

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

# **FREEDOM OF INFORMATION**

Report by the Senate Standing Committee  
on Constitutional and Legal Affairs on  
the Freedom of Information Bill 1978, and  
aspects of the Archives Bill 1978

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## **Table of Abbreviations**

AAT	Administrative Appeals Tribunal
ABC	Australian Broadcasting Commission
AC	Appeal Cases
ACOA	Administrative and Clerical Officers Association
ACOSS	Australian Council of Social Service
ACT	Australian Capital Territory
ACTU	Australian Council of Trade Unions
ADAB	Australian Development Assistance Bureau
AGPS	Australian Government Publishing Service
ALJR	Australian Law Journal Reports
All ER	All England Reports
ALR	Australian Law Reports
ASIO	Australian Security Intelligence Organization
AULSA	Australasian Universities Law Schools Association
CAGEO	Council of Australian Government Employee Organizations
CES	Commonwealth Employment Service
Ch	Chancery
CIA	Central Intelligence Agency (US)
CLR	Commonwealth Law Reports
CSIRO	Commonwealth Scientific and Industrial Research Organisation
D.C. Cir.	District of Columbia Circuit Court
F. 2d.	Federal Reports 2nd Series (US)
FBI	Federal Bureau of Investigation (US)
fn.	footnote
FOI	Freedom of Information
FOIA	Freedom of Information Act (US)
FOIL	Freedom of Information Legislation (Campaign Committee)
IDC	Interdepartmental Committee
L. J.	Law Journal
LW	Law Week (US)
NSWR	New South Wales Reports
PA	Privacy Act (US)
QB	Queens Bench
RCAGA	Royal Commission on Australian Government Administration
SACOSS	South Australian Council of Social Service
SR (NSW)	State Reports (New South Wales)
WLR	Weekly Law Reports

## Index to Clauses

(NB: A paragraph number followed by 'R' indicates a Recommendation with respect to the particular clause).

### Freedom of Information Bill

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6.28–6.30, 6.33R
- clause 3: See generally Chapter 7, paras 7.4ff;  
7.5, 12.13, 12.31, 25.16
- clause 4: See generally Chapter 12, paras 12.29ff;  
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- clause 5: See generally chapter 12, paras 12.1ff;  
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**PART A**  
**GENERAL ISSUES**

## **Terms of reference and conduct of inquiry**

### **Terms of Reference**

**1.1** On 28 September 1978 the Senate resolved as follows:<sup>1</sup>

- (1) That the Freedom of Information Bill 1978 be referred to the Standing Committee on Constitutional and Legal Affairs for inquiry and report as soon as possible.
- (2) That the Archives Bill 1978 be referred to the Standing Committee on Constitutional and Legal Affairs for inquiry and report as soon as possible, in so far as the Bill relates to issues common to, or related to, the inquiry into the Freedom of Information Bill 1978.
- (3) That, subject to paragraph (2), the Archives Bill 1978 be referred to the Standing Committee on Education and the Arts for inquiry and report as soon as possible.

**1.2** In examining the Archives Bill, we have interpreted the delineation of functions between the two Committees, as set out in the resolution of 28 September 1978, as requiring us to concentrate on Part V of the Bill relating to Commonwealth records with particular emphasis on access to those records. We examine the Archives Bill in Part F of this Report. In other parts of this Report, unless the context otherwise makes clear, references to 'the Bill' refer to the Freedom of Information Bill 1978.

### **Collection of evidence**

**1.3** Consistent with the ideals of freedom of information, we have attempted from the outset of our inquiry to involve the public in our deliberations to the greatest extent possible. The Committee advertised widely in national newspapers in early October 1978 calling for submissions by 30 November 1978. However, in order that it might obtain the maximum benefit from this public input, the Committee has continued to accept submissions at all stages of the inquiry. We also wrote to more than 160 individuals and organisations thought likely to be interested in the reference. These included the various freedom of information campaign committees in each State; councils for civil liberties; law reform commissions; academic institutions; Commonwealth government departments; State governments; representatives of all branches of the media; public service union organisations; business associations; political parties; library, historical and archival associations; and professional legal associations.

**1.4** In response to these advertisements and requests we received 168 submissions, a list of which appears in Appendix 8. We wish to place on record our appreciation of the time and effort which so many people have expended in putting forward their constructive suggestions for improvement of the bills. In a departure from the previous practice of parliamentary committees, submissions received by the Committee have been made freely available to the public before any public

<sup>1</sup> Australia, Senate, *Journals* 1978, No. 56, p. 387.

hearings at which individuals and government departments have been invited to elaborate upon their written submissions. We have in this way had the benefit of submissions being subjected to a degree of public examination even before our own detailed examination. In seeking elaboration of written submissions we conducted sixteen public hearings throughout Australia at which fifty-two organisations and thirteen private individuals (a total of 129 witnesses), from five States and the Australian Capital Territory, gave evidence. We would like to thank all those who appeared before us for their interest and assistance in our consideration of the reference. A list of those persons who gave evidence to the Committee appears in Appendix 7. As well as public hearings, we held some thirty-six private meetings during which we considered the evidence and drafted our Report.

**1.5** Although we sought submissions from every Commonwealth government department and heard evidence from representatives of fifteen departments, it became apparent that we would be able to recommend alterations to very few clauses of the Bill without more concrete statistical material upon which to estimate the administrative implications of proposed amendments. Accordingly we requested the Public Service Board to conduct a survey of departments and statutory authorities. The questions and the replies in summary form are reprinted as Appendix 4 to this Report. Information was sought on matters such as the age of material and the form in which it is currently stored by departments; the number of persons currently engaged in preparation of manuals and similar documents; the steps which departments have taken to identify the different enactments or schemes for which manuals would need to be prepared and available for inspection under the Bill as drafted; and the anticipated impact on staff resources if decisions on requests for access were to be notified within lesser periods than currently set out in the Bill.

**1.6** We wish to express our appreciation to the Public Service Board and government departments for the co-operation and assistance they provided throughout our inquiry.

### **Appointment of advisers**

**1.7** To assist us in the conduct of our inquiry, Dr Geoffrey Hawker, College Fellow in Administration at the Canberra College of Advanced Education and Mr John McMillan, Solicitor, of Canberra were appointed as advisers to the Committee. We are indebted to Dr Hawker and Mr McMillan for their invaluable advice and assistance throughout the inquiry.

**1.8** We must also acknowledge the assistance we have received from the present Secretary to the Committee, Christopher Fogarty, the Research Officers, Andrew Snedden and Tim Dodson, and the Stenographer, Colleen O'Hara. Malcolm Starr, the former Secretary, and Hazel Church, a former Research Officer, both made significant contributions during the earlier part of the inquiry. We are also grateful to the staff of the Parliamentary Library for their ready assistance on numerous occasions.

## The background to the Bill: freedom of information in Australia and overseas

### Australia

**2.1** The attention that freedom of information legislation has attracted in Australia affords some confidence that interest in the issue is now firmly based, and is likely to grow. The occasional awareness of freedom of information that existed as recently as a few years ago can be contrasted with the widespread conviction now held throughout the community that legislation is a necessary reform. This impression is confirmed by the number, range and substance of submissions received by this Committee.

**2.2** Although openness, accountability and responsibility are objectives that have traditionally been pursued in Australia since parliamentary government was established, it is only since the enactment of the United States Freedom of Information Act 1966 that we have looked upon legislation as a means of achieving those objectives. That legislation was first discussed prominently in 1967 in an article in the *Australian Law Journal*, 'Public Access to Government Documents', by Professor Enid Campbell.<sup>1</sup> In 1970, the first serious proposal for enactment of similar legislation in Australia was made by the Council of Commonwealth Public Service Organisations (now the Council of Australian Government Employee Organisations), in a lengthy submission to the Prime Minister.<sup>2</sup> The Council combined this proposal with other proposals, notably, the relaxation of restrictions which existed at the time proscribing public comment by government officials, and the repeal of section 70 of the Crimes Act and its replacement by criminal prohibitions against the unauthorised release of a few specific categories of information. Around this time secrecy and freedom of information also received isolated treatment in a few speeches and editorials.<sup>3</sup> However, most discussion concentrated on the role that public comment by government officials would have in ensuring openness.

**2.3** An early assault on government secrecy came in a book, *Secrecy: Political Censorship in Australia*, by Jim Spigelman, published in 1972. This book, which focused much public attention on the disadvantages of unnecessary secrecy in government, was less concerned with legislative solutions to the problem and more with the distortions that secrecy produces in political and administrative

<sup>1</sup> E. Campbell, 'Public Access to Government Documents', *Australian Law Journal* 41, July 1967, pp. 73-89. The idea of legislation also received a filip during the visit to Australia in July 1972 of the United States consumer advocate Ralph Nader, *Canberra Times*, 10 July 1972, p. 2.

<sup>2</sup> Council of Commonwealth Public Service Organisations, Submission to the Prime Minister and the Public Service Board relating to Official Secrecy and Restrictions upon Freedom of Expression in the Commonwealth Public Service, Canberra, 1970, 17 pages.

<sup>3</sup> See for example Clyde R. Cameron, M.P., Official Secrecy, Open Government, and Making Democracy Democratic, paper presented to the South Australian Institute of Personnel Management on 17 September 1972; J. Bennet, Open Government, paper presented to the 1973 National Convention of Councils for Civil Liberty on 29 September 1973; *Australian*, 7 February 1967; *Financial Review*, 13 February 1967; *Canberra Times*, 9 October 1967 and 1 September 1970.

management. Three years later Mr Spigelman outlined the advances which he thought had been made in the intervening period towards more open administration in a paper presented to a seminar on 'open government' organised by the Royal Commission on Australian Government Administration.<sup>4</sup>

**2.4** A commitment by a major political party to the enactment of freedom of information legislation was first made in the 1972 election campaign. The then Opposition Leader, Hon. E. G. Whitlam, declared that his party's aim for Australia was 'a less secret society, a more open society, a more co-operative society, a better informed and involved society'.<sup>5</sup> In his policy speech he stated:

A Labor Government will introduce a Freedom of Information Act along the lines of the United States legislation. This Act will make mandatory the publication of certain kinds of information and establish the general principle that everything must be released unless it falls within certain clearly defined exemptions. Every Australian citizen will have a statutory right to take legal action to challenge the withholding of public information by the Government or its agencies.<sup>6</sup>

**2.5** On 10 January 1973, soon after the Labor Government was elected to office, the Attorney-General, Senator (now Mr Justice) Murphy, announced that Cabinet had authorised him to prepare legislation along the lines of the United States Freedom of Information Act, subject to such modifications as would be required to adapt the United States system to the Australian constitutional and administrative structure. The first step in this process was the establishment of an interdepartmental committee ('the 1974 IDC') to report on the necessary modifications. Represented on the 1974 IDC were the Attorney-General's Department, the Departments of Prime Minister and Cabinet, Treasury, Defence, Special Minister of State, Foreign Affairs and the Public Service Board. In addition, the Government employed Mr A. Mondello, from the United States Department of Justice as a consultant to advise it on the operation of the United States Act.

**2.6** Little happened until September 1974 when the 1974 IDC published a report, *Proposed Freedom of Information Legislation*.<sup>7</sup> Although the report was brief, in many important respects it contains the foundation for the scheme that is now contained in the Bill introduced in the Parliament in 1978. Under that scheme, any person has a right to seek access to a document without showing special interest or need; a document must be released unless it falls within an exempt category and in respect of many documents an appeal may be made to the Administrative Appeals Tribunal against a decision that a document is exempt. An exempt document may as a matter of discretion be released and the Act is to have only a prospective operation.

**2.7** The 1974 IDC found that the scheme of the United States Act should be modified to suit the Australian constitutional and administrative structure, in two respects:

- (a) to ensure the confidentiality of Cabinet discussions and of consultations between Ministers; and

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<sup>4</sup> Royal Commission on Australian Government Administration (Dr H. C. Coombs, Chairman), *Appendix Volume Two*, Parl. Paper 187/1976, Canberra, 1977, pp. 157-163.

<sup>5</sup> Quoted in a speech delivered by Mr C. R. Macdonald, Managing Director of David Syme and Co. Limited, publishers of *The Age* to the Perth Press Club, 14 August 1978. Submission no. 84, appendix 2, p. 1.

<sup>6</sup> Australian Labor Party, *Policy Speech 1972*, Standard Publishing House, Sydney, 1972, p. 38.

<sup>7</sup> Australia, Attorney-General's Department, *Proposed Freedom of Information Legislation: Report of Interdepartmental Committee*, AGPS, Canberra, 1974.

- (b) to maintain the authority of Ministers over departments for which they are responsible.<sup>8</sup>

To this end it proposed that in respect of departments the decision whether to claim an exemption for a document should be vested in the responsible minister, and that in respect of certain categories of documents (substantially identical to those in the existing Bill) a certificate issued by a minister that a document is exempt should be conclusive. In the light of later proposals and developments, it is interesting to note the stance adopted by the 1974 IDC towards Cabinet documents. While it was of the opinion that the minister's certificate classifying a document as a Cabinet document should be conclusive, the Committee expressly reserved this as a question that ministers 'may wish to consider'.<sup>9</sup>

**2.8** Only seven submissions commenting on the 1974 IDC Report were received by the Government, although generally it attracted much criticism, partly for its brevity, partly for its failure to discuss important procedural amendments that were made to the United States Act in 1974, and also for what were seen as restrictive provisions that were not contained in the United States Act (for example, conclusive certificates and prospective operation). One editorial summarised the complaints of many in saying that the report was 'unimaginative, bereft of practical detail, and short of supporting argument'.<sup>10</sup> In the event, the Labor Government took no action on the Report before the 1975 election. However, it is interesting to note that several of the recommendations of the 1974 IDC were not subsequently adopted, a fact which evidences the changing attitude about freedom of information, and perhaps also the effect that public comment and criticism have had on the development of proposals. The proposals since rejected are:

- (a) that the decision to claim exemption be vested in the responsible minister;
- (b) that there be an exemption for drafts of documents or documents not brought into the final form for the purpose for which they were prepared;
- (c) that the Act not require each department to publish a description of its organisation and functions and its manner of doing business; and
- (d) that a request must be made to the department which originated a document.

In addition, the exclusion of prior documents from the operation of the Act was unqualified under the 1974 IDC's proposals. As well, it was unenthusiastic about recommending the need for publication and indexation of internal law. A further change from the IDC's proposals is the tightening of some of the exemptions, such as that protecting law enforcement.

**2.9** While the 1974 IDC Report was being debated, the Royal Commission on Australian Government Administration commenced a study of the issue. Initially a seminar on 'open government' was held, and later a specific study within the Commission on freedom of information legislation was instituted, and a consultant hired to assist in this regard. A draft bill was prepared, which was published, together with an Explanatory Memorandum, as a Minority Report of Commissioner Paul Munro.<sup>11</sup> The Commission itself felt it was inappropriate

<sup>8</sup> *ibid.*, p. 2.

<sup>9</sup> *ibid.*, p. 6.

<sup>10</sup> *The Canberra Times*, 6 December 1972, p. 2. For further comment see Coombs, *Appendix, Vol. Two*, cited footnote 4, pp. 157-190; *Rupert*, nos. 1, 2.

<sup>11</sup> Coombs, *Appendix, Vol. Two*, cited footnote 4, pp. 1-156.

either to endorse or to recommend a specific draft bill. However it did urge greater openness and freedom of access to information about governmental processes, and agreed that legislation could well contribute to those objectives. It noted:

We consider every reasonable attempt should be made to provide individuals and community groups with access to much information which until now has been the privileged possession of ministers and public servants.<sup>12</sup>

**2.10** The draft bill supported by Commissioner Munro (which is popularly titled the 'Minority Report Bill') goes much further than either the IDC Reports or the Government's Bill in requiring agencies to respond to public requests for information. In its procedural aspects, the Minority Report Bill also parallels more closely the provisions of the United States Act than does the Government's Bill. The main differences between the Minority Report Bill and the Government's Bill can be summarised as:

- (a) besides being more narrowly drafted, some of the exemptions also list criteria favouring disclosure that must be considered by an agency;
- (b) none of the exemptions is conclusive, and the Administrative Appeals Tribunal has a general power to order that any exempt document should be released in the public interest;
- (c) a general index of available documents has to be prepared by each agency;
- (d) requests have to be answered within ten working days, and charges are regulated by criteria in the Act; and
- (e) a wider range of powers is conferred upon the Tribunal, for instance, to order that costs be awarded against the government, or that no charge be levied for a document which the Tribunal has decided is not exempt.

**2.11** The Liberal-National Country Party Government elected in December 1975 had also declared itself in favour of freedom of information legislation. The Prime Minister, Rt Hon. J. M. Fraser, explained this support at an address to mark the 50th anniversary of *The Canberra Times* on 22 September 1976:

If the Australian electorate is to be able to make valid judgments on government policy it should have the greatest access to information possible. How can any community progress without continuing and informed and intelligent debate? How can there be debate without information?<sup>13</sup>

The Prime Minister also announced that another interdepartmental committee had been established to study and report on policy proposals for legislation. The same departments and authorities were represented on this IDC ('the 1976 IDC') except that the Department of Administrative Services replaced the Department of Special Minister of State.

**2.12** The Report by the 1976 IDC, entitled *Policy Proposals for Freedom of Information Legislation*, was tabled in November 1976.<sup>14</sup> This Report discussed in detail the procedural aspects of the legislation and included much explanation and justification of the proposals in the Report. Again, only a few submissions on the Report were received by the Government, although from general observation the Report generated much more interest in the community at large.

<sup>12</sup> Royal Commission on Australian Government Administration (Dr H. C. Coombs, Chairman) *Report*, Parl. Paper 185/1976, Canberra, 1977, para. 10.7.22, p. 350.

<sup>13</sup> *The Canberra Times*, 23 September 1976, p. 2.

<sup>14</sup> Australia, *Policy Proposals for Freedom of Information Legislation: Report of Interdepartmental Committee*, Parl. Paper 400/1976, Canberra, 1977.

By and large comment seems to have been critical, claiming that legislation along the lines of the Report would unnecessarily restrict the public right of access to documents and would be weighted more in favour of administrative convenience.<sup>15</sup> The 1976 IDC was criticised in particular for its failure to articulate the reasons why legislation is necessary. The most that was offered was a brief comment as to the basic premise from which the 1976 IDC worked:

The basic premise from which consideration of the issue in Australia must begin is that in a parliamentary democracy the Executive Government is accountable to the Parliament and through the Parliament to the people. An informed electorate is able to exercise a more informed choice at the ballot box. But more than that, openness of access to information . . . 'promotes an aware and participatory democracy'. Many authorities could be quoted in similar vein. There is no need to labour the point; there is no real dispute about the principle.<sup>16</sup>

This view was criticised by some on the ground that a Bill should be premised upon a more realistic appreciation of the objectives to be served by legislation.

**2.13** More time was spent by the 1976 IDC in defending the much-criticised remarks in the 1974 IDC Report to the effect that legislation should be tailored to accommodate the Australian constitutional and administrative structure. The 1976 Report stated that legislation 'must take into account the special position of Ministers and the role, subordinate to that of the Ministers, of public servants'.<sup>17</sup> Reference was made in this Report to the doctrines of collective and individual ministerial responsibility, a non-partisan public service, and the fact that documents to which the Act applies will include material that is capable of being used for political purposes.

**2.14** It is clear that a preoccupation with Westminster conceptions of government is a theme that unites the two IDC reports on the one hand, and the present Bill and its accompanying explanations on the other. Of equal importance in all three documents is a desire to develop legislation that does not impose an unreasonable administrative burden on the resources of agencies, and which avoids the large administrative dislocations that have occurred in some United States agencies. Consequently, the present Bill is based substantially upon the 1976 IDC report. Only a few differences exist, chiefly that:

- (a) some of the exemptions are altered or narrowed, mainly those for internal working documents, law enforcement, certain documents concerning operations of agencies, and documents to which secrecy provisions of enactments apply; and
- (b) a 60-day limit is imposed within which requests must be answered.

**2.15** The present Bill was introduced into the Parliament on 9 June 1978. It was described by the Attorney-General as 'a unique initiative . . . [that] will establish for members of the public legally enforceable rights of access to information in documentary form held by Ministers and government agencies'. It was pointed out that 'this is the first occasion on which a Westminster style government has brought forward such a measure',<sup>18</sup> and that 'the Bill represents

<sup>15</sup> See for example J. McMillan, 'Freedom of Information in Australia: Issue Closed', *Federal Law Review* 8, September 1977, pp. 379-434.

<sup>16</sup> *Policy Proposals for Freedom of Information Legislation*, cited footnote 14, para. 3.4, p. 13.

<sup>17</sup> *ibid.*, para. 4.13, p. 19.

<sup>18</sup> Australia, Senate, *Hansard*, 9 June 1978, p. 2693. The Australian Bill was not in fact the first introduced in a Westminster country, but was preceded by Bills introduced in two Canadian provinces, Nova Scotia and New Brunswick. See pp. 20-21 of this Chapter.

a major step forward in removing unnecessary secrecy from the administrative processes of government'.<sup>19</sup>

**2.16** Only two developments of note have occurred since the Bill was introduced. First, the Freedom of Information Bill and related aspects of the Archives Bill 1978 were referred for consideration to this Committee on 28 September 1978. Secondly, late in 1978, the Attorney-General's Department published a booklet entitled *The Freedom of Information Bill 1978 Background Notes* that contained the Bill, the Explanatory Memorandum, the Attorney-General's Second Reading Speech, and also a short summary of the main criticisms that had been made of the Bill together with the Department's replies to those criticisms.<sup>20</sup>

**2.17** In many ways this booklet is an unusual, if not unprecedented, step in relation to a Bill. Its publication and the reference of the Bill to this Committee reflect the large degree of public interest that freedom of information legislation now commands. Compared with some years ago when the idea of legislation was mooted in a few academic articles and editorials, the prospect of legislation is now well known, understood and discussed widely throughout the community. We have earlier referred to the large number of submissions received by this Committee from individuals and major community action groups in Australia. In addition there have been 100 or more press discussions of freedom of information legislation during the last several years, and numerous treatments of the issue on television, radio, and at public seminars and conferences. Active freedom of information lobbies exist in most State capitals and it is apparent from submissions to the Committee, that a detailed 'Briefing Kit' on the Bill prepared by one of the lobbies (the Freedom of Information Legislation Campaign Committee (FOIL)) has been widely distributed and used throughout the community. There have also been attempts in some quarters to monitor government secrecy: for example, the thirty-five questions asked by Senator Missen in the Senate which questioned the non-disclosure of government documents and whether such non-disclosure was compatible with the Freedom of Information Bill (these questions and the answers provided thereto are published in tabular form as Appendix 5 to this Report); and a column published for some time in the *Sydney Morning Herald*, entitled 'Things They Won't Tell You'.<sup>21</sup>

**2.18** The final Australian development to which we will refer has occurred in the States. In New South Wales the Government Administration Review headed by Professor Peter Wilenski of the University of New South Wales devoted a chapter to freedom of information in its Interim Report *Directions for Change*.<sup>22</sup> Noting that the issue was an important one that deserved wide public debate, the Report indicated that a Green Paper incorporating a draft bill would later be published by the Review. It was also proposed that, in the interim, the Government should make a statement in favour of greater access to information by citizens and issue broad guidelines to agencies detailing how this should operate. Neither the statement nor the Green Paper has been published.

<sup>19</sup> Australia, Senate, *Hansard*, 9 June 1978, p. 2699.

<sup>20</sup> Australia, Attorney-General's Department, *The Freedom of Information Bill 1978. Background Notes*, AGPS, Canberra, 1978.

<sup>21</sup> *The Sydney Morning Herald*, June 10, 14, 15, 19, 22, 27; July 4, 7, 18, 24; and August 5, 18, 26, 31, 1978.

<sup>22</sup> Australia, New South Wales, Government Review of New South Wales Government Administration (Professor Peter Wilenski, Commissioner), *Directions for Change: An Interim Report*, Government Printer, New South Wales, 1978, Ch. 21, pp. 285-299.

**2.19** In South Australia a Working Party on Freedom of Information was established in 1978, comprising representatives of a few government departments. A discussion paper by the Working Party was published in early 1979.<sup>23</sup> No action of this kind has been taken in the other States, although promises to enact legislation have been made by a few of the leaders of major parties.<sup>24</sup>

### Overseas developments

**2.20** Government papers on freedom of information, both local and international, have customarily drawn a distinction between three types of constitutional settings in which legislation has been introduced. First there are countries where it is said that the legislation should be viewed from an historical perspective. Into this category fits Sweden, which has legislation dating back to 1776, and other Scandinavian countries—Finland, Norway and Denmark—with which Sweden has historical and cultural links. The second category is reserved for the United States of America, where the Constitution requires a strict separation between the legislative and executive arms of government. Countries with a Westminster style government, principally Australia, Britain and Canada, are said to constitute the third category. There the Executive is drawn from, and is directly answerable, accountable and responsible to, the Parliament.

**2.21** This distinction is usually drawn for the purpose of arguing that freedom of information legislation is a reform less suited to countries with a Westminster style government than it is to other countries. We examine these arguments fully in Chapter 4, and for the moment we merely note some aspects of the operation of freedom of information legislation in other countries.<sup>25</sup>

**2.22** *European countries.* The first point to note about a country like Sweden is that it does have a Cabinet system of government similar to ours, based upon a parliamentary executive, although it does not have other features of Westminster government. In particular, there is no similar convention of individual ministerial responsibility for the work of civil servants. Most officials work in administrative boards which carry out the normal administrative work of administering schemes, executing the law, and commenting on proposed policies. These boards are largely autonomous and independent of central ministerial control. The departments of State presided over by ministers are very small and are substantially policy oriented.

**2.23** The only significant difference then, between Sweden and Australia is that some protection may need to be given in Australian information legislation to the confidentiality of the relationship between ministers and public servants, any of whom may theoretically act in the role of ministerial adviser. The only other relevant difference between the countries could be the fact that Sweden is now well accustomed to such legislation: a difference related to the difficulty, and not the advisability, of enacting it in another country.

<sup>23</sup> Australia, South Australia Premier's Department, *Issues Paper on Freedom of Information*, December 1978.

<sup>24</sup> e.g. Mr M. Bingham, leader of Tasmanian State Opposition, Policy Speech 1976, reported in *The Examiner*, 24 November 1976, p. 10.

<sup>25</sup> For a fuller discussion of foreign developments and citation of other references see J. McMillan, 'Making Government Accountable: A Comparative Analysis of Freedom of Information Statutes—Parts I, II and III', *New Zealand Law Journal*, vols. 11, 12 and 13, June-July 1977 pp. 248-256, 275-280, 286-296; Canada, Commission on Freedom of Information and Individual Privacy, *Public Access to Government Documents: A Comparative Perspective* (Research Publication 3, Dr D. C. Williams, Chairman), The Commission, Ontario, November 1978; I. Galnoor, *Government Secrecy in Democracies*, Harper & Row, New York, 1977.

**2.24** Although the earliest Swedish law on openness in government was enacted as long ago as 1776, the present law was enacted in 1949. Called the Freedom of the Press Act, it is one of four Acts which together comprise the Constitution.<sup>26</sup> As such, it is an entrenched law which can only be amended by special process (by two successive Parliaments with an intervening general election). The Act deals generally with securing the independence of the Press, confidentiality of journalists' sources and the right of individuals to contribute anonymously to newspapers. The Act also regulates the main features of the access laws, such as the basic procedure to be observed when a request is made, the right of appeal, the classification system, and the four areas in which exemptions may operate. The exemptions relate to first, the 'security of the realm and its relations with foreign powers'; secondly, 'official activities for inspection, control or other supervision'; thirdly, protection of the 'legitimate economic interest of the State, communities and individuals'; and fourthly, 'the maintenance of privacy, security of the person, decency and morality'. These broad areas are particularised in an ordinary Act, called the Secrecy Law, which is a codified enactment referring to upward of 250 different classes of document which are exempt from disclosure, and incorporating by reference regulations which also spell out long lists of particular categories of documents that are exempt. By contrast with the Australian Bill, which defines fourteen or so broad categories of exemption, many of the Swedish exemptions descend to an unusual degree of particularity: for instance, documents prepared by parole officers on prison inmates; and documents which touch on 'naval stations as well as wharves and vessels intended for the armed forces, military airports as well as airplane workshops and airplanes intended for the armed forces, military positions and mine defences'.

**2.25** Several other points about the Swedish law are worth noting. First, there is no exemption as such for internal working documents. However these are given a substantial degree of protection since the Act only applies, in general, to completed documents (such as documents sent from one authority to another), not to internal notes, drafts and tentative working papers. Even so, public access is gained at a preparatory stage to most policy proposals, budgetary plans, submissions and reports as any matter to be submitted to Cabinet is first circulated for comment (pursuant to a constitutional requirement) to all relevant authorities and ministers. Secondly, most appeals against denial of access are made not to an administrative court but to the Ombudsman. In 1972, for example, the four parliamentary Ombudsmen received 100 complaints, compared with twenty-five appeals to the Supreme Administrative Court. Thirdly, there is no uniform archival rule. Instead most exemptions contain their own limitation on the maximum period for which the documents described therein can be withheld. This varies from 70 years in some cases (such as information of a highly personal nature) to 2 years in others (such as Cabinet minutes that do not deal with sensitive issues such as national security). The final comment concerns the success of the law. Now well entrenched in Swedish public administration, it is regarded by some as 'indispensable', and is said by a former Ombudsman to be 'much more important than the ombudsman office'.<sup>27</sup> However the law is used primarily by the Press, who are permitted to inspect the contents of filing cabinets related to topics they are researching, and for whom incoming documents are laid out daily in public reading rooms where they can be inspected.

<sup>26</sup> Translated versions of the Scandinavian legislation are printed in S. V. Anderson, 'Public Access to Government Files', *The American Journal of Comparative Law* 21, 1973, pp. 450-463 (Sweden), pp. 463-468 (Finland), pp. 468-473 (Norway and Denmark).

<sup>27</sup> S. V. Anderson, *The American Journal of Comparative Law*, cited footnote 26, p. 427, footnote 40.

**2.26** There is less to be said about the other European statutes on openness, which are of more recent enactment than the Swedish law and have failed to create the same degree of public interest. *Finland's* Law on the Public Character of Official Documents, which was enacted in 1971, contains many procedural similarities to the Swedish law; individuals may browse through any public documents without first having to identify those they are interested in; the internal journals (indexes of public documents) are open to inspection; and it is as much an offence to withhold public documents as to disclose secret ones. The major difference is the exemptions which are few in number and broad in scope. For example, documents prepared by a defence agency and relating to some aspect of military activities or organisation.

**2.27** A similar situation prevails in *Norway* and *Denmark*, each of which enacted a law on publicity in administration in 1970. Both laws contain broad exemptions. In Denmark, for example, documents can be withheld out of consideration to 'the public's economic interests' or 'where secrecy is required by the special character of the circumstances'. In Norway access can be refused 'because publicity will thwart public regulation and control measures or other necessary requirements or prohibitions, or endanger their accomplishment'. Another major reason attributed to the lack of use by the Danish press and public of the law is that departmental registers of documents are not available. The final point to note about each country is that an appeal against a denial can be taken either to an administrative court or to the Ombudsman.

**2.28** Three other European states have also taken recent steps in the direction of providing a public right of access to official documents. *Austria* in 1973 enacted a Federal Ministries Bill including clauses (inserted during the committee stage) requiring ministries and (indirectly) authorities to provide information to the public on request, subject to the obligation of civil servants to observe official secrecy. Although this obligation appears all encompassing, the Federal Government and the Federal Chancellery have issued guidelines setting out broadly the procedures and exemptions that should be observed in making information available to the public.

**2.29** Consequent upon the recommendation of a Commission for the Coordination of Administrative Documentation in 1973 that the public's right to communication and information should be guaranteed by the legislature, 'for only intervention by the latter could make the impact necessary for the reversal of the most deeply rooted administrative habits',<sup>28</sup> a statute inspired by the United States Act was eventually enacted in *France* in 1978. One innovative feature of the Act is the creation of a Commission on Access to Administrative Documents which is responsible for supervising the implementation of the law; advising ministries on regulations they will prepare; listing the specific documents within each exemption which must be kept secret; proposing suitable amendments to the laws and regulations; and receiving complaints from individuals and giving an opinion thereon to the competent authority.

**2.30** The latest European country to have adopted such legislation is *The Netherlands*. An Openness of Administration Act, approved in 1978, is expected to commence operation in mid-1979. This law has the same strength and weakness as most of the other European laws: appeal against denial to the Supreme Administrative Court, yet broad exemptions which confer upon the government

<sup>28</sup> L. Fougere, Freedom of Information and Communication to Persons of Public Documents in French Theory and Practice: Present Situation and Plan for Reform, paper presented at a Colloquy of the Council of Europe on Freedom of Information held at the University of Graz from 21-23 September 1976. Available at the Department of Attorney-General's Library.

a broad discretionary power to withhold information. (For instance, information 'shall not be divulged if it might (a) endanger the unity of the Crown or (b) damage the security of the State'). There are two innovative features, however, that differ from provisions in most other statutes. First, the Act confers a right to the information in administrative documents, whereby although the actual document would not be disclosed an official would communicate the information contained therein. Secondly, the Act requires that after the first three years, and thereafter at five-yearly intervals, two nominated ministers shall prepare a report on the implementation and operation of the Act, which incorporates the findings of government bodies, scholars and representatives of the media and public service organisations.

**2.31** Finally, we note in passing that investigations into freedom of information proposals have also been looked at by both the Council of Europe's Legal Affairs Committee and the Human Rights Commission, although no concrete proposals have as yet been forthcoming.<sup>29</sup>

**2.32** *United States of America.* It is curious to note that, although the United States Freedom of Information Act has often been distinguished by Australian governments because of the different constitutional arrangements in the United States, it is also the one to which we most frequently look for a model. The United States Act was enacted in 1966, and commenced operation on Independence Day 1967, after successive Congressional inquiries during 1955-1966 had concluded that existing provisions in the Administrative Procedure Act 1946 requiring administrative disclosure were inadequate. In the first few years, operation of the Act was marked by disputes between officials and members of the public who alleged that both the letter and spirit of the Act were routinely violated. Critics such as Ralph Nader claimed that legislation 'which came in on a wave of liberating rhetoric is being undercut by a riptide of agency ingenuity'.<sup>30</sup> Complaints were made in particular about the number of documents withheld (as many as 60% of documents requested in some agencies, together with almost all of the one billion (US) or more classified documents); the delay by agencies, which averaged thirty-three days for response to an initial request and an additional fifty days for a decision on an internal appeal; the fees, which varied from \$3-\$7 per hour for search costs, and from 5c-\$1 per page for copying costs; and the high and non-reimbursable court costs, which contributed to the fact that of 2200 denials in the first four years only 100 appeals were heard, although seventy-five of this number succeeded in whole or in part.<sup>31</sup>

**2.33** In recent years the United States Act has been the subject of recurrent inquiries by Congressional Committees.<sup>32</sup> These have occurred mainly in those areas where traditionally sensitive interests fail to be protected by government

<sup>29</sup> T. Riley, 'Freedom of Information—An International Movement', *Contemporary Review* 234, 1357, February 1979, p. 75.

<sup>30</sup> R. Nader, 'Freedom from Information: the Act and the Agencies', *Harvard Civil Rights—Civil Liberties Law Review* 5, 1, 1970, p. 5.

<sup>31</sup> United States, House of Representatives Committee on Government Operations (C. Holifield, Chairman), *Administration of the Freedom of Information Act*, House of Representatives Report no. 92-1419, U.S. Government Printing Office, Washington, 1972.

<sup>32</sup> See e.g. United States, House of Representatives, *Freedom of Information Act Requests for Business Data and Reverse-FOIA Lawsuits: Twenty-fifth Report of the Committee on Government Operations*, Report no. 95-1382, Washington, July 1978; United States, Senate, *The Erosion of Law Enforcement Intelligence and Its Impact on Public Security: Hearings before Senate Committee on the Judiciary Sub-Committee on Criminal Laws and Procedures*; United States House of Representatives, *U.S. Government Information Policies and Practices—Administration and Operation of the Freedom of Information Act: Hearings before Sub-Committee of the Committee on Government Operations*; cf. discussion by K. P. O'Connor, Submission no. 88 incorporated in *Transcript of Evidence*, pp. 530-545.

confidentiality, mainly national security, trade secrets, and law enforcement. Some proposals for alteration in the administration of the Act have been made, particularly in the handling or administration of requests for information submitted to the government by private corporations. Claims have also been made by some government witnesses appearing before the Congressional inquiries that private citizens and foreign governments now question the ability of agencies to protect confidential information in the areas of law enforcement and national security. Concern has also been expressed by some agencies about the increasing costs of the Act, and indeed an inquiry on this matter was undertaken by the United States General Accounting Office. Further reference is made to these matters in later chapters of this Report.

**2.34** In reaction to the criticism Congressional committees held further hearings on the Act in 1972-74, and in 1974 the Act was substantially amended. (It is noteworthy that these 1974 amendments were finally passed when both houses of Congress overruled a Presidential veto.) Many Australian critics claim our Bill should be amended along similar lines to include provisions imposing strict time limits, regulating fees, reforming the exemptions, protecting national security and law enforcement, and providing for reimbursement of legal fees to successful appellants. The Act was again amended in 1976 in order to reform an exemption that had been strictly interpreted by the Supreme Court. Indeed many commentators regard these amendments as one example of the strong protective interest that Congress evinces in the Act. They point out that rarely does Congress act as swiftly to amend a law that has received a restrictive interpretation; and that in few areas does it react so critically against alleged attempts by the Administration to thwart the philosophy underlying the Act.

**2.35** To this extent it is correct to explain the United States Freedom of Information Act in the context of the constitutional arrangement of government; that is, a Legislature which is completely separated from the Executive will naturally promote and support measures by which it can assert its dominance and control over the Executive. However, to evaluate the United States Freedom of Information Act solely in this philosophical light, as some Westminster commentators would do, is to misunderstand the reasons why that Act is now regarded as essential, and regarded by some as perhaps the most important item of administrative law legislation in operation. The Act does not serve to enhance legislative control of the Executive (which in Westminster countries is said to exist via the parliamentary executive and conventions like that of ministerial responsibility). It serves primarily to enhance *public* control of the Executive, something which, in the absence of information legislation, is no more of a reality in the United States than in Australia. Consequently, the public has been the greatest beneficiary of the Act, making about 150,000 requests in 1976 under both it and the Privacy Act. The great majority of requests are met, and the information thereby gained has apparently had a large impact in enabling public control of, and participation in, government programs and decision making.<sup>33</sup>

**2.36** In recent years other statutes have been enacted which complement the United States Freedom of Information Act. The main statute is the Privacy Act 1974, which regulates the acquisition, storage, retention, correction and dissemination of personal files. Generally speaking, an individual has broader rights of

<sup>33</sup> H. C. Relyea, 'The Provision of Government Information: the Federal Freedom of Information Act', *Canadian Public Administration* 20, 2, Summer 1977, pp. 317-341.

access to personal files under this Act than under the Freedom of Information Act. Another important point is that, although the Privacy Act prohibits the indiscriminate disclosure of personal files, it cannot be used as a bar to the disclosure of information that is available under the Freedom of Information Act. The other United States statutes are the Fair Credit Reporting Act 1970, which confers a right of access to the records of consumer reporting agencies; the Family Educational Rights and Privacy Act 1974, which gives adults access to personal records maintained by educational institutions that are the recipient of federal funds; the Federal Advisory Committee Act 1972, which opens to the public the meetings of advisory committees; and the Government in the Sunshine Act 1976, which opens to the public the meetings of the governing bodies of many independent statutory authorities, particularly the regulatory agencies.

**2.37** *Commonwealth countries.* The first recognisable step towards legislation in a Commonwealth country was taken by *Canada* in February 1973, when the Government tabled in the Parliament and issued to departments by way of a Cabinet directive a set of guidelines titled 'Notices of Motion for the Production of Papers'. The guidelines provided that any paper or document 'should' (not 'must') be tabled, unless it fell within one of sixteen exemptions. It also came to be used as a guide in answering requests from the public. The exemptions safeguard the familiar interests protected by freedom of information legislation, but most were so broadly expressed that they went further than this: for instance, 'Internal departmental memoranda', 'Papers that are private or confidential and not of a public or official character', and 'Legal opinions or advice provided for the use of the Government'. One notable feature of the guidelines was the rules on release of reports by outside consultants: those which are comparable in nature to a Royal Commission report should be released, and in other reports consultants should separate recommendations from factual and analytical data in order that the latter may be released.

**2.38** In 1973 this Cabinet directive was referred for consideration to the Standing Joint Committee on Regulations and Other Statutory Instruments, along with a private member's Right to Information Bill which had been introduced into the House of Commons on various occasions, in several forms and each without success, by Mr Gerald Baldwin. Hearings were held by the Standing Joint Committee in 1974 and 1975, and a report tabled in December 1975 endorsing in principle the concept of freedom of information legislation. The report was approved by the House of Commons in February 1976. A government commitment to legislation of some sort was subsequently made in a Green Paper, *Legislation on Public Access to Government Documents*, which was tabled in June 1977.<sup>34</sup>

**2.39** The Green Paper did not favour legislation along the lines of the United States model, and proposed differences in three respects. First, the proposed exemptions would be more broadly expressed, and prefaced by qualifications such as disclosure 'might be injurious to' rather than, say, 'could be reasonably expected to'. Secondly, a minister's decision would be final and no appeal to the courts would be allowed. Instead, an Information Commissioner would be established, with powers to investigate on behalf of individuals and provide advice to departments. Thirdly, none of the procedural requirements found necessary in the United States in 1974 was to be included.

<sup>34</sup> Canada, Department of Secretary of State, *Legislation on Public Access to Government Documents*, Government Printer, Ottawa, 1977.

**2.40** In December 1977 the Green Paper was referred to the Joint Committee for study; it reported in June 1978. In general, the Committee favoured a strong law bearing more similarity to that in the United States, but based also in part on the provisions in both the 1976 IDC Report and the Minority Report Bill of the Coombs Commission: narrow exemptions and strong procedural and enforcement provisions. The recommendations on appeals combined both the alternatives discussed in the Green Paper: a complaint could first be made to the Information Commissioner, but if his recommendation that a document should be released was not accepted by a department or minister, an appeal could then be made to the courts. However, the then Secretary of State indicated in October 1978 that legislation would be introduced which would not permit an appeal to the courts but vest the final decision in a minister. Finally, the newly elected Conservative Government in Canada has indicated that it will give priority to a law on access to information.

**2.41** Reforms have also been instituted or researched in some of the Canadian provinces. Private members' bills, based mainly on the United States Act, have been introduced in most of the ten provinces, though none has been passed. In three provinces however the governments have introduced bills, and in two these have been passed. Nova Scotia passed an Act in May 1977, that was proclaimed in November of that year, thus becoming the first government in the Commonwealth to adopt such legislation. The Act has some unusual features: it combines a right to inspect and correct personal files; besides containing exemptions it lists categories of documents that must be made available (though in the case of conflict, the exemption prevails); and it specifies that the right of appeal from a denial is first to the minister, and thence to the Legislature where the appeal must be presented by a member. The second province to enact legislation was New Brunswick in June 1978. There the power to make a decision on a request is vested in the minister. The appeal system from a minister's decision is very similar to that in Sweden whereby the appeal may be taken either to the Ombudsman (who may only make a recommendation to a minister), or to a judge of the Supreme Court; both avenues may be used if an applicant so desires. The other province deserving discussion is Ontario, where a 'Commission on Freedom of Information and Individual Privacy' was established in March 1977 and is currently operating. A number of quite lengthy research publications, which we have already cited, has been provided by the Commission, and they have been of use in our own deliberations.

**2.42** One factor which unites the studies undertaken by the various Canadian provincial and national governments is a concern to safeguard the traditional role and authority of ministers. The point of greatest experimentation in each of the various proposals arises in the discussion on the nature of the appeal rights to be granted to a dissatisfied applicant. There appears to be a common assumption that external review detracts from ministerial authority, which must itself be an immutable element of the constitutional arrangements. The Ombudsman, whose role figures prominently in many of the recommendations is, it seems, utilised less because he can assist individuals to assert their rights than because he provides an intermediate solution to the extremes of ministerial or judicial control.

**2.43** In *Britain* a fixation with ministerial responsibility has, perhaps not surprisingly, provided the prevailing climate in which all consideration has been given to freedom of information. The most recent Government White Paper on the issue states inflexibly at the outset that 'nothing must be allowed to

detract from the basic principle of Ministerial accountability to Parliament'.<sup>35</sup> Individual and collective ministerial responsibility and accountability are referred to as 'the hub around which so much of our administrative and political life revolves', and as doctrines that lie 'behind our existing practices of disclosure of official information' (which, by and large, were regarded as adequate).<sup>36</sup>

**2.44** One might not have expected this emphasis in Britain, nor for that matter in Australia, since the Report of the Fulton Committee on the Civil Service in 1968, which found that reliance upon ministerial responsibility was inadequate and that a large number of new techniques for scrutiny and accountability was needed. The Fulton Committee also concluded that 'the administrative process is surrounded by too much secrecy. The public interest would be better served if there were a greater amount of openness'.<sup>37</sup> The Committee further proposed that the Government set up an inquiry to investigate official secrecy. What has resulted is a plethora of inquiries and proposals, four of which appear determined to continue the secrecy so deplored by the Fulton Committee.

**2.45** The first was a Government White Paper, *Information and the Public Interest*, which urged no changes but found the existing information practices to be largely adequate.<sup>38</sup> Next was the Franks Committee, whose terms of reference confined it to section 2 of the Official Secrets Act. It proposed a number of changes—which are summarised in Chapter 21 of this report—in relation to the British equivalent of section 70 of the Commonwealth *Crimes Act* 1914.<sup>39</sup> Decisive action on these proposals was not taken until after the *Crossman Diaries Case*<sup>40</sup> in 1975 and an embarrassing leak of Cabinet minutes in 1976. It was announced in November 1976 that the Official Secrets Act would be reformed, along the lines of the Franks Report but with modifications (mentioned in Chapter 21). The Government, as the Home Secretary proudly claimed, would 'replace the old blunderbus with an Armalite rifle'. Detailed proposals, yet to be enacted, were outlined in a further White Paper published in July 1978.<sup>41</sup>

**2.46** To balance this apparent resistance to disclosure, the Prime Minister (Rt Hon. J. Callaghan) in November 1976 announced that there would be more openness—a concession to the Labour election manifesto of 1974 that a measure be enacted 'to put the burden on the public authorities to justify withholding information'.<sup>42</sup> The new policy was implemented in part in a letter to departments in July 1977 by the head of the Civil Service, Lord Croham, advising them to implement new practices to facilitate openness. One practice was that background material for policy studies and reports be written in a form that enables it to be separated and published.<sup>43</sup> The only other notably liberal step has been the publication by the Government in March 1979 of yet another White Paper,

<sup>35</sup> Great Britain, *Open Government*, Cmnd 7520, HMSO, London, March 1979, para. 2, p. 3.

