



**Lifting the veil of secrecy: response to ALRC  
Issues Paper 34: Review of Secrecy Laws**

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# 1. Introduction

## 1.1 The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights;
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

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. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from the NSW Government Department of Water and Energy for its work on utilities, and from Allens Arthur Robinson for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

## 1.2 PIAC's work on secrecy

PIAC has, for many years, been active in the related field of freedom of information, having most recently made a submission and given evidence to the Senate Standing Committee on Finance and Public Administration inquiry into the Freedom of Information (Removal of Conclusive Certificates and Other Measures) Bill 2008. PIAC welcomes this opportunity to make a submission to the ALRC, in relation to its current secrecy reference.

## 1.3 The current review

PIAC welcomes the current review of secrecy laws in Australia, which is somewhat overdue. The Australian Law Reform Commission (ALRC) in its *Issues Paper 34: Review of Secrecy Laws* (the Issues Paper) notes that in 1995 the Administrative Review Council (ARC) recommended a thorough review of all Commonwealth legislative prohibitions on disclosure of government information by public servants, to ensure that they did not prevent disclosure under the *Freedom of Information Act 1982* (Cth) (the FOI Act).<sup>1</sup>

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<sup>1</sup> Australian Law Reform Commission, *Issues Paper 34: Review of Secrecy Laws* (2009) [1.2].

The Issues Paper identifies four main axes across which tensions between the often competing public interests in maintaining the secrecy of government information and in transparent government are concentrated: legislative restrictions; the implied right of freedom of communication on government and political matters<sup>2</sup>; the equitable duty of confidentiality and the common law duty of fidelity; and claims of public interest immunity.

An additional axis of interaction identified in the Issues Paper: ministerial certificates<sup>3</sup>, is addressed in the body of this submission, specifically in relation to secrecy and freedom of information (FOI).

In general, PIAC endorses the approach identified in the Issues Paper<sup>4</sup> as having been recommended by the Gibbs Committee Review of Commonwealth Criminal Law (Gibbs Review)<sup>5</sup>: that it is undesirable to criminalise unauthorised disclosure of *all* forms of official information, and that criminal sanctions are warranted only in relation to those categories of Commonwealth information, the continued secrecy of which is strictly required for the effective functioning of government.<sup>6</sup>

PIAC would, however, go further: the application of criminal sanctions under secrecy laws should be determined not by reference to broad categories of information, classes of documents, or agencies of origin, but by the nature of the information at stake, and the potential, if any, for its release to damage vital public interests.

PIAC believes that there should be an overriding public interest test, in which the need to protect government information is balanced against the general public interest in open and transparent government. No sanction—and certainly no criminal sanction—should ever apply where disclosure of government information is in the overriding public interest (as, for example, where it shows that government was involved in illegal acts<sup>7</sup>), even though its release may, as an incidental but unintended by-product, also cause appreciable harm to other aspects of the national interest.

For example, disclosure of government information evidencing prior knowledge by the Australian Government of systematic mistreatment of prisoners by members of what has been referred to as ‘the coalition of the willing’ in connection with hostilities in Afghanistan and Iraq, may have the capacity to inflict at least some level of damage upon Australia’s diplomatic relations with another country or countries. It may also be thought to say something of vital importance to electors about the conduct of their elected government. While the balance may in some cases be a delicate one, PIAC believes that it is presently skewed too far in favour of the merely expedient, at the price of transparency.

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<sup>2</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520: a legislative restriction that burdens freedom of communication in relation to government and political matters will only be valid where it is reasonably adapted to serve a legitimate end; see also *Bennet v President, Human Rights and Equal Opportunity Commission* (2003) 204 ALR 119 (cited in the Issues Paper), being a case in which Regulation 7(13) of the *Public Service Regulations 1999* (Cth) (the Public Service Regulations) was struck down, on the basis that it failed to distinguish between the types of information caught.

<sup>3</sup> Ministerial certificates are to be abolished under the Freedom of Information (Removal of Conclusive Certificates and Other Measures) Bill 2008 (Cth).

<sup>4</sup> Australian Law Reform Commission, above n1, [1.85] to [1.86].

<sup>5</sup> H Gibbs, R Watson and A Menzies, *Review of Commonwealth Criminal Law: Final Report* (1991).

<sup>6</sup> *Ibid* 317-321.

<sup>7</sup> The Issues Paper refers to *Fraser v Public Service Staff Relations Board* [1985] 2 SCR (Canada) 455; available on-line: *Fraser v PSSRB* (1985) CanLII 14 (SCC).

In PIAC's view, the principles developed under the equitable duty of confidence should be regarded as the touchstone for principled protection of government information. An approach based on the equitable duty of confidence requires a focus on the material in question and the nature of any detriment caused by its release, and has the decided advantage of leaving open an exception where disclosure would expose serious wrongdoing or iniquity.

So far as there is general duty upon Commonwealth officers under the Public Service Regulations<sup>8</sup> not to disclose government information *in general*, it is far too broad. PIAC believes that such an important obligation should not be located in delegated legislation. The related penalty provision in section 70 of the *Crimes Act 1914* (Cth) (the Crimes Act), which presently imposes criminal liability for disclosure of *any* official information by government officers, should be repealed.

Section 79 of the Crimes Act imposes separate criminal liability for disclosure of official secrets. It substantially overlaps with subsection 91.1(1) of the *Criminal Code*<sup>9</sup>, which deals with espionage and related activities. PIAC believes that at least to the extent of any overlap, section 79 should also be repealed.

#### **1.4 Do secrecy provisions unduly limit the sharing of information?**

PIAC is not sufficiently close to the subject matter to comment on the impact secrecy laws may have upon the sharing of information on an inter-governmental or intra-governmental basis.

As regards the sharing of information as between government and members of the public, PIAC believes that federal secrecy provisions (in which category it would include the exclusion of security agency documents<sup>10</sup>, the incorporation of secrecy provisions<sup>11</sup> and the broad national security defence and international relations exemption provisions<sup>12</sup> under FOI laws) unduly inhibit the sharing of information, particularly in the absence of any public interest override.

