

1983

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

FREEDOM OF INFORMATION AMENDMENT BILL 1983

EXPLANATORY MEMORANDUM

(Circulated by the Hon. L.F. Bowen,
Deputy Prime Minister and
Minister representing the Attorney-General)

NOTES ON CLAUSES OF THE BILLClause 1 - Short title, etc.

Clause 1 provides for the citation of the Act, and for the Freedom of Information Act 1982 to be referred to as the Principal Act.

Clause 2 - Commencement

2. Clause 2 will enable different provisions to be proclaimed to commence operation on different days.

Clause 3 - Interpretation

3. Paragraph 3(a), which will omit from sub-section 4(1) the existing definition of "Department" and substitute a new definition of that word, is consequential upon changes to the definition of "Department" in the Public Service Act 1922 effected by the Public Service Acts Amendment Act 1982. The change in definition will not affect the scope of the Principal Act.

4. Paragraph 3(b), which will omit from sub-section 4(1) the definition of "Document Review Tribunal", is consequential upon clause 40 which will abolish that Tribunal by repealing Part VII of the Principal Act.

5. Paragraph 3(c) is a drafting amendment which will remove from paragraph (b) of the definition of "exempt document" in sub-section 4(1) a redundant reference to regulations made in accordance with section 7 - there is no such regulation-making power.

6. Paragraph 3(d) will amend the definition of "official document of a Minister" in sub-section 4(1) to make clear that a document of a Minister does not fall within the Act unless he has it in his capacity as a Minister. Documents which a Minister holds in his capacity as a member of Parliament, for example, relating to electorate matters, do not come within the Act. The amendment clarifies the Principal Act on this point.

7. Paragraph 3(e) is a drafting amendment to simplify the language of the Act by defining a reference to "State" to include the "Northern Territory". The effect is that the Northern Territory is treated as equivalent to a State for the purposes of the Act.

8. Paragraph 3(f) will insert a new sub-section 4(5) defining "security of the Commonwealth" to make clear that that phrase as it appears in section 33 of the Principal Act extends -

- . to the security of matters relating to the detection, prevention or suppression of activities hostile to the interests of the Commonwealth or its allies or associated countries (proposed paragraph 5(a)); and
- . to the security of the communication and cryptographic systems of the Commonwealth and of allied or associated countries for the purposes specified in the definition (proposed sub-paragraphs (5) (b) (i) and (ii)).

9. Paragraph 3(f) will also insert new sub-sections 4(6) and (7) to deal with the case where an agency is abolished after a request is made to it. Where the functions of the former agency are vested in another agency, the request is deemed to have been made to that other agency. Where the functions of

the abolished agency are distributed between two or more agencies, the request is deemed to have been made to the agency which has acquired the functions most closely relating to the document the subject of the request. If the documents of the abolished agency have been deposited with the Archives, the request is deemed to have been made to the agency the functions of which most closely relate to the document the subject of the request. If the agency which is thereby deemed to have received the request, or to have made the decision, as the case may be, was not in existence at the time the request was thus deemed to have been made to it, then for the purposes of dealing with that request, for example, for complying with the time for notifying the applicant of a decision on the request, the new agency is deemed to have been in existence at the relevant time. This will ensure that a request continues to be dealt with notwithstanding a change in the Administrative Arrangements Order abolishing a department and transferring its functions to one or more other departments.

Clause 4 - Exemption of certain bodies

10. The effect of proposed sub-section 7(2A) will be to exempt agencies from the operation of the legislation in respect of documents which originate with, or which are received from, intelligence agencies as specified in the sub-section. These documents will be exempt documents for the purposes of the Act. They will not need to be referred to in statements under sub-paragraph 8(1)(a)(iii) of the Act.

Clause 5 - Certain documents to be available for inspection and purchase

11. Paragraph 5(a) will omit the existing section 9(2)(c), which provides for an annual statement bringing up to date the information contained in a statement that is required to be

published under section 9 listing the manuals and the like of an agency that are available for inspection and purchase, and insert a new provision requiring that, if practicable, the updating statement be published quarterly and, in any case, annually.

12. Paragraphs 5(b) to (h) will restrict to the case of the Commissioner of Taxation the power of the Minister administering the Act to extend the time for compliance with section 9 or to modify the requirements of that section with respect to the publication of manuals and the like.

