

## Privilege and contempt (clauses 31, 35 and 36)

### Pending or likely legal proceedings

**23.1** The legal interests of the Commonwealth are protected by clause 31 which exempts documents affecting legal proceedings or subject to legal professional privilege. The relevant provisions provide:

31 (1) A document is an exempt document if its disclosure under this Act would be reasonably likely to have a substantial adverse effect on the interests of the Commonwealth or of an agency in or in relation to pending or likely legal proceedings.

(2) A document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege.

Sub-clause (3) provides in effect that legal advice which comprises part of the internal law of an agency must nevertheless be published or indexed in accordance with clause 7.

**23.2** The Explanatory Memorandum explains that clause 31 will prevent the legislation 'being used to compel the Commonwealth to disclose its hand in pending or likely litigation or to circumvent the ordinary rules of discovery applied by the Courts'.<sup>1</sup> It is not explained why both sub-clauses are necessary for this result and perhaps the only reason is an historical one. Sub-clause (1) was originally proposed by the 1974 Interdepartmental Committee (IDC) and later endorsed by the 1976 IDC.<sup>2</sup> Sub-clause (2) was added by the draftsman as it was felt that some documents, such as an opinion by the Crown Solicitor to a department, would not be protected by sub-clause (1) but would be protected by legal professional privilege.<sup>3</sup> We assume also that the form of the clause is influenced by the freedom of information experience of some of the litigation sections of United States departments. For instance the Anti-Trust Division of the Department of Justice has complained vigorously about the use that is made of the Freedom of Information Act by corporations that either are being prosecuted or are under investigation. It is alleged that a voluminous number of requests will be made by the corporation—on the one hand so that it can glean information about the proceedings, and on the other hand, so it can tie up the officials carrying out the investigation or the prosecution and thus slow down the proceedings.

**23.3** It is quite understandable that the Commonwealth should wish to prevent abuses of the Act such as this and to that end to prevent any person circumventing the discovery rules. However, to our mind, it is unnecessary to have both sub-clauses to achieve that result. Together they cover a broader area than that required.

<sup>1</sup> Australia, *Freedom of Information Bill 1978: Explanatory Memorandum*, Canberra, 1978, para. 118.

<sup>2</sup> Australia, *Policy Proposals for Freedom of Information Legislation: Report of Interdepartmental Committee*, Parl. Paper 400/1976, Canberra, 1977, para. 12.9 and Appendix B incorporating the 1974 IDC para. 9E (b).

<sup>3</sup> *Transcript of Evidence*, pp. 149-151.

**23.4** Sub-clause (1) has been criticised by Dr Taylor, the Director of Research of the Administrative Review Council, on the basis that it goes much further than the common law.<sup>4</sup> At common law, there is privilege for communications passing between a lawyer and client, and for documents brought into existence for the purpose of pending or likely legal proceedings. Sub-clause (1) does not adopt this standard, but creates a new standard of damage to the Commonwealth's litigious interests. The University of Queensland Public Interest Research Group claimed that the common law had never sought to protect this interest as such, and nor should the Bill. They quoted from Lord Blanesburgh in *Robinson v. South Australia* [No. 2]:

The fact that production of the documents might in the particular litigation prejudice the Crown's own case or assist that of the other side is no such 'plain overruling principle of public interest' as to justify any claim of privilege . . . In truth the fact that the documents, if produced, might have any such effect upon the fortunes of the litigation is of itself a compelling reason for their production—one only to be overborne by the gravest considerations of State policy or security.<sup>5</sup>

The Law Institute of Victoria in their submission also criticised the disparity between the common law and the exemption:

The Committee believes this to be an extremely disturbing provision. It is at a loss to see why documents which would otherwise be discoverable become, in consequence of only possible legal proceedings, exempt documents. The provision would appear to provide that if the document is likely to be evidence of a citizen's just cause the citizen and his legal advisers are to be denied access to that evidence. The Committee does not believe that this should be the ethical standard of Government.<sup>6</sup>

**23.5** In our opinion the exemption should not be at odds with the common law, which itself expresses the balance between the competing interests of parties to a case, a balance developed by decades of judicial experience. In the context of a Freedom of Information Bill the Commonwealth is not deserving of greater protection. Indeed, one purpose of the legislation is surely to enable people to gain information on the basis of which they can decide whether to engage in litigation with the Commonwealth. Sub-clause (1) could dampen this purpose—for instance, it is possible that an agency could misuse the clause by withholding an otherwise non-exempt document showing that the agency had clearly breached the requirements of the law.

