Commonwealth
OMBUDSMAN

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4 December 2009

Senator Cory Bernardi
Senator for South Australia
Chair – References Committee
Senate Standing Committee on Finance
and Public Administration
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Senator Bernardi

Please find attached a submission from the Commonwealth Ombudsman in relation to the Standing Committee Inquiry into the Independent Arbitration of Public Interest Immunity Claims.

The submission responds to a request for input from the Standing Committee and highlights issues arising out of our office's experience in investigating FOI complaints. The submission suggests that an 'adviser' role may be preferential to an 'arbitrator', in the resolution of issues within the parliamentary context, in order to ensure that parliament retains sole control over its own affairs.

If you require any further information, please contact me directly on tel: 02 6276 0149 or have the Committee Secretariat contact Mr Adam Stankevicius, Senior Assistant Ombudsman on tel: 02 6276 3754.

Yours sincerely

Prof. John McMillan
Commonwealth Ombudsman

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Submission by the Commonwealth Ombudsman

INQUIRY INTO INDEPENDENT ARBITRATION OF PUBLIC INTEREST CLAIMS

CONDUCTED BY THE SENATE STANDING COMMITTEE ON FINANCE AND PUBLIC ADMINISTRATION

Prof. John McMillan
Commonwealth Ombudsman

December 2009

BACKGROUND

General

The Commonwealth Ombudsman safeguards the community in its dealings with Australian Government agencies by:

- correcting administrative deficiencies through independent review of complaints about Australian Government administrative action
- fostering good public administration that is accountable, lawful, fair, transparent and responsive
- assisting people to resolve complaints about government administrative action
- developing policies and principles for accountability, and
- reviewing statutory compliance by law enforcement agencies with record keeping requirements applying to telephone interception, electronic surveillance and like powers.

The work of the Ombudsman is an important means of safeguarding the public interest in high-quality, ethical, fair and transparent public administration.

Specific

While this office does not have specific information that goes directly to the questions which the Committee is seeking to answer, our experience in oversight of the Freedom of Information Act regime may provide some assistance in your deliberations.

In a typical year, this office receives between 200 to 300 complaints about actions taken by agencies dealing with requests under the *Freedom of Information Act 1982*. Some of those complaints raise issues relating to public interest:

- where a person has sought remission of fees and charges on the ground that providing access to the documents would be in the public interest
- where an exemption claim depends in part on an express or implied public interest test.

Our role in these instances, generally, is limited to considering whether the agency made a decision reasonably available to it and whether it did so in a fair and proper manner. One problem, for example, is that agencies sometimes fail to consider public interest issues at all, when the legislation mandates that they do so.

We are less likely to debate the merits of a claim that was fairly made, even if there may be sensible arguments against it. That is a role better performed by the review process.

In the course of our general complaints work, this office is able to issue notices requiring any person to provide information or documents or to attend and answer questions relevant to an investigation. The *Ombudsman Act 1976* removes almost all grounds for a person to resist such a notice. The only exception is s 9(3) where the Attorney-General has issued a certificate that permits refusal on very limited and express public interest grounds:

(3) Where the Attorney-General furnishes to the Ombudsman a certificate certifying that the disclosure to the Ombudsman of information concerning a specified matter (including the furnishing of information in answer to a question) or the disclosure to the Ombudsman of the contents of any documents or records would be contrary to the public interest:

(a) by reason that it would prejudice the security, defence or international relations of the Commonwealth; or

(b) by reason that it would involve the disclosure of communications between a Minister and a Minister of a State, being a disclosure that would prejudice relations between the Commonwealth Government and the Government of a State; or

(c) by reason that it would involve the disclosure of deliberations or decisions of the Cabinet or of a Committee of the Cabinet; or

(d) by reason that it would involve the disclosure of deliberations or advice of the Executive Council; or

(e) if the information, documents or records are, or were, in the possession or under the control of the ACC or the Board of the ACC—by reason that it would:

(i) endanger the life of a person; or

(ii) create a risk of serious injury to a person; or

(f) if the information, documents or records are, or were, in the possession or under the control of the Integrity Commissioner (within the meaning of the Law Enforcement Integrity Commissioner Act 2006)—by reason that it would:

(i) endanger the life of a person; or

(ii) create a risk of serious injury to a person;

the Ombudsman is not entitled to require a person to furnish any information concerning the matter, to answer questions concerning the matter or to produce those documents or records to the Ombudsman.

No such certificates have been issued during my period as Ombudsman, and our understanding is that none were issued under any of my predecessors. (There is a similar provision in s 35(5)-(6) about limiting disclosure by my office).

RESPONSE TO TERMS OF REFERENCE

As we understand the context, the present position is that each House of the Parliament determines its own procedures and manages its own affairs.

A House or Committee can request or require documents to be produced. In the interaction between the Executive and Parliament, while such a requirement can be made of a government official, it would be for the relevant Minister to comply or to claim that compliance is not required. If a Minister declines to comply because he or she claims that to do so would be contrary to the public interest, an issue can arise. It is for a Committee to decide to refer the matter to the relevant House, and for the House to decide whether to deal with it as a contempt. This can raise complex constitutional issues if the Minister is a member of the other House.