13. Paragraph 5(j) is consequential upon the amendment made by paragraph 5(a). A person who asks to inspect or to purchase a manual or the like listed in the most recent statement published by an agency in accordance with the section is required to be told of any other manuals or like documents which have been brought into existence since that statement was published and which relate to the same subject as the manual the subject of his inquiry.

Clause 6 - Unpublished documents not to prejudice public

14. Clause 6 is consequential upon paragraphs 5(b) to (h).

Clause 7 - Part not to apply to certain documents

15. Paragraph 7(a) omits a redundant reference in paragraph 12(1)(a) of the Act to an Archives Act which did not eventuate and inserts a reference to the Archives Act 1983. The amendment will also bring within the scope of the Act a document containing information relating to the personal affairs of the person requesting access to the document irrespective of the date upon which it became a document of the agency. The amendment will ensure that an applicant will

not have to go to an agency to seek a document that is available under the FOI legislation and to the Archives to seek a document that would otherwise be available only under the Archives legislation.

16. Paragraphs 7(b) and (c) will bring within the scope of the Act all documents which were in the possession of an agency or Minister on or after 1 December 1977 and, in the case of a document containing information relating to the personal affairs of the person requesting access to that document, remove the present limitation to documents in the possession of an agency or Minister since 1 December 1977, that is, 5 years before the date of commencement of the Act.

Clause 8 - Documents in certain institutions

17. Clause 8 omits a redundant reference in sub-section 13(4) to an Archives Act which did not come into existence and inserts a reference to the Archives Act 1983.

Clause 9 - Transfer of requests

18. Paragraph 9(a) is a drafting amendment which will remove from paragraph 16(2) (a) of the Act a redundant reference to regulations under section 7 (there is no such regulation-making power).

19. Paragraphs 9(b) and (c) are drafting amendments to clarify the operation of sub-section 16(3) of the Act, by bringing the language of that sub-section into line with that of sub-section 7(2) of the Act.

Clause 10 - Time within which formal requests to be decided

20. Paragraphs 10(a) and (d) provide for addresses to which requests may be sent or delivered to be published in the Gazette rather than prescribed by regulation (as is presently required) and will provide that in the absence of such publication a request may be sent or delivered to an address specified in the Commonwealth Government Directory.

21. Paragraph 10(b) will add a requirement that agencies or Ministers acknowledge receipt of a request not more than 14 days after receipt of the request.

22. Paragraphs 10(c) and (d) will have the effect of reducing the time an agency or a Minister has for complying with a formal request from 60 days to 45 days from 1 December 1984 and to 30 days from 1 December 1986. Agencies or Ministers will, however, be able to extend the reduced time periods by 15 days where they invoke the 'reverse FOI procedures' in the proposed section 26A or existing section 27 (proposed sub-section 19(4)). If an agency or Minister does so extend the time, the applicant shall be informed (proposed sub-section 19(5)).

Clause 11 - Decisions to be made by authorized persons

23. This is a drafting amendment, to avoid having separate terminology for the principal decision-maker in respect of courts and tribunals to that used in respect of other agencies.

Clause 12 - Information as to existence of certain documents

24. These amendments to section 25 are consequential upon clauses 16 and 17.

Clause 13 - Reasons and other particulars of decisions to be given

25. Paragraph 13(a) will extend to all decisions under the Act relating to a refusal to grant access to a document in accordance with a request or the deferral of access the provisions of section 26 of the Act requiring a written notice to be given containing a statement of reasons for the decision. Section 26 now requires such a notice to be given only in respect of a decision under Part III of the Act refusing to grant access to a document or deferring the provision of access to a document. Paragraph 13(b) is consequential upon the amendment made by paragraph 13(a).

26. Paragraph 13(c) will add to the matters required to be included in a notice under section 26 appropriate information concerning an applicant's right to complain to the Ombudsman about the decision to which the notice relates.

27. Paragraph 13(d) excludes the application of section 13 of the Administrative Decisions (Judicial Review) Act 1977 to any decision in respect of which a notice is required to be given under section 26 of the Principal Act. The purpose of this amendment is to make it clear that the entitlement of a person to reasons for a decision under the Principal Act is contained in section 26 of that Act, which requires a statement appropriate to decisions under that Act. Paragraph 13(e) is consequential upon the amendment made by paragraph 13(a).