<sup>36</sup> *Ibid.*, para. 11, p. 6.

<sup>37</sup> Great Britain, The Civil Service Committee (Lord Fulton, Chairman), *Report*, Cmnd 3638, HMSO, London, June 1968, vol. 1, para. 277, p. 91.

<sup>38</sup> Great Britain, *Information and the Public Interest*, Cmnd 4089, HMSO, London, June 1969. Both this Paper and the Fulton Report were preceded by three inquiries into the 'D' Notice System. See D. G. T. Williams, 'Official Secrecy in England', *Federal Law Review* 3, 1968–1969, pp. 22–50.

<sup>39</sup> Great Britain, Home Office, Departmental Committee on Section 2 of the Official Secrets Act 1911 (Lord Franks, Chairman), *Report*, Cmnd 5104, HMSO, London, September 1972, vol. 1.

<sup>40</sup> *Attorney-General v. Jonathan Cape* [1975] 3 All ER 484, [1976] QB 752.

<sup>41</sup> Great Britain, Home Office, *Reform of Section 2 of the Official Secrets Act 1911*, Cmnd 7285, HMSO, London, July 1978.

<sup>42</sup> British Labour Party, *The Labour Party Manifesto: October 1974*, London, 1974, p. 24.

<sup>43</sup> This letter is referred to in *Open Government* cited footnote 35.

entitled *Open Government*, proposing on this occasion that a Code of Practice be adopted, in effect bringing into operation a freedom of information scheme on an administrative basis without judicial involvement.<sup>44</sup>

2.47 It is clear that British officialdom is resisting access legislation. Indeed, Lord Croham's Information Directive commented that 'Our prospects of being able to avoid such an expensive development here could well depend on whether we can show that the Prime Minister's statement had reality and results'.<sup>45</sup> For its part the White Paper referred to in the previous paragraph says it would be 'rash' to design a course leading to such legislation, believing that an analysis of foreign experience seems 'to indicate that no country has attempted to establish a system which would alter the fundamental relationship, already established, between the executive, the legislature and the courts'.<sup>46</sup> The same resistance is not however evident elsewhere. The Labour Party has supported the enactment of legislation both at its annual conferences in 1977 and 1978 and at the National Executive Committee level in 1978. Since 1975 support for the idea has been expressed by an All-Party Committee for Freedom of Information as well as a number of community groups.<sup>47</sup> Lastly, in January 1979 an *Official Information Bill* was introduced into the Commons as a Private Member's Bill by Clement Freud, M.P. (Liberal) with backing from all parties. The Bill went to a Committee stage and withstood a number of government amendments particularly ones designed to remove judicial review.<sup>48</sup> Before it could go back to the House for the Report Stage and Third Reading, Parliament was dissolved. Since the election of the new Government a Private Member's Bill has again been introduced (this time by Mr Michael Meacher, M.P., a Labour member) and is expected to be read a second time on 9 November 1979.<sup>49</sup>

<sup>44</sup> *Open Government*, cited footnote 35.

<sup>45</sup> This letter is referred to in *Open Government* *ibid.*

<sup>46</sup> *Open Government*, cited footnote 35, para. 38, p. 12.

<sup>47</sup> P. White, 'Official Secrets and Government Openness in Britain', *Australian Library Journal*, (to be published November 1979). See also strong support for such a bill from Rt Hon. Anthony Wedgwood Benn, M.P., 'Democracy in the Age of Science', *Political Quarterly* 50, 1, January-March 1979, pp. 7-23.

<sup>48</sup> Great Britain, House of Commons, *Hansard*, 19 January 1979, cols 2131-2213. During the debate Mr Freud remarked: 'The Official Secrets Act decrees that anything is secret that an official says is secret. It is the civil servants' chastity belt', col. 2145.

<sup>49</sup> Great Britain, House of Commons, *Hansard*, 25 July 1979, col. 608.

## **The Freedom of Information Bill: the issues summarised**

### **Introduction**

**3.1** In this chapter we identify and discuss in outline the seven general issues which have emerged in the course of our review of the Freedom of Information Bill 1978 as the most important, most controversial, or both. We commence with the obviously important, but in fact remarkably uncontroversial, question of whether there is a demonstrable need for freedom of information legislation at all in Australia. The other issues then successively identified, all of which are subject to more detailed scrutiny later in this Report, are:

- (a) the compatibility of freedom of information legislation with the basic principles of our system of government;
- (b) the question of administrative burdens;
- (c) the scope of the exceptions and exemptions in the Bill;
- (d) its access and appeal procedures;
- (e) the protection it affords for suppliers of information; and
- (f) the question of monitoring compliance with the legislation once it is enacted.

### **The need for freedom of information legislation**

**3.2** We have been very impressed by the fact that among our 168 submissions and 129 witnesses we encountered almost unanimous support for some form of freedom of information legislation. This support came in varying degrees from politicians, departments, statutory bodies, professional associations, academics, unions, research workers, public interest groups, newspapers and individual citizens. Support for freedom of information legislation also came from departments within the Federal Government and from most of the State governments. The only submission which was positively hostile and opposed to any form of freedom of information legislation came from the Premier of Queensland.

**3.3** It seems to us that there are three quite specific justifications for having effective freedom of information legislation in Australia, each of which arises out of the principles upon which democratic government claims to be based. The first of these touches upon the issue of the rights of the individual. With certain national security exemptions to which we refer elsewhere, we believe that every individual has a right to know what information is held in government records about him personally. We believe that the individual has the right to inspect files held about or relating to him, and, as we shall argue later, the right to have material which is inaccurate corrected on such a file. His file, after all, is accessible to other people (that is, to various public servants) and we see no reason why it should not be equally accessible to the person most directly concerned.

**3.4** Secondly, we believe that when government is more open to public scrutiny, it in fact becomes more accountable. As a result there is a greater need for it to be seen to be efficient and competent. The accountability of the government to the

electorate, and indeed to each individual elector, is the corner-stone of democracy, and unless people are provided with sufficient information accountability disappears. The Prime Minister (Rt Hon. J. M. Fraser) has described the situation thus:

The principle of responsibility—to the electorate and the Parliament—is a vital one which must be maintained and strengthened because it is the basis of popular control over the direction of government and the destiny of the nation. To the extent that it is eroded, the people themselves are weakened. If the people cannot call to account the makers of government policy they ultimately have no way of controlling public policy or the impact of that policy on their own lives . . . . But just as fundamental are two further requirements. First, people and Parliament must have the knowledge required to pass judgment on the government . . . . Too much secrecy inhibits people's capacity to judge the government's performance.<sup>1</sup>

**3.5** Thirdly, we believe that if people are adequately informed, and have access to information, this in turn will lead to an increasing level of public participation in the processes of policy making and government itself. Governments should be constantly in receipt of advice, not only from the professional public service but also from other sections of the community and from individual citizens and their members of Parliament. Unless information is available to people other than those professionally in the service of the government, then the idea of citizens participating in a significant and effective way in the process of policy making is set at naught. This participation is impossible without access to information.

**3.6** Thus we believe that, for reasons which touch both upon the rights of the individual and upon the public policy aspects of our system of government, an effective Freedom of Information Bill is clearly needed in Australia today.

**3.7** The essence of democratic government lies in the ability of people to make choices: about who shall govern; or about which policies they support or reject. Such choices cannot be properly made unless adequate information is available. It cannot be accepted that it is the government itself which should determine what level of information is to be regarded as adequate. The whole thrust of our Report is to ensure that a maximum amount of information is made publicly available, and that the barest minimum of restriction is placed on the public disclosure of such information. It appears that this proposition is not altogether accepted by governments; it is certainly not one which appears to permeate the legislation which we are studying.

**3.8** Apart from allowing people to make rational decisions about policies, as we have observed, information is necessary if governments are to be kept accountable. This point was first made over 2000 years ago by Aristotle<sup>2</sup> who also dismissed the often voiced criticism that the public 'cannot understand' the information provided because they lack the necessary technical skills.<sup>3</sup> Precisely the same point was made in 1861 by J. S. Mill who wrote that a principal function of any representative assembly was to 'compel a full exposition and justification'<sup>4</sup> from the Executive of all its actions.

<sup>1</sup> J. M. Fraser, 'Responsibility in Government', *Australian Journal of Public Administration* XXXVII, 1, March 1978, pp. 1-2.

<sup>2</sup> Aristotle, *The Politics* (tr. T. A. Sinclair), Penguin, London, 1962, Book iii, ch. ii, pp. 124-5.

<sup>3</sup> ' . . . there are tasks of which the actual doer is not either the best or the only judge, cases in which even those who do not possess the operative skill pronounce an opinion on the finished product,' Aristotle, cited footnote 2, p. 125.

<sup>4</sup> J. S. Mill, *Representative Government*, Everyman, London, 1964, p. 239.

**3.9** The need for information in a democracy, if it is to work effectively, has been spelt out many times. Thus, United States President James Madison as long ago as 1822 wrote:

A popular government, without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy; or, perhaps both. Knowledge will forever govern ignorance: and a people who mean to be their own governors, must arm themselves with the power which knowledge gives.<sup>5</sup>

A similar but more recent view was put in the following terms: 'Democracy places a burden of thought upon the public more onerous than the burden placed upon it by other systems'.<sup>6</sup> Equally, the need for government to continue to make this information available has been expressed as follows:

Classical democratic theory is informed by an exceedingly ambitious purpose: the education of an entire people to the point where their intellectual, emotional and moral capacities have reached their full potential and they are joined, freely and actively, in a genuine community. Beyond this magnificent general purpose, classical democratic theory also embodies one great strategy for the pursuit of this goal: the use of political activity and government for the purposes of public education. Governance is to be a continued effort in mass education.<sup>7</sup>

**3.10** Democracy rests very largely upon the idea of consent; that is the idea that people agree to abide by the 'rules of the game' although 'under representative government what the majority of the people consent to directly is rather the making of laws by certain persons than the enforcement of specific laws'.<sup>8</sup> In turn such a theory of consent depends upon people having adequate information upon which they can make the decision to continue consenting to what is going on.

**3.11** By contrast, secrecy in government, where excessive or unnecessary, is in fact destructive of the very foundations of a democratic society. In 1968 the Fulton Committee in Britain clearly recognised this. It suggested that the administrative process was 'surrounded by too much secrecy' and that 'the public interest would be better served if there were a greater amount of openness'. It stated:

We welcome the trend in recent years towards wider and more open consultation before decisions are taken; and we welcome, too, the increasing provision of the detailed information on which decisions are made. Both should be carried much further; it is healthy for a democracy increasingly to press to be consulted and informed.<sup>9</sup>

In its response to the Fulton Committee, the British Government in its White Paper *Information and the Public Interest* detailed the steps taken to give effect to such proposals. These included the presentation of the economic assessment for the ensuing 15 months with the annual Budget; the Treasury Green Papers on Public Expenditure and numerous other departmental White and Green Papers. The report concluded:

The Government agrees with the Fulton Committee in wishing to see more public explanation of administrative processes, a continuing trend towards more consultation before policy decisions are reached, and increasing participation by civil servants in explaining the work of Government to the public.<sup>10</sup>

<sup>5</sup> I. Brant, *James Madison: Commander in Chief 1812-1836*, Bobbs-Merrill, Indianapolis, 1961, vol. 6, p. 450.

<sup>6</sup> R. E. Lane & D. O. Sears, *Public Opinion*, Prentice Hall, New Jersey, 1964, p. 57.

<sup>7</sup> L. Davis, 'The Cost of Realism: Contemporary Restatements of Democracy', *The Western Political Quarterly* XVII, 1, March 1964, pp. 40-41.

<sup>8</sup> J. P. Plamenatz, *Consent, Freedom and Political Obligation*, OUP, London, 1968, p. 21.

<sup>9</sup> Great Britain, The Civil Service Committee (Lord Fulton, Chairman), *Report*, Cmnd 3638, HMSO, London, June 1968, vol. 1, para. 278, p. 91.

<sup>10</sup> Great Britain, *Information and the Public Interest*, Cmnd 4089, HMSO, London, June 1969, para. 36, p. 12.

**3.12** These issues of openness and trust were restated with great clarity by the Franks Committee in its inquiry into the British Official Secrets Act. It wrote:

A totalitarian government finds it easy to maintain secrecy. It does not come into the open until it chooses to declare its settled intentions and demand support for them. A democratic government, however, though it must compete with these other types of organization, has a task which is complicated by its obligation to the people. It needs the trust of the governed. It cannot use the plea of secrecy to hide from the people its basic aims. On the contrary it must explain these aims: it must provide the justification for them and give the facts both for and against a selected course of action. Nor must such information be provided only at one level and through one means of communication. A government which pursues secret aims, or which operates in greater secrecy than the effective conduct of its proper functions requires, or which turns information services into propaganda agencies, will lose the trust of the people. It will be countered by ill-informed and destructive criticism. Its critics will try to break down all barriers erected to preserve secrecy, and they will disclose all that they can, by whatever means, discover. As a result matters will be revealed when they ought to remain secret in the interests of the nation.<sup>11</sup>

**3.13** The loss of trust and public confidence to which the Franks Committee so clearly pointed can be evidenced by events in the United States in recent years. The attempts to suppress the 'Pentagon Papers', indeed even to withhold them from the Senate Foreign Relations Committee,<sup>12</sup> and the whole saga of the later Watergate 'cover-ups' illustrate how destructive of the fabric of democracy itself excessive secrecy can be. It is also illustrative of how ineffective it is in anything but totalitarian regimes.

**3.14** Many members of the Parliament feel themselves unable to fulfil their proper role as elected representatives because they are denied information which they consider vital to making proper decisions. Appendix 5 indicates the poor response received by Senator Missen to inquiries seeking information about governmental activity. Another member has written:

Information is a vital and valuable national resource. Access to information is equivalent to power . . . Individual freedom and individual efficiency will largely be determined by each person's ability to secure the right information at the right time.<sup>13</sup>

And of his role as a member he writes:

In Canberra I feel like a member of a football team which never plays at home—the public servants have collectively about 85% of the information and we have about 15%—much of which is acquired from leaks and newspaper reports.<sup>14</sup>

We cannot see why such a situation should persist. Government should not have aims that are different from those of the people who elect it, and in these circumstances the provision of information to the public is clearly an inherent responsibility of any government.

<sup>11</sup> Great Britain, Home Office, Departmental Committee on Section 2 of the Official Secrets Act 1911 (Lord Franks, Chairman), *Report*, Cmnd 5104, HMSO, London, September 1972, vol. 1, para. 12, p. 12.

<sup>12</sup> See for example B. Woodward & C. Bernstein, *The Final Days*, Coronet, London, 1977, p. 212.

<sup>13</sup> Barry Jones, M.P., 'The Challenge of Post Industrialism', Current Information Service files, Australian Parliamentary Library, November 1978, pp. 11–12.

<sup>14</sup> Barry Jones, M.P., 'A Personal Viewpoint', Opening address delivered at the State College of Victoria seminar on Directions in Australian Education and Society by the Year 2000, Melbourne Town House, 23 February 1979, Current Information Service files, Australian Parliamentary Library

### **The compatibility of freedom of information legislation with the basic principles of our system of government**

**3.15** It has been put to us that three characteristics exist in our system of government in Australia which, taken together, either render the need for freedom of information legislation less here than overseas, or else mean that Australia would be just as well served by having a Bill which in itself was less complete or far reaching than we are proposing. Further, it was suggested that these features of our system would mean that any freedom of information legislation would have less chance to stimulate real changes in the nature of government and its operation than has been found to be the case elsewhere. These three characteristics relate to (a) what is called the Westminster system of government, which we shall examine in detail in Chapter 4; (b) the problems of Executive and Crown privilege, which we shall examine in detail in Chapter 5; and (c) the impact upon the future role of our Parliament and individual members of Parliament, an issue which we examine later in this chapter and generally throughout our Report.

**3.16** *The Westminster system.* Freedom of information is not an exclusively Australian issue. The point of our review of Australian and overseas history in Chapter 2 was to suggest that the experience of other countries is similar to our own. We have useful lessons to draw, as the demand for freedom of information is not a mere fad or something imported thoughtlessly from abroad. It has local origins and the legislation must be fitted to local needs.

**3.17** Nevertheless it has been argued at great length before the Committee that the workings of the Westminster system are an almost total impediment to the legislation. We do not agree. But we concede that we cannot dismiss lightly the 'Westminster' objections which have been pressed upon us, if only because they have come from some highly placed people who could have considerable influence upon the implementation of the legislation. The Secretary of the Treasury (Mr J. Stone), for example, thought that the present Bill 'is a diminution and not a fundamental attack' upon the Westminster tradition but that extension of the Bill could indeed 'cut much more fundamentally' at it.<sup>15</sup>

**3.18** The Westminster system has the appeal of simplicity. The conventional picture (leaving aside any residual powers of the Crown) is that the people elect a parliament, the majority in parliament choose a ministry, the ministers consider advice received from the permanent public service and elsewhere, and make decisions which are government decisions. The public service, apolitical and appointed on merit, then carries out those decisions. The line of responsibility is clear. The public servant is responsible to the minister, the minister to parliament, and parliament to the people. The public servant, in theory, has no independent power of his own. He is responsible to his minister, and his minister, through parliament, is responsible to the people. Ministers are thus responsible, in both collective and individual senses, for the activities of the public service. And the public service is the instrument which carries out the tasks which the community demands through its ministers. It is a system where lines of authority and responsibility are unambiguous and where the roles of the actors, and the relationship between them, are clear.

<sup>15</sup> *Transcript of Evidence*, p. 1708.

**3.19** In fact we do not think this is the way the system works now, or ever has. The system is neither so rigid nor so weak that it has failed to accommodate change. As parliamentarians, we have seen the system changing in helpful ways, as have ministers and members of the community. We think that an increasing number of public servants are responding to these changes too.

**3.20** Certainly there has been a demand from the community in recent years for new forms of oversight and supervision of administrative activity. This is one way to interpret the apparatus of the new administrative law. Ministers of all parties have supported these developments, and for good reasons. They understand that ministers do not actually know all about, or effectively control, the whole of the complex machinery of the modern state. Indeed, the extent of ministerial control has never been without limit. No one, least of all ministers, has ever suggested that it should. Large parts of the government apparatus are formally beyond ministerial responsibility, and this has always been so. There has never been a time, even in theoretical or prescriptive writings, when it was imagined that ministerial control applied to judicial agencies, elective local governments and to many quasi-autonomous statutory bodies. The question to be decided is just what does fall within ministerial control and why. This is an important question and freedom of information legislation is helpful in answering it. Ministers need to know about, and control, the important decisions, and they need to agree about what is important: that is why Cabinet or collective unity is vital. But it is selectively applied. And ministers as individuals do not want to be held answerable for all things done within the public service. On the contrary, they will often want to see responsibility more accurately placed—or anyway, placed elsewhere.

**3.21** Freedom of information legislation is a means not only of ensuring the more direct accountability of public servants to the public, but also of ensuring greater accountability of public servants to their ministers. It is in the interests of ministers themselves to expose the advice of their officials to wider scrutiny so as to improve the quality of that advice and ensure that all possible options have been canvassed. Freedom of information legislation can be in the interests of the public servants and government agencies whose processes are opened up to public gaze too, for it will lead to more adequate public recognition of the effectiveness of the public service. Greater exposure of government agencies to scrutiny can be expected in the longer term to result in a reduction in the level of suspicion and distrust surrounding relations between some government and non-government agencies.

**3.22** Not all public servants, we are glad to say, feel unable to contemplate these issues about the direction in which our political institutions are going and should go. In evidence before us, many public servants, of different rank and experience and from different departments, have approached issues about public service anonymity, ministerial authority, political accountability and the like with insights drawn from important perspective. We in turn have drawn upon many of their contributions and feel justified in so doing. Public servants are not the umpires of our system but we should not pretend that they are excluded, or are correct in excluding themselves, from the game entirely. It is more constructive to see what their real role is. This implies a need to examine the 'system' as it presently operates, not as it is once alleged to have done.

**3.23** What has happened, in short, is that critics have got things the wrong way around. It is not that freedom of information will change our governmental system; it is rather that our changing governmental system is contributing to pressures

for freedom of information legislation. A Freedom of Information Act is indeed one way to make government adaptable, flexible and effective. In Chapter 4 we consider in detail the working of the Westminster system and we show how freedom of information legislation can contribute to its more effective operation.

**3.24** *Executive and Crown privilege.* We also draw particular attention in this regard to an important recent judicial decision. During the course of the Committee's inquiry the High Court handed down its judgment in the case of *Sankey v. Whitlam*<sup>16</sup> in which it was called upon to determine various claims of Crown privilege in respect of documents whose production was sought. But the decision clearly had ramifications for freedom of information legislation beyond claims of Crown privilege in court proceedings. These ramifications are discussed in Chapter 5.

**3.25** *The role of Parliament.* It has been suggested that, with an effective Freedom of Information Act, some of the traditional roles of the Parliament and its backbench members will be diminished. We do not accept this view; indeed we remember that this was also claimed to be a consequence of the introduction of the Ombudsman legislation, and nothing has been further from the truth.<sup>17</sup> Our view is buttressed by reported statements by Lord Croham, a former Head of the British Civil Service. He expressed the view that less secrecy in the public service would lead to a strengthening of Parliament in relation to the Executive, in that members of Parliament could be expected to be better placed to scrutinise the government's performance on openness, obliging ministers to explain their refusals to release documents on request.<sup>18</sup> While Lord Croham's comments were directed more specifically to administrative guidelines rather than legislative requirements, we believe that our proposals will have the effect of increasing the capacity of the Parliament to hold the Executive properly accountable for its actions and decisions.

### **Administrative burdens**

**3.26** One of the questions to which we have been most sensitive throughout is whether the public service can physically cope with effective freedom of information legislation. Many departmental submissions, including ones otherwise wholly sympathetic to the principles of freedom of information, drew attention to expected practical problems in its implementation, and the impossibility in most cases of carrying it into effect within existing staff ceilings. The public service unions, while very supportive of the legislation in principle and indeed anxious to extend its scope, were concerned at the workload implications for their members. Submissions we received from outside the public service were less immediately concerned with the resource implications of the present Bill and possible extensions to it, but many did nonetheless acknowledge that this was a central issue to be considered. Some indeed went further and expressed the concern that the real (or imagined) administrative implications of the Bill, and the resistance it would create in this respect within the public service, would be the rock on which the proposed legislation would founder.

**3.27** We devote the whole of Chapter 6 to a thorough examination of this problem. Questions as to the resource implications of particular clauses, both existing and proposed, are discussed as they arise throughout the Report, and in Chapter

<sup>16</sup> (1978) 53 ALJR 11.

<sup>17</sup> J. Disney, 'Ombudsmen in Australia', *The Australian Quarterly* 46, 4, December 1974, pp. 38-55; Commonwealth Ombudsman, *First Annual Report*, AGPS, Canberra, 1978.

<sup>18</sup> *The Times*, 17 August 1978, p. 2.

6 we attempt to bring together all the material bearing upon the problem and to make some overall evaluation of its significance. To give our conclusions as substantial an empirical foundation as possible, we asked the Public Service Board to conduct on our behalf a special survey of departments and major authorities exploring the scale of existing information retrieval arrangements, and the likely demands upon agency operations that would be created by freedom of information legislation of different degrees of stringency.

**3.28** To the extent that it is possible to baldly state conclusions in this complex and uncertain area, the view that we have reached is that the Public Service *can* cope both with the present Bill and with the variations to it that we propose throughout the Report. We have no doubt that some additional resources will be required to make the legislation work effectively, even taking into account various off-setting savings and the potential utilisation of present government information resources in freedom of information work, but we take the view that the Government, by its very introduction of a Freedom of Information Bill, has committed itself to providing those resources on the necessary scale. We do not believe those resources will be as large as some commentators have feared, and take the view in any event that the contribution that will be made by effective freedom of information legislation to administrative efficiency and to democratic practice generally will be well worth paying for.

### **Exceptions and exemptions**

**3.29** Most of our submissions and witnesses were concerned to draw our attention to the issues which they saw arising out of the nature of specific exemptions and exceptions which the Bill contains. Some matters should quite properly remain protected from general public disclosure. By and large we have been confronted with five basic areas of controversy in deciding where the limits against disclosure should be drawn.

**3.30** The first of these relates to whether or not documents which came into existence before the introduction of this Bill should remain automatically exempt. The current Bill says they should, with some minor qualifications. In Chapter 14 we shall argue that access to prior documents should be phased in over a period of time. We reject the idea that they should be automatically exempt, but we recognise the real administrative problems of granting immediate access.

**3.31** Secondly, the current Bill provides that ministers may issue certificates which conclusively state that a document should be exempt from disclosure. In the light of both the judgment in the *Sankey* case and what we understand to be the fundamental principles of democracy, we reject the whole notion of conclusive certificates. We accept that such ministerial fiats should be given considerable weight, but we believe such certificates should be subject to sensitive review by a member of the judiciary and we propose specific safeguards (especially in Chapters 16 and 17) for the handling of such material in this area.

**3.32** Thirdly, there is the question of exemption for particular types of documents. These issues are discussed in Chapters 16 to 26. It will be seen there that we have sought to limit some of the proposed exemptions by imposing greater tests upon them in a descriptive sense (such as with internal working documents), while recommending the total elimination of others (such as that for documents affecting the national economy).

**3.33** Fourthly, we have confronted the issue of how to decide when and where there is a public interest in disclosure which overrides a particular interest in non-disclosure. This issue is raised in our discussion of the judgment in the *Sankey* case and elaborated upon in Chapter 15. It will be seen that we favour the extensive use of a public interest test to ensure that when documents are withheld, they are only withheld for good and sufficient reasons.

**3.34** Finally, clause 5 of the Bill effectively vests great power in the Executive to exempt whole classes of documents or particular agencies from any of the operations of freedom of information legislation. In Chapter 12 we propose ways to limit the use of this power and insist that such exemptions should clearly be subject to parliamentary debate, scrutiny and approval.

### **Access and appeal procedures**

**3.35** It is important that freedom of information legislation state clearly the procedures for obtaining access to information and establish an equally clear set of procedures for appealing against the denial of access. Issues related to the identification of documents, delays in securing documents, fees to be charged for production of documents, and the costs of possible litigation to enforce one's right to documents are sensitive ones and need to be dealt with carefully. They are issues which have clearly been prominent in the thinking of many of our witnesses and submissions where important points of principle have been raised and must be answered. In our view careful attention must be paid to the implementation of this legislation. In a number of chapters we have therefore considered how individual members of the public can obtain access to information under the Act and how they can seek a review of, or appeal against, adverse decisions which affect them.

**3.36** Throughout Part B, and in Chapter 31, we discuss the administrative procedures associated with the present Bill and those which will need to be developed if the Bill is to be strengthened. The way in which the Act is implemented will be crucial. Legislation is one thing; administration is another. Our concern is that the legislation should not fail, or simply do less than it might, because inadequate thought has been given to administrative procedures. Although we are a parliamentary committee reporting on an instrument of legislation, we feel it important to stress that our considerations have taken full and explicit account of the administrative considerations put before us. We see that legislative prescription and administrative implementation are two sides of the one matter. Accordingly, we pay due regard to both.

**3.37** In Chapters 8, 9, 10 and 11, then, we trace through the sequence of a freedom of information request as it might be made, from the articulation of the request through to its satisfaction or denial or appeal. For the most part we follow the logic and language of the present Bill, though we have a number of suggestions to make about changing the procedural aspects of the Bill for the better. We deal in turn with the procedures involved in gaining access to a document: the form in which requests can be lodged, the transfer of requests to more appropriate agencies, requests involving the use of computers, the deletion of material from a document to enable it to be disclosed, the extent to which the power to release documents or to refuse disclosure is delegated, the duties, liabilities and legal protection afforded to individual officers involved in giving access to documents, the time limits for making decisions on requests for access including the possibility of deferment in certain circumstances, and the costs and fees associated with the grant of access.

**3.38** In Chapters 27–30 of the Report we deal with Review and Appeal. Part V of the Bill deals with review by the Administrative Appeals Tribunal of a limited number of decisions made under the Bill. In Part D of the Report we recommend a role for the Administrative Appeals Tribunal which is both quantitatively and qualitatively more extensive than that proposed to be vested in it under the Bill as currently drafted. In Part D we further recommend that the review functions of the Administrative Appeals Tribunal be complemented by vesting in the Ombudsman certain functions which will allow him to conciliate between persons seeking access to information and agencies refusing to comply with such requests.

### **Protection for suppliers of information**

**3.39** Clearly there are cases when people, associations or other governments will think again about providing information to the Australian Government if they believe that that information could be drawn into the public domain under freedom of information legislation. We would not wish that to happen. So far as personal information is concerned, we deal with this matter in Chapter 24, where it will be seen that we are concerned to protect the personal privacy of individuals. As far as material from foreign governments is concerned, we believe our recommendations for exemptions in Chapter 16 cover this. In terms of information from State governments, it will be seen from Chapter 17 that detailed suggestions are made as to what sorts of information should be exempt and how these exemptions should operate.

**3.40** Material provided by commercial or other associations is dealt with in Chapter 25. In this and other instances we raise the issue of 'Reverse-FOI' suits whereby the providers of information have a right to go to the Administrative Appeals Tribunal to prevent the release of information which they believe could harm their proper interests, and we propose that the Commonwealth should have an obligation to forewarn the originators of such material of the fact that its release is being contemplated.

**3.41** Concern was expressed to us that public servants who placed opinions on paper for others, or people acting as referees or judges for the award of scholarships, grants and the like may face defamation suits if their opinions were revealed. Similarly the issue of copyright over certain material was raised with us as constituting a potential problem under freedom of information legislation. Both these issues are dealt with in Chapter 9, while in Chapter 22 we discuss the operation of prescribed secrecy provisions in other legislation and make a consequent recommendation to amend clause 29 to take account of the issues so raised. As a result of these discussions and their associated recommendations we believe that adequate protection can be afforded to all providers of information, where it is clear that such information should be withheld.

### **Monitoring compliance with the Bill**

**3.42** Legislation of course is one thing; its effective operation can be entirely another. We sincerely hope that all government agencies affected will co-operate in the spirit of the legislation and we see no reason why this should not occur. The recommendations made in this report reflect our perceptions of the appropriate balance between conflicting public interests and competing demands on finite administrative resources. In the light of these judgments, it is essential

that the operation of freedom of information legislation be kept under constant review in order to take account of changes in the balance of these interests and demands. Monitoring the operation of the Act is the subject of the final section of the Report.

**3.43** In Chapter 31 we consider what departments should do to keep their unfolding experience under review. We note the part to be played by the Ombudsman—as a settler of difficulties as they arise, as a constructive critic of departmental practice and, possibly, as an initiator of needed reforms. The Attorney-General's Department and the Public Service Board have roles to fill also, and we describe these in detail.

**3.44** In Chapter 32, we examine the future role of the Parliament itself. Freedom of information is part of Parliament's armoury too, and we thus consider how it might be used effectively in the future. We have already noted in this chapter the views of several British authorities who believe that freedom of information legislation will enhance the role of the Parliament, and we know from our study of the way in which the United States Congress monitors progress under that country's Freedom of Information Act that no loss of congressional power or authority has occurred. We fully expect that to be the experience in Australia.

## Implications of freedom of information for the Westminster system of government

4.1 Many of those who do not share our enthusiasm for freedom of information, or for opening up the processes of government to greater public scrutiny, frequently take refuge in saying that such concepts are somehow incompatible with a system of government based, as ours is, upon the Westminster model. To them, the features which are unique to the Westminster system, and which clearly differentiate it from the United States or Swedish models, somehow operate to require a more limited and restricted Freedom of Information Bill. They see what has come to be known as 'open government' as something foreign and irrelevant to us in Australia, because we are essentially a Westminster system.

4.2 We reject such arguments and assert strongly that there is nothing in the Westminster system which should operate to preclude Australia from having an effective Freedom of Information Bill. As we shall show, opponents of the Bill have frequently misunderstood what the Westminster system is, or else have misrepresented how it actually operates in our contemporary society. We conclude that an effective Freedom of Information Bill, far from being incompatible with a Westminster system, may in fact have the potential to strengthen it.

4.3 On 9 June 1978 the Attorney-General, Senator Durack, presented the Freedom of Information Bill to the Senate. At the outset of his speech he noted: 'Although a number of countries have freedom of information legislation, this is the first occasion on which a Westminster style government has brought forward such a measure.'<sup>1</sup> This is certainly true at a national level, although we note that the Canadian provinces of Nova Scotia and New Brunswick enacted such legislation in 1977 and 1978 respectively.<sup>2</sup> In addition the former Canadian Federal Government had a Green Paper<sup>3</sup> on freedom of information under detailed study, and the newly elected Conservative Government has indicated that it will give special priority to the projected law on access to information.

4.4 While the United States and Swedish experiences may be familiar to many, we readily acknowledge that the introduction of freedom of information legislation in a country with a Westminster system of government does pose unique problems which do not confront policy makers in Washington or Stockholm. These differences have been critical in giving the proposed Australian bill its particular form and character. Even if a Freedom of Information Bill were to be passed in Australia, which was far more extensive and liberal than the current proposal, it would still be significantly different in form from familiar overseas examples. But it need be no less effective in obtaining precisely the same desired objectives.

<sup>1</sup> Australia, Senate, *Hansard*, 9 June 1978, p. 2693.

<sup>2</sup> Canada, Commission on Freedom of Information and Individual Privacy, *Freedom of Information and Ministerial Responsibility* (Research Publication 2, Dr D. C. Williams Chairman), The Commission, Ontario, September 1978, p. 48.

<sup>3</sup> Canada, Department of the Secretary of State, *Legislation on Public Access to Government Documents*, Government Printer, Ottawa, 1977.

4.5 In this chapter we analyse exactly what the 'Westminster system' is, both in theory and practice, and test the view of those who support the specific provisions of this Bill on 'Westminster-related' grounds against what we see as the realities of Australian federal government and administration.

### **The nature of the Westminster system**

4.6 There is no precise definition of the Westminster system in a real sense, and it is unlikely that there ever could be because so much of what is understood as essential to the system is informal, depending upon traditions, conventions and understandings that do not admit of precise formulation. Quite clearly a great deal of Australian practice is modelled upon British traditions and practices, and although new Australian attitudes have developed (for instance in relation to the federal nature of our government) there are still valuable lessons to be drawn from the British system. This lack of precise definition was indeed recognised by some of the most senior public servants who gave evidence before us. Mr Lindsay Curtis (First Assistant Secretary, Attorney-General's Department) said: 'I do not know of any definitive description of what constitutes the Westminster system'<sup>4</sup> and Mr (now Sir) Geoffrey Yeend (Secretary, Department of the Prime Minister and Cabinet) stated that 'the Westminster system is all things to all people—that depends on whom you are asking to define it.'<sup>5</sup>

4.7 Despite this lack of definition, witnesses from the very highest level of the public service were all concerned to tell us that somehow freedom of information legislation would alter the traditional pattern of Westminster government. This point was made by Mr Curtis and Mr (now Sir) Geoffrey Yeend, and supported by Sir Arthur Tange (Secretary, Department of Defence)<sup>6</sup>; it was also made by Mr J. O. Stone (Secretary, Treasury) who put it thus:

The diminution, shall I say, which the Bill represents from what may in any case be thought to be a rather overstrained interpretation of the Westminster tradition, is a diminution and not a fundamental attack upon it.<sup>7</sup>

He did however add that if the present Bill were extended it would 'cut much more fundamentally at the Westminster tradition.'

4.8 A more extreme position, however, was taken by the Premier of Queensland, who in his submission to us stated that freedom of information legislation in principle represents 'an attempt to graft upon the governmental structure of Australia, which is modelled upon the Westminster system . . . ideas and concepts which are alien to that system'.<sup>8</sup> Needless to say, this is a view which we reject. While we see freedom of information legislation as altering what may have been seen to be the principles of the Westminster system in their purest form, we do not see this as in any way derogating from that tradition. Rather it will make that very tradition operate better in the wider interests of the people of Australia. Indeed we find ourselves very much in sympathy with the Freedom of Information Legislation Campaign Committee (FOIL) which, in recognising that some modification of the traditional view of the Westminster system was consequential upon the passage of any effective freedom of information legislation, said that 'we must be prepared to accept an alteration of our traditional conventions of government in light of the realities of contemporary government.'<sup>9</sup>

<sup>4</sup> *Transcript of Evidence*, p. 15.

<sup>5</sup> *Transcript of Evidence*, p. 2299.

<sup>6</sup> *Transcript of Evidence*, p. 2046.

<sup>7</sup> *Transcript of Evidence*, p. 1708.

<sup>8</sup> Submission no. 108, p. 1.

<sup>9</sup> Submission no. 9 incorporated in *Transcript of Evidence*, p. 168.

**4.9** Although we do not offer any definition of the Westminster system, we can quite easily state what have traditionally been held to be the key elements of it, those which distinguish it from governmental systems such as those of the United States or Sweden, and those without which it is alleged our system of government in Australia could not operate. The characteristic features of a Westminster system, of which perhaps only the first amounts to a necessary condition, are usually stated to be:

- (a) that the *Executive is to be found as part of and not as separate from the Legislature*; that is, that ministers are all members of the Parliament;
- (b) that there is a doctrine and practice of *collective ministerial responsibility* usually expressed in the phrase 'Cabinet solidarity' which requires all ministers to consider themselves equally responsible for and bound by the decisions of the executive government;
- (c) that there is a doctrine of *individual ministerial responsibility* which holds that each minister is personally responsible for all of the decisions made and carried out by the department which he heads;
- (d) that the government of the day is served by a *public service which remains politically neutral and in no way involved in partisan controversies* so that it is able to serve any government regardless of its political complexion with an equal degree of loyalty and efficiency;
- (e) that *the members of the public service remain as far as possible personally anonymous*, so that particular views are not ascribed to individual public servants, and so that the views of public servants are not seen to be at variance with the views ultimately expressed by the executive government.

**4.10** Of these five elements, the first is in no way affected by freedom of information legislation, and so it is to the other four features of the Westminster system that we must now turn. In each case we wish to ask the following:

- what precisely does this mean in a theoretical sense?
- how precisely does this operate in practice?
- how is it thought that this part of the Westminster system will be affected by freedom of information legislation? and
- how do we respond to such fears as may be advanced?

In each case, although we shall rely principally upon Australian experience, we shall also seek to compare the situation as far as it is applicable in Britain and to a lesser extent Canada.

### **Collective ministerial responsibility**

**4.11** A very clear formulation of this principle has been given by a British author in relation to that government, but it applies without any further qualification in Australia. He writes:

In accordance with these conventional rules about collective responsibility, all members of the administration are expected publicly to support its policies and its actions, regardless of their private feelings on the matter. Should they for any reason no longer be prepared to do so, they must resign their offices (although not, usually, their seats in Parliament). Constitutionally, they cannot acquiesce in a decision and then, at some later stage when, for example, it becomes unpopular, claim that they were opposed to it and thus seek personally to escape the political penalties.

By the same token, it is impossible for the House of Commons to vote for the removal of a particular member of the government without also voting against the whole government, unless it is clear that the government is prepared to sacrifice that individual either as a scapegoat or because no collective responsibility is

involved. Just as, at an election, the voters must judge the government's record as a whole, so must they (and the House of Commons) judge the government as a whole. In short, the administration must stand or fall together. All its members must submit its policy to Parliament, must defend that policy, and, without exception, must resign or submit themselves to a general election if the House of Commons refuses to support it.<sup>10</sup>

A more cynical expression of this in practice was the statement of Lord Melbourne, who following a Cabinet discussion on the Corn Laws in 1841 said:

Bye the bye, there is one thing we haven't agreed upon, which is, what we are to say. Is it to make our corn dearer or cheaper, or to make the price steady? I don't care which, but we had better all be in the same story.<sup>11</sup>

**4.12** The earliest assertion of this principle, that all ministers must support the agreed upon policy or face the consequences, was seen in 1792 when the younger Pitt dismissed his Lord Chancellor for publicly dissociating himself from Pitt's creation of the Sinking Fund.<sup>12</sup> In 1878 Lord Salisbury declared:

It is, I maintain, only on the principle that absolute responsibility is undertaken by every Member of a Cabinet who, after a decision is arrived at, remains a Member of it, that the joint responsibility of Ministers to Parliament can be upheld, and one of the most essential conditions of Parliamentary responsibility established.<sup>13</sup>

**4.13** It is held that if ministers publicly criticise government policy they are dismissed (a recent British example being the dismissal of Mr E. Heffer for speaking against British membership of the EEC in the Commons); or they should resign (e.g. when Mr L. E. Bury resigned as Minister for Air in 1962 for disagreeing with the Government about the impact of Britain's entry into the EEC,<sup>14</sup> or when Mr Gorton resigned in 1971 after publishing a series of articles criticising Cabinet leaks in a national newspaper). Equally if they cannot support government policy, because particular decisions have been taken (e.g. Mr Ellicott's resignation as Attorney-General in 1977 because of decisions about the conduct of *Sankey v. Whitlam*<sup>14(a)</sup>) or have not been taken (e.g. Mr Menzies' resignation in 1939 over failure to introduce a national insurance scheme); or because they disagree with general policies (e.g. Mr Bury's resignation in 1971 over disagreements on foreign policy), then the proper course open to them is to resign from the Ministry.

**4.14** This principle—that Cabinet speaks with one voice only—has never really been departed from in Australia, although one author has written that 'it is not an absolute value in Australian politics'<sup>15</sup> and Prime Minister Chifley allowed a considerable degree of freedom in discussion of the Bretton Woods financial agreement.<sup>16</sup> On the other hand the Prime Minister (Rt Hon. J. M. Fraser) has written that 'collective responsibility is the key feature of Cabinet government'.<sup>17</sup> By contrast this principle has been formally set aside twice in Britain

<sup>10</sup> G. C. Moodie, *The Government of Great Britain*, Methuen, London, 1964, p. 88.

<sup>11</sup> Sir Spencer Walpole, *Life of Lord John Russell*, Greenwood Press, New York, 1968, p. 369.

<sup>12</sup> H. Wilson, *The Governance of Britain*, M. Joseph, London, 1976, p. 16.

<sup>13</sup> Great Britain, House of Lords, *Hansard*, 8 April 1878, cols 833–4.

<sup>14</sup> In seeking Bury's resignation, Menzies wrote: 'Ministerial responsibility and Cabinet solidarity are of the essence of our system of Government'. See L. F. Crisp, *Australian National Government*, 4th edn. Cheshire, Melbourne, 1978, p. 355.

<sup>14(a)</sup> (1978) 53 ALJR 11.

<sup>15</sup> Royal Commission on Australian Government Administration (Dr. H. C. Coombs, Chairman), *Appendix, Volume One*, Parl. Paper 186/1976, Canberra, 1977, p. 36.

<sup>16</sup> L. F. Crisp, *Ben Chifley: A Political Biography*, Angus & Robertson, Hong Kong, 1977, pp. 198–212.

<sup>17</sup> J. M. Fraser, 'Responsibility in Government', *Australian Journal of Public Administration*, XXXVII, 1 March 1978, p. 3.

this century. In 1932 the separate parties of the National (coalition) Government produced an 'agreement to differ' on the question of the tariff. In 1975 Prime Minister Harold Wilson formally announced that this doctrine would be relaxed for the period of the referendum campaign on membership of the European Economic Community.<sup>18</sup> In the House of Commons he said:

The Cabinet has, therefore, decided that, if when the time comes there are members of the Government, including members of the Cabinet, who do not feel able to accept and support the Government's recommendation; whatever it may be, they will, once the recommendation has been announced, be free to support and speak in favour of a different conclusion in the referendum campaign.<sup>19</sup>

In practice, of course, it is often somewhat different. While a minister may not publicly disagree with a government decision, it is not uncommon for the media to make a great deal of the 'known' opposition of an individual minister to a particular decision.

**4.15** None of the witnesses before our Committee really discussed what impact the Freedom of Information Bill might have upon the question of collective ministerial responsibility. However it would undoubtedly be felt that if the traditional solidarity of Cabinet were to be undermined, the stability of Cabinet government as such would be weakened. Similarly, it might be felt that if the secrecy of Cabinet discussions were breached then frank discussion would no longer be possible, especially if particular points of view were to become identifiable with particular ministers who might be in a minority, and as a result the operations of the Cabinet would be impaired. This indeed was what lay behind the remarks of the Secretary of the Department of the Prime Minister and Cabinet who stressed how important it was that ministers should be able:

to meet together, to have a full and frank discussion of all aspects of a problem, to make concessions to one another, to seek the best and appropriate solution and then to enunciate it with one voice . . . so that the public is not . . . confused.<sup>20</sup>

It is also pointed out, rightly, that the United States Freedom of Information Act does not apply to the operations of the United States Cabinet, although its role in the government of the United States is very different from that in a Westminster system.<sup>21</sup>

**4.16** We agree that there are serious difficulties and we make it clear that we in no way seek to reduce the effectiveness of the Cabinet system; nor do we seek to destroy the secrecy surrounding Cabinet discussions. These points are made particularly in Chapter 18 dealing with clause 24 of the Bill. There are, however, three areas in which we would argue for some modification of the traditional practices. The first of these relates to the question of whether Cabinet *decisions* once made (or at least most of them) should be revealed publicly. We discuss this in Chapter 18 also.

**4.17** Secondly there is the question of the revelation of more details about the operations and discussions of Cabinet at some future date. In *Conway v. Rimmer* Lord Reid expressed a view that 'cabinet minutes and the like ought not to be disclosed until such time as they are only of historical interest'. However he went on to add: 'but I do not think that many people would give as the reason that premature disclosure would prevent candour in the cabinet'.<sup>22</sup>

<sup>18</sup> Wilson, cited footnote 12, p. 75.

<sup>19</sup> Great Britain, House of Commons, *Hansard*, 23 January 1975, col. 1746.

<sup>20</sup> *Transcript of Evidence*, pp. 2299-3000.

