The Law Society
of New South Wales

170 Phillip Street, Sydney NSW 2000
Australia; DX 362 Sydney
Tel (02) 9926 0333 Fax (02) 9231 5809
ACN 000 000 699 ABN 98 696 304 966
www.lawsociety.com.au

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Direct Line: 9926 0209

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Mr John Corcoran
President
Law Council of Australia
GPO Box 1989
Canberra ACT 2601

Dear Mr Corcoran

Re: ALRC Issues Paper: Review of Secrecy Laws

Comment from constituent bodies was invited by the Law Council on the recent ALRC Issues Paper on Review of Secrecy Laws in early February 2009. A subsequent Briefing Note was also circulated on the proposed submission by the Law Council dated 13 February 2009.

The Criminal Law Committee of the Law Society of NSW is unable to provide any submissions, at this stage due to lack of time. Submissions will be made at the appropriate time on the publication of a Discussion Paper by the ALRC.

The Litigation Law and Practice Committee has provided comments on that part of the Issues Paper dealing with the interaction between the secrecy laws and the *Freedom of Information Act*. The submission is enclosed.

Yours sincerely

Joe Catanzariti
President

SUBMISSION BY THE LITIGATION LAW & PRACTICE COMMITTEE OF THE NSW LAW SOCIETY

Relationship between secrecy laws and the Freedom of Information Act

The relationship between legislation should be clear to avoid duplication of regulation, overlap or regulatory gaps. Legislation should have clear rules that can be easily identified. The rules should be consistent with the objects of the legislation and not go beyond its jurisdiction. All other matters not covered by the legislation are subject to the general law.

There is a conflict between information that is classified as "secret" and information of government administration that is available to the access regime under the Freedom of Information Act (FOI), subject, of course, to specified exemptions and exclusions. In broad terms, secret information should be information that is in the *national interest* to protect. Information that is accessible under the FOI should be subject to *public interest* as the test for release of information.

Dichotomy between secret information and information subject to Freedom of Information

There must be a clear distinction between secret information held by government and information that can be accessed under administrative laws. Information (or documents) must not be classified in a manner that covers up the mistakes of government although this will continue to occur. Administrative laws will never overcome the practice of "cover-up" as mechanisms will be found to achieve this objective.

Secret information needs clear classification to identify its character. Officers classifying documents containing secret information must be well trained to make accurate classifications and to reject documents that contain only administrative information. All information other than a narrow category of classified secret information should be available for access under the FOI Act.

Secret information

The characterisation of information as "secret" must be limited only to those documents(and information) that are really necessary to be protected in the national interest. Confidential information or commercial-in-confidence information must not be classified as "secret". This information falls into a different category and should be dealt with under the FOI Act, the Administrative Appeals Tribunal Act or the Privacy Act.

There are categories of government administration where secrecy and confidentiality are necessary to prevent a breakdown of confidence on those who deal with the department or agency. This can be seen in relation to taxation

matters where the confidence of taxpayers is critical to protect government revenue. Other agencies, such as the Australian Security Intelligence Organisation (ASIO), need to protect information that has the risk of damaging public confidence in the protection afforded by the work of that agency. It would be fair to say that the public does not have complete confidence in the work of the intelligence agencies and there should be put in place some method of reviewing the decisions made by intelligence agencies into classification of information.

Exemptions for certain agencies and documents

It is partly by the use of exclusionary categories and partly through the use of conclusive certificates, that the balance referred to in Questions 7-1 to 7-3 of the Review, as between the FOI Act and secrecy provisions, is presently mediated. It could be argued that the relationship between the FOI Act and secrecy provisions in other Acts could be balanced, on the basis that the existence of a secrecy provision in another Act could give rise to a prima facie claim for exemption, but that the ultimate claim itself should be tested by reference to the limited range of exemptions which the FOI Act itself sets out.

Without a thorough audit of all provisions in other legislation, which are picked up by section 38, it is difficult to express a concluded view on question 7-2(b). Such an audit should be conducted as a matter of urgency. The fact that present exemptions from the FOI Act extend to security agency documents which might establish wrong doing or even criminality on the part of agency staff, there is strength in the suggestion that the secrecy provisions of the FOI Act need close scrutiny.

The better view would appear to be that the relationship between the FOI Act and secrecy laws 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 the agency of origin.

Government administration information

Information is collected, stored and used by government at all levels. This information assists elected officials to make considered decisions that affect the public interest. Secret information which may be referred to in Cabinet documents do not form part of these documents and its classification as "secret" ensures that the information maintains its secrecy and does not form part of Cabinet documents or other administrative documents.