#### **1.5 Current offence provisions**

The Issues Paper notes<sup>13</sup> that the Senate Standing Committee on Legal and Constitutional Affairs, when considering the Freedom of Information Bill 1978 (Cth), criticised the practice of including in new statutes a default provision making it an offence to disclose without authorisation any information obtained in connection with the administration of the Act. This appears to borne out by the ALRC's count of 370 such provisions involving 166 pieces of primary and subordinate legislation.<sup>14</sup>

PIAC agrees with the approach taken by the Gibbs Review, which recommended repeal of section 70 and subsection 79(3) of the Crimes Act. The proscription in section 70, which covers disclosure of *any* fact or document that comes into a person's knowledge or possession by virtue of a position as a Commonwealth officer, which it was his or her duty to keep secret, is open to severe criticism, as it applies to any information regardless of its nature, or the effect that release might have.<sup>15</sup>

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<sup>8</sup> *Public Service Regulations 1999* (Cth), reg 2.1.

<sup>9</sup> *Criminal Code Act 1995* (Cth), sch 1.

<sup>10</sup> *Freedom of Information Act 1982* (Cth), sub-s 7(1A).

<sup>11</sup> *Freedom of Information Act 1982* (Cth), s 38.

<sup>12</sup> *Freedom of Information Act 1982* (Cth), s 34.

<sup>13</sup> Australian Law Reform Commission, above n1, [2.13]

<sup>14</sup> *Ibid* [2.16]; most are reported as establishing criminal offences.

<sup>15</sup> Australian Law Reform Commission, above n1, [2.37] and [2.39].

PIAC notes that the Gibbs Review proposed replacing these provisions with new legislation that would have imposed penalties for disclosure of certain types of information, in categories relating to: defence, foreign relations, national security and 'in confidence' documents<sup>16</sup>, and to law enforcement.<sup>17</sup>

## 1.6 A general criminal offence?

PIAC does not believe that there is sufficient warrant to impose criminal liability upon Commonwealth officers who disclose government information, unless liability is contingent upon a principles-based consideration of the actual information involved, the potential (or actual) consequences of release, the intention with which the act in question was done, and the absence of any overriding public interest in disclosure. Mere receipt of information of a specified kind, release of which would be capable of causing damage, should not be a criminal (as opposed to civil) offence, in the absence of intent to cause harm to specified public interests.

Subject to ensuring that an injunction is available, where appropriate, to restrain dealings that might otherwise amount to a criminal offence, PIAC believes that there is sufficient protection for all but the most sensitive government information under the law of breach of confidence. Given the legitimate interest of electors in the activities of government and its emanations, it is hard to see why disclosure by a Commonwealth public servant of Commonwealth information having no inherent quality of confidence should be a criminal offence.

Unauthorised disclosure of highly confidential non-government information by private individuals gives rise (absent an element of personal dishonesty, as in fraud, insider trading and the like) to civil liability only. Disclosure by a government employee of innocuous government information can currently give rise to criminal liability. PIAC believes that the current review provides a valuable opportunity to remedy this anomaly.

## 1.7 Framing a general offence

PIAC'S primary submission is that section 70 of the Crimes Act should be repealed. PIAC further submits that it should not be replaced.

If that recommendation is not adopted, PIAC believes it to be fundamental that any general criminal offence is framed by reference to the nature of the material in question, the effect of disclosure, and the overriding public interest in transparent government. It should incumbent upon the Commonwealth to establish, as an element of any general offence, that disclosure was, on balance, not in the public interest.

Any criminal secrecy provision of general application should not be triggered by breach of an obligation arising under the general law, but upon breach of a clearly identified duty of non-disclosure, set out in the relevant statute.

### **Recommendation**

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*That section 70 of the Crimes Act 1914 (Cth) be repealed and not replaced. In the event that repeal is not recommended, that the section is amended to ensure:*

- (a) that any general criminal offence for disclosure of government information is framed by reference to the nature of the material in question and the effect of disclosure, having regard to the overriding public interest in open and transparent government; and*

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<sup>16</sup> These categories reflect those set out at in *Freedom of Information Act 1982* (Cth), paras 32(1)(a)(i), (ii) and (iii).

<sup>17</sup> See *Freedom of Information Act 1982* (Cth) paras 37(1)(a) and (b); 37(2)(b) and (c).

- (b) *that the nature of any act or omission giving rise to liability is clear on the face of the legislation, and does not arise from a breach of duty arising under delegated legislation, or under the general law.*

## 1.8 Official secrets

Section 79 of the Crimes Act applies to any disclosure of information categorised as an official secret, regardless of its nature or the effect of disclosure. The Issues Paper notes that it extends to persons who are not and never have been Commonwealth officers, based upon the existence of a duty, the source of which must be found elsewhere. PIAC agrees that these factors alone strongly suggest that the section should be repealed.

PIAC also agrees that the overlap between section 79 of the Crimes Act and subsection 91.1(1) of the Criminal Code makes it undesirable that section 79 be retained, at least in its present form. While it is true that there are some section 79 offence provisions that are not strictly replicated under subsection 91.1(1), PIAC believes that careful and cautious consideration should be given to whether or not the matters they cover should be the subject of new offence provisions.

PIAC recommends a careful audit of the areas that would become exposed in the event that section 79 were to be repealed. As noted in the Issues Paper, these are primarily:

1. offences relating to the retention and disposal of official information *with* an intention to prejudice security or defence;
2. offences that relate to the communication, retention, disposal and care of official secrets, *without* any intention to prejudice security or defence.

In PIAC's view, type 2 offences should not be regarded as warranting criminal, as opposed to civil, offence provisions. If it is thought that criminal offence provisions are needed to catch any type 1 activities that would otherwise go become unregulated consequent upon the repeal of section 79, the drafting should follow the model adopted in subsection 91.1(1) of the Criminal Code.

### **Recommendation**

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*That section 79 of the Crimes Act 1914 (Cth) be repealed, and consideration given to:*

- (a) *amending section 91.1 of the Criminal Code (Cth) to include those offences, formerly caught by section 79, that involve an intention to prejudice security or defence; and*
- (b) *allocating offences formerly caught by section 79 that do not involve an intention to prejudice security or defence to new civil penalty provisions.*

## 1.9 Standardisation

Schedule 2 to the Issues Paper sets out a range of existing secrecy provisions, from which PIAC has identified 20 categories of Commonwealth information over which secrecy provisions are presently imposed: banking; children; communications; copyright and design; corporations; customs and excise; defence; discrimination; economy; education; elections; family law; law enforcement; migration; national security; privacy; public service; superannuation; transport; and tax.

In PIAC's view, a schedule that attempted to allocate each existing secrecy provision under one or other of these broad headings might provide a useful starting point from which to identify duplication and compare penalties

regimes across broadly similar categories of Commonwealth secrecy laws. A similar project, extending to a comparison with state and territory secrecy laws, some of which are in tension with the Commonwealth provisions<sup>18</sup>, would also be a worthwhile exercise.

