

## Commonwealth–State relations (clause 23)

### The issues raised by clause 23

**17.1** The Freedom of Information Bill provides in clause 23 that a document is exempt if its disclosure would prejudice Commonwealth–State relations or disclose information received in confidence from other governments. It further provides that a minister or principal officer may issue a conclusive certificate to this effect. The relevant part of clause 23 provides:

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—

(iv) relations between the Commonwealth and any State; or

(b) would divulge any information or matter communicated in confidence by or on behalf of the Government of another country or of a State 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.

**17.2** These provisions were vigorously attacked in evidence before the Committee as being far too sweeping and very little was said in clear defence of them, even by representatives of the Commonwealth Government. Virtually the only supporters of the provisions as they stand were the State governments. The Committee agrees with those witnesses who argued that the provisions are too sweeping and that other exemptions make adequate provision for information about Commonwealth–State relations which does need protection. Moreover we are firmly of the view that there should be no conclusive certificates in this area. This chapter outlines our reasons for coming to these conclusions and recommends changes to the Bill to take account of them.

**17.3** Many witnesses argued that the provisions were drawn too broadly. *The Advertiser*, for example, did

not accept that prejudice to Commonwealth–State relations is a good ground for withholding documents. The public cannot have too much information in a federal system about what is going on between the Commonwealth and the States, or on how the actions of one may affect the other.<sup>1</sup>

<sup>1</sup> Submission no. 128, incorporated in *Transcript of Evidence*, p. 1895.

The Women on Welfare Campaign said that 'many issues concerning welfare are involved in the interface of Commonwealth-State responsibilities and prescriptions on release of such material can prejudice the rights of citizens'.<sup>2</sup> The New South Wales Division of the Young Liberal Movement of Australia said that

The exemption relating to documents the disclosure of which would 'prejudice Commonwealth-State relations' is too widely drawn given the extent of such relations in Australia. Partisan political considerations (a major determinant of Commonwealth-State relations) should not be allowed to limit public access to Government documents.<sup>3</sup>

*The Sydney Morning Herald* thought that the provisions would 'permit the exemption of vast numbers of innocuous documents'.<sup>4</sup>

**17.4** Examples of the sorts of documents which might be withheld were given by a number of witnesses. The South Australian Council of Social Service (SACOSS), for example, said that the provision in question would

only serve to exacerbate the already difficult administration of capital grants programs under Section 96 of the Constitution. The voluntary sector already experiences difficulty in following guidelines for funding which often vary between the State and Federal Governments. Any resolution of these difficulties (should it ever occur) would currently be an internal process which may not always be in the interests of the voluntary sector and their clients . . . . Another example, in a related area, is the difficulty experienced by some Local Government Authorities with the Commonwealth Road Grants Program. It is the opinion of some councils that funds which are allocated to the State Highways Department by the Federal Department for dispersal to local councils for local roads, are adjusted by the Department to complement the State Roads Program. At present it is impossible to check on this, nor is it possible for the councils to effectively plan ahead for the amount of funding they can expect.<sup>5</sup>

As SACOSS pointed out, 'scrutiny and advice are essential in such situations to ensure that administrative decisions are not made to facilitate the staff of welfare departments but rather ease the difficulties of those seeking a service from a government department'.<sup>6</sup>

**17.5** Other examples of documents which might be caught up in the provisions of the existing legislation in a harmful way would include the voluminous reports and documents produced by the Commonwealth Government in its capacity as a member of joint Commonwealth-State bodies. These are numerous. Some are ministerial councils, including the Australian Agricultural Council, the Fisheries Council and the Forestry Council. Others deal with the marketing of primary produce (for example, the Australian Apple and Pear Corporation, the Australian Canned Fruits Board, the Australian Dairy Corporation, the Australian Dried Fruits Control Board and the Australian Egg Board); liaison on health and welfare matters (for example, the National Health and Medical Research Council, the National Consultative Council on Social Welfare and the National Advisory Council for the Handicapped); liaison with representatives of community or ethnic groups (for example, the Australian Ethnic Affairs Council and the National Aboriginal Consultative Council); and consultation on industrial matters. Further examples include the Commonwealth Grants Commission, the Commonwealth Legal Aid Commission and the Criminology Research Council.

<sup>2</sup> Submission no. 113, incorporated in *Transcript of Evidence*, p. 1776

<sup>3</sup> Submission no. 126, p. 2.

<sup>4</sup> Submission no. 111, p. 4.

<sup>5</sup> Submission no. 94, incorporated in *Transcript of Evidence*, p. 1746.

<sup>6</sup> *ibid.*

**17.6** In addition, the Commonwealth contributes to the work of many non-government or voluntary organisations, either on a continuing basis or from time to time, and the State Governments are similarly involved. It would obviously be wrong if the exemption were to be used to draw a veil over Commonwealth involvement with, for example, the Australian Council of Social Service, the Australian Council on the Ageing, the International Social Service (Australia), the Australian Council on the Rehabilitation of the Disabled and the Red Cross. The information required, created and disseminated by the Commonwealth Government in relation to these and many other bodies, and in relation to the many Commonwealth programs which affect them, includes virtually all categories of government information.