We understand that this has not come to a head in the Commonwealth context, although on a number of occasions, there have been political controversies resolved by political means, or through the effluxion of time. A dispute in the NSW Legislative Council after a Minister declined to comply with a resolution requiring that documents be tabled led to the decision of the High Court in *Egan v Willis* [1998] HCA 71. The High Court dismissed the Minister's appeal, substantially on the basis that the Courts

would not interfere with the manner in which the Legislative Council exercised its power to control its processes.

The position within Parliament is, following the passage of the *Freedom of Information (Removal of Conclusive Certificates and Other Measures) Act 2009*, now at odds with what occurs when any person makes a request under the FOI Act. Previously, though relatively rarely, a Minister could issue a certificate establishing the public interest ground for an exemption and could affirm that certificate even if the Administrative Appeals Tribunal (AAT) determined that there were no reasonable grounds for its issue. Following the 2009 amendments, the conclusive certificate process no longer exists, and a Minister or agency must make the case for an exemption in the AAT. That is, the power to resolve a dispute between an applicant claiming access under the FOI Act and a Minister or agency has moved from the Minister to the AAT and the courts.

The same procedure has long applied in judicial proceedings, following the decision of the High Court in *Sankey v Whitlam* (1978) 142 CLR 1. It was there decided that it is for a court to decide whether a public interest immunity claim by a Minister should be upheld.

The procedure outlined in the Proposed Resolution of the Senate is similar in effect to that now applying in the FOI domain and in judicial proceedings. The Minister would no longer have a conclusive power to make a claim of privilege before the Senate. The effect of the new proposal is that an independent arbitrator appointed by the Senate would have a determinative power, in that documents must be tabled if the arbitrator 'reports that reasons given for the withholding of information or documents are not justified'. In cases of commercial confidentiality, the Auditor-General would play a similar role.

It is sensible in principle that the Senate should take heed of how FOI exemption and public interest immunity claims are dealt with in other forums. It is anomalous that a Ministerial claim of exemption can be overruled by the courts or the Administrative Appeals Tribunal, but has conclusive effect within the Parliament. The justification for the different procedure has always been that 'the struggle between the two principles involved, the executive's claim for confidentiality and the Parliament's right to know, must be resolved politically' (*Odgers' Australian Senate Practice* (12th ed, 2008) at 469. The middle path, taken in the Proposed Resolution, is to appoint an independent arbitrator to examine and rule on the Minister's claim.

The Committee may wish to consider, as an alternative, the appointment of a specialist 'adviser' to the President, and leave the decision making responsibility with the Senate. In effect, the adviser would comment on the grounds offered by a Minister in support of a claim of public interest immunity, and it would be for the Senate to decide whether to press a claim for information or documents to be provided, and what action to take if the Minister did not comply with a resolution of the Senate.

Such an adviser could be the proposed Information Commissioner, when that office is created under the FOI reforms presently under consideration. The Commissioner would have the independence and expertise required to examine the Minister's claim and to advise the President. Under the proposed reforms, the Commissioner will have a determinative power in respect of FOI exemption claims, including Ministerial exemption claims. The Commissioner would be better placed than the Auditor-General to deal with these issues, since it is not presently a function of the Auditor-

General to administer FOI legislation or to provide specific advice to the Parliament on document exemption claims.

It would be problematic, in our view, to give the adviser a determinative role of the kind envisaged in the Proposed Resolution before the Senate. Courts and tribunals, before ruling on public interest immunity and FOI exemption claims, hear evidence from both sides to a case. For example, in *McKinnon and Secretary, Department of the Treasury* (2004) 86 ALD 138, in which the AAT had to decide if there were reasonable grounds to support a conclusive certificate claim made by the Treasurer, the Administrative Appeals Tribunal conducted eight days of hearings, heard evidence from a number of witnesses including four senior Treasury officials, and was addressed by Senior Counsel for both sides. That would not be atypical for cases in which there are important or hard-fought document exemption claims being made.

It would be incompatible for a hearing of that kind to be conducted by an arbitrator or adviser dealing with a refusal by a Minister to comply with a resolution of the Senate to produce documents. Absent such a hearing process, it would be preferable to restrict the arbitrator or adviser to providing advice to the Senate through the office of the President.

Using the Information Commissioner in this restricted role would also remove any ground for criticising decisions of an arbitrator appointed by the Senate against claims of political alignment or bias. A decision of a standing independent officer (such as the Information Commissioner or a special adviser to the Senate President) is more likely to be perceived as credible.

This position would, in our view, be further strengthened if there were express grounds of public interest against which a Minister could properly make a claim and the Commissioner or adviser could assess it. We note the discussion in Odgers at p 469 of the criteria circulated to Senators in 2005. Those criteria mirror the exemption provisions in the FOI Act. The adviser would, of course, require access to the information itself as well as to contextual information that may throw light on the strength of the Minister's claim.

As the Committee would be aware, officials appearing before the Senate or its Committees have regard to Guidelines issued by the Department of the Prime Minister and Cabinet. Those Guidelines have been reviewed following the Senate's 13 May 2009 Order relating to witnesses and the further consideration by the Procedure Committee. Those Guidelines recognise that, for the most part, it is for Ministers to make or affirm immunity claims that have been made, especially where there is any uncertainty. Officials are to disclose where there are no grounds and to refuse, citing the reasons the public interest would be damaged by disclosure, where there are such grounds.