



Ms Christine McDonald
Secretary
Senate Standing Committee on Finance and Public Administration
The Senate
Parliament House
CANBERRA ACT 2600

Dear Secretary,

FREEDOM OF INFORMATION (REMOVAL OF CONCLUSIVE CERTIFICATES) BILL 2008

The Law Council of Australia is the peak body for the Australian legal profession, representing nearly 60,000 lawyers through the Law Societies and Bar Association of the States and Territories, and the Large Law Firm Group (the "constituent bodies" of the Law Council). The Law Council speaks on behalf of the profession on national and international issues, including Federal legislative and policy initiatives.

The Law Council welcomes the *Freedom of Information (Removal of Conclusive Certificates) Bill 2008* (Cth) (the FOI Amendment Bill). The intended purpose of the Bill will be to remove the power of Commonwealth Government Ministers to issue 'conclusive certificates', to arbitrarily prevent public access to information and documents that would otherwise be released by government instrumentalities upon request under the *Freedom of Information Act 1982* (Cth) (the FOI Act).

As Senators will be aware, the FOI Act was introduced by Federal Parliament with the broad objective of improving openness and transparency in public administration. Conclusive certificates are inimical to this objective. Conclusive certificates can be issued by a Minister, declaring a document or class of documents exempt. The decision is non-reviewable by the Administrative Appeals Tribunal (AAT) and the Court and simply amounts to a veto power used to frustrate requests for information made under the FOI Act.

The original justification for conclusive certificates at the time the FOI Act was implemented was that "the ultimate responsibility for decisions on particularly sensitive matters should lie with the relevant Minister."¹ However, as noted by the Australian Law Reform Commission (ALRC) in its 1995 report into the Freedom of Information Act:

"It can be argued that highly sensitive information, release of which would not harm the public interest but which would precipitate a public accountability debate, is exactly the

¹ ALRC Report 77, *Open Government: a review of the federal Freedom of Information Act*, 1995, Australian Law Reform Commission, Commonwealth of Australia, paragraph 8.17



sort of material to which the FOI Act is designed to give access because it involves responsibility at the very highest levels of government.”²

The provisions of the FOI Amendment Bill

The primary amendments under the Bill will remove the power to issue a conclusive certificate in respect of:

- (1) documents affecting national security, defence or international relations (s 33);
- (2) documents affecting relations with the States and Territories (s 33A);
- (3) cabinet documents (s 34);
- (4) executive council documents (s 35); and
- (5) internal working documents (s 36).

The exemption provisions under the listed categories will remain in place, however the AAT will have power to conduct full merits review of any decision to withhold a document under a listed category of exemption.

Specific measures are also introduced to protect against disclosure of sensitive documents relating to national security, defence or international relations, and cabinet documents.

As a general comment, the provisions appear to go further than the recommendations of the ALRC,³ which considered conclusive certificates to be justified in respect of documents affecting national security, defence and international relations (s 33) and cabinet documents (s 34). The provisions of the Bill effectively allow parties to test claims of exemption under ss 33 and 34 on appeal to the AAT, whilst allowing the AAT to prevent unintended disclosure of the information during the proceedings.

There exist a number of other provisions giving effect to the process to be followed by the AAT and government agencies in deciding whether to consult 3rd parties about the commencement of proceedings release of personal or potentially commercially sensitive information.

Whilst the FOI Amendment Bill will not have retrospective effect, existing conclusive certificates will be automatically revoked upon a request made after the Bill is enacted for information/documents currently withheld under the conclusive certificate.

The Law Council has not identified any specific concerns with any aspects of the FOI Amendment Bill and recommends that it be passed.

Broader FOI reforms

The Law Council notes that Senator John Faulkner, in his 2nd Reading Speech to the Parliament in relation to the FOI Amendment Bill, stated that the Government will release a further Bill to amend the FOI Act in 2009 for public consultation. The further Bill will implement reforms drawn from key recommendations of the joint Australian Law Reform Commission and Administrative Review Council 1996 Open Government report.

² Ibid.

³ Ibid.

The Law Council looks forward to the opportunity to comment on the proposed Bill once it is released for public comment.

If there are any queries concerning these comments, please contact Nick Parmeter on (02) 6246 3751 or nick.parmeter@lawcouncil.asn.au.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'W Grant'.

Bill Grant
Secretary-General

29 January 2009