Australian Government
Australian Law Reform Commission

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Dear Committee Secretary

Inquiry into the Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009 (Cth)

The Australian Law Reform Commission (ALRC) makes the following submission to the Senate Standing Committee of Privileges Inquiry into the Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009 (Cth) (the Bill). In making this submission, the ALRC draws on its experience from its inquiry into secrecy laws which culminated in the final report—*Secrecy Laws and Open Government in Australia*, Report No 112 (2009) (ALRC Report 112) (available online at <www.alrc.gov.au>).

The ALRC notes that ALRC Report 112 is available from the Committee's inquiry website, and that the Committee is aware of the ALRC's recommendations in that report. The ALRC also notes that the Committee has expressed a particular interest in Subdivision 355–B of item 1 of schedule 1 of the Bill, and the potential the provision has for limiting the operation of parliamentary privilege, particularly as specified by s 16 of the *Parliamentary Privileges Act 1987* (Cth).

***Secrecy Laws and Open Government in Australia*, Report No 112 (2009)**

On 5 August 2008, the Attorney-General of Australia, the Hon Robert McClelland MP, asked the ALRC to conduct an inquiry into options for ensuring a consistent approach across government to the protection of Commonwealth information, balanced against the need to maintain an open and accountable government by providing appropriate access to information. The lack of consistency in secrecy provisions has been identified in a number of prior reviews, including three prior reviews by the ALRC.[1]

1 Australian Law Reform Commission and Administrative Review Council, *Open Government: A Review of the Federal Freedom of Information Act 1982*, ALRC 77 (1995), rec 13; Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and*

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The ALRC undertook a comprehensive mapping exercise to catalogue the secrecy provisions currently on the federal statute book. The ALRC identified 506 secrecy provisions in 176 pieces of legislation, including 358 criminal offences. This mapping exercise provided a sound evidence base for the ALRC's analysis of secrecy provisions and the recommendations for reform in the Report.

A number of key issues emerged—including the catch-all nature of some of the provisions and an over-reliance on criminal sanctions. The ALRC also identified considerable inconsistency in the framing and elements of specific secrecy provisions, reflecting their introduction at different times, using different language and often with widely ranging penalties.

The principles underpinning the recommendations in ALRC Report 112 are that:

- administrative and disciplinary frameworks play the central role in ensuring that government information is handled appropriately, and that every person in the information chain understands their responsibilities in respect of that information;
- criminal sanctions should only be imposed where they are warranted—when the disclosure of government information is likely to cause harm to essential public interests—and where this is not the case, the unauthorised disclosure of information is more appropriately dealt with by the imposition of administrative penalties or the pursuit of contractual remedies;[2]
- there is a continuing role for properly framed secrecy offences—both general and specific—in protecting Commonwealth information, provided that they are clear and consistent, and directed at protecting essential public interests.

ALRC Report 112 recommended three broad areas for reform. First, the ALRC recommends the repeal of the wide catch-all provisions currently in the *Crimes Act 1914* (Cth), and the introduction of a new general secrecy offence, limited to disclosures that harm essential public interests.[3] Secondly, the ALRC considers the wide variety of other specific secrecy offences and recommends best practice principles to guide the review, repeal and amendment of these provisions.[4] Thirdly, the ALRC considers the administrative frameworks governing those that handle government information and makes a range of recommendations to improve the management of government information within those frameworks.[5]

Secrecy provisions and parliamentary privilege

The ALRC considered the relationship between secrecy provisions and the operation of parliamentary privilege throughout the inquiry into secrecy laws—in the Issues Paper (released in December 2008), the Discussion Paper (released in June 2009) and in ALRC Report 112 (tabled in Parliament on 11 March 2010).[6]

In Chapter 16 of ALRC Report 112, the ALRC noted that the then Clerk of the Senate, Harry Evans, provided a submission to draw to the ALRC's attention the issue that:

Security Sensitive Information, ALRC 98 (2004), rec 5–2; Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108 (2008), rec 15–2.

2 The ALRC recommended an exception to this general principle in relation to various laws, including certain taxation laws. See Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009) Ch 8.

3 See Ibid, recs 4–1 and 5–1.

4 See, in particular, Ibid, recs 9–1 to 9–9.

5 See Ibid, recommendations in Chapters 12 to 15.

6 Australian Law Reform Commission, Review of Secrecy Laws, Issues Paper No 34 (2008), [4.52] and [4.56]; Australian Law Reform Commission, *Review of Secrecy Laws*, Discussion Paper No 74 (2009), and Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009), Ch 16.

