Commissioner refusing to grant access to a document in accordance with a request or deferring the provision of access to a document;
- a decision of an agency refusing to grant access to a document on the basis of sections 28 (Cabinet documents) or 29A (documents affecting national security, defence or international relations) or in circumstances where the Freedom of Information Commissioner has dismissed the complaint under section 49G; or
- a decision as to the amount of a charge that is required to be paid before access to a document is granted provided that the Freedom of Information Commissioner has certified that the matter is one of sufficient importance for the Tribunal to consider.

Section 50(2) provides that a person who is served a notice under section 12(1) of the Principal Act may apply to the Tribunal for review of a decision under section 12(2)(a) not to specify a document in a statement.

Section 50(3) provides that a person who is the subject of information in a document referred to in section 33(3) (or that person's next-of-kin, if they are deceased) may apply to the Tribunal for review of a decision to disclose that document.

Section 50(3A) provides that a business, commercial or financial undertaking may apply to the Tribunal for a review of a decision to disclose a document referred to in section 34 contrary to the undertaking's view as obtained under section 34(3).

Section 50(3B) provides a person who is the subject of information in a document referred to in section 39 (or that person's next-of-kin, if they are deceased) may apply to the Tribunal for review of a decision by the Freedom of Information Commissioner or a principal officer of an agency or a Minister not to amend the document in accordance with section 39.

Section 50(3C) provides that an applicant who has applied to the Health Services Commissioner for conciliation in relation to a decision of an agency to refuse access to a document in accordance with a request may apply to the Tribunal for a review of the decision of the agency if the matter is not successfully conciliated by the Health Services Commissioner.

Section 50(3D) provides that an agency may apply to the Tribunal for review of a decision of the Freedom of Information Commissioner under section 49P.

Section 50(3E) requires the applicant to notify the Freedom of Information Commissioner in writing as soon as practicable of an application for review to the Tribunal under sections 50(1)(b) or (c) where the decision being appealed is a deemed decision of the Freedom of Information Commissioner because the Freedom of Information Commissioner failed to make a decision within the relevant time period.

Section 50(3F) requires the agency to notify the Freedom of Information Commissioner in writing as soon as practicable of an application for review to the Tribunal under section 50(3D) of a decision of the Freedom of Information Commissioner.

Section 50(3G) provides that an application cannot be made under section 50 by a person if that person has agreed to a fresh decision of the agency or the decision of the Freedom of Information Commissioner was made in accordance with a negotiated agreement between the applicant and the agency.

Section 50(3H) provides that a person is not entitled to apply to the Tribunal for review of a decision in relation to which sections 50(1), (3) or (3A) applies if the person has made or caused to be made an application for review of the decision to the Visitor of a University unless the Visitor has declined to conduct that review or a period of 30 days has elapsed since the day on which that application for review was made.

- Clause 16 substitutes a new section 51 for section 51 of the Principal Act.
- Section 51(1) provides that the Tribunal may, on its own motion, call on the Freedom of Information Commissioner to assist the Tribunal in respect of a review.
- Section 51(2) prohibits the Freedom of Information from being joined as a party to proceedings under section 50 unless it is a review of a decision of the Freedom of Information Commissioner in his or her capacity as the principal officer of the office of the Freedom of Information Commissioner.
- Clause 17 repeals section 51A of the Principal Act, which provided for conciliation by the Health Services Commissioner.
- Clause 18 substitutes section 52 of the Principal Act with a new section 52.
- New section 52 provides that the time available to apply to the Tribunal under section 50 is limited to 60 days from the day on which notice was given to the person of the relevant decision.
- Clause 19 repeals sections 53(2), (3) and (4) of the Principal Act as these sections relate to complaints to the Ombudsman who no longer has functions under the Principal Act.
- Clause 20 inserts provisions to also require the Freedom of Information Commissioner to notify a person of their right to intervene in a Tribunal proceeding under section 53A of the Principal Act where the Freedom of Information Commissioner makes a decision refusing to grant access to a document which is exempt under section 33(1).
- Clause 21 substitutes "this Part" with "this Division" in section 54, 55 and 59 of the Principal Act to reflect the new structure of Part VI.
- Clause 22 repeals section 57 of the Principal Act as the Ombudsman will no longer have the function of intervening in Tribunal proceedings under the Principal Act.
- Clause 23 inserts at the end of section 61 a new requirement for the Tribunal to bring evidence of misconduct outlined at the start of section 61 to the notice of the Freedom of Information Commissioner.

