

Security, defence and international relations (clause 23)

16.1 There is no serious dispute that an exemption protecting the security, defence or international relations of the Commonwealth is necessary, and equally there is little dispute that the criterion should be whether disclosure would prejudice one of these interests. The only dispute concerns how this determination of prejudice should be made. Under the Bill, it has to be made by a minister or principal officer, who may attach a certificate to a document certifying conclusively that disclosure of the document would prejudice the interest in the defined fashion and that the document is thereby exempt. A certificate may be placed upon a document at any time, whether or not the document has been requested and the certificate may be of indefinite duration.

16.2 The relevant provision is clause 23 which provides in part:

23. (1) A document is an exempt document if disclosure of the document under this Act would be contrary to the public interest for the reason that the disclosure—

(a) would prejudice—

- (i) the security of the Commonwealth;
- (ii) the defence of the Commonwealth;
- (iii) the international relations of the Commonwealth; or
- (iv) . . .

(b) would divulge any information or matter communicated in confidence by or on behalf of the Government of another country . . . to the Government of the Commonwealth or a person receiving the communication on behalf of that Government.

(2) Where a Minister is satisfied that the disclosure under this Act of a document would be contrary to the public interest for a reason referred to in sub-section (1), he may sign a certificate to that effect and such a certificate, so long as it remains in force, establishes conclusively that the document is an exempt document referred to in sub-section (1).

(3) Where a Minister is satisfied as mentioned in sub-section (2) by reason only of matter contained in a particular part or particular parts of a document, a certificate under that sub-section in respect of the document shall identify that part or those parts of the document as containing the matter by reason of which the certificate is given.

(4) The responsible Minister of an agency may, either generally or as otherwise provided by the instrument of delegation, by writing signed by him, delegate to the principal officer of the agency his powers under this section in respect of documents of the agency.

(5) A power delegated under sub-section (4), when exercised by the delegate, shall, for the purposes of this Act, be deemed to have been exercised by the responsible Minister.

(6) A delegation under sub-section (4) does not prevent the exercise of a power by the responsible Minister.

16.3 Much of the considerable criticism of clause 23 is a criticism of conclusive certificates in general, and we have repeated and endorsed that criticism in Chapter 15. Some critics have complained in addition that the procedure established in clause 23 is deceptive, in that it ignores the existence of the security classification system. They point out that if a document is already classified it is probable that a conclusive certificate will be attached to the document if and when requested. Some support for this contention may be found in the submission from the Department of Foreign Affairs, which said that 'a valid security classification . . . is *prima facie* ground for exemption under section

23 (1)'.¹ There is clearly a large number of classified documents in existence to which the exemption could thus apply—for instance, the Department of Foreign Affairs estimates that its *current* file holdings include 6 million documents, a high proportion of which are classified;² while the Department of Defence indicated that 65 000 new files are created annually, 20% of which are classified 'Confidential' or above.³ If we accept that security stamps are over-used at present, as some witnesses have put to us and are likely to be so in the future, then clause 23 incorporates indirectly a system that is at odds with the presumption of openness that underlies the Bill.

The equivalent United States exemption

16.4 An illustration of a similar result may be found in the history that attaches to the equivalent exemption in the United States Act. That exemption, which expressly incorporated the security classification system, was interpreted in 1973 by the Supreme Court in *EPA v. Mink*⁴ so that an agency could withhold any document which bore a security classification. The Court would not question the propriety of the classification, nor would it inspect classified documents in order to separate non-exempt from exempt information. This decision was in fact criticised by one of the judges of the Court, Mr Justice Douglas, in a dissenting judgment in which he declared that as a result of the Court's decision 'the much-advertised Freedom of Information Act is on its way to becoming a shambles'.⁵ It was pointed out by critics in subsequent congressional hearings that, by this decision, the Act failed to touch the one billion (US) or more existing classified documents. Other evidence was also given revealing the abuses of the classification system: for instance, that 55 000 government employees were authorised to classify a document, that at least sixty-six different classification marks existed, and that the number of classified documents could safely be reduced by at least two-thirds.⁶

16.5 The effect of the Supreme Court ruling was ultimately changed in two ways. First, the United States Act was amended to provide that the Court could inspect any document, and also to provide that the Court could determine whether or not a document was in fact properly classified. Under the classification system, documents can be classified only if an unauthorised disclosure could reasonably be expected to cause at least damage to the national security (the Court in effect now has a power—albeit still unused—to determine whether disclosure would have this effect).⁷ Secondly, the classification system was itself reformed, initially in 1972 by President Nixon and lately in June 1978 by President Carter.⁸

¹ Submission no. 150, incorporated in *Transcript of Evidence*, p. 2380. The Department did indicate that a marking, although *prima facie* acceptable, would be reviewed upon receipt of a request.