**17.7** The sorts of documents encompassed by the Commonwealth–State description are indeed so various that other exemptions in the Bill will be sufficient in most cases to cover them. This was pointed out by many witnesses. The Victorian Committee for Freedom of Information said that ‘documents affecting Commonwealth–State relations are surely covered by the other exemptions, e.g., Cabinet documents, policy making material, and information supplied confidentially. In such areas as law enforcement plans and financial matters the Bill also offers adequate protection.’<sup>7</sup> Each of these exemptions is discussed in a subsequent chapter.

**17.8** The Commonwealth Government has not rebutted these criticisms. The Explanatory Memorandum states merely that ‘the proposal to exempt documents the disclosure of which would prejudice Commonwealth–State relations takes account of the particular significance of Commonwealth–State relations to the Australian Federation’.<sup>8</sup> This does not however argue the proposition. The 1976 IDC Report said little more, merely commenting that

in the Australian system the conduct of relations between the federal government and the State governments, sovereign in their respective spheres, has always been a matter of major importance. This recognises, quite apart from the constitutional and legal aspects, the impact that the effect of variations in those relations might have on the interests of the nation as a whole. As a result, matters which might affect those relations in any substantial way have been dealt with at the highest level. For example, there is a traditional arrangement that all contacts between the Commonwealth and State governments on matters of policy or requests for assistance are made in the first instance between the Prime Minister and the Premier of the State concerned.<sup>9</sup>

However, the 1976 IDC also pointed out that ‘no explicit exemption of this kind’ exists in the United States Act and that in Canada the exemption is contained in guidelines relating to the production of papers by the government in the Parliament.<sup>10</sup> The introduction of a sweeping legislative provision, such as the present Bill contains, does not seem to be warranted by the experience of other countries.

**17.9** For these reasons we can see no justification for conclusive certificates in this area. Exemptions should rather be claimed on the grounds that:

- (a) disclosure would be prejudicial to Commonwealth–State relations; and
- (b) such disclosure would be contrary to the public interest.

Moreover exemptions under this clause should be appealable to the Administrative Appeals Tribunal.

<sup>7</sup> Submission no. 44, p. 2, footnote 3.

<sup>8</sup> *Explanatory Memorandum to the Freedom of Information Bill 1978*, p. 16.

<sup>9</sup> Australia, *Policy Proposals for Freedom of Information Legislation: Report of Inter-departmental Committee*, Parl. Paper 400/1976, Canberra, 1977, para. 6.4.

<sup>10</sup> *ibid.*

**17.10** In a letter to the Committee, the Chief Minister of the Northern Territory informed us that he had written to the Prime Minister seeking confirmation that the Freedom of Information legislation will not apply to the 'past, present or future activities and documents of the Northern Territory Government and its authorities'.<sup>11</sup> In view of the status of the Northern Territory as a self-governing territory, we support the view of the Chief Minister. It is also appropriate that information supplied to the Commonwealth by the Northern Territory should be treated in the same way as we propose for information supplied by a State. No such considerations apply in the case of the Australian Capital Territory as it is not self-governing.

**17.11 Recommendation: The Bill should be amended to include a separate test of public interest in determining whether documents relating to Commonwealth-State relations should be exempt and to permit appeals on this exemption to the Administrative Appeals Tribunal.**

#### **Information supplied to the Commonwealth by a State**

**17.12** The position of the States as suppliers of information to the Commonwealth Government needs to be considered separately. The State governments went to some lengths to explain their problems in this regard, but their positions varied. South Australia did not accept that 'documents affecting relations with the States . . . should be left solely with the Commonwealth Government, whether through a Minister or a delegated official'.<sup>12</sup> It said that it was likely that circumstances would arise where there would be genuine disagreements about the sensitivity of material; and that State governments could be aware of consequences following the release of material which the Commonwealth would not know about. It therefore proposed that requests for information provided by a State government should be referred back to the originating government for decision.

**17.13** The Victorian Government went somewhat further. It referred to information generally relating to Commonwealth-State relations whether supplied by a State government or not. It also referred to situations in which a State government might prefer that information should be released against the wishes of the Commonwealth Government. It argued that 'consideration should be given to a provision for consultative machinery between Federal and State governments'.<sup>13</sup>

**17.14** The Western Australian Government thought that 'the Bill should be amended to provide for State participation in decisions as to whether a certificate should be issued under Clause 23 (2) and, in cases where such a certificate is not granted, as to whether State Government documents should be disclosed'. It suggested that under the present Bill it might be necessary for a State 'to mark all of its correspondence to the Commonwealth "confidential" so as to bring its documents within Clause 23 (1) (b)'.<sup>14</sup>

**17.15** The Queensland Government went further again. It argued that 'any information which is exchanged between the Commonwealth and a State' should remain confidential until both Commonwealth and State governments reached agreement about disclosure.<sup>15</sup> This would appear to cover not only information

<sup>11</sup> Submission no. 157, p. 2.

