

AUSTRALIA'S RIGHT TO KNOW

Submission to the Senate Finance and
Public Administration Committee

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

January 2009



Australia's Right to Know

Australia's Right to Know (RTK) is a coalition of 12 major media organisations: News Limited; Fairfax Media; Free TV Australia; Australian Subscription Television & Radio Association (ASTRA); Commercial Radio Australia; SBS; ABC; Sky News; Australian Associated Press (AAP); APN News and Media; Media Entertainment and Arts Alliance (MEAA); and West Australian Newspapers.

RTK was formed in 2007 to address an increasing trend against freedom of speech and access to information in Australia. RTK aims to draw public attention to existing and proposed restrictions on journalism and free speech in Australia and bring about improvements, particularly through legislative reform.

RTK regards free speech, free press and access to information as fundamental to a democratic society that prides itself on openness, responsibility and accountability. Any limitation on openness must be clearly articulated and limited to what is necessary and proportionate in a democratic society and only to protect essential public interests.

Submission

Summary

RTK welcomes and strongly endorses the Federal Government's proposal to remove conclusive certificates from the *Freedom of Information Act 1982 (Cth)* (the Act).

To further promote transparency of government, RTK urges the Government to also consider amendment of the Act to introduce an overriding public interest test. This test would empower the Administrative Appeals Tribunal to order disclosure of documents in the public interest, notwithstanding that an exemption may technically apply. Such an amendment would be consistent with a commitment to encourage a pro-disclosure culture throughout government.

Related documents

In 2007, RTK commissioned a report on, among other things, the need for reform of freedom of information laws. See:

- Irene Moss AO (chair), *Report of the Independent Audit into the State of Free Speech in Australia*, commissioned by Australia's Right to Know, 31 October 2007, especially section 6.8.4 (Conclusive certificates), http://www.abc.net.au/news/opinion/documents/files/20071105_righttoknow.pdf;

In 2008, in response to the Solomon Review of the Queensland Freedom of Information Act, RTK argued for a wide-ranging and comprehensive overhaul of Queensland's law and practice.

- *Submission of Australia's Right to Know to the Queensland Freedom of Information Independent Review Panel*, 6 March 2008, especially section 7 (Review of exemptions permitting the issue of Ministerial certificates), [http://www.foireview.qld.gov.au/documents_for_download/submissions/Australia's Right to Know submission.pdf](http://www.foireview.qld.gov.au/documents_for_download/submissions/Australia's%20Right%20to%20Know%20submission.pdf).

Conclusive certificates

1. RTK notes the Federal Government's intention to remove conclusive certificates is consistent with its election promise and to similar amendments introduced in other Australian jurisdictions, including Western Australia and, most recently, the ACT.¹
2. RTK believes conclusive certificates should be abolished because the power is:
 - a. inconsistent with the object of the legislation and undermines the Act's main purpose of enhancing government openness and transparency;
 - b. used to avoid public participation in and scrutiny of government policies and decision-making and other matters of public interest – see, notably, the High Court *McKinnon case*,² where the use of conclusive certificates effectively put any government documents beyond the reach of administrative review when covered by a certificate;
 - c. instrumental in allowing ministers to choose to keep documents secret without a full merits review, contrary to the principle of the separation of powers. Appeals to the AAT on certificates specifically exclude consideration of the public interest in favour of release allowing ministers to exercise the power to protect political interests;
 - d. unnecessary because the public interest in not releasing certain documents is already protected by existing exemptions applying to specific classes of sensitive information;
 - e. open to misuse as Ministers or designated officers have consistently cited the re Howard public interest factors as valid reasons for issuing certificates. Contentions that release of documents will inhibit candour and frankness and tend to cause confusion, have been widely discredited in tribunals and courts. (see *General Manager, WorkCover Authority of New South Wales v the Law Society of New South Wales* [2006] NSWCA 84 and *Re Howard and Treasurer of Commonwealth of Australia* (1985) 7 ALD 626)
 - f. the decision-maker may be inclined to identify the government's interest in nondisclosure as the only relevant public interest. The decision-maker is not required to balance competing public interests and is entitled to withhold information despite overriding public interests in favour of disclosure that cannot be considered by independent review.
3. Abolition of conclusive certificates would enable the legislation to be better aligned with international human rights instruments³ and jurisprudence⁴, which generally requires a careful balancing of competing public interests where interference in any one right is limited to what is proportionate and necessary in a democratic society.

