

CHAPTER 1

Introduction

Background

1.1 On 26 November 2008, the Senate referred the Freedom of Information (Removal of Conclusive Certificates and Other Measures) Bill 2008 (the bill) to the Senate Standing Committee on Finance and Public Administration (the committee) for inquiry and report by 10 March 2009.

Purpose of the bill

1.2 The purpose of the bill is to amend the *Freedom of Information Act 1982* (FOI Act) and *Archives Act 1983* to remove the power to issue conclusive certificates for all exemption provisions where certificates may be issued. In his Second Reading Speech, the Special Minister of State stated that 'the repeal of the power to issue conclusive certificates is an important step in achieving greater accountability in government decision making on access requests under the FOI Act and Archives Act'.¹

1.3 There are a number of procedural measures in the bill directed to protect particularly sensitive information in the conduct of proceedings before the Administrative Appeals Tribunal (AAT), including against unnecessary disclosure. Under these provisions, the:

- AAT will be required to consider evidence on affidavit or otherwise when determining whether a document is exempt under a national security, defence or international relations exemption, or a confidential foreign government communication exemption or the cabinet exemption. If the AAT is not satisfied that such a document is exempt on that evidence, it has the discretion to inspect the document.
- AAT will, upon exercising its discretion to make confidentiality orders under subsection 35(2) of the *Administrative Appeals Tribunal Act 1975*, be directed to give particular weight to a submission by an agency, Minister or the National Archives of Australia that it should make such orders where the proceedings relate to a document or record that is claimed to be exempt under a national security, defence or international relations exemption, or confidential foreign government communication exemption (subsection 33(1) of the FOI Act and paragraphs 33(1)(a) and (b) of the Archives Act).
- Inspector-General of Intelligence and Security will be asked by the AAT to provide evidence as to any damage that could result from disclosure of

1 The Special Minister of State and Cabinet Secretary, Senator the Hon John Faulkner, Second Reading Speech, *Senate Hansard*, 26 November 2008, p.7293.

documents or records claimed to fall within a national security, defence, or international relations exemption, or a confidential foreign government communication exemption (subsection 33(1) of the FOI Act and paragraphs 33(1)(a) and (b) of the Archives Act) before determining that such a document is not exempt.

- Presidential members of the AAT will hear applications for review of a decision to refuse access to a document or record under a national security, defence, or international relations exemption or a confidential foreign government communication exemption (subsection 33(1) of the FOI Act and paragraphs 33(1)(a) and (b) of the Archives Act) and the cabinet exemption (section 34 of the FOI Act).²

1.4 The bill also addresses an anomaly affecting rights of access to documents relating to intelligence matters where they are held by a Minister rather than an agency. Proposed subsection 7(2A) will make a document in the possession of a Minister exempt from the FOI Act where it has originated with, or been received from, an intelligence agency or the Inspector General of Intelligence and Security.³

1.5 The Special Minister of State concluded:

The measures in this bill deliver on the Government's election commitment to abolish conclusive certificates. They also establish a fair balance between ensuring appropriate safeguards are in place in the review process with respect to sensitive information, while at the same time ensuring full independent merits review of agencies' decisions on FOI.⁴

Conduct of the inquiry

1.6 The committee advertised the inquiry nationally in *The Australian* and on the Internet. The committee invited submission from the Commonwealth Government and interested organisations and individuals.

1.7 The committee received 8 public submissions. A list of individuals and organisations that made submissions to the inquiry together with other information authorised for publication is at Appendix 1. The committee held a hearing in Canberra on 12 February 2009. Appendix 2 lists the names and organisations of those who appeared. Submissions and the Hansard transcript of evidence may be accessed through the committee's website at http://www.aph.gov.au/senate/committee/fapa_ctte/index.htm.

2 Freedom of Information (Removal of Conclusive Certificates and Other Measures) Bill 2008, Explanatory Memorandum, pp 1–2.

3 Freedom of Information (Removal of Conclusive Certificates and Other Measures) Bill 2008, Explanatory Memorandum, p.3.

4 The Special Minister of State and Cabinet Secretary, Senator the Hon John Faulkner, Second Reading Speech, *Senate Hansard*, 26 November 2008, p.7293.

Acknowledgement

1.8 The committee thanks those organisations and individuals who made submissions and gave evidence at the public hearing.