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SENATE

STANDING COMMITTEE ON FINANCE AND PUBLIC
ADMINISTRATION

**Reference: Freedom of Information (Removal of Conclusive Certificates and Other
Measures) Bill 2008**

THURSDAY, 12 FEBRUARY 2009

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**SENATE STANDING COMMITTEE ON
FINANCE AND PUBLIC ADMINISTRATION**

Thursday, 12 February 2009

Members: Senator Polley (*Chair*), Senator Fifield (*Deputy Chair*), Senators Cameron, Jacinta Collins, Hanson-Young, Moore, Parry, and Ryan

Participating members: Senators Abetz, Adams, Arbib, Barnett, Bernardi, Bilyk, Birmingham, Mark Bishop, Boswell, Boyce, Brandis, Bob Brown, Carol Brown, Bushby, Cash, Colbeck, Coonan, Cormann, Crossin, Eggleston, Farrell, Feeney, Fielding, Fisher, Forshaw, Furner, Hanson-Young, Heffernan, Humphries, Hurley, Hutchins, Johnston, Joyce, Kroger, Ludlam, Lundy, Ian Macdonald, McEwen, McGauran, McLucas, Marshall, Mason, Milne, Minchin, Nash, O'Brien, Parry, Payne, Pratt, Ronaldson, Scullion, Siewert, Stephens, Sterle, Troeth, Trood, Williams, Wortley and Xenophon

Senators in attendance: Senators Cameron, Collins, Fifield, Moore, Parry, Polley and Ryan

Terms of reference for the inquiry:

To inquire into and report on: Freedom of Information (Removal of Conclusive Certificates and Other Measures) Bill 2008

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Committee met at 4.36 pm**McKINNON, Mr Michael, Australia's Right to Know; and Freedom of Information Editor, Seven Network**

CHAIR—Welcome to the inquiry into the [Freedom of Information \(Removal of Conclusive Certificates and Other Measures\) Bill 2008](#). The bill under inquiry removes the power to issue conclusive certificates to the Freedom of Information Act 1982 and the Archives Act 1983. I draw attention to the terms of reference, which call for the committee to allow all stakeholders an opportunity to review the final bill and ensure the efficacy and transparency of the mechanisms applicable to a decision to exempt material; review of appropriate regime for such decisions et cetera.

Information on parliamentary privilege and the protection of witnesses and evidence has been provided to you. The committee has before it your submission and I now invite you to make a short opening presentation at the conclusion of which the committee will put questions to you.

Mr McKinnon—I would like to thank the committee in the first instance for the invitation to speak today. From the submissions by Australia's Right to Know and the Seven Network the committee would be aware of the support for this bill to abolish conclusive certificates. Australia's Right to Know is a coalition of 12 major media organisations. It was formed in 2007 to address an increasing trend against freedom of speech and access to information in Australia. I urge the committee to consider the coalition's views.

I advise that the coalition also supports two issues raised in the Press Council's submission: specifically, the problems expressed about the proposed subsection 7(2B) on security issues and the proposed section 67 in regard to certain operations of the AAT. However, despite concerns about these aspects of the bill, Australia's Right to Know supports the bill and does not believe its passage should be stopped because of these flaws. These issues can and should be addressed as part of the broader reform of the FOI promise by the Rudd government.

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. The committee may be warned that the passage of this bill will cause damage to the Australian Public Service, stifling full and frank advice and misleading the public. As my submission points out, these claims lack any evidence despite decades of litigation. The claims are contrary to the legal obligations on public servants and most importantly they defy the spirit and practice of FOI legislation.

The price of secrecy about government policy is poor policy. I have numerous examples, but I will raise with the committee one example from early February 2003. I was working as the FOI editor of the *Australian*. I had obtained health department documents showing that bulk-billing rates were in freefall, with rates dropping by as much as one per cent a month, and bureaucrats were unable to predict how far the decline would go. Those documents directly contradicted then Prime Minister John Howard's statement to parliament two months earlier, when he said:

... any suggestion that bulk-billing has disappeared or is disappearing, given the rates of bulk-billing in Australia at the present time ... is factually incorrect.

Within days of our publication, then federal health minister Kay Patterson announced reform plans and bulk-billing became a major election issue, with sustained improvements in bulk-billing rates having been made since then, according to information that is now routinely published following that FOI request.

Public servants arguing for secrecy should be guided on the value of transparency in the Public Service and the FOI Act by the thoughts of Marie Shroff, New Zealand's privacy commissioner, who served for 16 years as New Zealand's cabinet secretary. If I can beg the committee's indulgence, Shroff notes:

Even at the hardest end of FOI—access to Cabinet documents—the benefits are clear. If I, as a civil servant, write a Cabinet paper which I expect to be sought for public release I am going to be extraordinarily careful to get my facts right, to avoid trespassing into politics, to give comprehensive reasons for and against a proposal, and to think very carefully about my recommendations. My advice will therefore be balanced, accurate and comprehensive. Sometimes I will put in more detail than might formerly have been the case: I might quote from sources rather than summarising them, especially when unpalatable advice might be needed; and I might clearly identify legal advice and separate it from policy advice to allow for possible legal protection under legal professional privilege. I will record carefully the reasons for my particular recommendations—although this will largely be to ensure that my reputation as a professional and neutral public servant will be enhanced if the advice is released.