Clause 14 - Procedure on request in respect of documents likely to affect Commonwealth-State relations

28. Clause 14 inserts new section 26A, providing for consultation with the States and the Northern Territory in certain circumstances. Consultation is required before access is given to a document, or a document containing information, which originated with a State or the Northern Territory and it

is considered that the State or the Northern Territory, as the case may be, might wish to assert that the document is an exempt document under new section 33A to be inserted by clause 17 of the Bill.

29. The clause provides that consultation shall take place in accordance with arrangements made between the Commonwealth and the States and the Northern Territory.

30. Proposed new sub-section 26A(2), together with new section 58F to be inserted by clause 33 of the Bill, provides a scheme whereby a State or the Northern Territory, as the case may be, may appeal to the Administrative Appeals Tribunal against a decision to give access to a document which has been the subject of consultation in accordance with sub-section 26A(1). Where consultation has taken place in respect of a document, access to that document is not to be given under the Act unless the time for appeal to the Tribunal has expired or the Tribunal has confirmed the decision that the document is not an exempt document under proposed new section 33A, as the case may be.

Clause 15 - Certain periods to be disregarded for the purposes of section 19

31. These amendments are consequential upon clause 10 above adding a definition of 'relevant period' to section 19. Paragraphs 15(a) and (b) will substitute the phrase 'relevant period' as defined in the proposed sub-section 19(4) for 'prescribed period' where it appears in sub-section 31(1) (which allows an agency to disregard certain periods in which it is awaiting payment of a charge or deposit in computing the time in which it must give a decision on a request). Paragraph 15(c) will omit sub-section 31(2), which defines 'prescribed period' - that definition no longer being required for the purposes of sub-section 31(1).

Clause 16 - Documents affecting national security, defence or international relations

32. Clause 16 will substitute a new sub-section 33(1).

33. The proposed sub-section 33(1) does not include references appearing in the existing sub-section 33(1) to documents affecting Commonwealth-State relations and documents communicated in confidence by a State. These are proposed to be dealt with in new section 33A subject to a public interest test - see clause 17 below.

34. The range of documents affecting international relations embraced by the proposed paragraph 33(1)(b) will be expanded, compared to the existing paragraph 33(1)(b), to include documents communicated in confidence by or on behalf of -

- (a) an international organisation; or
- (b) an authority of a Government of another country.

Clause 17 - Documents affecting relations with the States

35. Clause 17 will insert a new section 33A, dealing with documents of concern to the States or the Northern Territory. A document will ordinarily be an exempt document under that new section if its disclosure under the Act -

- (a) would or could reasonably be expected to cause damage to relations between the Commonwealth and a State or the Northern Territory; or
- (b) would divulge information communicated in confidence by a State or the Northern Territory, or an authority of a State or of the Northern Territory.

36. A document is not, however, exempt under the new section if, on balance, the public interest would be better served by the disclosure of the relevant information in the document - sub-section 33A(5). The purpose of this provision is to cover those cases where there is a real public interest in having access to information concerning Commonwealth-State matters notwithstanding that the disclosure of the information might be considered either to be likely to cause damage to Commonwealth-State relations or to disclose matter communicated in confidence to the Commonwealth by or on behalf of a State Government or a State authority.

37. Proposed section 33A may be compared with the provision in section 36 of the Principal Act relating to the so-called internal working documents. Sub-section 36(1) requires, for a document to be exempt under that section, both that the document must be of a certain kind and that the disclosure of the document would be contrary to the public interest. In the case of proposed section 33A, however, a document will be prima facie exempt if its disclosure would, or could reasonably be expected to, cause damage to Commonwealth-State relations or its disclosure would divulge information communicated in confidence by a State or an authority of a State. It is only where there is a countervailing public interest in the disclosure of the relevant information in the document that it would not be exempt under the new section.

Clause 18 - Cabinet documents

38. Clause 18 will insert a new sub-section (1A) in section 34, which will have the effect of removing a purely factual document from the scope of the exemption under that section unless its disclosure -

- (a) would involve the disclosure of any Cabinet deliberation or decision; and

- (b) the fact of that deliberation or decision has not been officially published.

Clause 19 - Executive Council documents

39. Clause 19 will insert a new sub-section (1A) section 35, which will have the effect of removing a purely factual document from the scope of the exemption under that section unless its disclosure -

- (a) would involve the disclosure of any deliberation or advice of the Executive Council; and
- (b) the fact of that deliberation or advice has not been officially published.