> From time to time executive government officials suggest that statutory secrecy provisions prevent them providing information to either House of the Parliament or its committees and/or render them liable under such provisions for supplying relevant information.[7]

Evans suggested further that secrecy provisions 'may also inhibit the provision of information to the Houses and their committees by prospective witnesses without the inhibition becoming known'.[8]

The ALRC noted that the Parliament may choose to abrogate parliamentary privilege expressly and prevent the disclosure of information to the Parliament or its committees,[9] and gave s 37(3) of the *Auditor-General Act 1997* (Cth) as an example of this. The ALRC also noted that the Exposure Draft of the Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009 (Cth) (Tax Laws Exposure Draft Bill) contained a far more detailed regime for dealing with disclosures to ministers and parliament.[10]

The ALRC discussed the controversial question of whether a secrecy provision may override parliamentary privilege by 'necessary implication'. As has been noted in the submission by the current Clerk of the Senate to the Committee's inquiry,[11] there are a range of views on this issue. For example, in 1991, the Commonwealth Solicitor-General, Dr Gavan Griffith QC, provided advice on the application of secrecy provisions to officials appearing before parliamentary committees, as follows:

> Although express words are not required, a sufficiently clear intention that the provision is a declaration under section 49 [of the *Australian Constitution*] must be discernible. Accordingly, a general and almost unqualified prohibition upon disclosure is, in my view, insufficient to embrace disclosure to committees. The nature of section 49 requires something more specific.[12]

In 2000, Bret Walker SC provided advice to the NSW Legislative Council about whether a secrecy provision applied to prohibit certain witnesses from disclosing information to the budget estimates committee of the NSW Legislative Council. Walker advised that, in order for a secrecy provision to prevent the disclosure of information to a parliamentary committee, there must be either an express reference to the Houses, or that the statutory scheme would be rendered 'fatally defective' unless such an application were implied.[13]

The ALRC also noted that the view that parliamentary privilege can be abrogated by 'necessary implication' has been criticised by Evans;[14] and no definitive view or court ruling has emerged.

The ALRC concluded that parliamentary privilege will normally override secrecy provisions, permitting the disclosure of protected information to Parliament or a parliamentary committee. This override will be supported by the exception for disclosures in the course of an officer's duties in the recommended general secrecy offence and most specific secrecy offences. In a small number of situations, however, the disclosure of certain information to Parliament or parliamentary committees may not be the desired outcome. The ALRC concluded that, in these circumstances, any legislative intent to abrogate parliamentary privilege should be clearly stated in the provision and supporting documents.[15]

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7 Clerk of the Senate, *Submission SR 03*, 23 January 2009.

8 Ibid.

9 An intention to abrogate parliamentary privilege requires express statutory words: H Evans (ed), *Odgers' Australian Senate Practice* (12th ed, 2008), 53; G Griffith, *Parliamentary Privilege: Major Developments and Current Issues*, NSW Parliamentary Library Research Service Background Paper No 1/07 (2007), 82–84.

10 Exposure Draft, Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009 (Cth) sch 1 pt 1 cl 355-55.

11 R Laing, *Submission to the Senate Standing Committee of Privileges Inquiry into the Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009 (Cth) (the Bill)*, 26 March 2010.

12 Explanatory Memorandum, Parliamentary Privileges Amendment (Effect of Other Laws) Bill 1991 (Cth).

13 J Evans, 'Orders for Papers and Executive Privilege: Committee Inquiries and Statutory Secrecy Provisions' (2002) 17(2) *Australian Parliamentary Review* 198, 210.

14 H Evans (ed), *Odgers' Australian Senate Practice* (12th ed, 2008).

15 Exposure Draft, Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009 (Cth) sch 1 pt 1 cl 355-60(3).

The question of whether the privilege should be abrogated by the secrecy provisions in the Bill, and whether that should be done expressly or by necessary implication is ultimately a matter for the Australian Parliament. However, it is the ALRC's view that if the Parliament intends that parliamentary privilege should be abrogated in certain circumstances, the legislative intent to do so should be clearly stated in the provision and supporting documents. In ALRC Report 112, the ALRC suggested that the Tax Laws Exposure Draft Bill is an example of this.

