The Senate

Standing Committee on Finance and Public Administration

Freedom of Information (Removal of Conclusive Certificates and Other Measures) Bill 2008 [2009]

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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.

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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.

CHAPTER 2

Freedom of Information

> *A popular government without popular information or the means of acquiring it, is but a prologue to a Farce or a Tragedy or perhaps both. Knowledge will forever govern ignorance, and a people who mean to be their own Governors must arm themselves with the power knowledge gives.*
>
> James Madison, 1822

2.1 This chapter considers the principles of freedom of information, the purpose and operation of the *Freedom of Information Act 1982*, exempt documents and conclusive certificates and their respective review mechanisms.

The importance of public access to information

2.2 The importance of access to information is articulated by Article 19, an international non-governmental organisation promoting freedom of information, which states:

> Information is the oxygen of democracy. If people do not know what is happening in their society, if the actions of those who rule them are hidden, then they cannot take a meaningful part in the affairs of that society. But information is not just a necessity for people – it is an essential part of good government.[1]

2.3 Privacy International, a non-governmental watchdog on privacy invasion commented in its 2006 global survey that:

> Freedom of information is an essential right for every person. It allows individuals and groups to protect their rights. It is an important guard against abuses, mismanagement and corruption. It can also be beneficial to governments themselves – openness and transparency in the decision-making process can improve citizen trust in government actions.[2]

2.4 In its 1995 review of the *Freedom of Information Act 1982* (FOI Act), the Australian Law Reform Commission (ALRC) and Administrative Review Council (ARC) stated the following on the relationship between democracy and the ability of the people to scrutinise government decision making:

> Australia is a representative democracy. The Constitution gives the people ultimate control over the government, exercised through the election of the

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1 Article 19, *The Public's Right to Know, Principles of Freedom of Information Legislation*, International Standards Series, London, June 1999, p.1.

2 Privacy International, *Freedom of Information Around the World 2006, A Global Survey of Access to Government Information Laws*, 2006, p.6, http://www.privacyinternational.org/foi/foisurvey2006.pdf (Accessed 9 December 2008).

> members of Parliament. The effective operation of representative democracy depends on the people being able to scrutinise, discuss and contribute to government decision making. To do this, they need information. While much material about government operations is provided voluntarily and legislation must be published, the FOI Act has an important role to play in enhancing the proper working of our representative democracy by giving individuals the right to demand that specific documents be disclosed. Such access to information permits the government to be assessed and enables people to participate more effectively in the policy and decision making processes of the government.[3]

2.5 The ALRC and ARC further noted that:

> Without information, people cannot adequately exercise their rights and responsibilities as citizens or make informed choices. Government information is a national resource. Its availability and dissemination are important for the economic and social well-being of society generally.[4]

2.6 The 2007 Independent Audit into the State of Free Speech in Australia stated:

> The primary objective of FOI is to help hold governments to account and to facilitate public participation in government decision-making.[5]

2.7 Similarly, the Commonwealth Ombudsman argued that 'access to government information is integral to democratic, transparent and accountable government'.[6] The Ombudsman also noted that:

> FOI has a symbolism that reaches far deeper into our concern as a society to enhance democracy and to ensure transparency and accountability.[7]

2.8 For this very reason, the FOI debate in Australia is not purely a legal debate. This is highlighted by evidence of the increasing use of FOI legislation by the media, particularly in seeking documents held by state and local government authorities. According to the Independent Audit into the State of Free Speech in Australia, in August and September 2007, for example, 70 media reports alone were based on documents released in response to FOI applications by journalists or other individuals

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3 Australian Law Reform Commission and Administrative Review Council, *Open government: a review of the federal Freedom of Information Act 1982*, 1995, p.12.

4 Australian Law Reform Commission and Administrative Review Council, *Open government: a review of the federal Freedom of Information Act 1982*, 1995, p.12.

5 Australia's Right to Know, *Report of the Independent Audit into the State of Free Speech in Australia*, 31 October 2007, p.93.