Clause 20 - Documents affecting enforcement of the law and protection of public safety

40. Clause 20 will substitute a new paragraph 37(1)(c) providing that a document is exempt if its disclosure would, or could reasonably be expected to, endanger the life or physical safety of any person, whereas existing paragraph 37(1)(c) applies only in respect of persons engaged in law enforcement.

Clause 21 - Documents affecting financial or property interests of the Commonwealth and documents concerning certain operations of agencies

41. Clause 21 will substitute new sections 39 and 40.

42. New section 39 differs from existing section 39 in that the exemption does not apply in respect of matter in a document the disclosure of which under the Act would, on balance, be in the public interest.

43. New section 40 -

- (a) clarifies the application of the exemption in existing section 40 with respect to staff management interests by making it clear that the intention is to refer to management or the assessment of personnel;
- (b) extends the present exemption in respect of documents the disclosure of which would have a substantial adverse effect on the supervision or review of the operations of an agency to documents the disclosure of which would have a substantial adverse effect on the proper and effective conduct of the operations of an agency;
- (c) provides that a document is not exempt under the section in respect of matter in the document the disclosure of which under the Act would, on balance, be in the public interest.

Clause 22 - Documents relating to business affairs, etc.

44. Clause 22 is consequential upon paragraph 3(e).

Clause 23 - Documents containing material obtained in confidence

45. The amendment in clause 23 will give the Act an operation it was intended to have.

46. Clause 23 provides that a document is not an exempt document if its disclosure under the Act would constitute a breach of confidence if it is an internal working document which was prepared by a Minister, or by a member of the staff

of a Minister, a prescribed authority or an officer or employee of, an agency in the course of his duty for purposes relating to the affairs of an agency or of a Department of State.

47. The object of the proposed amendment is to make it clear that the breach of confidence ground of exemption in section 45 does not apply to internal working documents. The question whether these documents should remain confidential was intended to be considered in the light of the test of the harm to the public interest which would result from disclosure which is contained in section 36. A recent decision of the Administrative Appeals Tribunal has indicated that the mere fact that a departmental officer intended communications with another officer to be confidential may of itself be enough to bring that document within the scope of section 45 as it now stands. On this interpretation, section 45 would have a much wider operation than had been intended and there would be a more limited right of access than intended to internal working documents.

Clause 24 - Certain documents arising out of companies and securities legislation

48. Clause 24 is also consequential upon paragraph 3(e).

Clause 25 - Form of request for amendment of records

49. Clause 25 is consequential upon paragraph 10(a).

Clause 26 - Review of requests for amendments

50. Clause 26 inserts new paragraph 51(1)(aa) which will apply the internal review procedures to a decision under Part V of the Principal Act refusing to amend a record. Section 54

of the Principal Act provides for internal review of a decision in respect of the provision of access or a decision on the liability to pay a charge. There is, however, no provision for internal review of a decision under Part V refusing to amend a record. The proposed Government amendment corrects an oversight and would bring consistency to the review procedures under the Act.

51. Clause 26 also corrects the omission of a drafting amendment consequential upon clause 31 of the Bill.

Clause 27 - Role of the Ombudsman

52. Clause 27 will insert a new Part VA, sections 52A to 52F, which will expand the role of the Ombudsman under the Act.

53. New section 52A provides that, for the purposes of Part VA, a reference to the taking of action has the same meaning as it has in the Ombudsman Act 1976 and that action shall be deemed to have been taken by an agency in circumstances in which it would be deemed to have been taken by an agency for the purposes of the Ombudsman Act 1976 which extends the meaning of the word action to include, among other things, 'inaction and refusal to act'.

54. New sub-section 52B(1) provides that a person may complain to the Ombudsman concerning action taken by an agency in the exercise of powers or the performance of functions under the Act. This provision makes it clear that all the Ombudsman's existing powers under the Ombudsman Act 1976 extend to freedom of information matters.

55. New sub-section 52B(2) has the effect that the Ombudsman's powers to investigate a person's complaint about a decision will not be restricted merely because that person has a right to make an application to the Administrative Appeals Tribunal in respect of that decision.

56. New sub-section 52B(3) provides that, where a person has made a complaint to the Ombudsman about action taken by an agency, that person may not make an application to the Tribunal for review before he has been informed of the result of his complaint.