Clause 24 provides the Freedom of Information Commissioner with the ability to receive complaints by inserting a new Part VIA into the Principal Act.

Section 61A(1) provides that complaints may be made to the Freedom of Information Commissioner about—

- actions that an agency has taken or failed to take in the performance or purported performance of its functions and obligations under the Act, including decisions that a document does not exist or cannot be located;
- a delay by a Minister in dealing with a request;
- an action taken or failed to be taken by a Minister in deferring access to a document;
- an action taken or failed to be taken by a Minister in releasing a document that is claimed to be exempt under section 33 of the Principal Act (relating to personal affairs of individuals); and
- an action taken or failed to be taken by a Minister in releasing a document that is claimed to be exempt under section 34 of the Principal Act (relating to commercial matters).

Section 61A(2) provides that a complaint must be in writing, set out the nature of the complaint and identify the agency or Minister concerned.

Section 61A(3) provides that a person who may make a complaint may include—

- the applicant who has made a request to which the complaint relates;
- a person, or next-of-kin of a deceased person, if the matter relates to a decision to disclose a document referred to in section 33 of the Principal Act (containing information in relation to the personal affairs of the person or deceased person); and
- a business, commercial or financial undertaking, if the matter relates to a decision to disclose a documents referred to in section 34 of the Principal Act (containing information in relation to matters of business, commercial or financial nature of that undertaking).

Section 61A(4) provides that a complaint must be made within 60 days after the action or conduct that is the subject of the complaint occurred and section 61B enables the Freedom of Information Commissioner to accept or decline to deal with a complaint.

Section 61B(1) provides that the Freedom of Information Commissioner may—

- accept a complaint to the extent that it relates to the performance by an agency of its functions;
- accept a complaint about a Minister to the extent that it relates to delay, a decision to defer access to a document or a decision to release information about the personal affairs of individuals or the commercial, business and financial information of undertakings;
- determine not to accept or dismiss a complaint.

Section 61B(2) provides that the Freedom of Information Commissioner may determine not to accept or may dismiss a complaint in certain circumstances. The circumstances are not exhaustive and do not limit the Freedom of Information Commissioner's general ability not to accept or to dismiss a complaint set out in subsection 61B(1). The Freedom of Information Commissioner may decline to deal with a complaint on the following grounds—

- if the action or failure by the agency to act, was not in the performance of its functions or obligations under the Act;
- if the complaint could be heard by another body and the complainant has not yet exercised their right to complain to that body;
- if the complaint is frivolous, vexatious, misconceived, lacking in substance or not made in good faith;
- if the complainant does not have sufficient interest in the subject matter of the complaint;
- if the complainant fails to cooperate;
- if the complaint is out of time;

- if the Freedom of Information Commissioner considers that a complaint is not appropriate in the circumstances or is unable to contact the applicant following reasonable attempts.

Section 61B(3) provides that the Freedom of Information Commissioner must dismiss a complaint if the complaint has been or could be dealt with under the Freedom of Information Commissioner's review function or by the Tribunal.

Section 61B(4) provides that if the Freedom of Information Commissioner dismisses a complaint, he or she must give the complainant written notice setting out the grounds for dismissal.

Section 61C allows the Freedom of Information Commissioner to refer complaints received to another body in appropriate circumstances. The Freedom of Information Commissioner can decline to deal with a complaint if he or she has consulted a person or body with relevant jurisdiction and considers it is more appropriate to refer the complaint to that other person or body. The Freedom of Information Commissioner must give notice in writing to the complainant about the referral, and the notice must contain reasons for the decision to refer.

Section 61D provides that the Freedom of Information Commissioner must notify the principal officer of the agency or the Minister (as the case requires) and the complainant in writing if the Freedom of Information Commissioner accepts a complaint. A copy of the written complaint must accompany the notice. The Freedom of Information Commissioner may notify another person about the complaint if he or she believes that the rights or interests of the person are affected by the subject-matter of the complaint.