### **Recommendation**

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*That the Australian Law Reform Commission, as part of the next stage of its review of secrecy laws, prepare a schedule that allocates all existing secrecy provisions (across all Australian jurisdictions) to one of the following categories to assist in identifying duplication and undertaking a comparison of penalty regimes: banking; children; communications; copyright and design; corporations; customs and excise; defence; discrimination; economy; education; elections; family law; law enforcement; migration; national security; privacy; public service; superannuation; transport; and tax.*

## **2. What information should secrecy provisions protect?**

### **2.1 Specific types of information**

In PIAC's view, the policy basis for continuing to apply secrecy provisions to information falling within each of the categories outlined above ought to be identified with clarity, then carefully weighed and considered.

In most categories, it will only be a relatively small sub-set of material over which there is a strong case for secrecy to be maintained. In the case of law enforcement, the relevant sub-set of material might be that which relates to operational matters.<sup>19</sup> In the case of family law matters, it might relate only to the identity of children or parties.<sup>20</sup>

In PIAC's submission, the fact that information falls within one of the categories outlined above should be a necessary, though not sufficient, condition for it being treated as secret.

### **2.2 Information held by security agencies**

The current position is that there are some persons and agencies, and some information, for example information created or held by ASIO, ASIS, DSD, ONA, DIO, DIGO and IGIS<sup>21</sup> ('security agency information'), in relation to which across-the-board secrecy provisions apply. PIAC submits that the conventional wisdom should be tested against an approach that would restrict information, including security agency information, by reference to its nature and the possible consequences of disclosure, as opposed to its agency of origin.

### **Recommendation**

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*That official information, including information created or held by security agencies, be categorised for the purpose of secrecy laws by reference to its subject matter, and the nature of the activity to which it relates.*

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<sup>18</sup> Compare, for example, *Tobacco Advertising Prohibition Act 1992* (Cth) s19 and the *Public Health (Tobacco) Act 2008* (NSW) s 16. While both proscribe publication of similar matter, the former provides for a defence of incidental publication in a magazine or newspaper, while the latter does not.

<sup>19</sup> A similar approach is taken under the *Freedom of Information Act 1989* (NSW) s 9 and sch 2.

<sup>20</sup> See, for example, *Family Law Act 1975* (Cth) s 121; cf *Children (Criminal Proceedings) Act 1987* (NSW) s 11.

<sup>21</sup> ASIO – Australian Security Intelligence Organisation, ASIS – Australian Secret Intelligence Service, DSD – Defence Signals Directorate, ONA – Office of National Assessments, DIO – Defence Intelligence Organisation, DIGO – Defence Imaging and Geospatial Organisation and the IGIS – Inspector General of Intelligence and Security.

## 2.3 Information that may harm a specific public interest if disclosed

PIAC believes that the potential for harm should be a primary consideration in determining whether information should be treated as secret. Even specified types of information (such as information relating to defence) or information held by specified agencies (such as ASIO) or persons should not be treated as secret if release or disclosure would not, and could not be reasonably expected to, harm specified public interests.<sup>22</sup>

## 2.4 What about countervailing public interests?

PIAC believes that what is missing from the current secrecy regime is any form of public interest override. Vital public interests in open justice, transparent government and freedom of political discussion are effectively ignored.

Any system that seeks to prioritise information for protection by reference to any harm that release might do warrants a balancing exercise, in which any detriments to the public interest stemming from disclosure are considered against the broader public interest in open and transparent government.

### **Recommendation**

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*That any new or existing offence of unauthorised possession or publication of government material require proof of harm to specific public interests that is not outweighed by the public interest in open and transparent government in general.*

## 2.5 Form of secrecy provisions

In PIAC's view, it is difficult to formulate one hard and fast form for secrecy provisions across all statutes. It makes sense for a relatively simple statute to contain any secrecy provision(s) in one place.<sup>23</sup> It is difficult to see how such an approach would assist in terms of clarity or ease of use where a large and complex statute, such as the *Income Tax Assessment Act 1997* (Cth), is concerned.

# 3. Whose conduct is regulated

## 3.1 Contractors, consultants and local government

PIAC believes that those, other than Commonwealth officers, who contract with or act as consultants to government in the course of providing goods or services should be regulated by the same set of secrecy provisions that govern disclosure or safekeeping of information by the agency or Commonwealth officers with whom or on whose behalf they are dealing.

## 3.2 Media and the general public

A more difficult question is whether secrecy provisions should be given an extended operation, so that they regulate the activities of anyone, including the media, who come into unauthorised possession of Government material.

Subject to the remarks made earlier in this submission as to the present degree of duplication as between section 79 of the Crimes Act and subsection 91.1(1) of the Criminal Code, and the lacunae that might emerge if sections 70 and 79 of the Crimes Act were to be repealed and not replaced, it seems not unreasonable that

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<sup>22</sup> Compare *Freedom of Information Act 1982* (Cth) para 33 (1)(a).

<sup>23</sup> See, for example, *Family Law Act 1975* (Cth) s 121.

some form of liability—either criminal or civil—should extend to those who come into possession of genuinely secret material.

In PIAC's view, criminal liability should only apply to third parties who knowingly deal with secret material with the intention of damaging the defence or security of Australia.

In their current form, there is a question whether subsections 79(2), (5) and (6) of the Crimes Act are consonant with the implied Constitutional freedom of political and governmental communication.<sup>24</sup>

It does not seem reasonable to extend criminal liability, as is presently the case under subsection 79(2), where there is no intention to harm such interests, particularly where the subsection operates on the basis that mere carelessness can be enough to trigger liability, quite irrespective of any actual harm.

The penalties in subsections 79(5) and (6), which impose maximum terms of imprisonment of seven and two years respectively for bare receipt of secret information with no intention of harming Commonwealth defence or security interests, are undoubtedly harsh.

PIAC submits that it should be made clear beyond doubt that members of the public and the media will not be subject to criminal liability under secrecy provisions such as section 79 in the absence of an intent to harm Australia's defence or security interests. Receipt of proscribed information, otherwise than in those circumstances, should be the subject of civil penalty provisions only.

### **Recommendation**

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*That unauthorised possession, transmission or publication of government information, including security agency information, should not attract criminal penalties in the absence of intent to harm defence or security interests.*

## **3.3 Former Commonwealth office holders**

PIAC questions the observation in the Issues Paper that secrecy obligations that expressly bind Commonwealth officers only during their period of employment do not provide adequate protection.<sup>25</sup> PIAC agrees with the view expressed by Finn and cited in the Issues Paper<sup>26</sup>, that third party and commercial information can be protected in these circumstances under the equitable duty of confidence. Government information can also be protected, under the same equitable principles, subject to the government being able to show detriment to the overall public interest.<sup>27</sup> PIAC submits that this formulation strikes an appropriate balance.