6 Commonwealth Ombudsman, *Scrutinising government, Administration of the Freedom of Information Act 1982 in Australian Government Agencies*, March 2006, p.2.

7 Professor John McMillan, Commonwealth Ombudsman, 'The FOI Landscape after *McKinnon'*, *Public Administration Today*, Speech, April–June 2007, p.45.

including opposition members of parliament, who made the released documents available.[8]

2.9 Each year, Australian Government agencies receive over 30,000 FOI requests. In 1996–97, 30,788 such requests were made whilst in 2004–05, there were 39,265 requests.[9] This figure rose to 41,430 in 2005–06 and then declined in 2006–07 by six per cent to 38,787.[10] There has been a steady decline since 2005–06 from 41,430 to 29,019 in 2007–08.[11]

2.10 The majority of FOI requests in Australia are made from individuals seeking access to their own personal records. Of the 29,019 FOI requests made in 2007–08, 85 per cent (or 24,684 requests) were for documents containing personal information either about the applicant themselves or other persons.[12] Centrelink received the highest number of requests (9,849 requests) followed by the Department of Immigration and Citizenship (7,912 requests) and the Department of Veterans' Affairs (6,491 requests).[13]

2.11 However, the Independent Audit into the State of Free Speech in Australia noted:

> Success in access to personal information about the applicant is not an appropriate test of success of FOI. The rationale of the legislation is to improve accountability, and facilitate public participation in government decision-making.[14]

2.12 Indeed, applications for documents concerning non-personal information or 'other information' such as government decisions, policy development and research, are more complex than those for personal information as the statistics reveal.

2.13 In 2007–08, 15 per cent of FOI requests (or 4,335 requests) were received for non-personal information or 'other information' including documents concerning

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8 Australia's Right to Know, *Report of the Independent Audit into the State of Free Speech in Australia*, 31 October 2007, p.94.

9 Commonwealth Ombudsman, *Scrutinising government, Administration of the Freedom of Information Act 1982 in Australian Government Agencies*, March 2006, p.9.

10 Attorney-General's Department, *Freedom of Information Act 1982 Annual Report 2006-07*, October 2007, p.2.

11 Attorney-General's Department, *Freedom of Information Act 1982 Annual Report 2007-08*, October 2008, p.2.

12 Attorney-General's Department, *Freedom of Information Act 1982 Annual Report 2007-08*, October 2008, p.3.

13 Attorney-General's Department, *Freedom of Information Act 1982 Annual Report 2007-08*, October 2008, p.3.

14 Australia's Right to Know, *Report of the Independent Audit into the State of Free Speech in Australia*, 31 October 2007, p.96.

policy development and government decision-making.[15] Of these, 41 per cent (1,552 requests) were directed to the Department of Immigration and Citizenship, 24 per cent (891 requests) to the Australian Taxation Office and 14.3 per cent (537 requests) to the Trade Marks Office.[16]

2.14 In 2007–08, 8.5 per cent of applications for 'other information' documents were refused entirely and in relation to another 53 per cent of applications, the applicant received part of the relevant information requested. Comparatively, 3.5 per cent of applications for personal documents were refused entirely while an additional 18.5 per cent of applications were granted information in part.[17]

2.15 Of the top twenty agencies, the Australian Securities and Investment Commission rated the highest in terms of refusals to release both personal information and 'other information' under FOI with a refusal rate of 36.84 per cent. The Department of Health and Ageing refused 32.69 per cent of all requests whilst the Australian Federal Police refused to release information in relation to 19.71 per cent of all requests during the year. However, whilst the Department of Immigration and Citizenship and Centrelink received the highest number of all FOI requests, they also refused the highest number of all requests in absolute terms across the top twenty agencies with 385 and 437 applications refused respectively. The FOI Annual Report doesn't specify how many such requests were for personal information and how many for 'other information'.[18]