Section 61E requires an agency or Minister to co-operate with the Freedom of Information Commissioner in dealing with a complaint and section 61F requires the Commissioner to deal with a complaint in private.

Section 61G provides that if the Freedom of Information Commissioner accepts a complaint, he or she may conduct preliminary inquiries, consult with the relevant agency or Minister and the complainant, and any other person if the Commissioner believes their rights or interests may be affected. This is to determine the material facts and issues and whether the complaint can be resolved informally. The Commissioner must

take reasonable steps to do so if he or she determines that the complaint can be resolved informally.

Section 61H requires that the Freedom of Information Commissioner use his or her best endeavours to conciliate the complaint if it cannot be resolved informally. If the parties to the complaint enter into a written agreement, the Freedom of Information Commissioner must resolve the complaint in accordance with the agreement.

Section 61I establishes the procedure for dealing with a complaint if conciliation fails. This section applies, as set out in section 61I(1), if the Freedom of Information Commissioner has tried but failed to conciliate the complaint and is satisfied that there is no reasonable likelihood that the complaint will be resolved by conciliation.

Under section 61I(2), the Commissioner must allow agencies and the Minister (as the case requires) an opportunity to make oral or written submissions in relation to the complaint. Section 61I(3) requires the Freedom of Information Commissioner to deal with complaints with as little formality and technicality as possible. If the Freedom of Information Commissioner having received submissions from the relevant parties believes further information is required to resolve the complaint he or she is empowered under section 61I(4) to ask an agency or Minister for further information or to produce documents, other than documents, or information included in documents, which an agency claims are exempt under section 28 (Cabinet documents) or section 29A (documents affecting national security, defence or international relations).

Section 61J(1) provides the Freedom of Information Commissioner with power to compel an agency prescribed in the regulations for this purpose, to produce documents upon a request if he or she believes that a wilful or flagrant breach of an agency's obligations has occurred and that it is necessary and appropriate to compel a document that an agency has failed to produce on request. Under section 61J(2) the Freedom of Information Commissioner may issue a production notice requiring the prescribed agency to produce the document. Section 61J(3) provides that the production notice must not seek documents which an agency claims are exempt under section 28 (Cabinet documents) or section 29A (documents affecting

national security, defence or international relations).

Section 61J(4) provides that the production notice must state—

- the documents to be produced;
- whether the original of a document is to be produced;
- the time for compliance (not less than 14 days after notice is given); and
- the place where the documents are to be produced.

The Commissioner must give a copy of the production notice to the principal officer of the agency concerned (section 61J(5)). Before issuing a production notice, the Freedom of Information Commissioner must consider the most appropriate way for the documents to be produced taking into account any special security requirements relevant to the documents (section 61J(6)). Section 61J(7) allows the Freedom of Information Commissioner to amend or revoke a production notice during the compliance period. Under section 61J(8) the agency must produce the documents in accordance with the production notice within the compliance period unless the Supreme Court orders otherwise under section 61K. Any application to the Supreme Court under section 61K suspends the compliance period (section 61J(9)).

Section 61K establishes a right to apply to the Supreme Court if an agency believes that the Freedom of Information Commissioner does not have jurisdiction to issue a production notice under section 61J. It provides that the Supreme Court may make any order it considers proper and allows for the principal officer of a prescribed agency (as defined in section 61J(10)) to make the application to the Tribunal and be a party to an application by the Freedom of Information Commissioner. Nothing in section 61K(4) limits the ability of a prescribed agency to make any other application to the Supreme Court about the issuing of a production notice.

Section 61L is about the outcome of complaints. Section 61L(1) provides the Freedom of Information Commissioner with power to make any recommendations the Commissioner thinks appropriate to the agency or Minister in relation to a complaint. Section 61L(2) allows the Freedom of Information Commissioner to recommend improvements to the policies, procedures and systems of the agency in relation to compliance with the Principal Act. If the Commissioner intends to make

recommendations in relation to an agency or Minister he or she must notify the agency or Minister, the complainant and any other party to the complaint (section 61L(3)). A notice provided by the Freedom of Information Commissioner must not disclose an exempt document or information that would make a document an exempt document (section 61L(4)). Section 61L(5) provides that the Freedom of Information Commissioner must give an agency, Minister, person or body the opportunity to comment on and respond to any draft recommendation or adverse comment that the Freedom of Information Commissioner intends to make. The Freedom of Information Commissioner must take these responses into account before making his or her recommendation (section 61L(6)) and include the comments of the agency, person, Minister or body in a manner that fairly, fully and accurately represents their position (section 61L(7)). Section 61L(8) allows the Freedom of Information Commissioner to refer complaints to another prescribed person or body if he or she believes that the matter is within the person's or body's jurisdiction and warrants further investigation.