The Law Society of NSW has provided submissions to government inquiries on access to government information. These submissions have encouraged the introduction of better arrangements or exhorted governments to make information readily available as a matter of course and avoid practices and

processes that seek to hide information. The approach to access to information taken by the Queensland Government following the Report: *The Right to Information: Reviewing Queensland's Freedom of Information Act* (June 2008) (Queensland FOI report) is fully supported. This approach, it is submitted, should be taken up in all Australian jurisdictions.

The release of information held by governments has to pass the public interest test. This test is too broad and the Queensland FOI Report identifies this concern.

Public interest

The Queensland Review Panel says that "public interest is the central, unifying feature of freedom of information." The Report refers to the 1995 report of the Australian Law Reform Commission and the Administrative Review Council, *Open Government: a review of the federal Freedom of Information Act 1982* (ALRC/ARC report) in relation to the public interest test. The test "allows all considerations relevant to a particular request to be balanced". The ALRC/ARC report also notes that "it can at times be difficult to perform this balancing exercise." The Queensland Review Panel observes that the balancing exercise tends to favour withholding information. This is the case with the Queensland FOI Act where an assumption is made that a document that falls within the bounds of an exemption provides a prima facie case against disclosure under the public interest test. The Queensland Review Panel says that this approach "does not give the public interest a fair chance in the balancing exercise, contrary to the original intention of the legislation."

The Queensland Review Panel recommends a design to overcome these difficulties. The features of the design are:

1. the essential features of the public interest test for FOI to be listed in the Act to more easily identify the relevant public interest factors that are to be balanced, and applicants can know if their applications have been properly assessed;
2. a single public interest test will apply namely, "access is to be provided to matter unless its disclosure, on balance, would be contrary to the public interest;"
3. all exemptions in the current FOI Act will no longer apply as the harm that each exemption is intended to protect would be included in the public interest factors mentioned above.

The Queensland Review Panel says that "these changes are designed to simplify the administration of the public interest test by making it more transparent, understandable and credible, to make it more likely that it will be applied in the way the legislation intended."

The public interest concerns the welfare of the public within the jurisdiction of the government. In modern times the welfare of the public requires information that shows their governance is transparent as possible and that mistakes can occur and will be remedied. This is not possible if information is not easily available for access due to government practices to not disclose information by using classifications that do not accurately characterise the substance of the information.

The "public interest" differs from the "national interest" although the same persons are involved in both interests.

National interest

The national interest concerns the nation's economic and cultural interests and the protection of its people by way of defence or other security activities. The national interest is the interest of the state within the international community of states. The national interest also relates to the national interest of other nations and there is an obligation at international law to handle their documents and information in a proper manner within Australia.

It is the national interest that needs protection by classifying information as "secret".

Information classified as "secret" should be narrowly defined to ensure it serves the national interest. It should not be used in relation to public interest matters except, perhaps in very limited circumstances such as taxation matters where the revenue of government requires protection.

The matrix of secrecy provisions identified by the Australian Law Reform Commission should be closely examined so that only information which deals with the "national interest" is defined as "secret" and all other information should be subject to administrative law and the Privacy Act.

Culture of information access

There needs to be a positive culture of access to information such that governments willingly and readily provide information to the public about their activities and the reasons for them. Governments have a natural predisposition to be less than transparent, especially regarding mistakes made by government officials. It is accepted that Governments can make mistakes, but they should take immediate remedial action and keep the public informed.

The Inquiry into the Review of Secrecy Laws should look at encouraging a culture of information access by proposing strategies that seek to release information. Modern computer technologies can assist in this process. Government departments and agencies together with Ministerial websites can provide useful information about government business and activities. However, these strategies should be supported by clear and unambiguous legislation.

The Inquiry should consider recommending the establishment of a Government Commission that is empowered to review all documents classified as "secret." The Commission should be staffed with security cleared, competent persons with expert knowledge to identify the character of information, the nature of documents containing the information and the purpose for which the document and information is so classified. This means that the commission will be a type of review body. It should have powers to question government officers and request further particulars. The Commission's decision should be final but it may be subject to a Governor-General-in-Council intervention. The Commission should have reporting requirements and the public interest would be served by reports to Parliament. The national interest would be served by accurate classification of documents.

The Inquiry should also examine the possibility of secrecy provisions being consolidated within existing or new security legislation. In this exercise all secrecy provisions should be reviewed to reclassify the information being protected, as suggested earlier. In this manner information would be handled within the context of the administration required under the legislation. The burden would be removed from persons handling the information to classify it.

Persons other than "whistleblowers" should be dealt with by the general law for breach of confidence where the release of information is unauthorised. The Issues Paper covers this debate to propose civil penalties rather than criminal sanctions for these breaches.

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