The points made by Shroff underpin the reasons for effective FOI legislation in a modern democracy. The public has a right to know, and transparency improves the performance of both politicians and public servants.

At some stage in the future this committee may turn its attention to the reform of the FOI Act proposed by the Rudd government. The committee would be well guided by the premise that information should always be released except to protect essential public interests—and I stress that point: essential public interests. The price of secrecy can be truly immense. The failures of the financial markets responsible for the global economic crisis may not have occurred if greater transparency and accountability had been in force and if more timely and accurate information on credit risk had been available. The committee would be well guided on its deliberation on this and any future reform bill by the words of the newly elected United States President on his first day at work at the White House. Despite being confronted by two wars and a collapsing economy, Barack Obama's priority was to restore faith in government. He told a packed press conference:

The way to make government responsible is to hold it accountable. And the way to make government accountable is make it transparent so that the American people can know exactly what decisions are being made, how they're being made, and whether their interests are being well-served. And I expect members of my administration not simply to live up to the letter but also the spirit of this law

Barack Obama went on to say that every agency and department would be told that his 'administration stands on the side not of those who seek to withhold information, but those who seek to make it known.' I suggest that his sentiments should be well considered by this committee. Thank you.

CHAIR—Thank you very much for your opening comments. We will go to questions.

Senator FIFIELD—I just want your view on whether, should this legislation pass, conclusive certificates, which have previously been issued, should be subject to this legislation or whether they should stand as something that was issued under a previous set of rules, if you like.

Mr McKinnon—I think that, once legislation passes, any information that had been gathered by certificates would then fall into a normal FOI regime where if I sought, for example, to get those documents that we had sought relating to the extent of bracket creep and how much that was putting money into government coffers, we could go back and get those documents and they would no longer be covered by a certificate. I am of the view as a journalist that almost all of the information that was covered by certificates, and still is, is probably fairly historic now given that events have moved on in a lot of ways on those issues. But, no, I certainly think the public should have a right to attempt to get that information, and the AAT would then look at arguments for and against its release.

Senator FIFIELD—You would not view it as, in a sense, retrospectively applying a different set of rules?

Mr McKinnon—I understand that at best that is a convention relating to the release of information relevant to previous governments. I do not see necessarily that a change of government in any way detracts from the Australian people's right to access government documents. I do though feel fairly strongly that, to a large degree, the majority of information would be historic—I would probably be one of only a few people in the world who might be interested in relodging those FOIs!

Senator FIFIELD—I am sure it would satisfy some great curiosity.

Mr McKinnon—I would love to see the documents in my hot little hand that, for example, we went all the way to the High Court to get and could not get!

CHAIR—As there are no further questions, is there anything that you would like to add to your comments to date?

Mr McKinnon—No, I am trusting that as I am not there the quality of our submissions has carried the day.

CHAIR—It certainly has. We appreciate your having given up your time and we thank you for your submission. I would also like to apologise for the delay in getting started today but there were divisions in the chamber.

Mr McKinnon—Parliament has issues that it has to look at and I would be the first to argue that it should be looking at them.

[4.48 pm]

SNELL, Mr Rick Douglas, Senior Lecturer, Faculty of Law, University of Tasmania; and Private capacity

CHAIR—Welcome. Information on parliamentary privilege and the protection of witnesses and evidence has been provided to you. The committee has before it your submission and I now invite you to make a short opening presentation at the conclusion of which the committee will put questions to you.

Mr Snell—I think my submission almost speaks for itself. The removal of these conclusive certificates is a long-overdue reform that has been necessary in Australia almost since day one. I think that they were a significant design weakness which has actually hampered the operation of the act, either directly or indirectly, ever since 1983. Part of the design weakness is that there are either no limitations or very minimal limitations on the use and exercise of the acts. There is minimal accountability built into the system. One of the indicators of that is that people struggle to tell us how many conclusive certificates have been issued over the years and how many are still in operation. It has all the weaknesses of a categorical approach to exemptions—that is, just because a particular document falls into a particular category, such as being covered by a confidential certificate, it therefore must remain secret regardless of the actual content of the information. There are no declassification processes associated with these conclusive certificates, so there is no ongoing review of the necessity or desirability to continue with the certificates. There is no adequate addressing of the harm that is actually caused by the release of information balanced against the public interest in releasing certain types of information. I think that was demonstrated quite clearly in the McKinnon case that went before the High Court—the actual nature of the documents themselves. All this was exacerbated by conclusive certificates being applied to internal working documents. I read that it was only included in the minister's second reading speech at the last moment and had not been discussed prior to that, so it was kind of slipped in at the last moment. Extending it certainly to internal working documents was a major weakness in the system.

In my submission I make reference to the proposed section 7(2B) amendment and outline the reasons why I think that is unjustified and unnecessary at this particular time. I point out that I am in support of the external review body, the AAT, having a full merits review capacity to be able to release information in the public interest if it makes that decision. I support the points Peter Timmins made about the archives. In summary, that puts forward the key points that I wanted to try to get across.

CHAIR—Thank you very much.

Senator FIFIELD—I have a question that I posed to Mr McKinnon before you in relation to existing conclusive certificates. Would your view be that, where there is an existing conclusive certificate, that should cease to be the case under the new legislation or that, for the certificates in place, the rules that applied before should still apply?

