CHAPTER 3

Proposed changes to the *Freedom of Information Act 1982*

Introduction

3.1 This chapter considers the key proposed changes to the *Freedom of Information Act 1982* (FOI Act) including repeal of conclusive certificates.

3.2 The committee acknowledges that the Freedom of Information (Removal of Conclusive Certificates and Other Measures) Bill 2008 (the bill) is the first step in the Government's plan to introduce more comprehensive reform of the FOI Act.[1] A number of witnesses raised this point and argued that it was difficult to consider the current amendments without consideration of the wider context of reform in which they would sit. Moreover, some witnesses suggested broader reforms to the FOI Act which sat outside of the bill's purview. Whilst the committee appreciates both the concerns and efforts of witnesses in providing such evidence, its deliberations were limited to the terms of reference before it.

Repeal of conclusive certificates

3.3 The primary amendments under the bill will remove the power to issue conclusive certificates in respect of:

- documents affecting national security, defence or international relations (s 33);
- documents affecting relations with the States and Territories (s 33A);
- Cabinet documents (s 34);
- Executive Council documents (s 35); and
- deliberative process documents (s 36).

3.4 Whilst seeking to repeal conclusive certificates, under the proposed changes, every exemption claim would be subject to full merits review by the Administrative Appeals Tribunal (AAT). Thus, under the proposed amendments, the decision on whether to release documents would fall solely to the AAT.

3.5 Mr Matthew Moore highlighted that the removal of conclusive certificates does not imply that such documents will automatically be released when sought, but instead:

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1 Senator the Hon. John Faulkner, Special Minister of State, *Abolition of Conclusive Certificates*, Media Release 33/2008, 26 November 2008, http://www.smos.gov.au/media/2008/mr_332008.html (Accessed 2 February 2009).

> …simply means that government departments will have to explain why these documents are exempt and should not [be] released, and be prepared to argue their case in the Administrative Appeals Tribunal.[2]

3.6 However, other witnesses argued that the removal of conclusive certificates was a positive step towards greater transparency in itself. As one case in point, Mr Rick Snell, Senior Lecturer in Law, University of Tasmania, stated of the proposal to remove conclusive certificates:

> Whilst not used regularly their existence and potential use was enough to undermine the key objectives of the FOI Act.[3]

3.7 Mr Michael McKinnon, Freedom of Information Editor for the Seven Network and representative of Australia's Right to Know, also noted of the proposed changes:

> This bill goes to the heart of the issues of government transparency and the public's right to be informed. If this bill fails to become law, politicians will still be able to stamp documents as 'secret' without any consideration of the public interest in their release.[4]

3.8 According to Australia's Right to Know, abolition of conclusive certificates would:

> …enable the legislation to be better aligned with international human rights instruments and jurisprudence, 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.[5]

3.9 Witnesses noted that whilst the removal of conclusive certificates is a positive development in improving the effective operation of the FOI Act, in order to have truly open and accountable government much broader reforms, especially in the areas of the public interest test and a pro disclosure culture, are required. According to the Australian Press Council:

> While conclusive certificates are a major impediment to access to information, their abolition will not be sufficient, in the absence of other major reforms, to ensure that information is readily available to those who seek it.[6]

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2 Mr Matthew Moore, 'All talk, little action from Rudd so far', *Sydney Morning Herald*, 29.11.08, p.42.

3 Mr Rick Snell, *Submission 7*, p.1.

4 Mr Michael McKinnon, *Committee Hansard*, 12.02.09, p.1.

5 Australia's Right to Know, *Submission 1*, p.2.

6 Australian Press Council, *Submission 3*, p.3.

Proposed subsection 7(2B)

3.10 A number of witnesses raised concerns in relation to clause 2 of schedule 1 which amends the FOI Act by introducing a new subsection 7(2B). The proposed subsection states that a Minister is exempt from the operation of the Act in relation to documents that have originated with, or were received from, seven listed security agencies.[7]

3.11 The proposed subsection is designed to address an anomaly whereby a document held by the security agencies would be exempt but the same document held by a Minister not exempt.

