7 January 2009

Standing Committee on Finance and Public Administration
The Senate
Parliament House
CANBERRA ACT 2600

By email: fpa.sen@aph.gov.au

Dear Committee

Submission on the Freedom of Information (Removal of Conclusive Certificates and Other Measures) Bill 2008

We thank you for the opportunity to make a submission on the Freedom of Information (Removal of Conclusive Certificates and Other Measures) Bill 2008 (Cth) (the Bill).

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organization that seeks to promote a fair, just and democratic society by making strategic interventions on public interest issues. In making strategic interventions on public interest issues PIAC seeks to:

- expose unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate;
- promote the development of law—both statutory and common—that reflects the public interest; and
- develop community organisations to pursue the interests of the communities they represent.

Established in July 1982 as an initiative of the Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia.

PIAC has a long-standing interest in the operation of the *Freedom of Information Act 1982* (Cth) (the FOI Act). For over fifteen years PIAC has utilised freedom of information legislation on behalf of clients. PIAC has undertaken a number of test cases under freedom of information legislation including *Searle Pty Ltd v PIAC* (1992) 102 ALR 163 and *Re Organon (Australia) Pty Ltd and Department of Community Services and Health* (1987) 13 ALD 588. PIAC has written papers and contributed to debates about freedom of information legislation including making submissions to the Australian Law Reform Commission in respect of its inquiry into the *Freedom of Information Act 1982* (Cth) in March and July 1995, and more recently making a submission to the NSW Ombudsman in respect of his review of the *Freedom of Information Act 1989* (NSW).

PIAC welcomes the Bill, which will remove the power of a Minister to issue conclusive certificates under the FOI Act. PIAC takes the view that the Bill is a significant step towards improving the effective operation of the FOI Act and ensuring more open and accountable government.

PIAC has long been concerned that the use of Ministerial certificates is at odds with the fundamental precepts that underpin the FOI Act, particularly transparency and government openness, and has consistently advocated for the

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repeal of the conclusive certificate provisions. As the Australian Law Reform Commission (ALRC) commented in its joint report with the Administrative Review Council in 1995:

> … it is inappropriate that a Minister is able to issue a conclusive certificate in respect of deliberative process documents. Decisions to withhold documents revealing deliberative processes, which are in the majority of cases the decisions of officials, should always be reviewable. Absence of a conclusive certificate provision will not reduce the capacity of agencies to exempt deliberative process documents if disclosure would be contrary to the public interest, for example, because of legitimate questions of timing. It will, however, mean that an agency's assessment of the balance between ensuring government efficiency and the public interest in disclosure of the particular information will be open to external scrutiny. The abolition of conclusive certificates, together with the FOI Commissioner's guidelines on applying a public interest test, will make it easier to ensure that the correct balance is achieved.[1]

PIAC agrees with the ALRC's comments in its 1995 report and submits that they apply with equal force to documents claimed to be exempt pursuant to sections 33, 33A, 34 and 35 of the FOI Act. PIAC notes that the Bill has gone beyond the ALRC and ARC's recommendations in respect of conclusive certificates, and proposes to abolish entirely the use of certificates under the FOI Act. PIAC supports this reform.

While the abolition of conclusive certificates is consistent with the principles of open and transparent government, PIAC is concerned that some provisions of the Bill are not. Proposed subsection 7(2B) would exclude for the first time from the scope of the FOI Act documents in the hands of government Ministers, which originated within or were received from certain defence or security agencies. Subsection 7(2A) already immunises all such documents while they remain in the hands of those agencies.

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.[2] Under the proposed amendments, these options are not available, the entire document being automatically excluded from the operation of the Act.

An applicant already faces a heavy onus in attempting to overcome a claim for exemption in relation to defence or security documents under paragraphs 33(1)(a) and (b), particularly given the broad interpretation given to national security, defence and international relations by the Courts.[3] PIAC considers that entirely excluding a new category of documents, not presently excluded from the operation of the FOI Act, is contrary to the principle of open and transparent government and winds back, in relation to defence and security documents, the advances of this principle made by the abolition of conclusive certificates.

PIAC is concerned 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 bodies the subject of investigation.[4] 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

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1 Australian Law Reform Commission and Administrative Review Council Report 77 *Open Government: A Review of the Federal Freedom of Information Act 1982* (1995) paragraph 9.19.

2 *Freedom of Information Act 1982* (Cth) ss 33(3), 22(1).

3 See, *Freedom of Information Act 1982* (Cth) s 4(5); see also *Re Hocking v Department of Defence* (1987) 12 ALD 554, *Re Maher and Attorney-General's Department* (1985) 7 ALD 731.

4 See, for example, *Freedom of Information Act 1988* (NSW) Sch 1, cl 4A(2), in which such pubic interest qualifications to claims of exemption based on national security and anti-terrorism concerns already exist.

embarrass an agency, or the government of the day.[5] The Haneef case and subsequent visa revocation, turning as they did on inconsistencies between reports and threat assessments issued by the Australian Security and Intelligence Organisation (ASIO) and the Australian Federal Police respectively[6], and the extent of awareness at Ministerial level of those inconsistencies, demonstrate the importance of retaining a potential avenue for disclosure of such documents under the FOI Act.

Finally, PIAC is concerned about the operation of proposed section 60A in relation to documents that are claimed to be exempt on the basis that their disclosure would, or could reasonably be expected to, damage the international relations of the Commonwealth, or would disclose information imparted in confidence. Section 60A requires that before the Tribunal determines a national security, defence or international relations: paragraph 33(1)(a); claim of exemption, or a claim of exemption based on government confidentiality: paragraph 33(1)(b); or grants access to a document the subject of such a claim; it must invite the Inspector-General of Intelligence and Security to give evidence as to the possible result of disclosure, and give particular weight to that evidence.

While the Inspector-General of Intelligence and Security may be qualified to provide expert and independent evidence in respect of national security or defence documents, PIAC is not convinced that with the Inspector-General of Intelligence and Security is qualified to give evidence in answer to questions of whether disclosure would affect international relations, nor with general questions of confidentiality. PIAC submits that the additional safeguards set out in the proposed amendments to sections 58E and 63 should be sufficient to protect the sensitive nature of such documents and that the Inspector-General of Intelligence and Security should not be required under section 60A to give evidence in relation to international relations or confidentiality.

PIAC acknowledges that there is a legitimate balance to be struck between the public interest in protecting national security and defence, and the public interest in open and transparent government. It is, however, difficult to form a conclusive view on whether the current amendments, which PIAC understands represent the first tranche of a more general legislative overhaul of the FOI Act, strike an appropriate balance, without a view of the whole. PIAC looks forward to making further comment as may be appropriate, in light of further amendments as they are made available for public consideration.

If you have any questions about this letter, please contact the writer on the number below.

Yours sincerely

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5 See, for example, *Secretary of State for Defence v Guardian Newspapers* (1985) 1 AC 339; *Alister v R* (1984) 154 CLR 404, per Brennan J at 456 (as to the balance between security and safeguards).

6 M J Clarke QC, *Report of the Inquiry into the Case of Dr Mohamed Haneef* (2008) 196.