57. New sub-section 52B(4) provides that any report made by the Ombudsman in respect of a complaint must not contain any information as to the existence or non-existence of a document if such information, were it included in a document of an agency, would cause that latter document to be exempt either because it affects national security, defence, international relations or relations with the States, or because it affects certain aspects of law enforcement.

58. New sub-section 52C will empower the Ombudsman to designate a Deputy Ombudsman as the Deputy Ombudsman for freedom of information matters, with that Deputy Ombudsman having, in respect of freedom of information matters, all the powers and functions of the Ombudsman other than the power of the Ombudsman to make reports to the Parliament.

59. New sub-section 52D(1) will require the Ombudsman to furnish to the Public Service Board evidence coming to his attention concerning a breach of duty or misconduct by an officer of the Public Service in relation to a freedom of information matter.

60. New sub-section 52D(2) will require the Ombudsman to furnish to the Public Service Board a copy of a report he makes to a Department under the Ombudsman Act 1976 as a result of an investigation in respect of action taken by that Department in relation to a freedom of information matter.

61. New sub-section 52D(3) will require the Ombudsman, in the annual and other reports which he makes to the Parliament in respect of his operations, to report on his operations with respect to complaints made to him or investigations by him in respect of freedom of information matters and to empower him to include observations on the operation of the Freedom of Information Act and any recommendations he sees fit to make concerning the better securing of public access to documents of agencies or official documents of Ministers.

62. New section 52E will have the effect that a certificate given by the Attorney-General under section 9 of the Ombudsman Act 1976, to restrict access by the Ombudsman to information affecting defence, security or international relations and information disclosing Cabinet deliberations or the deliberations of the Northern Territory Executive Council, shall not be taken to affect the power of the Ombudsman to seek information as to the reasons for a decision refusing access to a document or to require a person to answer questions concerning that decision.

63. New section 52F will empower the Ombudsman to represent, or to arrange representation for, a person who has requested access to a document under the Freedom of Information Act in proceedings before the Administrative Appeals Tribunal.

Clause 28 - Interpretation

64. This amendment is consequential upon clause 17.

Clause 29 - Internal review

65. Paragraph 29(a) will have the effect that an application may be made for internal review of a decision by an agency in all cases in which an appeal lies to the Administrative Appeals Tribunal under sub-section 55(1) of the Principal Act.

66. Paragraph 29(b) will have the effect of requiring that an application for internal review, like an initial request under section 15, be in writing.

67. Paragraph 29(c) is consequential upon paragraph 29(a) above.

Clause 30 - Applications to Administrative Appeals Tribunal

68. Clause 30 will have the effect that the period of 14 days for responding to an application for internal review of a decision commences on the date on which that application was received by or on behalf of the agency concerned. This will serve to identify more clearly the point in time from which the period for dealing with the application commences to run.

Clause 31 - Application to Tribunal where decision delayed

69. Clause 31 is consequential upon clause 10.

Clause 32 - Powers of Tribunal

70. Clause 32 will have the effect of transferring to the Administrative Appeals Tribunal the review function now vested in the Document Review Tribunal.

71. Paragraph 32(a) will make the exercise of the Administrative Appeals Tribunal's power under the existing sub-section 58(1) subject to the proposed sub-sections 58(3), (4) and (5A). Paragraph 32(b) is consequential upon paragraph 32(c).

72. Paragraph 32(c) will omit existing sub-section 58(3), which provides that the Administrative Appeals Tribunal does not have jurisdiction to review a decision to give a certificate under section 33, 34, 35 or 36. Paragraph 32(c) will insert a new sub-section 58(3). While the new sub-section continues to provide that the Tribunal does not have jurisdiction to review a certificate given under section 33, 33A, 34, 35 or 36, it will also provide that the Tribunal may determine questions relating to the claim of exemption in respect of which the certificate is issued if the Tribunal is constituted by three presidential members or a single presidential member in accordance with proposed new section 58B - see clause 33.

73. Paragraph 32(c) will also omit existing sub-section 58(4), which requires the Administrative Appeals Tribunal to refer to the Document Review Tribunal, at the request of an applicant, a question whether reasonable grounds exist for claiming exemption for a document in respect of which a certificate has been issued. A new sub-section 58(4) will be inserted, which will have the effect of giving to the Administrative Appeals Tribunal the jurisdiction exercisable under the existing Act by the Document Review Tribunal, to determine a question whether there exist reasonable grounds for the claim that a document in respect of which a certificate has been issued is an exempt document under section 33, 33A, 34 or 35.