3.12 A number of witnesses raised concerns that the proposed subsection would exclude for the first time documents in the possession of Ministers originating within or received from specific defence and security agencies whilst subsection 7(2A) already excludes such documents in the hands of those agencies.[8] Associate Professor Moira Paterson held that:

> It is disappointing that the exemption provisions of section 7 of the FOI Act are to be extended to information in the possession of Ministers instead of all those provisions being repealed, so that they would no longer apply to information in the possession of agencies.[9]

3.13 Of the consequences of the reform, the Public Interest Advocacy Centre (PIAC) noted that:

> Proposed subsection 7(2B) would exclude completely from the scope of the FOI Act certain categories of documents that might, under the current Act, be held not to be exempt in the absence of a conclusive certificate. Under the current provisions of the FOI Act, a Minister has the option of issuing a conclusive certificate over part only of such a document, and/or to release a copy from which the material of concern has been redacted. Under the proposed amendments, these options are not available, the entire document being automatically excluded from the operation of the Act.[10]

3.14 The PIAC maintained that subsection 7(2B) has the 'potential' to exclude documents:

> …in the hands of Ministers evidencing conduct that lacks or has exceeded lawful authority, or reports that have already been disclosed to persons or

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7 These include the Australian Secret Intelligence Service, Australian Security Intelligence Organisation, Inspector-General of Intelligence and Security, Office of National Assessments, Defence Imagery and Geospatial Organisation, Defence Intelligence Organisation, and the Defence Signals Directorate.

8 Public Interest Advocacy Centre Inc, *Submission 2*, p.2. See also Mr Rick Snell, *Submission 7*, p.2 and Australian Press Council, *Submission 3*, p.4.

9 Associate Professor Moira Paterson, *Submission 8*, p.2.

10 Public Interest Advocacy Centre Inc, *Submission 2*, p.2.

> bodies the subject of investigation. The proposed amendments fail to leave open any avenue to distinguish between documents the disclosure of which might pose a genuine threat to security or to the national interest, and those that merely have the potential to embarrass an agency, or the government of the day.[11]

3.15 According to Mr Mark Polden, solicitor with PIAC, a determination that a document should be exempt from disclosure from the Act 'merely because it came from or was created by a particular agency' rather than for reasons that it would damage or be likely to damage Australia's interests is 'highly undesirable'.[12]

3.16 Mr Rick Snell took a similar view, arguing that the blanket exemption for organisations proposed in section 7(2B) is 'unjustified and very poor access policy'.[13] He noted that it exempts all information regardless of its actual connection to the core activity of such agencies and that 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 case serious harm that outweighs any public interest in release.[14]

3.17 Professor Kenneth McKinnon, Chairman of the Australian Press Council also held the view that the amendment is 'too sweeping' and that:

> We do not have any cause for concern that there are documents that should be exempt. We recognise that any government anywhere will need to keep some documents secret in the national interest, but we do not want 'in the national interest' to become, by default, another kind of harbouring mechanism which allows documents that, to all intents and purposes, are perfectly innocuous to come under the exemption clauses.[15]

3.18 Within the context of the proposed subsection 7(2B), Associate Professor Paterson also raised the issue of appropriate scrutiny of security agencies and stated that:

> …it is likewise important at a time when national security bodies are provided with large budgets that there should be appropriate scrutiny of their financial processes and expenditure.[16]

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11 Public Interest Advocacy Centre, *Submission 2*, pp 2–3.