**23.6** There is other evidence in the submissions that gives rise to a fear that sub-clause (1) will be misinterpreted. For instance, the Capital Territory Health Commission indicated that they would withhold pursuant to the clause 'documents relating to enquiries concerning medical misadventures', and 'documents relating to inquiries concerning possible offences under statutes'.<sup>7</sup> We do not doubt that there are some documents in those categories that would be protected at law by legal professional privilege, but on the other hand, neither do we doubt that there are documents in those general categories that should be available to the public or individuals in order that they can determine whether the law is being enforced and whether the agency and its employees are acting in accordance with the law. A similar misapplication of the exemption is perhaps suggested by the submission from the Department of Home Affairs.<sup>8</sup> Attached to that submission is a legal

<sup>4</sup> *Transcript of Evidence*, p. 1678.

<sup>5</sup> [1931] AC 704 at pp. 715–16. Submission no. 33, incorporated in *Transcript of Evidence*, pp. 1351–52.

<sup>6</sup> Submission no. 112, p. 12.

<sup>7</sup> Submission no. 161, p. 2.

<sup>8</sup> Submission no. 73, pp. 3–5.

opinion sought by the Australia Council, seemingly on the question whether it could refuse to disclose material prepared in the course of considering grant applications, on the basis that defamatory comments may be contained in the material and disclosure could thereby give rise at a later stage to litigation.<sup>9</sup> Although the Council was advised that the exemption probably did not provide protection in these circumstances, it is nevertheless disturbing that an agency would seek to invoke the sub-clause in circumstances so remote from those contemplated by the provision.

**23.7** Sub-clause (1) could thus be deleted if sub-clause (2) provides an adequate and acceptable standard for protecting the legal interests of the Commonwealth. Two criticisms have been made of sub-clause (2). The first is that it incorporates a common law standard, and to that extent could compel an applicant to seek costly legal advice on the definition of legal professional privilege. We have expressed in Chapter 15 our general objection to the incorporation of common law standards, but in this instance we prefer that standard to sub-clause (1). We have in mind in particular that it is a standard whose meaning and application are reasonably fixed and can be readily ascertained, and that the range of documents protected by the standard in the context of this Bill is few in number.

**23.8** The second criticism was made by the Freedom of Information Legislation Campaign Committee (FOIL), which claimed that sub-clause (2) could be invoked even where there were no legal proceedings involving the Commonwealth pending or likely.<sup>10</sup> We doubt whether this construction is intended by the draftsman. Nonetheless on a literal interpretation of sub-clause (2) it could be invoked in respect of a document that might never be required in any judicial proceeding, and even in respect of a document that was once relevant to proceedings that have since terminated. However it would seem that this defect could be remedied easily by stipulating in sub-clause (2) that the legal proceedings to which the document relates be pending or likely. We feel that the Administrative Appeals Tribunal can also be relied upon to give an appropriate construction to sub-clause (2).

### **23.9 Recommendations:**

- (a) **Sub-clause 31 (1) should be deleted as redundant; and**
- (b) **Sub-clause 31 (2) should be amended to read 'A document is an exempt document if it is of such a nature that it would be privileged from production in pending or likely legal proceedings to which the Commonwealth or an agency is or may be a party, on the ground of legal professional privilege'.**

### **Disclosure which would be a contempt of Parliament or of a court**

**23.10** Clause 35 exempts documents which have traditionally been protected from public disclosure by judicial bodies or by Parliament and provides:

35. A document is an exempt document if public disclosure of the document would, apart from this Act and any immunity of the Crown—

- (a) be in contempt of court;
- (b) be contrary to an order made or direction given by a Royal Commission or by a tribunal or other person or body having power to take evidence on oath; or
- (c) infringe the privileges of the Parliament of the Commonwealth or of a State or of a House of such a Parliament or of the Legislative Assembly of the Northern Territory.

<sup>9</sup> *ibid.*, opinion from Messrs. Allen, Allen and Hemsley, Solicitors, Sydney.

<sup>10</sup> Submission no. 9, 'FOIL Campaign Briefing Kit', *Rupert Newsletter*, Dickson, A.C.T., August 1978.

**23.11** Two submissions criticising this exemption were received from FOIL and from the Deputy Leader of the Opposition, the Hon. Lionel Bowen, M.P. Both suggested that concepts such as parliamentary privilege are too uncertain or amorphous to be the standard for an exemption in a Bill such as this. Mr Bowen felt that 'the institution of Parliament [should not] be used in any way to reduce the flow of information to the public'<sup>11</sup>, while FOIL claimed that 'there seems to be no justification for an exemption that would convert otherwise non-exempt material into exempt material simply because it is captured by the incertitude of the common law or the unregulated discretion of any body, be it a court or Parliament'.<sup>12</sup>

**23.12** While we sympathise with these criticisms, on balance we think it would be contrary to accepted practice if the exemption were not included. Parliament and the courts have unique functions, and have traditionally had powers to regulate their own proceedings that have been regarded as a necessary incident to their functions. The Bill, which is designed to open to public scrutiny the operations of the Executive, should not unnecessarily interfere with the other organs of the State with consequences that cannot at the outset be entirely foreseen.

