



COMMONWEALTH OF AUSTRALIA

PARLIAMENTARY DEBATES



HOUSE OF REPRESENTATIVES

**FREEDOM OF INFORMATION (REMOVAL
OF CONCLUSIVE CERTIFICATES
AND OTHER MEASURES) BILL 2008**

Second Reading

SPEECH

Monday, 14 September 2009

BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES

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Date Monday, 14 September 2009
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Questioner
Speaker Byrne, Anthony, MP

Source House
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Question No.

Mr BYRNE (Holt—Parliamentary Secretary to the Prime Minister and Parliamentary Secretary for Trade) (7.56 pm)—I present the explanatory memorandum to this bill and move:

That this bill be now read a second time.

The DEPUTY SPEAKER (Hon. BC Scott)—Would the parliamentary secretary like to continue?

Mr BYRNE—It is not often that I get asked to speak, as my good friend the member for La Trobe would know! Before I start—and with your indulgence, Mr Deputy Speaker, and very briefly—I want to speak about a very good friend of mine who is on my right-hand side: the honourable member for Denison, Duncan Kerr.

The DEPUTY SPEAKER—Indulgence is granted.

Mr BYRNE—I learnt with a great degree of sorrow last week that the member for Denison was leaving this place as of the next election. I say from a personal perspective that I think the parliament is losing one of its great characters and one of its great consciences. I had the honour and the privilege of serving with Duncan on the Parliamentary Joint Committee on Intelligence and Security, formerly known as the Parliamentary Joint Committee on ASIO, ASIS and DSD. I came to know Duncan predominantly through that exercise. I respected his opinions. I respected the thought that he gave to the issues at hand. I say, Duncan, that I really do think your departure is a great loss. As your friend and as someone who has served with you, I say it has been a great honour serving with you, and I wish you all the best in the future. Thank you very much, Mr Deputy Speaker, for granting me your indulgence; it was the first opportunity I have had since the announcement. And thank you to the other side for their indulgence.

Addressing the issue at hand, which is the Freedom of Information (Removal of Conclusive Certificates and Other Measures) Bill 2008: the purpose of the Freedom of Information (Removal of Conclusive Certificates and Other Measures) Bill 2008 is to amend the Freedom of Information Act 1982 (FOI Act) and the Archives Act 1983 to remove the power to issue conclusive certificates.

The bill implements an election commitment to abolish conclusive certificates and marks the first step in the government's plan to undertake the most significant overhaul of the FOI Act since its inception in 1982.

The government released draft bills for public comment in March 2009 addressing its remaining FOI election commitments, as outlined in the policy statement *Government information: Restoring trust and integrity*.

Proposals in those bills are in part drawn from key recommendations of the joint Australian Law Reform Commission and Administrative Review Council 1996 *Open government report*. While more than a decade has been lost on FOI reform under the Howard government, the Rudd government is moving ahead on these issues to ensure that we have a more open, more transparent and more accountable government.

The broader package of reform measures focuses on fostering a pro-disclosure culture across government and includes the establishment of an information commissioner and an FOI commissioner who will be independent statutory officers and champions for FOI.

With respect to conclusive certificates, 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 Freedom of Information Act and Archives Act. Conclusive certificates act as a bar to someone seeking access to a document under FOI. The effect of a minister placing a conclusive certificate on a document is to limit the capacity for the Administrative Appeals Tribunal—otherwise known as the AAT—to review the exemption claim underlying the certificate. Under the current act, where a conclusive certificate applies, the AAT's jurisdiction is limited to determining if reasonable grounds exist for the exemption claim. But even if the AAT were to find that no reasonable grounds exist for the exemption claim, a minister may continue to refuse to allow access to the document.

Those limitations on external review should not be preserved. The external administrative review system was still relatively young at the time of the commencement of the FOI Act. Now, after more than a quarter of a century, the proven strength of that system greatly diminishes the need for executive control over an independent review process for document access. More importantly, I passionately believe that public confidence is increased in government decisions if they are open to being fully tested by an independent review process. For this reason, the government believes that all exemption decisions under the FOI Act and the Archives Act should be subject to full external merits review.

Abolishing the power to issue conclusive certificates does not mean information that should be protected against disclosure will be released. Where an exemption claim properly applies to a document, that exemption will continue to provide protection against its disclosure. Should an exemption claim be the subject of a review application to the AAT, parties will still be able to appeal from an AAT decision to the Federal Court on a question of law. That is the position that applies now for exemption claims that are not supported by a conclusive certificate.

The bill provides for existing conclusive certificates to be revoked if and when a new request for access to documents covered by a certificate is received. In effect, revocation will be deemed to have taken effect at the time any new request is received. A decision will then be made under the established processes on whether or not an exemption should be claimed for any document formerly covered by a certificate.

The bill also contains some consequential amendments to the FOI Act and the Archives Act that arise as a result of the repeal of conclusive certificates. It also introduces some measures that affect procedures in the AAT. Some of these measures are directed to ensuring that particularly sensitive information is not unnecessarily disclosed and apply to documents whose release could damage national security, defence or international relations, or would disclose confidential foreign government information or cabinet information.

To assist the AAT in reviewing an exemption claim to protect from disclosure national security documents and other sensitive information, the AAT will be required to call the Inspector-General of Intelligence and Security to provide expert evidence if it is not satisfied as to the merit of an exemption claim of this type.

I believe that the measures in the bill provide a fair balance between not unduly affecting procedural rights of applicants and ensuring appropriate safeguards for sensitive information.

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. Under the current act, a document held by an agency is excluded from the FOI Act if it has originated with, or has been received from, an intelligence agency or the Inspector-General of Intelligence and Security, but the same document would not be excluded if it happens to be held instead by a minister. The bill remedies this anomaly.

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.

In conclusion, this bill is a first step in FOI reform, but it is an important step in the government's broader commitment to making government open, accountable and transparent.