Additional Reform and Public interest override

4. On introduction of the Bill into Parliament, Minister Faulkner commented that abolition of conclusive certificates is the first step in the Government's significant overhaul of the Act and FOI practice.
5. RTK looks forward to the release in 2009 of exposure draft legislation addressing broader reform measures aimed at promoting a pro-disclosure culture.
6. In its 2007 election policy document, the Federal Government committed, to comprehensive reform of FOI law and practice and specifically committed to:

*abolish conclusive certificates, ensuring the public interest test is applied more thoroughly and consistently and establishing a pro-disclosure culture throughout government.*⁵

7. RTK submits that, in addition to abolishing conclusive certificates, a pro-disclosure culture would be facilitated by the introduction of a public interest override test. A public interest override test would empower the Administrative Appeals Tribunal (AAT) on external review to decide that the public interest requires access to be granted to an exempt document.
8. Such a power has existed and operated under section 50(4) of the Victorian *Freedom of Information Act 1982* since that Act came into force 25 years ago without detriment to proper standards of public administration in that State.
9. RTK supports the views of the Commonwealth Human Rights Initiative (CHRI) in its submission to the then Shadow Attorney-General, Ms Nicola Roxon MP, during her review into the Australian *Freedom of Information Act 1982*.
10. CHRI argued that the AAT be given the power to apply the public interest override:

Currently, s.58(2) applies so that, while the AAT can determine whether an exemption applies, it has no discretionary power to require disclosure regardless of the availability of an exemption. Considering that the AAT is an independent appeals body staffed with impartial judicial officers there is little justification for the current refusal to allow the AAT to exercise a discretion to compel release when it is in the public interest. An independent body which is external to government and immune to political pressure surely is best placed to apply a test which may have direct implications for both politicians and public officials. This argument has increasing force when one considers the increasing trend towards politicisation of the public service. It is hard to justify allowing government officials to use their discretion in applying the Act, while limiting the powers of the independent watchdog responsible for overseeing their decisions.⁶

11. The policy aims of the Act would be enhanced if a discretion were to be given to an independent arbiter such as the AAT to not only review government decisions to withhold a document, but also to independently and impartially assess the public interests arising in the circumstances of every case to determine whether the document, even though exempt, should remain secret.
12. In RTK's view, the introduction of a public interest override would promote the object of the Act to have maximum disclosure limited only by essential public interests.

ENDNOTES

¹ Western Australia's *Freedom of Information Bill 2007*, passed by the lower house on 28 November 2007 and introduced into the upper house on 4 December 2007; and the ACT's *Freedom of Information Amendment Bill 2008 (No 2)*, introduced into the Legislative Assembly on 11 December 2008.

² *McKinnon v. Secretary, Department of Treasury* [2006] HCA 45, <http://www.austlii.edu.au/au/cases/cth/HCA/2006/45.html>.

³ See, for instance, Article 19 of the *International Covenant on Civil and Political Rights*, ratified by Australia on 13 November 1980, <http://www.austlii.edu.au/au/other/dfat/treaties/1980/23.html> and <http://www2.ohchr.org/english/law/ccpr.htm>; and Article 10 of the *European Convention on Human Rights*, <http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf>.

⁴ See, for instance, Monica Macovei, *Freedom of expression: A guide to the implementation of Article 10 of the European Convention on Human Rights*, Human rights handbooks, No. 2, 2nd edition, January 2004, Directorate General of Human Rights, Council of Europe: Strasbourg, http://www.coe.int/T/E/Human_rights/hrhb2.pdf.

⁵ Australian Labor Party (Kevin Rudd – Federal Labor Leader, and Senator Joe Ludwig – Shadow Attorney-General), *Government information: Restoring trust and integrity*, Election 2007 policy document, October 2007, page 7, http://www.alp.org.au/download/now/071026_government_information_policy.pdf.

⁶ *Submission by the Commonwealth Human Rights Initiative to the Review by Shadow Attorney-General of the Australian Freedom of Information Act 1982*, March 2004, paragraph 12, http://www.humanrightsinitiative.org/programs/ai/rti/international/laws_papers/australia/submission_alp_review_of_foi_act_mar04.pdf.