**23.13** The need for an exemption such as this is more apparent in the case of persons or bodies having power to take evidence on oath. It would undermine the authority of any such institution if evidence which it had ordered could be given in camera, were simultaneously or subsequently disclosed by an associated or different agency. Many such bodies, in order to promote a working relationship with other groups and individuals in the community, also prefer to receive evidence confidentially rather than relying upon their coercive powers to obtain that evidence. These arrangements could be deleteriously affected if directions or orders of such bodies were not given recognition in the Bill.

**23.14** We recognise nevertheless that there is a danger inherent in paragraph (b) of clause 35. Many of the tribunals and commissions that now have power to take evidence upon oath have important regulatory powers in the exercise of which the public is greatly interested (for instance, the Trade Practices Tribunal, Australian Broadcasting Tribunal, Industries Assistance Commission). Public participation is intended by Parliament to be a feature of the inquiries held by these bodies, yet that itself can be dependent upon public access to information that is relevant to the inquiries. Under the Bill, it would be theoretically possible for a tribunal or commission to dampen the prospect of public participation by making either a general or a questionable ruling that not only precludes disclosure of evidence given to it, but also permits another agency to withhold information that would otherwise be available under the Freedom of Information Act. However, we cannot see any way of re-drafting the exemption so as to reduce this danger. We must trust that these bodies will exercise their powers so as not to discourage public participation; we hope this faith is not misplaced. The only other approach would be to amend the parent statute of each of the bodies, to the effect that an in camera ruling had to be made in accordance with the same criteria for exemptions as are contained in the Bill. However, this is a large task that is beyond the scope of our inquiry, and we must leave it to subsequent practice to see whether a reform of such magnitude is warranted.

<sup>11</sup> Submission no. 2, p. 1.

<sup>12</sup> Cited footnote 10, p. 10.

## Privileged documents

**23.15** Clause 36(1) exempts from access under the legislation a document or a class of documents in respect of which the Attorney-General has certified that disclosure would be contrary to the public interest on a ground that could form the basis for a claim of privilege by the Crown in a judicial proceeding. The relevant provision provides:

36. (1) Where the Attorney-General is satisfied that the disclosure under this Act of a particular document, or of any document included in a particular class of documents, would be contrary to the public interest on a particular ground, being a ground that could form the basis for a claim by the Crown in right of the Commonwealth in a judicial proceeding that the contents of the document, or of a document included in that class, as the case may be, should not be disclosed, he may sign a certificate that he is so satisfied, specifying in the certificate the ground concerned, and, while such a certificate is in force, but subject to Part V, the document, or every document included in that class, as the case may be, is an exempt document.

Sub-clause 36(2) extends the operation of such a certificate to a document that is substantially identical to one referred to in the certificate.

**23.16** Essentially, two reasons for this exemption have been offered. The first is that it accords with exemption five of the United States Freedom of Information Act which employs a comparable, common law standard (memoranda that 'would not be available by law to a party . . . engaged in litigation with the agency'). It has earlier been pointed out, and our own observations do not indicate otherwise, that the United States exemption has only been applied to material that is already protected by other exemptions in our Freedom of Information Bill.<sup>13</sup> The second justification offered by the 1976 IDC is that the enumeration of specific exemptions 'carries the risk that there may be some documents that do not fit within any of the specified categories the disclosure of which would cause substantial harm'.<sup>14</sup> One would expect that these mysterious documents could be listed at this stage (if so, appropriate exemptions could be created); however, one department has already decided to seek sanctuary in clause 36. The Department of Administrative Services indicated that the exemption may 'be called up, as appropriate, to ensure that material provided to the Department as part of Procurement Demands, a quotation, a tender bid or a contract document are adequately protected from improper disclosure of a confidential information'.<sup>15</sup> The Department did not contend, or refer to any decisions which indicate that this information would be privileged at common law. There appeared to be an assumption in the Department's submission that the exemption would be available to it as easily and readily as other exemptions—an assumption that is clearly at odds with the drafting of clause 36, which requires that a certificate from the Attorney-General accompany any claim to exemption.