Mr Snell—I think they should be repealed. It is my understanding that the current government announced—I think it was the Deputy Prime Minister—that they would reconsider all conclusive certificates if anyone asks for particular information that had previously been covered by conclusive certificates. They would reassess the desirability and necessity to maintain the certificates. As a general principle, I think there is no reason to not remove a certificate. Each particular case should be judged on its merits. There will only be a handful of applicants, like Michael McKinnon and maybe a couple of others, who will go back through the archives and try to have a look at what was withheld and what was not withheld. It would be an interesting exercise anyway to have information see the light of day which people previously felt was necessary to keep secret. Michael McKinnon makes that point in his submission—about, say, Reserve Bank minutes and agendas.

Senator FIFIELD—Indeed. Thank you for that.

CHAIR—Mr Snell, there are no further questions.

Mr Snell—All right—that is fine.

CHAIR—I think that is probably a reflection on your submission. It is obviously detailed. I again apologise for the delay. I thank you for your submission and for appearing, via teleconference, at the hearing this afternoon.

Mr Snell—It is a pity I was not there to listen to the Department of the Prime Minister and Cabinet make their submission.

CHAIR—Thank you very much.

[4.57 pm]

POLDEN, Mr Mark Alexander, Solicitor, Public Interest Advocacy Centre

SIMPSON, Ms Elizabeth, Senior Solicitor, Public Interest Advocacy Centre

Evidence was taken via teleconference—

CHAIR—I welcome the next witnesses, who are from the Public Interest Advocacy Centre. I apologise for the delay. Information on parliamentary privilege and the protection of witnesses and evidence has been provided to you. The committee has before it your submission. I invite you to make a short opening presentation. At the conclusion of your remarks, I will invite members of the committee to put questions to you.

Ms Simpson—We would like to begin by outlining the Public Interest Advocacy Centre's interest in and experience with the freedom of information legislation, both at a Commonwealth and New South Wales level. PIAC was established in 1982 as a specialist legal policy organisation that focuses on making strategic interventions on public interest issues. One of those issues that we have consistently identified as important is increasing government accountability and transparency, particularly looking at issues such as freedom of information from a consumer's point of view. We have on a regular basis used the legislation for individuals and community organisation. We have also undertaken test cases in the past, including the matter of *Searle v PIAC, Re Organon*, and *Hittich v Commonwealth*. PIAC has also made a number of submissions, including to the Australian Law Reform Commission in 1995 and to the New South Wales Ombudsman last year about the New South Wales legislation. That is a bit of background about the Public Interest Advocacy Centre's interest in the freedom of information legislation. I think that, generally speaking, PIAC welcomes the bill and sees it as a positive step towards making the FOI Act more effective, but there are two particular concerns that we raised in our letter about the appropriate balance that we see being struck between opening up the legislation and, in some ways, concerns about perhaps it being closed down. I will let Mark outline the first particular concern that we have, and then I might look at the second.

Mr Polden—My remarks about the bill are restricted to clause 2 of schedule 1, which amends the Freedom of Information Act by introducing a new section 7(2B). The existing section 7(2A) of the FOI Act immunises all documents created by or emanating from Defence or security agencies from the scope of FOI when they are in the hands of agencies. At present, such documents are within the scope of the act when in the hands of ministers. The bill would change this by bringing the position as it applies to documents in the hands of ministers into line with that which applies to documents in the hands of agencies. In doing so, it would extend a blanket immunity from FOI to all documents, no matter what their content, which have originated with or have been received from ASIS, ASIO, the Inspector-General of Intelligence and Security, ONA, Defence Imagery and Geospatial Organisation, DIO or DSD. If I might, I will refer to those documents in shorthand as security agency documents.

It is important to underline that the wholesale excision of security agency documents from the scope of FOI as a class will take effect whether or not access to them would or could reasonably be expected to damage the security of the Commonwealth, the defence of the Commonwealth or the international relations of the Commonwealth, or would divulge any information or matter communicated in confidence by a foreign government, an authority of a foreign government or an international organisation to the Commonwealth to a person or agency acting on the Commonwealth's behalf. It would be possible to bring security agency documents in the hands of agencies within the scope of the FOI Act, just as they presently are when they are in the hands of ministers. Security documents in the hands of ministers, although within the scope of the present act, are nevertheless protected from disclosure where access would or could reasonably be expected to damage the security of the Commonwealth, defence of the Commonwealth or international relations, or divulge information communicated in confidence by another government—to shorthand it.

If a determination is made that one of those exemptions applies, it renders the security document in question, although otherwise within the scope of the act, exempt from disclosure on the basis of a clear, principled and rational application of legitimate public interest concerns. As opposed to that, a determination that a document should be exempt from disclosure or exempt from the act not because it would damage or be likely to damage Australia's interests, whether they be in defence, security or foreign relations, but merely because it came from or was created by a particular agency is, in PIAC's view, highly undesirable. Such an approach creates islands of invisibility. Presently it is possible for a minister to issue a conclusive certificate to

the effect that disclosure of a document, including a security agency document in a minister's hands, would or would be likely to damage, amongst other things, Australia's defence or national security interests.