Section 61M provides that the Freedom of Information Commissioner may treat a complaint referred to him or her by the Ombudsman, Privacy Commissioner or Health Services Commissioner as a complaint received under section 61A.

Section 61N enables the Freedom of Information Commissioner to communicate relevant information to a body to which a complaint has been referred under section 61C.

- Clause 25 inserts a new heading, 'Division 1 – Protections in relation to legal action' after Part VII of the Principal Act.
- Clause 26 Subclause (1) amends section 62 of the Principal Act to remove reference to internal review and substitutes a reference to the new process of review by the Freedom of Information Commissioner set out in Division 1 of Part VI. Section 62 provides protections in certain circumstances for actions for defamation or breach of confidence.
- Subclause (2) inserts after section 62(2) of the Principal Act a new section 26(3). Under this provision, the provision of access to a document in accordance with—

- a request by the Freedom of Information Commissioner;  
or
- a production notice issued by the Freedom of Information Commissioner under Part VIA—

does not constitute a waiver of any privilege attaching to that document in relation to its contents.

Clause 27 amends section 63(b) of the Principal Act to remove reference to internal review and substitutes a reference to the new process of review by the Freedom of Information Commissioner set out in Division 1 of Part VI.

Clause 28 inserts new sections 63A and 63B after section 63 of the Principal Act.

Section 63A provides that the Freedom of Information Commissioner, his or her staff, contractors, agents or other persons acting for or on behalf of the Commissioner cannot be compelled in a legal proceeding to produce any document or part of a document that has come into his or her possession in the performance of his or her functions under Parts VI and VIA, except in a criminal proceeding, a proceeding under section 61K or a proceeding involving a claim that the Freedom of Information Commissioner does not have jurisdiction to compel the production of documents.

Section 63B provides that no civil action lies against a person who makes a complaint to the Freedom of Information Commissioner for anything done in good faith by that person in making that complaint.

Clause 29 inserts new Divisions 2 and 3 before section 64 of the Principal Act. New Division 2 is in relation the production of documents to the Freedom of Information Commissioner.

Section 63C(1) provides that the Freedom of Information Commissioner may ask for an explanation as to why a document is exempt, if, in the course of a review under Division 1 of Part VI or a complaint process under Part VIA, an agency or Minister claims that a document is an exempt document.

Section 63C(2) provides that the Freedom of Information Commissioner may ask to inspect and make copies of the document if he or she is not satisfied that he or she can reasonably make a decision or a recommendation on the basis

of the explanation provided under 63C(1). The Commissioner may not, however, ask to inspect and make copies of a document that has been claimed to be exempt under section 28 (Cabinet documents) or 29A (documents affecting national security, defence or international relations).

New section 63C(3) provides that if the document is claimed to be exempt under section 31 (law enforcement documents)—

- the inspection of the document requested under section 63C(2) may only take place at the premises of the agency or Minister; and
- the Freedom of Information Commissioner is not entitled to possession of, or to make copies of, the document.

Section 63D(1) and (6) require the Freedom of Information Commissioner to do all things necessary to ensure that only a specified person, being the Commissioner, a member of his or her staff, a contractor, agent or other person acting for or on behalf of the Commissioner, has access to a document, or the contents of a document, produced to the Freedom of Information Commissioner under Division 1 of Part VI or in dealing with a complaint under Part VIA.

Section 63D(2) prohibits a person who is or has been a specified person from intentionally or recklessly disclosing any information, document, or contents of any document received or considered in the course of a review or complaint to any person, other than—

- a specified person in the course of performing his or her functions under this or any other Act or acting for or on behalf of a specified person in the performance of those functions;
- to the person who provided the information or document or that person's representative; or
- in accordance with section 61N.

This offence carries a penalty of 240 penalty units or imprisonment for 2 years or both.