Objective and purpose of the *Freedom of Information Act 1982*

2.16 *The Freedom of Information Act 1982* (FOI Act) came into effect on 1 December 1982 and states:

> The object of this Act is to extend as far as possible the right of the Australian community to access to information in the possession of the Government of the Commonwealth by:
>
> (a) making available to the public information about the operations of departments and public authorities and, in particular, ensuring that rules and practices affecting members of the public in their dealings with departments and public authorities are readily available to persons affected by those rules and practices; and

15 Attorney-General's Department, *Freedom of Information Act 1982 Annual Report 2007-08*, October 2008. p.3.

16 Attorney-General's Department, *Freedom of Information Act 1982 Annual Report 2007-08*, October 2008. p.4.

17 Attorney-General's Department, *Freedom of Information Act 1982 Annual Report 2007-08*, October 2008, p.5.

18 Attorney-General's Department, *Freedom of Information Act 1982 Annual Report 2007-08*, October 2008, p.6.

> (b) creating a general right of access to information in documentary form in the possession of Ministers, departments and public authorities, limited only by exceptions and exemptions necessary for the protection of essential public interests and the private and business affairs of persons in respect of whom information is collected and held by departments and public authorities; and
>
> (c) creating a right to bring about the amendment of records containing personal information that is incomplete, incorrect, out of date or misleading.[19]

2.17 According to the Department of the Prime Minister and Cabinet (PM&C), the purpose of the FOI Act is to extend the right of every person to access information in the possession of the Government of the Commonwealth and its authorities in two ways:

- it requires Commonwealth agencies (Departments and authorities) to publish information about their operations and powers affecting members of the public as well as their manuals and other documents used in making decisions and recommendations affecting the public; and
- it requires agencies to provide access to documents in their possession unless the document is within an exception or exemption specified in the legislation.[20]

2.18 The FOI Act produced a key change in the emphasis of the law as compared to the situation prior to its enactment by:

- creating a right of access;
- not requiring a person to establish any special interest or 'need to know' before he or she is entitled to seek or be granted access; and
- setting out the circumstances in which access can be denied as a matter of discretion.

2.19 The FOI Act provides a right of access to information in the possession of government departments and agencies. It is a statutory acknowledgement of the public right to know.[21] Of this, the Commonwealth Ombudsman commented:

> The purpose of the Freedom of Information Act 1982 (FOI Act) is to extend, as far as possible, the legal right of individuals to obtain access to documents held by Australian Government agencies. In addition, the Act

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19 Section 3(1) of the *Freedom of Information Act 1982*.

20 Department of the Prime Minister and Cabinet, *General Description of the Freedom of Information Act 1982*, http://www.pmc.gov.au/foi/about_act.cfm, last updated 21 May 2008, (Accessed 4 December 2008).

21 Australia's Right to Know, *Report of the Independent Audit into the State of Free Speech in Australia*, 31 October 2007, p.93.

> enables individuals to seek amendment of records that contain inaccurate personal information.[22]

2.20 In 1979, the Senate Standing Committee on Constitutional and Legal Affairs identified three objectives of FOI legislation:

- to increase public scrutiny and accountability of government;
- to increase the level of public participation in the processes of policy making and government; and
- to provide access to personal information.[23]

2.21 Transparency International identified three key facets to FOI laws in Australia:

- rights of access to public information in documents held by government agencies;
- a right to request access and amendments to personal information; and
- an obligation for government agencies to record and publish, or make publicly available, specified information.[24]

2.22 Mr Rick Snell noted that the Act is 'about improving the flow of high-quality and reliable information between government and its citizens'.[25] Similarly, Mr Jack Herman and Ms Inez Ryan stated:

> Among the main objectives of the Freedom of Information Act, in addition to its focus on providing access to personal information (and thus ensuring that it is accurate), is the facilitation of public scrutiny of government actions and subsequently an increase in government accountability. Consequently, the information made available should lead to greater public input into policy-making.[26]

Exemption provisions

2.23 There are twenty exemption provisions in the FOI Act that preclude access to documents. In addition, the Act allows Ministers to issue conclusive certificates under

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22 Commonwealth Ombudsman, *Annual Report 2007–2008*, p.114.