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<sup>24</sup> See above n2.

<sup>25</sup> Australian Law Reform Commission, above n1, at [3.21].

<sup>26</sup> P Finn, *Official Information, Integrity in Government Project: Interim Report 1* (1991) 257; cited in *Ibid* [3.23].

<sup>27</sup> [1980] HCA 44; (1980) 147 CLR 39 (the Defence Papers case).

## 4. What kind of conduct should be regulated?

### 4.1 What kind of conduct should be regulated?

PIAC agrees with the observations of the Senate Standing Committee on Legal and Constitutional Affairs, cited in the Issues Paper<sup>28</sup>, to the effect that criminal liability should not attach, without more, to mere receipt or possession of government information.

PIAC holds similar concerns to those expressed by McGinness<sup>29</sup>, also cited in the Issues Paper, as to the undesirability of criminalising mere receipt of information where the recipient has no intention of publishing that information. It is important to consider the position of journalists charged in these circumstances, who are faced with the prospect of going to gaol for an indeterminate period of time, rather than breaching their ethical obligations by revealing their sources. There is real potential for such provisions to be used to target end-recipients of information, in an effort to pressure them into revealing information that enables 'leaks' to be traced back to their source.

### 4.2 Subsequent unauthorised handling

The Issues Paper notes that while receipt of official information may be a crime, the Commonwealth cannot obtain an injunction to restrain the commission of a criminal offence.<sup>30</sup>

The High Court held in *Commonwealth v John Fairfax & Sons Ltd*<sup>31</sup> that disclosure of confidential information would, however, be restrained at the instance of the Government if national security, relations with foreign countries or the ordinary course of business of government will be prejudiced.

Mason J noted:

It can scarcely be a relevant detriment to the government that publication of material concerning its actions will merely expose it to public discussion and criticism. It is unacceptable in our democratic society that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticize government action.<sup>32</sup>

PIAC believes that the necessity of showing that disclosure would be a breach of confidence, that the public interest requires publication to be restrained, and that there are no other contradictory and more compelling matters of public interest in favour of publication, strikes an appropriate balance.

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<sup>28</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of the Australia, *In Confidence: A Report of the Inquiry into the Protection of Confidential Personal and Commercial Information Held by the Commonwealth* (1995) [7.11.7]; cited in Australian Law Reform Commission, above n1, [3.30].

<sup>29</sup> J McGinness, 'Secrecy Provisions in Commonwealth Legislation' (1990) 19 *Federal Law Review* 49, 85; cited in Australian Law Reform Commission, above n1, [3.30].

<sup>30</sup> Australian Law Reform Commission, above n1, [3.38], and footnote 43, citing McGinness, above n34; see also, *Commonwealth v Fairfax*, above n27.

<sup>31</sup> Above, n27.

<sup>32</sup> *Ibid* at [27]

### 4.3 Should intent or recklessness be required?

While the Issues Paper refers to only one example of a strict liability offence, it suggests that such a standard may nevertheless be appropriate where there is evidence that a requirement to prove fault could undermine the deterrent effect of a secrecy provision, or where a matter may be peculiarly within the knowledge of a defendant.

The report cites section 58 of the *Defence Force Discipline Act 1982* (Cth) as an example. It is hard to see from that example why the matters that need to be proven<sup>33</sup> support the argument advanced.

PIAC does not support the retention of strict liability in any secrecy-based offence provision.

### 4.4 A public interest test?

In the absence of any submission that considered the need to include a requirement that the unauthorised disclosure caused some harm, the Gibbs Review recommended that, in the case of members of the intelligence and security services, unauthorised disclosure of government information should be prohibited by criminal sanctions, without proof of harm. PIAC opposes this approach.

Some existing secrecy legislation in fact go further: sections 39, 39A and 40 of the *Intelligence Services Act 2001* (Cth), which regulate the Australian Secret Intelligence Service (ASIS), the Defence Imagery and Geospatial Organisation (DIGO) and the Defence Signals Directorate (DSD) respectively, do not stop at binding staff. They bind contractors and others who interact with ASIS, DIGO and the DSD, and create offences for communicating information connected with or relating to the performance of agency functions, without any requirement that disclosure cause, or is likely or intended to cause any harm at all to the public interest.

The Issues Paper cites McGinness<sup>34</sup>, in noting that:

One would hope that any reform in Australia, where the process of opening government to public scrutiny is more advanced than in the United Kingdom, would proceed on the basis that a test of harm resulting from disclosure should apply for even the most sensitive categories of national security and defence information.

That is a sentiment which PIAC endorses.

### **Recommendation**

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*That criminal penalty provisions, including for disclosure of information by defence or security personnel, should require proof of harm.*

### 4.5 Constitutional issues

PIAC does not believe that the current key secrecy provision affecting Commonwealth officers, Regulation 2.1 of the *Public Service Regulations 1999* (Cth)<sup>35</sup>, provides a suitable model for protecting Commonwealth

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<sup>33</sup> Namely, disclosure of information without lawful authority, in circumstances likely to be prejudicial to the security or defence of Australia

<sup>34</sup> McGinness, cited in Australian Law Reform Commission, above n1, [3.83].

<sup>35</sup> See also *Public Service Act 1999* (Cth) sub-s 13(13).

information in a way that is consistent with the implied freedom of communication on governmental and political matters.

On PIAC's analysis, a provision that prohibits, in the terms of Regulation 2.1: 'any disclosure that could be prejudicial to the effective workings of government, including the formulation or implementation of policies or programs' is far too wide.

Understood at its simplest, an action is *effective* if it brings about an expected result. Expressed at such a high level of generality, the interest sought to be protected ('the *effective* workings of government') may frequently be in tension with other important public interests, such as the *transparent* workings of government.

It is true that it has been held that Regulation 2.1 in its present (amended) form does not infringe the implied freedom<sup>36</sup>, being reasonably adapted to serve a legitimate end—the effective functioning of government—despite an inevitable area of indeterminacy about the meaning of the phrase 'the effective operation of government' that could lead to some information not being disclosed that could legitimately be disclosed.<sup>37</sup> PIAC does not believe that a decision that has not been tested at appellate level should be regarded as having finally determined such a vitally important constitutional issue.