There is a limited avenue to review conclusive certificates in the AAT and the Federal Court. The bill will change that by replacing the machinery of conclusive certificates with the new section 60(A), which strengthens the safeguards relating to the defence, national security, international relations and confidentiality exemptions. 60(A) provides for the Inspector-General of Intelligence and Security to give evidence on any damage that would be caused or might reasonably be expected to be caused to defence, national security or international relations before any determination is made by the AAT that an agency or minister should give access, in whole or in part, to a document over which a defence, national security, international relations or confidentiality exemption is claimed. Section 67 introduces a further protection by providing for an automatic stay of tribunal decisions pending appeal. Why these safeguards would not work equally well for documents prepared by or emanating from any of the agencies enumerated in section 7(2B) remains unclear. It would appear that the additional safeguards which the bill introduces are considered adequate to compensate for removal of conclusive certificates where they might formerly have been issued in relation to defence and national security exemption claims over documents emanating from agencies other than the seven agencies nominated in the bill.

PIAC is aware of only one case to date in which it has been felt necessary to issue a conclusive certificate in relation to documents over which a claim for exemption based on defence or national security has been made. That case is *McKinnon v DFAT*. PIAC is not aware of a single case in which a certificate has been issued over national security agency documents in the hands of a minister, despite the fact that such documents are clearly within the scope of the present act.

Documents emanating from government agencies or departments other than security and defence agencies identified in 7(2B) might be thought at least equally capable of going to issues intimately touching defence, national security and relations with foreign governments. Compare, for example, the facts in *McKinnon v DFAT*, which involved Department of Foreign Affairs and Trade documents relating to whether David Hicks was legally held by the United States.

In addition, defence documents relating to, say, the disposition and rules of engagement of Australian special forces in Iraq and Afghanistan also fall within the scope of the act. That will not change as a result of the amendments. Existing exemptions are apparently regarded as adequate to protect the contents of such documents if disclosure could or would jeopardise Australia's defence, national security or international relations.

The contrast to that is the proposed blanket excision from the act of each and every document created by each of the agencies referred to in the new section 7(2B). One of those documents is the Office of the Inspector-General of Intelligence and Security. The Inspector-General's remit extends to checking that agencies, including ASIS, ASIO, FSD, DIGO, DIO and ONA conduct their activities lawfully and comply with Australia's human rights obligations. The Inspector-General conducts inquiries and investigates complaints. The question thus arises: should the documents relating to a complaint which the Inspector-General has found sustained, establishing illegal conduct or conduct in breach of human rights by an agency over which the Inspector-General's office has oversight, be subject to a class exclusion? Should this be the case, even where disclosure would not and could not reasonably be expected to harm Australian security or defence interests? In PIAC's view the answer to that question is a resounding 'no'.

Senators may recall the event many years ago now in which ASIS was involved in an incident at a Melbourne hotel. More recently, there has been controversy over a perceived lack of cooperation between ASIO and the AFP concerning a foreign doctor questioned under national security laws. Under the current act, documents going to such matters are amenable to FOI provided they are in the hands of a minister as opposed to an agency. They may, of course, be subject to a claim of exemption. They are outside the scope of the act entirely if they are in the hands of an agency.

Is there, then, any satisfactory criterion of distinction between documents in the hands of ministers and those same documents in the hands of agencies? If I might interpolate here, I think this was certainly referred to, albeit a little obliquely, in the second reading speech by Senator Faulkner. Perhaps it might be argued at the margin that an appeal might be made to an argument about the principle of ministerial responsibility. Perhaps not—but even if there is no compelling ground to distinguish between documents in the hands of ministers and those very same documents in the hands of agencies, does it follow that the right and only solution is to throw the baby out with the bathwater by excluding ministerial documents presently within the scope of FOI from

the scope of the act so as to make for a consistency in treatment of documents of similar kinds when held by a minister and by an agency? In PIAC's view, judgements about how that perceived anomaly ought to be resolved need to be seen against the overriding objective of the act, which is to provide a general right of access subject only to exceptions and exemptions necessary for protection of essential public interests and the government's stated commitment to opening up FOI.

CHAIR—Could you just summarise so that we can open it up to questions.

Mr Polden—PIAC's position is that it is undesirable to extend the existing blanket exemption in section 7(2A) such that under the proposed section 7(2B) it would also apply to documents in the hands of ministers. I note that, in that regard, PIAC's submission aligns closely with those filed by Associate Professor Moira Paterson, Mr Rick Snell from the University of Tasmania and the Australian Press Council.

CHAIR—Thank you very much. We will now go to questions.

Senator FIFIELD—Mr Polden, regarding your concerns about the Inspector-General of Intelligence and Security and whether he is qualified to provide expert advice in relation to whether or not disclosure would affect international relations, what would be the preferred mechanism for determining matters of that sort?

Mr Polden—I will hand that matter to Elizabeth who is responsible for that aspect of the submission.

Ms Simpson—I think PIAC's view is that we can contrast that additional procedure, the additional layer of the inspector-general being involved with giving evidence, with the other procedures that have been proposed under the bill, which is in proposed sections 58E and 63 of the bill under which the AAT would in the first place consider evidence on affidavit as to why a document would be exempt, because of the potential damage to international relations or communication in confidence by or on behalf of a foreign government. If they were not satisfied with that then there would be the opportunity for the AAT to look at it. I think that PIAC thinks that, similar to the kinds of sensitivities around cabinet documents, there does need to be an additional procedure, but we think that would be sufficient to strike the balance around the sensitivities of these documents. If the Senate committee or the government felt that there was a need to have an independent third party, another body, to perhaps give evidence on a particular matter, we discussed another body but felt that it should really be a third-party individual who looks at matters of foreign affairs and trade rather than the inspector-general who is much more ordinarily focused on looking at security agencies, their work and their documents.