<sup>21</sup> *Transcript of Evidence*, p. 31.

<sup>22</sup> *Conway v. Rimmer* [1968] 1 All ER at p. 874.

**4.18** The same issues were raised in 1975 when the British Government attempted to prevent the publication of the late Richard Crossman's 'Diaries of a Cabinet Minister'. In that case the Crown argued that 'publication would be against the public interest in that it would prejudice the maintenance of the doctrine of collective cabinet responsibility',<sup>23</sup> and that 'since Cabinet government depends on the mutual confidence of collective responsibility, its basis can be eroded by the premature disclosure of what has passed within the confidential relationship'.<sup>24</sup> In dismissing the Crown's appeal, Lord Chief Justice Widgery said:

It seems to me that the degree of protection afforded to cabinet papers and discussions cannot be determined by a single rule of thumb. Some secrets require a high standard of protection for a short time. Others require protection until a new political generation has taken over.<sup>25</sup>

The maintenance of the doctrine of joint responsibility within the cabinet is in the public interest and the application of that doctrine might be prejudiced by premature disclosure of the views of individual ministers . . . There must however be a limit in time after which the confidential character of the information and the duty of the court to restrain publication, will lapse.<sup>26</sup>

As a result, although the events described by Crossman were only 10 years old and bore 'a distressing similarity' to current problems, and despite the fact that at the time of publication the individuals involved (i.e. in Cabinet) were the same, the Lord Chief Justice saw fit to prevent suppression of the publication.<sup>27</sup>

**4.19** Following this controversy, a committee under Viscount Radcliffe was established and the Report of the Committee of Privy Councillors on Ministerial Memoirs appeared in January 1976.<sup>28</sup> It set out some guidelines for future publications which appear very restrictive in character, but the impact of this Report cannot yet be estimated.

**4.20** Finally there is the question of the extent to which advice or policy options given by various departments to Cabinet should be available, and we deal with these matters in Chapters 18 and 19 discussing clauses 24 and 26 of the Bill. However we note here that in July 1977 the Head of the Civil Service in Britain, Lord Croham, wrote to his department heads saying that in the case of future policy studies,

the background material should, as far as possible, be written in a form which would permit it to be published separately, with the minimum of alteration, once a ministerial decision to do so had been taken.<sup>29</sup>

Indeed, in the same month the Expenditure Committee of the House of Commons had stated that it saw 'no reason why there should not be general publication of PRU [Policy Research Unit] reports'.<sup>30</sup>

<sup>23</sup> *Attorney-General v. Jonathan Cape* (The Crossman Diaries Case) [1975] 3 All ER at p. 485.

<sup>24</sup> *ibid.*, at p. 488.

<sup>25</sup> *ibid.*, at p. 493.

<sup>26</sup> *ibid.*, at pp. 496-7.

<sup>27</sup> *ibid.*, at p. 497.

<sup>28</sup> Great Britain, Committee of Privy Councillors on Ministerial Memoirs (Viscount C. J. Radcliffe, Chairman), *Report*, Cmnd 6386, HMSO, London, January 1976. At para. 56, p. 20, they state that in memoirs a Minister '... should not reveal the opinions or attitudes of colleagues as to the Government business with which they have been concerned. That belongs to their stewardship, not to his. He may, on the other hand, describe and account for his own.'

<sup>29</sup> *The Times*, 17 August 1978, p. 2. See also *The Listener*, 7 September 1978, pp. 298-299.

<sup>30</sup> Great Britain, House of Commons, *Eleventh Report from the Expenditure Committee, Session 1976-7, The Civil Service Volume I—Report* (535-1), HMSO, London, 25 July 1977, para. 49, p. XXX.

**4.21** We have discussed various issues touching upon the doctrine of collective ministerial responsibility at length, and elsewhere in this Report we make various recommendations about the alteration of this Bill as it affects the general workings of the Cabinet. We are firmly of the opinion that, while the changes which we recommend will have the effect of exposing somewhat more of the operation of Cabinet government in Australia, they will in no way derogate from the principle of collective ministerial responsibility, a principle which we regard as vital to the proper operation of our system of government and which we would in no way seek to weaken. Indeed it will be seen that our recommendations, if adopted, would clearly protect the confidentiality of all Cabinet deliberations; they would preserve the necessary degree of secrecy for advice tendered to Cabinet and would in no way expose the individual views or opinions of ministers in a way which could adversely affect the doctrine of collective responsibility. Our subsequent chapters on exemptions for Cabinet documents spell this out in greater detail.

### **Individual ministerial responsibility**

**4.22** No part of the Westminster system has been so thoroughly criticised, nor has any part so thoroughly changed, as the doctrine of individual ministerial responsibility.<sup>31</sup> It must be remembered that this doctrine developed in the days when departments of state were small and it was a reasonable assumption that ministers of state were familiar with everything that went on in their departments.

**4.23** The two strands of this doctrine have been expressed and described as follows:

The first strand (in terms of logic, if not of history) states that the political head of a department, and only the political head, is answerable to Parliament for all the actions of that department. The positive aspect of this is that Members of Parliament wishing to query any of the actions of a department know that there is one man to whom they may address their questions, who cannot evade the duty of answering them. The negative aspect of it is that civil servants are not answerable to Parliament for their actions, and are protected from political controversy by the minister. As Gladstone said: 'In every free state, for every public act, some one must be responsible; and the question is, who shall it be? The British Constitution answers: "the minister, and the minister exclusively"'.<sup>32</sup>

The second strand of the doctrine states that the minister must receive 'the whole praise of what is well done, the whole blame of what is ill' in the work of his department; and that in consequence he must resign if serious blunders are exposed. Evidence for the importance attached to this second strand of the doctrine is to be found not only in text-books about British government but in 'a veritable canon of Parliamentary *obiter dicta*'.<sup>32</sup>

Sir Ivor Jennings, in his classic study of Cabinet government in Britain writes:

The responsibility of ministers to the House of Commons is no fiction, though it is not so simple as it sounds. All decisions of any consequence are taken by ministers, either as such or as members of the Cabinet. All decisions taken by civil servants are taken on behalf of ministers and under their control. If the minister chooses, as in the large Departments inevitably he must, to leave decisions to civil servants, then he must take the political consequences of any defect of administration, any injustice to an individual, or any policy disapproved by the House of Commons. He cannot

<sup>31</sup> For a definition of the doctrine of individual ministerial responsibility see S. E. Finer, 'The Individual Responsibility of Ministers', *Public Administration* XXXIV, 1956, p. 379.

<sup>32</sup> A. H. Birch, *Representative and Responsible Government*, George Allen & Unwin Ltd, London, 1964, pp. 139-140.

defend himself by blaming the civil servant. If the civil servant could be criticised, he would require the means for defending himself. If the minister could blame the civil servant, then the civil servant would require the power to blame the minister. In other words, the civil servant would become a politician. The fundamental principle of our system of administration is, however, that the civil service should be impartial and, as far as may be possible, anonymous.<sup>33</sup>

Although both these statements were written to describe practices in Britain they apply with equal validity to the Australian political system, at least as statements of the doctrine in its pristine purity as a theory.

**4.24** There can be no doubt, however, that in practice things have just not worked out this way. By and large ministers have not resigned under these circumstances. Political practices have changed, and the twin forces of the increasing complexity and scope of departments of state (meaning that no one believes that ministers can be 'on top' of everything) and the development of party solidarity<sup>34</sup> (meaning that political parties rally to protect their own members from political attacks) have fundamentally eroded this doctrine. If one excludes ministers who resigned to take up other appointments, or resigned voluntarily at the end of their careers, there have been some thirteen ministerial resignations in Australia (federally) since 1939, none of which involved this principle. In Britain, of thirty-eight ministerial resignations in the same period, only two could have been said to have arisen as a result of the operation of this doctrine.<sup>35</sup>

**4.25** In Australia, the only recent example of a minister seeking to accept personal responsibility in this classical tradition occurred in 1967 when the Minister for Air (Mr Howson) in relation to the VIP flights controversy stated:

I recognise that it is a Minister's responsibility to have a final responsibility in his own field. If there are deficiencies then he must shoulder the blame. I have told the House of the deficiencies that have come to light . . . There have been mistakes . . . and I am the responsible Minister. I have therefore felt it necessary, out of respect to my colleagues and to this Parliament, to say to the Prime Minister . . . that I was prepared to offer my resignation to him . . . I have done this even though I believe that I have acted at all times honestly, with integrity . . .<sup>36</sup>

The Prime Minister (Rt Hon. H. E. Holt) however did not accept the resignation, in part because he felt no political necessity to do so.

**4.26** Politicians have themselves redefined the doctrine in a more limited way.<sup>37</sup> In the aftermath of the Crichton Downs affair (which did eventually lead to a ministerial resignation) in Britain, Herbert Morrison, M.P., said:

There can be no question whatever that Ministers are responsible for everything that their officers do, but if civil servants make errors or commit failures the House has a right to be assured that the Minister has dealt with the errors or failures adequately and properly, or that he will do so. That is a duty that falls on Ministers as well, and it would be wrong for a Minister automatically to defend every act of his

<sup>33</sup> J. W. Jennings, *The British Constitution*, 5th edn, Cambridge University Press, Cambridge, 1966, p. 149.

<sup>34</sup> M. Duverger, *Political Parties*, 2nd edn, Methuen, London, 1954, p. 352.

<sup>35</sup> H. Dalton (1947) over Budget leaks and Sir J. Dugdale (1954) over Crichton Down. See also Lord Denning, *The Discipline of the Law*, Butterworths, London, 1979, pp. 5-6, 88-101.

<sup>36</sup> Australia, House of Representatives, *Hansard*, 8 November 1967, p. 2777.

<sup>37</sup> M. Wright, 'Ministers and Civil Servants: Relations and Responsibilities', *Parliamentary Affairs* XXX, 3, Summer 1977, p. 294.

officers or servants merely because they belong to his Department. Therefore, the House has to be satisfied that he is dealing with the matter adequately.<sup>38</sup>

The Home Secretary of the day said:

Where action has been taken by a civil servant of which the Minister disapproves and has no prior knowledge, and the conduct of the official is reprehensible, then there is no obligation on the part of the Minister to endorse what he believes to be wrong, or to defend what are clearly shown to be errors of his officers. The Minister is not bound to defend action of which he did not know, or of which he disapproves. But, of course, he remains constitutionally responsible to Parliament for the fact that something has gone wrong, and he alone can tell Parliament what has occurred and render an account of his stewardship.<sup>39</sup>

**4.27** In the Australian context, the doctrine was expressed as being a quite limited one, when in 1965 the Attorney-General, Mr B. M. (now Sir Billy) Snedden said:

What of cases where the Minister is not personally involved? . . . Responsible, yes, in the sense that he may have to answer and explain to Parliament, but not absolutely responsible in the sense that he has to answer *for* (is liable to censure for) everything done under his administration . . . There is no absolute vicarious liability on the part of the Minister for the 'sins' of his subordinates. If the Minister is free from personal fault, and could not by reasonable diligence in controlling his department have prevented the mistake, there is no compulsion to resign.<sup>40</sup>

In a similar vein, the Prime Minister, Rt Hon. J. M. Fraser, has recently written that:

It has always been difficult for a minister to be aware of—let alone directly involved in—every exercise of the powers conferred upon him. I do not know why this ministerial inability to be Superman should surprise anyone. It is, after all, the very reason for the existence of a public service, organized into departments, to act as the minister's agents.<sup>41</sup>

The very size and complexity of modern departments inevitably means that the chances of these mistakes, even on a large scale, will multiply. For instance, in August 1977 the Auditor-General pointed out that the Department of Social Security had overpaid benefits to the extent of \$40 m<sup>42</sup> but the Minister did not feel obliged to resign, and neither did anyone seriously call for her resignation.

**4.28** Commentators have expressed similar views. The Royal Commission into Australian Government Administration (the Coombs Commission) was told, in relation to Britain, that:

In fact, it seems fair to add that British observers, as a consequence of redefining individual ministerial responsibility, have virtually abandoned the concept as a method of imposing accountability upon civil servants' actions . . .<sup>43</sup>

Professor Finer has written:

We may put the matter in this way: whether a Minister is forced to resign depends on three factors, on himself, his Prime Minister and his party . . . For a resignation to occur all three factors have to be just so: the Minister compliant, the

<sup>38</sup> Great Britain, House of Commons, *Hansard*, 20 July 1954, col. 1274.

<sup>39</sup> Great Britain, House of Commons, *Hansard*, 20 July 1954, cols 1286–7.

<sup>40</sup> Speech to the third Commonwealth and Empire Law Conference on 25 August 1965 quoted in Crisp, *Australian National Government*, cited footnote 14, p. 355 (footnote).

<sup>41</sup> Fraser, *Australian Journal of Public Administration*, cited footnote 17, p. 5.

<sup>42</sup> Australia, Auditor-General's Office, *Report of the Auditor-General upon the Treasurer's Statement of Receipts and Expenditure and upon other accounts for the year ended 30 June 1977*, AGPS, Canberra, 1977, ch. 2.

<sup>43</sup> Coombs, *Appendix, Volume 1*, cited footnote 15, p. 21.

Prime Minister firm, the party clamorous. This conjuncture is rare and is in fact fortuitous. Above all, it is indiscriminate—which Ministers escape and which do not is decided neither by the circumstances of the offence nor its gravity.<sup>44</sup>

In another Westminster system, Canada, it has been observed that:

the whole doctrine of Ministerial responsibility is only a convention, an unwritten rule that tends to shift and change over time, and recent events have demonstrated this convention is now but a myth.<sup>45</sup>

Dr Emy in his paper for the Coombs Commission wrote:

Unlike Britain, it is difficult to say whether ministerial responsibility is a significant influence upon the probity of ministers' personal behaviour. There have been several cases in recent political history where a ministerial resignation might reasonably have been expected, but none was forthcoming. This is indicative of a wider point: Australian parliamentary practice has been characterised by a reluctance to make rules or even to pass judgment upon the propriety of ministerial behaviour. The case for separate standards of public morality, or for an ethic of responsible government, has gone by default.

Australian ministers have shown little inclination to accept the implications of a concept of absolute responsibility. Public criticism of their official advisers is not unknown: nor are attempts to shift the blame for political as well as administrative error on to public servants . . . In Australia, the inadequacy of ministerial responsibility as a method of imposing a realistic degree of political responsibility upon ministers reflects the basic weakness of the House of Representatives as an institution . . . The basic cause of this situation is the effect of party discipline upon a small legislature. But the House itself has taken too little interest in the procedures and devices it has at its disposal for securing information and accountability. It has failed to use the reports from either independent authorities such as the Public Service Board, or from its own committees such as Public Accounts, or from the public corporations as a basis for debate and inquiry. Parliament has failed to develop any systematic or constructive approach to the problem of scrutinising the actions of bureaucrats, the organisation and efficiency of the public service, or the personal behaviour and policy aspirations of ministers. Consequently, even the concept of answerability is of little practical significance. It has even less significance if ministers themselves refuse to take this function seriously. There is widespread recognition that parliament does not possess the requisite influence seriously to embarrass ministers. Where ministers enjoy personal authority within the party, it is difficult to believe that the open or parliamentary processes provide any real threat to their reputation.<sup>46</sup>

Similarly one of the Commissioners of that inquiry submitted to us that 'the obsolescence of ministerial responsibility as a partial instrument of political and administrative accountability and control is proclaimed everywhere save in Westminster system Parliaments themselves.'<sup>47</sup> On the other hand this legislation, taken together with other recent changes in administrative law such as the Ombudsman Act, the Administrative Appeals Tribunal Act and the yet to be proclaimed Administrative Decisions (Judicial Review) Act will provide other avenues for review of departmental decisions and other mechanisms to provide for the accountability of the various departments and public servants.

**4.29** It has also become apparent that the decline in the anonymity of public servants, particularly at the most senior levels, is related to the general decline

<sup>44</sup> Finer, *Public Administration*, cited footnote 31, p. 393.

<sup>45</sup> G. Baldwin, 'Freedom of Information: Another Personal View', *Canadian Political Science Bulletin* 7, January 1978, p. 63.

<sup>46</sup> Coombs, *Appendix, Volume 1*, cited footnote 15, p. 35.

<sup>47</sup> Submission no. 12 incorporated in *Transcript of Evidence*, p. 607.

in levels of individual ministerial responsibility. From time to time particular policies have become clearly identified with senior public servants rather than their ministers, especially in areas where one permanent head remains in place during the tenure of several different ministers. Equally, ministers have from time to time attempted to shift responsibility for particular decisions (especially of an administrative nature) on to public servants. In this latter case there are many instances in our statutes where decisions are required to be made by the statutory officers concerned and not by their ministerial heads. Some of these powers may involve statutory officers making decisions which have a highly political content, for example the determination made by the Director-General of Social Security to refuse to pay certain unemployment benefits (the Karen Green case), a matter which eventually found its way to the High Court<sup>48</sup>; or a decision made some years ago by the Director-General of Civil Aviation about the importation of aircraft.<sup>49</sup> In these and other cases the statutory officers concerned have been exposed to considerable publicity and analysis of their actions, with their ministers playing a strictly limited role in the ensuing political controversy.

**4.30** In our view it is clear that the theory and practice of individual ministerial responsibility bear increasingly little relationship to each other. The short answer to those who have expressed views that freedom of information legislation will adversely affect the operation of the doctrine of individual ministerial responsibility is that they are in fact worrying about something which has long ceased to exist in practice.

**4.31** A further answer which we believe can be given to those concerned about the implications of freedom of information legislation for individual ministerial responsibility, is that our proposals are, in fact, likely to give a new vigour and meaning to this very concept, and to revitalise this whole aspect of the traditional Westminster system. Clearly if more information is made available to the public, then ministers will be required to answer for more of the activities and administrative decisions of their departments. Sir Arthur Tange recognised this when he told the Committee:

I think I am entitled to say that the working of this legislation will result in a new relationship between the Minister and members of Parliament and a new relationship between Ministers and members of Parliament and the media. Some of the ideas on freedom of information originated in countries which do not have the Westminster system. I think it will be essential to the effective working of a Westminster system, assuming that Parliament still continues to have question time and questions without notice, that as far as possible the Minister is aware of a mass of detail. At present he can do this at a time of his own choosing and in accordance with his judgment of the national priorities and the responsibilities of his portfolio. But henceforth this will be dictated by the exigencies of the operation of a piece of legislation which, at four o'clock on Friday afternoon might lead to the release of documents quite properly under the application of this legislation and of which it might be impossible for the Minister to be aware before he goes into the next question time in Parliament. This seems to me to be one of the realities of the situation.<sup>50</sup>

**4.32** We in fact see these freedom of information proposals as requiring ministers to take greater personal interest in the actions of their departments at a lower level of administration and decision making. To this extent we believe that effective

<sup>48</sup> *Green v. Daniels* (1977) 13 ALR 1.

<sup>49</sup> S. Brogden, *Australia's Two Airlines Policy*, MUP, 1968, ch. 7. Also, *R. v. Anderson* (1965) 113 CLR 177.

<sup>50</sup> *Transcript of Evidence*, p. 2046.

freedom of information legislation will lead to a renewed strengthening of the principle of individual ministerial accountability. Ministers will be required to accept a greater degree of personal responsibility for the proper and efficient working of their departments. Where maladministration occurs, and this clearly results from the failure of the minister to take effective action to prevent it, or where it results from neglect of his administrative (as distinct from his policy making) responsibilities as a minister, then public exposure should occur. If this in turn leads to the imposition of political sanctions against the minister concerned, we would see that as potentially strengthening the democratic process. In short, where a department fails to operate as it should because a minister has failed in his responsibilities there is no justification for this failure being concealed from the electorate. We feel that freedom of information legislation will achieve this strengthening of accountability on the part of ministers.

### **The neutrality of the Public Service**

**4.33** It has traditionally been held that a Westminster system must be served by a public service which is a career service<sup>51</sup> of high professional standards, one which advises governments equally well regardless of their political complexion, one where the senior public servants play no overt role in the political contests of the day and are generally anonymous in the public eye; and where the professional service carries out the instructions of the elected government once decisions have been made. While in no way debating the issue, or proffering any opinion, we do note that there has been an increasing public debate in recent years and there appears to be a growing body of informed opinion that challenges some of these views, and regards the possible development of a public service where senior officers change regularly with changes of government as not being incompatible with the ideals of the Westminster system.<sup>52</sup> For instance, the Prime Minister, the Rt Hon. J. M. Fraser recently acknowledged that:

The present government has recognized that there may be occasions when governments will wish to appoint politically committed persons to the highest public service positions. When such politically committed persons are appointed, there should be no continuing commitment to them on the part of succeeding governments . . . The appointment of a politically committed individual as head of a department might serve the interests of the government making the appointment very well. But new governments might conclude that it is impossible for a person so identified with their political opponents to serve them impartially . . . We have responded to this problem with the Public Service Amendment (First Division Officers) Act passed earlier this year . . . It is felt that these new procedures enable a government to make appointments from outside the normal public service career structure, but prevent any lasting breach of the principle of an apolitical public service.<sup>53</sup>

<sup>51</sup> This is as distinct from the United States system where senior administration officials are removed and replaced ('the spoils system') when a new President takes over. However we noted that in recent years the changes in Permanent Heads of Departments have been more frequent than in the past, something admitted by the Public Service Board when it appeared before us (*Transcript of Evidence*, p. 898). However, the Prime Minister, when introducing the Public Service Amendment (First Division Officers) Bill 1976 which makes it in effect easier to remove First Division Officers when governments change, said 'One of the most important foundations of the parliamentary system of government is the political neutrality of the Public Service'. Australia, House of Representatives, *Hansard*, 18 November 1976, p. 2865.

<sup>52</sup> See for example R. M. Spann, 'Bureaucracy and the Public Service', in H. Mayer & H. Nelson (eds), *Australian Politics: A Fourth Reader*, Cheshire, Melbourne, 1976, ch. 81.

<sup>53</sup> Fraser, *Australian Journal of Public Administration*, cited footnote 17, p. 7.

**4.34** In its submission to the Coombs Commission, the Public Service Board expressed its interpretation of the doctrine of public service neutrality as follows:

The concept of neutrality does not imply that public servants have no political views or associations. Rather, it is concerned with the responsibility owed by a public servant to the government of the day, irrespective of its political complexion; impartial advice on policy options; and the whole-hearted implementation of decisions made at the political level irrespective of whether they accord with the views of the officer.<sup>54</sup>

Again, this sounds fine in theory, but it is well attested that the struggle between the departmental view and a contrary ministerial view does not cease simply because a decision is eventually made by the politicians.<sup>55</sup> The doctrine also implies that '... while bureaucrats should not be partisan, they do not have the right to be neutral between government and opposition. Public servants owe loyal service to the government in office ...'.<sup>56</sup> A further implication is that:

A public servant has a duty while at work to protect and promote the minister's and the government's interests, as he would if they were wholly acceptable to him personally. So, in making clear policy options, he should indicate how they might be related to the apparent political aims and general outlook of the government; and he should interpret and promote the government's and the minister's policy concerns as best he can, even in the absence of clear guidelines in a particular field of policy.<sup>57</sup>

**4.35** A further question arises about the nature of the ministerial–public service relationship when the opinions of senior public servants are published after they retire from the Service; especially if these comments are critical of government policy or of the ministers whom they have served. Such publications are by no means unknown in Australia. For instance, when Mr (later Sir) Paul Hasluck left the then Department of External Affairs, he wrote on several occasions in a highly critical way of the foreign policies of his former Minister, Dr H. V. Evatt. Similarly, Sir Alan Watt, a former Permanent Head of the same Department criticised various policies and ministers whom he had served in his book *The Evolution of Australian Foreign Policy 1938–1965* which was published in 1967, only two years after many of the events he described. Mr W. R. Crocker and Mr M. Booker, both former senior Australian diplomats, published books after their retirement entitled *Australian Ambassador* and *The Last Domino* in 1971 and 1976 respectively. Both books were highly critical of some aspects of Australian foreign policy.

**4.36** Most recently, Mr A. Renouf, another former Permanent Head of the Department of Foreign Affairs, published his book *The Frightened Country* in 1979. This book, highly critical both of current government policy and members of the current Government, was written while Mr Renouf was still an officer of the Department and was published within a few weeks of his retirement. Mr Renouf's actions were very quickly and forcefully condemned by the Public Service Board which, in a formal statement issued on 20 August 1979, said:

The conventions relating to public comment by public servants include a requirement that public servants concerned with policy should not publicly criticise

<sup>54</sup> Australia, Public Service Board, *First PSB Submission to the Royal Commission on Australian Government Administration*, Public Service Board, Canberra, 1974, p. 64.

<sup>55</sup> R. K. Alderman & J. A. Cross, 'Ministerial Reshuffles and the Civil Service', *British Journal of Political Science* 9, 1, January 1979; R. N. Spann, *Government Administration in Australia*, George Allen & Unwin, Sydney, 1979, p. 473.

<sup>56</sup> J. W. Pickersgill, 'Bureaucrats and Politicians', *Canadian Public Administration* 15, Fall 1972, p. 426.

<sup>57</sup> Spann, *Government Administration in Australia*, cited footnote 55, p. 257.

Ministers (past or present). In the case of senior public servants and certainly those who have had the unique responsibilities of Permanent Head it is the Board's view that those conventions should have application after retirement also in respect of matters which arose when they were serving officers.

In the Board's view the proper relationship between Ministers and senior public servants requires an atmosphere of mutual confidence and trust with public servants giving advice fearlessly and Ministers accepting responsibility for decisions made. Within a Westminster-type system neither Ministers nor public servants should allow themselves to become in any sense public adversaries.

The publication, by an ex-Permanent Head, immediately after his retirement, of his opinions about the appropriateness or otherwise of the policy decisions or actions of Governments which he has served, is not in the Board's view conducive to the maintenance of a proper ministerial-public service relationship—if the example were to be emulated on any scale it could be destructive of it.

This statement by the Public Service Board is a clear example of the classic approach to ministerial-public service relationship within a Westminster-type system of government. It also serves to reinforce our view that freedom of information legislation will only be effective if the public service as a whole, and especially at a senior level, is prepared to adopt attitudes which are more conducive to the free exchange of information than has been the case in the past.

**4.37** We would not seek to dwell on this issue of neutrality. No submission or witness before us suggested that freedom of information legislation would have any significant impact in this area, and this is a view which we share. There is a world of difference between taking a 'political' position in terms of supporting government, rather than opposition, policies; and taking a 'partisan' position favouring one political party or cause above another. Few senior public servants have overtly identified themselves with particular political parties,<sup>58</sup> although in recent years a number of people of known prior political affiliation have been appointed to very senior public service positions, with consequential problems arising upon changes of government.<sup>59</sup> We would not see our proposals altering this in any way. Provided, as we said, that partisan considerations remain absent from the operations of the public service we see no changes of behaviour likely to result from any of our proposals.

**4.38** There is a further consideration however, that goes beyond the question of public servants playing a partisan role; and that relates to the whole question of how the distribution of power has shifted between public servants and politicians. In recent years it has been increasingly argued that there has been an undesirable shift of real power from the elected government to the public

<sup>58</sup> Rare examples being those of Dr John Burton, a former head of the then Department of External Affairs, who resigned to fight an election as an endorsed party candidate (H. W. Scarrow, *The Higher Public Service of the Commonwealth of Australia*, Duke University Press, Durham, N. C., 1957, pp. 154-6); Dr Rex Paterson, a former Director of the Commonwealth Department of National Development, later M.P. for Dawson (Queensland) (Spann, *Government Administration in Australia*, cited footnote 55, p. 259); and Mr Ellicott (now Minister for Home Affairs) who was a former Solicitor-General.

<sup>59</sup> The appointment of a number of such persons by the Labor Government during 1972-75 was a prime factor leading to the introduction of the *Public Service Amendment (First Division Officers) Act 1976* (No. 6 of 1977) by the Liberal-National Country Party Government. By changing the method of appointing and removing First Division Officers, the new legislation makes it easier to terminate 'political appointments'. See in particular clause 3 (a) of the Bill amending s. 54 of the Principal Act.

service. Writing in 1964, R. H. S. Crossman summarised developments which he characterised as involving 'the passing of Cabinet government' thus:

Unification and centralisation have had two important political effects. Firstly, they have made it even more difficult for departmental ministers to get their way against their senior officials, or where necessary to dismiss them. In our new kind of civil service, the minister must normally be content with the rôle of public relations officer to his department . . . Secondly, the centralisation of authority, both for appointments and for policy decisions . . . has brought with it an immense accretion of power to the Prime Minister. He is now the apex not only of a highly centralised political machine, but also of an equally centralised and vastly more powerful administrative machine.<sup>60</sup>

This shift of power was recognised on both sides of British politics. The Labour Party spoke of the 'dangerously unbalanced and dependent relationship' of ministers with their officials<sup>61</sup> and the Conservatives of

a recognisable shift of power away from the elected politician to the bureaucrat. It would be wrong to close one's eyes to the fact that, in Sir Eric Roll's words, 'the tradition that ministers take the political decisions and civil servants carry them out has long been overtaken by reality.'<sup>62</sup>

**4.39** The same is the case in Australia. One of the foremost experts on the subject has recently written:

The professional expert and the manager [in Australia] played a relatively more important role . . . than in Britain.<sup>63</sup>

and,

Among the institutional elites of Australian society, public servants occupy an important place. Australia has an executive-biased political system . . . Parliaments rarely have a large supply of able members, operate fewer formal controls on administration than in most countries. Ministers have often had political skills and interests, rather than executive capacity or experience. This has helped to give senior departmental officers and the executive heads of the large statutory corporations considerable influence, especially when they have worked with a strong head of government. Public officers have played a major part in Australian history . . . The Federal system has helped in this process.<sup>64</sup>

One Canadian observer has summarised the situation thus:

There is no doubt, however, that while the *focus* of responsibility in government continues to be primarily the minister, the *locus* of actual responsibility lies increasingly in the public service.<sup>65</sup>

**4.40** This shift in the balance of power between the elected government and the professional public service has important implications for freedom of information legislation. In essence it means that the public service should be made more open to public scrutiny and more accountable for its actions than has traditionally been the case. We do not believe that this changed attitude is in any way incompatible with the principles of the Westminster system. In Chapter 2 under the heading 'Democracy and the right to know' we discussed some aspects of this matter. We

<sup>60</sup> W. Bagehot, *The English Constitution*, C. A. Watts, London, 1964, introduction, p. 51.

<sup>61</sup> P. Shore, *Entitled to Know*, MacGibbon and Kee, London, 1966, p. 155. See also the Labour Party evidence to the Fulton Committee, Great Britain, the Civil Service Committee (Lord Fulton, Chairman), *Proposals and Opinions*, HMSO, London, June 1968, vol. 5 (2), pp. 652-673.

<sup>62</sup> *The Times*, 27 May 1976, p. 16.

<sup>63</sup> Spann, *Government Administration in Australia*, cited footnote 55, p. 33.

<sup>64</sup> Spann, *Government Administration in Australia*, cited footnote 55, pp. 36-7.

<sup>65</sup> Williams, *Freedom of Information and Ministerial Responsibility*, cited footnote 2, p. 28.

pointed out that in Britain the Fulton Committee (1968) had deplored excessive secrecy in government and had called for greater exposure of government administration to the public gaze;<sup>66</sup> that this view had been endorsed by the British Government's White Paper (1969)<sup>67</sup> and recognised by the Franks Committee (1972).<sup>68</sup> However the long awaited government response to the Franks Committee recommendations, published in July 1978<sup>69</sup> has been greeted with great disappointment by supporters of the concept of less secrecy in government.<sup>70</sup>

**4.41** This administrative secrecy is, however, in no way confined to the operations of Westminster-style governments. A recent study by the International Institute of Administrative Sciences reported on the problems of government secrecy in four Western European, two Eastern European and three Scandinavian countries plus the United States and Canada. The report indicated that most fears expressed about the danger of open government were quite groundless, as adequate protection has always been afforded to material that ought to be protected. Thus, even in Sweden, 'there has been little danger of too much administrative openness'.<sup>71</sup>

**4.42** We noted earlier that an essential feature of the Westminster system was the accountability of the Executive to Parliament, and in this regard we are much encouraged by the statements of Lord Croham, a recent former head of the British Civil Service, that greater openness of the public service to the general electorate will 'lead to a strengthening of Parliament in relation to the executive'.<sup>72</sup>

**4.43** We find it interesting by contrast that the Public Service Board in its submission to us sought to imply that greater public access to information would in fact increase the power of the public service in relation to the elected government. The Board spoke of

the added *power* which public access to internal working documents could give public servants. Evidence that Ministers had acted contrary to advice given by or even the views of public servants could be used against Ministers by those disagreeing with the relevant actions. In such cases the public servants could be portrayed by Ministerial opponents as wise/expert/disinterested, etc., and the Minister put on the defensive. The coercive influence on governments which could thus be put in the hands of public servants should not be underestimated. Nor would it fail to be recognised by Ministers.<sup>73</sup>

This of course amounts to no more than speculation and for our part the views of Lord Croham are much to be preferred. It is certainly upon that premise that we have proceeded.

<sup>66</sup> Great Britain, The Civil Service Committee (Lord Fulton, Chairman), *Report*, Cmnd 3638, HMSO, London, June 1968, vol. 1, para. 277, p. 91.

<sup>67</sup> Great Britain, *Information and the Public Interest*, Cmnd 4089, HMSO, London, June 1969.

<sup>68</sup> Great Britain, Departmental Committee on Section 2 of the Official Secrets Act 1911, (Lord Franks, Chairman), *Report*, Cmnd 5104, HMSO, London, vol. 1, September 1972.

<sup>69</sup> Great Britain, Home Office, *Reform of Section 2 of the Official Secrets Act 1911*, Cmnd 7285, HMSO, London, July 1978.

<sup>70</sup> For an example of this response see R. J. Williams, 'Official Secrets and Open Government: A Reappraisal', *Political Quarterly* 50, 1, January-March 1979, pp. 100-104.

<sup>71</sup> D. C. Rowat, *Administrative Secrecy in Developed Countries*, Macmillan Press Ltd, London, 1979, p. 13.

<sup>72</sup> *The Times*, 17 August 1978, p. 2.

<sup>73</sup> Submission no. 47 incorporated in *Transcript of Evidence*, p. 840.

## **The anonymity of the Public Service**

**4.44** In the classic model of the Westminster system it is expected that the particular views of individual public servants are not common knowledge.<sup>74</sup> It has traditionally been held that differences of opinion between ministers and officials should not become public knowledge; that policy decisions or positions should be identified as being the responsibility of ministers and not officials; and that, whatever views the officials do hold, they defer and accept the policies decided by ministers. Anonymity has thus been described as an 'equally important tradition'<sup>75</sup> as that of neutrality in the public service. In evidence before us, senior Australian public servants stressed the importance of this tradition. Mr Curtis said:

I think the principal point that is being considered is whether a public service could continue to serve successive governments, not only with impartiality but with an acceptance of impartiality by governments if their positions on policy issues become known and debated. Perhaps where public servants become identified with particular partisan issues, not necessarily political partisan issues, then it may well be that a succeeding government committed to a different line of thought would wish to have different advisers . . . . The second point is that once the views of an individual public servant become known and subject to public debate it seems to be almost inevitable that the public servant is going to be drawn into the arena to defend his views.<sup>76</sup>

Mr Stone said that one of the effects of the Westminster system is that 'we cannot have a situation in which a department is saying one thing when the Minister may want to be saying something else'.<sup>77</sup>

**4.45** Defenders of the traditional view of the Westminster system are most anxious to preserve this concept of absolute anonymity. The British Government's White Paper states:

The risk must be avoided of officials becoming personally identified with a particular line of advice on a particular issue of policy or exposed to pressure to discuss in what respects their advice has not been accepted by ministers. It is clearly right that officials should not be drawn into expressing personal views on policy matters which could be represented as in conflict with those of their Ministers, or as reflecting any political bias.<sup>78</sup>

This is very much in line with the submission of the Public Service Board which we quoted above.

**4.46** Once again, however, the political reality has far outdistanced the pristine theory, as Mr Curtis clearly recognised when he said:

Given the extent to which the names of senior officials of at least some departments are now publicly known and their views and backgrounds, or supposed views and backgrounds, are discussed in the daily Press and weekly journals, it may be doubted whether much if anything is left of the tradition of anonymity.<sup>79</sup>

And again,

It seems to me inevitable that as the interface between government and the public becomes larger with the expansion of government regulatory activities, more and more will be known about not only who the public servants are who are operating within the system but what their views are as well.<sup>80</sup>

<sup>74</sup> Spann, *Government Administration in Australia*, cited footnote 55, ch. 10.

<sup>75</sup> Birch, cited footnote 32, p. 242.

<sup>76</sup> *Transcript of Evidence*, p. 23.

<sup>77</sup> *Transcript of Evidence*, p. 1693.

<sup>78</sup> *Information and the Public Interest*, cited footnote 67, para. 30, p. 10.

<sup>79</sup> *Transcript of Evidence*, p. 28.

<sup>80</sup> *Transcript of Evidence*, p. 29.

This is not a new phenomenon. Professor Encel writes:

Educational policy in Victoria is identified with the name of Frank Tate and in N.S.W. with those of Peter Board and Harold Wyndham. The building of railways, of great bridges, of water supply projects, electricity generating enterprises . . . with names like Speight, O'Connor, Bradfield, Hudson and Monash. In other cases, leading officials have become dominant figures over the whole range of state administration . . . like J. D. Story, in Queensland, and Wallace Wurth in N.S.W.<sup>81</sup>

The Ontario Commission research paper notes, 'it is evident that official anonymity is gradually declining despite the efforts of most ministers and public servants to resist this development,<sup>82</sup> and the Fulton Committee wrote of anonymity that 'it is already being eroded by Parliament and to a more limited extent by the pressures of the press, radio and television; the process will continue and we see no reason to seek to reverse it'.<sup>83</sup>

**4.47** Public servants at a very senior level appear frequently before parliamentary committees where quite free exchanges of opinion occur. As has been said, their supposed views are canvassed in the press<sup>84</sup> and, indeed, discussed in the Parliament.<sup>85</sup> Leading figures such as Sir Arthur Tange are inextricably linked with their departments and their views become known over many years. Industry and interest group leaders develop close relationships with senior public servants.<sup>86</sup> It is increasingly common for such officials to speak at public meetings and seminars, especially since the 1974 repeal of regulation 34 (b) of the Public Service Regulations which forbade an officer to publicly comment upon any administrative action or upon the administration of any department.<sup>87</sup> In short it could be said that this concept has largely vanished and 'that lapses in ministerial responsibility help to reinforce a decline in anonymity resulting from other changes in the political system'.<sup>88</sup>

**4.48** The principal issue arising in this context is what changes to the Westminster system are likely to arise if greater access is granted to what are generally called 'internal working documents' (a matter dealt with in fuller detail in Chapter 19 relating to clause 26 of the Bill) and whether this in turn will reveal the identity of individual public servants and the specific nature of their advice.

**4.49** First it is held that such increased disclosure would lead to some change in the nature of the relationship between officials and their ministers. Specifically Mr Stone said that: 'the breach in the relationship between Ministers and their

<sup>81</sup> S. Encel, *Equality and Authority: A Study of Class, Status and Power in Australia*, Cheshire, Melbourne, 1970, p. 71.

<sup>82</sup> Williams, *Freedom of Information and Ministerial Responsibility*, cited footnote 2, p. 24.

<sup>83</sup> Fulton, *Report*, cited footnote 66, para. 283, p. 93.

<sup>84</sup> See for instance the articles in *The National Times* dealing with Sir Arthur Tange (Defence), 28 April 1979, pp. 23-31; Mr John Stone (Treasury), 28 October 1978, pp. 8-11; Mr Geoffrey Yeend (Prime Minister and Cabinet) and Sir Alan Carmody (Prime Minister and Cabinet), 11 November 1978, pp. 14-17; Mr Nick Parkinson (Foreign Affairs), 18 November 1978, pp. 8-10; Mr Pat Lanigan (Social Security), 2 December 1978, pp. 18-19; Mr K. O. Shann (Public Service Board), 9 December 1978, pp. 33-36; and Mr Ian Castles (Finance), 16 December 1978, pp. 39-41.

<sup>85</sup> See for instance comments about the views of Sir Arthur Tange in Australia, Senate, *Hansard*, 20 March 1979, pp. 739-745.

<sup>86</sup> See comments of Mr Curtis in *Transcript of Evidence*, p. 28.

<sup>87</sup> Spann, *Government Administration in Australia*, cited footnote 55, p. 260.

<sup>88</sup> Williams, *Freedom of Information and Ministerial Responsibility*, cited footnote 2, p. 25.

departments which would be involved in the publication of such a document would be very much against the public interest',<sup>89</sup> and

In my considered judgment the release, under sanction of the Bill, of what are loosely called internal working documents of departments, that is to say the kind of documents that pass in the policy-advising process between officials and their Ministers, would be subversive of the system under which we presently operate. People may not like that system but it is the system.<sup>90</sup>

**4.50** Secondly, several of our witnesses echoed criticisms that have also been made overseas that the public exposure of these advisings, or the revelation of the identity of individual public servants will lead to a major change in the nature of that advice itself. It is said that the quality of the advice tendered will be adversely affected, being more cautious and less innovative.

The Chairman of the Public Service Board Mr R. W. Cole said:

To take an extreme example, if it was suggested that internal working documents should not be exempt . . . Documents that I have seen over my years in the Treasury, the Department of Transport and the Department of Finance, often have quite strongly criticised existing government policies or things that are going to become government policies. There has been a battle going on behind the scenes as to whether the Government should adopt policy x. At present it is possible in the Public Service to write a document saying policy x being proposed by a Minister is very bad for these reasons, and that goes to the Minister or may even go into Cabinet. If that were going to be published or made available to journalists it could not be written.<sup>91</sup>

And again,

I am just asserting that it is a fact that people do write documents in a way which is geared to what they believe will be the readership, and that where they have an obligation to write for a wider readership they write them in a different way. I am not saying this is 100 per cent so, but they write them in a different way from the way in which they write them for internal purposes.<sup>92</sup>

In doing the best you can you may chance your arm somewhat because you may not be sure of your facts and you may be making a quick judgment. If the senior public servant fears that in some sense this might be published and held against him he may be ultra-cautious, which may not be helpful to the recipient.<sup>93</sup>

**4.51** Indeed in its written submission the Board spelt this out in greater detail. It submitted:

Public servants if believing that they may be writing, in effect, for publication could tend to be more careful and less straight forward and frank in internal written communications. Being more careful has obvious merits though it may slow advising processes down—a public servant whose primary aim is never to be seen to make a mistake is not the ideal model. Particularly in the policy advising areas of government quick and often comparatively informal papers are prepared of necessity—i.e., to an externally imposed timetable. Even deeper assessments, particularly those which may be critical of an existing policy, may be written in direct language rather than in the guarded language common in reports which are written by public servants for publication. Any inhibition on frankness in communication would in the Board's view risk weakening the policy formulation and advice to government functions of the public service.

<sup>89</sup> *Transcript of Evidence*, p. 1696.

<sup>90</sup> *Transcript of Evidence*, p. 1697.

<sup>91</sup> *Transcript of Evidence*, p. 887.

<sup>92</sup> *Transcript of Evidence*, p. 888.

<sup>93</sup> *Transcript of Evidence*, p. 889.

Individual public servants could become publicly identified with particular points of view. They could thus become involved in political controversies as either critics or defenders of government policies or of the policies of opposition parties. Public servants could be attacked in person for views they may have expressed. Before it is thought 'why not?' the question needs to be asked: should those public servants be given the right of reply in such circumstances? The Board believes that it would be inappropriate for individual public servants to become involved in political debate and that it would seriously erode the concept of a neutral public service if circumstances were allowed to arise in which any such tendency developed. Indeed, if this were to happen, pressures would almost certainly arise for Governments to take responsibility for the appointment of persons to positions in the Public Service below the Permanent Head/Statutory Officer level concerned with policy formulation and advice.<sup>94</sup>

**4.52** When the Secretary of the Treasury was asked if he thought that subsequent disclosure of official advisings would cause a document to be written in a different fashion, he replied: 'In my opinion it is quite certain it would do so'. He said that for himself 'I would be much more circumspect than I am normally accustomed to be'. However, on the issue of the quality of his own advice, he said that 'The policy prescriptions I hope would not differ'. But as to the impact on others he felt that they might in fact tend to reduce the quality of their output,

Because I have seen sufficient of the world to notice that in fact people do write differently, or even speak differently for that matter, in one set of circumstances from another.<sup>95</sup>

**4.53** With slightly different emphasis, the Secretary of the Department of the Prime Minister and Cabinet said:

I think those who contend that nothing will change do not know what they are talking about. The system will certainly change. It will change for me and I expect it will change for others. Let me add that does not say anything about the integrity of advisers if that is what the British comment was about. The advice will be just as frank and forthright and I hope as accurate, but it will be done differently.<sup>96</sup>

By this he meant that formal records might not be kept but rather that records would be of a less formal nature; more would be done by simple discussion, or on the telephone. He said 'You may not be allowed to record a file note of the discussion. The Minister may not want it'.<sup>97</sup> He added,

It is not a fear of exposure; it is that advisers only have one try. You put your thoughts down on a piece of paper and that is it. It then goes out to public controversy; you do not have a second chance to go and explain your views; you do not then enter the public platform to defend and explain what you have said. I believe it will be a permanent change, not necessarily in the same degree all the way through, but those who contend that there will be no change are doing something less than facing up to all the facts.<sup>98</sup>

**4.54** This view has frequently been advanced in the courts to argue for the non-disclosure of documents, and in almost all cases the courts have rejected this view. Viscount Simon L. C. said:

It is not a sufficient ground [to withhold a document] that the documents are 'state documents' or 'official' or are marked 'confidential'. It would not be a good ground

<sup>94</sup> Submission no. 47 incorporated in *Transcript of Evidence*, pp. 839-840.

<sup>95</sup> *Transcript of Evidence*, p. 1713.

<sup>96</sup> *Transcript of Evidence*, p. 2305.

<sup>97</sup> *Transcript of Evidence*, p. 2305.