Regulation 2.1 does not give any guidance as to the degree of prejudice required; nor does it require countervailing public interests favouring disclosure to be taken into account. It would appear that evidence of a relatively insubstantial effect, weighed in isolation from any public interest favouring disclosure, will suffice to trigger the proscription it embodies.

In any particular case, the potential for release of information to have an impact (however slight) upon the effective working of government will be proven by way of evidence from government officials. History suggests that the argument would almost certainly be mounted that public servants will be less frank in their advice if there exists a risk that it might later be disclosed.<sup>38</sup> It is foreseeable that it might equally be suggested that a failure to impose secrecy requirements upon even non-controversial matter would be corrosive of trust between government, its departments and their various interlocutors, and thus prejudicial to the effective working of government.<sup>39</sup>

PIAC endorses Richard Jolly's comments, noted in the Issues Paper, that because secrecy laws specifically target the communication of information about government, they require compelling justification if they are to be regarded as reasonably adapted to serve a legitimate end. As Mason CJ said in *Australian Capital Television v Commonwealth*:<sup>40</sup>

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<sup>36</sup> *R v Tjanara Goreng Goreng* [2008] ACTSC 74; cf *Bennett v President, Human Rights and Equal Opportunity Commission* (2003) 204 ALR 119.

<sup>37</sup> *R v Tjanara Goreng Goreng*, above n36, [37].

<sup>38</sup> See, *Re Ian McCarthy and Australian Telecommunications Commission* [1987] AATA 233 (19 June 1987), for a case in which this argument was made in relation to the deliberative process exemption in section 36 of the *Freedom of Information Act 1982* (Cth).

<sup>39</sup> See, generally, *Re Howard and the Treasurer* (1985) 7 ALD 645, for a discussion of these considerations in the context of deliberative process exemption claims under FOI laws. .

<sup>40</sup> *Australian Capital Television Pty Ltd & New South Wales v Commonwealth* [1992] HCA 45; (1992) 177 CLR 106 (30 September 1992) at [46].

... only a compelling justification will warrant the imposition of a burden on free communication by way of restriction and the restriction must be no more than is reasonably necessary to achieve the protection of the competing public interest that is invoked to justify the burden on communication.

In PIAC's view, Regulation 2.1 does not satisfy this test.

## 4.6 Political discussion generally

The Issues Paper asks whether other provisions, for example, sections 39, 39A and 40 of the *Intelligence Services Act 2001* (Cth), are consistent with the implied freedom. As noted earlier in this submission, these secrecy provisions bind staff, contractors and others who interact with defence and security agencies not to communicate information prepared by or on behalf of the agencies with which they are involved, connected with or relating to the performance of agency functions. They do not require disclosure to cause, or be likely or intended to cause, any harm to the public interest, and they impose a penalty of imprisonment for up to two years.

So far as they do not turn on the likely effect of disclosure, do not require proof of any intention to harm security or defence interests, and do not allow for any exception in the case of information tending to show that the agency in question has exceeded its lawful authority, PIAC believes that sections 39, 39A and 40 are in need of amendment or repeal, and that any sanction they impose should be limited to civil as opposed to criminal liability.

Even so, in PIAC's view it is difficult to say that offences of this kind, so far as they are limited to disclosure of material relating to security agency functions, would be held to be other than reasonably adapted to serve a legitimate end.

### **Recommendation**

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*That sections 39, 39A and 40 of the Intelligence Services Act 2001 (Cth) be amended to require proof of harm to specific public interests that outweighs the general public interest in favour of disclosure, and to impose civil penalties only.*

## 4.7 Exceptions and defences

The Issues Paper notes that electing to frame provisions as defences rather than exceptions does not alter evidential or legal burdens of proof, but may have procedural disadvantages for a defendant.

In PIAC's view, exemptions for conduct in the course of or for the purpose of carrying out functions under an enactment, as required by law or under the authorisation of specified persons, in the course of legal proceedings or law enforcement, or with consent, are relatively uncontentious.

Each of the exceptions identified at paragraphs 4-2(a) to (e) of the Issues Paper is likely to be of such frequent and general application that it should be incorporated into secrecy provisions whenever they appear in an enactment. PIAC believes that this is best dealt by requiring proof of '*unauthorised disclosure*', defined in the dictionary to any Act that incorporates a secrecy provision, as disclosure that does not fall within one of the defined exclusionary categories.

Secrecy provisions (and certainly those imposing criminal liability) should require proof that the act in question would cause, or would reasonably be expected to contribute to causing, significant prejudice or detriment to a

specific public interest or interests and was, in addition, contrary to the general public interest, having regard to any countervailing factors in favour of disclosure.

PIAC believes that a defence should be available where, at the time of the alleged offence, a person did not know, and would not reasonably have believed, that the information, document or article in question contained protected subject matter, disclosure of which would cause significant damage or prejudice to the public interest.

PIAC agrees that the exceptions and defences incorporated into Commonwealth secrecy laws should be reviewed to ensure compliance with current drafting guidelines.

## 4.8 Public interest disclosure legislation

PIAC notes the ALRC's concern that its present review not duplicate the current efforts of the House of Representatives Standing Committee on Legal and Constitutional Affairs, which has recently announced a number of proposed changes to laws governing whistleblower protection.<sup>41</sup>

PIAC notes however, the similarities between aspects of the *Protected Disclosures Act 1994* (NSW), *Whistleblowers Protection Act 2001* (Vic) and the Public Interest Disclosures Bill 2007 (Cth), which are summarised in the Issues Paper. PIAC believes that these might provide a useful model for a national protected disclosure regime, under which protected disclosure should be exempt from both criminal and civil liability arising from would otherwise be a breach of secrecy laws.

PIAC is not at all convinced that security agencies should be immune from a public interest disclosure regime, particularly if the protection given under whistleblower laws is conditioned on the kinds of matters referred to at 4.59 and 4.69 of the Issues Paper.<sup>42</sup>

PIAC has no in-principle objection to the approach suggested in the Issues Paper<sup>43</sup>, in which disclosure of security agency information might be permitted only to or by a nominated external agency or person, such as the IGIS. This raises the question, however, of to whom such protected disclosure might be made, were it to concern the person of the IGIS, or the activities of that office.

