



**AUSTRALIAN
PRESS
COUNCIL**

SUBMISSION

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Suite 10.02, 117 York Street, Sydney NSW 2000

Phone: (02) 9261 1930 Fax: (02) 9267 6826

Internet: <http://www.presscouncil.org.au/>

Email: info@presscouncil.org.au

Australian Press Council
Submission to the Australian Senate Finance and Public
Administration Committee Inquiry into the
Freedom of Information (Removal of Conclusive
Certificates and Other Measures) Bill 2008

Executive summary

The Australian Press Council congratulates the government on taking action to address problems with the system of Freedom of Information in Australia. The abolition of conclusive certificates will make a positive contribution to the development of open and accountable government.

However, the Press Council is of the view that the Bill does not go far enough towards improving access to government information. The Press Council urges the government to engage in a complete overhaul of the system of Freedom of Information in Australia, with particular emphasis on the reformulation of exemptions.

With specific reference to the *Freedom of Information (Removal of Conclusive Certificates and Other Measures) Bill 2008*:

- Proposed subsection 7(2B): Wherever security issues are relevant to an freedom of information request, the decision-maker should be required to weigh the public interest in national security against the public interest in accountability and transparency, with specific regard to the documents being sought and the reason for which the application has been lodged, regardless of where the documents originated or by whom they are held.
- Proposed section 67: When exercising its power to stay the operation of an AAT decision granting access pending an appeal against that decision, a court should be required to apply a test similar to that which is applied to applications for injunctive relief, i.e. there must be reasonable prospect of the appeal succeeding in order for the stay to be imposed.

Submission

The Australian Press Council congratulates the government on taking action to address problems with the system of Freedom of Information in Australia. The abolition of conclusive certificates will make a positive contribution to the development of open and accountable government. However, the Press Council is of the view that the Bill does not go far enough towards improving access to government information.

The Press Council recognises the significance of abolishing conclusive certificates and fully supports the government's efforts in this regard. The decision of the High Court in *McKinnon's case* recently highlights the potential for mechanisms such as conclusive certificates to be abused by Ministers seeking to withhold information for political purposes. While conclusive certificates are a major impediment to access to information, their abolition will not be sufficient, in the absence of other major reforms, to ensure that information is readily available to those who seek it.

In order to facilitate public access to government information, a complete overhaul of the Freedom of Information system is required. A crucial component of such an overhaul would be the reformulation of the exemptions so as to narrow their scope and limit the degree to which they can be exploited to withhold material that is embarrassing or politically inconvenient to governments. While it may be proper for Cabinet deliberations to remain confidential, this does not require that all documents informing those deliberations to remain secret. Indeed, there have been many occasions when governments have publicly released documents presented to Cabinet – notably, when such documents support the government's position.

The scope of the exemptions for Cabinet documents and the exemption for “internal working documents”, in particular, are too broad and should be narrowed. The Press Council is of the view that Cabinet documents should be readily available to the public without the need for lodging of Freedom of Information applications, unless there is a sound public interest reason for withholding material.

With respect to the “business affairs” exemption, where a private business has contracted to provide goods or services to government, there is contradiction between the aim of protecting the business's confidential information and the aim of making governments accountable for their decisions. Under the business affairs exemption, information that it would be in the public interest to disclose may be exempt from Freedom of Information because it concerns a contractual relationship between government and a private company. The exemption should be redrafted so as to require the decision-maker to engage in a balancing exercise, whereby the public interest in accountability and transparency is weighed against the private interest in confidentiality, taking into account the extent of damage that is likely to be suffered by the private business interest-holder if the information is disclosed.

In addition to the problem of Ministers who withhold information for political purposes, government officers may withhold information that ought to be released. One mechanism that would act as an incentive to Ministers and public servants to exercise their discretion in the public interest would be the inclusion of a clause making it an offence to withhold information for improper purposes, such as the

concealing of corruption or incompetence. The Press Council is of the view that such a clause should be included in any revised Freedom of Information legislation.

Another important component of any meaningful reform of Freedom of Information would be an alteration to the fee structure. Many individuals and organisations that lodge Freedom of Information applications for purposes of research, as opposed to applications for personal information, are charged hefty fees which are so excessive that they are, in effect, a significant disincentive to proceeding with the application. If the issue of fees is not addressed in any reform process, there can only be a modest increase in the amount of government information that is actually released under Freedom of Information.