² *ibid.*, pp. 2379–80.

³ Submission no. 153, incorporated in *Transcript of Evidence*, p. 1998.

⁴ 410 US 73 (1973).

⁵ *ibid.* (Slip Opinion p. 5).

⁶ See discussion and references in Minority Report Bill: Australia, Royal Commission on Australian Government Administration (RCAGA) (Dr H. C. Coombs, Chairman), *Appendix, Volume Two*, Parl. Paper 187/1976, Canberra, 1977, Section 3, Explanatory Memorandum, pp. 110 ff.

⁷ The change is discussed and references given in J. McMillan, 'Freedom of Information in Australia: Issue Closed' *Federal Law Review* 8, 1977, pp. 399–404.

⁸ Executive Order 11652, as amended by Executive Order 11714 and Executive Order 11862; and Executive Order 12065.

The effect of those changes has been to narrow the criteria for classification; to limit the persons who are authorised to classify a document; to require that each classification mark bear the date of the classification and the name of the classifier; to attach personal responsibility for classification to the classifier; and to provide that most documents are to be automatically declassified after six years. Unclassified documents may be classified after a request is received under the Freedom of Information Act, but only the agency head or his deputy has power to classify the document at this stage.

16.6 The combined effect of these reforms has been highly successful. For instance, between 1972–1975 there was a 75% reduction in the number of authorised classifiers, a 6% reduction in the number of documents classified and a 41% reduction in the classification of documents as 'Secret'. In addition, a number of previously classified documents has been disclosed as a result of suits taken under the Freedom of Information Act. In none of these has a court unilaterally de-classified material. The apparent impact of the courts' reserve power has alone been sufficient to encourage an agency to voluntarily de-classify material after a litigant has filed suit.⁹

16.7 The Australian Government's answer to these criticisms is that the classification of a document is irrelevant to the question of whether it is exempt under the Freedom of Information Bill. An exemption is gained only where a minister or permanent head makes an independent judgment that a document should be withheld; any classification that may have been stamped upon a document, perhaps by a much more junior officer, is in no way binding upon the minister or permanent head.¹⁰ While this answer may be legally correct, we are firmly of the opinion that bad classification practices will adversely affect the operation of the Bill. First, the classification marking is meant to indicate to those inside the Public Service that a document is one requiring special protection. Clearly such a marking would have some presumptive weight with a minister or permanent head (or more likely, the officer who submitted a recommendation to either). Secondly, classified documents are capable of being withheld under other exemptions as well—for instance, under clause 26 if in addition to containing defence information the document also contained an advice, opinion or recommendation. In respect to these other exemptions it may not be the minister or permanent head who is making the decision to withhold or release a document. We doubt whether an official would be prepared to arrive comfortably at a decision that a document could in the public interest be released under clause 26 if the document nevertheless bore a classification marking of some sort. Thirdly, the classification system has an educative effect within the Public Service. If markings are applied liberally, an atmosphere of caution and secrecy is likely to prevail; however, if all officers appreciate that great care is to be taken before classifying a document, it is likely that they will appreciate the countervailing claims that the public may have for access to documents that touch in one way or another upon issues of security or defence.

The Protective Security Handbook

16.8 However we do not think that it is necessary to incorporate by reference the classification system within the Freedom of Information Bill. It would be sufficient if the classification system were reformed so that it was compatible with the

⁹ See McMillan, cited footnote 7.

¹⁰ Australia, Attorney-General's Department, *Freedom of Information Bill 1978: Background Notes*, AGPS, Canberra, 1978, p. 9.