<sup>98</sup> *Transcript of Evidence*, p. 2306.

that, if they were produced, the consequences might involve the department or the government in Parliamentary discussion or in public criticism . . . Neither would it be a good ground that production might tend to expose a want of efficiency in the administration . . . In a word, it is not enough that the minister or the department does not want to have the documents produced.<sup>99</sup>

In the United States, the Supreme Court in its historic judgment on the question of the release of the 'Watergate tapes' said:

However, neither the doctrine of separation of powers, nor the need for confidentiality of high level communications, without more, can sustain an absolute, unqualified presidential privilege of immunity from judicial process under all circumstances. The President's need for complete candour and objectivity from advisers calls for great deference from the courts. However, when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises. Absent a claim of need to protect military, diplomatic or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of presidential communications is significantly diminished by production of such material for in camera inspection with all the protection that a district court will be obliged to provide.<sup>100</sup>

**4.55** The Australian High Court has recently pronounced decisively on these objections in *Sankey v. Whitlam* (which we discuss at length in Chapter 5). Acting Chief Justice Gibbs said:

Not all Crown servants can be expected to be made of such stern stuff that they would not be to some extent inhibited in furnishing a report on the suitability of one of their fellows for appointment to high office, if the report was likely to be read by the officer concerned. However this consideration does not justify the grant of a complete immunity from disclosure to documents of this kind.<sup>101</sup>

Mr Justice Mason (a former Solicitor-General) said:

I agree with his Lordship [Lord Reid in *Conway v. Rimmer*] that the possibility that premature disclosure will result in want of candour in Cabinet discussions or in advice given by public servants is so slight that it may be ignored . . . I should have thought that the possibility of future publicity would act as a deterrent against advice which is specious or expedient.<sup>102</sup>

And Mr Justice Stephen said of such claims that 'Recent authorities have disposed of this ground as a tenable basis for privilege'.<sup>103</sup>

**4.56** We tend to support the view that the courts have expounded—in effect that while there may well be some change in the nature of advice provided to the government, these changes will be for the better. The specious or expedient advice, the unsubstantiated comments about individuals, or the expression of mere opinions without any real support may well vanish, but we share Mr Stone's hope that the quality of policy prescriptions will not differ. We are not alone in this view. The Fulton Committee said:

We think that administration suffers from the convention, which is still alive in many fields, that only the Minister should explain issues in public and what his department is or is not doing about them . . . In our view, therefore the convention of anonymity should be modified and civil servants, as professional

<sup>99</sup> *Duncan v. Cammell Laird and Co. Ltd* [1942] 1 All ER at p. 595.

<sup>100</sup> *United States v. Nixon* 94 S.Ct. 3090 L.Ed.2d (1974).

<sup>101</sup> *Sankey v. Whitlam* (1978) 53 ALJR 11 at p. 22.

<sup>102</sup> *ibid.*, at p. 44.

<sup>103</sup> *ibid.*, at p. 31.

administrators, should be able to go further than now in explaining what their departments are doing, at any rate so far as concerns managing existing policies and implementing legislation.<sup>104</sup>

Lord Armstrong, an eminent English public servant writes,

To my mind there would be every advantage in the name of the civil servants responsible for such [policy option] studies being known, and their being allowed to join in public debate on their own findings.<sup>105</sup>

**4.57** Lest it be thought that such views are confined to judges and British public servants, we would note that Mr R. Doyle, Senior Research Officer of the Administrative and Clerical Officers Association told the Committee that 'We do not accept that FOI legislation will do away with the concept of candour'<sup>106</sup> and when asked if he thought that comprehensive freedom of information legislation would cause his members to behave in a different fashion in terms of committing advice and opinion to paper, he replied 'Shortly, no'.<sup>107</sup>

**4.58** The inevitability of this process was recognised by the Attorney-General (Senator Hon. P. D. Durack, Q.C.) when he told us that

The views or supposed views of individual public servants tend more and more to be canvassed in the Press. Individual public servants have more and more direct dealings with the public in the development as well as in the administration of government policies and programs. This process of change needs to be allowed to evolve.<sup>108</sup>

**4.59** Indeed there are two further desirable consequences which could flow. Lord Croham wrote:

If I am right, therefore, openness will do precisely what civil servants are attacked for doing. It will reinforce moderation and consistency in government and lead to less violent swings in policy.<sup>109</sup>

And Mr Curtis, speaking of the advantage enjoyed over most members of the general public by those individuals who have close personal contacts with public service decision makers, commented:

One of the purposes of freedom of information legislation is to ensure that the insider, the person who has established an inside running, does not get a better deal with government than a person who does not have these contacts or inside running.<sup>110</sup>

**4.60** We are thus led to the conclusion that although an effective Freedom of Information Bill will in fact cause some revision in the doctrines of public service neutrality and anonymity, and may indeed modify the relationship between ministers and public servants, these changes are likely to be for the better. The Public Service Board and others submitted that any loss of any portion of the secrecy which now surrounds so much of the workings of government and the public service would have a detrimental effect upon the system as a whole.<sup>111</sup>

<sup>104</sup> Fulton, *Report*, cited footnote 66, para. 283, p. 93.

<sup>105</sup> Sir William Armstrong, *The Role and Character of the Civil Service*, OUP, London, 1970, p. 15.

<sup>106</sup> *Transcript of Evidence*, p. 930.

<sup>107</sup> *Transcript of Evidence*, p. 931.

<sup>108</sup> Senator P. Durack, Q.C., *The Freedom of Information Bill; An Address by the Attorney-General Senator Peter Durack, Q.C., To The Australian Pharmaceutical Manufacturers Association*, Press Release by the Attorney-General, Canberra, 21 August 1978, p. 7.

<sup>109</sup> *The Times*, 17 August 1978, p. 2.

<sup>110</sup> *Transcript of Evidence*, p. 28.

<sup>111</sup> Submission no. 47 incorporated in *Transcript of Evidence*, pp. 839-840.

Such a view was by contrast rejected by the public service unions<sup>112</sup> and attacked by many other witnesses. A view similar to that of the Public Service Board was put strongly to the British Fulton Committee more than a decade ago. Like that Committee, we reject it.

**4.61** Our view about the impact of such legislation on the other aspects of the Westminster system which we have discussed is similar. Collective Cabinet responsibility will not be weakened and individual ministerial responsibility may well be strengthened. The political system, whatever its form or nature, should exist to one end only: not the convenience of the government, but the service of the people. To this end, no views about the supposed nature of the Westminster system should prevent the strengthening of the accountability of all parts of the government to the people from being achieved. We well remember that these accusations against freedom of information legislation were equally mounted against the Ombudsman legislation (it was going to destroy ministerial responsibility and render the private member of Parliament irrelevant) and virtually all other major developments in administrative law reform.

### Conclusion

**4.62** We value the Westminster system of government; we do not seek to change it; nor do we believe effective freedom of information legislation would change it. A great deal of the talk about the Westminster system and how it would be altered by freedom of information legislation has been obscure and misleading. To a great extent the term 'Westminster system' has been used as a smoke-screen behind which to hide, and with which to cover up existing practices of unnecessary secrecy. Very often people have alleged that the Westminster system is under attack by freedom of information legislation when what is actually under attack is their own traditional and convenient way of doing things, immune from public gaze and scrutiny. We are indeed seeking to put an end to that. What matters is not the convenience of ministers or public servants, but what contributes to better government. The only feature of the Westminster system which cannot be in any way modified without fundamentally subverting that system is the need to ensure that members of the Executive Government are part of, and drawn from, the Legislature. Freedom of information legislation does not alter this one iota. The other features of the Westminster system which we have identified will either not be significantly changed by our freedom of information proposals or else will, we believe, be changed for the better.

**4.63** Freedom of information legislation does not relate to any specific system of government, be it a Westminster, presidential or any other system. It is rather a question of attitudes, a view about the nature of government, how it works and what its relationship is to the people it is supposed to be serving. Any political system which holds that the people are entitled to a maximum degree of information about how *their* government operates, so that it can be made more responsive and accountable to them, will welcome an effective Freedom of Information Bill. In this respect a Westminster system of government should be no different from any other.

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<sup>112</sup> *Transcript of Evidence*, pp. 908-942. See especially p. 930.

## **Implications of the Sankey v. Whitlam judgment for freedom of information**

**5.1** During the deliberations of this Committee, the High Court gave its historic decision in *Sankey v. Whitlam and others*<sup>1</sup> (the *Sankey* case). That decision is now historic for reasons outside our terms of reference (principally the re-appraisal of Crown privilege), yet there are portions of the judgments that in our opinion are relevant to our consideration of the Freedom of Information Bill. Certainly many submissions made to us after the decision was handed down invited us to contrast the approach of the court with the provisions of the Bill, and always with a view to disapproving the latter. Be that as it may, we should state that the conclusions we express in this Report have been reached independently of the High Court's decision. We have found, nonetheless, that the judgments provide confirmation of some of the opinions and criticisms that we have registered, and that they provide a useful insight into the judicial technique applied in cases involving a dispute about the disclosure of government documents.

### **The decision**

**5.2** The proceedings before the High Court arose out of committal proceedings commenced by Mr Sankey, a private citizen, in November 1975 against four ministers in the Labor Government, including the then Prime Minister the Honourable E. G. Whitlam, Q.C. The prosecution alleged against each defendant the statutory offence of conspiracy to effect a purpose unlawful under a law of the Commonwealth and a common law offence of conspiring to do an unlawful act in that each defendant had conspired to deceive the Governor-General by recommending his assent to a borrowing of money that allegedly was in contravention of the Financial Agreement Acts. Mr Sankey sought production of a number of official documents that recorded the relevant deliberations and decisions of the Government, and which he claimed were essential to the proof of his allegations. The Government (a Liberal-National Country Party Government at the time the request was made) claimed privilege in respect of some of the documents. Mr Whitlam argued that to disclose the remainder would amount to a breach of parliamentary privilege. The court rejected both claims (Gibbs ACJ, Stephen, Mason, Aickin JJ; Jacobs J dissenting on a separate issue and without deciding the claims).

**5.3** The documents whose production was resisted by the Commonwealth included a schedule listing the matters brought before the Executive Council for consideration; explanations setting out the reasons for the advice tendered to the Executive Council; memoranda from senior officials to ministers or to senior officials of other departments; letters between ministers, notes of a meeting with the Prime Minister; and loan programs submitted by the Commonwealth to meetings of the Loan Council. Most of the documents, if sought under the Freedom of Information Bill, could be protected by a conclusive certificate under clause 23

<sup>1</sup> (1978) 53 ALJR 11.

(documents the disclosure of which would prejudice Commonwealth–State relations) and clause 25 (Executive Council documents). Protection could be sought for the memoranda and letters passing between officials and ministers under clause 26 (internal working documents), though that protection would not be conclusive. None of the documents was in fact a Cabinet document, as defined in clause 24 of the Bill, though many were clearly analogous in nature, and ‘Cabinet papers’ were specifically included in the remarks made by some of the Justices.<sup>2</sup>

**5.4** Briefly the court held that where production of government documents is resisted by a claim of Crown privilege it is ultimately a matter for the court to determine in all cases whether the claim to privilege succeeds; it is not a matter to be determined finally by the Executive Government. The court will determine this after balancing two aspects of the public interest: the public interest that harm will not be done to the nation or the public service by the disclosure of documents (sometimes stated more narrowly as the public interest in the efficient conduct of the affairs of government); and the public interest that the administration of justice should not be frustrated by the withholding of documents that must be produced if justice is to be done. The court has the ultimate power of decision where the production is opposed due to the contents of the documents, or the objection is a class claim (for instance, that although the documents are not individually sensitive, the production of documents of that character could imperil frankness and candour within the public service). In so deciding, the court expressly overruled suggestions made in earlier cases that class claims might be conclusive as applied to certain categories of documents, such as State papers and Cabinet minutes and submissions.

### **Implications of the decision**

**5.5** Much else was said in the judgments about issues that are common to the law on Crown privilege and the provisions of the Bill: particularly, whether an Executive claim of privilege should be conclusive in some instances; whether and in what circumstances internal working documents should be protected; the meaning and operation of the concept of ‘public interest’, and the form of the claim that should be made by the Crown. There are, admittedly, differences between the law on Crown privilege, and the law embodied in the Bill, which negate the direct relevance of the judgments in any analysis of the Bill. The High Court was dealing with a power, the exercise of which could result at most in a negligible (albeit significant) degree of disclosure, whereas a tribunal hearing cases under the Bill would exercise a power that also regulates disclosure, but on a much more frequent basis. Arguably the use of judicial power in one instance is different in kind to its use in the other. Moreover the question to be resolved by a court is resolved in a context where quite identifiable interests are balanced, one of which is the effect that non-production would have upon the ability of a litigant to prove his or her case. There are interests to be balanced in a freedom of information case, although they may not be as ascertainable or concrete as that. Certainly the Bill implies that an applicant’s interest in, or need for a document is an irrelevant consideration. Lastly, it may also be a point of distinction that the High Court was discussing a power that is exercised by a court, whereas the appellate jurisdiction under the Bill is exercised by the Administrative Appeals Tribunal some of whose members are laymen (though it should not be forgotten that the judicial power, as the *Sankey* case itself demonstrated, can be exercised by a magistrate).

<sup>2</sup> *Ibid.*, pp. 22 (Gibbs ACJ); 30 (Stephen J); 43 (Mason J).

**5.6** Notwithstanding these differences we are of the opinion that a comparison between the *Sankey* case and the Bill is unavoidable if not essential. Above all, the judgments have challenged, or even undermined, many ideas that were previously held (and are reflected in the Bill) about the relationship between government and the courts. The generally favourable reaction that has greeted the judgment amongst commentators and members of the public indicates that the relationship has undergone change, and that public opinion in many quarters favours the High Court's assessment of how that relationship should now be expressed. We should also remember that one objection often raised to the idea of freedom of information legislation is that disclosure is an issue with political ramifications that should be resolved by political processes and in a parliamentary forum. Even those favouring legislation have expressed fears about the fitness and ability of courts to resolve the issue. We believe that the *Sankey* case, in providing a timely insight into the application of the judicial technique in resolving disputes about disclosure, has answered many of these objections.

**5.7** It is also relevant that the Government has, in a sense, accepted the law as declared by the High Court. The Attorney-General indicated recently in response to a parliamentary question that the Government did not propose to amend the law to abridge or confine the discretion of a court as exercised in the *Sankey* case.<sup>3</sup> The contrary course has been taken in New South Wales. The Evidence Act, 1898,<sup>4</sup> was recently amended so as to abolish a court's discretion to order the disclosure of 'government communications', which are defined to mean communications on a senior level of government, including communications as to Cabinet proceedings, the formulation of government policy, or government administration at senior level. It now provides, in part, as follows:

61. (1) When the Attorney-General certifies in writing that in his opinion—

- (a) any communication relating to a matter so described, is a government communication and is confidential; and
- (b) the disclosure of the communication in any legal proceedings described in the certificate is not in the public interest,

the communication shall not be disclosed in or in relation to those legal proceedings or be admissible in evidence in those legal proceedings.

It is further provided that a court shall accept a certificate 'as conclusive that the communication is a government communication and is confidential and that the disclosure of the communication in those legal proceedings is not in the public interest' (section 61 (2)). Moreover a court cannot permit government communications to be disclosed in legal proceedings unless the Attorney-General has had an opportunity to give a certificate (section 62).

**5.8** It will be readily apparent to any student of administrative law that these provisions do far more than overturn the effect of the decision in the *Sankey* case. Before their enactment it was still acknowledged that a court had a discretion to order the production of any document, although judicial statements had been made to the effect that the discretion should be used only in exceptional circumstances in relation to certain categories of documents, State papers being one example.<sup>5</sup> The Evidence (Amendment) Act, 1979 (N.S.W.) abolishes that discretion altogether. It restores to the courts the illusory power conferred upon

<sup>3</sup> Australia, Senate, *Hansard*, 2 May 1979, pp. 1544-5.

<sup>4</sup> Evidence (Amendment) Act, 1979 (no. 40) (N.S.W.).

<sup>5</sup> *Sankey v. Whitlam* (1978) 53 ALJR 11 at p. 22 (per Gibb ACJ) and the cases there cited; sepe, also D. C. Pearce, 'The Courts and Government Information', *Australian Law Journal* 50, 513.

them by the decision of the House of Lords in 1942 in *Duncan v. Cammell Laird & Co. Ltd*<sup>6</sup> to rubber stamp any claim to privilege made by a minister. Indeed, the Act retires the N.S.W. courts to a role that they have never previously accepted, as the ruling of the House of Lords had always been resisted in Australia in relation to class claims, both by the Privy Council and by the N.S.W. Supreme Court.<sup>7</sup>

**5.9** We see no merit in the New South Wales approach and would not in any circumstances wish to see that approach followed by the Commonwealth. We have been impressed in fact by the public reaction, which has been as swift and intense in its condemnation of this Act<sup>8</sup> as it was in praise of the High Court's decision in the *Sankey* case. Accordingly, in the remainder of this chapter we will discuss briefly the provisions of the Freedom of Information Bill that we have reconsidered in the light of the High Court judgment. The discussion is little more than a prelude to later chapters in which each of those provisions is discussed in more detail. A fuller discussion of the implications of the *Sankey* case for freedom of information is also contained in a staff paper prepared by a consultant to this Committee, and which was published in the Transcript of Evidence at pages 1727-1740.

### Conclusive certificates

**5.10** Clauses 23-25 of the Bill, which authorise various government officers to issue certificates stating conclusively that particular documents are exempt, are consistent with previous legal theory that a court would accept an Executive judgment concerning a similar document subpoenaed for use in legal proceedings. That theory has been disapproved in the *Sankey* case. The importance of that disapproval in terms of the Bill can be more readily appreciated if we look first at statements that were previously made by official spokesmen to justify the system of conclusive certificates embodied in clauses 23-25 of the Bill. The *Background Notes* issued by the Attorney-General's Department argues that decisions that documents be withheld in the interests of defence, security, foreign relations, or Commonwealth-State relations:

ought properly to be made by a Minister or the most senior officials of Government. Only they are in the position to make such a judgment. An independent body, such

<sup>6</sup> [1942] AC 624.

<sup>7</sup> E.g. *Robinson v. State of South Australia* (no. 2) [1931] A.C. 704 (P.C.); *Ex parte Brown; re Tunstall* [1966] N.S.W.R. 770 *cf. Ex parte Attorney-General; re Cook* [1967] 2 N.S.W.R. 689.

<sup>8</sup> Letter: 'Evidence Bill is intolerable', Brian Donovan (Secretary, Criminal Law Committee, Law Graduates' Association), *National Times* week ending 19 May 1979.

Article: 'Crown Privilege under the Law', Frank Hoffer (solicitor), *Sydney Morning Herald*, 3 May 1979.

Article: 'Citizens' Rights and Evidence (Amendment) Act', John Maddison M.P., *Sydney Morning Herald*, 9 May 1979.

Editorial: 'Law and State', *Sydney Morning Herald*, 3 May 1979.

Letter: 'Evidence Act and Individual Rights', Michael Evans (Lecturer in Law, N.S.W. Institute of Technology), *The Australian*, 24 May 1979.

Editorial: 'State v. People', *Sydney Morning Herald*, 8 May 1979.

Letter: 'Lack of Candour', Professor Harry Whitmore (University of N.S.W.), *Sydney Morning Herald*, 9 May 1979.

Letter: 'On Evidence', Professor Harry Whitmore, *Sydney Morning Herald*, 28 April 1979.

Article: 'Judge says reason for Evidence Act not valid'—referring to criticisms of Bill by Mr Justice Samuels of N.S.W. Supreme Court, *Sydney Morning Herald*, 1 May 1979.

Editorial: 'Let Judges decide', *Sydney Morning Herald*, 12 June 1979.

Article: 'Former judge attacks evidence legislation', *Sydney Morning Herald*, 12 June 1979.

Article: 'Crown privilege and the law', by Simon Isaacs Q.C. a former judge of the N.S.W. Supreme Court, *Sydney Morning Herald*, 12 June 1979.

as the Administrative Appeals Tribunal or a court, is not in a position to make such a judgment. In the area of Crown privilege in legal proceedings, *the Courts have made it clear that they will defer to the judgments of the Executive Government in these matters.*<sup>9</sup>

Concerning Cabinet and Executive Council documents in particular, the Department contends *inter alia* that the Bill 'does not move authority from the elected government to non-elected courts and tribunals in these matters'.<sup>10</sup> In similar vein the Attorney-General, Senator Durack, in an address to the Pharmaceutical Manufacturers Association on 21 August 1978 stated that decisions on:

vital national interests such as defence, security or our foreign relations . . . are too important to be left to independent tribunals or to the courts. In any event, the traditions of our law have always been that Judges have always regarded themselves as unfitted to make decisions on these matters. The courts have always taken the view that in matters of this kind they must defer to the opinions of the responsible Ministers.<sup>11</sup>

Similar remarks are contained in the Explanatory Memorandum accompanying the Bill, and in the transcript of an interview given by the Attorney-General on Sydney radio station 2UE on 29 June 1978.

**5.11** The High Court's decision quite clearly necessitates reconsideration of one of the assumptions that underlies clauses 23-25 to the effect that non-elected judicial officials are not fitted to rule on questions arising under those clauses, and have always acknowledged as much. Disapproval is also expressed by the High Court of the general assumption (inherent in the Bill also) that State papers are sacrosanct and should not be treated in the same manner as other government documents.<sup>12</sup> While some documents will be more sensitive than others, and the reasons for non-disclosure may vary depending upon the nature of the document or even the authority of the official who created it, it has been accepted that any judicial officer is fitted to rule whether that document should be disclosed. We see no reason why that judgment cannot equally be made in respect of decisions to be made by the Tribunal under the Bill.

**5.12** We feel also that the *Sankey* case has undercut the present rationale underlying clauses 23-25 in a more subtle way. The 1976 Report of the Interdepartmental Committee pointed out that under section 75 of the Constitution the court would determine whether a minister or senior officer had acted beyond power in applying a conclusive certificate to a document.<sup>13</sup> It was previously widely considered that this avenue for relief was of theoretical interest only. Evidentiary problems were considerable, and proof was required that a minister acted for an improper purpose, considered irrelevant matters or failed to consider relevant matters when deciding on the issue of a certificate. However, the range of matters that the court referred to as relevant aspects of the public interest in determining whether the disputed documents should be released suggests perhaps the width of the inquiry that the court might also make in determining, say, what

<sup>9</sup> Australia, Attorney-General's Department, *Freedom of Information Bill 1978: Background Notes*, AGPS, Canberra, 1978, p. 5.

<sup>10</sup> *Ibid.*

<sup>11</sup> Senator Peter Durack, Q.C., *The Freedom of Information Bill*, an address by the Attorney-General Senator Peter Durack, Q.C., to the Australian Pharmaceutical Manufacturers Association, Press Release by the Attorney-General, Canberra, 21 August 1978, p. 7.

<sup>12</sup> *Sankey v. Whitlam* (1978) 53 ALJR 11 at pp. 22-23 (Gibbs ACJ); 31 (Stephen J); 43 (Mason J); and 48 (Aickin J).

<sup>13</sup> Australia, *Policy Proposals for Freedom of Information Legislation: Report of Interdepartmental Committee*, Parl. Paper 400/1976, Canberra, 1977, para. 21.5, p. 86.

matters were relevant or irrelevant for a minister to consider. That is, the possibility of legal challenge to a certificate is now perhaps greater than it seemed to be before the decision in the *Sankey* case. If so, it is clear that ministers are not responsible to Parliament alone when issuing certificates: the objective sought to be achieved in the Bill. If legal challenge is practically available in one procedure, it is ironic that it should not be available via another and less costly procedure. We recognise that the court, in reviewing a certificate pursuant to the common law rules of administrative law, is not reviewing a certificate on the merits, as would the Tribunal under any review system incorporated in the Bill. However, if the court embarked on a broad ranging inquiry, as we have suggested it might, such an inquiry would have distinct similarities to a review on the merits.

**5.13** Despite these changes, we acknowledge that it is neither logical nor practical to argue from the *Sankey* case that the Tribunal should now have power to order that any Cabinet document be disclosed. It is feasible in a Crown privilege case to balance the interests of justice against arguments of candour and of Cabinet solidarity, where the instances of enforced disclosure are rare and the interests of justice are concrete and calculable. If the same procedure were adopted in the Bill it is likely that all Cabinet papers would eventually be requested, and that the Tribunal would be forced to make, from case to case, a judgment that is in truth a policy choice to be made after consideration of experience, questions and priorities that might not be possessed by, or adequately presented to, the Tribunal. This policy choice (whether or not Cabinet documents are to be assured of protection) is one that probably has to be made by the government when it is drafting the Bill and formulating the exemptions that are to be contained in it. Our recommendation to this effect is contained in Chapter 18.

**5.14** Different questions arise if it is sought to use the judgment to support an argument for removing the system of conclusive certificates applying to documents concerned with national security. If anything, the High Court contrasted questions relating to such documents as ones which raised special issues. Gibbs ACJ referred to documents concerning national security or diplomatic relations as 'two obvious examples' of cases where it may be necessary to maintain secrecy for many years.<sup>14</sup> Stephen J also referred to such documents as ones which merit almost automatic protection by a court in a Crown privilege case<sup>15</sup> although His Honour referred in fact to 'defence secrets' which is arguably a far smaller category than documents in respect of which an official has claimed that disclosure 'would be contrary to the public interest for the reason that disclosure would prejudice security'.

**5.15** Despite this implied reservation by some members of the court, all upheld the basic power of the courts to rule on any claim of Crown privilege—no claim is conclusive. In Chapter 16, where this issue is discussed in more detail, we have proposed a similar system whereby the Tribunal is not to treat any claim as conclusive, although it is expected that much respect would be accorded to an Executive opinion that a document should not be disclosed on the grounds that security or diplomatic relations may be affected.

### **Internal working documents (Clause 26)**

**5.16** There have been many reasons suggested as to why internal working documents should be protected. One traditional argument is that disclosure would

<sup>14</sup> *Sankey v. Whitlam* (1978) 53 ALJR 11, at p. 22.

<sup>15</sup> *ibid.*, p. 29.

imperil the frankness and candour with which officials' views are expressed in the deliberative processes of government, and that the quality or nature of the decisions reached might thereby be affected. The High Court indicated firmly that this interest should not outweigh the interests of justice. Stephen J asserted that 'recent authorities have disposed of this ground as a tenable basis for privilege'.<sup>16</sup> The candour argument has been described as 'the old fallacy'<sup>17</sup> and, public servants were said to be 'made of sterner stuff'.<sup>18</sup> Mason J felt that the possibility of a want of candour 'is so slight that it may be ignored . . . I should have thought that the possibility of future publicity would act as a deterrent against advice which is specious or expedient'.<sup>19</sup>

**5.17** Before an internal working document can be withheld, an agency must be satisfied that disclosure 'would be contrary to the public interest' (paragraph 26 (1) (b)). In our observation, it was hitherto assumed that a concern to protect frankness and candour could in appropriate cases be cited as the public interest ground. This must now be doubtful, in view of the quoted remarks, and of clause 26 (5), which provides that the notice to an applicant of the reasons for a decision under clause 26 'shall state the ground of public interest on which the decision is based'. It is difficult to see how a decision treating the need for frankness and candour as the ground of public interest could do little more than repeat that frankness and candour were desirable in administrative decision making. However, comments by some of the Justices might imply that a statement to this effect would not comply with clause 26 (5). For example, Mason J said:

I have gained little assistance from the affidavits sworn by Ministers and heads of departments in support of the objection to production. They have sought refuge in the amorphous statement that non-disclosure is necessary for the proper functioning of the Executive Government and of the Public Service, without saying why disclosure would be detrimental to their functions, except for the reference to want of candour . . . Affidavits in this form . . . are plainly unacceptable now that the court is to resolve the issue for itself . . . An affidavit claiming Crown privilege should state with precision the grounds on which it is contended that documents or information should not be disclosed so as to enable the court to evaluate the competing interests.<sup>20</sup>

**5.18** Whether frankness and candour can survive this challenge is a matter that will ultimately be determined by the Tribunal. However, we have canvassed the matter now lest this possible effect of the judgment be used as an argument for amending a clause of the Bill, such as clause 26 (5). Later comments we make in Chapter 19 express opinions similar to those expressed by the High Court, and consequently we see no reason to restrict the provisions of the Bill.

**5.19** A further reason for quoting the above remarks is that, in our opinion, they lend support to the case for amending clause 37 (4) of the Bill so as to empower the Tribunal to review a decision under paragraph 26 (1) (b) that the disclosure of a document would be contrary to the public interest. The quoted remarks indicate an acceptance by the High Court of the view that the courts are competent to weigh questions of public interest in relation to all categories of documents, and particularly those concerned with policy making in departments.

<sup>6</sup> *ibid.*, p. 31.

<sup>7</sup> *ibid.*, p. 31, Stephen J quoting Lord Salmon in *Rogers v. Home Secretary* [1973] AC 388 at 413.

<sup>18</sup> *ibid.*, p. 31, Stephen J quoting Lord Radcliffe in *Glasgow Corporation v. Central Land Board* [1956] SC (HL) 1 at 20.

<sup>19</sup> *ibid.*, p. 44.

<sup>20</sup> *ibid.*, p. 44.

Although the public interest in non-disclosure may weigh more heavily in a case arising under the Bill (where disclosure will be more frequent, and the possible danger to efficient policy making proportionately greater), we do not doubt that this added consideration is encompassed by the competence of the courts as indicated by the *Sankey* case. There are, of course, additional reasons why an appeal should be permitted against a decision under paragraph 26 (1) (b) and this matter is developed further in Chapter 19.

### **'Public interest'**

**5.20** The phrase 'public interest' which is central in the *Sankey* decision, is also contained in many provisions of the Bill. It appears in the exemptions in clauses 23 (documents affecting national security, defence, international relations, and relations with States); 26 (internal working documents); 29 (documents concerning operations of agencies); 33 (national economy); and 36 (documents privileged from production at common law). The phrase also qualifies clause 19, providing that access to a non-exempt document may be deferred until the happening of a particular event or until the expiration of a specified time 'where it is reasonable to do so in the public interest'.

**5.21** In almost every submission where the phrase was discussed objections were raised against its inclusion in any provision of the Bill. Many referred to it as an ill-defined or amorphous concept, one that eludes definition even by jurists and whose meaning may vary at the whim of a minister or official. Thus, many also felt that the inclusion of the phrase in the Bill will in fact work to the disadvantage of members of the public and will provide a loophole to be exploited by agencies. The suggestions for reform generally fell into three categories: that the phrase be discarded; that it be defined either in the Bill or by this Committee; or that an appeal to the Tribunal be allowed against any decision made on a public interest ground.

**5.22** We cannot accept the thrust of this criticism as it is our firm opinion that a 'public interest' criterion is a very useful one that should be used throughout the Bill. We accept that its use in clauses 23, 29, and 33 is perplexing, but we have no doubt that it is a concept which should be used (albeit differently) in conjunction with criteria contained in the exemptions expressed in those clauses. In Chapter 15 we discuss the form in which the concept should be incorporated. In the remainder of this chapter we are concerned merely to discuss the meaning and utility of the phrase.

**5.23** Basically, we are in favour of using the concept because we believe that by so doing the Bill can require both an agency and the Tribunal to consider many factors favouring disclosure that might otherwise be ignored. This opinion has been strengthened by the decision in the *Sankey* case in which their Honours individually identified aspects of the public interest that supported the case for non-disclosure on the one hand and disclosure on the other. The range of factors identified affords some guidance as to how the phrase 'public interest' may work in the context of the Bill.

**5.24** The public interest factors isolated by their Honours that supported the case for non-disclosure were, briefly, that the documents subpoenaed by Mr Sankey were of the status of Cabinet documents and that disclosure of these would interfere with the interchange of opinion and the like in the decision-making process and would make Cabinet government more difficult. Balanced against this were a variety of factors supporting the case for disclosure. Briefly,

these included: the documents were three years old; confidentiality was not claimed on the basis of the *contents* of the documents but on the basis of their class; the matters to which the documents related were already the subject of a great deal of public knowledge; the documents related to issues that were no longer current; they related to a proposal that was never put into effect, was abandoned and was of no continuing significance; the allegation made was one of criminal wrongdoing and the documents were essential to the case; to withhold the documents would be close to conferring immunity from suit in the circumstances of the case, since high officers of State were charged and it was of great public interest that justice proceed; and, the countervailing argument about protecting the proper functioning of the public service was inappropriate when what was charged was itself a grossly improper functioning of that very arm of government and of the public service which assists it. In a separate discussion their Honours also discussed whether privilege could be claimed for documents that had already been published. Generally there seemed to be agreement that no public interest could stand to be protected unless earlier publication was unauthorised and doubt existed as to the authenticity of the document published. Similarly, if one document forming part of a series of documents has lawfully been published, then the case for disclosure of the remaining documents may be strengthened.

**5.25** To our mind, this analysis by the court indicates that 'public interest' is a convenient and useful concept for aggregating any number of interests that may bear upon a disputed question that is of general—as opposed to merely private—concern. Although in that case the starting point was the nebulous interest of 'due administration of justice' and 'proper functioning of the public service', the court broke these down to practical, recognisable considerations that were capable of being weighed—one against the other. The 'public interest', which has been described as an amorphous concept, incapable of useful definition, proved to be a viable concept enabling all relevant considerations to be brought to bear. Nor do we think that the utility of this concept is confined to Crown privilege cases, where the court can weigh against the government's interest in confidentiality the litigant's 'need to know'. It does not appear that the 'need to know' criterion as applied to a single litigant made the balancing process in the *Sankey* case any more or less difficult. There is no reason for supposing that in a freedom of information case (where the particular applicant's interest is irrelevant) it would be more difficult for a tribunal to isolate factors that are related to the *public's* interest in disclosure, or 'need to know'.

**5.26** Indeed it is perhaps possible to speculate on the basis of this judgment as to the utility of the concept of 'public interest' in various clauses in the Bill (particularly the exemptions). The main effect would be to allow the consideration of a range of factors that might otherwise be ignored. For instance, if an appeal were allowed on the question of public interest in the internal working documents exemption (clause 26) a court might allow argument as to the subject matter of the document and the importance of the subject in current public debate; whether the document was a *final* report of a *committee* (where disclosure might be thought to have little effect upon the interchange of opinions that led up to the final report); whether the contents of the report had already been discussed by an official spokesman; or whether there was unhealthy speculation as to the contents of a document; and so on. Coupled with an exemption protecting business and commercial information, such a criterion might permit argument as to whether the details of a particular manufacturing process designed,

for example, to ensure health and quality controls, or safeguards against water or air pollution should be disclosed where there may be a strong public interest in examining the effectiveness of these controls and safeguards. Similarly, if a dispute concerned confidential commercial statistics on the investment and expenditure in children's television programming, other relevant considerations could be suggested such as the need for public awareness of the priority and attention that is given to such areas in program budgeting.

**5.27** Undoubtedly the use of the concept in the Bill will raise difficult problems of legal interpretation and relevance. Some of the examples that we have already given are more a matter of opinion or speculation than of evidence. Resort to this may be inevitable, since something such as the importance of frankness in internal deliberations could not be established by the rules of evidence normally applied by courts. However this was a problem that arose even in the *Sankey* case where similar interests were in question and their Honours expressed no difficulty in passing judgment on such arguments. Although the public interest in gaining access to documents dealing with the national economy or trade secrets may not hitherto have been articulated, the law is very much a development of examples, concepts and principles by evolution from case to case. The development of a concept of public interest in some of the areas protected by the exemptions in the Bill should be as natural a process as the development of legal doctrine generally.

**5.28** In our view then, 'public interest' is a phrase that does not need to be, indeed could not usefully, be defined—a task that many submissions asked us to undertake. Yet it is a useful concept because it provides a balancing test, by which any number of relevant interests may be weighed one against another. This is shown not only by the *Sankey* case but by other cases as well, including those not concerned with a question of Crown privilege. For example in *Attorney-General v. Jonathan Cape (the Crossman Diaries case)*<sup>21</sup> Lord Widgery Chief Justice of the (English) High Court had to decide whether publication of a diary that revealed confidential Cabinet deliberations should be restrained on the basis that publication would breach the confidential relationship among ministers. Although his Lordship was satisfied that such a confidence existed and in that case was broken, he held nevertheless that a further matter had to be considered: whether the public interest is best served by non-disclosure. In that case Lord Widgery could not see why revelation of Cabinet discussions that had occurred eleven years before the date of proposed publication should be restrained.

**5.29** These cases demonstrate that the relevant public interest factors may vary from case to case—or in the oft-quoted dictum of Lord Hailsham of Marylebone 'The categories of public interest are not closed'.<sup>22</sup> It is essential therefore that wherever the phrase is used the Bill should provide scope for adequate argument as to what result the public interest may require. This scope will only exist if the Tribunal is empowered to adjudicate on the question. 'Public interest' is not a balancing test that is customarily applied by administrators. It is a test that must be weighed by an adjudicator who has no interest in the outcome of the proceeding and who is skilled by professional experience in weighing factors one against another. It is clear that the Bill does not confer this function on the Tribunal and that is a matter to which we return in subsequent

<sup>21</sup> [1975] 3 WLR 606.

<sup>22</sup> *D v. National Society for the Prevention of Cruelty to Children* [1977] 2 WLR 201 at pp. 218–19.

chapters, particularly Chapter 15. In passing however we note that this omission is the essence of much of the criticism contained in many of the submissions. Objection was made not so much to a public interest ground, but to the interpretation and application of it by administrators alone.

**5.30** The judgment in the *Sankey* case has also influenced our thinking on two other provisions. The first is clause 26 (5), which requires that the ground of public interest relied upon whenever that clause is invoked be specified in writing and notified to the applicant. Our earlier comments in this chapter will have indicated that we foresee the judgment will have a useful precedential effect on the degree of particularity that will be necessary in any notice complying with clause 26 (5). The second is clause 36. In Chapter 23 we comment that, in the light of the *Sankey* case that exemption could well be dropped as it does not appear to add to the existing exemptions.

## Resource implications

### Introduction: the problem

**6.1** A recurring theme in our deliberations has been concern at the ability of the public service to cope with the physical demands that effective freedom of information legislation will undoubtedly place upon it. The Attorney-General, Senator Durack, has emphasised that the Government is 'sensitive to the demands that this legislation will make on the resources available to Departments and authorities'<sup>1</sup> and that 'costs need to be monitored'.<sup>2</sup> Although the Attorney has not unduly belaboured the point about resource implications, it is apparent that worries to this effect have certainly contributed to the Government's decision to confine the scope of the Bill in several important ways, in particular the decision to apply it prospectively only, and not to documents created before its proclamation.<sup>3</sup> The Public Service Board, for its part, made it clear that the implementation of the Bill could not be regarded as cost-free:

So long as governments seek to limit the number of Public Servants and the overall cost of the Public Service, greater access by the community to the information holdings of the Service should be seen as another service of government competing for the finite resources made available. To increase resources in one area of government activity will inevitably lead to some lessening of emphasis in another, or to an increase in the overall level of resources.<sup>4</sup>

**6.2** The impact of staff ceilings on the ability of departments to mobilise new resources for freedom of information purposes was a problem repeatedly raised in evidence before us from departmental and statutory authority witnesses. So, too, was the pressure that the passage of the Bill will necessarily impose on senior officers, who will have to make many important decisions in the administration of the legislation—especially in its early stages—and whose numbers cannot readily be increased even were there a willingness to make additional appropriations for this purpose.<sup>5</sup> The public service unions, for their part, while welcoming the Bill, emphasised the strains it would impose on staff, not just at senior but at *all* levels, if appropriate new resources were not brought on strength. The Council of Australian Government Employee Organisations (CAGEO) put the point this way:

For the Government to introduce legislation, albeit limited legislation, without additional financial and staff resources, would in fact negate the value of the legislation, and importantly, from CAGEO's viewpoint, place quite intolerable strains on the limited labour resources available in times of difficult staff ceilings.<sup>6</sup>

**6.3** Throughout our inquiry, and in making all the recommendations which follow in subsequent chapters, we have been thoroughly mindful of these considerations. It is pointless to generate proposals which, however attractive they

<sup>1</sup> Senator the Hon. P. Durack, Q.C., *The Freedom of Information Bill*; An address delivered to the Pharmaceutical Manufacturers Association, Press Release by the Attorney-General, Canberra, 21 August 1979, p. 9.

<sup>2</sup> Australia, Senate, *Freedom of Information Bill 1978: Explanatory Memorandum*, Canberra, 1978, p. 5.

<sup>3</sup> *Transcript of Evidence*, p. 78.

<sup>4</sup> Submission no. 47, incorporated in *Transcript of Evidence*, p. 849.

<sup>5</sup> *Transcript of Evidence*, p. 868.

<sup>6</sup> Submission no. 8, incorporated in *Transcript of Evidence*, p. 995.

may be in principle, are likely to be quite incapable of practical realisation by this or any other government in the immediately foreseeable future. Equally, however, we have proceeded on the assumption that the Government has, by bringing forward the Bill, clearly manifested its intention to make freedom of information work and that it has committed itself—and will continue to commit itself in the future—to providing the necessary resources to ensure that it does.

**6.4** In this chapter we see our task as twofold. First, we endeavour to evaluate the resource implications of the Bill as it is presently drafted, taking into account both overseas experience and the estimates made by our own departments and authorities. Secondly, we attempt to assess the likely resource implications of those changes to the Bill that we propose in the course of this Report, in particular changes relating to the time within which access requests should be met and the matter of prior documents. We have been much assisted in these tasks by the Public Service Board, which at our request, and in consultation with us, carried out a survey of the resource implications of freedom of information legislation in thirty-seven departments and selected non-departmental agencies, the results of which survey are summarised in Appendix 4 (in this chapter called 'the Public Service Board Survey'). We are most grateful to the Board, and in particular its Chairman, Mr R. W. Cole, for their co-operation in this respect. Our conclusions on the resource question, necessarily expressed in fairly general terms because of the uncertain state of the data, are set out in paragraph 6.48 below.

### **Overseas experience**

**6.5** Here as elsewhere, overseas experience must be used with great caution by those who would draw lessons of any kind, positive or negative, about the likely impact of freedom of information legislation in Australia. Political systems, administrative practices, cultures and traditions are all different. Certainly there can be no ready or immediate comparability of likely Australian experience with that in the United States or anywhere else in terms of actual numbers of staff employed or actual dollar costs.

**6.6** One conclusion in relation to resource implications that it is perhaps permissible to draw from overseas experience is that agency and departmental predictions of probable impact are likely to be somewhat exaggerated. In the United States, the one country for which we have some detailed resource documentation, this appears to have been the case. In respect to the United States Privacy Act 1974 (which deals with access to personal records as distinct from general government documents, and which is administered jointly with the Freedom of Information Act by the same personnel in most agencies) the Office of Management and Budget estimated that operating costs over its first four or five years would run at \$200-300 million per year. In fact, however, the cost of administering the Act in its first year of operation (September 1975-September 1976), excluding one-off commencement costs, was only \$36.59 million.<sup>7</sup> In the case of the Freedom of Information Act itself, the comparable figure for 1975 was \$11.8 million although this has increased to \$20.8 million in 1976 and \$26 million in 1977.<sup>8</sup> Such cost escalation as has occurred in recent years in the United States has been largely attributed to the pressures that have developed in a handful of particularly controversial agencies, notably the FBI and CIA, rather than across the

<sup>7</sup> K. P. O'Connor, Submission no. 88, incorporated in *Transcript of Evidence*, p. 537.

<sup>8</sup> Figures supplied to Committee Chairman by Dr H. C. Relyea, Specialist, American National Government, Library of Congress, Congressional Research Service.

whole spectrum of government activity. Certainly expenditures have varied enormously: a survey of federal law enforcement agencies conducted by the United States Comptroller-General, covering the three fiscal years 1975-7, showed that operating costs for the Privacy and Freedom of Information Acts over that period ranged from \$159 000, incurred by the United States Postal Department's Inspection Service, to about \$3.8 million incurred by the FBI.<sup>9</sup> A similar pattern prevails elsewhere in the Executive Branch, with relatively high costs in some agencies being balanced against a number of others reporting 'negligible' expenses which were absorbed by normal operating budgets.<sup>10</sup>

**6.7** While the figures quoted do convey an impression of the order of magnitude of reported freedom of information spending, their relative exactness is somewhat misleading. Mr K. P. O'Connor, who visited the United States in late 1978 to conduct research for the Australian Law Reform Commission's current privacy reference, reported to us his findings in this respect:

Overall cost is calculated by adding up various items (e.g. cost incurred in granting access, publication requirements, security and control, etc.). However, I was informed that agencies do not use well-defined or uniform criteria in determining the relevant items of cost. A good deal of discretion is left with the agency. Agencies were left largely to making their own calculations within the broad categories stipulated in the forms sent out by the Office of Management and Budget. It was considered that there had been a tendency to write-off to FOIA/PA compliance costs which would have been incurred, in any event, regardless of these laws. It was felt that the details provided by agencies *should* be treated with some caution. For example, an agency has sometimes shown the purchase of a computer as a FOIA cost, when in fact it had multi-purpose use. Again, personnel salaries were not assessed in a manner which had regard to how much of the officer's work was related to FOIA or PA and how much was not. Further, in reporting agencies are asked to assess their 'incremental' costs. But few had a clear 'cost base' from which to begin. On the other hand, some agencies had absorbed compliance costs and not reported any special costs attributable to those laws. (In 1977 two agencies had shown no costs, but recorded income from fees for copies provided under the laws leaving on paper a 'profit'.) My conclusion is that the costs as reported, despite their *apparent* exactness, tend to overstate the true situation.<sup>11</sup>

These impressions are confirmed by other official sources we have sighted.<sup>12</sup> Not the least of the difficulties confronting anyone seeking to identify the net additional cost attributable to the Freedom of Information and Privacy legislation is the way in which, as Mr O'Connor noted, compliance costs that would have occurred anyway have been written down to it. The Comptroller-General of the United States, for example, reports the impression of one official from the Immigration and Naturalization Service (a very high request-volume agency) that 'about 90 per cent of their requests would have been received and answered even without the existence of the two Acts'.<sup>13</sup>

**6.8** We would not wish it to be thought that there has been no criticism of the administrative and cost burdens associated with the United States legislation, or

<sup>9</sup> United States, Comptroller-General, *Data on Privacy Act and Freedom of Information Act Provided by Federal Law Enforcement Agencies*, 16 June 1978.

<sup>10</sup> H. C. Relyea, 'The Provision of Government Information: The Federal Freedom of Information Experience', *Canadian Public Administration*, vol. 20, summer 1977, p. 339.

<sup>11</sup> *Transcript of Evidence*, pp. 537-538.