12 Mr Mark Polden, Public Interest Advocacy Centre, *Committee Hansard*, 12.02.09, p.5.

13 Mr Rick Snell, *Submission 7*, p.2.

14 Mr Rick Snell, *Submission 7*, p.2.

15 Professor McKinnon, Australian Press Council, *Committee Hansard*, 12.02.09, p.9.

16 Associate Professor Moira Paterson, *Submission 8*, p.2.

3.19 In response to such concerns, Mr Paul Tilley, Acting Deputy Secretary of the Department of the Prime Minister and Cabinet (PM&C) highlighted that:

> The purpose of the proposed subsection 7(2B) is to support the exclusion that applies to the intelligence agencies and the IGIS. Proposed subsection 7(2B) replicates an existing exclusion that applies to agencies that hold documents that have originated from an intelligence agency and the IGIS. It is therefore anomalous to treat intelligence agency documents differently when they are held by a minister. That is the purpose of that amendment.[17]

3.20 With the repeal of conclusive certificates, the bill proposes to establish a review system for exempt documents. Thus, under the proposed changes in the bill, all decisions made to deny access to documents under the FOI Act and *Archives Act 1983* (Archives Act*)* respectively would be subject to full merits review by the AAT. This proposal goes further than the ALRC and ARC's 1995 recommendation that conclusive certificates be abolished for the internal working documents exemption but not for national security, defence and international relations (s 33) and Cabinet document (s 34) exemptions.[18]

The proposed role of the Administrative Appeals Tribunal

3.21 The proposed subsection 58B(1) provides for a special constitution requirement for the AAT to review a decision to refuse access to a document on the grounds of a Cabinet exemption (section 34), or a national security, defence or international relations exemption or a confidential foreign government communication exemption (subsection 33(1)).[19]

3.22 This provision will empower presidential members of the AAT to hear a review application relating to those exemption decisions where it is not satisfied by evidence on affidavit or otherwise that the document was exempt. Under the provision, a presidential member means the President, Deputy President or member who is a Judge.

3.23 The bill also repeals section 58E and substitutes it with a new provision detailing the AAT's power to require the production of a document the subject of a national security, defence or international relations exemption or on a confidential foreign government communication exemption (subsection 33(1)) or the Cabinet exemption (section 34). The Explanatory Memorandum continues:

> It is intended that the AAT exercise its discretion to call for the production of these types of exempt documents if it is not satisfied on affidavit evidence or otherwise that the document is exempt. The purpose of the

17 Mr Paul Tilley, PM&C, *Committee Hansard,* 12.02.09, p.12.

18 Australian Law Reform Commission and Administrative Review Council, *Open government: a review of the federal Freedom of Information Act 1982*, 1995, Chapter 9.

19 Explanatory Memorandum, p.5.

> amendment is to protect against the unnecessary disclosure of sensitive information.[20]

3.24 According to Associate Professor Paterson, as drafted, the provision may require the AAT to make a decision as to whether or not a document is exempt based on evidence in affidavits. Of this she stated:

> While it may be assumed that information in affidavits is true, there is no requirement for an affidavit to contain all of the relevant facts and it is therefore possible that it will contain the truth but not the whole truth relevant to the issue of exemption. A possible solution is to require affidavits to disclose all evidence relevant to whether the information is exempt.[21]

3.25 In response to such concerns, Mr Tilley of PM&C stated:

> Under the proposed subsection 58E the AAT can require the exempt document to be produced for its inspection if it is not satisfied in affidavit evidence, or otherwise, that the document is exempt. The AAT would be able to exercise this discretion if the member was not satisfied the affidavit evidence disclosed all of the relevant facts.[22]

3.26 The bill seeks to insert a new procedural requirement after section 60 in the conduct of proceedings in the AAT involving review of a national security, defence or international relations exemption or a confidential foreign government communication exemption (subsection 33(1)). Before making a determination that a document is not exempt, the AAT will be required (under proposed subsection 60A(5)) to request the Inspector General of Intelligence and Security (IGIS) to give evidence as to the damage that could result from disclosure or whether information or a matter communicated in confidence would be divulged upon disclosure. If the AAT is satisfied that the exemption claim should be upheld on other evidence, it is intended that the AAT will not seek evidence from the IGIS. The Explanatory Memorandum explains this provision:

> The purpose of this proposed amendment is to assist the AAT through the provision of expert advice, which would be independent to an agency's submissions in support of its decision to claim an exemption. However, proposed subsection 60A(8) makes it clear that the AAT is not bound by any opinion expressed by the IGIS upon giving evidence. This measure is not intended to affect the ability of agencies to give evidence before the AAT on the harm that could result from the disclosure of the documents. Subsection 60A(4), makes it clear that the IGIS could only be called to give evidence after the relevant agency or Minister has given evidence or made submissions.[23]

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20 Explanatory Memorandum, pp 4–5.

21 Associate Professor Moira Paterson, *Submission 8*, p.2.

22 Mr Paul Tilley, PM&C, *Committee Hansard*, 12.02.09, pp 12–13.

23 Explanatory Memorandum, p.6.

3.27 Mr Rick Snell maintained that the proposal that the IGIS provide evidence before the Tribunal in support of an exemption:

> …reflects the excessive approach and caution used in dealing with exemption claims in this area.[24]

3.28 The PIAC held that whilst the IGIS is qualified to give evidence in respect of national security or defence documents, it questioned the qualifications of the IGIS to give evidence in answer to questions of whether disclosure would affect international relations as well as general questions of confidentiality.[25] In addition, PIAC's Mr Polden noted:

> …as far as the Inspector-General of Intelligence and Security has the oversight role…in relation to compliance by ASIS, ONA, ASIO and the rest, with their obligations to human rights law and the obligation to inspect those matters it seems a little difficult to be calling that person to given independent evidence in relation to the desirability or otherwise of matters going, if I can put it this way, into the public domain, at lest where that has to do with the functions of the inspector's own office. It is a little bit like the inspector giving evidence–or, as Bob Dylan once said, 'I find myself investigating myself'. I think there is a bit of a conflict there.[26]

3.29 However, in response, Mr Paul Tilley of PM&C stated:

> The bill includes a measure directed at meeting that concern. Proposed subsection 60A(5) of the FOI Act provides that the IGIS does not need to give evidence if, in the option of the IGIS, the IGIS is not appropriately qualified to give evidence. Equivalent provision is made in a proposed subsection 50A(5) of the Archives Act.[27]

3.30 The PIAC held that the IGIS should not be required under section 60A to provide evidence in relation to international relations or confidentiality.[28] However, PIAC's Senior Solicitor, Ms Elizabeth Simpson did recognise the validity of subsection 60A(5):

> It certainly gives the Inspector-General an opportunity to indicate if he does not believe they are appropriately qualified to give evidence, so there is an opportunity for him not to give evidence in these particular instances. I think PIAC is just concerned that rather than put him in the position of having to try to make that decision on a case by case basis, we are simply concerned that there is this kind of misfit, as it were.[29]

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24 Mr Rick Snell, *Submission 7*, p.2.

25 Public Interest Advocacy Centre, *Submission 2*, p.3. Similarly, Mr Peter Timmins questioned the IGIS in relation to evidence affecting international relations. See further *Submission 6*, p.1.

26 Mr Mark Polden, PIAC, *Committee Hansard*, 12.02.09, p.7.

27 Mr Paul Tilley, PM&C, *Committee Hansard*, 12.02.09, p.13.

28 Public Interest Advocacy Centre, *Submission 2*, p.3.

29 Ms Elizabeth Simpson, PIAC, *Committee Hansard*, 12.02.09, p.7.

3.31 In proceedings involving an exemption claim under section 33 of the FOI Act or section 33(1)(a) or (b) of the Archives Act, the AAT would be required under the bill to give particular weight to a submission made by an agency or Minister that it is desirable that confidentiality orders under section 35(2) of the *Administrative Appeals Tribunal Act 1985* be made. This may require a private hearing or impose restrictions on publication or disclosure to certain parties of evidence.

