The following is a brief submission in connection with this reference.

As you may have seen from my blog (www.foi-privacy.blogspot.com), I'm all in favour of the abolition of conclusive certificates. While I appreciate the frustration of the Australian Press Council in advocating wider reform it seems there is little point in suggesting additions to the Bill at this stage, given what Minister Faulkner clearly sees as a two stage process.

That in itself is a strange way to go about things. President Obama on day one managed to set a new tone and has given his troops 120 days to flesh out new guidelines on how to achieve his government's objective of more transparency. After 400 days the Rudd Government is...well, not far advanced. Looking at these changes without the detail of what is proposed for stage two doesn't make a lot of sense, not that I suggest any further delay in getting rid of certificates. A case in point is that the proposed ADT review power changes will be rendered academic or of short duration if the Government follows on with its commitment to replace the ADT with an Information Commissioner for the purposes of external review.

In the meantime however if the Committee wants to look beyond the Government's proposal, the ARTK submission that the Tribunal should have a discretion to require release of an otherwise exempt document makes sense. The Victorian approach to this is too narrow - the Tribunal there can only find in favour of disclosure where the public interest *requires*. This has been interpreted narrowly in the courts. Where on balance the public interest would be advanced and no harm to any compelling public interest would arise from disclosure might be a better way to go.

The track record in interpreting and applying the national security and international relations exemptions, as with other exemptions, is that decision makers in government agencies and the Tribunal have often been very conservative. The proposal that the Inspector General of Intelligence and Security must give evidence before the Tribunal can find against an agency claim of this kind reflects excessive caution. By the very nature of the job the Inspector General is unlikely to be a pro-disclosure advocate. The PIAC submission also made a good point that the Inspector has no standing or necessarily expertise in international relations .The exemptions in the FOI Act in this area are very tight. Surely the applicant and the agency can sufficiently inform the thinking of the independent tribunal member.

Given that the Bill sensibly provides for abolition of ministerial certificates from the Archives Act as well, it's worth noting that some other changes to that Act are ripe for consideration, but going there may go further than the Committee wishes at the moment.

Last year the Government acted on some recommendations for change to the Archives Act in a 1998 report from the Australian Law Reform Commission that had been gathering dust ever since. However many recommended changes - for example broad changes to the objects and moves towards more continuous disclosure - didn't receive a mention anywhere in public discussion at the time.

The annual wholesale release of cabinet submissions and decisions magically after they turn 30 years old is a good illustration of the point. Many of more than one thousand cabinet submissions and three thousand decisions taken in 1978 were released on 1 January this year. Many hundreds could and should have been in the public domain years ago, with no harm arising for any interest. If anyone had sought access before 1 January 2009 under FOI they would have run up against a vigorously enforced tightly worded cabinet document exemption with no public interest or harm test. Our 30 year rule and its place in the context of open government principles is long overdue for re-examination.

No Government or other speaker in Parliamentary debate on changes to the Archives Act last year made mention of this or another ALRC recommendation - that the Archives Act should not include legal professional privilege as a ground for exemption for documents even though they are 30 years or older. In the recent 1978 cabinet documents release, nine documents about the establishment of the Uranium Marketing Authority (as best I can work out it never came to pass) were claimed exempt on the basis of legal privilege (and another) ground. Surely this is worth re-examination.

I would try to make myself available should the Committee wish to discuss the Bill or issues raised in this submission.

Peter Timmins.