MONASH University

27 January 2009

Committee Secretary
Senate Standing Committee on Finance and Public Administration
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600
Email: fpa.sen@aph.gov.au

Dear Sir/Madam,

Inquiry into the Freedom of Information (Removal of Conclusive Certificates and Other Measures) Bill 2008

I write with reference to the current Senate Inquiry into the Freedom of Information (Removal of Conclusive Certificates and Other Measures) Bill 2008. Thank you for granting me an extension of time to make this submission.

Removal of conclusive certificates
The Bill's removal of the conclusive certificate procedures in the Freedom of Information Act 1982 provides a useful starting point for long overdue reform of that Act.

I have previously stated that:

> Given the significance of independent review, any measures which restrict it must be viewed with considerable caution. At worst, such measures increase the risk that information will be withheld on spurious grounds, thereby undermining the objectives of the legislation. At best, they reduce public confidence in it. …[I]t is significant that courts have long moved away from a stance which allows documents to be withheld simply on the basis of ministerial 'say-so'. The concept of definitively conclusive certificates is therefore an anachronism. [M Paterson, 'The Media and Access to Government-Held Information in a Democracy' (2008) 8 *Oxford University Commonwealth Law Journal* 3, 10.]

Changes to AAT procedures
I have no specific concerns about the majority of proposed amendments to AAT procedures. They would appear to strike a reasonable balance between transparency and the need to ensure that the AAT is fully cognisant of any security-related issues that need to be considered before granting access to documents claimed to be exempt on security grounds.

However, I would query the terms of the proposed change in Item 17 (s 58E). The amendment in item 15 (s58(B)) requires that claims for exemption on national security-related and Cabinet ground must be heard by a tribunal constituted only of presidential members or judges. Given the senior status of those persons it is arguable that disclosure of sensitive information is unlikely to present any serious risks. However, I realise that some compromise may be required to allay departmental concerns.

As currently drafted, the provision may require the Tribunal to make a decision as to whether or not a document is exempt based on evidence in affidavits. While it may be assumed that information in

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affidavits is true, there is no requirement for an affidavit to contain all of the relevant facts and it is therefore possible that it will contain the truth but not the whole truth relevant to the issue of exemption. A possible solution is to require affidavits to disclose all evidence relevant to whether the information is exempt.

Exception for documents received from national security bodies
It is disappointing that the exemption provisions of section 7 of the FOI Act are to be extended to information in the possession of Ministers instead of all those provisions being repealed, so that they would no longer apply to information in the possession of agencies

I have previously commented that:

> A factor which differentiates Australia from other western nations is the fact that we lack any Bill of Rights, and therefore any mechanism for ensuring that civil liberties are not unacceptably undermined by national security laws. Arguably, therefore, the need for transparency is all the greater. To the extent that bodies such as ASIO have extensive powers, it is important to ensure that they are exercised appropriately and that measures introduced for anti-terrorist reasons are not used to harass political opponents or others whose views are regarded as politically unacceptable. [M Paterson, *Freedom of Information and Privacy in Australia: Government and Information in the Modern State* (LexiNexis/Butterworths, 2005) [1.79].

I would also add that it is likewise important at a time when national security bodies are provided with large budgets that there should be appropriate scrutiny of their financial processes and expenditure.

To the extent that documents require protection for reasons of national security, defence or international relations, they will arguably fall within the exemptions in s 33(1). In that case the new procedures in relation to AAT review would be available and arguable provide sufficient protection.

A possible explanation for the blanket exemption is that agencies or Ministers may inappropriately fail to claim exemption because they are unaware of the potential implications of release. If that is a real concern, it can be dealt with via a requirement for consultation in relation to any correspondence from specified national security organisations along the lines of those available under ss 26A, 27 and 27A.

However, I acknowledge that any proposal for repeal of the existing exemption provisions of section 7 would be likely to engender fierce opposition from some influential quarters that could delay or totally thwart the enactment of the Bill as it stands. It may well be the case that additional revision of the Act to eliminate or reduce the existing over-protection of some classes of information, although desirable now, should proceed incrementally in several Bills.

Qualification to notification requirements
My final concern relates to the qualification to notification requirements in Items 18 to 21. The result of the qualification is satisfactory as long as the AAT, and the Federal Court in any appeal, decides that the information is exempt on the grounds relied on by the Minister or agency. No one is given access to it; so the information subject's situation remains substantially the same as if no application for access to it had been made.

But he or she may be seriously harmed if access to the information is given to the person applying for it; the information subject should have the right to resist the application and assert that the

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information is exempt on privacy (or any other) grounds. The AAT's rejection of the Minister's or agency's claim for exemption on public interest grounds provides prima facie evidence that the reasons that caused the Tribunal to make its order under section 59 or section 59A restraining notification of the application no longer have the cogency that justified the making of the order. The risk of harm to the information subject is, of course, increased by the fact that the applicant is entitled to disclose it to the world.

As the Federal Court may reverse the AAT's decision on appeal, it would clearly be inappropriate for the information subject to be notified of the application (and for applicant to be able to act on the decision) before the appeal is heard and decided. However, by the time the appeal is decided the damage to the information subject has been done; the decision has been made without his or her having had an opportunity to present evidence and argument to convince the Tribunal that the information is exempt on a ground not relied by the Minister or agency. I suggest that, in order to prevent information subjects being harmed in this way, new legislative provision (in the AAT Act and the Federal Court Act, as well as to the FOI Act) needs to be made for a special procedure to be followed by the AAT in such cases. That might take the form of requiring the Tribunal, where it rejects the Minister's or agency's grounds for exempting the information from disclosure, to make what is in effect a "determination nisi" that expressly leaves open an opportunity for the information subject, if he or she chooses, to assert that the information is exempt from disclosure on any ground and to have that decided by the Tribunal.

The "determination nisi" would have to be made appealable by the Minister or agency. If the Federal Court upheld the appeal, it would set aside the "determination nisi" and make a conclusive order that the information was exempt. However, if it rejected the appeal, it would order that the matter be returned to the AAT to be dealt with in accordance with the law. The AAT would be required to notify the information subject forthwith of the application for access to the information and allow him or her a set period to apply to be joined in the proceedings. If he failed to apply, the Tribunal would forthwith order that the "determination nisi" be made absolute and the applicant would have the right of access to information in accordance with that determination. However, if the information subject applied in due time to join the proceedings, the AAT would be required to order that joinder and would then proceed to try in the normal way the new (or possibly all) issues raised and, having done so, to make a substantive decision that would replace the "determination nisi".

Appropriate provisions of a similar nature would also have to be made to deal with the situation where the applicant was successful in an appeal against a decision of the AAT refusing access to the information.

Yours sincerely,

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