The Press Council notes that the Special Minister of State, Senator John Faulkner, has indicated that an exposure draft of a further Freedom of Information reform bill will be released early in 2009 and that this Bill is described as a “first step”. With this assurance in mind, the Press Council accepts that certain aspects of the further reforms sought may already be in the pipeline. The Council looks forward to reading the exposure draft when it becomes available.

In addition to its view that the proposed reforms do not go very far in addressing problems with Freedom of Information in Australia, the Press Council has specific concerns with regard to the content of the *Freedom of Information (Removal of Conclusive Certificates and Other Measures) Bill 2008*. Sections 7 and 67 are of particular concern.

The Bill inserts a new subsection into s.7 of the Act. The new subsection 7(2B) states that the Minister is exempt from the operation of the Act in relation to documents that have originated with, or were received from, a number of listed security agencies. The Council appreciates that the stated intention of the subsection is to address an anomaly whereby a document held by the security agencies would be exempt but the same document, when held by a Minister is not so exempt. On the face of it, the subsection seems reasonable. However, the new clause has the potential to expand the scope of the exemption. This begs the question: should the mere fact that a document has originated with a security agency, by itself, justify its exemption from Freedom of Information? It is the Press Council’s view that, while many documents that are held by security agencies ought to remain confidential, there will be some documents which it would be in the public interest to disclose. The fact that a document has been received from a security agency should not be enough, by itself, to warrant exemption unless there is also a sound reason for maintaining the document’s confidentiality. Such a reason might include a threat to national security or defence. Not all documents that originate with security agencies pose a threat to national security. Some such documents may be considered matters of legitimate public interest. Wherever security issues arise it may be appropriate to require the decision-maker to weigh the public interest in national security against the public interest in accountability and transparency, with specific regard to the documents being sought and the reason for which the application has been lodged, regardless of where the documents originated or by whom they are held.

Certain provisions, both in existing legislation and in the Bill, while apparently having been included with the best of intentions, leave open opportunities for abuse. The Bill inserts a new section 67 that automatically stays the operation of an AAT decision granting access where an appeal has been commenced against that decision. On its surface, this seems perfectly reasonable since the release of material prior to

the determination of the appeal would render the appeal a nullity. However, the Press Council is concerned that politicians seeking to delay the release of potentially embarrassing material could exploit this mechanism. For example, in the months preceding an election, a government might initiate an appeal against a decision to release documents confident that the appeal will not be determined until after the election. Information, like justice, is often effectively denied if delayed. In order to address this, the legislation should include a test similar to that which is applied to applications for injunctive relief, i.e. there must be reasonable prospect of the appeal succeeding in order for the stay to be imposed. In addition, when the information is potentially politically significant the matter should be brought to trial as quickly as possible and an interim determination given with a degree of urgency.

In spite of misgivings the Press Council has with regard to certain aspects of the Bill, the Council is pleased that the government has taken positive steps to abolish conclusive certificates and the Council anticipates further reform during 2009.

The Australian Press Council

The Australian Press Council is a voluntary association of organisations and persons established on 22 July 1976. The membership of the Council is set out in the attachment.

The objects of the Australian Press Council are to promote freedom of speech through responsible and independent print media, and adherence to high journalistic and editorial standards, by:

- considering and dealing with complaints and concerns about material in newspapers, magazines and journals, published either in print or on the Internet;
- encouraging and supporting initiatives by the print media to address the causes for readers' complaints and concerns;
- keeping under review, and where appropriate, challenging political, legislative, commercial or other developments which may adversely affect the dissemination of information of public interest, and may consequently threaten the public's right to know;
- making representations to governments, public inquiries and other forums as appropriate on matters concerning freedom of speech and access to information;
- undertaking research and consultation on developments in public policy affecting freedom of speech, and promoting public awareness of such issues;
- promoting an understanding of the Objects, Principles and workings of the Council especially among editors, journalists and journalism schools, through forums and consultations; and encouraging feedback for Council's consideration.

The Australian Press Council

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For details and biographies see:

<http://www.presscouncil.org.au/pcsite/about/members.html>