<sup>12</sup> H. C. Relyea, *The Administration of the Freedom of Information Act: A Brief Overview of the Executive Branch Annual Reports for 1976*. Library of Congress, Congressional Research Service, Committee Document no. 61, pp. CRS-23, 24.

<sup>13</sup> United States Comptroller-General's report, cited footnote 9, Appendix 1, p. 7.

no concern expressed at the rapidly escalating character of that cost burden, particularly in relation to the Justice Department and its associated agencies. But even a commentator like Allen Weinstein, who in a recent article records in elaborate and sometimes lurid detail the nature and extent of these and other criticisms of the legislation, concludes that 'support for the Act in Congress and the country remains strong' and 'few people would argue that it should be repealed or emasculated'.<sup>14</sup> These impressions were confirmed by Senator Knight, himself a recent visitor to the United States, in evidence before us.<sup>15</sup>

**6.9** A point which has not been overlooked in United States discussions is that the costs associated with the legislation, however great, pale almost into insignificance when compared with the amount spent on 'executive branch public relations puffery'.<sup>16</sup> Mr O'Connor told us that he had been informed that the total spent by the United States Government in its information and public relations functions 'was estimated conservatively to be \$1000 million—i.e. forty times the reported Freedom of Information Act figure'.<sup>17</sup> Perhaps the most important point of all to consider, however, when weighing up, in the United States or anywhere else, the cost implications of freedom of information legislation against its advantages, is that made by Dr Relyea:

And there is also the more philosophic argument: the maintenance of democratic practice requires money. If, indeed, the Freedom of Information Act contributes to the realisation of a democratic system of government, then the cost of its demise or diminution is the more troubling consideration.<sup>18</sup>

#### **Expected utilisation of the Act**

**6.10** An almost universal uncertainty prevails on this basic question. The 1976 Interdepartmental Committee said that 'the work-load under any scheme for freedom of information is impossible to predict',<sup>19</sup> and this is still a widely accepted view. In the Public Service Board Survey departments and authorities were asked:

On the basis of the Department's experience of requests for information at present, what is the anticipated annual number of requests under the Freedom of Information legislation?

The answers received to this and other questions are summarised in Appendix 4. In commenting to us on them, the Public Service Board stated that 'as expected, most replies are tentative, and in many cases admittedly based on little more than guesswork'.<sup>20</sup> The Department of Finance put succinctly a common response: 'There are too many unknowns to allow the impact of the legislation to be quantified with any precision'.<sup>21</sup>

<sup>14</sup> A. Weinstein, 'Open Season on "Open Government"', *The New York Times Magazine*, 10 June 1979, p. 32.

<sup>15</sup> *Transcript of Evidence*, pp. 2098–2115.

<sup>16</sup> Relyea, cited footnote 10, p. 339.

<sup>17</sup> *Transcript of Evidence*, p. 538.

<sup>18</sup> Relyea, cited footnote 10, p. 339.

<sup>19</sup> Australia, Parliament, *Policy Proposals for Freedom of Information Legislation: Report of Interdepartmental Committee*, Parl. Paper 400/1976, Canberra, 1977, para. 22.9.

<sup>20</sup> *Public Service Board, FOI Survey January–February 1979, Notes on Departmental Responses to 28 February 1979*, incorporated in Committee Document no. 41, para. 3.

<sup>21</sup> Reply of 20 February 1979 by Department of Finance to Public Service Board Survey on resource implications of FOI Bill (PSB Survey) incorporated in Committee Document no. 41, p. 3.

**6.11** The quantified estimates that we did receive, as to the likely number of additional requests that would be received by agencies annually, varied greatly. Broadly speaking they fell into four groups: (a) about 100—e.g. Attorney-General's, Industry and Commerce, Transport; (b) about 1000—e.g. National Development, Housing and Construction; (c) between 2000 and 20 000—e.g. Health, Primary Industry, Public Service Board, Veterans' Affairs; and (d) 100 000 or more—Australian Electoral Office, Employment and Youth Affairs, Immigration and Ethnic Affairs.

**6.12** There is little doubt in our minds that a number of these figures, particularly those in the highest categories, represent a very considerable over-statement of the likely reality. The Immigration and Ethnic Affairs Department's postulated total of over 100 000 requests per year is a clear case in point. The figure looks somewhat implausible right at the outset when one notes that in the United States—a country some fifteen times larger than Australia in population terms—the equivalent agency, the Immigration and Naturalization Service, received in 1977 (the latest year for which we have figures available), only 26 486 requests under the Freedom of Information and Privacy Acts combined.<sup>22</sup> Looking more closely at the assumptions on which the Australian Department's total is based, this impression cannot but be reinforced: what has been taken into account are 50 000 requests (out of a possible total of 300 000) from overseas applicants to immigrate who have been rejected at the preliminary check stage; all 20 000 recipients of ministerial letters rejecting appeals against initial decisions; all 500 persons whose applications for change of status are annually rejected; all 1000 rejected applicants for an extension of visitor permits; all 30 000 rejected overseas student applicants; all 150 refused applicants for grant-in-aid support; and 100 academic and media requests.<sup>23</sup> It is apparent that the Department has treated as the basis for its estimates the maximum conceivable number of possible requests rather than what is, on any view, the *likely* number of actual requests.

**6.13** Another very high figure which we have difficulty in accepting at anything like its face value is the 86 000 requests per year estimated by the Australian Electoral Office to be its likely additional burden with respect to what are described as 'electors' roll/index inquiries' alone, which figure does not include an unquantified number of additional inquiries of a 'commercial' nature which the agency also expects 'to be flooded with': together these demands will, in the agency's estimate, require another fifty staff to handle.<sup>24</sup> It appears that the sole foundation for the extraordinarily high base figure is the agency's assumption that 'if . . . say 1% of electors each year demanded and the law provided for their inquiry to be answered, there would be 86 000 inquiries'.<sup>25</sup> Just why anything like this, or any other randomly chosen, number of electors could reasonably be expected to be stimulated by the passage of the Freedom of Information Act to make, in specific reliance on that Act, the kind of inquiry here contemplated, we are not told.

**6.14** The only other agency which estimates an annual demand in the 100 000 plus range is the Department of Employment and Youth Affairs.<sup>26</sup> The estimates

<sup>22</sup> United States Comptroller-General's report, cited footnote 9.

<sup>23</sup> Reply of 6 March 1979 by Department of Immigration and Ethnic Affairs to PSB Survey, incorporated in Committee Document no. 41, paras 4–11.

<sup>24</sup> Reply of 16 February 1979 by Australian Electoral Office to PSB Survey, incorporated in Committee Document no. 41, paras 10–16 and 20–22.

<sup>25</sup> *ibid.*

<sup>26</sup> Reply of 19 April 1979 by Department of Employment and Youth Affairs to PSB Survey, Committee Document no. 83, p. 6.

here (a maximum 500 000 in the first year, a minimum 100 000 in subsequent years), although frankly acknowledged by the Department to be based on 'crude assumptions', there being 'no information which provides any guidance on this matter' are intuitively more plausible given the existence of over four hundred thousand registered unemployed, many of whom can be expected as individuals to have more than a passing interest in their personal files. The Department anticipates that 'compared with the volume of work flowing from requests for personal records, inquiries about policy matters, statistics, etc., are likely to be almost insignificant'. It estimates, again we think realistically, that the great bulk of these requests would not be in writing, that 80% of them would not involve consideration of potentially exempt material, and that 'these "simple" requests could be dealt with by local office counter staff'.

**6.15** We have not found it possible, or indeed believed it likely to be very productive, to undertake any kind of detailed analysis of the replies of all the thirty-seven departments and authorities who participated in our survey. Perhaps the most important point to emerge from the agency estimates, looked at as a whole, apart from the obvious uncertainty which prevails and the differing character and quality of the assumptions on which those estimates have been based, is the clear picture provided of the enormously varied impact that the Freedom of Information legislation will have. To fully appreciate that variability, it is necessary to look at more than simply the raw numerical data, however well founded the different estimates of likely request levels may be. Straightforward numbers may be a useful yardstick for departments and authorities of an essentially service-delivery nature, where most requests will be relatively simple applications for access to personal records. However they may be almost meaningless for agencies where most requests will be for policy-related material and where the potential application of various exemptions will need to be much more closely examined. Bearing in mind these considerations, we note that the particular agencies who believe—and for the most part we accept their assessments—that they will be under heavier pressure than most others are as follows: first, among the more service-delivery oriented departments, Employment, Social Security, Health, Veterans' Affairs, Immigration and the Australian Government Retirement Benefits Office; and secondly, among the others, Attorney-General's, Primary Industry and the Australian Taxation Office.

### **Expected staffing and other costs**

**6.16** Obviously estimates of the actual costs of the Freedom of Information legislation, in manpower and other terms, are going to be directly contingent on the expected utilisation of that legislation. Reflecting the differences of both experience and approach described above, agencies reached, predictably enough, many different conclusions when responding to our survey question<sup>27</sup> about the eventual impact of the legislation upon themselves. The task of initially compiling or updating the manuals and indexes required under clauses 6 and 7 was one for which estimates of additional staff required ranged from nil (most departments), to 10-15 man-years (Social Security, Public Service Board), to 40-plus man-years (Primary Industry), to an extraordinary 250 man-years (Australian Taxation Office). Estimates, where quantified, of the numbers of additional staff thought

<sup>27</sup> The question was, '(i) What is the number of people wholly or partly employed at present in preparing such manuals or other similar documents and in supplying information to the public? (ii) Is it anticipated that the introduction of the Freedom of Information Bill 1978 (as drafted) would require an increase in those numbers?'

to be required to process freedom of information requests in an ordinary full year fell into five broad categories: (a) nil or negligible—e.g. Defence, Treasury, Aboriginal Affairs, Administrative Services, Auditor-General, Industrial Relations Bureau; (b) under 10—e.g. Capital Territory, Housing, Industry and Commerce, Productivity, Australian Government Retirement Benefits Office; (c) 10-20—e.g. Attorney-General's, Public Service Board, Prime Minister and Cabinet, Transport; (d) 30-60—e.g. Health, Home Affairs, Veterans' Affairs, AGPS, Australian Electoral Office and Employment (for the last-mentioned, this is assuming 'low' utilisation: double that if 'high'); and (e) over 100—e.g. Social Security (320) and Immigration (125).

**6.17** Again we have made no attempt to systematically analyse individual agency responses, or to aggregate total responses in either numerical or dollar terms: the assumptions on which such calculations would be made would be too uncertain, and variable, to be of assistance. A further point that must be acknowledged is that any such calculation would in any event inevitably conceal some of the real, even if hidden, costs that will necessarily be associated with the legislation, at least in its initial operation. The Treasury made the point quite strongly in evidence:

In the early stages, before the scope of the legislation becomes generally known and clear guidelines are established, we could well be faced with a spate of requests for what turns out to be exempt information. If this should happen, then the practical workings of the Department could be considerably disrupted for a time through having to divert numbers of staff from other duties to process the requests.<sup>28</sup>

The Department of the Capital Territory argued to similar effect:

Without actual operational experience it is difficult to estimate the actual resources that will be required or indeed the precise nature of those resources. However, the Department believes they will be significant, for even if large numbers of staff are not involved, implementation of the legislation will certainly make additional demands on all senior officers.<sup>29</sup>

**6.18** There are other costs that will be associated with the introduction of the legislation, as to which we have not sought specific estimates, but which in many instances will be not insubstantial. In the first place, there is the accommodation and equipment costs that will be associated with the provision and improvement of reading rooms, copying facilities and the like. Secondly, there is the cost of developing and maintaining staff training programs, both within agencies and across the public service as a whole: we discuss this important issue in the next section below. Thirdly, there will be the costs associated with the central supervision and general monitoring of the legislation, primarily by the Attorney-General's Department (which has itself estimated that it will require five to six additional officers for this purpose. Fourthly, there will be the costs associated with the review and appeal procedures under the legislation: these do not appear to us to be likely to be very great under the Bill as it is presently drafted, but will assume some importance if our recommendations to greatly expand the available review and appeal avenues are accepted. We return to this matter below. At this stage, we say only that with respect to none of these matters do we regard the likely cost burden upon the Government as significant enough to justify any retreat from the concept of the Bill or the commitment to make it work.

**6.19** There is a further general point that needs to be made about the staffing and other resources—and especially the *variable* nature of those resources—that

<sup>28</sup> Submission no. 124, incorporated in *Transcript of Evidence*, p. 1686.

<sup>29</sup> Submission no. 149, incorporated in *Transcript of Evidence*, p. 2221.

will be necessary to ensure the effective operation of the Bill. The certainty that the impact of the legislation will vary across the public service is in itself significant. In a sense, it provides the means of control which managers are seeking. The provision of adequate resources for the departments or authorities most affected is crucial, but this does not imply any need to provide substantial new resources throughout the whole public service. The demand which freedom of information legislation will make upon the public service will definitely not be the sum of all estimated demands; however we may adjust the estimates to take reality into account. We believe, on the contrary, that with effective management inside the public service, it will be the places where the demand is greatest that the relief comes easiest. The Government has given a commitment in introducing the Bill which will ensure its successful implementation. Although the Government has not promised to provide specific resources for freedom of information legislation, it has approved the allocation of some of the resources of the public service to the reform. We believe that the public service has the capacity to use this mandate with vigour and with success, and that it can do so, by and large, at less cost than critics of the proposed legislation assume.

### **Training and development**

**6.20** We have emphasised, and will continue to emphasise throughout this report, the crucial importance of public servants being adequately prepared to carry out the implementation of freedom of information. Staff development must take place at all levels. As the Canadian Green Paper said:

Basic to the successful administration of a statute would be the development of a commitment to and a sense of responsibility for the policy embodied in it, on the part of departmental personnel, from management to clerical staff.<sup>30</sup>

**6.21** We doubt, however, that adequate work is presently being done in this area. The unions are certain that it is not. For example, the Australian Clerical Officers' Association (ACOA) said to us:

The administration of the Freedom of Information Act will demand a workforce reasonably well instructed in the requirements of granting access to governmental information. The Executive appears to have adopted a decidedly flat-footed stance towards preparation for the administrative task ahead of it. There would appear to be no reason why, for training purposes, the principles of access embodied in the Bill, to the extent that they represent some liberalisation, should not already be in operation. No such policy has been announced. No training of staff is in progress.<sup>31</sup>

The Federal Secretary of CAGEO, Mr R. Gradwell, similarly said that:

a number of our unions have given the Freedom of Information legislation a reasonable amount of publicity in their journals, but when we look inside the Public Service and the government authorities, to the best of our knowledge there has not been any concerted attempt made to produce the simplest form of pamphlet outlining it to acquaint all staff with it . . . it seems to me to be perfectly reasonable . . . [to have] some internal publicity.<sup>32</sup>

**6.22** Staff associations naturally see these issues clearly. Their members may be pressed hard by the legislation unless the Government takes seriously the commitments it has given. The staff associations are supporters of strong legislation,

<sup>30</sup> Canada, Department of Secretary of State, *Legislation on Public Access to Government Documents*, Govt. Printer, Ottawa, 1977, p. 22.

<sup>31</sup> Submission no. 42, incorporated in *Transcript of Evidence*, p. 912.

<sup>32</sup> *Transcript of Evidence*, p. 1007.

but they do say that the great mass of public servants need some guidance and leadership from the more senior managers if it is to work effectively, or at all. Training and development, clearly, must not be undertaken only at the middle and lower levels of the public service: senior managers must also be taught to understand the legislation, to think about it, and to work through its implications for themselves and their organisations.

**6.23** Some departments are making progress. The Department of Administrative Services, for example, considers that:

extensive education of Departmental officers in all facets of the legislation is required . . . to raise the awareness of officers of the implications of the legislation for Departmental operations. Training courses on more specific procedural aspects will be arranged . . . Consideration is being given to arranging training in the Department's regional offices, preferably with the use of audio visual aids to increase coverage and reduce costs.<sup>33</sup>

The Department of Foreign Affairs has said that:

a substantial training program on this package of legislation (including the Ombudsman Act, the Administrative Appeals Tribunal Act and the Archives Bill) will have to be set up and maintained on a continuing basis. The Department considers that proper administration of the legislation will require a clear understanding of its provisions and constant attention if the individual's right of access to information, the public interest in exempting certain information from this right and due protection of the officers of the Public Service are all to be secured. Staff at virtually all levels may need at some stage of their careers to be aware of the implications of this legislation.<sup>34</sup>

The Department of the Capital Territory also has said that:

To reduce the possibility of duplicated effort and the consequent inefficient use of limited departmental resources, there is an urgent need for action to develop information management techniques and training courses which are uniform throughout the Service and which will enable the Service to cope adequately with the new initiatives in administrative law.<sup>35</sup>

There are not enough departments, however, whose thinking, let alone actual planning and action, has gone so far.

**6.24** We do not anticipate that the implementation of a systematic training and development program, both inter-departmental (in which the Attorney-General's Department and Public Service Board would be primarily involved) and intra-departmental, would be especially costly. The development of officers to understand fully the spirit and letter of the Freedom of Information legislation is something which is ideally situated within the normal work routine. It is true that some special instruction in the subject will be necessary and more experienced officers must be brought into systematic contact with their less experienced colleagues. But these are matters well within the capacity of efficient officers to manage. There are, moreover, staff training and development units scattered throughout the public service which can be of great help. Officials in these units are an under-utilised resource, for the meaning of staff development is often vague and uncertain. With the active involvement of senior management, this can change. Putting freedom of information into effect gives a clear line of direction to training and development work. Doing this will have invigorating effects all round.

<sup>33</sup> Submission no. 141, p. 2.

<sup>34</sup> Submission no. 150, incorporated in *Transcript of Evidence*, p. 2385.

<sup>35</sup> *Transcript of Evidence*, p.2236.

**6.25** It has been said that educational programs of any kind cannot yet be sensibly undertaken because the final shape of the legislation is not clear. While it is of course true that a great many detailed matters of substance and procedure in the present Bill may be subject to change before it is finally enacted—not least, we hope, as a result of this Report—we do not believe that there is any case at all on these grounds for postponing the commencement of staff familiarisation and training programs. The very act of comparing the Bill as it presently stands with our recommendations and discussion in this Report may well be a salutary and effective means of raising the issues in such a way that their complexity is fully appreciated. We will have occasion to emphasise throughout this Report that what matters most of all in implementing freedom of information legislation is that its basic underlying principles be understood, appreciated and sensitively applied; nothing is more likely to produce dispute and disillusion than the treatment of this legislation as a mere set of mechanical rules, capable of being memorised and applied by automata. While the training of automata may have to wait upon the emergence of precise programming instructions, the task of sensitising human beings to the general nature and implications of the task they will be performing is one that can commence immediately.

**6.26 Recommendation:** All agencies, and in particular the Public Service Board and Attorney-General's Department, should give urgent attention to the planning and implementation of programs to train and develop staff in freedom of information matters, it being neither necessary nor desirable that the commencement of such programs wait upon the passage of the legislation in its final form.

### **Commencement of the legislation (clause 2)**

**6.27** No consideration of the resource implications of the present Bill would be complete without some reference to the time period over which it is likely to commence operation. Because of the very considerable resources that will have to be devoted in a number of agencies to, in particular the compilation of manuals, indexes and guidelines pursuant to Part II of the Bill, the question of commencement is an extremely important one in resource planning.

**6.28** Clause 2, as it is presently drafted, allows for complete flexibility in respect to commencement:

2. The several Parts of this Act shall come into operation on such respective dates as are fixed by Proclamation.

No time limits are fixed for the commencement of the Bill, or any part of it: this is left wholly within the hands of the Executive to determine. It is apparent to us that there will in fact be considerable pressure from within the public service to delay the implementation of the legislation as long as possible. The Public Service Board put the point to us in the following diplomatic terms, stating that it 'would support a reasonable period of grace between enactment and proclamation of the Bill to enable the Service to gear itself to meet the requirements of the legislation in its final form', although it did 'not offer a particular view on the length of time that would be appropriate'<sup>36</sup>.

**6.29** A number of submissions to the Committee have suggested that the Bill should specify a particular period within which it will commence operation. It

<sup>36</sup> *Transcript of Evidence*, p. 850.

was pointed out, for instance, by the Freedom of Information Legislation Campaign Committee that the *Administrative Decisions (Judicial Review) Act 1977*, which was assented to on 16 June 1977, has still not been proclaimed, the stated reason in that case for the delay being the preparation of regulations to implement the Act. Since regulations (that could be quite extensive) will have to be prepared to implement the Freedom of Information Bill on various matters such as charges and access procedures, it is feared that there may be a lengthy delay between Royal Assent and Proclamation into effect. The suggestion commonly made to us was that clause 2 should be amended to provide that the Bill will commence operation 12 months from the date of Royal Assent. It would still be possible, consistent with this approach, to provide for a staged introduction of different Parts of the Bill.

**6.30** After considering the matter carefully we do not in fact propose to recommend any change to the language of clause 2, as we recognise the difficulty of forecasting in advance the exact date when a statute can commence operation. That process of forecasting is particularly hard to perform with this Bill, as it will require a marked change in the administrative procedures of some departments. Moreover, it is likely that there will be much interdepartmental consultation as to the form of the regulations and we expect that specialist advice will also be sought from such bodies as the Administrative Review Council. It may be inappropriate or unwise to schedule these activities to a predetermined timetable that is difficult to adjust.

**6.31** But having said that, it is nevertheless our firm opinion that the Act should commence operation no later than 12 months from the date of assent. Although the Bill is yet to be enacted, the Attorney-General has announced clearly on a number of occasions the Government's intention to proceed with the legislation. There has already been a long lead-time, and the implications of the Bill should already be sufficiently clear for all departments and authorities as a result of general discussion of the Bill and of this Committee's hearings. Agencies, in our opinion, should be in a position to administer this Bill within 12 months of its enactment. Elsewhere in this Report we have sought to ensure that this will be administratively possible, by preserving for the time being both the existing restriction on the application of the Bill to prior documents and the 60 day time period in which requests are to be answered. Alterations to these provisions should be phased in as agencies become accustomed to the legislation.

**6.32** There is no reason why different Parts of the Bill should not be introduced at different stages. We note in particular that, in Part II, clauses 6 and 7 each provide that the publication of the statements and indexes anticipated in these clauses will occur 'not later than 12 months after the commencement of this Part'.<sup>37</sup> We believe it to be appropriate, in the light of this built-in time lag, for Part II to be proclaimed earlier than other Parts of the Bill, and in fact to commence operation immediately upon assent.

### **6.33 Recommendations:**

- (a) While clause 2 of the Bill should not be amended to specifically so provide, the legislation should commence general operation not later than 12 months after its passage through the Parliament;**
- (b) Part II of the Bill should be proclaimed immediately upon assent.**

<sup>37</sup> Clause 7 (2) (b).

## Resource implications of proposed changes to the Bill

**6.34** The discussions so far in this chapter about resource implications has proceeded on the basis of the Bill as it presently stands, with no assumptions at all being made about likely fundamental changes to it. Obviously, however, it is necessary to take into account the potential resource impact of the changes which we recommend elsewhere in this Report: to propose sweeping changes without giving due regard to considerations of this kind would be both irresponsible and more likely than not, fruitless. We have taken the view that, on balance, there are only three areas of proposed change where resource questions loom really large. These are the extension of the scope of the Bill to cover prior documents, the reduction in the time to be allowed for agency response to access requests, and the extension of review and appeal rights and procedures. Each of these questions is considered in the paragraphs which follow. While we do acknowledge that the various extensions we propose in the obligations to prepare and publish material under Part II, some of the procedural variations we propose in relation to Part III, and some of the rewriting of the language of exemption clauses in Part IV may all create additional pressures on staff in certain areas, we believe that their quantitative significance—when measured against the array of obligations already contained in the present Bill—is not such as to justify special concern.

**6.35** *Implications of extension of Bill to prior documents.* In the Public Service Board Survey we asked departments and authorities the following question:

3. (a) To what extent does the Department anticipate increased demand for information under the Freedom of Information legislation if disclosure were to be required of past or existing documents?
- (c) What is the age of the material expressed in percentage terms (i) 0-5 years (ii) 5-10 years (iii) 10-30 years (iv) over 30 years?

The responses received to this question are summarised in Appendix 4. Although, by and large, they provide a very useful collection of information, particularly as to the amount of information of any real age that is held (in most cases surprisingly little), there is little point, because of the variable character of the answers, in attempting to tabulate this information in any aggregated form. There are, however, a number of general impressions which do emerge.

**6.36** In the first place, here as elsewhere, agencies were quite unable to forecast with any real precision the possible effects on demand and workload if the present provisions (confining the operation of the Bill, with minor exceptions, to documents created *after* its enactment) were extended. None indicated an awareness of existing known demand for public access to prior documents that was not met by present arrangements, although some respondents (including the Department of Foreign Affairs, the Industrial Relations Bureau, the Department of Industry and Commerce, the Australian Electoral Office and the Australian Government Retirement Benefit Office), tentatively identified parts of the community which could have a particular interest in access to prior documents in specified areas. The main resource cost associated with extending access to prior documents, apart from the additional demand likely to be generated by the availability of a larger volume of material, was likely to be in relation to the excision of exempt material under clause 20: this process was thought likely to be time consuming, and would require careful judgment by senior staff. Certainly it was the case, almost without exception, that agencies felt that if access were extended beyond the current provisions of clause 10 (2) there would be 'considerable' additional resource costs.

**6.37** A particular problem was identified by those relatively new departments which were the product of a considerable history of change of function: agencies such as Housing and Construction, National Development, the Industrial Relations Bureau and the Department of Finance are now responsible for records accumulated by several different predecessor departments, and would have to organise that material for inspection within current functional arrangements and according to current policies. Both these departments, and a number of those which have regarded themselves as traditionally 'non public', foreshadowed difficulties in coping with any significant initial demand for older documents.

**6.38** We appreciate the force of these considerations and, in our discussion of the whole prior documents question, in Chapter 14, fully take them into account. We believe that there is a strong case to be made in principle for the extension of the Bill to prior documents generally, but modify our recommendations to accommodate the kinds of concern which agencies have expressed. Our proposals are, in short, that general retrospectivity should only apply in relation to personal records, which are for the most part easily retrievable and raise few difficult exemption questions. So far as general government records are concerned, we propose that the Bill should apply in the first instance only to documents up to five years old, with future extensions to this period being phased in as this becomes administratively feasible. Further, even the limited extensions with respect to prior documents which are proposed to be incorporated in the Bill are recommended to take effect only after 12 months from the date of proclamation. We believe that these proposed phasing-in arrangements will allow a full opportunity for the resource implications of any extensions to the scope of the Bill to be assessed in the light of actual experience, and necessary adjustments made accordingly.

**6.39** *Implications of reducing agency response time.* This again was the subject of a question we specifically asked in the Public Service Board Survey:

4. What is the anticipated impact on staff resources if decisions on requests for access were to be notified within (a) 60 days, (b) 28 days, or (c) 14 days?

The answers to these questions are summarised in Appendix 4, and the whole matter is discussed at some length in Chapter 8 of this Report (see paragraphs 8.35–43).

**6.40** Predictably, the bulk of the respondents were not confident of being able to meet a response time of less than 60 days (as currently provided) without significant additional resource costs. Most anticipated an unmeasurable, but probably significant, increase in the time of senior officers if a 28 or 14 day response time were introduced. Departments generally supported the existing 60 day provision with the comment that it would be in their interests to respond as soon as possible within this period; many drew attention to the appeal provisions of the Bill in relation to the response time. Many considered that responses to all requests within 28 or 14 calendar days could not be achieved within existing resources without detrimental effects on normal existing functional responsibilities.

**6.41** As explained in Chapter 8, we have—despite the considerable number of submissions which pressed us to make drastic time reductions immediately—responded cautiously in this area, and with some sympathy to the administrative problems agencies are likely to confront, particularly in the early stages of the operation of the legislation. We have, accordingly, recommended that while there should be substantial time reductions these should be gradually phased in, with a

reduction to 45 days after two years and to 30 days after four years, and with any further reductions to await subsequent review. We make the further point that, subject to Parliamentary approval, even these initial reductions should be subject to waiver if circumstances genuinely demand it. It is our belief that the scheme we have recommended will, again, enable the as yet unknown resource implications of this proposal to be fully assessed before any drastic new demands are placed upon the system.

**6.42** *Implications of proposed review and appeal procedures.* We do propose, later in this Report, that the existing review and appeal procedures provided for under the present Bill should be very much extended, particularly so far as the role of both the Ombudsman (discussed in Chapters 27 and 29) and the Administrative Appeals Tribunal (discussed in Chapters 27 and 30) are concerned. We have not been able to make any estimate of the establishment and operating costs that will be involved in expanding the Ombudsman's office, but we believe it not inaccurate to say that, relatively speaking, informal and conciliatory services of this kind can be delivered far more cheaply than any other comparably effective form of remedial assistance.

**6.43** Nor have we been able to make any complete or worthwhile estimate of the cost to government that will be involved in the proposed extended jurisdiction of the Administrative Appeals Tribunal, although we do deal in Chapter 30 with questions as to the way in which the Government's cost burden is shared out among different agencies, and also the circumstances in which costs should be awarded to successful applicants against agency or ministerial decisions. One of the few relevant precisely quantified estimates we have received in this area was from the Attorney-General's Department, which indicated in its response to the Public Service Board Survey that an additional 5-6 staff members would be required in the Crown Solicitor's Division to handle Tribunal appeals arising from the public service generally.<sup>38</sup> Although the costs associated with the staffing and operation of the Tribunal itself, so as to enable it to deal with a wider range of freedom of information matters, will undoubtedly be significant (and the costs of litigating individual cases even more so), these costs should not be overstated. We believe that the role we propose for the Ombudsman will be a very important one in practice, serving in particular to keep a good many cases away from the Tribunal which might otherwise proceed there. Only experience will indicate the extent to which the Tribunal does come to be utilised in this area, but a massive initial injection of funds to expand the ranks of its members and staff will in our view be unlikely to be necessary.

### **Offsetting savings**

**6.44** Freedom of information should not be seen merely as an innovation which will consume resources. This is an important lesson of overseas experience which is applicable in this country also. If handled properly, it will free certain resources which should be seen as offsets against other costs associated with the legislation. The savings flow from better information-keeping and management within government. We do not say that these savings can be precisely estimated in advance, any more than can costs, but we do say they should be taken specifically into account.

<sup>38</sup> Reply of 20 March 1979 by Attorney-General's Department to PSB Survey, Committee Document no. 76, p. 5.

**6.45** In Australia the off-setting savings which will become possible with the legislation are becoming more widely recognised. The Records Management Association of Australia, for example, congratulated the government for bringing freedom of information forward. The Association noted criticisms that the legislation would mean 'great pressure on registry staff' and other officers, and would 'demand great efficiency in registry standards for manual registries, EDP data bases and micrographics'. It argued however, that the new demands would 'force long overdue development of trained information managers', not only in relation to freedom of information generally but especially in making the Archives legislation effective.<sup>39</sup> The Australian Advisory Council on Bibliographical Services similarly supported the 'improvement of registries . . . [and] library activities' which the legislation would make possible.<sup>40</sup> The Victorian Government maintained that the legislation would promote 'long overdue development in records management and the development of a new "breed" of trained information managers'.<sup>41</sup> Some Commonwealth departments made similar points, based upon their own experience. The Department of Trade and Resources, for example, described how it was engaged on a project 'directed to integrating all our information holdings' both to 'prepare for the implementation of the Bill when enacted and to improve our internal management of current information'.<sup>42</sup> We support these statements, which pay regard to important problems of government administration.

**6.46** Although freedom of information in legislative form is new to Australia, the public service which will be implementing it has been in existence for a long time. We believe that a good many of the resource costs of the legislation will in fact be found by the rearrangement and more effective use of resources already being used within the public service. Central attention should be directed in this respect towards the existing government information services, which as now constituted, consume a very great deal of money. When this question was last publicly examined, by the Coombs Royal Commission, the direct cost of the government information sections amounted in all to some \$51 million: early in 1975, some 800 staff were employed in special information sections in departments, and further large numbers were employed in the statutory authorities.<sup>43</sup> Agencies responding to our own question, asked in the Public Service Board Survey, as to the number of people employed at present in preparing manuals and supplying information to the public, confirmed that some hundreds of public servants are engaged in this work. We note with considerable interest that in 1978 the Prime Minister established a task force within his Department to examine government information services. It is important to examine the effectiveness of existing agency information systems—what information goes to the public, who distributes it, how it is delivered, at what cost and so on—because there are savings to be made in this area. The interaction between freedom of information and government information services generally has been acknowledged clearly enough within the government. As the 1976 IDC observed, 'part of the apparent "freedom of information" workload of departments could perhaps more properly be regarded as a continuation of existing departmental services of providing information to the public'.<sup>44</sup> We recommend that the task force to which we have referred

<sup>39</sup> Submission no. 127, p. 1.

<sup>40</sup> Submission no. 75, p. 16.

<sup>41</sup> Submission no. 121, p. 6.

<sup>42</sup> Committee Document 69, p. 2.

<sup>43</sup> Australia, Parliament, Royal Commission on Australian Government Administration (Dr H. C. Coombs, Chairman) *Report*, Parl. Paper 186/1976, Canberra, 1977, p. 351; cf. J. Hilvert, 'Towards Costing Government Information Services', *Rupert*, no. 5, October 1976, pp. 13–15.

<sup>44</sup> 1976 IDC *Report*, cited footnote 19, para. 22.9.

should take our findings and recommendations into account so that the procedures associated with freedom of information and with the provision of governmental information can be properly brought together and savings made.

**6.47 Recommendations: Close attention should be given, in particular by the task force presently examining government information services, to the utilisation of existing government information and public relations resources in the administration of the Freedom of Information legislation.**

## **Conclusion**

**6.48** This chapter has canvassed a number of matters which will be recurring themes throughout this Report. We have been concerned here less with the making of detailed recommendations—there are plenty of those elsewhere in the report and particularly in the chapters which follow—than with putting the resource question in its total context. The key points we have attempted to establish can perhaps be summarised as follows:

- (a) It is not possible to predict the resource consequences of the present Bill with any real precision at this stage.
- (b) By bringing forward the Bill, the Government has implicitly accepted the responsibility for providing the necessary resources to make it work effectively.
- (c) Agency estimates of the net resource consequences of the present Bill have a tendency to somewhat overstate the likely extent of the problem. Any inclination on the part of the Executive to rely on such estimates as a ground for either containing the scope of the legislation, or unduly delaying its operation, should be strenuously resisted by the Parliament and the community.
- (d) Agencies do not need to know with certainty all the demands which freedom of information will make upon them in order to begin to prepare for it. This is especially true of the need to train and develop staff so that they understand the spirit as well as the letter of the legislation.
- (e) Those changes we propose to the Bill which would have an immediate effect—in particular the rewriting of various exemption provisions and the establishment of more far-reaching review and appeal procedures—would not significantly increase resource demands.
- (f) Those changes we propose to the Bill which would undoubtedly have significant resource effects—namely its extension to prior documents, and the reduction of response time—have been recommended to be phased in rather than introduced immediately. By the time they are due to be effected, both government and Parliament will have ample evidence on which to predict and assess their resource implications.

**PART B**  
**ACCESS PROCEDURES**

## Directories, indexes and manuals

### Introduction

**7.1** An effective system of freedom of information demands not merely that members of the public have rights, but that they be able in practice to exercise them. In this Part of the Report we consider the adequacy of the various machinery and procedural provisions set out in Parts II and III of the Bill. The present chapter is concerned specifically with Part II, 'Publication of Certain Documents and Information', one of the least known and publicised parts of the Bill, but in our view one of the most important.

**7.2** The first thing that Part II of the Bill is concerned to do is to assist the process of identifying those documents that may be available for public access. In many instances, of course, applicants for information will be able to identify with some precision what exactly it is they are seeking, and will have a clear idea of whom to ask for it. But on many other occasions applicants will be in difficulties in either or both these respects unless they receive a good deal of official co-operation and assistance. There are other provisions in the Bill (discussed further in Chapter 8 below) which create obligations to facilitate in various ways access requests once made, but it is an indispensable part of the scheme of the legislation that the public be given, at the outset and without this being contingent on any particular request having been made, as much information as possible as to what information is in fact available and where it can most conveniently be found. Whether Part II of the Bill, and in particular clause 6, adequately serves this purpose is one of the questions to which we direct our attention below.

**7.3** The second subject area with which Part II of the Bill is concerned is the 'internal law' of departments and agencies, i.e. the internal rules, policies and guidelines which supplement the formal text of statutes and regulations and in fact do more to determine how discretionary decisions are made in the great majority of cases than do the legislative texts themselves. Clause 7 requires that manuals and other documents incorporating these 'interpretations, rules, guidelines, practices or precedents' be made available for public inspection and purchase, and that an index of such documents be prepared and published in the *Gazette* and updated every twelve months. These requirements need only to be stated for their importance to be appreciated, and we applaud the Government for introducing them. Whether, however, they are, as presently drafted, fully adequate to meet their apparent purpose, is a further matter requiring detailed attention in this chapter.

### The meaning of 'documents'

**7.4** There is a preliminary matter which it is appropriate to mention at this point. Although the Bill is expressed to be concerned with freedom of 'information', nearly all its clauses in fact refer not to information as such, but to 'documents'. This has led in turn to some concern being expressed to us about, first, the application of the Bill generally to non-documentary forms of information (e.g. that held on tape or film or in computer storage), and, secondly, the status of

requests for information which are imprecise to the extent that they are not couched in the form of requests for particular, clearly identified, documents or non-documentary material.

7.5 By and large, we regard these kinds of fears as unfounded. As to the first point, the definition of 'documents' employed in clause 3 of the Bill, does appear wide enough to encompass information that is stored or recorded by electronic means, on computers and/or tape and film and the like:

'document' includes any written or printed matter, any map, plan or photograph, and any article or thing that has been so treated in relation to any sounds or visual images, that those sounds or visual images are capable, with or without the aid of some other device, of being reproduced from the article or thing, and includes a copy of any such matter, map, plan, photograph, article or thing, but does not include library material maintained for reference purposes.

We regard the exclusion of 'library material maintained for reference purposes' as reasonable, provided the manifest spirit of the clause is observed and departments and agencies do not try to conceal behind this proviso reports and other material which would otherwise be available under the legislation, but which happens to be stored in the library of the department or agency concerned.

7.6 As to the second general criticism mentioned in para. 7.4, it is true that a request for 'information', as such, may not have to be met by an agency. The Bill does not impose an obligation upon agencies to compile information which does not presently exist in retrievable documentary form at the request of an applicant; established mechanisms, such as the parliamentary question, are available for this purpose. We have not recommended any change to the Bill in this respect, as we recognise that considerably more agency resources would be required to implement the Bill if there were an obligation to answer imprecise requests of this kind. Furthermore, in our opinion the restriction of the Bill to requests for documents does not seriously reduce its utility. Departments already carry out some activities designed to make information available to the public upon request (for instance, the public and community relations sections of departments), and we expect that these activities will continue. In addition, the Bill itself contains some mechanisms to assist an applicant to identify whether there are any documents that record information that may be sought on a particular matter. In particular, there is an obligation upon agencies to assist a person in identifying documents that are sought under the Bill. Clause 13 (2) requires only that a request 'provide such information concerning the document as is reasonably necessary to enable a responsible officer . . . to identify the document'; clause 13 (4) imposes a duty on the agency 'to assist a person . . . to make a request in a manner that complies with this section'; and clause 15 deals specifically with the provision of information where it is 'not available in discrete form in documents of the agency' but is stored on tape, within a computer data-bank or in some analogous manner.

#### **Directory of government activity (clause 6)**

7.7 Clause 6 envisages that an expanded Commonwealth Government Directory will be published annually, containing in the future a statement of the categories of documents possessed by each agency, plus a summary of the organisational structure of each agency—its functions, decision-making powers, and agency arrangements facilitating consultation or representation of views by members

of the public. The clause does not specifically confine such publication to the Directory itself, but it is clearly contemplated that this volume will be the primary means by which the information in question is conveyed.

**7.8** One objective of this clause is clearly to enable members of the public to exercise effectively their rights under the Act. We would be concerned however if this were thought to be the only objective of clause 6. Yet sub-clauses (1) and (2) provide that the information referred to in the clause will be 'in a form approved by the Minister administering this Act' and that the form shall be such as the minister 'considers appropriate for the purpose of assisting members of the public to exercise effectively their rights under Part III' (which outlines the procedures applying to requests for access). The Bill contains no provisions empowering a citizen to challenge the form approved by the minister, and we foresee a possible danger that the minister will approve a form that concentrates on those aspects of an agency's organisation that are relevant only to this Bill.

**7.9** The objectives that can be achieved by clause 6 are far broader. In the first place, it can afford to a greater number of persons the opportunity to participate in government decision making. The size and complexity of the national government apparatus and its geographical isolation from the large population centres has meant, it seems, that most people, however concerned, balk at the prospect of trying to play a participating role in government regulation and formulation of policy. Only those who are familiar with Canberra corridors—lobbyists and established pressure groups, in the main—can capitalise on the opportunities for participation that presently exist. We believe that clause 6 should place more emphasis, therefore, on the identification of those consultative and other participatory mechanisms which do exist. We return to this point below.

**7.10** Clause 6 could also describe more fully and require the publication of the resources of agencies that are available for public use, particularly resources that are related to an open government policy. For instance, it is the practice of some departments to list in the Directory publications that are available to the public, though this practice is neither uniform nor complete.

**7.11** Lastly, it has become apparent to us, from submissions and evidence received from librarians and their representative associations that libraries have, and are anxious to perform, an important role in any open government policy. They already possess extensive holdings of government reports and publications and could readily expand their present role: they could be used both as regional centres for the perusal of published manuals, indexes and guidelines that are to be specifically made available under the Bill, and as advice centres on available government material in general. The Directory could promote their role in this respect.

**7.12** Arising out of these considerations we make a number of specific recommendations for the amendment of clause 6, going respectively to the expansion of the list of matters to be included in the Directory, the matters to be considered by ministers in approving the form of the information conveyed, and the time-limits which should apply to the updating of such information.

**7.13** In expanding the list of matters to be included in the Directory, as set out in sub-paragraph 6 (1)(a)(i), particular attention should be given to the expression

particulars of any arrangement that exists for consultation with, or representations by, bodies and persons outside the Commonwealth administration in relation to the formulation of policy in, or the administration of, the agency;

It appears that there are a number of formal and informal arrangements for public participation that might not qualify as arrangements for 'consultation' or 'representations' on a strict reading of this provision. One example is the provision in the *Environment Protection (Impact of Proposals) Act 1974* enabling a person to request an agency to indicate what steps it is taking to assess the environmental impact of a proposal or activity. Again there are many advisory committees established with community representatives of one kind or another: they should be included in the Directory—and identified accordingly as accessible to requests and representations—even if they have not established any consultative machinery of a formal kind. Other matters that should in our view be listed are the nature of agency facilities (reading rooms, libraries and the like) that are available for public use, and the informational literature (press releases, statistical series, booklists, periodicals and the like) which is available from each agency on a subscription service or free mailing list basis. We also believe that the Directory should contain at least a summary account of the nature and operations of the Freedom of Information legislation itself, indicating the procedures to be followed in making access requests (not least a full description of the initial contact point for each agency); a more detailed account should certainly be published in the form of a 'Freedom of Information Handbook', a matter to which we return in Chapter 8.

**7.14 Recommendation: The list of matters required to be published under clause 6 (1) (a) should be rewritten to encompass among other things:**

- (a) all possible institutional avenues presently existing (and which it is practicable to identify) for direct and indirect public participation in governmental decision making;
- (b) facilities provided for physical access to agency information;
- (c) informational literature available by way of subscription services or free mailing lists; and
- (d) basic information about Freedom of Information legislation access procedures, including initial contact points for each agency.

**7.15** Paragraph 6 (1) (a) requires that the information in question be published 'in a form approved by the Minister'; clause 6 (2) states that this form 'shall be such as he considers appropriate for the purpose of assisting members of the public to exercise effectively their rights under Part III'. We stated our view above that the information made available under clause 6 should not simply be confined to that which is necessary to enable rights under Part III of the Act to be exercised, and we recommend accordingly.

**7.16 Recommendation: The matters to be considered by the minister under clause 6 (2) in approving the form in which information about agencies and their documents is to be published should be widened to include what is necessary to enable members of the public:**

- (a) to take advantage of existing avenues for participation in governmental policy formulation and decision making;

- (b) to avail themselves of agency facilities and information resources; and
- (c) to exercise effectively the rights conferred under the Freedom of Information legislation as a whole.

7.17 We believe that the public would benefit far more if the information in clause 6 were revised every 6 months rather than annually. Although it may not be feasible to publish the Directory twice each year, every alternate revision under clause 6 could be published in a special edition of the *Gazette*.

#### **Publication of manuals and indexation of internal laws (clause 7)**

7.18 Freedom of information legislation complements many principles that are an integral part of our legal system. Foremost among those principles is the rule of law, which requires that government decisions and the officials who make them should alike be answerable to the same system of law that applies to others. The chief way in which this principle has gained expression in our legal system is through the enactment of legislation that declares the rights, obligations, powers and duties of the Executive, and the correlative rights, liabilities and privileges of the public. However, this objective—that government should be according to law, and that all law should be published, available and accessible—is under challenge from the contemporary practice of enacting legislation that is couched in general terms and creates broad discretionary powers under which the Executive is permitted to adopt internal rules, policies and guidelines to supplement the Parliamentary word. If those internal supplements are hidden—inaccessible or unobtainable by the public—the rule of law is to that extent displaced.

7.19 That is what has happened. Almost every statute that is to be administered by the Executive is affected by an internally-adopted interpretation—whether it is part of a bound manual or another page in a file—that may be used by an official when a question arises as to the application of the statute. This is not to deny that the parliamentary word does not govern, and that frequent resort is not had to it. However, internal interpretation exists; it is a gloss upon, or supplement to, the statute and—whether correct or incorrect, prejudicial or favourable to the subject—it has a potential use. Often those interpretations are not secret, in the sense that an interested inquirer will be denied the right to inspect them. Some are published, others are digested in letters of advice to citizens, and access is given to some when that is sought. However these interpretations are nevertheless hidden, insofar as their existence is not readily known and they are not published in a form that makes them as accessible throughout the country as are the statutes which they supplement, or on occasions supplant.