74. Paragraph 32(d) is a consequential amendment to sub-section 58(5), to give to the Administrative Appeals Tribunal a like jurisdiction with respect to a document claimed to be exempt under section 36.

75. Paragraph 32(e) will insert a new sub-section 58(5A), which will give to the Administrative Appeals Tribunal jurisdiction in cases where a certificate has been issued under section 33 or 33A to the effect that information about

the existence or non-existence of a document described in a request would be exempt matter under whichever one of those sections is applicable. The question to be determined by the Administrative Appeals Tribunal is whether there exist reasonable grounds for that claim.

76. Paragraph 32(f) will insert a new sub-section 58(7) which provides for the Administrative Appeals Tribunal to be empowered to give access to prior documents where an agency or a Minister does not rely on the prior documents ground for refusing access to a document in accordance with the request.

77. The objective of the amendment is to give the Administrative Appeals Tribunal a power to do what was always the intention, namely, to be able to make a decision to give access to prior documents that a decision-maker could have made under the Act. The new sub-section 58(7) will apply where application is made to the Tribunal for a review of a decision refusing to grant a person access to a document in accordance with a request and -

- . the agency or Minister did not rely on the prior documents ground in making the decision; or
- . where the decision is deemed to be made under sub-section 56(1) of the Principal Act, the agency or Minister informs the Tribunal that it is not intended that access be refused on the prior documents ground; or
- . where the agency or Minister informs the Tribunal that it is no longer intended that access be refused on the prior document ground.

In those circumstances the Tribunal is to review the decision as if the prior documents ground were not a ground for refusal of access to a document.

Clause 33 - Procedure upon exercise of powers under sub-section 58(4), (5) or (5A)

78. Clause 33 inserts a new section 58A that sets out the consequences attaching to a determination by the Administrative Appeals Tribunal that there do not exist reasonable grounds for claiming that a document is exempt, or that information about the existence or non-existence of a document should not be disclosed in the exercise of its powers under sub-section 58(4), (5) or (5A). In such a case, the appropriate Minister (as defined in new sub-section 58A(9)) is required to decide whether or not to revoke the certificate in issue.

79. New paragraph 58A(2)(a) will provide that where the Minister decides to revoke a certificate under sub-section 33(2), 33A(2), 34(2) or (4) or 35(2) or (4), the claim that the document to which the certificate relates is exempt shall be taken to have been withdrawn. The new paragraph 58A(2)(b) will provide that where the Minister decides to revoke a certificate under sub-section 33(4) or 33A(4), he shall inform the applicant of the existence or non-existence of the document to which the certificate relates.

80. If, however, the Minister decides not to revoke the certificate, the new sub-section 58A(3) will require the Minister to give notice of that decision to the applicant and cause a copy of that notice to be laid before each House of Parliament within 5 sitting days.

81. The proposed sub-sections 58A(4), (5) and (6) set out what is required to be included in a notice under the proposed sub-section 58A(3). Sub-section 58A(4) will require the Minister to state his findings on any material question of fact, the material on which those findings were based and the reasons for the decision. Sub-sections 58A(5) and (6) will

provide that the Minister is not required to include in the notice matter that would cause the notice to be exempt under section 33, 33A, 34 or 35 or information as to the existence or non-existence of a document or of a state of fact if that information would, if included in a document of an agency, cause that document to be exempt under those sections. This will ensure that the notice to be given does not have to include exempt matter.

82. The purpose of proposed sub-section 58A(7) is to avoid a double obligation to give a statement of reasons, by excluding section 13 of the Administrative Decisions (Judicial Review) Act 1977.

83. The purpose of proposed sub-section 58A(8) is to preserve the power which the person giving a certificate would otherwise have to revoke it, notwithstanding the specific power now to be conferred on the appropriate Minister to override a recommendation of the Tribunal.

84. Clause 33 will also insert the following proposed sections dealing with the composition and procedures of the Administrative Appeals Tribunal for the purpose of determining a question arising under sub-section 58(4), (5) or (5A).