23 Senate Standing Committee on Constitutional and Legal Affairs, *Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978, and aspects of the Archives Bill 1978*, 1979, pp 21–22.

24 Transparency International, *Overview of Freedom of Information in Australia*, undated, http://www.transparency.org.au/documents/FOI_Summary_Information_06_10.pdf (Accessed 5 December 2008).

25 Mr Rick Snell, 'Three quick steps to bring FOI laws into the age of enlightenment', *The Australia*, 28.9.07, p.37.

26 Mr Jack Herman and Ms Inez Ryan, 'The urgent need for reform of Freedom of Information in Australia', *Freedom of Information Review*, Number 114, December 2004, p.62.

five of the exemption provisions. The ALRC and ARC review noted that the purpose of exemption provisions is to 'balance the objective of providing access to government information against legitimate claims for protection'.[27]

2.24 According to PM&C, exemptions are based on what is essential to maintain the system of government based on the Westminster system and on what is necessary for the protection of the legitimate interests of third persons who provide information to the Commonwealth Government. PM&C also stated that such exemptions are designed to provide a balance 'between the rights of applicants to disclosure of government held documents and the need to protect the legitimate interests of government and third parties who deal with government'.[28]

2.25 In certain circumstances, documents relating to a number of categories, where their release could damage government or third party interests or other public interests, are exempt. These include documents relating to national security, defence or international relations, Commonwealth/State relations, Cabinet and Executive Council documents as well as documents under a range of other categories.[29]

2.26 The relevant agency is responsible for deciding whether an exemption applies or whether disclosure would be in or contrary to the public interest. Under the FOI Act, exemptions can be claimed only where the relevant information is genuinely sensitive and harm would be caused upon its disclosure.

2.27 However, the 2007 Independent Audit into the State of Free Speech in Australia noted that there was a wide range of interpretations in relation to exemptions:

> There are inadequacies in the design of the laws; too much scope for interpretation of exemption provisions in the ways that lead to refusal of access to documents about matters of public interest and concern; cost barriers to access; and slow review processes that often fail to provide cost-effective resolution of complaints.[30]

Conclusive certificates

2.28 The 1982 FOI Act provides for the power to issue conclusive certificates under a number of sections in the Act:

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27 Australian Law Reform Commission and Administrative Review Council, *Open government: a review of the federal Freedom of Information Act 1982*, 1995, p.91.

28 Department of the Prime Minister and Cabinet, *General Description of the Freedom of Information Act 1982*, http://www.pmc.gov.au/foi/about_act.cfm, last updated 21 May 2008, (Accessed 4 December 2008).

29 Part IV, Exempt Documents of the *Freedom of Information Act 1982* provides a list of all exempt documents under the Act.

30 Australia's Right to Know, *Report of the Independent Audit into the State of Free Speech in Australia*, 31 October 2007, p.vi.

- s 33 – national security, defence and international relations;
- s 33A – Commonwealth/State relations;
- s 34 – cabinet documents;
- s 35 – Executive Council documents; and
- s 36 – deliberative process documents.

2.29 Under the Act, where the Minister (or Secretary to the Department of the Prime Minister and Cabinet (s 34) or Secretary to the Executive Council (s 35)) is satisfied that a significant document should not be disclosed, they may sign a certificate that establishes conclusively that a document is exempt from release under one of the relevant sections listed.

2.30 The issue of a conclusive certificate effectively places a document outside the reach of formal FOI processes. A certificate as a conclusive mechanism, therefore, issued by a Minister, denies access to certain documents. Government agencies are required to deny access to a document under the protection of a certificate unless it is possible to release the document with the protected material removed.