7.20 A simple example will illustrate our point. The *Social Services Act 1947* is a slim volume of some 200 sections. In a broad sense, the Act confers rights upon the public, since it lists the circumstances and conditions under which over four million Australians presently receive, and are entitled to receive, benefits ranging through Age, Invalid and Widow's Pensions, Unemployment, Sickness and Supporting Parent's Benefits, and Family and Handicapped Child's Allowance. The Act uses a number of general phrases to confer or delimit these entitlements, such as 'permanent and bona fide domestic basis', 'of good character', and 'without just cause' and it creates an equally large number of discretionary powers, prefaced by the expression 'the Director-General may'. Discretionary powers and phrases of this nature are (as they should be) confined, structured and checked by internal interpretations and guidelines. Many officers also have to apply these standards, and others have to police whether recipients are *bona fide*. There

are an equal number of internal rules that specify procedures to be followed by those officers in the exercise of their functions. In other instances officers make decisions in novel situations, and their decisions and any reasons that support them may be regarded as a guide for the future—a ruling of precedential significance.

**7.21** Many of these interpretations, guidelines and precedents of the Department are collected in internal manuals. Claims have been made to this Committee by several witnesses<sup>1</sup> that these manuals are not publicly available. The Director-General, on the other hand, stated in evidence to the Committee that some were available for inspection at offices of the department.<sup>2</sup> What is clear, however, is that none is available at libraries and book shops where the Act itself can be inspected or bought. Equally, manuals that are claimed to be available are not prominently on view at all, if any, of the service counters operated by the Department.

**7.22** In these circumstances this internal *law*—for that is what it is—is hidden. The rights and duties of the public can be affected by laws that are not public. The law may even be a misinterpretation of the statute, but is governing nonetheless. It may correctly interpret, but be misapplied. Its silent existence is unacceptable in a system that exalts the rule of law, rather than the men and women who administer it.

**7.23** This example can be multiplied. Hidden law can be found in the fields of taxation, superannuation, employee compensation, company registration, customs and excise, or trade practices. Indeed one department which gave evidence to the Committee, the Department of the Capital Territory, estimated that it would publish as many as 400 manuals if it were required by the Bill to make available its internal law.<sup>3</sup>

**7.24** It is against this background that the Committee treats clause 7 as one of the most important clauses in the Bill. Briefly, that clause requires each agency to make available for inspection and purchase all documents that are part of its internal law, i.e., that which is defined as 'interpretations, rules, guidelines, practices or precedents' that are provided by an agency.

for the use of, or are used by, the agency or its officers in making decisions or recommendations, under or for the purposes of an enactment or scheme administered by the agency, with respect to rights, privileges or benefits, or to obligations, penalties or other detriments, to or for which persons are or may be entitled or subject.

In addition, an index of the documents containing these rules has to be prepared and published in the *Gazette*, and updated every 12 months.

**7.25** It is to be noted that if a document is not so indexed and made available, then, under clause 8, a person who is not aware of the rule in question

shall not be subjected to any prejudice by reason only of the application of that rule, guideline or practice in relation to the thing done or omitted to be done by him if he could lawfully have avoided that prejudice had he been aware of that rule, guideline or practice.

<sup>1</sup> E.g. Australian Council of Social Services, Submission no. 48, incorporated in *Transcript of Evidence*, p. 445; the Women on Welfare Campaign, Submission no. 113, incorporated in *Transcript of Evidence*, p. 1774; cf. Department of Social Security, Submission no. 117, incorporated in *Transcript of Evidence*, p. 2140.

<sup>2</sup> *Transcript of Evidence*, pp. 2196–7.

<sup>3</sup> Submission no. 149, incorporated in *Transcript of Evidence*, p. 2230.

**7.26** It is interesting to note that a similar requirement appearing in the United States Freedom of Information Act has had a marked and important impact on government administration. The provisions on internal law were predicted from the outset as being one of the notable advances enacted by the Freedom of Information Act, in part because of the sophisticated United States system of administrative justice, fashioned from the constitutional requirement that individual rights would not be affected except by due process of law; but partly also because of the abhorrence of secret law—a sentiment that is more universal in its recognition. A recent article discussing the United States Freedom of Information Act gives a description of some of the material that is now available pursuant to the internal law provisions of that Act:

Literally hundreds of indexes are now published, including indexes of such things as environmental impact statements, the outside contacts of the Federal Trade Commissioners, merger clearances by the Commission, policy directives from the Immigration Commissioners, authorizations issued to banks by the Federal Reserve Board to acquire shares, invest, or undertake a merger, advisory interpretations of the Tax Code issued to individual taxpayers by the Internal Revenue Service, the Federal Power Commission's instructions to oil companies, details of the different programmes operated by agencies, and internal agency guidelines and manuals on such things as drug analysis, supervision of recipients of federal funds, Federal-State highway management, analysis of food additives, pesticides and vitamins, and security, auditing, training, administrative and legislative policies and personnel management. In addition, categories of secret law that have been disclosed pursuant to court order include the manual for tax auditors, the Parole Commission's guidelines and decisions, the Air Force's rulings on violations of the honour code, and the criteria to be applied by prosecutors when deciding whether to prosecute.<sup>4</sup>

**7.27** The support for these sections on internal law is not confined to those outside the Administration who use the Act. It was confidently predicted by many promoters of the Act that, in time, the Administration would experience the benefit of open government, and it appears that in many quarters this has occurred. Some interesting remarks on the internal law provisions of the United States Act were recently made by William E. Williams, a Deputy Commissioner of the Internal Revenue Service during hearings on the impact of the Act on law enforcement, held by the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary:

On balance, we believe that to date these Acts have had a beneficial influence upon the tax administration process. Today, for example, all of the IRS administrative procedures and operational handbooks, with the exception of our law enforcement manual, are available to the public upon request, and portions of the manual are being published by one of the major tax services. Prior to FOI, these materials were kept confidential, although subsequent experience has demonstrated no legitimate tax administration function was served by this restriction. With this access, individuals, the media and public interest groups have done much to identify shortcomings in our procedures, which the Service, in turn, has moved to correct (e.g., improved publicity to all taxpayers regarding their appeal rights, and streamlining of our appeals procedures).

I believe that the confidence of taxpayers and tax practitioners in our administration of the revenue laws has been enhanced by this ability to see for themselves, and to comprehend the complex procedural issues inherent in the application of the tax laws. I further believe that the growing public pressure for tax law simplification

<sup>4</sup> J. D. McMillan, 'Freedom of Information in Australia: Issue Closed', *Federal Law Review* 8, (1977) 379 at p. 390.

must be attributed, at least in part, to this greater appreciation for the administrative complexities inherent in the current law. In a broader context, a January, 1978, Harris Poll, citing a significant increase in the public's confidence in Federal Executive Branch institutions may well reflect, at least in part, the overall impact of this Act.<sup>5</sup>

**7.28** Part II of the Australian Bill is not as broad in its ambit, or as demanding in its requirements, as the comparable provisions of the United States Freedom of Information Act. However, if several amendments to the existing provisions were made, we feel that Part II could operate as successfully and acceptably as its United States counterparts. Although at first sight apparently quite far-reaching in its terms, we feel that sub-clause 7 (1) has in fact been drafted too restrictively and, in its operation, may not apply to a number of documents that should be published or indexed. In particular, the sub-clause may not apply to some documents that are of precedential significance, or reflect the approach adopted by an agency concerning the interpretation or application of a particular statute. Presently the clause applies to 'manuals or other documents containing interpretations, rules, guidelines, practices or precedents' and to 'documents containing particulars of (a scheme administered by the agency)'. Categories of documents which may not be comprehended by this terminology and to which we think it should be expressly extended include letters of advice to persons outside the agency and what might be loosely described as 'statements of policy'.

**7.29** *Letters of advice to persons outside the agency.* It is possible—and indeed happens—that an agency may carry on a notable proportion of its regulatory activity by way of letters of advice. A company wanting to know whether its planned reorganisation complies with trade practices requirements, an accountant inquiring as to the approach of the Taxation Commissioner, a citizen making preliminary inquiry as to his or her eligibility for a benefit, grant or subsidy—all may receive advice, on which it is understood they will act, as to the course they should take. Such advice (even though it does not bind an agency) can, in a practical sense, amount to internal law of that agency, because it reflects the approach the agency adopts in the administration of its legislation. Certainly it is advice that would be of interest to another corporation, accountant or citizen, either contemplating a similar course of conduct, or who has been treated differently by an agency in an earlier matter. While it is possible that such advice may be classified by some as an 'interpretation' or 'guideline' by an agency, we see no danger, and some advantage, in having this expressly in the Bill. We have in mind in particular that, in the early years of operation of the United States Freedom of Information Act, agencies claimed that advisory opinions and 'no action' letters were not within the scope of the internal law provisions of the Act. Legal action was necessary to establish that these were part of the internal law of an agency.<sup>6</sup>

**7.30** *Statements of policy.* Statements are sometimes made as to the manner in which a statute will be administered that do not amount to an interpretation of the statute or a statement made in the exercise of any power conferred by the statute. Equally, the statement may not amount to a guideline to staff or a practice direction, on how to administer the statute, since it might be designed

<sup>5</sup> William E. Williams, Statement to Subcommittee on Criminal Laws and Procedures, United States Senate Committee on the Judiciary, 25 April 1978, incorporated in *Transcript of Evidence*, pp. 2157–8.

<sup>6</sup> Australia, Parliament, Royal Commission on Australian Government Administration (Dr H. C. Coombs, Chairman), Appendix Volume Two, Parl. Paper 187/1976, Canberra 1977, p. 103.

simply to explain to the public circumstances that affect the administration of the Act. Examples might include policy statements on budgetary allocations for a particular program (for instance, legal aid subsidies, or welfare benefits), or statements on agreed Commonwealth-State arrangements that affect the administration of an Act. Again, to ensure that statements such as these are indexed and made available on an accessible basis, we propose that they be included in clause 7 (1).

**7.31** A further question arises with respect to documents that are used in enforcing the law as distinct from merely administering it within an agency, the emphasis in clause 7 (1) as it is presently drafted being squarely on the latter. There is an overlap between the two concepts, and many manuals—for instance, those on tax avoidance and evasion—may already come within the terms of clause 7. But there are other matters about which there may be some doubt—for example, the internal rules relating to police fingerprinting and the use of firearms, or the procedures followed in social security investigations—and we believe it is important that they be expressly encompassed by clause 7. As a matter of general principle, documents ought, *prima facie*, to be disclosed if they are used in enforcing enactments or schemes administered by an agency where a member of the public might be directly affected by that enforcement, if they are documents containing information on the procedures to be followed, the methods to be employed or the objectives to be pursued in the enforcement of the enactments or schemes in question. Clause 27 of the Bill (discussed in Chapter 20) does, of course, provide for the exemption of certain documents the disclosure of which would actually prejudice law enforcement in designated circumstances, and clause 7 (4) preserves the full force of that exemption in the present context. While it is clear that there will be many manuals on law enforcement that will be wholly or partially exempt from publication, and properly so, nevertheless there are non-exempt documents in this field that should be indexed and accessible.

**7.32 Recommendation: The categories of ‘internal law’ documents described in clause 7 (1) and required (subject to exemptions) to be published, should be extended so as to clearly encompass:**

- (a) letters of advice (of precedential status) to persons outside the agency;
- (b) statements of policy; and
- (c) documents used in enforcing the law (as distinct from administering it).

**7.33** Under clause 7 (2) an index has to be updated at least every 12 months. We recommend that a period of 3 months be adopted. If internal law is to be accessible, it should be made so as soon as possible. Government administration now develops at a quick pace, legislation is amended regularly, new discretionary powers are created at frequent intervals, internal procedures are amended as problems are disclosed, and new precedents arise daily as novel issues arise. Unless these changes are notified regularly to the public, the internal law that is indexed under the Bill will be of merely historical significance. It is clear that, if agencies are to meet their obligations under the Bill as it is presently drafted, they will have to prepare documents for indexation concurrently with their creation. In these circumstances there is little to be lost and much to be gained by requiring indexes to be revised at regular intervals of 3 months. We note

in passing that the United States Freedom of Information Act requires indexes to be amended on a quarterly basis, though in fact it is common for many agencies to do this sooner, when the need for amendment arises.

**7.34 Recommendation: Clause 7 (2) should be amended to require the publication, where necessary, of an index-updating statement at not less than 3 monthly intervals rather than 12 monthly as presently provided.**

## Processing access requests

### The obligation to facilitate access (clauses 9 and 13)

**8.1** The premise on which the whole Freedom of Information Bill is constructed is that access to information is a matter of right and not something which is dependent on a showing of interest or need to know in any particular case. We wholeheartedly endorse that premise, which is incorporated in Clause 9 of the Bill in the following terms:

9. Subject to this Act, every person has a legally enforceable right to obtain access in accordance with this Act to—

(a) a document of an agency, other than an exempt document; or

(b) an official document of a Minister, other than an exempt document.

As the Attorney-General put it in his Explanatory Memorandum, this clause 'embodies the basic principle of the legislation which is that an agency must justify the withholding of a document instead of the person seeking access having to justify his request'.<sup>1</sup>

**8.2** We see the importance of clause 9 as more than purely formal. Not only ought it to colour the whole approach that is adopted with respect to the interpretation and application of the exemption clauses in the Bill—discussed at length in Part C of this Report—but it ought also, in our view, to influence departments and authorities in their practical administration of the access procedures now under discussion as Part B. We regard clause 9, together with the even more explicit provisions in clause 13 discussed further below, as amounting to a clear legislative instruction to departments and authorities to do everything in their power to clear the applicants' path and to avoid putting any but the most obviously necessary obstacles in their way.

**8.3** Regrettably, these points do not yet appear to have met with universal or wholehearted acceptance. There is still something of a rearguard resistance, discernible in the submissions to us of a number of departments and authorities, to the fundamental character of the Bill as one based on 'rights' rather than 'need'. A number of those who made submissions or appeared before the Committee wished to restrict the right by making it conditional upon a demonstration of need. The basis of this need was not clearly specified to us, but seemed usually to be bound up with notions about the 'reasonableness and unreasonableness' of requests, as one witness put it, from the departmental point of view.<sup>2</sup> Clause 13 (3) of the Bill, which we mention below and discuss in detail in Chapter 13, covers cases where requests may 'interfere unreasonably' with the operations of an agency; but that is different from assessing the reasonableness or otherwise of the request itself. This fundamental point needs to be understood clearly. The Director-General of Social Security also argued that information should desirably be made available only 'when it is needed'.<sup>3</sup> He thought it worth exploring the possibilities of creating a system which would permit access to information to be

<sup>1</sup> Australia, Senate, *Freedom of Information Bill 1978. Explanatory Memorandum*, Canberra, 1978 p. 5.

<sup>2</sup> *Transcript of Evidence*, p. 816.

<sup>3</sup> *Transcript of Evidence*, p. 2181.

'declined on the basis that its cost is wholly out of proportion to the need which can be demonstrated by the person who is asking for it'.<sup>4</sup> However, he did not 'feel confident that [he had] a solution that would be acceptable' and he added that his department would 'comply faithfully with whatever decision emerges in the legislation'.<sup>5</sup>

**8.4** Other departments did try to suggest some ways to determine need. The Department of Immigration and Ethnic Affairs, for example, thought that access to information should not be extended to 'illegal immigrants and temporary entrants' who were 'without any claim to the benefits of the legislation—given that they are not part of the taxpaying Australian community'.<sup>6</sup> The Department also argued that access should be refused 'on the grounds of potential for improper use of information acquired'.<sup>7</sup>

**8.5** We cannot accept these views, understandable though they may be. We believe that such solutions would create more difficulties than they would solve. On practical grounds it would be possible for those with a 'need' under such legislation to claim access to information on behalf of those who had no such legally enforceable right deriving from need. To police the operations of the Act to prevent this happening would not be administratively feasible. Certainly it would be very costly. Much more important, such an attempt would be undesirable. We are not able to discern a philosophical basis for determining need in some agreed fashion and we believe the attempt should be abandoned.

**8.6** There are certain circumstances in which individuals requesting information should be required to establish their identity, but this is a different matter from establishing need. The Department of the Capital Territory, for example, pointed out that when a person seeks access to a document concerning him or herself personally it would 'be necessary . . . to develop procedures to ensure that persons seeking access to personal or confidential commercial material can establish their identity and interest before access is given'.<sup>8</sup> We take 'interest' to be used in a narrow sense. The Department of Health also said that

specific provision may be needed to ensure that medical records are . . . released only to the person concerned or to the nominated doctor. In view of the particularly private nature of medical records it is suggested that consideration could be given to the adoption of requirements firstly, that an applicant should produce proof of identity when applying for access to his medical record and secondly, that the nomination of the doctor, where the record is not to be directly disclosed to the person seeking it, must be made in writing.<sup>9</sup>

It is clear that departments are well able to establish suitable procedures.

**8.7** If, as seems clear, the idea of a right of access to information is not well understood and accepted throughout the public service, then work still needs to be done inside the public service to clarify that 'basic principle' of the legislation. This is a task for departmental management which must be undertaken without delay, and with support from other agencies as appropriate.

<sup>4</sup> *Transcript of Evidence*, p. 2182.

<sup>5</sup> *ibid.*

<sup>6</sup> Submission no. 158, incorporated in *Transcript of Evidence*, p. 2331.

<sup>7</sup> *ibid.*

<sup>8</sup> Submission no. 149, incorporated in *Transcript of Evidence*, p. 2231.

<sup>9</sup> Submission no. 83, incorporated in *Transcript of Evidence*, p. 1031.

**8.8** Clause 13 (4) requires an agency to assist a person making a request to comply with the legislation:

(4) It is the duty of an agency, where practicable, to assist a person who wishes to make a request, or has made a request that does not comply with this section or has not been directed to the appropriate agency or Minister, to make a request in a manner that complies with this section or to direct a request to the appropriate agency or Minister.

An inquirer may often need to be told that the request should be put in writing or that it should be directed to a particular agency or minister—to permit, in short, the provisions for making a request described above to be met. As the Attorney-General has explained it, this means that 'an agency must therefore attempt to assist a person who has made a request that does not sufficiently identify a document to provide sufficient information to identify the document concerned or to specify within a broadly stated subject matter the particular document to which access is sought'.<sup>10</sup> Clause 13 (5) reinforces this provision by providing that requests for access should not be refused without giving the inquirer a reasonable opportunity of consultation with a view to removing the barrier to access.

**8.9** These are important provisions, even to people who are knowledgeable about government and have a reasonably clear idea about the nature of the documents they seek. As the Freedom of Information Legislation Campaign Committee pointed out:

since there is no requirement that internal filing indexes be released, or that lists of such things as committee reports be prepared, few requests will be able to identify particular documents and might be regarded as framed by reference to subject-matter . . . . It will be difficult for a person who does not have substantial knowledge of any agency's filing system or record holdings to challenge an assertion that it would be burdensome to locate those documents. Any request should be answered which sufficiently identifies a document to enable it to be located.<sup>11</sup>

The 'duty' placed on agencies 'to assist a person who wishes to make a request' was commended in numerous submissions made to the Committee. We note that the Attorney-General has himself claimed that this positive obligation on agencies to assist applicants is a feature of the Australian Bill, not found in the United States legislation.<sup>12</sup>

**8.10** While we thus welcome the inclusion of clause 13 (4) in the Bill, we believe that it should be strengthened, by the deletion of the words 'where practicable', to make it unequivocally clear that it is the duty of an agency to assist a person to make a request. It may be said that this would be to place too heavy a burden upon departments to be helpful with requests which are without merit. But this objection is unacceptable to us. This is not because we think that all requests will indeed have merit. There are bound to be inquiries which are of a frivolous or vexatious nature. This is not a situation peculiar to freedom of information. All government organisations receive a proportion of frivolous requests but they cannot refuse co-operative service generally because of the actions of a few. We do not support such frivolous requests but neither do we exaggerate their significance.

**8.11** More significant are those requests which cannot be accommodated under the Freedom of Information legislation, but which are made for quite defensible

<sup>10</sup> *Explanatory Memorandum*, cited footnote 1, p. 8.

<sup>11</sup> Submission no. 9, incorporated in *Transcript of Evidence*, p. 116.

<sup>12</sup> Australia, Senate, *Hansard*, 9 June 1978, p. 2698.

reasons. Countless requests are made for information which the government simply does not have. By no means will all these requests be made frivolously or with intent to waste the government's time. Many will come from individuals who want information and look to the government to provide it. This is legitimate, even if they are going to the wrong place. It is important that citizens, courteously, be told this. Indeed such explanations should be part of the informal procedures which take place before formal requests are made under the legislation.

**8.12** There is, however, a point which may appear to lie in the opposite direction. The Australian Advisory Council on Bibliographical Services put the issues well in its submission to the Committee when it pointed out that clause 13 (4) 'is open to some abuse' if the assistance given to inquirers turns out to be 'on the agency's terms'. The inquirer could be 'placed in the position of having to give considerable information to the agency, information which many people may not want to give'.<sup>13</sup> It is right that departments and authorities should be under a positive obligation to assist applicants for information. But this means all applicants. Departments must not be helpful to some applicants and unhelpful to others: that would be to introduce a hidden 'needs' criterion dependent upon bureaucratic preference or prejudice. We emphasise again, however, that clause 13 (4) is valuable and that a positive statement of departmental obligations can be met by a straightforward change to it.

**8.13 Recommendation: The words 'where practicable' should be omitted from clause 13 (4) in order to make unequivocally clear the responsibility of agencies to respond helpfully to persons making requests.**

**8.14** Here as elsewhere, to give this recommendation force will require some positive action from government agencies. The significance of sub-clauses 13 (4) and (5), and indeed provisions like clause 9 making it clear that access to information is a matter of right rather than need, must be brought systematically to the attention of those public servants who will receive and process freedom of information requests. The supervisors of staff at counter and inquiry positions will be in an especially important position. A further way to support the intent of the legislation, then, will lie in the fields of staff training and development. We have emphasised this in general terms already in Chapter 6; and we emphasise it again in the present context.

**8.15 Recommendation: The training given to public servants to equip them to implement the legislation should emphasise the underlying principles of the legislation and make it clear that the assistance they give inquirers should be given in an equitable, even-handed way without regard to the public servant's view as to the quality of the application or its likely outcome.**

#### **A Freedom of Information Handbook**

**8.16** Action is also necessary to ensure that agencies are helpful to potential applicants for documents even before inquiries under the legislation are made. To a great extent the publication of manuals and indexes, as provided for in clauses 6 and 7, is designed to ensure this, and we have discussed those clauses at length in the previous chapter. However, it is also important that agencies, or the government as a whole acting on their behalf, should draw the attention of members of the public to their rights under the legislation. They must take an active part in doing this. It is also in their own interests that they do so: an informed public will not create administrative difficulties of the sort apparently feared by so many officials.

<sup>13</sup> Submission no. 75, p. 22.

**8.17** A number of submissions to the Committee argued these points. The Law Institute of Victoria, for example, criticised the Bill because it 'does not require that guidelines for the making of an application be published and made freely available to the public'.<sup>14</sup> The Women's Electoral Lobby (Victoria) assumed 'that some sort of guidelines will be drawn up for the public so that the workings of the legislation and procedures which are to be followed will be explained'.<sup>15</sup> We are not so confident. Special action needs to be taken by departments if this is to happen and particular attention must be paid to the language in which any such explanatory material is written or otherwise disseminated. The submission of Mrs K. Millar thus said that attention must be paid to 'people whose native language is not English'<sup>16</sup> and a representative of the South Australian Council of Social Service also spoke of the need for an explanatory brochure in 'lay language, the language of the people'.<sup>17</sup>

**8.18** We support these arguments and believe that a handbook explaining the operation of the legislation and nature of the rights conferred by it would meet the difficulties identified. Such a handbook should be distributed free or at a minimal charge and would include such matters as explanations in plain language of the working of the legislation; examples of government documents which might be of interest to citizens; explanations of the different sorts of information that are available—documents, tape recordings, computer printouts, maps and so on; indications of the limitations to the Act (for example, departments will not do research for people or analyse documents or collect information that they do not have); indications of the scope of exemptions under the Act and of the appeal provisions and procedures; references to relevant agency publications and contact points; examples of how to write or telephone a department; advice that requests should be as accurate as possible to avoid searching and to keep costs down; and full details of the fee structure, giving illustrations and explaining ways in which waivers or reductions of fees and charges can be sought.

**8.19** A good example of what we have in mind is the *Citizen's Guide on How to Use the Freedom of Information Act and the Privacy Act in Requesting Government Documents* prepared in the United States by the House of Representatives Committee on Government Operations.<sup>18</sup> In Australia, such a handbook could well be prepared in the first instance by the Attorney-General's Department, which will have the general responsibility for overseeing the administration of the freedom of information legislation. It may be desirable for those departments and authorities which are likely to be heavy recipients of freedom of information requests to produce their own handbooks, brochures or other such literature. Certainly we believe that the basic handbook we propose, or if necessary some abbreviated version of it, should be published not only in English but also in the principal migrant languages.

## **8.20 Recommendations:**

- (a) Preparatory work should commence at once on the production of a Freedom of Information Handbook, explaining the nature of the rights conferred by the Freedom of Information legislation and the procedures by which they might be exercised.**

<sup>14</sup> Submission no. 112, p. 4.

<sup>15</sup> Submission no. 7, incorporated in *Transcript of Evidence*, p. 366.

<sup>16</sup> Submission no. 120.

<sup>17</sup> *Transcript of Evidence*, p. 1807.

<sup>18</sup> United States, House of Representatives, *A Citizen's Guide on How to Use the Freedom of Information Act and the Privacy Act in Requesting Government Documents: Thirteenth Report by the Committee on Government Operations*, House Report no. 95-793, Washington, 1977.

- (b) Such handbook should be written in plain and accessible English, produced also—if necessary in abbreviated form—in the principal migrant languages, and distributed free or at a minimal charge.
- (c) The Attorney-General's Department should have the responsibility for producing the basic handbook, but other agencies should consider, where appropriate, producing their own information brochures and other publicity.
- (d) The basic handbook if possible should be available at the time of proclamation of the legislation, but delays in its production at that time should not be used as an excuse to delay such proclamation.

### Form of requests (clause 13)

**8.21** Clause 13 (1) states that a person who wishes to obtain access to a document 'may make a request in writing' to the agency or minister concerned. Oral requests for documents may in practice evoke an affirmative agency response in certain circumstances, but they will not have any formal status under the present legislation. (In technical terms, the satisfaction of such requests will be contingent upon the exercise by the minister or agency of the residual discretion conferred by clause 12.) This is made clear—but not as clear as it could be—by clause 16 (1), which provides, among other things, that 'where a request is *duly made* . . . the person shall be given access to the document'. In his Explanatory Memorandum, the Attorney-General states that 'the only formal requirement comprehended by the term "duly made" is that the request be in writing'.<sup>19</sup> He goes on to note that further formalities are required if a request is to evoke not merely an access response, but a response within the 60 day time limit fixed by the Bill: this follows from clause 17 which requires, as a condition of this time limit being satisfied, that a request be both 'made in writing and . . . expressed to be made in pursuance of this Act'.

**8.22** We make it clear at the outset that we accept the appropriateness of this general scheme. It must be acknowledged that it is difficult administratively to contemplate a system where statutory obligations could be founded on other than written requests. Equally, we regard it as not unreasonable that an applicant who wishes to specifically rely on the Freedom of Information legislation in making his request, and in particular to get the benefit of such time limits on response as that legislation imposes, should be required to expressly make clear that his request is made pursuant to that legislation. There is a difference between freedom of information requests and those made, for example, by school children seeking project material, and we would not regard it as appropriate that an agency should be bound by the present legislation to meet strict time limits in relation to the latter (although, needless to say, we of course believe that agencies should meet such non-freedom of information requests as soon as possible). But while we do accept the general scheme, we make the point that it does not emerge as clearly as it might from the language of the Bill. The Attorney-General's Memorandum makes clear the intended relationship between the formality requirements in clauses 13, 16 and 17, but the language of the Bill does not. Matters would be assisted in this respect if the expression 'duly made' in clause 16 (1) were abandoned in favour of the expression 'made in writing', and we recommend accordingly.

<sup>19</sup> *Explanatory Memorandum*, cited footnote 1, p. 10.

**8.23 Recommendation:** For purposes of clarification, the requirement in clause 16 (1) (a) that a request be 'duly made' should be replaced by one that it be 'made in writing'.

**8.24** We commend the simplicity of the requirement that requests simply be made 'in writing'. There are no provisions requiring the use of special procedures or forms of requests, and this is as it should be. (This is not to say that it might not be appropriate to spell out in regulations or the proposed handbook a pro forma request—but as a guide rather than a mandatory direction.) Simple procedures are best. However, procedures which appear simple to the educated or experienced may be mysterious to other people. Making a written request may not be simple to them, but their legitimate desire for governmental information will not be any the less for that.

**8.25** Many welfare groups, such as the South Australian Council of Social Service and the Women on Welfare Group, urged these considerations strongly upon us. Requests for information from government come in many forms; they are certainly not all made in writing or to the correct 'address of the agency or of the Minister' (clause 17 (b)). It is essential that the provisions of the legislation are not interpreted so that it is easily operated only by the knowledgeable or by those who are already so adept that they scarcely need its help. The present Bill contains in sub-clauses 13 (4) and (5), and in clause 14 which relates to transfers of requests, provisions which make possible its flexible application in this respect, and we make no specific recommendations for changing them. We do emphasise again, however, the crucial importance of their being interpreted and applied with sensitivity.

**8.26** Many requests will not be made in writing initially, and some may remain unwritten even though the request for information is successful. The proportion of written to non-written requests will vary from agency to agency. The Department of Employment and Youth Affairs, for example, said that it

would envisage that the great bulk of requests would be for access to personal records and would not be in writing. It is estimated that eighty per cent of such requests will not involve consideration of potentially exempt material. These 'simple' requests could be dealt with by local office counter staff.<sup>20</sup>

Other departments, particularly those concerned primarily with policy matters or those which have restricted functions of service delivery, will probably receive written requests as a matter of course and this has been in fact the assumption of most departments. We trust that in respect to those service-delivery and other departments where a high percentage of requests can be expected that are not in proper form, the attitude of the Department of Employment and Youth Affairs will prevail, and such requests will either be met anyway where it is convenient to do so, or the applicant will be given every assistance to put his application in proper form.

**8.27** Whereas the interests of the applicant are protected by sub-clauses 13 (4) and (5), sub-clauses 13 (2) and (3) are largely directed towards protecting the interests of the agency. Clause 13 (2) provides that:

a request shall provide such information concerning the documents as is reasonably necessary to enable a responsible officer of the agency, or the Minister, as the case may be, to identify the document.

While the language of clause 13 (2) cannot reasonably be objected to, it is again important that it be approached by public servants in the right spirit, and with

<sup>20</sup> Submission no. 164, para. 4.16.

due appreciation of the difficulties confronting most applicants—even with the help of the material required to be made available under clauses 6 and 7—in identifying with greater precision the particular documents they want. Similar considerations apply to clause 13 (3)—dealing with categorical requests, compliance with which ‘would interfere unreasonably with the operations of the agency’—which we discuss in detail in Chapter 13. It is a matter, in essence, of balancing sub-clauses (2) and (3) against sub-clauses (4) and (5); since it is the agency which will largely determine how the balance works out, its officers must approach this part of the legislation with a full understanding of it, and with sensitivity to the underlying aims of the legislation as a whole.

#### **Transfer of requests (clause 14)**

**8.28** However well agencies prepare for the legislation and however well they deal with particular requests which come to them, it will of course be the case that not all requests will be sent to the right agency. Clause 14 thus enables the transfer to the appropriate agency of requests for access to documents that have been sent to the wrong agency or that involve the functions of another agency more closely than those of the agency which received the request. This is a necessary provision which will demand thought from agencies if it is to work properly. It is clear from clause 14 (2) that requests which are transferred from one agency to another do not have any effect on the time limits which apply. That is to say, a request is deemed to be received in a second agency at the time the request was made to the first agency. Departments and authorities cannot therefore transfer requests among themselves in order to keep the time limits running by a process of multiple transfers of requests. There may still be problems: because time is running, some agencies may be tempted to argue that transferred requests which are received rather late will interfere, say, with their ordinary operations, and they may therefore attempt to claim exemptions under clause 13 (3).

**8.29** There are, however, good reasons for departments making prompt transfers of requests. Only by doing this can they ensure that inquirers are not sending the same request to many different agencies in the hope of getting better treatment from one of them. If there are to be uniform standards throughout the public service, then rapid transfer of requests is essential. This underlines the fact that departments will have to develop consistent procedures to guide the transfer of requests. We were not reassured by the evidence we heard. In fact this issue seems to have generated very little attention. The Public Service Board said that consultation between departments would be necessary. But more needs to be done. As the Postal and Telecommunications Department said ‘. . . it could be a difficult judgment whether the subject matter of a document has a closer connection with a statutory authority than with the Minister or his Department’.<sup>21</sup> It would appear that the Attorney-General’s Department, as the Department responsible for the overall administration of the legislation, would be in the best position to co-ordinate the development of guidelines in this area, and we recommend accordingly.

**8.30 Recommendation: The Attorney-General’s Department should, in consultation with the agencies most closely concerned, consider the arrangements which will guide transfers from one agency to another, and formulate guidelines for the effective administration of all aspects of clause 14.**

<sup>21</sup> Submission no. 98, incorporated in *Transcript of Evidence*, p. 950.

### **Requests for non-written information (clause 15)**

**8.31** Clause 15 (1) provides for the granting of access where information does not exist in discrete form in documents of the agency but could be put into such form through the use of a computer or through the making of a transcript from a sound recording. Clause 15 (2) enables an agency to refuse a request if doing this would interfere unreasonably with the operations of the agency; an appeal against such refusal lies to the Administrative Appeals Tribunal.

**8.32** These provisions, particularly as they relate to computer-stored information, have been the subject of some criticism. It is at this point, as one submission put it, that the Bill 'is most like a freedom of access to documents instrument and least like a real freedom of information initiative'; it was argued that an agency 'may legally avoid answering questions from the public on the grounds that the question does not constitute a request for access to any existing document, storage or transcript'.<sup>22</sup> At the very least it does appear that clause 15 may permit certain sorts of information to be unrecoverable under the terms of the legislation. As the submission of Mr P. R. Munro suggested, 'clause 15 provides a procedure enabling an agency to search its computer records' but the 'opaque legalistic and discretionary means of including computer records within documents covered by the Act is to be contrasted with the extremely explicit definition of "information storage device" contained in clause 3 of the *Audit Amendment Act 1978*. . . . it should be made abundantly clear that the matters coming within the definition of "information storage device" will require adequate identification and definition as being within " a category of documents maintained" under clause 6'.<sup>23</sup> This view received some confirmation from the Chairman of the Public Service Board who indicated that information would probably not be available if a new program for its retrieval had to be written. As he put it 'if data is held in an organization but it is not accessible even to the permanent head unless he authorizes a major research program or, alternatively, diverts the computer programs to produce a new stream of information, that does raise a question as to whether that information is available'.<sup>24</sup>

**8.33** We believe that, by and large, it would be an unreasonable interference with the operations of an agency to require it to write a wholly new program for the retrieval of information stored in a wholly different, or differently aggregated, form, in computer data files. It would not, on the other hand, be at all unreasonable for it to be required to supply to an applicant particular data which can readily be printed out without the necessity for a new program to be written at all. Between these extremes there are a number of intermediate situations which can be envisaged, where modifications to an existing program are required to a greater or lesser extent. How each agency might handle such requests is essentially a decision for it to make: we make recommendations in Chapter 11 below which would enable it to recover an appropriate fee for the amount of computer and computer finance time involved, and no doubt this would be a relevant consideration for the agency to weigh. The only specific recommendation we make with respect to clause 15 is the modification of the language of sub-clause (2) to bring it into line with our proposed amendment to clause 13 (3), discussed in Chapter 13 below. Although it may not make an important difference to the legal meaning of the sub-clause to express the requisite degree of interference as 'substantial and unreasonable' rather than merely 'unreasonable', we

<sup>22</sup> Mr R. Clarke, Submission no. 13, p. 3.

<sup>23</sup> Submission no. 12, incorporated in *Transcript of Evidence*, p.601.

<sup>24</sup> *Transcript of Evidence*, p. 883.

believe this kind of terminology will convey more precisely the spirit of what is intended, and help to ensure that this escape route is not relied upon by an agency more than is absolutely necessary.

**8.34 Recommendation: The qualification in clause 15 (2) should be amended to require that compliance interfere 'substantially' as well as 'unreasonably' with the operation of the agency.**

#### **Time limits (clause 17)**

**8.35** Clause 17 requires an agency to 'take all reasonable steps to enable the applicant to be notified of a decision on the request as soon as practicable but in any case not later than sixty days after the day on which the request is received'. For the time limits in this clause to apply to a request, it must be made in writing, expressed to be made pursuant to the Act, and it must be sent to a specified address of the agency. The sixty-day time limit, it must be stressed, is the maximum time within which an agency is required to respond. The phrase 'as soon as practicable' has a force which applies regardless of what the maximum time limit may be. Under clause 39, complaint of unreasonable delay may be made to the Ombudsman before that time has expired, and if he is satisfied that in all the circumstances the delay is unreasonable, the agency's attitude may be treated as a refusal so that an immediate appeal lies to the Administrative Appeals Tribunal.

**8.36** We note the Attorney-General's observation that 'in many cases it ought to be practicable for an agency to make a decision on a request in less' than the time limit.<sup>25</sup> A number of departments have indicated clearly that they recognise this fact. The Director-General of Social Security for example said that departments had a 'moral obligation' to respond to requests as quickly as possible. He said that his department 'would undertake to make the minimum use of "the sixty-day rule" consistent with carrying out [its] functions'.<sup>26</sup> The Chairman of the Public Service Board also said that

the 60 days was simply a safety valve to cope with the unknown . . . it may prove, in the light of experience, that a much shorter period is easily workable; and . . . even if on occasions it takes 60 days, I would expect that in most cases it would be done more quickly.<sup>27</sup>

**8.37** Where information is readily to hand and there are no difficulties in releasing it, then it should of course be speedily released. This is well understood. By the same token, an agency must tell an applicant as soon as practicable if it intends *not* to release a document. This decision cannot be kept quiet until the end of the time period as a delaying or intimidating tactic. If the time period cannot be met for special circumstances, such as staffing absences or natural disasters, then this should be communicated to the applicant. The language of the present clause 17 is such that no further amendment is required to ensure this obligation as a matter of law, but we believe, as a practical matter, that the point needs to be emphasised.

**8.38** The sixty-day time limit itself has been vigorously opposed by many non-departmental witnesses. *The Sydney Morning Herald*, for example, thought it

<sup>25</sup> *Explanatory Memorandum*, cited footnote 1, p. 11.

<sup>26</sup> *Transcript of Evidence*, p. 2215.

<sup>27</sup> *Transcript of Evidence*, p. 871.

'absurdly protracted'; the Victorian FOIL Committee that it was 'too long'; CAGEO that it was 'excessive'. The ACOA summarised a common view in saying that

The allowance of 60 days to decide requests may in some cases be justified having regard to existing reference aids, registry systems, and the likely need to secure advice on the application of the Bill or Government policy. However, for the general run of cases the limit creates an excessive, and seemingly needless potential for delay.<sup>28</sup>

We strongly sympathise with these views. We recognise that departments in general opposed a reduction for reasons of administrative convenience. However departmental positions were not closely argued and there were differences of opinion among departments.

**8.39** There was no disposition on the part of departments or authorities to argue for an extension of the sixty-day period. The Department of Primary Industry and the Department of Foreign Affairs, for example, thought that the period was 'reasonable' and the Department of Health 'endorsed' it. The Public Service Board summarised public service reaction as follows:

The bulk of the respondents were not confident of being able to meet a response time less than 60 days . . . without significant additional resource costs. Most anticipated an unmeasurable but probably significant increase in the time of senior officers if a 28 or 14 day response time were introduced. Departments generally supported the existing 60 day provision with the comment that it would be in their interests to respond as soon as possible within this period. Many drew attention to the appeal provisions of the Bill in relation to the response time arrangements. Many considered that responses to all requests within 28 or 14 calendar days could not be achieved within existing resources without detrimental effects on normal ongoing functional responsibilities.<sup>29</sup>

There were however differences of opinion among departments as to the extent to which, if at all, the period could be reduced. Some of the smaller agencies thought that the period might be reduced without undue difficulty to their operations. The Trade Practices Commission (TPC), for example, said that:

Because the extent of the Commission's records is comparatively limited it does seem . . . that most requests for access could be the subject of decision within 28 days, so that if the time limit were reduced from 60 days to 28 days [it is doubtful] whether any increase in staff resources would be needed.<sup>30</sup>

Other agencies emphasised various circumstances of staffing and demand which could influence their position. The Department of Veterans' Affairs, for example, said that:

Based on our predictions of future workloads and given that adequate staff is available, the 60 day limit would probably have little adverse effect on the Department's operations. With the above provisos it is felt that the 28 day limit could be met on most occasions.<sup>31</sup>

The Australian Government Retirement Benefits Office (AGRBO) said that:

The contracting of the time in which decisions on requests should be notified from 60 to 28 days would not present difficulties for straight forward requests for AGRBO

<sup>28</sup> Submission no. 42, incorporated in *Transcript of Evidence*, p. 915.

<sup>29</sup> Public Service Board, *FOI Survey January-February 1979. Notes on Departmental Responses to 28 February 1979*, incorporated in committee document no. 41, para. 13.

<sup>30</sup> Reply of 22 February 1979 by TPC to Public Service Board survey on resource implications of Freedom of Information Bill (PSB Survey) incorporated in committee document no. 41, p. 2.

<sup>31</sup> Reply of 16 February 1979 by Department of Veterans' Affairs to PSB Survey incorporated in committee document no. 41, p. 2.

material if the additional staff resources envisaged were available and access to prior documents was excluded, 28 days might well be too short for more complex requests and transferred requests (Clause 14) and would certainly be too short if there was access to prior documents not held by the AGRBO.<sup>32</sup>

There was support for a phased reduction of the time limit from the Australian Bureau of Statistics (ABS) which said that:

On the assumption that the ABS will not be inundated with requests, there should not be a great impact on resources if the period for the notification of requests was reduced from 60 days to 28 days. Due to the unknown nature and level of demand for access to documents, particularly in the early stages, it may be advisable to start the period at 60 days, say, and reduce it later, if practicable, to 28 days, say. To reduce the period to 14 days would have a significant impact because experience has shown that the shorter the period allowed, the greater the use of higher level staff who can formulate sensible recommendations from examinations of ad hoc requests.<sup>33</sup>

**8.40** The Committee has weighed these views against the suggestions from non-departmental witnesses who suggested a range of possible reductions. A number suggested that twenty-eight days would be preferable (for example the Women's Electoral Lobby); others suggested fourteen (for example CAGEO); others suggested more complex arrangements such as fifteen to twenty days with an extension if necessary to sixty (for example the Library Association). A large number suggested that ten days, or ten working days, would be sufficient (for example *The Sydney Morning Herald*, *The Advertiser*, the Queensland Council for Civil Liberties, the Australian Council of Social Service and the Hon. Lionel Bowen M.P.).<sup>34</sup> Phasing-in arrangements were also supported by some witnesses, including the Young Liberal Movement of Australia (N.S.W. Division) and the ACOA. The latter said, for example, that:

Having regard to the Government's apparent failure to allocate resources necessary to prepare the Service for administration of a Freedom of Information policy, it may be appropriate for the Committee to recommend that the time limit be retained at 60 days, to be reduced to 10 days 18 months from the coming into operation of the Act.<sup>35</sup>

**8.41** Most of those criticising the present sixty-day provision and urging its reduction have pointed by way of comparison to the ten-day initial limit which prevails in the United States. It is often not appreciated by those who have made this distinction that the United States reference is to ten *working* days, and that the proper comparison, given the Australian reference to calendar days, is not between sixty and ten, but between sixty and fourteen (or more than fourteen during holiday periods). It remains true, however, that—with the exception of the CIA and the FBI, both of which have been subject to an extraordinary and continuing avalanche of requests—the ten working day limit in the United States has proved to be thoroughly workable. Writing in 1977, Harold C. Relyea, the United States Library of Congress freedom of information expert, stated that:

an examination of somewhat incomplete information supplied by approximately ninety federal agencies in their 1975 FOI Act reports clearly indicates that the vast

<sup>32</sup> Reply of 20 February 1979 by AGRBO to PSB Survey incorporated in committee document no. 41, p. 4.

<sup>33</sup> Reply by ABS to PSB Survey incorporated in committee document no. 41, p. 3.

<sup>34</sup> Submission no. 111, p. 3; submission no. 128 incorporated in *Transcript of Evidence*, p. 1893; submission no. 19 incorporated in *Transcript of Evidence*, p. 1341; submission no. 48 incorporated in *Transcript of Evidence*, 438; and submission no. 2, p. 3.

<sup>35</sup> *Transcript of Evidence*, p. 915.

majority of them are experiencing little difficulty in complying with the response time frame. Only about a third of these agencies cited any instances when they found it necessary to seek a ten-day extension of an administrative deadline and of these, only six entities, excepting the Central Intelligence Agency and the Justice Department, found it necessary to obtain such an extension in more than a dozen cases.<sup>36</sup>

More recent commentaries indicate no basic change in this state of affairs, apart from a substantial improvement in the FBI backlog. While acknowledging, here as elsewhere, the danger of excessive reliance on overseas precedents, the United States experience does lead us to believe that there is at least a prima facie case for significantly reducing the sixty-day limit which is proposed for Australia.

**8.42** The unfamiliarity of the freedom of information concept in this country, and the administrative pressures—particularly in the present economic and financial climate—that will undoubtedly be associated with its introduction, lead us, however, to be somewhat cautious in our recommendations in this area. We are of the opinion that a reduction in time limits can and should be accomplished, but that such reduction should be gradually phased in, rather than achieved at the outset on a once and for all basis. We have made clear in Chapter 6 our inability to estimate with any real precision the impact that the Freedom of Information legislation will have on departmental and authority operations: the legislation will need to be in operation for some time for its impact on agency resources to be fully and accurately assessed. While any figure that may be specified has of necessity a somewhat arbitrary character, we have determined, after full consideration of all the evidence supplied to us on this issue—particularly from the agencies themselves—that the sixty-day time limit should be reduced to forty-five days two years after the legislation has come into operation, and to thirty days after four years. Further reductions, which we would certainly like to believe are possible, should depend on reviews of the legislation as it is then operating. We believe that the initial two-step phased reduction down to thirty days should be specifically incorporated into the text of the Bill. It may be that circumstances will emerge that make the attainment of even these limited reductions quite impossible. In order to allow for this contingency, but to ensure Parliamentary debate of the question while at the same time avoiding the necessity for formal legislative amendment, we propose that any such waiver of the reduction clause should require approval in the Parliament by affirmative resolution. (Technically, this could most satisfactorily be accomplished by the promulgation of a regulation expressed to take effect only upon an affirmative resolution of both Houses: see further the discussion in Chapter 12.)