Bill and did not permit or condone practices that may be at odds with the objectives of openness espoused in the Bill. A consideration of the present security classification system, which is established by the *Protective Security Handbook* (see Appendix 3) issued in June 1978, indicates clearly that some amendments are required to that system.

16.9 In the first place the criterion adopted for classification on the one hand is different from the criterion for an exemption on the other. Four classifications applying to national security are provided for in the *Protective Security Handbook*¹¹:

- (a) 'Top Secret', for documents whose unauthorised disclosure could cause 'exceptionally grave damage' to the 'national security' (which is defined in paragraph 2.1 of the *Handbook* to mean the defence, security or international relations of Australia);
- (b) 'Secret', for documents whose unauthorised disclosure could reasonably be expected to cause 'serious damage' to the 'national security';
- (c) 'Confidential' for documents whose unauthorised disclosure could reasonably be expected to cause 'damage' to the 'national security'; and
- (d) 'Restricted', for documents whose unauthorised disclosure 'could possibly be harmful to the national security'.

There is also a classification of 'In Confidence' for other documents that may affect the national interest, or contain material supplied in confidence to the government relating to the personal affairs of a person.

16.10 It is probable that the criterion used in the Bill ('would prejudice') approximates the criterion for 'Confidential' documents ('could reasonably be expected to cause damage'). In our opinion either the Bill or the classification system must be altered so that parallel standards are contained in each. Not only is it confusing for officers to have to make in respect of any document two possible judgments about the effect that disclosure would have (prejudice or damage?) but it is also pointless. The main purpose for the security classification system is to provide internal guidance for officers on what documents must be protected. This object is expressed clearly by the Prime Minister, Rt Hon. J. M. Fraser, in the Foreword to the *Protective Security Handbook*:

It is the firm view of the Government that Australian citizens should have access to information held by or on behalf of Government, unless there are strong reasons for non-disclosure. One of the most important reasons for non-disclosure is national security In such cases, it is the responsibility of every citizen—and especially of persons in government employment and members of the Defence Force—to ensure that information is safeguarded and not disclosed without authority. The purpose of this book is to set out the reasonable and necessary requirements for the protection of such information.¹²

16.11 In other words, the Bill and the *Protective Security Handbook* both serve the same purpose: to provide guidance on what documents should or can be disclosed. Accordingly the criteria should be the same. It matters little in our opinion whether it is the Bill or the security classification system that is altered, although we suspect that it would be more convenient to adopt the language of 'damage' contained in the *Handbook*. This is the terminology that is used in other countries with which Australia has inter-locking defence and diplomatic arrangements, and

¹¹ See Appendix 3, p. 00.

¹² See Appendix 3, p. 00.

consistency is desirable. Moreover, the word 'damage' is (terminologically speaking) better able to be expressed in degrees (exceptional damage, serious damage) than the word 'prejudice'.

16.12 If consistency is to be achieved, we think internal consistency within the *Handbook* is also necessary. Presently three qualifications are used to describe the likelihood of damage—'could cause', 'could reasonably be expected to cause', and 'could possibly be'. To our mind, the second of the formulations is the preferred one. In passing, we would draw the Government's attention to an even stricter test now established in the United States by President Carter, whereby it must be reasonably expected that unauthorised disclosure could cause *identifiable* damage to the national security.

16.13 Recommendation: The criteria of prejudice to the security, defence or international relations of the Commonwealth employed in the Bill should be brought into line with the language of the *Protective Security Handbook*.

16.14 It is our expectation that a request for a classified document would be treated like any other request—that is, the document would be reviewed to determine whether it contained sensitive information (or was properly classified) and to see further whether a discretionary release of the document could in any case be made (clause 12). However, if the Bill and the *Handbook* were made compatible, then in most cases only documents that are presently marked 'Confidential' or above would be exempted. Documents that are presently marked 'Restricted' would not be entitled to protection. That classification marking should in fact be discarded, since it would no longer serve any useful purpose in alerting officers to the danger of disclosure.