3.32 Where an exemption claim is properly applied to a document, the exemption will continue to provide protection against its disclosure. Where an exemption claim is the subject of a review application to the AAT, parties can still appeal from an AAT decision to the Federal Court on a question of law.[30] That is the position that currently applies for exemption claims that are not supported by a conclusive certificate.

Existing conclusive certificates

3.33 All existing certificates would be revoked under proposed subitem 34(2) if and when a new application for documents covered by an existing certificate is received. The Explanatory Memorandum notes:

> Existing certificates will be revoked on and from the time the first request for access to a document covered by the certificate is made. If a certificate covers more than one document, and access is not sought to all documents, it is intended that the certificate will continue to have effect in relation to those documents not subject to the access request.[31]

3.34 In response to the question of whether existing conclusive certificates should be exempt from the proposed legislation, Mr McKinnon noted:

> I do not see necessarily that a change of government in any way detracts from the Australian people's right to access government documents.[32]

3.35 Similarly, Mr Snell stated:

> As a general principle, I think there is no reason to not remove a certificate. Each particular case should be judged on its merits.[33]

Notification of third parties

3.36 The bill proposes amendments to sections 59 and 59A of the FOI Act. Currently, sections 59(3) and 59A(3) require agencies and Ministers to inform third parties of proceedings when their business or personal information is contained in a document in issue in an AAT proceeding.

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30 Senator the Hon. John Faulkner, Special Minister of State and Cabinet Secretary, Second Reading Speech, *Senate Hansard*, 26.11.08, p.1.

31 Explanatory Memorandum, p.8.

32 Mr Michael McKinnon, *Committee Hansard*, 12.02.09, p.2.

33 Mr Rick Snell, *Committee Hansard*, 12.02.09, p.3.

3.37 Under the proposed amendments, the obligation to inform third parties would remain, however, the AAT would be given the discretion to permit an agency or Minister to refrain from informing a third party or third parties on application by the agency or Minister. In considering an application, the AAT would be required to consider whether informing the third party would prejudice an investigation; enable a person to ascertain the identity or existence of a confidential source; endanger the life or physical safety of any person; or cause damage to the security, defence or international relations of the Commonwealth. Of this proposed amendment, the Explanatory Memorandum states:

> In certain cases where notification may not be appropriate, an agency or Minister will be able to apply to the AAT for an order that it be excused from informing certain third parties of an application by an FOI applicant for AAT review. The measure would apply to sections 59 and 59A of the FOI Act.[34]

3.38 Associate Professor Paterson questioned the notification requirements in items 18 to 21 on the grounds that if access to the information is given to the person applying for it, the information subject should have the right to resist the application and asserted that the information is exempt on privacy (or any other) grounds:

> The AAT's rejection of the Minister's or agency's claim for exemption on public interest grounds provides prima facie evidence that the reasons that caused the Tribunal to make its order under section 59 or section 59A restraining notification of the application no longer have the cogency that justified the making of the order. The risk of harm to the information subject is, of course, increased by the fact that the applicant is entitled to disclose it to the world.[35]

3.39 Associate Professor Paterson highlighted that as the Federal Court may reverse the AAT's decision on appeal, it would not be appropriate for the information subject to be notified of the application (and for the applicant to be able to act on the decision) before the appeal is heard and decided. However, she noted that by the time the appeal has been decided, the damage to the information subject has been done. Moreover, the decision would have been made without their having the opportunity to present evidence and arguments to convince the Tribunal that the information is exempt on a ground not relied by the Minister or agency. She recommended that an alternative procedure be followed by the AAT (under the AAT Act and Federal Court Act) in such cases:

> That might take the form of requiring the Tribunal, where it rejects the Minister's or agency's grounds for exempting the information from disclosure, to make what is in effect a "determination nisi" that expressly leaves open an opportunity for the information subject, if he or she chooses,

34 Explanatory Memorandum, p.2.

35 Associate Professor Moira Paterson, *Submission 8*, p.3.

> to assert that the information is exempt from disclosure on any ground and to have that decided by the Tribunal.[36]