**23.17** In fact, it is far from clear exactly what categories of information are protected at common law by the rules of Crown privilege. The most useful summary of the types of information that have hitherto been protected is provided by Mr D. C. Pearce in an article 'The Courts and Government Information'.<sup>16</sup> Mr Pearce sets out the categories of information that were held in

<sup>13</sup> J. McMillan, 'Freedom of Information in Australia: Issue Closed', *Federal Law Review* 8, 1977, 379 at p. 418.

<sup>14</sup> 1976 IDC Report, cited footnote 2, para. 13.1.

<sup>15</sup> Submission no. 141, p. 6. The Department also indicated that clauses 32 and 34 may be invoked to exempt disclosure of this information.

<sup>16</sup> *Australian Law Journal* 50, 1976, p. 513.

*Conway v. Rimmer*<sup>17</sup> to be exempt and these include: Cabinet documents,<sup>18</sup> documents concerned with policy making within departments, dispatches from ambassadors abroad, documents relevant to defence, reports on appointment to offices of importance, and other documents necessary for the proper functioning of the public service. Documents in which the exemption has not been applied include commercial transactions,<sup>19</sup> documents produced by organisations which serve the public but which are not part of the public service, routine governmental reports including personnel reports. However, Mr Pearce indicates no such lists could ever be definitive or exhaustive since the claim of Crown privilege is one that is resolved on an individual basis depending on the facts of the particular case. Other variables such as the competing public interests that the Executive be able to function effectively and that the administration of justice should not be frustrated must be balanced by the court.

**23.18** Witnesses pointed to other variables. For instance, Mr Peter Applegarth, President of the University of Queensland Public Interest Research Group, pointed out that the scope of the privilege may vary not only from case to case but also from time to time. In his opinion it would be wrong to assume, on the basis of *Sankey v. Whillam*<sup>20</sup> (the Sankey case), that the rules of Crown privilege will now be applied liberally, as 'there could be a judicial retreat away from the adventurism displayed in that case'.<sup>21</sup> Mr J. Goldring in his submission expressed the view that the exemption conflicted with the principle that justice should appear to be done, since a member of the Cabinet (the Attorney-General) would be certifying that a matter is subject to privilege.<sup>22</sup>

**23.19** Another criticism we would add is that the exemption is now premised upon an outmoded definition of the rules of Crown privilege. Clause 36 empowers the Attorney-General to issue a certificate in respect of a particular document, a document included in a particular class of documents, or a class of documents. This construction is clearly based upon the view entertained in the *Sankey* case that privilege could be claimed either on the basis of the contents of the document or because the document formed part of a class of documents that deserved protection irrespective of their contents. The High Court in the *Sankey* case indicated strongly that it did not favour class claims. Stephen J held that 'those who urge Crown privilege for classes of documents regardless of particular contents carry a heavy burden'.<sup>23</sup> Gibbs ACJ commented similarly, that 'speaking generally, such a [class] claim will be upheld only if it is really necessary for the proper functioning of the public service to withhold documents of that class from production'.<sup>24</sup> While these comments still permit the Crown to make a class claim, the approach of the Court in that case indicates that such a claim will be extremely difficult to sustain. As we have earlier explained (in Chapter 5), the Court rejected the idea expressed in some earlier cases that class claims might be conclusive as applied to State papers, or Cabinet minutes and submissions; and in the *Sankey* case the Court refused to accept a claim in respect

<sup>17</sup> [1968] AC 910 (see especially at p. 925 (per Lord Reid)).

<sup>18</sup> Note however Lord Reid's qualification on p. 952 that this limitation applied until such time as they were only of historical interest.

<sup>19</sup> However, this category may be exempt if the transaction has political ramifications and it is impossible to disentangle the political from the commercial aspects of the matter. See ALJ article cited footnote 16, p. 514.

<sup>20</sup> (1978) 53 ALJR, 11 at p. 31.

<sup>21</sup> *Transcript of Evidence*, p. 1358.

<sup>22</sup> Submission no. 15, para. 11.

<sup>23</sup> Cited footnote 20, at p. 31.

<sup>24</sup> *ibid.*, pp. 21-22.

of such documents. Furthermore, Mason J indicated that in his opinion the areas in which class claims would operate were restricted: 'I see no reason to extend the umbrella of non-disclosure or non-production to all documents concerned with policy making in government departments.'<sup>25</sup>

**23.20** In our opinion, therefore, clause 36 could undermine two principles that are central to the philosophy of the Bill. The first is that the exemptions should, in as certain a fashion as possible, demarcate what is publicly available and what is not. The second is that a person need not evince any interest in or need for a document, whereas in a privilege claim this very factor may be salient.

**23.21 Recommendation: Clause 36 should be deleted on the grounds that it is redundant and contrary to the principle of the Bill.**

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<sup>25</sup> *ibid.*, p. 45.