16.15 A view has however been put to us that protection should not be denied under the Bill to documents that are presently marked 'Restricted' or indeed are unclassified. According to this view, those learned in security matters can gain useful information by piecing together snippets of 'Restricted' or unclassified information gleaned from a number of sources. It is even possible that sensitive information concerning the methods, associations, interests and capacities of intelligence agencies could be unwittingly disclosed in this fashion. A similar view has been put in a recent British Government White Paper, *Reform of Section 2 of the Official Secrets Act 1911*. The paper, in rejecting the proposal of the Franks Committee¹³ that criminal sanctions against unauthorised disclosure in the security and intelligence area should be confined solely to documents classified 'Top Secret', and 'Secret', said:

The Government has concluded that information relating to security and intelligence matters is deserving of the highest protection whether or not it is classified. This is pre-eminently an area where the gradual accumulation of small items of information, apparently trivial in themselves, could eventually create a risk for the safety of an individual or constitute a serious threat to the interests of the nation as a whole.¹⁴

16.16 We cannot accept this view. It is a view which is totally one sided, and claims that exclusive consideration should be given to those arguments that favour non-disclosure. Once the Freedom of Information Bill is enacted, there will henceforth be two competing interests that have to be balanced (disclosure and non-disclosure), and it is to be expected that a result will often be reached where one interest is displaced by another and jeopardised to that extent. We

¹³ Great Britain, Departmental Committee on Section 2 of the Official Secrets Act 1911 (Lord Franks, Chairman), *Report*, Cmnd. 5014 HMSO, London, 1972.

¹⁴ Cmnd. 7205 July 1978, para. 31.

do not deny that there may be instances where unclassified information could be released and reveal something about Australia's security. Even security is not an interest that will always, and totally, outweigh the public's interest in access. Indeed, clause 23 as presently drafted concedes this point as it provides that a document is exempt if disclosure 'would be contrary to the public interest for the reason that the disclosure would prejudice the security of the Commonwealth'. But, in any case, we are confident that those occasions when sensitive information will be released will be rare, and that the damage will be minimal—if it were otherwise, quite clearly the information should be given a higher classification. We should also bear in mind that in the United States only documents marked 'Confidential' are protected. In excess of 40 000 freedom of information requests are made annually to the Department of Defense (besides the requests to many other agencies with classified material). Although there have been complaints about the danger of the release of sensitive material—and the volume of requests undoubtedly heightens this danger—we are not aware that the exemption in the United States Act is regarded as depriving the Department of Defense of its ability to protect sensitive information.¹⁵ Nor does there appear to be any suggestion that an additional classification (to cover material of a lower grading than 'Confidential') should be created. As we have noted, these problems arise in large measure because of the great volume both of classified material and of requests in the United States. The scale of operations in Australia is such that we do not anticipate problems of that nature here.

16.17 In the second place, if the classification markings are to be compatible with the criteria in the Bill, clearly there should not be any separate markings or systems of classification that could detract from, or cause confusion with, the system established by the *Handbook*. For instance, there is a separate practice by which all Cabinet documents are marked 'Confidential'. If this practice were to continue it would inevitably create confusion as to whether a document was entitled to protection and as to the exemption under which such protection should be granted. We are not opposed to the marking of Cabinet documents so as to distinguish them from others, but we do feel that a new system of markings should be introduced and we discuss this further in Chapter 18. We nevertheless acknowledge that there are some markings that are internationally used and understood, and that great disruption could be caused by discarding them. Markings like 'In Confidence', which come into this category, will most likely have to be retained.

16.18 Recommendations:

- (a) The national security classification 'Restricted' should be discarded as serving no useful purpose in alerting officers to the danger of disclosure.**
- (b) Cabinet documents should be distinctively marked but should not carry national security classifications unless such classifications are justified by their contents.**

Classification of portion of a document

16.19 Clause 20 of the Bill (discussed also in Chapter 10) provides that an agency must separate exempt and non-exempt information that is contained in

¹⁵ Allen Weinstein, 'Open Season on "Open Government"'. *New York Times Magazine*, 10 June 1979, p. 32; *Daily Telegraph* (London), 2 July 1979, p. 5.

a document and disclose the latter if the applicant so wishes. It is in the following terms:

20. (1) Where—
- (a) a decision is made not to grant a request for access to a document on the ground that it is an exempt document;
 - (b) it is practicable for the agency or Minister to grant access to a copy of the document with such deletions as to make the copy not an exempt document; and
 - (c) it appears from the request, or the applicant subsequently indicates, that the applicant would wish to have access to such a copy,
- the agency or Minister shall grant access to such a copy of the document.
- (2) Where access is granted to a copy of a document in accordance with sub-section (1)—
- (a) the applicant shall be informed that it is such a copy and also informed of the provision of this Act by virtue of which any matter deleted is exempt matter; and
 - (b) section 22 does not apply to the decision that the applicant is not entitled to access to the whole of the document unless the applicant requests the agency or Minister to furnish to him a notice in writing in accordance with that section.

Clause 23 (3) (quoted in para. 16.2) reiterates that this practice shall apply also to classified documents.

16.20 The present classification system could detract from this rule in three ways. First, there is no requirement in the *Handbook* that a classification marking indicate the portion of the document to which it applies (if not all the document is of equal sensitivity). Indeed, the *Handbook* indicates the contrary. For instance, it indicates that

all classified books, pamphlets, letters, memoranda, papers . . . should be plainly and conspicuously marked with the appropriate classification at the top and bottom of each page, including the front cover, the title page, and the back of the rear cover or last page of books and pamphlets.¹⁶

Secondly, the *Handbook* requires that a file normally be classified at the level of the highest classified document contained in the file. This creates an obvious danger that any request for that file would be denied, notwithstanding that it also contains unclassified and possibly innocuous materials. Thirdly, the *Handbook* provides that 'a document must not bear a lower classification than the highest classification of any of its appendices or attachments.'¹⁷ This gives rise to the same danger.

16.21 We have little doubt that it is administratively feasible to require in the classification system that documents be classified in part or by portion. The recent Executive Order signed by President Carter instituting changes to the existing classification system in the United States requires that most documents be classified section-by-section, not as a whole. In explaining these changes, President Carter pointed out that most classification was in fact 'derivative', that is, based on references to other classified documents. If a previous document bore an overall classification because only one small portion of it contained sensitive information, then any later document referring to that earlier document would also be classified in full because there would be no way of telling whether the portion of the earlier document to which reference was made was a portion that contained the sensitive information. It would be possible to have an endless

¹⁶ See Appendix 3, p. 431.

¹⁷ See Appendix 3, p. 431.

chain of classified documents, only one of which (the document first classified) actually contained sensitive information. Accordingly, the United States system provides that:

In order to facilitate excerpting and other uses, each classified document shall, by marking and other means, indicate clearly which portions are classified, with the applicable classification designation, and which portions are not classified.¹⁸

In addition, a person is not vested with classification authority simply because he reproduces, extracts or summarises information that is already classified. Instead, he is to respect the original classification (after verifying, so far as practicable, that the classification is still current) and indicate further on the document the date for declassification review that is marked on the earlier document.

16.22 Recommendation: *The Protective Security Handbook* should be re-written to specify that a classification marking will indicate the portion of the document (if not all) to which it applies.

Declassification

16.23 Another amendment which in our opinion should be made to the *Protective Security Handbook* is in respect of declassification. It is widely accepted that a large volume of material is unnecessarily classified. Indeed, in evidence to the Committee the Secretary of the Department of Defence (Sir Arthur Tange) said 'I would readily agree, there is a good deal of overclassification'.¹⁹ The reason for this, as often as not, is not that the initial classification was inappropriate, but that the document does not require an enduring classification. In the *Protective Security Handbook* there are no rules regulating the declassification of material. What this will mean in effect is that any classified document will retain that status for thirty years, until it becomes subject to the Archives Bill. Under that Bill, its classification will continue only if the minister, principal officer, or designated official attaches a certificate to a document indicating conclusively that the document will not be available for public access.

16.24 Again, it is different in the United States. Until recently, under the classification system established by President Nixon in 1972, a document would be automatically declassified after a set number of years—twelve years for documents classified 'Top Secret', eight years for 'Secret' and six years for 'Confidential'. However, a document could be exempted from this general declassification schedule, and it was estimated that this occurred with 53% of documents. Since the declassification system was amended in 1978 by President Carter, it is provided that most documents (regardless of their classification) are to be automatically declassified after a maximum period of six years. Only agency heads or officials with 'Top Secret' classification authority (of which there are only 1400 among six million federal civilian and military employees) may classify a document for a longer period. But they must state why the longer period of classification is necessary, and the classification must in any case be reviewed within twenty years. A document may only remain classified beyond this period on the authorisation of the agency head and any such further classification must be reviewed at least every ten years.