Section 63D(3) provides that the Freedom of Information Commissioner may copy any document produced to the Commissioner in a review under Division 1 of Part VI or in

dealing with a complaint under Part VIA except a document that is claimed to be exempt under section 28, 29A or 31.

Section 63D(4) provides that the Freedom of Information Commissioner may copy a document that is claimed to be an exempt document (other than a document that is claimed to be exempt under sections 28, 29A or 31) only to the extent that is necessary for the performance of the Commissioner's functions in conducting a review or dealing with a complaint.

New section 63D(5) requires the Freedom of Information Commissioner to, on completion of a review or a complaint process—

- return any document produced to the Commissioner in the review of a request or in dealing with the complaint to the person who produced the document; and
- return to that person, or destroy, any copies of the document.

Clause 30 substitutes section 64 of the Principal Act with a new section 64 and inserts new sections 64A and 64B.

Section 64(1) requires the Freedom of Information Commissioner to prepare an annual report on the operation of the Principal Act.

Section 64(2) requires the report to contain the following information for the relevant year—

- the number of requests made to each agency and to each Minister;
- the number of decisions that an applicant was not entitled to access to a document on a request, the provisions under which these decisions were made and the number of times each provision was invoked;
- the name and designation of each officer of an agency with authority to make a decision in relation to a request, the number of decisions made by each officer that an applicant was not entitled to a document pursuant to a request;
- the number of applications for review of a decision by the Freedom of Information Commissioner under Division 1 of Part VI and the decisions on the applications;

- the number of applications to the Tribunal under section 50 and in respect of each application—
  - the decision of the Tribunal;
  - the details of any other order made by the Tribunal; and
  - if the decision in respect of which the application was made was a decision that an applicant is not entitled to access to a document in accordance with a request, the provision under which the first-mentioned decision was made;
- the number of complaints made to the Freedom of Information Commissioner under Part VIA;
- the number of notices served on the principal officer of an agency under section 12(1) and the number of decisions by the principal officer under that section that are adverse to a person's claim;
- details of any disciplinary action taken against any officer in respect of the administration of the Principal Act;
- details of any recommendations made by the Commissioner under Part VIA;
- the amount of any charges collected by each agency and Minister;
- details of any reading room or other facility provided by the agency or Minister for use by applicants or members of the public, and the publications, document or other information regularly on display there;
- details of any difficulties encountered in the administration of the Principal Act in relation to staffing and costs;
- any other facts that indicate an effort by agencies or Ministers to administer and implement the spirit and intention of the Principal Act.

Section 64(3) provides that the report may include a report on the performance and exercise of the Freedom of Information Commissioner's functions and powers under the Principal Act.

Section 64(4) provides that the report must fairly, fully and accurately set out the response of an agency, Minister, person or body in relation to a recommendation referred to in section 64(2)(i).

Section 64(5) requires the Freedom of Information Commissioner to transmit the annual report to each House of Parliament to be laid before that House on the same day that his or her annual report under the **Financial Management Act 1994** is laid before that House.

Section 64A(1) requires the Freedom of Information Commissioner to report to the Accountability and Oversight Committee of the Parliament—

- on the number of times that relevant Ministers have made statements under section 65AB; and
- if there have been 4 or more successful applications to the Supreme Court or the Tribunal by agencies against decisions of the Freedom of Information Commissioner in a 12 month period.

Section 64A(2) requires a report to—

- set out a summary of the cases and the reasons for the determination of the Supreme Court or the Tribunal in each case; and
- be made as soon as practicable after every 4 successful applications in the 12 month period.

Section 64A(3) provides that a report is not required to set out a summary of a case if a summary of that case has been included in an earlier report under 64A(1)(b).

Section 64AB requires an agency or Minister to give information referred to in section 64(2) to the Freedom of Information Commissioner to enable the Commissioner to prepare his or her annual report.

Clause 31 repeals section 65AA of the Principal Act to remove the obligation of the principal officer of each council to prepare a report on the operation of the Principal Act.