#### **8.43 Recommendations:**

- (a) the Bill should provide for the reduction of the sixty-day time limit prescribed by clause 17 to forty-five days two years after the legislation has come into operation, and to thirty days four years after its operation.**
- (b) Further reductions in the time limit are in principle desirable, but should wait upon future reviews of the legislation's operation.**
- (c) Either or both of the initial time reduction steps should be capable of waiver only by an affirmative Parliamentary resolution.**

<sup>36</sup> H. C. Relyea, 'The Provision of Government Information: The Federal Freedom of Information Experience', *Canadian Public Administration*, vol. 20, summer 1977, pp. 338-9.

## Making the access decision

### Duty and discretion in decision making (clauses 16 and 12)

**9.1** The basic duty of the decision-maker is expressed in unmistakable terms in clause 16 (1) of the Bill:

1. Subject to this Act, where—

(a) a request is duly made by a person to an agency or Minister for access to the document of the agency or an official document of the Minister; and

(b) any charge that, under the regulations, is required to be paid before access is granted has been paid,

the person shall be given access to the document in accordance with the Act.

This mandatory 'shall' language is of course immediately qualified by sub-clause (2), which provides that 'An agency or Minister is not required by this Act to give access to a document at a time when the document is an exempt document'. But we regard the layout of clause 16—the way in which the duty to grant access is first stated more or less absolutely, and only then subjected to qualification—as more than simply a matter of convenient drafting form. We see it as a clear statutory direction to decision-makers to approach their task on the basis that there is a presumption in all cases in favour of disclosure, with the onus being squarely on the decision-maker to establish that the document in question is in fact exempt, rather than being on the applicant to establish that it is not. In this sense, clause 16 may be regarded as extending and reinforcing the basic underlying theme of the Bill, expressed in clause 9 (and discussed by us in Chapter 8), that access to information is a matter of right, and not something that has to be established by the applicant on any basis of interest or need to know.

**9.2** The bias of the Bill in favour of disclosure is further demonstrated by clause 12, which makes it clear that even if the decision-maker is satisfied that a particular document comes within one or other of the exemptions specified by the Bill, that is by no means the end of the matter. The absolute duty to disclose a non-exempt document is not accompanied by the duty *not* to disclose a document which is exempt. The decision-maker still has a residual discretion to disclose, conferred upon him by clause 12 in the following terms:

12. Nothing in this Act is intended to prevent or discourage Ministers and agencies from publishing or giving access to documents (including exempt documents), otherwise than as required by this Act, where they can properly do so or are required by law to do so.

It is to be noted that this clause refers not only to other competing statutory obligations to disclose, but allows the agency to grant access to an exempt document simply where it believes it can 'properly' do so. 'Properly' here is not a term of legal art: we read it rather as an invitation, which we wholly support, for decision-makers to apply a commonsense rather than narrowly technical approach to the application of the Bill's exemption provisions, and to confine their refusals to disclose only to those cases where there would be almost universal consensus that good government demanded it.

**9.3** The question arises, however, as to whether the Bill should not be even more explicit on these matters than it is already. Does the language of clauses 9, 12 and 16, to which we have referred, clearly convey to the ordinary reader the

principles we have suggested are embodied in them? Is there a need for some more explicitly stated incentive for officials to carry out these principles? Should there, indeed, be sanctions of some kind incorporated in the Bill creating penalties for those who do not?

**9.4** There were several individuals and organisations who argued that the legislation should contain, as the Women's Electoral Lobby (Victoria) put it 'a clear statement of the intent of the legislation . . . [or a] stated philosophical commitment to the right of the individual to obtain access to information'.<sup>1</sup> The Freedom of Information Legislation Campaign Committee (FOIL) similarly wanted the legislation to contain 'a general exhortation embodying the spirit of the Act', to the effect that it 'shall be administered with a view to making the maximum amount of government information promptly and inexpensively available to the public'.<sup>2</sup> We are persuaded of the merits of the Bill containing some more explicit provision of this kind. The logical place for its inclusion would be as a supplement or extension to clause 9. We note that there has been an increasing tendency in recent years for Commonwealth Acts to embody statements of general guiding principle, not necessarily justiciable in themselves, but important insofar as they constitute a clear legislative direction as to the spirit in which the Parliament wants to see the Act administered. Recent examples of this kind appear in the *Family Law Act 1975* (s. 43); the *Administrative Appeals Tribunal Act 1975* (s. 36 (4)); and in the 1977 amendments to the *Broadcasting and Television Act 1942* (s. 19 (3)); and the Australian Security and Intelligence Organization Bill 1979 (cl. 20).<sup>3</sup> A provision of the kind we are suggesting for the present Bill would be neither unique nor revolutionary.

<sup>1</sup> Submission no. 7, incorporated in *Transcript of Evidence*, p. 367.

<sup>2</sup> Submission no. 9, incorporated in *Transcript of Evidence*, p. 166.

<sup>3</sup> The relevant provisions are as follows:

*Family Law Act 1975*

43. The Family Court shall, in the exercise of its jurisdiction under this Act or any other Act, and any other court exercising jurisdiction under this Act shall, in the exercise of that jurisdiction, have regard to— 30

- (a) the need to preserve and protect the institution of marriage as the union of a man and a woman to the exclusion of all others voluntarily entered into for life;
- (b) the need to give the widest possible protection and assistance to the family as the natural and fundamental group unit of society, particularly while it is responsible for the care and education of dependent children; 35
- (c) the need to protect the rights of children and to promote their welfare; and
- (d) the means available for assisting parties to a marriage to consider reconciliation or the improvement of their relationship to each other and to the children of the marriage. 40

*Administrative Appeals Tribunal Act 1975*

36. . . (4) In considering whether information or the contents of a document should be disclosed as mentioned in sub-section (3), the President shall take as the basis of his consideration the principle that it is desirable in the interest of securing the effective performance of the functions of the Tribunal that the parties to a proceeding should be made aware of all relevant matters but shall pay due regard to any reason specified by the Attorney-General in the certificate as a reason why the disclosure of the information or of the contents of the document as the case may be, would be contrary to the public interest.

*Broadcasting and Television Act 1942*

19. . . (3) In considering whether any directions should be given under sub-section (2), the Tribunal shall take as the basis of its consideration the principle that it is desirable that proceedings before the Tribunal at an inquiry should be held in public and that evidence given before the Tribunal and the contents of documents lodged with, or received in evidence by, the Tribunal should be made available to the public and to all the persons having an interest in the proceedings, but shall pay due regard to any reasons why any such directions should be given.

Footnote 3 continued on page 113]

**9.5 Recommendation: The Bill should contain an additional clause specifically exhorting agencies, when processing requests for documents, to do so with a view to making the maximum amount of information promptly and inexpensively available to the public.**

**9.6** We were urged by a number of witnesses, however, to go further than this, and create various specific incentives and sanctions to encourage officials to observe both the letter and spirit of the Bill. In Chapter 8 of this report we emphasised the need for training and development programs to ensure that officers understand the legislation and learn to adopt a positive attitude towards it. But it has been put to us that recommendations of this kind may be empty words unless there are ways in which inadequate practice can be penalised. The Women's Electoral Lobby (Perth) referred to the need to create 'sanctions to discourage unjustified withholding of information'.<sup>4</sup> The Australian Journalists Association said that the Bill 'does not provide any penalties for officials who ignore the time limit on providing information' and commented 'this is . . . incredible because of the 60 days allowed under the Bill to provide such information.'<sup>5</sup> The Victorian Committee for Freedom of Information thought that 'failure to include disciplinary proceedings . . . means that (the) Bill does not take account of the likely level of administrative resistance' inside the Public Service.<sup>6</sup> The FOIL Campaign Committee argued similarly that 'insofar as an official can face disciplinary or criminal penalties for disclosing information (even non-exempt information), it is highly inequitable that the Tribunal does not have express power to draw to the attention of the relevant personnel authorities evidence that an officer has acted arbitrarily or capriciously in withholding information'.<sup>7</sup> Mrs G. McGilligan, who made an individual submission, argued that 'if this Bill is to be effective it should have penalties. If an officer of the Department violates any of the clauses then penalty should apply. It applies to the ordinary taxpayer if he breaks the law in sending a late return etc., and yet in something as important as freedom of information, there isn't one penalty clause included. As a citizen of Australia I object to this'.<sup>8</sup>

**9.7** The United States experience, again, has been relevant to our deliberations. In 1974, the United States Freedom of Information Act was amended to provide for the disciplining of officers responsible for withholding information 'arbitrarily or capriciously'.<sup>9</sup> Such a provision in Australia was supported by a number of submissions. The Australian Journalists Association, for example, argued that 'there should be a similar provision in the Australian Bill'<sup>10</sup> and the FOIL Campaign Committee also thought that 'deterrent powers of this nature are needed to make

*Continued from page 112*

*Australian Security and Intelligence Organization Bill 1979*

20. The Director-General shall take all reasonable steps to ensure that— 5
- (a) the work of the Organization is limited to what is necessary for the purposes of the discharge of its functions; and
  - (b) the Organization is kept free from any influences or considerations not relevant to its functions and nothing is done that might lend colour to any suggestion that it is concerned to further or protect the interests of any particular section of the community, or with any matters other than the discharge of its functions. 10

<sup>4</sup> Submission no. 71, p. 2.

<sup>5</sup> Submission no. 81, incorporated in *Transcript of Evidence*, p. 309.

<sup>6</sup> Submission no. 44, incorporated in *Transcript of Evidence*, p. 398.

<sup>7</sup> *Transcript of Evidence*, pp. 170-71.

<sup>8</sup> Submission no. 64.

<sup>9</sup> United States, Department of Justice, *Attorney-General's Memorandum on 1974 Amendments to Freedom of Information Act*, Washington, February 1975, p. 23.

<sup>10</sup> *Transcript of Evidence*, p. 309.

officials individually accountable for the decisions which they make'.<sup>11</sup> The United States system is, in brief, that if a court orders the production of withheld documents and assesses costs against the government, and also issues a written finding that agency personnel acted in this way, then the United States Civil Service Commission is required to decide whether disciplinary action should be taken against the officer who was primarily responsible for the withholding. The Commission is required, after investigating and considering evidence, to submit its findings and recommendations to the agency concerned and to send copies of its findings and recommendations to the officer concerned or his representative. The agency concerned is then required to take the corrective action recommended by the Commission.

**9.8** Congress did not expect this provision to be invoked often, but only in 'unusual circumstances'.<sup>12</sup> This has turned out to be so. By the end of 1976—the latest date for which we have information—only one employee of an agency had undergone investigation for allegedly having 'acted arbitrarily or capriciously with respect to the withholding' of records under the United States FOI Act. A Civil Service Commission determination of January 1977 dismissed the charges of impropriety in this particular case.<sup>13</sup> It may still be the case, of course, that disciplinary provisions have a salutary effect in restraining abuses of freedom of information law in the United States, though on this point we have no evidence.

**9.9** The Australian departments and authorities which made submissions or gave evidence to the Committee did not address the issue of disciplinary provisions or penalties at all, and appear to have assumed that the question was not a real one. The 1976 Interdepartmental Committee Report said merely that 'it would be inappropriate to make provision of this kind in the Freedom of Information legislation'<sup>14</sup>, without giving any reason in support other than to refer to the role of the Ombudsman, a point we take up below. Some reasons can be articulated, though neither separately nor in combination are they especially conclusive. Disciplinary provisions were introduced in the United States only after experience had shown that evasion of the legislation did occur, and to follow the example in Australia might be seen as prejudging the issue of administrative resistance here. In addition, such disciplinary provisions are rare in Australian legislation, and might invite resistance from a Public Service which feels itself under attack in other ways. And further, the Administrative Appeals Tribunal is not, as an adjudicatory and inquisitorial body, in the same position as the United States courts.

**9.10** This is not to say that there are no legislative sanctions already applicable to public servants who fail to properly carry out their duties, or that these should never be employed in a freedom of information context. For public servants subject to the *Public Service Act* 1922, regulations 32 (d) and (e) to that Act provide respectively that every officer shall 'carry out all duties appertaining to his office' and shall 'give effect to all enactments'. Failure to observe these instructions would be a breach of section 55 (1) (b) of the Act, which makes it an offence for an officer to be 'negligent or careless in the discharge of his duties', or

<sup>11</sup> *Transcript of Evidence*, p. 171.

<sup>12</sup> United States Attorney-General's *Memorandum* cited footnote 9, p. 23.

<sup>13</sup> See H. C. Relyea, *The Administration of the Freedom of Information Act: A Brief Overview of Executive Branch Annual Reports for 1976*. Library of Congress, Congressional Research Service, Committee Document no. 61, CRS-24.

<sup>14</sup> Australia, Parliament, *Policy Proposals for Freedom of Information Legislation: Report of Interdepartmental Committee*. Parl. Paper 400/1976, Canberra, 1977, para 23.8.

of section 55 (1) (c) making it an offence for an officer to be 'guilty of any disgraceful or improper conduct'. The penalties for an offence are disciplinary measures, a fine, reduction in salary or rank, or dismissal. We acknowledge, however, that these sanctions are a somewhat blunt instrument to apply in the present context, and are likely—and properly so—to be employed only in the most exceptional circumstances.

**9.11** We are inclined to believe that, here as elsewhere, the most useful means in practice of pressuring officials into compliance with both the letter and spirit of the Freedom of Information legislation may be to rely on the authority of the Ombudsman. We have placed a good deal of emphasis elsewhere in this Report (see especially Chapter 29) on the variety of functions the Ombudsman—now established and operating under the *Ombudsman Act 1976*—can usefully perform in relation to the Freedom of Information legislation, and do so again in the present context. As the 1976 Interdepartmental Committee noted:

The Ombudsman would be competent to investigate complaints about delays or other instances of maladministration in connection with the freedom of information legislation, and there is a procedure in the Ombudsman Bill for the Ombudsman to report instances of misconduct that come to his attention.<sup>15</sup>

The Ombudsman has power to report on particular cases of administrative recalcitrance however these cases may come to light and whether or not they have been referred to his office in the first place. We believe that departmental management will take notice of any such public report by the Ombudsman. Indeed the possibility of this should provide a more effective incentive to agencies to inculcate good information practices than the possibility of action by the Administrative Appeals Tribunal, as such action would necessarily be remote and in the nature of a last resort. The Ombudsman's report in such cases should be referred also to the Public Service Board as the agency responsible for personnel management in the Service as a whole. While we are confident that reliance on the Ombudsman will in practice serve the objectives we have indicated, we do believe that the whole question of incentives and sanctions should be kept under review, and in particular be given close attention by the parliamentary review we recommend in Chapter 32 to take place three years after the Act commences operation. If it becomes clear that the essentially informal role we have proposed for the Ombudsman is proving ineffective, then renewed consideration should be given to incorporation in the legislation of an explicit disciplinary sanction along United States lines.

**9.12 Recommendation: The Ombudsman should, where appropriate, draw public attention to misbehaviour or maladministration by particular officers in relation to freedom of information matters in his annual reports or in special reports, and such reports should be referred to the agency concerned and to the Public Service Board.**

#### **Authority to make decisions (clause 21)**

**9.13** Clause 21 allows agencies very broad scope to make their own arrangements for the implementation of the legislation:

21. A decision in respect of the request made to an agency may be made, on behalf of the agency, by the responsible Minister or the principal officer of the agency or,

<sup>15</sup> *ibid.*

subject to the regulations, by an officer of the agency acting within the scope of authority exercisable by him in accordance with arrangements approved by the responsible Minister or the principal officer of the agency.

It is clear to us that the way in which agencies organise their decision-making, and in particular the nature and extent of the delegations which apply, will have a crucial impact on the efficiency and economy with which the legislation operates in practice. In our inquiry we have been concerned to establish both how agencies are approaching this problem in their present thinking and whether there is any place for amending the Bill itself to establish more precise guidelines as to who should exercise authority under it.

**9.14** It may assist in understanding what follows for us to briefly describe the basic decision-making structure of the Australian Public Service as it is presently constituted. Public servants generally are classified into one or other of four Divisions: the First Division, comprising only permanent heads, usually designated 'Secretaries', of departments; the Second Division, which has six internal 'levels', comprising in descending order Deputy Secretaries, First Assistant Secretaries and Assistant Secretaries (the last-mentioned of which, at levels 1 or 2, have salaries in the range \$25-27 000); the Third Division, which consists of 'classes' numbered from 1 (salary level around \$8000) up to 11 (salary level around \$22 000), containing the vast bulk of administrative and professional officers; and the Fourth Division, comprising the support staff of manual, secretarial and technical workers. Individual departments of government are themselves organised under their Minister and Permanent Head into 'divisions', which have responsibility for the major functions of the department. There are usually some five or six divisions in a department, each under the charge of a First Assistant Secretary, of which there are some 350 in the Australian Public Service as a whole. Divisions are made up of 'branches' (usually three or four) under the charge of an Assistant Secretary. These officers (totalling some 1000 in the Public Service) have responsibility for supervising the day to day operations of the vast bulk of public servants, who are organised into 'sections' of various size and functional scope. 'Sections', in turn, are headed by senior Third Division officers in the class 10-11 range. Where regional offices exist, as is particularly the case with the service-delivery departments, supervisory authority at the section level and below tends, by and large, to be exercised by officers at slightly less senior classifications than at the central office. It is to be noted that Assistant and First Assistant Secretaries together form the general management and policy-advising echelons of the public bureaucracy, and would not normally have a close involvement in routine decision-making. Their hierarchical position corresponds roughly to the Assistant Secretary level and above in the British Civil Service and to Grade 16 and above in the United States Federal Government Service. The organisation and structure of Australian statutory authorities is, in general, comparable to that described for departments.

**9.15** In the survey conducted on our behalf by the Public Service Board (the returns from which are summarised as Appendix 4 to this Report) one of the questions put to departments and authorities was:

What consideration, if any, has been given to the staff levels at which officers will be delegated power to grant and/or deny access to information under FOI legislation? The answers typically revealed great uncertainty about what delegations, and administrative arrangements generally, they would need to adopt. Few agencies distinguished between the different kinds of decisions they would be required to

make (in particular, precedent-setting, as compared with precedent-following, decisions), and fewer still sought to distinguish in any way between the appropriate officer level for, on the one hand, granting requests, and on the other hand, refusing them. The survey showed that much thinking on this whole subject remains to be done.

**9.16** To the extent that any kind of consensus emerged, it was that decisions to grant or refuse would be made at around the branch head level, i.e. by a Second Division, level 1 or 2, Assistant Secretary. Some departments clearly appreciated that their working arrangements would be likely to alter with growing experience of the legislation. Thus the Department of Primary Industry, for example, said that 'initially . . . decisions would need to be taken at no less than Branch Head level', but that 'once experience is gained on the volume, handling and nature of freedom of information requests and grounds which constitute public interest become clearer, decisions on access for routine requests could probably be delegated to Section Head . . . level.<sup>16</sup> Some other departments had a fairly clearly worked out view as to the kinds of delegation level that would, right from the outset and thereafter, be appropriate for different kinds of decision. Thus the Department of Veterans' Affairs, for example, said that:

In the regions, group leaders (Class 5-8) should be given the authority to grant access to information. And the authority to deny access should be vested in Regional Managers or Assistant Managers (Class 9-11). At Central Office the granting of access would be at Section Leader level (Classes 8-11). The denial of requests would be vested in Divisional Heads.<sup>17</sup>

But responses as precisely expressed as these were most uncommon.

**9.17** One of the things that makes any kind of generalisation about appropriate administrative arrangements very difficult in this area is that not all decisions—whether they be to grant or refuse access—will be of equal substance, complexity or difficulty. In the first place, it is bound to be the case in many different spheres of government activity that certain kinds of requests are made with monotonous frequency. It may be that the initial decisions relating to each such kind of request will be quite difficult to make; but once the precedent has been set, the decision in each individual instance thereafter can, as a practical matter (we return below to the issue of principle) be made at a much more junior level. On the other hand, there will continue to be, in most departments (and in 'policy' departments probably more than others), a succession of essentially 'one-off' requests, raising complex or difficult issues requiring the time and thought of senior officers, and for which there will be no easy way of providing clear-cut structures in advance. Because of these considerations, and because the nature and quantity of various kinds of decisions which will need to be made under the legislation will also vary considerably from agency to agency, it is obviously pointless to try and stipulate in any kind of detail—in legislative form or otherwise—the kind of administrative arrangements which should apply.

**9.18** We believe, however, that there is at least one over-riding principle which does apply universally, and which ought to govern all the detailed arrangements

<sup>16</sup> Reply by Department of Primary Industry to Public Service Board Survey on resource implications of Freedom of Information Bill (PSB Survey), incorporated in Committee Document no. 41, para 6.

<sup>17</sup> Reply of 16 February 1979 by Department of Veterans' Affairs to PSB Survey, incorporated in Committee Document no. 41, (p. 3).

that agencies proceed to make. This is the principle that while authority to *grant* requests should be delegated as far as realistically possible down the line, authority to *refuse* requests should be confined to a much smaller group of senior officers. The main support for this principle, which has been urged upon us by a number of individuals and organisations, derives from the United States experience which, it has been argued persuasively, establishes that 'the fewer the people who can deny a request, the better the operation of the Act'.<sup>18</sup> There is in the United States no statutory obligation upon agencies to organise their decision-making in this way, and practice varies. Where authority to refuse has been delegated to quite junior levels (as was the case in the Department of the Interior), timidity—and a very large rejection rate—has tended to prevail. Where, as has been the case in some regulatory commissions, not only has the authority to refuse been delegated to junior officials but the authority to release confined simultaneously to agency head level, the result has been an almost complete frustration of the legislation's purpose. By contrast the experience of one of the largest United States agencies, the Department of Health, Education and Welfare (with over 130 000 employees), where the units responsible for administering freedom of information requests may only grant requests, and denial authority has been confined to just four senior officers, has been that this kind of arrangement is both administratively workable and more generally productive of decisions in accordance with the spirit of the legislation. We note that the United States Attorney-General has specifically directed that 'it is . . . incumbent upon an agency to fix . . . responsibility clearly in its regulations by confining authority to deny, both on initial determinations and on appeals, to specified officials or employees'.<sup>19</sup>

**9.19** We see no practical barriers to the adoption of this approach in Australia and recommend accordingly. It should not, in particular, be assumed that it will necessarily imply the imposition of enormous additional workloads on already hard-pressed senior officials. Many denial decisions will undoubtedly prove to be of a fairly routine character once initial precedent-setting decisions have been made. While this consideration might be thought to justify the delegation downward, accordingly, of such decisions, a majority of us nonetheless believe it to be important—given the infinite variety of particular fact situations—that there be at least some review of each such decision at a senior level before the final denial is made. It is true that in a handful of agencies, which we identified in Chapter 6, the workload created by the Freedom of Information legislation will probably be such as to justify the appointment of a Second Division officer with more or less full-time responsibility for such matters. But across the general run of agencies we believe that the additional workload involved will be manageable without undue strain.

## **9.20 Recommendations:**

- (a) In the decision-making arrangements adopted by agencies for the handling of freedom of information requests, the general principle to be applied should be that authority to grant requests be delegated downward as far as realistically possible, while authority to deny requests should be confined to a small group of officers of at least Second Division status.**

<sup>18</sup> Australia, Parliament, Royal Commission on Australian Government Administration, (H. C. Coombs, Chairman), *Appendix Volume Two*, Parl. Paper 187/1976, Canberra, 1977, p. 69.

<sup>19</sup> United States Attorney-General's *Memorandum* cited footnote 9, pp. 14–15.

- (b) **Officers who are delegated authority to deny access requests should be specifically identified by title in annual departmental reports and in the material required to be published or made available under Part II of the Bill.**

**Giving reasons and other particulars (clause 22)**

**9.21** *The obligation to notify.* Clause 22 states broadly, and in terms generally acceptable to this Committee, the obligation to notify in writing an applicant whose request for information has been refused or deferred. It is expressed as follows:

(1) Where, in relation to a request for access to a document of an agency or an official document of a Minister, a decision is made under this Part that the applicant is not entitled to access to the document in accordance with the request or that provision of access to the document be deferred, the agency or Minister shall cause the applicant to be given notice in writing of the decision, and the notice shall—

- (a) state the findings on any material questions of fact, referring to the material on which those findings were based, and the reasons for the decision;
- (b) where the decision relates to a document of an agency, state the name and designation of the person giving the decision; and
- (c) inform the applicant of his right to apply for a review of the decision.

(2) An agency or Minister is not required to include in a notice under subsection (1) any matter that is of such a nature that its inclusion in a document of an agency would cause that document to be an exempt document.

**9.22** A good deal of guidance as to what is likely to be required in practice, if agencies and their officers are dissatisfied with this provision, has now been given by the Administrative Appeals Tribunal in its decision in *Re Palmer and Minister for the Capital Territory*.<sup>20</sup> Although a quite different subject matter (an ACT rating appeal) was involved and the requirement to give reasons was imposed by a different piece of legislation, section 37 of the *Administrative Appeals Tribunal Act 1975*, this legislation closely parallels in its requirements clause 22 of the Freedom of Information Bill. The Tribunal in *Palmer* explicitly acknowledged the reality of the decision-making process in pointing out that the decision-maker frequently acts on 'recommendations, reports and results of investigations carried out by subordinate officers or appropriately qualified experts',<sup>21</sup> and stated that in giving reasons those considerations 'which have actuated the mind of the expert in making his recommendation or giving his opinion, if material to the decision of the decision-maker, should be included'.<sup>22</sup> It added that:

If it was permissible for the decision-maker merely to indicate that he had relied upon the advice of a named expert, the intent of the section could be by-passed. Additionally, the benefits to the citizen in the obtaining of reasons, which in our view are fundamental to the whole scheme of administrative review embodied in the Act would be set at nought.<sup>23</sup>

The Tribunal stated the rationale for the clause in question in the following terms:

the citizen's entitlement to be fully informed is not merely an incident arising in the course of and for the purpose of a review by this Tribunal. It is a right which arises

<sup>20</sup> (1979) 23 A.L.R. 196.

<sup>21</sup> *ibid.*, p. 205.

<sup>22</sup> *ibid.*

<sup>23</sup> *ibid.*

consequent upon a decision being made which is capable of being so reviewed, and the reasons, when properly given, ensure that the citizen is sufficiently informed to determine whether he wishes to take the matter further, and if so whether to make representations to the Minister, proceed in the appropriate court of law or to seek a review by this Tribunal.<sup>24</sup>

In stating reasons, 'elucidation in plain language intelligible to a layman' would be required.

**9.23** A representative of the Department of the Capital Territory, which department has had a good deal of experience with appeals to the Administrative Appeals Tribunal, suggested the likely effect of clause 22 will be to require the Department:

to advise the applicant of all of the findings on the questions of fact that (the decision-maker) considered. If it is an eligibility question to go to appeal, you would have to state just what you have decided in terms of the person's income, family situation and go through the exercise and set down what you had in your mind. You would have to state what weight you placed to various criteria and how you finally reached that decision. Having set that statement out you then give the person—and this is the whole idea of the Administrative Appeals Tribunal context—the grounds on which he can decide whether he wishes to appeal. Having disclosed the reasons for the decision, he may then believe that you have not taken into account certain factors that should have been taken into account and that therefore he would have a ground of appeal. It would seem to me that in the same context for freedom of information similar logic would apply; the Department would be forced to set out, subject to some constraints in the Bill, why it decided to claim an exemption for a particular type of document. It would have to give to the applicant, and eventually then to the Tribunal, a statement setting out those reasons. That is a test which is not easily met. You cannot just give the AAT, or the applicant in the Administrative Appeals Tribunal Act, a short statement which does not contain a great deal of information. The decision requires a great deal of information.<sup>25</sup>

To similar effect the Department stated in its submission to the Committee, 'much of the criticism of the Bill appears to ignore the role to be played by the Tribunal in determining whether the departments have properly refused or deferred access to documents or have otherwise acted unreasonably'.<sup>26</sup>

**9.24** It is clear that under clause 22 the obligation to give proper reasons for decisions is going to be a reasonably onerous one. However, the whole trend of Australian administrative law, accepted and advanced by governments of different complexions in recent years, is against those who would—for reasons we can understand in practice, if not approve in principle—resist this kind of requirement. The *Administrative Decisions (Judicial Review) Act 1977*—if and when it is ever proclaimed—will add even further to the need for public servants to give reasons for their decisions in a full, plain and careful way. We believe this is as it should be.

**9.25** Although we have, then, no general objection at all to clause 22 as it is presently drafted, there is one matter of some importance, omitted from the list of matters required to be notified, which we believe ought to be included. Applicants should, in our view, be informed not only of their right to apply for a review of the decision against them, but also the procedures by which they might initiate

<sup>24</sup> *ibid.*, p. 206.

<sup>25</sup> *Transcript of Evidence*, pp. 2263–6.

<sup>26</sup> Submission no. 149 incorporated in *Transcript of Evidence*, p. 2224.

such a review, including the availability of internal review, intervention by the Ombudsman and an appeal to the Administrative Appeals Tribunal. It may be that this is a matter of detail which could be dealt with in regulations, but we believe it is of sufficient importance to justify inclusion in the Bill itself.

**9.26 Recommendation: Clause 22 should be amended to specifically include, among the matters of which the applicant must be notified, the procedures by which he might secure a review of the decision.**

**9.27** *Disclosing the existence of sensitive documents.* A particular problem that arises in relation to the giving of reasons and particulars, but which is not addressed at all in the present Bill, is the position of the decision-maker when he is confronted with a request for a document which is manifestly exempt from disclosure, but where the character of the document is such that the mere acknowledgement of its existence, albeit accompanied by a denial of access, will itself cause the damage against which the exemption provision is designed to guard. One obvious example would be a request for a Cabinet paper recommending a devaluation of the currency; another might be a request for a criminal intelligence record disclosing the activities of a particular police informant.

**9.28** In the United States, it is considered permissible to deny the existence of a document in relation to national defence or foreign policy because the relevant exemption there concerns 'matters that are specifically authorised . . . to be kept secret in the interest of national defence or foreign policy'. The United States Court of Appeals in *Phillippi v. Central Intelligence Agency*<sup>27</sup> held that the CIA could answer a particular request in the following terms:

In the interests of national security, involvement by the US Government in the activities which are the subject matter of your request can neither be confirmed nor denied<sup>28</sup>

and that the Agency should not be required, as was sought, to provide a public affidavit explaining in as much detail as possible the basis for that response. The other area where this question has been controversial is in relation to law enforcement documents. It has been argued that because the relevant clause of the United States Act focuses on 'matters that are investigatory records', this does not permit an agency to conceal the very existence of the document in question, however sensitive. We understand that an amendment to the law enforcement clause to enable a *Phillippi*-type denial has been foreshadowed.

**9.29** We agree that there will, on occasion, be a need for an agency to refuse to acknowledge the very existence of a document. However, although it might be argued that there are a number of other contexts in which this response might conceivably be justified in particular instances, we believe that the power to respond in the way suggested is so open to potential misuse that it ought to be confined to a very narrow set of exemptions, namely, those relating to classes of documents which by their very nature are likely to be widely accepted as especially sensitive. We accordingly confine our recommendation to documents subject to exemption under clause 23 (or at least so much of that clause as applies to security, defence and international relations: we exclude Commonwealth-State relations for the kinds of reasons discussed generally in Chapter 17); clauses 24 and 25 (Cabinet and Executive Council documents); and clause 27 (law enforcement documents: discussed further in paragraphs 20.14-16).

<sup>27</sup> 546 F.2d. 1009 (D.C. Cir. 1976).

<sup>28</sup> *ibid.*, p. 1011.

**9.30** We acknowledge further that, in the contexts mentioned, it must be open to the agency concerned to exercise its power of neither confirming nor denying the existence of a document, not only in relation to those documents for which this response is peculiarly appropriate, but also in respect of all documents for which an exemption is claimed. If an agency normally merely denies access to a document and only occasionally takes the further step of refusing to confirm or deny its existence, then this inconsistency of response may well be revealing in itself. We do not go so far as to suggest that the agency *should* give a 'no confirmation or denial' response in respect of all documents for which it claims exemption; we say only that this power should be available in the event that the agency wants to take advantage of it.

**9.31** Lest there be any possibility of being misunderstood, we make the further point that nothing we have said should be taken as in any way encouraging an agency to make a 'no confirmation or denial' response in respect of documents for which it cannot properly claim any exemption: these should of course be released in the normal way.

**9.32** For the purposes of enabling an appeal to the Administrative Appeals Tribunal, a 'no confirmation or denial' response should be treated as a refusal to grant access. Although this result would probably follow from a proper reading of the Bill as it presently stands, we recommend an amendment to it to put the matter beyond doubt. We take up in Chapter 30 the question of what the obligation of the Tribunal itself should be when confronted with cases of this kind, and there recommend, for consistency, that the Tribunal should itself have the same power, in appropriate cases, to neither confirm nor deny the existence of a document as has the original ministerial or agency decision-maker.

**9.33** We acknowledge that there is a potential for some abuse of the power we have recommended in that a 'no confirmation or denial' response is likely to be somewhat disheartening to an applicant who might otherwise, faced with a straightforward denial of access to a document acknowledged to exist, take that refusal to the Administrative Appeals Tribunal. He will still be able to appeal such a response to the Tribunal, but may be in a position of contributing less by way of substantive argument than would otherwise be the case. There will, accordingly, perhaps be a temptation for agencies to rely on this form of words in respect of a greater number and variety of documents than it strictly should. We can say here only that we hope that the Ombudsman (whose proposed general role we spell out in detail in Chapter 29) will exercise a significant informal restraining role in this respect.

#### **9.34 Recommendations:**

- (a) The Bill should be amended to provide that where an agency relies upon an exemption relating to security, defence or international relations (clause 23), Cabinet or Executive Council documents (clauses 24 and 25) or law enforcement (clause 27), it should be entitled to respond in a form of words which denies access to the document without confirming or denying the existence of that document.**
- (b) A response in these terms should be treated for the purposes of appeal to the Administrative Appeals Tribunal as a refusal to grant access.**

## Protecting the information-giver

**9.35** Situations will arise from time to time where material to which access is sought will be defamatory in character, or of such a kind that its release involves breach of confidence, breach of copyright or even breach of the criminal law. If the Bill contained no specific statutory protections against liability, the situation could thus arise that those officials involved in the release of such information, even when acting *bona fide* and with proper delegated authority, could find themselves on the receiving end of civil or criminal proceedings. Clauses 46 and 47 purport to deal with this problem, at least so far as defamation, breach of confidence and criminal offences are concerned. The question arises, however, as to whether these clauses—admirable as they may be in intent—are in fact adequate to protect not only those officials immediately involved in the granting of access to material but also others—in particular the original authors of the documents in question—whose interests arguably ought to be protected.<sup>29</sup>

**9.36** *Defamation.* Clause 46, which relates to both defamation and a breach of confidence, is in the following terms:

46. (1) Where access has been given to a document and—
- (a) the access was required by this Act to be given; or
  - (b) the access was authorised by a Minister, or by an officer having authority, in accordance with section 21 or 38, to make decisions in respect of requests, in the *bona fide* belief that the access was required by this Act to be given,

no action for defamation or breach of confidence lies, by reason of the authorizing or giving of the access, against the Commonwealth or an agency or against the Minister or officer who authorized the access or any person who gave the access.

(2) The giving of access to a document (including an exempt document) in consequence of a request shall not be taken, for the purposes of the law relating to defamation or breach of confidence, to constitute an authorization or approval of the publication of the document or of its contents by the person to whom the access was given.

**9.37** This would appear sufficiently far reaching to exclude any possibility of liability in defamation for those involved, in one way or another, in the circumstances specified, in actually authorising or giving access to the material in issue. They would appear to be liable neither for the 'publication' involved in the initial grant, nor for the subsequent re-publication of the material by the person to whom access is so granted. It is possible, on one view of the general common law of defamation, that if an official could in fact foresee that the material might be republished he would be liable for any defamatory imputation contained in it. Although this matter may require further examination, we are inclined to believe that clause 46 as presently drafted does in fact preclude any such liability.

**9.38** It certainly does not appear, however, that clause 46 in itself does anything to protect the interests of the original *authors* of documents to which access is granted, whether those authors come from inside or outside the Public Service. While the byzantine complexities of the present law of defamation make almost any summary statement dubious,<sup>30</sup> the common law position seems to be that an author of a document is liable for any defamatory imputations it may contain so far as any subsequent publication of that document is concerned which he might reasonably have foreseen or anticipated (subject of course to any specific defences

<sup>29</sup> See analysis by Mr R. E. Lucas, submission no. 110.

<sup>30</sup> cf. Australia, Law Reform Commission, *Unfair Publication: Defamation and Privacy*, Report no. 11, 1979.

of privilege and so forth on which he may be able to rely). With the enactment of the Freedom of Information legislation, so the argument would go, publication and re-publication of such documents must now be regarded as matters of generally foreseeable likelihood. While it is true that the defences of absolute and qualified privilege will between them protect nearly all conceivable forms of communication made within the Public Service, and probably most communications directed to the Public Service from persons, businesses and organisations outside it, it does not seem to us to be beyond doubt that such communications would continue to enjoy that privilege when they are published—under the Freedom of Information legislation procedures—to persons outside the Public Service who may well have no discernible interest (i.e. an interest of a kind regarded as relevant in defamation law) in receiving them.

**9.39** It may be that, on an extended reading of clause 46, the original authors of documents would be regarded as implicitly covered by its terms. We believe, however, that it would be desirable for the Bill to be amended to put the matter beyond doubt. Provided material is not exempt under the Bill, or is reasonably believed to be not exempt, then the public interest demands that it be released. There is no reason in principle why persons immediately involved in the granting of access should be afforded greater protection than the original authors of the documents in question. We hasten to add, lest we be misunderstood, that there is nothing in the Bill or in anything we have recommended which would extend any similar immunity to those successful applicants under the Freedom of Information legislation (or anyone else who might subsequently come into possession of the material) who choose to republish the material in question. They would do so at their own risk; they would be subject in their own right, as publishers, to the law of defamation, and properly so. In other words, the extension of clause 46 immunity to original authors would not in itself be likely to open the floodgates to the circulation in the community at large of a mass of hitherto unpublished—because defamatory—material.

**9.40 Recommendation: Clause 46 should be amended to place beyond doubt the principle that the original authors of defamatory material, whether within or outside the Public Service, should not incur liability merely by virtue of its being published under, or as a result of, the Freedom of Information legislation.**

**9.41 Breach of confidence.** We discuss in some detail in Chapter 25 the meaning of the legal concept of 'breach of confidence', as it appears in clause 34, and there recommend its deletion as adding nothing (apart from confusion) to the exemptions relating to personal privacy in clause 30 and business privacy in clause 32. It has to be acknowledged that the adoption of this recommendation might conceivably result in more information being released that would potentially constitute an actionable breach of confidence than might otherwise be the case, although we reiterate our view that the clause 30 and 32 exemptions are likely to afford quite ample protection for deserving cases. Under these circumstances, it is that much more important—if the legislation is to serve its purpose—that officials be protected by clause 46 from actions against them for breach of confidence arising out their release of material in good faith.

**9.42** Clause 46, as drafted, seems to serve this intended purpose. The officials involved in the release of the information are clearly protected and the question of protecting original authors in these matters does not arise in the same obvious way as it does in defamation cases. The Bill is silent as to protection for subsequent re-publication by persons granted access, but we believe that—as with

defamation—that is as it should be. We consider, however, that the question of protections applicable in the breach of confidence area should be subject to further consideration by the parliamentary draftsman to ensure in particular that there are no realistic circumstances in which an original author might find himself the subject of a breach of confidence action in respect of material released by an official acting in good faith in reliance on the Freedom of Information legislation.

**9.43** *Criminal offences.* Clause 47 deals with this matter in the following terms:

47. Where access has been given to a document and—

(a) the access was required by this Act to be given; or

(b) the access was authorized by a Minister, or by an officer having authority, in accordance with section 21 or 38, to make decisions in respect of requests, in the *bona fide* belief that the access was required by this Act to be given,

neither the person authorizing the access nor any person concerned in the giving of the access is guilty of a criminal offence by reason only of the authorizing or giving of the access.

This appears to sufficiently cover all realistic contingencies, and we recommend no alteration to this clause.

**9.44** *Copyright.* There is no clause in the Bill similar to clauses 46 and 47 to protect an official against an action for breach of copyright when he provides access to a document pursuant to the Freedom of Information legislation. The question does not arise in relation to documents originating within the government, because under section 176 of the *Copyright Act* 1968 the copyright in any literary work 'made by or under the direction or control of the Commonwealth' resides in the Crown: accordingly the Crown can provide access to such documents in any form it wishes, and no copyright problems arise. Potential problems do, however, arise for documents originating outside government.

**9.45** Presumably it was thought unnecessary to confer specific copyright protection, along similar lines to clauses 46 and 47, for externally-originated documents primarily because of the provision made elsewhere in the Bill empowering agencies to handle requests without breaching any private copyright that may subsist in a document in the possession of an agency: clause 18 (3) (c) provides that access may be given in a form different to that requested by an applicant if access in that form 'would involve an infringement of copyright (other than copyright owned by the Crown) subsisting in the document'. This provision in a sense confers a dual protection: on the agency officer handling requests and also on the original private author of the document in question.

**9.46** There is also the provision in section 183 of the *Copyright Act* 1968 which allows the Commonwealth or a person authorised by it in writing to perform an act which would otherwise be an infringement of copyright, if that act is done 'for the services of the Commonwealth'. Under section 183 (4) the Commonwealth must notify the copyright owner of such act, or determine that such notification is contrary to the public interest. It appears that this provision is widely ignored in the Public Service, and copyright owners are, by and large, none the wiser for that. However the enactment of freedom of information legislation might conceivably make them more alert to the need for self-protection, and more aware of their statutory rights under this provision. It would appear that, if section 183 is to be relied upon as the basic mode of protection against officers' liability for breach of copyright suits, then all officers granting access to documents must be specifically authorised under section 183. It might be argued, however, that section

183 provides no protection in this respect because the provision of copies of documents to freedom of information applicants may not be capable of being regarded, strictly speaking, as being 'for the services of the Commonwealth'.

**9.47** We discuss the whole matter of copyright law in greater detail in Chapter 10. We there conclude that clause 18 of the Freedom of Information Bill should be amended to provide less protection for private authors than paragraph 18 (3) (c) presently appears to envisage. The nature of the change proposed is that an agency should have power, in some instances at least, to reproduce a document in which private copyright subsists without the express permission of the copyright owner. We believe this change only nominally prejudices the present legal position of the copyright owner, as the government would already have power to permit inspection of the work without copyright being thereby broken. Moreover, the reproduction by the agency would not confer any implied authority upon the applicant to further reproduce the work; for him to do so would constitute a breach of copyright by him. Nevertheless, it may be prudent, to assure copyright owners that their rights have not been overridden, to include a clause in the Bill (similar to clause 46 (2)) to the effect that:

The giving of access to a copy of a document (including an exempt document) in consequence of a request shall not be taken, for the purposes of the law relating to copyright, to constitute an authorisation or approval of the doing of any copyright act in relation to the document or its contents by the person to whom the access was given.

**9.48** Strictly speaking it is probably unnecessary, in consequence of the changes we recommend in Chapter 10, to confer any protection upon an officer providing access to a document under the Bill against an action for breach of copyright. If access is given in a form approved by the Freedom of Information Bill, then the action is lawfully done; the Bill, as a later statute, would override any earlier provisions of the *Copyright Act* 1968 providing otherwise. However we appreciate the danger in relying upon statutory presumptions of this nature, recognising that a variety of interpretations can often be reached as to the respective scope or operation of two overlapping items of legislation. For abundant caution it would therefore appear prudent to give protection to officers similar to that extended to officers under clauses 46 and 47 in respect of actions for defamation or breach of confidence and prosecutions for criminal offences.

**9.49 Recommendation: Further to our recommendations in paragraph 10.19, the Bill should be amended to provide:**

- (a) that no action for breach of copyright shall lie against an officer for providing access to a copy of a document pursuant to the Bill; and
- (b) that the giving of access to a person to a copy of a document shall not be taken for the purposes of the law relating to copyright to constitute an authorisation or approval of any 'copyright act' (as referred to in section 31 of the *Copyright Act* 1968) in relation to the document or its contents by the person to whom access was given.

## Meeting successful requests

### Forms of access (clause 18)

**10.1** Clause 18 provides that access to a document can be given in a number of ways. Sub-clause (1) provides that an applicant may be allowed to inspect a document or may be provided with a copy of the document; be provided with means to view a film or to hear a sound recording; or be provided with a transcript of a sound recording or of shorthand notes. Sub-clauses (2) and (3) require that access shall be given in the form requested by the applicant unless doing so would interfere unduly with the operations of the agency or with the performance by the minister of his functions; would be detrimental to the preservation of the document; would be inappropriate, having regard to the physical nature of the document; or would involve an infringement of copyright.

**10.2** The Committee received little evidence and no complaints about these provisions. This is not, we believe, because issues about forms of access are unimportant, but rather because witnesses assumed that the Bill adequately specified a variety of forms appropriate to the different methods by which government information is now recorded and stored. On the face of it the Bill does appear to be adequate in this respect, and no other forms of access that might be needed have occurred to us. We do recognise, nevertheless, that there are many administrative and procedural questions concerning the form in which access is given that are yet to be fully resolved. We were disappointed that these matters were not canvassed in the submissions we received from agencies. Some idea of the various issues that may arise can be gleaned from the submission from the Department of Social Security, which did discuss some of the implications of clause 18. The Department said for example that 'additional space . . . is thought to be required for each of the . . . regional offices considered likely to have a significant demand for access to personal files'. In addition 'partitioning may be necessary to ensure privacy'. In some circumstances, the Department said, 'the lack of private office space may require an inquirer to accept an appointment to peruse a file at a specified time so that steps can be taken to ensure some privacy for the client'. The Department said also that 'offices may require additional photocopying facilities so that demands for copies of documents can be readily met'. Finally, the provision of additional microfilm viewers could be required 'if the office routine is not to be disrupted by requests from members of the public for access to information stored in micro-fiche form'.<sup>1</sup>

**10.3** We appreciate that these matters are likely to be addressed in the regulations made pursuant to the Bill. Even so, we would hope that agencies will individually examine these questions and be in a position to make a public announcement on the procedures they propose to adopt under clause 18 before the regulations are gazetted and the Bill commences operation. As the objective of clause 18 is to facilitate access to documents, members of the public have a definite interest in reviewing the procedures agencies propose to adopt. We feel, moreover, that agencies could benefit from discussing matters such as these

<sup>1</sup> Submission no. 117, incorporated in *Transcript of Evidence*, pp. 2137-38.

with the public. Although it is beyond the scope of our present inquiry to anticipate all the issues that may arise in implementing clause 18, there are a few important issues that we think should be borne in mind by agencies when they are undertaking the preparatory studies that we have envisaged. We mention them in the following paragraphs.