Senator FIFIELD—Apart from the issue of the inspector-general's qualifications to make those sorts of judgements, is there any conflict of interest in his current role by adding this task? Is it more a matter of you not thinking that that office actually has the capacity to make those judgements?

Mr Polden—I will respond in this way: it is not a matter that PIAC has necessarily turned its mind to, but, even in respect of another category of documents—getting away for a moment, if you like, from the international relations and confidentiality side of things—as far as the Inspector-General of Intelligence and Security has the oversight role that I mentioned previously 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 give independent evidence in relation to the desirability or otherwise of matters going, if I can put it this way, into the public domain, at least 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. I am not so sure about the other bit of it.

Senator FIFIELD—I guess the holder of that office, as you said, is not necessarily someone who has a particular appreciation for the sensitivities of relations between Australia and other countries. That is not the particular function of that office, as such. Thank you for that. I appreciate it.

Senator JACINTA COLLINS—I would like to ask a question that is supplementary to one asked by Senator Fifield. It relates to this issue and to the proposed section 60A(5), in relation to the appropriateness of IGIS giving evidence. You do not think that that is adequate to deal with that problem?

Ms Simpson—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. And we would also question whether or not there is that particular need in these cases to have that situation arise.

CHAIR—Thank you both for appearing via teleconference this afternoon and thank you also for your submission.

[5.16 pm]

McKINNON, Professor Kenneth Richard, Chairman, Australian Press Council

CHAIR—Welcome. Information on parliamentary privilege and the protection of witnesses and evidence has been provided to you. The committee has before it your submission and I now invite you to make a short opening presentation at the conclusion of which the committee will put questions to you.

Prof. McKinnon—Thank you. As was stated in the submission, the Press Council was pleased that the government was taking action—if only in a limited way—through the abolition of conclusive certificates. It does have some concerns about the actual bill, which I will come to in a moment, but before beginning that I need to say that our attitude has changed since the second reading speech at the end of November in that recent evidence indicates that nothing has happened in the federal government to change the negative attitudes towards information. That was at the nub of the problem, even though there were also legislative problems. That is to say that at the end of January, for example, the federal government, through Customs, refused a request from the *West Australian* newspaper for information about all of the video and still images gathered last year about the Japanese whale hunt. It was refused because the government said that such images could reasonably be expected to cause damage to international relations. Frankly, that is an example of the kind of excuse that does not stand up to scrutiny and it indicates that nothing has changed in government attitudes. We are therefore going to be looking with increased concern to the foreshadowed broader package of reform measures focusing on fostering of pro-disclosure culture, as well as an FOI commissioner et cetera, which were announced in the second reading speech. So, both legislation and culture are of concern to us and the most recent evidence on culture is not positive.

Turning to the bill itself, we believe that there are problems in two particular sections—firstly, with a new provision that provides for what happens when appeals are on. We see that this is a problem but we see that the new section, as inserted, which stays the operation of an AAT decision where an appeal has been commenced, is open to political manipulation, and is particularly a problem when parliamentarians are in election mode, which is a lot longer than most people think. We believe that the section could be used to delay the release of potentially embarrassing material, so our belief is that to be effective the section would have to be modified to include wording similar to that which allows injunctive relief—that is, there must be a reasonable prospect of the appeal succeeding for the stay of an order to be imposed or to have any weight. Secondly, 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. Our sense is that that would limit the effectiveness of what the minister is intending to achieve through this bill.

The final section that I would like to comment on is the new section 7(2B), which has the apparent intent of ensuring that an exemption granted to security agencies applies when the said material is in the hands of a minister—in short, there cannot be a separation between the exemption for agencies and the minister. We believe that that is a bit too sweeping and that there are, in an open culture, many documents that might come from prescribed agencies which ought not to be exempt. 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. We have in mind that in the past the examples have not been good. The Queensland government notoriously wheeled truck loads of papers into cabinet to get exemptions, and we believe that that sort of activity can stay if there is not close examination of the wording of clauses to ensure that they are properly limited in their application. By and large, finally, the federal government is in danger of becoming the last man standing against freedom, in that even New South Wales—I repeat: even New South Wales—is now going to bring in new legislation freeing up the flow of information. So while the bill is a step forward, it is only a step and there is a long way to go yet.

CHAIR—Thank you very much.

Senator MOORE—I am from Queensland, and I heard your comments about the Queensland government. In terms of process in this bill, I am interested in the question of the stay of appeal rights. I heard what you said and I am interested because I was in the public service for a long time. It always seemed to me that if you are going to appeal, and you actually put that provision in, there is not much value in releasing documents when the agency is going to appeal. So if you release documents and the agency is clearly going to appeal, what is the value of taking the appeal further? I think that is what this particular section is getting at: if you

have documents, they have gone to the AAT and the AAT has ruled in a certain way, the agency is going to appeal that and makes it public that they are going to appeal, and if the documents about which they are appealing have already been released into the public, it actually dismisses the value of the appeal.