The ALRC notes that the relevant provisions of the Bill are expressed in identical terms to the provisions in the Tax Laws Exposure Draft Bill, and that submissions to the Committee's inquiry have questioned the clarity of those provisions.[16] The ALRC does not intend to make any further comment on the drafting of the provisions. However, consistent with the ALRC's view expressed in ALRC Report 112, if the Parliament is of the view that the privilege should be abrogated and that the Bill does not clearly state this, the ALRC would support the clarification of this issue by amendment.

The conduct regulated by proposed s 355–25(1)(b)(i)

Under proposed s 355–25(1)(b)(i) of the Bill, an entity commits an offence not only if the entity *discloses* protected information, but also if the entity *makes a record* of the information.

In *Review of Secrecy Laws*, Discussion Paper No 74 (2009) (ALRC DP 74) the ALRC proposed that specific secrecy offences should generally not extend to conduct other than the disclosure of information—such as making a record, receiving or possessing protected information—without justification[17] on the basis that the harm involved in such conduct is not immediately obvious, and administrative action may provide an adequate sanction in such circumstances.[18]

In response to the proposal, a number of government agencies argued that specific secrecy offences —in their particular areas of responsibility—should extend to conduct other than disclosure of information, including the Australian Taxation Office (ATO).[19] The ATO submitted that taxation secrecy offences should extend to conduct such as accessing, making a record of, or receiving protected information:

> The ATO firmly believes that it is necessary to maintain this level of protection over such conduct because it should be considered to be just as inappropriate to access a taxpayer's record, out of mere personal interest ... as it is to record or disclose information. Indeed, making a record of a person's income information may indirectly result in a disclosure of that information (if the record is misplaced) and, as such, this conduct should be regulated in the same manner as disclosures.[20]

The Treasury submitted that 'criminalising the unauthorised recording of information acts as a strong deterrent', and that such offences were important 'given the vast amount of information held by the Tax Office'.[21]

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16 R Laing, *Submission to the Senate Standing Committee of Privileges Inquiry into the Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009 (Cth) (the Bill)*, 26 March 2010; A Twomey, *Submission to the Senate Standing Committee of Privileges Inquiry into the Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009 (Cth) (the Bill)*, 4 April 2010.

17 Australian Law Reform Commission, *Review of Secrecy Laws*, Discussion Paper No 74 (2009), Proposal 10–5.

18 Ibid, [10.94].

19 Department of Health and Ageing, *Submission SR 81*, 28 August 2009; Australian Intelligence Community, *Submission SR 77*, 20 August 2009; Australian Crime Commission, *Submission SR 75*, 19 August 2009; Australian Federal Police, *Submission SR 70*, 14 August 2009; Department of Families, Housing, Community Services and Indigenous Affairs, *Submission SR 68*, 14 August 2009; The Treasury, *Submission SR 60*, 10 August 2009; Australian Taxation Office, *Submission SR 55*, 7 August 2009.

20 Australian Taxation Office, *Submission SR 55*, 7 August 2009.

21 The Treasury, *Submission SR 22*, 19 February 2009.

In ALRC Report 112, the ALRC restated the general proposition that secrecy offences should be confined to circumstances where they are necessary to protect essential public interests.[22] The ALRC expressed the view that, in most cases, harm is only likely to be caused by the disclosure of information, but acknowledges that there may be contexts that justify applying criminal sanctions to other conduct, such as in the area of law enforcement.[23]

However, the ALRC concluded that in relation to personal and commercial information (such as taxation information) other conduct—such as accessing or making a record of information—without more, is not sufficient to warrant criminal penalty. Although such conduct may be preliminary to unauthorised disclosure, without more this kind of behaviour is properly an internal disciplinary matter and should be dealt with through the imposition of administrative sanctions.[24]

The ALRC therefore recommended that specific secrecy offences should not extend to conduct other than the disclosure of information—such as making a record of, receiving or possessing information—unless such conduct would cause, or is likely or intended to cause, harm to an essential public interest.[25]

I hope this information is of some help to Committee members.

Yours sincerely,

22 The ALRC's framework for reform of secrecy provisions is set out in Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009), Ch 4.
23 Ibid, [9.53]–[9.58].
24 Ibid, [9.59].
25 Ibid, Rec 9–3.