- Clause 32 inserts a new heading, "Division 4—Regulations" before section 66 of the Principal Act.
- Clause 33 amends section 66 of the Principal Act to provide that the Governor in Council may make regulations for or in relation to—
- the prescribing of professional standards for the purposes of the Principal Act;
  - forms of access to documents, including access through a website accessible to the public.
- Clause 34 inserts a new heading, "Division 5—Transitional and saving provisions" after section 66 of the Principal Act.
- Clause 35 inserts a new section 69 providing for transitional provisions in relation to the **Freedom of Information Amendment (Freedom of Information Commissioner) Act 2011** (2011 Act).

Section 69(1) provides that, despite the repeal of section 51A of the Principal Act by section 17 of the 2011 Act, the Principal Act as in force before the commencement of section 17 continues to apply to any application for internal review that was received but not determined by the agency before that commencement.

Where a decision has been made by the agency before commencement, and the time period (28 days) by which to seek internal review has not expired, any application for internal review after the commencement of the 2011 Act will be handled within the relevant agency (therefore under the Principal Act as if section 51 has not been repealed).

Section 69(2) provides that a person is not entitled to apply to the Freedom of Information Commissioner for review of any decision to which section 69(1) applies.

Section 69(3) provides that a person is not entitled to make a complaint to the Freedom of Information Commissioner if, before the commencement of section 24 of the 2011 Act the person had made a complaint to the Ombudsman in relation to the matter.

Section 69(4) provides that a person may apply to the Freedom of Information Commissioner under Division 1 of Part VI for review of a decision of an agency made after the commencement of section 13 of the 2011 Act in relation to a request made before

that commencement other than a decision made pursuant to section 69(1).

Section 69(5) requires the relevant agency to, in the notice of decision, inform a person to whom section 69(4) applies of the right to apply to the Freedom of Information Commissioner for review of that decision.

### **PART 3—AMENDMENT OF OTHER ACTS**

#### **Division 1—Health Records Act 2001**

- Clause 36 amends section 16(b) of the **Health Records Act 2001** to include reference to the new section 6AA. This amendment means that Part 5, HPP 5.2 and HPP 6 in the **Health Records Act 2001** does not apply to a document containing health information or to the health information contained in a document, to which access would not be granted under the Principal Act because of the new section 6AA.
- Clause 37 inserts a new paragraph (ab) after section 46(a) of the **Health Records Act 2001** to include reference to the new section 61C of the Principal Act. This enables the Health Service Commissioner to treat a complaint referred to him or her by the Freedom of Information Commissioner under section 61C of the Principal Act as a complaint made under section 45(1) of the **Health Records Act 2001**.
- Clause 38 inserts a new paragraph (bb) after section 51(3)(ba) of the **Health Records Act 2001** referring to Part VIA of the Principal Act, and inserts a reference to the Freedom of Information Commissioner in section 51(3). This insertion enables the Health Services Commissioner to refer complaints to the Freedom of Information Commissioner, where appropriate.

#### **Division 2—Information Privacy Act 2000**

- Clause 39 amends section 12(b) of the **Information Privacy Act 2000** to include reference to the new section 6AA. This amendment means that IPP 6, or any applicable code relating to IPP 6, in the **Information Privacy Act 2000** does not apply to a document containing personal information or to the personal information contained in a document, to which access would not be granted under the Principal Act because of the new section 6AA.

- Clause 40 inserts a new subsection (2) after section 26 of the **Information Privacy Act 2000** to include reference to the new section 61C of the Principal Act. This enables the Privacy Commissioner to treat a complaint referred to him or her by the Freedom of Information Commissioner under section 61C of the Principal Act as a complaint made under section 25(1) of the **Information Privacy Act 2000**.
- Clause 41 inserts a new paragraph (ab) after section 29(3) of the **Information Privacy Act 2000** referring to Part VIA of the Principal Act, and inserts a reference to the Freedom of Information Commissioner. This enables the Privacy Commissioner to refer complaints to the Freedom of Information Commissioner, where appropriate.
- Clause 42 inserts new section 34B into the **Information Privacy Act 2000** to allow the Privacy Commissioner to refer a complaint to the Freedom of Information Commissioner.