Prof. McKinnon—I see. No, we are not trying to obviate the appeals process by releasing material while a decision is pending. What we are saying is that the clause should be drafted in such a way that (a) the appeal can only proceed if there is a strong prospect of it succeeding, and that (b) the timing between the lodging of an appeal and a decision must be made as short as possible by legislation. I am not a lawyer, but our lawyers say that if you use the common injunctive processes you can by injunction ensure that the matter is only prevented from being released if there is a strong prospect of the appellant winning and that the appellant should not be able to lodge an appeal, as used to be the case with defamation actions, as a kind of stop-writ where the whole case would take a year or a year and a half to come on, by which time it was beyond being current and relevant.

Senator MOORE—I am all in favour of having speedy action. I take that point very clearly. But if you have a right to appeal it does seem to be an odd position to take that you are prejudging the quality of that appeal. My understanding is that Australian Public Service agencies are expected to only appeal where they determine that they have a strong case. So for people to presume beforehand that an appeal has little chance of success seems to me to be prejudging the process of appeal.

Prof. McKinnon—It would be subject, as it were, to an injunction. If the notice of appeal is given then the person in receipt of a judgment—I assume in all cases, the agency—would only appeal if there was a decision to release the information, and it is against that happening. The complainant would then say, ‘Let’s go back to court for an injunction’, and they would have to prove to the judge that there is a strong likelihood that the final decision would be in favour of the appellant agency, and then of course it would not be released. But if there is a weak case, which is only being used as a hindering mechanism, there is every reason for the judge to allow the material to be released.

Senator MOORE—I am interested as to who would make that decision, and determine that there is a weak case. But my understanding of the proposed legislation is that there is a stay if there is an appeal lodged, and that actually leaves the decision as to the quality with the next round of the appeal rather than anyone intruding at that stage.

Prof. McKinnon—Yes, and that is what we are against. What we are saying is that there should be the steps of familiar litigation processes available to stop hindering mechanisms. Our assumptions, based on a long history, is that wherever people want to prevent information being released, they will use every mechanism, particularly delaying mechanisms, to prevent and delay the release of such information. We are saying that, even in this interim and small bill, the wording should be such as to not allow that to happen.

Senator JACINTA COLLINS—Professor McKinnon, I have a question further to those asked by Senator Moore. I take on board your concerns about political manipulation, but can you bring to the committee’s attention any examples of the government’s legal services directions that require that agencies not pursue appeals unless the agencies believe they have reasonable prospects of success? Can you point us to any examples where you believe that has occurred?

Prof. McKinnon—It has been not worth doing since Treasury Costello’s success with conclusive certificates in the High Court. The judgement in the High Court effectively said that if the reviewing judge said he would not second-guess some judge who said that he had made a reasonable interpretation, or that there was a reasonable interpretation, and it has been worthless to proceed along those lines because the final decision of the High Court made that a completely unproductive approach.

Senator JACINTA COLLINS—I am sorry, I do not really understand that at all, Professor.

Prof. McKinnon—There have been no cases lodged since the High Court decision, that I know of, that proceeded against conclusive certificates being issued because the High Court said that the Treasury was perfectly reasonable and the reason why it was perfectly reasonable was that the Federal Court said that the original judge had proceeded reasonably and who were they to second-guess it, and the High Court upheld that. So there was no prospect of success against conclusive certificates. It is only the abolition that will open the process up somewhat, and that is the virtue of this particular bill. All we were trying to do was to get some extra attention to the wording that will limit the opportunity for anybody to use even these clauses—in what we consider to be an interim bill—for delaying or overly sweeping exemptions.

Senator JACINTA COLLINS—I understand what you are saying now—it is closely associated with the conclusive certificates—but I suppose my question was a broader one. You are concerned about political manipulation. Are there examples where the general direction that applies to agencies has been manipulated in other areas?

Prof. McKinnon—I could get chapter and verse together in a couple of days if you need it, but, in fact, with both state and federal governments, prior to the pending changes in legislation—and the reference to Queensland was to the past, not to the wholly admirable changes that are being brought in in Queensland—there are lots of examples where even piddling requests have been refused by agencies because of attitudes.

Senator JACINTA COLLINS—Thank you.

Prof. McKinnon—I am not sure if we are on the same wavelength—

Senator JACINTA COLLINS—No, I do not think we are on the same wavelength. You are still on the conclusive certificates; I am asking for what the precedent is to suggest that agencies are not following their general legal services directions about pursuing appeals.

Senator FIFIELD—My question is actually against my own best interests as an opposition senator. In your submission you state that the Council is of the view that documents should be readily available to the public without the need for lodging freedom of information applications. Wouldn't that grind the administration of government to a halt if cabinet could not discuss things freely, could not look at options and could not look at proposals without knowing that they would be everywhere in the days that follow. I just cannot conceive how cabinet could operate effectively, because there would be incredible self-censorship by departments in making cabinet submissions and ministers would ask departments to give them briefings verbally rather than in writing. Do you think that cabinet could actually operate effectively if what you are proposing came to pass?