85. Proposed section 58B will provide that the Administrative Appeals Tribunal shall be constituted in such a case by either three presidential members or a single presidential member - proposed sub-sections 58B(1) and (2). Proposed section 58B will also provide for application to be made to vary the constitution of the Administrative Appeals Tribunal, from a single presidential member to three presidential members, when it is determining such a question - proposed sub-section 58B(3).

86. Proposed section 58C relates to the procedures of the Administrative Appeals Tribunal when exercising its special jurisdiction in cases where a conclusive certificate has been given. These procedures are intended to provide adequate protection for documents and evidence relating to sensitive matters and, for that purpose, override discretions which the Tribunal would otherwise have under the Administrative Appeals Tribunal Act to decide on in camera hearings and to restrict or prohibit the publication of documents produced or evidence given to the Tribunal.

87. Proposed sub-section 58C(2) will require the Tribunal to hear in private any part of a proceeding in its special jurisdiction in which evidence or information is given or a document is produced to the Tribunal by an agency, a Minister or an intelligence agency. A private hearing is also required to be conducted of submissions made by an agency or a Minister in support of a claim to exemption of a document covered by a conclusive certificate or that information about the existence or non-existence of a document would be exempt matter. Subject to the discretion given by proposed sub-section 58C(4), the hearing of any other part of a proceedings before the Tribunal in exercising its special jurisdiction is required to be in public.

88. Proposed sub-section 58C(3) empowers the Tribunal to direct who may be present at a hearing in private under proposed sub-section 58C(2) and requires the Tribunal to give directions prohibiting the publication of documents produced, evidence given and submissions made to the Tribunal at such a hearing.

89. Proposed sub-section 58C(4) substantially repeats the ordinary powers of the Tribunal under the Administrative Appeals Tribunal Act to make orders as to in camera hearings and the prohibition or restriction of publication of evidence given to the Tribunal.

90. Proposed sub-section 58C(5) has the effect that an order by the Tribunal does not prevent the disclosure of matter by a person in the course of his duties.

91. Proposed section 58D is consequential upon proposed new sub-section 58B(2). The Administrative Appeals Tribunal Act 1975 does not make provision for the manner in which questions of law arising before the Tribunal are to be determined in a case where the Tribunal is comprised by three presidential members, since the Act does not provide for a Tribunal to be so constituted. Proposed section 58D therefore modifies the relevant section of the Administrative Appeals Tribunal Act 1975, by providing that -

- (a) where one only of the presidential members constituting the Tribunal is a Judge, a question of law is to be decided in accordance with his opinion; and
- (b) in the case where two or more of the members constituting the Tribunal are Judges, a question of law is to be decided according to the opinion of the majority of the members constituting the Tribunal.

92. Proposed section 58E will limit the power of the Administrative Appeals Tribunal to require the production of a document in respect of which there is in force a certificate under section 33, 33A, 34, 35 or 36. In such a case the Tribunal may only require that the document be produced for inspection by the presidential member or members constituting the Tribunal for the purpose of determining the relevant question. Where a document has been so produced, the Tribunal will be required to return the document to the person who produced it without permitting a person other than a member of the Tribunal as constituted for the particular proceeding, or a member of the staff of the Tribunal in the course of his duty, to have access to it.

93. Proposed new section 58F provides a procedure by which a State or the Northern Territory may challenge before the Administrative Appeals Tribunal a decision to give access to a document on the ground that it is not an exempt document. The proposed new section empowers the State or the Northern Territory, as the case may be, to apply to the Administrative Appeals Tribunal for a review of the decision of the Minister or agency granting access to the document on the ground that the document is properly an exempt document under section 33A of the Act. The proposed new section 58F is consequential upon proposed new section 26A to be inserted by clause 14.

94. Where such an application has been made by the State concerned or the Northern Territory, the agency or Minister making the decision to release the document shall inform the person who requested access to the document.

95. Proposed new sub-section 58F(3) deals with the case where, following consultation between the Commonwealth and a State or the Northern Territory in accordance with the procedure under proposed new section 26A, an application for access to a document is refused and the applicant appeals to the Administrative Appeals Tribunal against the decision to refuse access. In such a case, the agency or Minister concerned is required forthwith to inform the State concerned or the Northern Territory, as the case may be. This is to give the State or the Northern Territory an opportunity to apply, in accordance with section 30 of the Administrative Appeals Tribunal Act, to be made a party to the proceeding.