### **Division 3—Ombudsman Act 1973**

- Clause 43 inserts a new subsection (3B) under section 13(3A) of the **Ombudsman Act 1973**, which removes the Ombudsman's jurisdiction to receive any complaint or enquire into or investigate an administrative action taken by or on behalf of an agency or Minister under the Principal Act.
- Clause 44 inserts a new section 15C after section 15B of the **Ombudsman Act 1973** requiring the Ombudsman to refer complaints which could be made the subject of a complaint under Part VIA of the Principal Act to the Freedom of Information Commissioner, and notifying the complainant and the respondent in writing of the referral.
- Clause 45 amends section 20(1)(a)(iii) of the **Ombudsman Act 1973** to include reference to sections 20B, 20C and new section 20D of the **Ombudsman Act 1973**. This amendment permits a person who obtains or receives information in the course or as a result of the exercise of the functions of the Ombudsman to disclose that information for the purpose of any authorised communication to the Privacy Commissioner (section 20B), Health Services Commissioner (section 29C) and the Freedom of Information Commissioner (section 20D).

Clause 46 inserts a new section 20D after section 20C of the **Ombudsman Act 1973** requiring the Ombudsman or the Acting Ombudsman to communicate to the Freedom of Information Commissioner any information obtained or received in the course or as a result of the exercise of the functions of the Ombudsman, being information relating to a complaint referred to the Freedom of Information Commissioner under section 15C of the **Ombudsman Act 1973**.

#### **Division 4—Parliamentary Committees Act 2003**

Clause 47 inserts a new section 34 after section 33 of the **Ombudsman Act 1973** providing for transitional provisions regarding complaints under the Principal Act. The insertion provides that, despite the amendment of the **Ombudsman Act 1973** by section 43 of the 2011 Act, the **Ombudsman Act 1973** continues to apply to any complaint made to the Ombudsman before the commencement of section 43 in relation to an administrative action under the Principal Act, as if section 43 had not been enacted.

Clause 48 amends the **Parliamentary Committees Act 2003** to establish the Accountability and Oversight Committee.

Clause 49 amends the **Parliamentary Committees Act 2003** by inserting new section 6A. Section 6A(1) will establish the functions of the Accountability and Oversight Committee as being to—

- monitor and review the performance of the functions and exercise of the powers of the Freedom of Information Commissioner;
- consider and investigate complaints about the Freedom of Information Commissioner and the operation of the office of the Freedom of Information Commissioner;
- report to Parliament on any matter relating to the performance of the functions and the exercise of the powers of the Freedom of Information Commissioner and to any complaint concerning the Freedom of Information Commissioner and the operation of the office of the Freedom of Information Commissioner, that requires the attention of Parliament;

- examine the annual report and any other reports of the Freedom of Information Commissioner and report to Parliament; and
- inquire into matters concerning freedom of information referred to it by the Parliament and to report on those matter.

Subsection (2) prevents the Accountability and Oversight Committee from reconsidering a decision of the Freedom of Information Commissioner in relation to a review, or from reconsidering any recommendations or decisions of the Freedom of Information Commissioner in relation to a complaint.

#### **Division 5—Public Administration Act 2004**

- Clause 50 inserts a new paragraph (g) after section 6(1)(f) of the **Public Administration Act 2004** to specify the office of the Freedom of Information Commissioner as a "special body" under the **Public Administration Act 2004**.
- Clause 51 inserts a new paragraph (ia) after section 16(1)(i) of the **Public Administration Act 2004** to specify the Freedom of Information Commissioner as an office holder who has all the functions of a public service body Head in relation to employees of the office of the Freedom of Information.

#### **Division 6—Victorian Civil and Administrative Tribunal Act 1998**

- Clause 52 amends clause 29A of Schedule 1 to the **Victorian Civil and Administrative Tribunal Act 1998**.

Paragraph (a) inserts the words "or the Freedom of Information Commissioner" in paragraph (a) and paragraph (b) amends clause 29 to substitute the cross-reference to section 50(2)(a) for reference to 50(1)(a), (b), (d) or (e) or (3D).

The amendments allow a person to whom personal information relates to intervene in a proceeding at the Tribunal which reviews a decision of the Freedom of Information Commissioner in relation to a document that has been exempt under section 33(1) of the Principal Act.

#### **PART 4—REPEAL OF AMENDING ACT**

Clause 53 provides for the automatic repeal of the 2011 Act on 1 December 2013. The repeal of this Act does not affect in any way the operation of the amendments made by this Act (see section 15(1) of the **Interpretation of Legislation Act 1984**).