Prof. McKinnon—Yes, there are examples in other countries—for example, New Zealand—where that pertains at the moment. That is not to stop a government from declaring some of the material. We are not saying that every bit of every document that goes to cabinet should always be immediately available after the meeting. We are saying that the general tendency should be towards openness—much more openness than previous generations of public servants have known. Most public servants are brought up with the attitude that they have to be very careful with information. I do not believe that public servants—and I was head of an agency in Canberra—would fail to give thoughtful and careful documents to ministers. In fact the whole training of the most senior public servants is to, for example, make a file note of any significant conversation that has been held with anybody, and have it available as necessary if required. And the tradition of public servants is to give both sides of a question to a minister so that the minister can make the most carefully thought-out and balanced decision. Rarely, in my mind, would that be a problem. I can see that if Defence is arguing whether to have 50 tanks or two squadrons of some new fighter that there is a period within which that decision might well be debated, but it would probably be good for parliament to have a fair bit of information about the pros and cons, and some debate in the general public before a decision of that kind is made. There are plenty of examples of Defence making really costly decisions that were not that smart.

Senator FIFIELD—I suppose it might be of benefit if the reasoning and rationale behind things like the joint strike fighter were more transparent, for instance. You are slowly persuading me, Professor McKinnon. I may actually come to some sort of a conversion point here. Certainly, the longer I spend in opposition the more likely that probably is.

Prof. McKinnon—I have no experience as a missionary but if I could help your conversion I would.

CHAIR—Professor, there are no further questions. I thank you for your submission and your evidence this afternoon.

Prof. McKinnon—Thank you very much.

[5.37 pm]

ABLETT, Ms Maia, Senior Adviser, Department of the Prime Minister and Cabinet

BELCHER, Ms Barbara, First Assistant Secretary, Government Division, Department of the Prime Minister and Cabinet

SHEEDY, Ms Joan, Assistant Secretary, Privacy and Freedom of Information Policy Branch, Department of the Prime Minister and Cabinet

TILLEY, Mr Paul, Acting Deputy Secretary, Governance, Department of the Prime Minister and Cabinet

CHAIR—I welcome Mr Paul Tilley, Ms Barbara Belcher and representatives of the Department of Prime Minister and Cabinet. Information on parliamentary privilege and the protection of witnesses and evidence has been provided to you. As departmental officers you will not be asked to give opinions on matters of policy, though this does not preclude questions asking for explanations of policies or factual questions about when and how policies were adopted.

I now invite you to make a short opening presentation. At the conclusion of your remarks I will invite members of the committee to put questions to you. In particular I ask you to please accept our apologies for the delay. You would be more aware of the machinations of the Senate than our previous witnesses, perhaps, but I do appreciate the fact that you have been here waiting for us. **Mr Tilley**—I will make a short opening statement but I will be relying on my colleagues to answer most of the questions. I only started in this position on Monday.

CHAIR—You have had a few days!

Senator FIFIELD—Congratulations, Mr Tilley!

CHAIR—Yes, congratulations!

Senator JACINTA COLLINS—Where were you previously?

Mr Tilley—I was in the economic division of PM&C. The written submissions made to the committee include a number of suggestions which are directed to the broader reforms to the FOI Act. The government has announced that the broader package of reforms is to be dealt with in a second bill which is proposed for release for public comment as early as practicable this year.

I will just make some observations now on some of the concerns raised in the submissions relating to the specific measures in the [Freedom of Information \(Removal of Conclusive Certificates and Other Measures\) Bill 2008 \[2009\]](#), and I will start with the exclusion measure, item 2 of schedule 1. This item makes a document in the possession of a minister exempt from the operation of the FOI Act where the document has originated with, or been received from, the six intelligence agencies and the Inspector-General of Intelligence and Security, IGIS.

Underlying this measure is the fact that the six intelligence agencies and the IGIS are wholly excluded from the operation of the FOI Act. The joint 1995 Australian Law Reform Commission/Administrative Review Council *Open government* report recommended that intelligence agencies should remain excluded from the operation of the act. Its reasons, their review observes, are that if intelligence agencies were subject to the FOI Act the vast majority of their documents would be exempt. In terms of accountability mechanisms for intelligence agencies, the review also noted the role of the IGIS and the parliamentary committee on ASIO—now the Parliamentary Joint Committee on Intelligence and Security.

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.

If I can turn to the qualification to the production of sensitive exempt documents—item 17 of schedule 1—Associate Professor Moira Paterson suggests that proposed subsection 58E of the FOI Act could be amended to require affidavits to disclose all evidence relevant to whether a document is exempt under the national security or cabinet exemptions. Under 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.

I turn to the third-party notification qualification measure, which is items 18 to 21 of schedule 1. Again, Associate Professor Moira Paterson suggests that a special procedure be added to the measure that would enable an agency to apply to the AAT for an order to be excused from giving notice to a third party that an FOI applicant has made an application to the AAT for review of an exemption. A consequence of not giving notice is that a third party will not be in a position to determine whether they wish to apply to the AAT to join as a party to the review application. If the AAT does not ultimately uphold the exemption claim in respect of information concerning a third party, the concern is that the third party would not have an opportunity to defend the exemption. 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 an 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 thinks fit. Section 40(1)(c) of the AAT Act permits the tribunal to adjourn a review proceeding.

Regarding the Inspector-General of Intelligence and Security measure, which is item 25 of schedule 1 and item 10 of schedule 2—it relates to the Archives Act—in relation to the measure requiring the AAT to request the IGIS to give evidence before determining that a document is not exempt under the national security related exemptions in the FOI Act and the Archives Act, the Public Interest Advocacy Centre indicates it is not convinced that the IGIS is qualified to give expert evidence on all the matters covered by the national security related exemptions. The bill includes a measure directed to meet that concern. Proposed subsection 60A(5) of the FOI Act provides that the IGIS does not need to give evidence if, in the opinion 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.