2.31 Where such a certificate is issued, the Administrative Appeals Tribunal (AAT) cannot utilise its normal power to review the merits of the exemption claim and is limited to considering whether there exist reasonable grounds for the exemption claim under section 58. Therefore, the AAT does not have the power to grant access to a document, the subject of a certificate. If the AAT finds that there are no reasonable grounds for the issue of the certificate, it can only recommend that the relevant Minister revoke the certificate. PM&C explained the process:

> Where a conclusive certificate has been issued, the AAT considers whether there are reasonable grounds for the claims that the documents to which the conclusive certificate relates are exempt rather than where the final public interest lies. The decision of the AAT takes the form of a recommendation to the Minister. The recommendation is public. Whether the Minister acts on a recommendation is a matter for the Minister's discretion but an explanation must be made to Parliament if a recommendation is rejected.[31]

2.32 Therefore, if a Minister decides not to revoke the certificate, he or she must table a notice and advise Parliament of the action.

2.33 In 1995, the Australian Law Reform Commission and Administrative Review Council stated the following of conclusive certificates in their review of the FOI Act:

> A conclusive certificate issued by the Minister responsible for an agency makes the document that is the subject of the certificate exempt so long as the certificate remains in force. As the word 'conclusive' indicates, the AAT

31 Department of the Prime Minister and Cabinet, *General Description of the Freedom of Information Act 1982*, http://www.pmc.gov.au/foi/about_act.cfm, last updated 21 May 2008, (Accessed 4 December 2008).

> cannot revoke such a certificate. A conclusive certificate is therefore a 'ministerial veto'. The original justification for conclusive certificates was that the ultimate responsibility for decisions on particularly sensitive matters should lie with the relevant Minister. 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 sort of material to which the FOI Act is designed to give access because it involves responsibility at the very highest levels of government.[32]

2.34 In relation to the requirement that Ministers table a notice to not revoke a certificate, the ALRC and ARC noted:

> The AAT can review the issue of a conclusive certificate and express a view on whether there are reasonable grounds for the exemption claim. It can recommend, but not order, the revocation of a certificate. If a Minister chooses not to revoke a conclusive certificate on a recommendation of the AAT, he or she must advise Parliament by tabling a notice in both Houses and then reading it in the House in which he or she sits. This obligation imposes a considerable and sufficient discipline on Ministers.[33]

2.35 The use of conclusive certificates has been questioned by a number of commentators with some maintaining that they can be used by Ministers to evade external merits review.[34] The 2007 Independent Audit into the State of Free Speech in Australia argued that a range of factors limit the effectiveness of FOI legislation in ensuring access to information relevant to government accountability, the very reason such legislation was established in the first place and that:

> The existence of powers in the Federal Act for the issue of conclusive or ministerial certificates, and limited rights of review of the decision to issue a certificate, is inconsistent with the scheme of the legislation.[35]

2.36 The *McKinnon v Secretary, Department of Treasury* High Court case is considered by some commentators to have narrowed the scope of the AAT to review a ministerial decision to issue a conclusive certificate. The Majority judgement interpreted the FOI Act to require the existence of only one reasonable ground in support of a conclusive certificate for the certificate to be upheld, even when a range

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32 Australian Law Reform Commission and Administrative Review Council, *Open government: a review of the federal Freedom of Information Act 1982*, 1995, pp 98–99.

33 Australian Law Reform Commission and Administrative Review Council, *Open government: a review of the federal Freedom of Information Act 1982*, 1995, p.100.

34 See for example, Ms Jane Woodward, *Trans-Tasman Freedom of Information*, Honours Thesis, ANU, 10 June 2008, p.13, http://ricksnell.com.au/resources/WoodwardThesisFOIAusNZ2008.pdf (Accessed 8 December 2008).