### **Recommendation**

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*That the Australian Law Reform Commission recommend the introduction of a national protected disclosures regime under which disclosure occurring under Commonwealth, State or Territory protected disclosure legislation would be exempt from both criminal and civil liability under Commonwealth secrecy laws. Penalties*

## 4.9 Criminal penalties

PIAC notes the remarks in the Issues Paper in relation to the appropriateness or otherwise of attaching criminal liability to offences based on failure to take reasonable care of documents.<sup>44</sup>

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<sup>41</sup> Nicola Berkovic and Chris Merritt, 'Call to protect whistleblowers', *The Australian*, 26 February 2009, <<http://www.theaustralian.news.com.au/business/story/0,,25107842-17044,00.html>> at 9 March 2009.

<sup>42</sup> Namely, that the protected disclosure regime only applies to a limited range of matters, in the nature of criminality, gross waste of public funds, or substantial risk to public safety.

<sup>43</sup> Australian Law Reform Commission, above n1, [4.8]

<sup>44</sup> *Ibid* [5.30], in relation to *Crimes Act 1914* (Cth) para 79(4)(c).

PIAC is in broad agreement that the factors referred to at paragraph 5.39 of the Issues Paper should be taken into account on penalty, namely: the nature of the information protected; the offender's intent; the seriousness of the breach; the likely effect of the information being released; and the effect of a criminal conviction.

PIAC does not believe that intent at the level of carelessness should be enough to impose criminal liability, except perhaps where very serious damage to life and limb has been the direct result.

#### **4.10 Consistency in penalty**

PIAC believes that secrecy provisions should specify fines and penalties that are consistent with those that would result if the formulas set out in the Crimes Act (including reductions in the penalty that might otherwise apply where a matter is dealt with summarily, rather than on indictment) were to apply.

It is not appropriate for secrecy provisions to specify penalties that may be imposed by way of summary conviction, where other offences carrying the same maximum penalty must be tried before a jury.<sup>45</sup>

#### **4.11 Maximum penalties**

Disclosure of information obtained in the course of official duties (apart from information relating to defence, security and law enforcement) should rarely, if ever, amount to a criminal offence, as opposed to attracting a civil penalty.

If the disclosure in question involves information relating to law enforcement, defence or security, PIAC submits that the preferred approach should be to seek consistency in maximum penalties based on the following factors: the nature and volume of the material in question; the nature and extent of any harm or potential harm to identified public interests; the intent and motive of the defendant; the level of seniority and office held by the defendant; and any countervailing public interest factors.

#### **4.12 Subsequent handling penalties**

PIAC believes that the penalties for subsequent handling should be of a lower order, except where intent to damage Australia's national interest is proven.

While there is a reasonable case to be made that secrecy provisions should not continue to apply where identity information is already in the public domain, the policy implications of such an exemption or exception need to be carefully considered, not least in connection with circumstances in which the information has entered the public domain unlawfully.

#### **4.13 Benchmark penalties**

There should be benchmarks for maximum penalties for secrecy offences, according to category.

PIAC does not believe that it is appropriate, or of assistance in ensuring certainty, fairness and consistency of punishment as between similar offenders and offences, for a court to be given no guidance at all by the legislature as to the maximum penalty which is to apply to particular crimes.

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<sup>45</sup> Ibid [5.56], citing the *Defence Act 1903* (Cth) s 73F.

Sections 73A and 73F of the *Defence Act 1903* (Cth) are a good example: together they expose a public servant who discloses any defence-related information, other than in the course of official duties, to a fine of any amount, imprisonment for any period of time, or both.<sup>46</sup> Conduct falling foul of section 73A will also breach one or more of sections 70 and 79 of the *Crimes Act*—imprisonment for up to two or seven years—dependent upon intent and section 91.1 of the *Criminal Code*—imprisonment for up to twenty-five years—dependent upon intent. Sections 73A and 73F are anomalous, and are in need of urgent review.

#### 4.14 Drafting issues

PIAC does not believe that offence provisions should be located in delegated legislation, no matter what the size of the fine or the seriousness of the penalty they impose.

Secrecy provisions currently located in regulations, which carry a term of imprisonment or a significant fine or which specify a duty of non-disclosure that attracts a penalty by reason of the operation of section 70 of the *Crimes Act*, should be relocated to primary legislation.

All secrecy provisions should make clear on their face the consequences of breach. If the consequences of breach are contained in another piece of legislation<sup>47</sup>, the secrecy provision should cross-reference it, although this is not the preferred approach.

It is not necessary to redraft secrecy provisions that refer to monetary rather than penalty units, because of the operation of section 4AB of the *Crimes Act*,

#### 4.15 Infringement Notices

PIAC does not believe an infringement notice regime is appropriate. Secrecy offences—certainly those that impose criminal liability—should not be offences of strict or absolute liability, as opposed to requiring proof of a fault element, or state of mind.<sup>48</sup>

#### 4.16 Civil penalties

PIAC believes that there is a significant role for civil penalties to play in discouraging unauthorised handling of Commonwealth information. Broadly, PIAC agrees with the distinction referred to in the *Issues Paper*<sup>49</sup>, between conduct involving serious moral culpability, which should attract criminal sanctions, and conduct not involving that element.

Offences that do not involve intent to damage a significant public interest, such as defence or security, and that do not involve an element of fraud, dishonesty, or personal gain, should be dealt with under civil penalty provisions. PIAC believes that it is preferable to keep the two regimes civil and criminal completely separate, thus avoiding the issues relating to use of evidence in more than one set of proceedings.<sup>50</sup>

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<sup>46</sup> *Defence Act 1903* (Cth) sub-s 73A(1) and para 73F(2)(b)

<sup>47</sup> See, for example, *Public Service Regulations 1999* (Cth), reg 2.1; *Crimes Act 1914* (Cth) s 70.

<sup>48</sup> See Australian Law Reform Commission, above n1, [5.145] and references there set out to ALRC Report 95.

<sup>49</sup> See Australian Law Reform Commission, above n1 [1.152].

<sup>50</sup> *Ibid* [5.153], [5.154].

## **Recommendation**

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*That offences that do not involve intent to damage a significant public interest, such as defence or security, and that do not involve an element of fraud, dishonesty, or personal gain, should be dealt with under civil penalty provisions.*

## **5. A practical secrecy framework**

### **5.1 Protective framework**

PIAC is not in a position to comment in detail on the consistency or lack thereof between agency policies on information handling and Commonwealth secrecy provisions. It notes, however, that the remarks in the Issues Paper at 6.15 to 6.18 would appear to suggest that in some cases agency policies may be stricter and more onerous than the secrecy provisions that apply to the underlying information itself.