Clause 34 - Parties

96. Clause 34 will amend section 60 to enable the Minister who will have authority to refuse to revoke a certificate in accordance with proposed new section 58A to apply to be a party to proceedings before the Administrative Appeals

Tribunal calling into question the claim to exemption of the document in respect of which the certificate was given. That Minister may not be the Minister who issued, or whose delegate issued the certificate in question.

Clause 35 - Application of section 28 of Administrative Appeals Tribunal Act, & c.

97. Clause 35 will add a new sub-section 62(2) enabling application to be made to the Administrative Appeals Tribunal for a declaration that a notice under section 26 is not adequate. Where the Tribunal finds that such a notice is inadequate, the person who gave the notice shall furnish to the applicant an additional notice containing further and better particulars in relation to the matters in accordance with the decision of the Tribunal.

Clause 36 - Tribunal to ensure non-disclosure of certain matters

98. Clause 36 is a drafting amendment to make clear that the Administrative Appeals Tribunal is not to include exempt matter in a decision it gives.

Clause 37 - Production of exempt documents

99. Clause 37 is consequential upon clause 32. Section 64 of the Principal Act provides that the Administrative Appeals Tribunal may not require the production to it of a document in respect of which a conclusive certificate has been given. With the transfer to that Tribunal of the jurisdiction of the Document Review Tribunal under the Principal Act, the Administrative Appeals Tribunal may require the production of such a document in accordance with proposed new section 58E - see clause 33.

Clause 38 - Evidence of certificates

100. This amendment is consequential upon clause 17.

Clause 39 - Tribunal may make recommendations that costs be available in certain circumstances

101. Clause 39 will insert a new section 66 to empower the Administrative Appeals Tribunal, in certain circumstances, to recommend to the Attorney-General, that the costs of an applicant appearing before it be paid by the Commonwealth.

102. Such a recommendation may be made where the applicant is successful, or substantially successful, before the Tribunal (proposed sub-section 66(1)).

103. In deciding whether to make such a recommendation, the Tribunal is required to have regard to the following matters and may have regard to such other matters as it sees fit :-

- (a) whether payment of the costs would cause financial hardship to the applicant;
- (b) whether the Tribunal's decision will be of benefit to the general public;
- (c) whether the decision will be of commercial benefit to the person making the application; and
- (d) the reasonableness of the decision under review.

104. Clause 39 also repeals existing sections 66 to 69 (inclusive) consequential upon the abolition of the Document Review Tribunal.

Clause 40 - Repeal of Part VII

105. Clause 40 will repeal Part VII of the Principal Act which provides for the establishment and procedure of the Document Review Tribunal.

Clause 41 - Protection against certain actions

Clause 42 - Protection in respect of offences

106. Sections 91 and 92 of the Principal Act provide certain protection against legal proceedings for a person who gives access to a document to which access is required to be given by the Freedom of Information Act. Because access is not required to be given to a document, other than a document relating to the personal affairs of the applicant for access, which came into the possession of a Minister or agency more than 5 years before the date of commencement of the Act, the protection of sections 91 and 92 is not available where access is given to such a document. The purpose of clauses 41 and 42 of the Bill is to extend the protection of sections 91 and 92 to the giving of access to these so-called "prior documents".

Clause 43 - Reports to Parliament

107. The amendment to sub-section 93(1) proposed by paragraph 43(a) will require that the Attorney-General's annual report on the operation of the Principal Act, be tabled in the Parliament no later than 31 October in each year commencing with the annual report for the year ending 30 June 1985.

108. Paragraph 43(b) is consequential upon the abolition of the Document Review Tribunal.

Clause 44 - Regulations

109. Clause 44 will amend sub-section 94(3) to make clear that where, in accordance with a request, access is granted to an exempt document or to a 'prior document' outside the range of prior documents to which a person is entitled under section 12(2), charges may be levied in accordance with the Freedom of Information (Charges) Regulations.

Clause 45 - Transitional provisions

110. The transitional provision provides that an applicant who is entitled to apply for internal review of a decision refusing him access by virtue of section 12, 33, 34, 35, 37, 39 or 40 of the Principal Act may, within 14 days of clause 45 coming into operation, apply to have his request reconsidered afresh as if it had been lodged on the date he made his application, i.e., under those sections as proposed to be amended by the Bill.