Finally, if I can address in regard to the stay measure—item 33 of schedule 1 in regard to the FOI Act and item 17 of schedule 2 in regard to the Archives Act—the Australian Press Council submits that, when exercising its power to stay the operation of an AAT decision, the Federal Court should be required to apply a test that there must be reasonable prospects of the appeal succeeding in order for the stay to be imposed, which it states is the test applied to applicants for injunctive relief. The automatic stay provision only applies when an agency commences an appeal in the Federal Court from 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 undo the stay order. This is made clear in proposed subsection 67(3) of the FOI Act and subsection 58A(3) of the Archives Act. Thank you, Chair, that is our opening statement and we would be happy to take any questions.

CHAIR—Thank you very much.

Senator FIFIELD—Mr Tilley, does PM&C keep many records of FOI requests across government? Does PM&C aggregate them or would you have to go to each department and agency to determine how many FOI requests have been lodged, how many have been complied with in full, how many have been partly complied with and how many have been rejected?

Mr Tilley—Senator, I am sure that there are comprehensive records but there may be something.

Ms Sheedy—There is an annual FOI report which is table in parliament. In fact, the most recent one was tabled quite recently. That is an aggregation of FOI matters across the Commonwealth.

Senator FIFIELD—Thank you for that. I will go and look it up. I guess also in relation to questions like turnaround time requests, that is all in there, is it?

Ms Sheedy—Yes, it is. The report goes through the time frames and how agencies have met those time frames.

Senator FIFIELD—In relation to the position of FOI commissioner that is proposed, who would that actually answer to?

Ms Sheedy—That issue is still under consideration by government as part of the second stage reforms.

Senator FIFIELD—So, you cannot give us a steer as to whether the position will be some sort of independent statutory office holder? I assume that it would be.

Ms Sheedy—The government's election commitment to this was to actually establish an information commissioner, an FOI commissioner and a privacy commissioner in one body.

Senator FIFIELD—How would those positions be appointed? That would be a cabinet decision, I guess. You would not be able to take us through that. It is probably too early for you to take us through what the recruitment process might be, what the criteria might be and how those people might come to be appointed?

Ms Belcher—Yes, Senator, it is too early. The government will be considering all those issues. They are significant positions so one would normally expect that cabinet would consider the appointments.

Senator FIFIELD—What is the time frame? You may have already mentioned it.

Ms Belcher—The minister indicated that there would be a public statement of the directions of the next stage of the legislation as early as possible this year. I do not know that I can go much further than that, but we are expecting it certainly this year and as soon as possible.

Senator FIFIELD—The commitment was at some time during this term of parliament?

Ms Belcher—Yes, indeed—2009 was what the minister indicated was the likely time frame.

Senator MOORE—Mr Tilley, I think you went through each of the issues point by point. I know you were listening, and your team was listening, to the evidence we have received.

I have a more general question, and it is about the issue that was raised by one of the witnesses and which came through in a couple of the submissions—the concern about culture in the wider service. In terms of training, I know that there are FOI responsibilities in every agency and that you actually coordinate that. To respond to the kinds of concerns that were raised about the culture of FOI, is there anything in the training provided that would address that? I know it is a very difficult process but it seems to be, for those people who are passionate about FOI, something they talk about a lot. Certainly the government is moving towards some changed legislation—maybe not as quickly as some of the witnesses would like that to happen—but there is this underlying issue that the legislation is but one element. It is the culture within the organisation, the willingness to be transparent and seeing where the limitations operate that it is a wider concern. I am interested to see whether you or anyone has any comment on that kind of issue.

Mr Tilley—Our role is to help the government to develop these policies and implement this legislation. The government has made its policy commitments and it is in the process of legislating those commitments. Clearly our obligation is to now help the government implement that new legislation. I am not sure I can say much more than that. I am not sure whether Joan or Barbara can add anything.

Ms Sheedy—I would just add that the government's election commitment was to changing the culture, and certainly we would be looking to address that in the second stage of the reforms. But at the moment there is extensive FOI training provided to Commonwealth public servants and that is done by the Australian Government Solicitor.

Ms Belcher—Without pre-empting the role of the Information Commissioner, we would think it likely that putting out that message about culture would be one of the responsibilities.

Senator MOORE—Is the training that is offered introductory training for people who would be moving into the area, followed by more intensive training that people can access along the track?

Ms Sheedy—It is a whole series of training packages. It is actually up on their website. It is quite extensive.

Senator MOORE—I just felt that it was important to get that on the record—that is, the devolution of responsibilities to individual agencies and the proliferation of people working in this area. It is just important that people understand there is quite a structured training process there. It would be expected. Does anyone keep any records about whether people have completed the training so that the level of training across agencies is reviewed in some way?

Ms Sheedy—I am not entirely sure, but I would expect that the Australian Government Solicitor would keep records.

Ms Ablett—We will follow up on that.

Senator MOORE—I just think, having read the submissions, there seems to be this issue running through about the process.

CHAIR—Thank you. There are no further questions. I thank you for appearing before us this evening and, again, I apologise for the delay. I thank Hansard and the secretariat, and I now close the hearing.

Committee adjourned at 5.54 pm