PIAC would strongly support any initiative to have both the revised *Public Service Protective Security Manual* (PSM) and individual agency information-handling policies released, and to clarify the relationship between agency policies on information handling and the lawful and reasonable direction requirement under subsection 13(5) of the *Public Service Act 1999* (Cth). PIAC would be concerned, were secrecy obligations held to arise independently under agency policies that purport to impose stricter protective secrecy regimes than the relevant PSM guidelines.

PIAC does not believe that agency policies should require higher levels of security than those that arise under Commonwealth secrecy laws. If individual agencies seek to maintain the contrary, they need to make out a convincing case.

PIAC agrees that requiring Commonwealth officers to bind themselves to comply with secrecy obligations by swearing an oath or making an affirmation may have a useful role to play in drawing attention to responsibilities and encouraging compliance.

### **5.2 Injunctions**

PIAC agrees that where legislation prohibits and penalises the disclosure of Commonwealth confidential information, it is reasonable that it also provide a civil remedy, by way of injunctive relief, where disclosure would otherwise amount to a breach of the equitable duty of confidence. If the basis upon which an injunction might be obtained were governed by this principle, there is no apparent reason why it should be limited to national security, or other 'sensitive' information.

## **Recommendation**

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*That Commonwealth secrecy legislation be amended to provide for an injunction to be available to restrain unauthorised disclosure of government information under the general law of breach of confidence, irrespective of whether disclosure would also amount to a criminal offence.*

### **5.3 Australian Public Service (APS) Code of Conduct**

PIAC does not believe that it is in a position to comment on the effectiveness, or otherwise, of current procedures for investigation of suspected secrecy breaches that may amount to a breach of the APS Code of Conduct. It has some reservations, however, about lack of independence in the investigative process, and the apparent potential for conflicts of interest to arise.

Nor does PIAC believe that it is in a position to comment in detail on the effectiveness of processes for investigating and punishing breaches of privacy laws by Commonwealth officers who are not APS members. It notes, however, the criticisms of the *Defence Force Discipline Act 1982* (Cth) and the recommendations of the Senate Standing Committee on Finance and Public Administration in that regard, that non-military breaches should be referred to civilian authorities.<sup>51</sup> Otherwise, PIAC agrees that procedures modelled on those that apply to APS members should be adopted generally, and that an avenue of merits review should be made available.

## 5.4 Criminal investigations

PIAC does not believe that there is sufficient transparency in decisions by the Australian Federal Police to investigate alleged breaches of secrecy laws, particularly where the suspicion of political influence arises. The recent *Canberra Times* example, cited in the report<sup>52</sup>, is a glaring example.

## 5.5 Prosecution

PIAC is opposed, as a matter of general principle, to the Federal Attorney-General having a gatekeeper role over prosecutions relating to Commonwealth secrecy laws. The fact that such prosecutions involve material that government asserts should be kept secret, and the potential for party political considerations to intrude upon the decision-making process, makes such a role singularly inappropriate. The relatively recent controversy concerning Mohammed Haneef, involving the selective withholding of material citing national security concerns, is a case in point.

## 5.6 Overlapping proceedings

PIAC believes, given the effect of the decision in *Goreng Goreng v Jennaway*<sup>53</sup>, that legislation should provide that a person subject to administrative proceedings for breach of a secrecy provision may apply for a stay, to be determined having regard to factors of the kind referred to at 5.153 of the Issues Paper, if criminal proceedings are also in progress or possible. PIAC believes that consideration should be given to providing for use and derivative use immunity to apply to any evidence given under such circumstances, in the event that a stay is refused.

## 5.7 Effective oversight of agency security practices

PIAC believes that current arrangements relating to the Ombudsman and the IGIS are inadequate, so far as they are limited to the making of a report to the Prime Minister. In the case of the IGIS there seems no reason in principle why a report under section 24 of the *Inspector General of Intelligence and Security Act 1986* (Cth) should not be disclosed to the Parliamentary Joint Committee on Intelligence and Security.

# 6. Interaction with other laws

## 6.1 Secrecy provisions and the Freedom of Information Act

There is a clear tension when information that would otherwise be subject to secrecy or non-disclosure provisions also falls within the access regime established by the FOI Act, and is otherwise available for release.

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<sup>51</sup> Ibid [6.82].

<sup>52</sup> Ibid [6.91]

<sup>53</sup> [2007] FCA 2083.

For example, the very broad prohibition set out in section 70 of the Crimes Act relating to communication of government information, regardless of its nature or significance, appears diametrically opposed to the policy objectives sought to be achieved by the FOI Act, which creates 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.<sup>54</sup>

## 6.2 What information should be characterised as secret?

Information should be classified for the purpose of both FOI and secrecy laws by reference to its nature, the potential detriment that would stem from disclosure, and any countervailing interest in disclosure, rather than its security classification or agency of origin.

Any system of classification that renders material secret and excludes it from the scope of FOI law merely because it was prepared by, or received from, particular agencies, without regard to the nature of the material itself or the potential effect of disclosure, is deeply flawed. Such material may be sensitive, or it may be innocuous; it may reveal very serious wrongdoing or incompetence. There is no apparent reason why information in the latter category should be protected, at least where there is no evidence that to reveal it may reasonably be thought likely to cause appreciable damage to Australia's vital interests.

## 6.3 Exclusion of certain agencies and documents from FOI law

The Issues Paper states, perhaps somewhat inaccurately, that subsection 7(2A) of the FOI Act provides an exemption from FOI law for all agencies, in relation to documents originating in or received from ASIS, ASIO, ONA, IGIS, DIO, DIGO and DSD.

The FOI Act does not create an exemption (properly so called) for security agency documents as a class: such documents fall entirely outside the scope of the FOI Act when in the hands of agencies, but not when they are in the hands of Ministers. In PIAC's view, it is preferable to distinguish clearly between claims for exemption based on the grounds set out in the FOI Act, and the creation of exclusionary categories, which limit or exclude the application of the FOI Act to certain agencies, and/or categories of documents, disclosure of which is automatically an offence.<sup>55</sup>

In the hands of Ministers, security agency documents presently remain within the scope of FOI law, although the Federal Government has recently moved to exclude them.<sup>56</sup> If the Government or a Minister asserts that their disclosure would damage defence or national security, an exemption claim can be made, and examined by the Administrative Appeals Tribunal (AAT).

While the procedures to test exemption claims in the AAT are opaque and unsatisfactory, they at least provide an opportunity for a degree of independent review, otherwise missing from security determinations. A Minister is, however, presently able to issue a conclusive certificate, which on its face is determinative of the exemption from FOI law.

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<sup>54</sup> *Freedom of Information Act 1982* (Cth) s 3.