3.40 According to Professor Paterson, the 'determination nisi' would have to be appealable by the Minister or agency.

3.41 However, in response to concerns raised by Professor Paterson, Mr Tilley of PM&C stated:

> In circumstances where the AAT is proposing to overturn an exemption claim, it would be open to the AAT to adjourn the proceedings and direct that notice be given to the affected third party. Section 33(1)(a) of the AAT Act gives the AAT a broad discretion, subject to the AAT Act and other enactments, to conduct its proceedings as it things fit. Section 40(1)(c) of the AAT Act permits the tribunal to adjourn a review proceeding.[37]

Other measures proposed in the bill

Automatic stay of AAT decisions

3.42 When an appeal is instituted in the Federal Court against an AAT decision to provide access to a document or record, under proposed section 67 of the bill, the AAT decision will be automatically stayed until the Court decision on the appeal takes effect or such other time determined by the Court.

3.43 Of this initiative, the Australian Press Council highlighted that whilst it would appear a reasonable proposal given that the release of material prior to the determination of the appeal would render the appeal a nullity:

> …politicians seeking to delay the release of potentially embarrassing material could exploit this mechanism. For example, in the months preceding an election, a government might initiate an appeal against a decision to release documents confident to the appeal will not be determined until after the election.[38]

3.44 Professor McKinnon of the Australian Press Council also noted that:

> … there should be ways in which politically significant matters can be brought to trial quickly and an interim determination given with a degree of urgency.[39]

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36 Associate Professor Moira Paterson, *Submission 8*, p.3.

37 Mr Paul Tilley, PM&C, *Committee Hansard*, 12.02.09, p.13.

38 Australian Press Council, *Submission 3*, p.5. Australia's Right to Know supported these concerns and those raised in relation to subsection 7(2B) but emphasised that the body does not believe passage of the bill should be stopped because of such 'flaws'. Mr Michael McKinnon, *Committee Hansard*, 12.02.09, p.1.

39 Professor McKinnon, Australian Press Council, *Committee Hansard*, 12.02.09, p.9.

3.45 The Australian Press Council recommends that in order to address this risk, the legislation should include a test similar to that applied to applications for injunctive relief to the extent that there must be reasonable prospect of the appeal succeeding in order for the stay to be imposed. In addition, the council recommended that when information is of potential political significance, the matter should be brought to trial promptly and an interim determination given with a degree of urgency.[40]

3.46 However, Mr Tilley of PM&C clarified that:

> The automatic stay provision only applies when an agency commences an appeal to the Federal Court form the decision of the tribunal. Section 44 of the AAT Act permits an agency to appeal to the Federal Court on a question of law from a decision of the tribunal. This measure does not change the fact that an agency will still need support as contention that the tribunal has committed an error in law.
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> The practical effect of the stay measure is that the agency does not need to make a separate application to the Federal Court for a stay order at the time it commences an appeal. The reason for staying the tribunal's order is that giving access to the document would render any appeal redundant. This measure does not override the court's ability to under the stay order. This is made clear in proposed subsection 67(3) of the FOI Act and subsection 58(3) of the Archives Act.[41]

National Archives staff

3.47 Access to a record, by staff of the National Archives, will be limited under the proposed amendments where those staff members do not possess appropriate security clearance. This measure will replace the existing restrictions that operate in respect of those documents which are the subject of conclusive certificates.

Australian National Guide to Archival Material

3.48 Under the bill, the exclusion that currently applies to publication in the Australian National Guide to Archival Material of particulars of records to which a conclusive certificate is in force will be repealed. This measure will apply to subsection 66(2) of the Archives Act. The existing exclusion that applies to publication of exempt information in the Guide will not be changed.

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40 Australian Press Council, *Submission 3*, p.5.

41 Mr Paul Tilley, PM&C, *Committee Hansard*, 12.02.09, p.13.