<sup>12</sup> Submission no. 155, pp. 1-2.

<sup>13</sup> Submission no. 121, pp. 10-11.

<sup>14</sup> Submission no. 41, p. 3.

<sup>15</sup> Submission no. 108, p. 6.

supplied by a State government to the Commonwealth Government but also information which arises in exchanges between such governments as in conferences and meetings and the like.

**17.16** We agreed that the interests of the State governments should be considered when decisions relating to the disclosure of information affecting them are made. We note that the Commonwealth Government has expressed its intention in this regard by saying that 'where the possibility exists of prejudice to Commonwealth-State relations there will be consultation with the States'.<sup>16</sup>

**17.17** It will however be for the Commonwealth Government to decide how to carry out that consultation. The Government has already judged that 'a compulsory consultation process was . . . unnecessary and insufficiently flexible'<sup>17</sup> and we agree. Moreover, it is neither possible nor necessary to attempt consultation on every issue. It is not possible to refer back to the States for approval all requests for information which may involve information originally supplied by a State. Sometimes information is informally referred backwards and forwards in letters or telephone conversations and consultation may not then be possible. The Attorney-General's Department has made this point in saying that consultation would then 'have to extend to cases where the information communicated by a State government was included in a document produced by a Commonwealth agency: in some cases documents of this kind might be difficult to identify'.<sup>18</sup> For the most part we agree with the Secretary of the Prime Minister's Department that 'consultations should overcome most of the problems'.<sup>19</sup> As he also said, Premiers are 'pretty robust people and prejudice to relations is something that would happen but rarely'.<sup>20</sup> We agree with him that the State governments when they pass their own freedom of information legislation are unlikely to wish the Commonwealth Government to have veto powers.

**17.18** We do however believe that an elaboration of the Reverse-FOI provisions suggested in Chapter 25 would meet the reasonable expectations of the State governments. Here we set out, in summary form, the various possibilities which could arise when State documents are supplied to the Commonwealth. For completeness we note also the situation which should apply when Commonwealth documents are supplied to the States.

**17.19** *State document marked 'in confidence' which the Commonwealth wishes to release.* If State governments mark information which they supply 'in confidence', then the Commonwealth would refer requests for that information back to the State government if the Commonwealth Government proposed to release the information in response to a request under this legislation. If the State government continued to claim confidentiality for the document or information, it would have a right of appeal to the Administrative Appeals Tribunal on the grounds set out above. The Attorney-General's Department appears to have recognised this in saying that a State government 'should have the right of appeal to the Administrative Appeals Tribunal before access is provided'.<sup>21</sup>

<sup>16</sup> Letter of 13 March, 1979 from Secretary, Department of Prime Minister and Cabinet to Chairman.

<sup>17</sup> Paper of 9 May 1979 prepared by Attorney-General's Department, p. 2 (Committee Document 88).

<sup>18</sup> *ibid.*

<sup>19</sup> *Transcript of Evidence*, p. 2311.

<sup>20</sup> *Transcript of Evidence*, p. 2314.

<sup>21</sup> Attorney-General's paper, cited footnote 17, p. 2.

**17.20** *State document marked 'in confidence' which the Commonwealth refuses to release.* If the Commonwealth resisted disclosure on grounds arising from the fact that the State government supplying the information had marked it 'in confidence', normal freedom of information appeals procedures would apply. It would be a matter for the Commonwealth Government to determine, from case to case, whether the relevant State government should be informed of the Commonwealth's intention to resist disclosure. Again, consultation over time will establish mutually satisfactory ground rules.

**17.21** *State document not marked 'in confidence' which the Commonwealth refuses to release.* The Commonwealth Government might of course claim exemption of documents not marked 'in confidence' by a State government on grounds of its own choosing; and in such cases the normal freedom of information procedures would also apply.

**17.22** *State document not marked 'in confidence' which the Commonwealth wishes to release.* In this case no restrictions would apply and the document would be released in the ordinary way.

**17.23** *Commonwealth documents supplied to States.* In these cases documents might be marked 'in confidence' or might be unmarked. In either event, the Commonwealth could release the documents if it wished. In either event also the Commonwealth could seek to invoke exemptions, and then normal appeal procedures, as appropriate, would apply.

**Summary**

**17.24** The procedures as we recommend them may for convenience be tabulated as follows:

	<i>Status of document</i>	<i>Commonwealth attitude</i>	<i>Procedure</i>
State documents supplied to Commonwealth	Unmarked	Commonwealth wishes to release	Release of document(s)
		Commonwealth refuses release	Freedom of information procedures apply
	Marked 'in confidence'	Commonwealth wishes to release	Commonwealth consults State Documents released if State then agreeable; or if not, State may appeal against release to Tribunal
		Commonwealth refuses release	Freedom of information procedures apply
Commonwealth documents supplied to State(s)	Unmarked	Commonwealth wishes to release	Release of document(s)
		Commonwealth refuses release	Freedom of information procedures apply
	Marked 'in confidence'	Commonwealth wishes to release	Release of document(s)
		Commonwealth refuses release	Freedom of information procedures apply