35 Australia's Right to Know, *Report of the Independent Audit into the State of Free Speech in Australia*, 31 October 2007, p.vi, http://www.smh.com.au/pdf/foIreport5.pdf, (Accessed 23 January 2009).

of contradicting reasonable grounds may exist.[36] Of the McKinnon case, the Commonwealth Ombudsman, Professor John McMillan stated:

> Callinan and Heydon JJ, in the majority, went so far as to add that a conclusive certificate should be upheld if it contains one reasonable ground, with evidentiary support, for a claim that disclosure would be contrary to the public interest, even though there may be reasonable grounds to support disclosure.[37]

2.37 In his Second Reading Speech, the Special Minister of State held that the very effect of a Minister placing a conclusive certificate on a document is to limit the capacity of the AAT to review the exemption claim underlying the certificate.[38] This consequence has ensured that conclusive certificates are controversial. Mr Rick Snell argued accordingly that:

> The existence of such certificates leaves the Act exposed to changes in political will and bureaucratic commitment to the principles and objectives of the legislation…The current restraint in the use of these certificates is not cause to allow the damaging potential of this mechanism to go unchecked.[39]

2.38 The Senate Standing Committee on Constitutional and Legal Affairs in its 1979 report *Freedom of Information* commented on the issue of conclusive certificates for material other than defence, international relations and security documents:

> There is no justification for such a system tailored to the convenience of ministers and senior officials in a Freedom of Information Bill that purports to be enacted for the benefit of, and to confer rights of access upon, members of the public. This can only confirm the opinion of some critics that the bill is dedicated to preserving the doctrine of executive autocracy.[40]

2.39 Australia's Right to Know noted that the power of conclusive certificates is:

> …inconsistent with the object of the legislation and undermines the Act's main purpose of enhancing government openness and transparency.[41]

2.40 Similarly, the Law Council of Australia stated that conclusive certificates were 'inimical' to the broad objective of the FOI Act to improve openness and

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36 Transparency International, *Overview of Freedom of Information in Australia*, undated, p.3.

37 Professor John McMillan Commonwealth Ombudsman, 'The FOI Landscape after *McKinnon'*, Speech, *Public Administration Today,* April – June 2007, p. 43.

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

39 Mr Rick Snell, 'Conclusive or ministerial certificates – an almost invisible blight in FoI practice', *Freedom of Information Review*, Number 109, February 2004, p.9.

40 Senate Standing Committee on Constitutional and Legal Affairs, *Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978, and aspects of the Archives Bill 1978*, 1979, p.180, paragraph 15.20.

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

transparency in public administration. The Council continued that once a Minister had issued a conclusive certificate:

> 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.[42]

42 Law Council of Australia, *Submission 9*, p.1.

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.
>
> 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.

CHAPTER 4

Concluding Comments

4.1 Effective freedom of information legislation is a cornerstone of good governance. It helps to ensure that government decision making is transparent and that decision makers are held to account. Conversely, the legislative right of access to government information facilitates public participation in government decision-making.

4.2 The primary purpose of the bill is to repeal the power to issue conclusive certificates. This initiative goes beyond the recommendations of the Australian Law Reform Commission and Administrative Review Council. The committee recognises this initiative as an important step in ensuring greater openness and accountability in government decision-making.

4.3 The effect of the repeal of the power to issue conclusive certificates is that the Administrative Appeals Tribunal will have the power to undertake full merits review of all exemption claims under the FOI Act and Archives Act. Thus, passage of the bill will ensure that decisions are fully tested by an independent review process.

4.4 Whilst ensuring greater transparency in governance, the bill seeks to establish a balance between the public's right of access to government information and legitimate claims of protection in the national interest.

4.5 To abolish conclusive certificates and empower the Administrative Appeals Tribunal full merits review power, the committee supports the passage of this bill.

Recommendation 1

4.6 The committee recommends that the Senate pass the bill.

Senator Helen Polley

Chair

ADDITIONAL COMMENTS BY COALITION SENATORS

Coalition Senators concur with the findings and recommendations of the Committee. The Coalition is committed to open, responsible government.

