Inquiry into the Freedom of Information (Removal of Conclusive Certificates and Other Measures) Bill 2008
Senate Finance Committee FOI Inquiry 2009

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The removal of Conclusive Certificates is well overdue. Whilst not used regularly their existence and potential use was enough to undermine the key objectives of the FOI Act.

Most FOI legislation, outside of Australia, passed since the FOI Act (Cth) have avoided including the certificates or placed very severe limitations and reporting requirements on their operation. Australian jurisdictions (starting with Tasmania) have progressively removed these certificates from the statute books.

My views on conclusive certificates were set out in R Snell, 'Conclusive or ministerial certificates – an almost invisible blight in FOI practice' (2004) 109 Freedom of Information Review 9-12. I endorse the 6 arguments put forward at Para 2 of the ARTK submission. I have read Michael McKinnon's detailed submission and endorse his comments and draw the Committee's attention to how his experiences and analysis demonstrate the need to remove these certificates from the Australian FOI process.

I share the frustration of many with the slow and 'insiders' approach to FOI reform that has been adopted by the Rudd Government. Whilst this bill is a welcome, albeit unnecessarily delayed, implementation of a two stage process I register my concern at making these amendments in isolation from either the content or the general design of the second stage of this FOI process.

While stakeholders have been given a limited opportunity to make submissions on possible FOI reform the government has largely been a 'black hole'. Submissions and comment in and only the vaguest feedback returned.

The sooner these certificates are removed from the FOI Act the better. However if the government goes ahead with other reform promises then key parts of this amendment dealing with the AAT will have a very short operational life.

In stark contrast to the slow and opaque approach adopted by Senator Faulkner and Prime Minister Rudd has been the fully consultative, public, rapid and fundamental reforms adopted by the Bligh government in Queensland and the rapid, crystal clear instructions

issued by President Obama on his first day in office issuing an instruction for government agencies to be more responsive to freedom of information requests.

I support the ARTK submission that the Tribunal should be given a discretion to release otherwise exempt information if there are good reasons to do so in the public interest. This Committee should take the opportunity to indicate to the government what are the minimum requirements of a 21st century information act for Australia. One of these minimum requirements would be a public interest override provision.

The total exclusion of the bodies listed in the proposed section 7 (2B) (and the current exclusion in 7 (2A) should be reconsidered. The key operating principle should not be the exemption of particular offices or agencies but to protect information whose release would cause serious harm that outweighs any public interest in release. In this regards I endorse the submission made by the Public Interest Advocacy Centre

The Australian approach to the protection of classified information (relating to security, defence and intelligence information) has always been excessive and out of step with approaches in countries like the United States, United Kingdom, Canada and New Zealand see Paul Hubbard "Freedom of Information and Security Intelligence: An economic analysis in an Australian context" in Open Government: a journal on freedom of information, Vol 1, No 3 (2005). The key consideration should be the realistic assessment of the actual or potential harm that the release of particular information at any particular time will cause. The blanket exemption for the organizations in the proposed Section 7 (2B) is unjustified and very poor access policy. It exempts all information regardless of its actual connection to the core activity of these agencies or the needs of accountability and responsible government.

The proposal that the Inspector General of Intelligence and Security must give evidence before the Tribunal can find against an agency claim for exemption reflects the excessive approach and caution used in dealing with exemption claims in this area.

The structure set up by S 7(2B) excludes a wider range of material than currently is exempted under the FOI Act sans a conclusive certificate. The arguments expressed on pages 2-3 of PIAC's submission are endorsed.

The changes to the Archives Act are supported but highlight the problems of the current approach to the FOI Act. As I have argued to Senator Faulkner's office (on the single occasion I have been asked to express my views) a whole of government approach to information management ought to be the key guide in making reforms. Under such a comprehensive information policy long overdue changes would be made to the Archives Act (many of them taking up the neglected proposals from the 1998 ALRC Report) including changes to the objectives of the Act, continuous disclosure etc.

As the submission of Peter Timmins indicates the blanket 30 year rule for Cabinet information indiscriminatingly treats all information as worthy of the maximum

protection for non-disclosure with no reference to its actual sensitivity and/or public interest in making that information available earlier.

I also endorse Peter Timmin's submission in reference to the protection given to information classified as legal profession privilege under the Archives Act.

The progress on reform of Australian FOI law since the landmark ALRC/ARC Report at the end of 1995 has been agonisingly slow. This Bill represents a long overdue but small first step in bringing Australian information policy onto the remote edges of the 21st century. Conclusive certificates should never have been included in the FOI Act and certainly should not have persisted for 25 + years. This committee should play a key role in the design and implementation of FOI and a wider more disclosure orientated information policy.

The Rudd Government instead of treating the FOI reform process as a two way flow of ideas and information has acted as an information monopoliser. Whilst many are optimistic that the opaque operations of Senator Faulkner's office will produce an innovative and fresh approach to complement or even rival the Queensland Government's efforts it is a pity it is being developed on a 'Need to Know' basis.