¹⁸ Executive Order 12065.

¹⁹ *Transcript of Evidence*, p. 2019.

16.25 In our opinion, it is strongly desirable in the interests of freedom of information that a system for declassification be instituted on an administrative basis. There will always be a reluctance on the part of the Tribunal to review the classification of material, however dated the classification, and the only alternative to this is a system where declassification occurs automatically. In such a system *continued* classification will occur deliberately, by decision of a responsible official, and not as a matter of course. We have indicated throughout our Report that the presumption should be in favour of openness and that it is the decision to keep secret, not the decision to disclose, that should be the considered, deliberate one. We should add that none of the relevant departments has actively opposed the suggestion that a system for declassification should be instituted. Indeed, somewhat to our surprise, we found that none had even seriously considered the possibility when we raised it in evidence! Some concern was expressed by witnesses that a declassification system would give rise to administrative problems and initially impose an extra administrative burden upon those who are classifying documents. That much we acknowledge; yet we are sure that the time initially spent in instituting this system will be saved many times over in the long run. Unless documents are automatically declassified, reappraisals of the status of the document will have to be made whenever a request is received and possibly also when the document is transferred to the Archives Office. Time spent in these reviews will be saved if many documents become available automatically for public access.

16.26 Recommendation: A system for automatic declassification of national security documents should be instituted on an administrative basis.

The nature of the classification marking

16.27 The final comment we would make concerns the nature of the classification marking that should be recorded on a document. According to the *Protective Security Handbook* it is necessary in most instances to mark only the level of classification on a document. Only if the document is being circulated outside the office of classification does it have to bear details of the identity of the person who confirmed the classification if the original classifying officer was, in effect, of junior rank. Under the United States Executive Order the following details must be shown on the face of all classified documents:

- (a) the identity of the person who originally classified the document;
- (b) the office in which the document originated; and
- (c) the date at which declassification becomes effective, or subsequent review must occur.

16.28 If a declassification system is instituted in Australia, then clearly it will be necessary to indicate either the date of classification or of declassification. Administrative advantages could also accrue if this were done. For instance, if the identity of the classifier and the office in which he works are marked, it will be easier for another officer to verify the currency of the classification if and when any request under the Act for that document is received. Further, identification is desirable in the interests of accountable administration. Under the Freedom of Information Bill, an official who denies access to a document must disclose his identity when the applicant is informed of the denial. In this way some responsibility is placed on the officer involved. The officers who will be precluding access to security documents will often be the officers who have earlier classified these documents. For consistency at least, the names of those officers should be recorded on the documents so classified.

16.29 Recommendation: The following details should be shown on the face of all documents given a national security classification:

- (a) the identity of the person who originally classified the document;
- (b) the office in which the document originated; and
- (c) the date at which declassification becomes effective or subsequent review must occur.

Amendment of clause 23

16.30 On the basis of what we have already recommended, changes will be necessary to clause 23 if it is determined that the standards used in the *Protective Security Handbook* should be adopted in the Bill. We also recommend in the next chapter that clause 23 (1) (a) (iv) (protection of relations between the Commonwealth and any State) should be deleted.

16.31 There are two other changes to clause 23 that we feel are necessary. First we think that the reference to the public interest should be dropped. We have indicated in Chapter 15 that in our opinion these words are superfluous in this context. In other clauses where this phraseology is used, we have proposed that the public interest criterion be formulated in a manner similar to that in clause 26. However, we later recommend in this chapter that the Administrative Appeals Tribunal should have power to review a denial under clause 23. In our opinion it would be inappropriate for the Tribunal to decide, in the public interest, that documents should be released notwithstanding that disclosure could prejudice defence, security or international relations. Accordingly, the reference to public interest should be deleted from the clause.