The Freedom of Information Act (introduced by the Fraser Government) is a vital measure to ensure the government remains open, responsible and accountable for its decisions. While the availability of conclusive certificates was seen as a necessary control on the flow of information at the time the FOI Act was introduced, Coalition Senators agree that certificates have the potential to act as a brake on the process and that sufficient measures exist elsewhere in the Act to ensure that genuinely sensitive information receives the appropriate treatment.

We cannot agree with any suggestion that previous Coalition governments have used the conclusive certificate regime to resile from their commitment to open, accountable government. An examination of the record will confirm that conclusive certificates were used very sparingly under the Howard Government. On the information available, we can only find evidence of 12 conclusive certificates issued in the 11 ½ years of the Howard Government[1]. Records for the previous Labor Government are extremely difficult to locate. However, it would seem that 55 were issued for the period between 1982 and 1986 alone[2], during most of which time the Hawke Government was in power. The Coalition's record therefore cannot be characterised as one that shied away from openness in government nor one that hid behind the conclusive certificate regime.

Coalition Senators also wish to advert to a worrying trend that emerges from the most recent FOI annual report. The figures cited in 2007-2008 Annual Report indicate that, under the present government, FOI applications are being dealt with less expeditiously, at greater cost and with more propensity to refuse or withhold information.

The number of FOI applications received in 2007-2008 has dropped markedly (from 41,430 in 2005-06 to 29,019 in 2007-08), by almost 30%[3]. Even so, the response time has lengthened: the proportion of requests responded to within 30 days has declined by 12%, while the proportion still awaiting a response after 90 days has more than doubled[4]. Further, while the percentage of requests refused has remained constant, the proportion granted in full has declined (from 80.60% in 2006-07 to 71.42% in 2007-08) while the requests only partially granted has correspondingly increased

[1] Peter Costello, Treasure, 'Questions in Writing: Freedom of Information', House of Representatives, *Debates*, 20 March 2007, p. 105

[2] Ibid

[3] Attorney-General's Department, *Freedom of Information Act 1982, Annual Report* 2007-08, October 2008, p. 2

[4] Ibid, p. 8

(from 15.01% in 2006-07 to 24.22% in 2007-08)[5]. Finally, despite the decrease in applications, the overall cost of providing FOI has increased by some 18%. When the decline is taken into account, the average cost per application has risen by over 28%[6]. These are disturbing trends and it is hoped that the government can find some way to reverse them.

In conclusion, while the Coalition Senators welcome the majority report, we note that the use of conclusive certificates has never been a very important component of the administration of the Act, at least under Coalition governments. Of far more concern is the day-to-day provision of information to Australians, and on this measure the present Government clearly has much work to do.

Senator Mitch Fifield **Senator Steven Parry**

Senator Scott Ryan

[5] Ibid, p. 5

[6] Ibid, p.24

APPENDIX 1

Submissions received by the Committee

Submissions

1 Australia's Right to Know

2 Public Interest Advocacy Centre LTD

3 Australian Press Council

4 Office of the Privacy Commissioner

5 Mr Michael McKinnon, Seven Network

6 Mr Peter Timmins

7 Mr Rick Snell

8 Associate Professor Moira Paterson

APPENDIX 2

Public hearing

12 February 2009 – Parliament House, Canberra

Australia's Right To Know and Seven Network
Mr Michael McKinnon, FOI Editor Seven Network

Mr Rick Snell

Public Interest Advocacy Centre Ltd
Ms Elizabeth Simpson, Senior Solicitor
Mr Mark Polden, Solicitor

Australian Press Council
Professor Ken McKinnon, Chairman

Department of the Prime Minister and Cabinet
Mr Paul Tilley, Acting Deputy Secretary, Governance
Ms Barbara Belcher, First Assistant Secretary, Governance Division
Mr Joan Sheedy, Assistant Secretary, Privacy & FOI Policy Branch
Ms Maia Ablett, Senior Advisor, Privacy and FOI Policy Branch