<sup>55</sup> *Crimes Act 1914* (Cth) s 79.

<sup>56</sup> Freedom of Information (Removal of Conclusive Certificates and Other Measures) Bill 2008.

It is partly by the use of exclusionary categories, partly through the use of security classifications and exemption claims, and partly through the use of conclusive certificates, that the balance referred to in Questions 7-1 to 7-3 of the Issues Paper, between the FOI Act and secrecy provisions, is presently articulated.

The Rudd Government, in its 2007 policy statement, *Government Information: Restoring trust and Integrity*, made an election commitment to repeal the power to issue conclusive certificates. It might be observed, however, that the Senate Standing Committee on Finance and Public Administration is presently considering a proposal to move all security agency documents outside the scope of FOI law, not because disclosure would damage Australia's interests, but merely because they come from or were created by particular agencies. Such a step would mirror the approach presently found in sections 70 and 79 of the Crimes Act, and in sections 39, 39A and 40 of the *Intelligence Services Act 2001* (Cth), which has in the past been criticised for creating or maintaining class-based secrecy claims over documents, irrespective of any harm that would stem from their disclosure.

For documents that remain within the scope of FOI law, the Freedom of Information (Removal of Conclusive Certificates and Other Measures) Bill 2008 (Conclusive Certificates Bill), presently before the Senate Standing Committee on Finance and Public Administration, replaces the machinery of conclusive certificates with a new regime, requiring the Inspector General of Intelligence and Security to give evidence on any damage that release might cause to defence or national security, before a claim of exemption is determined by the AAT. The Government seems to regard this and related additional provisions as adequate to deal with even the most sensitive documents, apart from those created or sourced from the seven security agencies.

The proposed changes to the machinery for dealing with FOI exemption claims may be an important consideration when the balance between secrecy provisions and FOI laws comes to be considered.

## **6.4 Achieving a balance between secrecy and FOI**

It could be argued that the relationship between the FOI Act and secrecy provisions in other Acts would be better balanced were the existence of a secrecy provision in another Act sufficient to give rise only to a *prima facie* claim for FOI exemption, with the claim itself to be tested by reference to the range of exemptions and machinery provisions which the FOI Act itself sets out.

### **(a) Is there a need for an FOI override?**

It might be thought, for example, that the fact that a document was prepared by or received from a security agency could give rise to a *prima facie* exemption. In PIAC's view, the exemption itself should be tested having regard to the content of the document itself, the possible consequences of release, and any positive public interest factors in favour of disclosure.

The current review provides a valuable opportunity to consider whether the introduction of a further layer of procedural safeguards to the existing exemption provisions under the FOI Act should lend weight to the policy option set out in question 7-2 of the Issues Paper. In PIAC's view, disclosure in accordance with the objects of and subject to the exemptions set out in the FOI Act should override secrecy provision in other Acts.

### **(b) Should the FOI secrecy exemption be amended?**

The current secrecy provision in section 38 of the FOI Act has the effect of incorporating secrecy provisions in some (but not all) other enactments, in such a way as to override public access rights that would otherwise arise

under FOI law.<sup>57</sup> An initial audit by PIAC suggests that 88 of the 370 secrecy provisions identified by the Issues Paper are excluded from the scope of FOI laws by the operation of Schedule 2 of the FOI Act. Of these, only three relate to intelligence, and none to defence. Others relate to matters as disparate as aged care<sup>58</sup> and liability for fringe benefits tax.<sup>59</sup> By way of contrast, section 79 of the Crimes Act, which deals with Official Secrets, is not excluded from the scope of FOI.

Without a thorough audit of all provisions in other legislation that are picked up by the section 38 of the FOI Act, it is difficult to express a concluded view on question 7-2(b). Such an audit should be conducted as a matter of urgency.

PIAC's preliminary view is that the lack of coherence in the range and seriousness of matters excluded from FOI law by the operation of section 38, together with the width of the existing exemption provisions in the FOI Act suggest that section 38 should be repealed.

## 6.5 Security agency documents

The fact that documents held by security agencies that may establish wrong doing or criminality on the part of agency staff are outside the scope of FOI law, even where there is no possible claim that to reveal them would damage national security or defence, suggests that there is something awry in the present balance.

To take an example: documents in the hands of an agency that were created by or received from IGIS are presently entirely excluded from the scope of FOI law. The IGIS's remit extends to ensuring that ASIS, ASIO, DGSO, DIGO, DIO and ONA conduct their activities lawfully, and comply with Australia's human rights obligations.

The result is that documents in the hands of an agency relating to a complaint that the IGIS finds sustained, even if they were to establish illegal or criminal conduct, are subject to an automatic class exclusion from FOI law. There is no provision for independent review, and no need to show that disclosure would damage the national interest.

The better view would appear to be that the relationship between FOI and secrecy should be mediated by reference to content, any potential harm flowing from disclosure, and the public interest in openness and transparency, not by reference to agency of origin.

### **Recommendation**

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*That disclosure in accordance with the objects of and subject to the exemptions set out in the FOI Act, including disclosure of security agency information, should be exempt from both criminal and civil liability under Commonwealth secrecy laws.*

## 6.6 Archives Act

Where Commonwealth secrecy or privacy laws otherwise do not permit disclosure of personal information, consideration should be given to the utility of continuing the bar on disclosure in relation to deceased persons,

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<sup>57</sup> *Freedom of Information Act 1982* (Cth) s 38 renders information and documents exempt from FOI disclosure if disclosure is prohibited under a secrecy provision of another Act, which is either specified in Schedule 3 to the Act or which expressly applies section 38 to the relevant document or information.

<sup>58</sup> *Aged Care Act 1997* (Cth) sub-s 86-2(c); sections 86-5, 86-6, 86-7.

<sup>59</sup> *Fringe Benefits Tax Assessment Act 1986* (Cth) sub-s 5(3).

having regard, amongst other things, to the effect of subsection 33(g) of the *Archives Act 1983* (Cth), which involves unreasonable disclosure of information relating to the personal affairs of any person (including a deceased person).<sup>60</sup>

## 7. Conclusion

PIAC would be pleased to comment further or clarify any of the matters covered in this submission, and looks forward to being involved in the next step of the review process.

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<sup>60</sup> See, by way of comparison, section 11 of the *Children (Criminal Proceedings) Act 1987* (NSW), which imposes an automatic statutory suppression order upon any information that would identify or tend to identify a person who was a child at the time of criminal proceedings, in which they were mentioned or otherwise involved (including as a victim), irrespective of whether or not the person is living or dead.