16.32 Recommendation: Clause 23 (1) should be amended by deleting the redundant reference to public interest.

16.33 We are also of the opinion that clause 23 (1) (b), which exempts any information or matter communicated confidentially by another government to the Australian Government should be deleted. If the exemption remained, documents from two categories of governments would be protected—State governments and foreign governments. We indicate in Chapter 19 that there should not be an exemption specifically protecting information given by State governments. Concerning documents emanating from foreign sources, these are already protected by clause 23 (1) (a) (iii) which protects documents the disclosure of which would prejudice the international relations of the Commonwealth. In our opinion this is the appropriate standard to be adopted. If a foreign government requests seriously that its information be treated confidentially, then it is safe to assume that disclosure would prejudice relations with that government. We note that under the United States Freedom of Information Act there is no exemption specifically protecting information given by other governments, and indeed there have been occasions in the United States when disclosures have been made to Canadian and New Zealand citizens inquiring about the activities of their own governments (in areas other than defence and security). The United States Executive Order does indicate, however, that foreign government information should, unless there is an authorisation for its disclosure, be classified at least 'Confidential' and that it may remain classified for thirty years or more. We think that material provided to the Australian Government from foreign governments could be treated and protected similarly, if reference were made to it in the classification system, and the specific exemption for confidential material in clause 23 (1) (b) was dropped.

16.34 Recommendation: Paragraph 23 (1) (b), which exempts any information or matter communicated confidentially by another government to the Australian Government, should be deleted.

16.35 If all these recommendations are adopted, clause 23 (1) of the Bill would read:

A document is an exempt document if disclosure of the document under this Act could reasonably be expected to cause damage to:

- (a) the security of the Commonwealth;
- (b) the defence of the Commonwealth; or
- (c) the international relations of the Commonwealth.

Review by the Administrative Appeals Tribunal

16.36 It will already be clear from our earlier discussions of conclusive certificates and appellant rights that in our opinion an applicant denied access to a document pursuant to this clause should be entitled to appeal that denial to the Administrative Appeals Tribunal. The Tribunal's function would be to determine, in accordance with the criterion used in the Bill, whether disclosure would prejudice (or damage) defence, security or international relations. As the criterion used in the Bill would be parallel to that used in the *Protective Security Handbook*, the Tribunal would be determining in effect whether the document is properly classified. We stress that the Tribunal would not be making any broader judgment, on public interest grounds, as to whether disclosure would prejudice a defined interest. The Tribunal would be exercising a function similar in all respects to the function that is now exercised by courts under the United States Freedom of Information Act since it was amended in 1974. There has been no criticism, so far as we are aware, that the courts have misused this power or exercised it inappropriately. Instead, the prevailing practice in any freedom of information case brought under the national security exemption is for the court in the first instance to hear the case on affidavits. This means the government is given ample opportunity to justify the non-disclosure of documents without there being any risk that the documents will be unilaterally declassified or committed to the care of an office that can not properly protect it. We are confident that in Australia the Tribunal would not lightly order the disclosure of a classified document. What is more likely to occur is that when any appeal is lodged an agency will be compelled to reconsider seriously the earlier classification and decide whether any classification that is retained can be sustained, particularly by affidavit evidence. It is by this process alone in the United States that a large volume of previously classified material is now released since, in many cases, agencies are not prepared to justify a classification before a court.

16.37 We appreciate that the Tribunal is staffed by lawyers and by laymen, and it might be thought inappropriate to commit an important task of this nature to a person who does not have legal experience or training. We are prepared to concede the force of any such fear or hesitation, and recommend that, for the purposes of an appeal under this section, the Tribunal be constituted by a single presidential member. We appreciate also that such a member may not have a security clearance but in our opinion that is unnecessary. Classified documents are also handled by Cabinet ministers, and they do not have security clearances. We believe that judges as a class are as trustworthy as ministers. The issues arising out of review by the Tribunal are dealt with in Chapter 30.

16.38 Recommendations:

- (a) Clauses 23 (2)-(6) and 37 (5) should be deleted so that an applicant denied access to a document pursuant to clause 23 will be permitted to appeal to the Administrative Appeals Tribunal.**
- (b) Such an appeal should be heard by a presidential member of the Tribunal.**