**10.4 Reading rooms.** To our mind the public would be greatly assisted if agencies, where appropriate, established reading rooms containing such items as the statements and indexes published under Part II, documents commonly requested under the legislation, new reports or studies of the agency that are non-exempt, and copies of publications relevant to the administration of the Bill, such as the regulations and staff guidelines or procedures. We note that some United States agencies have adopted this practice, and that it appears to be of benefit and use both to the agency and its clients.

**10.5 Costs of access given in different form.** The Freedom of Information Legislation Campaign Committee submitted that a person should not 'be required to pay a fee that is greater than the fee that would have been payable if access were given in the form requested'.<sup>2</sup> This seems to us a reasonable proposal and we recommend that clause 18 be amended accordingly. The circumstances specified in clause 18 (3) as justifying the grant of access in a different form than that requested are all ones beyond the control of the individual applicant, and we believe that he should not be financially prejudiced as a result. This amendment should also ensure that agencies will be less inclined to depart from the terms of the applicant's request otherwise than for clear and defensible reasons.

**10.6 Regional availability.** A question of costs will also arise where a person residing in one city makes a request to inspect a document located in another city. We assume that, in many cases, it will be convenient for the agency to transfer a copy of the document to the city of the applicant's residence, if there is a Commonwealth Government office in that city. In our opinion, agencies should establish procedures that will permit applicants to inspect documents or copies thereof at the closest regional office of the Commonwealth Government, and to do so without paying any copying costs that may have been incurred (unless, of course, the applicant requests a copy of the document).

**10.7 Transcripts.** The Australian Broadcasting Commission indicated in evidence that it already sells to the public recordings of some programs on sound cassettes and that it could lose appreciable revenue if transcripts also had to be provided to the public under the Bill for a nominal sum.<sup>3</sup> Since this matter has been raised, and is obviously an important one, we think it desirable to record our understanding that in circumstances such as these, an agency is not required to make available an additional form of access (such as a transcript). This result, on our reading of the Bill, follows from paragraph 10 (1) (c) which provides that 'A person is not entitled to obtain access under this Part to . . . a document that is available for purchase by the public in accordance with arrangements made by an agency.'

#### **10.8 Recommendations:**

- (a) In order to enable public discussion of proposed access arrangements, agencies should announce the arrangements they propose to make under clause 18 before the regulations are gazetted and the legislation commences operation.**

<sup>2</sup> Submission no. 9, incorporated in *Transcript of Evidence*, p. 167.

<sup>3</sup> *Transcript of Evidence*, p. 1291.

- (b) Agencies should, where at all practicable, establish reading rooms to assist the public to peruse manuals, indexes and other information required to be made available.
- (c) The Bill should be amended to provide that where access is granted, pursuant to clause 18 (3), in a form other than that requested, a person should not be required to pay a fee greater than the fee that would have been payable if access were given in the form requested.
- (d) Applicants should be entitled to inspect documents at their closest regional Commonwealth Government office without paying any copying costs that may necessarily be incurred by the agency to make such inspection possible.

### **The problem of copyright**

**10.9** Some aspects of the effect of copyright law on the operation of the Freedom of Information Bill have already been canvassed in Chapter 9, in relation to the protections afforded by the Bill to the givers of information, but the matter requires more detailed attention than was there appropriate. On the face of it paragraph 18 (3) (c), providing that access may be given in a form different to that requested if access in that form would infringe copyright, appears to be fair. But further consideration of the provisions of copyright law suggests that this clause could potentially have a very marked impact in interfering with access.

**10.10** Pursuant to section 32 (1) of the *Copyright Act* 1968 Australian authors retain copyright in all unpublished original literary works. Incidents of the copyright are the right to control publication of the work or reproduction in a material form (s.31). The description 'original literary work' is sufficiently broad to cover such items as ministerial correspondence and submissions to ministers or departments by private persons or organisations. Consequently the Commonwealth could be argued to be breaching copyright if it provided an applicant with a photocopy of a document received from a private person or organisation without the express authority of that person or body. Access to the document cannot be denied altogether on copyright grounds, and an agency could certainly allow inspection of the document. However, this may be inappropriate and against the applicant's wishes in the case of a lengthy or complex document, or it may be difficult if an applicant does not live in a city where there is a regional Commonwealth Government office.

**10.11** There are other dangers also with clause 18 (3) (c). For instance, a private organisation that wished its submissions to government to remain confidential could in a practical sense hamper access by denying the government authority to reproduce the document. A practice such as this, which allows entities outside agencies to determine the form, and possibly the extent, to which access will be given, is inconsistent with the objective of the Bill that all these matters should be regulated in accordance with statutory guidelines administered by agencies. Where private interests seek to influence, advise or pressure governments, their views become a matter of public concern, and disclosure should be regulated by statutory criteria, formulated and agreed upon publicly. We believe that the recommendations we have made elsewhere in this report (especially in Chapter 25, dealing with the question of commercially sensitive information and the provision of Reverse-FOI actions in relation thereto) sufficiently protect the legitimate interests of non-government information suppliers without the necessity for any resort by them to copyright protection.

**10.12** A suggestion has been made that paragraph 18 (3) (c) is in fact designed to protect copyright in other categories of documents submitted by private individuals to agencies, such as programs and manuscripts provided to the ABC and the Australia Council. While protection of copyright in these items would be explicable, it is clear that the clause goes far beyond this role. Moreover the nature of the protection it does afford is somewhat illusory, since a member of the public may still inspect the manuscript in question despite paragraph 18 (3) (c). There is, in any event, a prohibition against publication or reproduction of the manuscript by members of the public, as we have earlier indicated, which exists regardless of whether an agency can provide copies to the public. Lastly, we point out that we have elsewhere in this Report (see Chapter 12) recommended that one of the particular examples given (program material of the ABC) should in any event be exempted by regulation from the operation of the Bill.

**10.13** In our opinion paragraph 18 (3) (c) should be altered. Three possibilities suggest themselves. First, the clause could be deleted entirely and the Bill amended to provide that the granting of access to a document in any form does not amount to a breach of copyright. The main impediment to the adoption of this procedure might appear to be Australia's obligations under the Berne Convention for the Protection of Literary and Artistic Works, by which Australia is bound. The Convention requires the signatories to ensure by legislation the exclusive right of authors to authorise the reproduction of their literary works (Article 9 (1)). Strictly speaking, Australia is only obliged to grant this protection to authors who are nationals of other countries bound by the Union, and to works first published in one of those countries (Article 3 (1)). On this view Australia's obligations would be very limited, and the Convention would be observed if paragraph 18 (3) (c) only applied to documents supplied to government which had originated outside Australia. However, the accepted custom is that a country does not afford less protection to the authors of its own country than it extends to authors of other countries.

**10.14** A further qualification on Australia's obligations under the Berne Convention appears to be authorised by Article 9 (2), which provides that:

It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

The Convention debates which led to the adoption of this provision in the Stockholm revision of the Berne Convention establish that it is intended to permit fair dealing, and that otherwise the right of the author to compensation is preserved. Section 183 of the *Copyright Act* 1968 (which we discussed earlier in paragraph 9.46) seems to amount to such a fair dealing provision.

**10.15** Although we do not purport to have undertaken an exhaustive study of copyright law, in our opinion it is certainly arguable that the Commonwealth would be able to take an expansive view as to what it is permitted to do by way of reproducing for freedom of information applicants submissions or documents that it has received from the public. Another theoretical justification on which it might seek to do this is that, in routine circumstances, it has received an implied licence from a person submitting information to it to reproduce that information. Although there do not appear to be any judicial authorities in point, we believe the Commonwealth could well adopt a line such as this as the rationale of the legislative policy espoused in the Bill.

**10.16** A second option is to enact some criterion, either in the Bill or in the *Copyright Act* 1968, for distinguishing between documents in respect of which copyright would be protected (e.g. artistic manuscripts) and documents in respect of which it would not (e.g. submissions to public inquiries). Were it possible to choose a relevant criterion, which we seriously doubt, it appears to us that it would be so general as to create problems more numerous or difficult than those which the amendment of paragraph 18 (3) (c) would be designed to resolve.

**10.17** Thirdly, something akin to a Reverse-FOI procedure could be devised. Copyright would only be protected, and reproduction in response to a request declined, if a person submitting information to the government specifically reserved his copyright in this respect. If he did, then of course it would be open to an agency to return the document to the person. While this option is preferable to paragraph 18 (3) (c) as it stands, it clearly has deficiencies. It does not overcome the basic copyright problem to which we have referred, but merely avoids it and reserves the right to prohibit reproduction to those individuals or organisations that are knowledgeable as to the pathways by which the intention of the legislation can be thwarted.

**10.18** To our mind, the first option is clearly preferable. If the government sees its way clear to adopt this approach without breaking any obligations Australia has under the Berne Convention, as we believe it probably can, we recommend that it do so.

**10.19 Recommendation: Clause 18 (3) (c) of the Bill should be deleted, and the Bill amended to provide that the the granting of access to a document in any form does not amount to a breach of copyright.**

#### **Deferment of access (clause 19)**

**10.20** Requests may be made to the right agency and the agency may intend to release the information. It may nevertheless not wish to do so immediately, for good reasons. Clause 19 is meant to cover this possibility. It provides that access to a document can be deferred where it is reasonable to do so in the public interest, or having regard to normal and proper administrative practices, or to action required by law to be taken in relation to the document requested. The sorts of documents intended here appear to be those relating, for example, to new taxation proposals, or to statutory requirements to table a report in Parliament, or press statements embargoed until a specific date. In submissions, departments suggested a number of other examples. The Department of Administrative Services thus referred to documents in the course of publication where deferment should be related to the publication date proposed by the publishing service.<sup>4</sup> The Department of the Capital Territory also suggested that "it would not be proper . . . for material to be published before it was received by the person for whom it was prepared".<sup>5</sup>

**10.21** The proposal to permit deferment was opposed in a number of submissions. The Women's Electoral Lobby (Victoria) for example thought that "there is a danger that . . . deferment procedures could be used in a controversial situation in order to confront the applicant (and general public) with a "fait accompli"". <sup>6</sup> The Council of Australian Government Employee Organisations also regarded clause 19 "as an unnecessary and over-cautious escape clause which

<sup>4</sup> Submission no. 141, p. 4.

<sup>5</sup> Submission no. 149, incorporated in *Transcript of Evidence*, p. 2223.

<sup>6</sup> Submission no. 7, incorporated in *Transcript of Evidence*, p. 368.

could allow unjustified deferments of consideration of applications'.<sup>7</sup> On the other hand a number of witnesses thought that there were safeguards against the abuse of the provision. The Department of the Capital Territory for example pointed out that the provision 'is only available for a specified time or until the occurrence of a particular event and only where public interest or normal proper administrative practices require such an action. The Administrative Appeals Tribunal has the jurisdiction to review such a decision and can reasonably be expected to deal adequately with any abuse of this procedure'.<sup>8</sup> Another witness, Mr D. Bubner, also thought that the provision was useful because access 'may be sought to a draft document but deferment may allow time for a better (more readable or more "acceptable"), or even a non-exempt, document to be prepared. On some occasions a document may be a borderline case in relation to exemption provisions and time will be needed by senior officers or a minister to make a considered decision'.<sup>9</sup>

**10.22** The Committee believes that there are legitimate uses for the period of deferment provided for in the Bill, especially if the provision is used sensitively by departments so that they can release material in due course for which they would otherwise feel disposed to claim exemption. We emphasise that a departmental decision to defer access can be appealed to the Administrative Appeals Tribunal and clause 19 (2) provides that an applicant shall be informed, as far as practicable, of the period for which the deferment will operate. Nevertheless, the clause could be tightened up considerably. We are concerned with the impossible vagueness and potential width of the words 'or having regard to normal and proper administrative practices', and recommend their deletion. In addition, it would be desirable for an agency or a minister, when giving notice of intention to defer, to be required to do so within a specified period of time. It may be that a deferment response is covered by the sixty day time limit specified in clause 17, but this is not entirely clear, and the Bill should be amended to ensure that it is. Usually it should be reasonable or practicable for such a response to be given much sooner, but a maximum period of sixty days should be set for this as for other kinds of response. When the response period under clause 17 is reduced in accordance with our recommendation in Chapter 8, this period should be correspondingly reduced.

**10.23 Recommendation: Clause 19 should be amended so as to—**

- (a) delete the words 'or having regard to normal and proper administrative practices';
- (b) require the notification of the intended deferment to be communicated to the applicant as soon as practicable but in any event not later than sixty days after the request is received.

**Deletion of exempt matter (clause 20)**

**10.24** Clause 20 provides for the deletion from a requested document of exempt matter 'where practicable'. Accordingly, an individual can still obtain requested information even if what he wants is mingled with other material which the agency determines to be exempt. This clause in a sense supplements the general spirit of clause 15 (which provides that information stored in computers should

<sup>7</sup> Submission no. 8, incorporated in *Transcript of Evidence*, p. 996.

<sup>8</sup> *Transcript of Evidence*, p. 2223.

<sup>9</sup> Submission no. 105, p. 4.

be made available if it can be rendered into discrete documentary form) and clause 18 (which provides, among other things, that except for overriding reasons of necessity access should be given in the form requested by the applicant), and is an important and valuable one. It would be indefensible if the presence of some exempt information in a source were to exempt the whole of the information.

**10.25** The key to the effective operation of this clause is the sensitive application of the phrase 'where practicable'. We can only hope that agencies will apply this liberally, flexibly, and in accordance with the general spirit of the Bill, and take considerable pains to ensure—even if this involves such steps as the masking out of individual paragraphs or even sentences on a page—that the maximum possible material is disclosed. We note that a failure to observe the letter of this clause enables an appeal by the applicant to the Administrative Appeals Tribunal, and hope further that, here as elsewhere, the Ombudsman (whose proposed functions are discussed in detail in Chapter 29) will exert a significant restraining influence on those agencies which are minded to ignore its spirit.

## Charges and fees

### The present provisions: safeguards and weaknesses

**11.1** The Bill clearly contemplates that members of the public who use the Freedom of Information legislation will have to pay for the documentary information that they acquire. Clause 16 provides that payment of a prescribed charge is a condition to be met before access is given to a non-exempt document. Clause 49 confers power upon the Governor-General to make regulations for, among other things

(a) the making of charges of amounts, or at rates, fixed by or in accordance with the regulations for access to documents (including the provision of copies or transcripts) in accordance with this Act, including requiring deposits on account of such charges;

In addition, clause 37 (6) provides that the powers of the Administrative Appeals Tribunal 'extend to matters relating to charges payable under this Act in relation to a request'. It is clear, therefore, that charges are likely to be levied, though no indication is given either in the Bill or in the explanatory statements that accompany it, as to the criteria in accordance with which the charges will be assessed or the procedures by which they will be levied.

**11.2** This omission has been much criticised in submissions received by this Committee from members of the public and from community groups. While there is no evidence that prohibitive charges will be levied by agencies, naturally a fear exists that the right of access conferred by the Bill will be too expensive to utilise. In part this fear is based upon reference to practices that have prevailed under the United States Freedom of Information Act. Before 1974, that Act was drafted in similar terms to the Australian Bill, in that it permitted agencies to impose charges in accordance with regulations made under the Act. Each agency could establish its own charges, and fee practices varied substantially from agency to agency. There was a difference first in the quantum of the fees charged—search fees varied from \$3 to \$7 per hour, and while the copying charge was 5c per page in some agencies, it went as high as \$1 per page in others.<sup>1</sup> A number of agencies ordinarily waived the payment of charges, while it was alleged that others used the power to deter members of the public from making requests—for instance, one inquirer was asked by the FBI to pay \$37 607 before the Rosenberg documents would be released.<sup>2</sup> Other prevailing practices also confirmed the opinion of critics that fees were employed to undermine the right of access: some agencies required pre-payment of expected fees before a search would be undertaken; others demanded a minimum fee (as high as \$10) regardless of the number of documents requested or disclosed; and it was alleged that there were agencies that would not charge regular clients, but would charge others. Since 1974, when the United States Act was amended following public criticism of fee practices during Congressional hearings on the Act, a considerably greater degree of standardisation has prevailed in charging practices. But search

<sup>1</sup> Australia, Parliament, *Royal Commission on Australian Government Administration (R.C.A.G.A.)* (Dr H. C. Coombs, Chairman). *Appendix, Volume Two*, Parl. Paper 187/1976, Canberra 1977, pp. 78–9.

<sup>2</sup> See 'Prying on the Truth—FOI in the USA', *Rupert* No. 1, February 1976, p. 5.

fees for Freedom of Information Act requests differ widely from agency to agency, so much so that according to Irene Emsellem, a staff member of Senator Kennedy's Judiciary Committee, 'the single most important action needed by Congress is uniformity in fees and fee waivers'. Miss Emsellem noted that charges for searches by agency 'professionals' vary from \$3 an hour at the Department of Health, Education and Welfare to \$12 an hour at the Nuclear Regulatory Commission. Computer search charges range from \$6.50 at the Federal Trade Commission to a huge \$188 an hour at the Justice Department.<sup>3</sup>

**11.3** We do not contest the assumption inherent in the present Bill that *some* charges and fees will be required to be paid. Only mild opposition has been expressed to this Committee against the principle that agencies should be empowered to levy charges in return for granting access to documents. The Library Association of Australia and the Australian Advisory Council on Bibliographical Services expressed the view that a system for disclosure of government information is comparable in objectives to the public library system, and both should be publicly subsidised to the same extent.<sup>4</sup> The Company Directors Association submitted that public subsidy was justified on the basis that the Bill would facilitate good relations with the business community.<sup>5</sup> While we endorse in theory the principle that the cost of safeguarding democratic rights, including perhaps 'the right to know', should be borne by the community, it is clear to us that the right of access conferred by the Bill will commonly be used by individuals to obtain information for private uses only, or to promote a private benefit or gain. While this is a legitimate use of the Bill, it does not call for public subsidy. There are practical reasons also why a power to levy charges must exist. If documents could be obtained free of charge, there is a distinct danger that agencies could be beleaguered with requests for most documents that are brought into existence. Certainly instances occurred in the United States where individual requests have demanded 'tons of records and literally millions of pieces of paper'.<sup>6</sup> Although it would be wrong if the Bill required that applicants had a 'need to know', or that requests had to be genuinely made, or if it provided that agencies could refuse to answer requests deemed to be frivolous or vexatious, quite clearly charges are a practical safeguard of the administrative efficiency of government.

**11.4** Most of the criticism on charges has concerned the absence of any safeguards in the Bill to ensure that charges will be reasonable and will not be imposed inconsistently or incorrectly. We think this criticism is well made and believe it is useful, therefore, to consider the nature of the safeguards which presently exist.

**11.5** Clause 49 provides that charges will either be specified, or be calculated in accordance with rates specified, in the regulations. There will be one set of regulations applying to all agencies; and to this extent at least a uniform code will be observed. In accordance with normal parliamentary procedures,<sup>7</sup> the regulations will be subject to scrutiny and disallowance by either House of

<sup>3</sup> A. Weinstein 'Open Season on "Open Government"', *The New York Times Magazine*, 10 June 1979, p. 32.

<sup>4</sup> Submission no. 95, incorporated in *Transcript of Evidence*, p. 2062 and Submission no. 75, p. 18.

<sup>5</sup> Submission no. 160, p. 1.

<sup>6</sup> R. L. Saloschin, 'The Freedom of Information Act: A Governmental Perspective' in F. E. Rourke (ed.), 'A Symposium: Administrative Secrecy: A Comparative Perspective'. *Public Administrative Review* (Jan./Feb. 1975), pp. 10, 12.

<sup>7</sup> *Acts Interpretation Act 1901*, s. 48.

Parliament, and to particular scrutiny also in the first instance by the Senate Standing Committee on Regulations and Ordinances. The actual charge imposed upon an applicant in accordance with the regulations can be reviewed, pursuant to clause 37 (6) of the Bill which provides that the powers of the Administrative Appeals Tribunal to review agency decisions regarding a request for access 'extend to matters relating to charges payable under this Act in relation to a request'. This rather cryptic provision means, we assume, that a person who has been granted access to a document, but feels that the charge imposed is too high—in that, for example, the wrong rate was imposed, or that the agency miscalculated the search time involved—can appeal to the Tribunal. If so, the Tribunal would be empowered merely to decide whether a particular charge was authorised by the Act, i.e., was in accordance with the rates specified in the regulations. If the charge was authorised, and properly calculated in the circumstances, the Tribunal's power would be at an end, however unreasonable or high it felt the authorised charge may have been. It may be that the language of clause 37 (6) can be argued to be wide enough to give the Tribunal a general discretion to fix whatever fees it deems appropriate in the circumstances, but we believe that a narrower reading would probably prevail.

**11.6** There are still many matters concerning charges that are not regulated by the provisions to which we have referred and are not protected by the avenues for scrutiny or review. In particular, questions arise as to what services and material will be charged for, what the actual level of charges will be, when deposits on account of charges will be required, and the whole question of waiver of fees and charges. Little guidance on these matters is given in the statements or explanations which accompany the Bill. The 1976 IDC Report commented merely that the schedule of charges to be prescribed by regulation

should be based on direct cost of search calculated at hourly rates taking account of the staff employed in dealing with the request. The 'direct' cost of search should encompass normal departmental search procedures and would not extend to the cost, for example, of locating a mislaid document. Where information is held on a microcopy, cinematograph film, videotape, sound recording tape or the like, standard charges related to the cost of retrieval should be prescribed. The copying of a document should be charged for at prescribed rates.

Where the cost of complying with a request is likely to exceed a prescribed amount, provision should be made for a department to inform the applicant of the estimated cost and obtain a deposit before proceeding further with the request. In all cases a department should be required to locate a requested document and inform applicants that upon receipt of a specified charge the document will be made available. There would be no charge made when a request for a document was not met.<sup>8</sup>

**11.7** The most that is contained in the statements that accompany the Bill is a short comment in the *Background Notes* that the regulation on charges will take into account these recommendations.<sup>9</sup> To our mind too little indication has been given as to the nature of the provisions on charges that will ultimately be adopted. Although many of the fears expressed to this Committee in submissions and evidence may ultimately prove to be unfounded, it is quite understandable that these fears should be held at this time. Most of the existing uncertainties will be clarified once the regulations are published, but we see no reason why the resolution

<sup>8</sup> Australia, Parliament, *Policy Proposals for Freedom of Information Legislation: Report of Inter-departmental Committee*. Parl. Paper 400/1976, Canberra, 1977, paras 19.5 and 19.6.

<sup>9</sup> Australia, Attorney-General's Department, *Freedom of Information Bill 1978—Background Notes, 'Criticisms, Explanations and Answers'*, AGPS, Canberra, 1978, p. 14.

of some of these questions should wait that long. Questions regarding costs are as important in a Freedom of Information Bill as questions regarding exemptions. It would have been a straightforward matter for some explanation to be given, for instance, on whether and in what circumstances fees would be waived, and we regret that this advice has not been forthcoming.

**11.8** Our consideration of this matter has led us to conclude that many, though not all, of the points which are the subject of uncertainty should be resolved in the Bill and not in the regulations. We acknowledge that the Bill is at present framed in accordance with the customary drafting practice of leaving to the regulations the actual charges or rates of calculation to be adopted. This approach is obviously sensible, since both inflationary changes and administrative experience which necessitates the need for amendments require that the charge or rate of calculation be susceptible to ready amendment. This amendment can be effected more easily in regulations, which only require gazettal, than in a Bill which requires passage through both Houses of Parliament. It would be impractical to insert the actual rates of charge in the Bill, and we do not recommend any change in that respect.

**11.9** There are however other matters which could be fixed or determined from the outset. They include the services and materials for which agencies should be entitled to levy charges; standardisation of charges; the time at which charges (including deposits) should be required to be paid; and the question of waiver of charges. Our consideration of the few references to charges in the departmental submissions illustrates this, as some agencies have apparently made assumptions in these respects that should be determined instead by Parliament, while submissions indicate inconsistencies could readily develop in the fee practices of agencies. For instance, the Commissioner for Employees' Compensation evidently assumes that charges must now be levied even for material otherwise free of charge<sup>10</sup> while the Office of Women's Affairs indicated its support for waiving fees where research time is less than one hour or the applicant is disadvantaged.<sup>11</sup> Again, some agencies have clearly assumed that a fee component should be the time spent by an officer examining a document to determine if it contains exempt information on preparing it for inspection.<sup>12</sup> The next section of this chapter contains our recommendations on those principles which we believe should be incorporated in the Act, rather than left to the regulations.

### **Setting of charges for services and materials**

**11.10** Perhaps the most immediately pressing question is the determination of whether, in principle, certain charges should be levied at all, and if so, what criteria should apply in fixing actual rates. We consider these issues in relation to, successively, charges for initial search and retrieval; charges for the examination of the material so retrieved to determine whether it is exempt; charges for the inspection by the applicant of documents to which access is granted; and charges for copying and materials.

**11.11** *Search and retrieval fees.* There appears to be common agreement that an agency should be able to charge for the time spent conducting a routine search

<sup>10</sup> Submission no. 99, para 13.

<sup>11</sup> Reply of 16 March 1979 by Department of Home Affairs to Public Service Board Survey on resource implications of Freedom of Information Bill, Committee Document no. 67, p. 13.

<sup>12</sup> e.g. Department of Social Security, Submission no. 117 incorporated in *Transcript of Evidence* p. 2137 and Department of Education, Submission no. 66, para. 6.

through the registry system for a document. There are, however, at least three different ways in which the search fee could be calculated.

**11.12** One option is to charge each applicant a *set retrieval fee*, say of \$10. This would be similar to the system that initially operated in relation to the records of Medibank, when any person could obtain his records from the Health Commission for a fee of \$8. The advantages of a set fee are that it is a system that is simple to operate, and is likely to be inexpensive to members of the public. The main disadvantage is obvious: that an agency could spend considerable time in answering a request without being able to recoup the direct costs involved—for instance, if an individual request seeks a large number of documents, or if the records requested are described qualitatively and time is spent in locating documents that fit the request description. This option is also susceptible to abuse. For instance, a number of applicants all seeking similar documents from one agency might be able to aggregate their requirements into one request, and pay a single request fee. The option could also tend to rigidify and make the charging of fees automatic where otherwise an agency may have been inclined to provide documents free of charge, for instance on the basis that the request is a routine one, or could be handled simply and quickly.

**11.13** The second option is to charge a *set retrieval fee with discretionary variations*, i.e. to allow the agency to charge at an hourly rate in certain defined circumstances—for instance, if a large number of documents is requested, if the anticipated search time will exceed a set number of hours, or if the documents are requested by reference only to the subject matter with which they deal. The main difficulty with this option is the identification of a reasonably precise criterion, that is not too broad or uncertain, to govern the use of the discretionary variation. We have not pursued this matter further, as in our opinion the same result will in a practical sense be achieved in most cases by use of the third option.

**11.14** The third option, which we favour, is to have a *set hourly rate* applying to the time spent searching for a document—for instance, the rate could be \$6 per hour, regardless of what level or rank of officer carried out the search. This option combines the advantages of simplicity, ease of calculation and amenability to challenge when a miscalculation is claimed. In practice, this option may possibly combine the advantages of the above option. What is likely to happen is that many agencies might not charge at all if the fee is small (for example, is less than \$10 or involves search time of less than one hour) for the reason that costs involved in calculating the sum payable may be as large as the costs that are so recovered. Certainly this is what has occurred in the United States. Hence charges are applied mainly to the more expensive inquiries. If this approach is to be adopted, it will be necessary to confer upon agencies, in addition to the discretionary waiver or reduction power that we recommend later in this chapter for impecuniosity and public interest reasons, a discretion to waive fees, in effect for administrative reasons, in respect of any individual request.

**11.15** It is, of course, possible to adopt the 'set hourly rate' principle with several variations. For example, the United States Justice Department distinguishes between 'clerical searches' where the charge is calculated as follows: 'For each one quarter hour spent by clerical personnel in excess of the first quarter hour in

searching for and producing a requested record, \$1.00<sup>13</sup> and on the other hand 'nonroutine, nonclerical searches' where the formula is expressed in these terms:

Where a search cannot be performed by clerical personnel, for example, where the task of determining which records fall within a request and collecting them requires the time of professional or managerial personnel, and where the amount of time which must be expended in the search and collection of the requested records by such higher level personnel is substantial, charges for the search may be made at a rate in excess of the clerical rate, namely for each one quarter hour spent in excess of the first quarter hour by such higher level personnel in searching for a requested record, \$2.00.<sup>14</sup>

However, we believe that, on balance, it would be simpler and more efficient—and probably no more costly in the long run for the agency to administer—for a single flat rate to apply whatever the personnel level involved.

**11.16** A particular question arises as to the basis on which search and retrieval fees should be levied in relation to computer-stored information. In Chapter 8 we have already discussed the operation of clause 15 of the Bill which spells out, among other things, the procedures applicable to the granting of access to such information. We state here our belief that it is proper that applicants be charged fees approximating the real cost to the agency concerned of the personnel and machine time involved in generating the output required. As an indication of what has been thought appropriate in this respect by at least one United States central agency (while noting at the same time, as we said in paragraph 11.2, that the Justice Department's computer fees are higher than those applying elsewhere) we quote the following further extract from the United States Department of Justice's 1977 Annual Freedom of Information Act Report:

<i>Computer time charges (includes personnel cost):</i>		\$
1. Central processor charge per hour	.	188.00
2. Main storage charge per 1000	per hour . . . . .	.50
3. Channel charges per hour	.	.74
4. Card reading per 1000 cards	.	.20
5. Printing per 1000 lines	.	.43
6. Card punching per 1000 cards	.	10.70
7. Tape mount	.	.50
8. Specific device charges		
a. IBM 2200 Cathode ray tube or equivalent per hour	.	4.20
b. IBM 3330 Disk storage or equivalent per hour	.	39.72
c. IBM 2314 Disk storage or equivalent per hour	.	39.72
d. IBM 3420 Tape Drive or equivalent per hour	.	44.59 <sup>15</sup>

**11.17 Recommendation: Charges for the search and retrieval of information should be fixed on a single set hourly rate basis, with provision for the agency to waive or reduce any such charge if it deems it appropriate in the circumstances.**

**11.18 Examination of documents.** An important question is whether charges should be levied only for the time taken to search for or locate a document, or whether it should also cover the time spent examining a document in order to determine whether it is exempt or contains exempt matter that should be deleted before disclosure. Charges are likely to be much higher if examination time is included. In many instances this may be the only time that is chargeable—for example, if a request is made for an internal report on a particular topic, there

<sup>13</sup> United States, Department of Justice, Freedom of Information Act, *Annual Report to Congress 1977*, Committee Document no. 60, p. 15.

<sup>14</sup> *ibid.*

<sup>15</sup> *ibid.*

may be no search time involved, because the identity and location of the report is readily ascertainable. But if it is a lengthy report that deals, say, with issues of national security, or with trade secrets of a named corporation, many hours may be spent by senior officers of the agency in examining its contents. Since the time of the officers may well be diverted for a considerable period from other equally important agency business (even necessitating perhaps the eventual employment of additional senior staff), there is a difficult question as to whether these costs to the public should be reflected in the charges that are made under the Bill.

**11.19** It is usual practice in the United States for no charges of this kind to be levied. Again the position of the United States Justice Department is typical, the relevant fee guideline being expressed as follows:

*Examination and related tasks in screening records.* No charge shall be made for time spent in resolving legal or policy issues affecting access to records of known contents. In addition, no charge shall be made for the time involved in examining records in connection with determining whether they are exempt from mandatory disclosure and should be withheld as a matter of sound policy.<sup>16</sup>

**11.20** We are aware of the budgetary strain that will undoubtedly be placed on a number of agencies if this approach is adopted. There will be some classes of requests—particularly in relation to defence and security matters—which will often require very lengthy screening indeed. These problems will be further multiplied as our recommendations with respect to the phasing in of access to prior documents come into effect, although it is to be noted, of course, that the Bill already provides for a degree of retrospectivity to the extent that access may be obtained under clause 10 (2) to past documents which are necessary to enable an understanding of later-created ones. We gave careful consideration, then, to whether there should not be some provision enabling, if only in limited and exceptional circumstances, the discretionary imposition of an appropriate examination fee. In the event, the majority of us take the view, on balance, that no examination fees of any kind ought to be charged. We are led to this conclusion both by the difficulties and uncertainties we see as being inevitably associated with the administration of any examination fee system, and our belief that there is no reason in principle why the financial burden upon an applicant should depend upon the inherent sensitivity of the material to which he seeks access (or for that matter, upon the varying sensitivities of the particular officers engaged in examining it).

**11.21** We believe that, as time goes by and the Freedom of Information legislation becomes well established, less and less time will in fact be needed for examination purposes. This will result not only from increased familiarity with the legislation and its standards, but also from the likely adoption of different attitudes and practices at the time that documents are created. Attention will become better focused on what information contained in the document can be released and what should be withheld (or reviewed afresh when a request is received). We understand, for instance, that in the United States many agencies now make an attempt in the creation of internal working documents to separate fact and opinion. Additionally, corporations supplying documents to the Government are asked by some agencies to mark those portions of the documents that should be considered for exemption.<sup>17</sup> A similar practice also exists with documents relating to national security, where the Executive Order establishing the

<sup>16</sup> *ibid.*

<sup>17</sup> e.g. United States, Food and Drug Administration, Regulations 21 FR S. 4.44-4.46.

security classification system requires that the classified portions of documents be specifically identified (see further discussion in Chapter 16); unclassified portions could not be withheld pursuant to the 'national security' exemption in the United States Freedom of Information Act. Practices such as these, if adopted in Australia, would clearly ensure efficiency in the administration of the Bill—a benefit both to the Executive and to the public. However, if agencies do not choose to adopt such practices, in our opinion members of the public should not have to bear the cost under the Bill.

**11.22** There is also another issue of consistency. If some agencies adopt practices to speed the examination and release of material, while others do not, members of the public who make requests under the Bill will be forced to pay higher charges to the latter. The same disproportion could arise in other ways. Those agencies which, by comparison with others, are less disposed to openness are likely to spend relatively more time in examining requested documents. It hardly seems fair or just, in a Bill designed to confer rights of access, that an agency's charges are inversely related to its commitment to the philosophy underlying the Bill.

**11.23** These variations may exist not only between agencies, but within an agency. Consider the evidence from the Department of Social Security:

Some calculation can be made of the workload involved in preparing a file for perusal. A straightforward file would take about 15 minutes to prepare counting time required for identification, location and extraction. Other files including those containing a large number of exempt documents would probably require an hour to prepare. In the case of longstanding files, such as family allowance and pensions, the state of the file and the possibility that access could reveal sensitive personal details (such as de facto relationships) would require more time to prepare the file for access.<sup>18</sup>

This brief example shows that charges, if based on examination time, would vary according to a number of factors which should not be reflected in the charge paid by members of the public.

**11.24 Recommendation: No charge should be made for the time spent in examining material to determine whether access should be granted to it.**

**11.25 *Inspection by applicant.*** When an applicant who has been granted access to material desires, either before obtaining copies or instead of obtaining copies of it, to inspect it by way of reading, viewing or listening as the case may be, certain additional personnel costs may well be incurred by agencies in making that possible. Such costs might involve the supervision of a reading room, the running of a film or videotape, or the playing of a tape recorder. Often the costs of this kind attributable to any individual applicant will be trivial, in that the personnel time involved is either minimal, or shared out in the supervision of a number of personnel simultaneously, or occupied simultaneously in conducting other agency business (e.g. routine clerical tasks): in these circumstances we believe that agencies will neither need nor desire to levy supervision charges. But in those exceptional circumstances where the personnel time attributable to satisfying the requirements of individual applicants is not in fact trivial, we see no reason why an agency should not be entitled to make a charge accordingly. The charge in question would be calculated by reference to the identifiable direct on-cost, and we would imagine that in most circumstances it could not legitimately exceed a figure of approximately \$5 per hour.

<sup>18</sup> Submission no. 117, incorporated in *Transcript of Evidence*, p. 2135-6.

**11.26 Recommendation: Agencies should be entitled to charge an applicant the identifiable direct on-cost incurred in supervising the inspection by him of material to which he is granted access.**

**11.27 Copying and material charges.** Agencies should be entitled to charge the identifiable direct on-costs incurred by them in photocopying documents, supplying sound or video-cassettes, computer print-outs and so on. Examples of charges specified in the 1977 fee guidelines of the United States Justice Department, other parts of which have been quoted above, are as follows:<sup>19</sup>

*Copies.* For copies of documents (maximum of 10 copies will be supplied) \$0.10 per copy of each page.

<i>Computerized Records—Material charges:</i>	\$
1. One-part paper per 1000 . . . . .	11.00
2. Two-part paper per 1000 . . . . .	17.63
3. Three-part paper per 1000 . . . . .	28.95
4. Four-part paper per 1000 . . . . .	37.52
5. Five-part paper per 1000 . . . . .	50.83
6. Stock Hollerith cards per 1000 . . . . .	1.78
7. Magnetic tape per reel . . . . .	9.50
8. Disk pack, each . . . . .	775.00

<i>Tape Recordings—Material charges:</i>	
1. 45 minute cassette . . . . .	.56
2. 60 minute cassette . . . . .	.60
3. 90 minute cassette . . . . .	.77

**11.28** We are particularly concerned that the photocopying charges imposed by agencies should be reasonable. Depending on how one takes into account, if at all, the depreciation of the machine concerned, the 'identifiable direct on-cost' might be capable of enormous variation. We state simply that we would regard any charge higher than 10 cents per page, at current values, as probably being unreasonably high.

**11.29 Recommendation: Agencies should be entitled to charge applicants the reasonable costs incurred by them in supplying copies of paper documents, sound and video-recordings and similar materials.**

**11.30 Notification of charges.** It is important that applicants know in advance the kinds of costs they may be liable to incur in securing access to information under the Bill. Where common or standard services and materials are required, it should be sufficient for this purpose that the relevant fee structure be adequately publicised in the proposed Freedom of Information Handbook (see Chapter 8) and elsewhere, with no necessity for direct personal notification. Where, however, quite substantial fees are likely to be incurred, we believe it appropriate that there be a requirement of advance notification before such charges can be levied. We recommend the adoption in this respect of the system applicable in the United States Department of Justice, which is embodied in that agency's fee guidelines as follows:

*Notice of anticipated fees in excess of \$25.* Where it is anticipated that the fees chargeable under this section will amount to more than \$25, and the requester has not indicated in advance his willingness to pay fees as high as are anticipated, the requester shall be notified of the amount of the anticipated fee or such portion thereof as can readily be estimated. In such cases, a request will not be deemed to have been received until the requester is notified of the anticipated cost and agrees to bear it.

<sup>19</sup> Committee Document no. 60, cited footnote 13, p. 15.

Such a notification shall be transmitted as soon as possible, but in any event within five working days, giving the best estimate then available. The notification shall offer the requester the opportunity to confer with Department personnel with the object of reformulating the request so as to meet his needs at lower cost.<sup>20</sup>

**11.31 Recommendation: Where it is anticipated that fees and charges in excess of \$25 are likely to be incurred by an applicant, a mandatory system of advance notification should apply before such charges can be levied.**

### **Standardisation of charges**

**11.32** Two questions arise for consideration here: whether the charges imposed under the Bill should be uniform across all agencies, and whether such charges should be uniform for all classes of applicants. We consider that both questions should be resolved in the affirmative.

**11.33** Clause 49 provides simply for the making of regulations in relation to 'the making of charges of amounts, or at rates fixed by or in accordance with the regulations'. We do not read the language of this clause, as it is presently drafted, as requiring either a single set of regulations applicable to all agencies, or that the charges set as between different agencies be uniform. It is, however, in our view important in the interests of fairness that there be such uniformity. While there may be commercial or budgetary considerations that might be thought to justify a variation in charges, noticeable variations from agency to agency are likely to be interpreted by the public as being an attempt by those agencies charging at higher rates to undercut the rights conferred by the Bill. So far as practicable the Bill should empower agencies to recover costs they have incurred. However we do not see that this policy has to be pursued to a point where the operation of the Bill could cause unnecessary suspicion and criticism likely to impair its success as a measure that is designed to assist, and not hamper, the public. The fact that a small amount might not be recovered by some agencies as a result of consistency being required is, in our opinion, outweighed by the considerations to which we have referred.

**11.34** We have given consideration to the question of whether the fees and charges incurred under the Bill should be uniform for all classes of applicants. Some possibilities that suggest themselves are that differential rates should apply to those seeking personal records as distinct from other classes of information, that lesser rates—or perhaps no rates at all—should apply to pensioners seeking personal information, or that commercial organisations be obliged to pay higher rates for information that they seek for business purposes. We are firmly of the opinion, however, that no such differentials should apply. Not only would they often be productive of great administrative inconvenience, but they would also tend to undermine, once again, the basic underlying principle of the Bill that the nature of the needs or interest of the individual applicant should be quite irrelevant to his exercise of rights under it. Anything which imports, as a routine administrative matter, a requirement that the reasons for a particular application be closely scrutinised, should be resisted. However we make it clear that we think there is a strong case to be made for the discretionary waiver or reduction of fees in appropriate individual cases, and we take up this point further below.

<sup>20</sup> *ibid.*

**11.35 Recommendation: Clause 49 should be amended to specifically provide for the imposition of fees and charges on a uniform basis as between different agencies. There should be no variation of scale charges as between different classes of applicants.**

**Time at which charges to be paid**

**11.36** Quite clearly no charge would be payable unless the document requested is disclosed, even though considerable time may be spent in searching for and examining that document. Consequently payment of a charge should not be required until the access decision has been made; to require otherwise would unnecessarily discourage requests. This procedure should be stated in the Act itself.

**11.37** A question arises as to whether, in accordance with the recommendation in the 1976 IDC Report, prepayment of a deposit on account of a charge may be required where the estimated costs are likely to exceed a prescribed amount. This is clearly envisaged by the Bill, insofar as clause 49 makes specific provision enabling regulations to be made 'requiring deposits on account of such charges'. We agree with this principle: in cases where much search time may be involved, and a waiver of charges seems unlikely, an agency may fairly seek some assurance that the ultimate charge will be paid and that its diversion of agency resources will not be wasted.

**11.38** It is important, however, that deposits should not be required to be paid unnecessarily or unreasonably. Once again the United States Department of Justice fee guidelines afford a useful precedent:

*Advance deposit.* (1) Where the anticipated fee chargeable under this section exceeds \$25, an advance deposit of 25% of the anticipated fee or \$35, whichever is greater, may be required.

(2) Where a requester has previously failed to pay a fee under this section, an advance deposit of the full amount of the anticipated fee may be required.<sup>21</sup>

We believe that the outlines of a system to this effect should be incorporated not only in the regulations but in the Bill itself. There is a good administrative reason for this, as well as a principled one. This is that, as a practical matter, the sixty-day time limit should not run during the period elapsing between request for, and payment of, a deposit. However, if the procedure for payment of deposits is contained solely in the regulations, it is arguable that the regulations could not override the time limit provision contained in the Bill.

**11.39 Recommendations:**

- (a) **Normally charges levied under the Bill should not be required to be paid until an affirmative access decision has been made;**
- (b) **Agencies should be entitled to require, where the anticipated fee chargeable exceeds \$25, an advance deposit of 25% of the anticipated fee; and**
- (c) **Where an applicant has previously failed to pay a charge under the legislation, agencies should be entitled to require an advance deposit of the full amount of the anticipated fee.**

**Waiver of fees**

**11.40** The present Bill contains no provisions specifically authorising or encouraging the waiver or reduction of fees for any reason. This is to be contrasted with the situation under the United States Freedom of Information Act,

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<sup>21</sup> *ibid.*

where is it provided that agencies can waive or reduce fees when 'furnishing the information can be considered as primarily benefiting the general public'<sup>22</sup> and where there is also an option to disregard charges for 'indigent requestors'.<sup>23</sup> The omission of clauses to this effect in Australia has been much criticised by a number of persons and organisations making submissions to us.<sup>24</sup> It may be that the regulations will contain such provisions, but we are not aware of any such government intention. It may also be, depending on the language in which the regulations couch the obligation to pay various fees and charges, that there will in any event (even in the absence of explicit provision) be a residual discretion left with agencies to waive or reduce fees in cases they regard as appropriate. We feel, however, that this whole matter is too important to be left in the general state of uncertainty which presently prevails, and that the Bill should state on its face the basic principles which should be applicable.

**11.41** We believe that the case for allowing for the discretionary waiver or reduction of fees where an applicant is impecunious is unanswerable, and there should be an explicit power conferred upon ministers and agencies to this effect. What counts as 'impecuniosity' should depend in any particular case both upon the means of any particular applicant or organisation on the one hand, and upon the amount of the fees and charges in issue on the other. To take a simple example, the retrieval and copying of a two-page social security record may represent a minimal financial burden even for a pensioner, while the retrieval and copying of all files bearing upon a long-running repatriation compensation matter might on the other hand represent a substantial imposition for anyone.

**11.42** We also believe that there should be explicit provision, as in the United States, for reduction or waiver by agencies or ministers when the provision of information 'can be considered as primarily benefiting the general public' rather than being for the benefit or gain of the individual applicant. Even more so than in the case of waiver for impecuniosity, the exercise of the proposed discretion is likely to be a difficult and often sensitive matter, but we again believe, on balance, that the provision of such an explicit power is desirable. It is likely to have a particular utility for community interest organisations and groups, working in such areas as environment protection, education, social welfare and civil liberties, who operate on shoestring budgets yet are intimately concerned with the kind of policy formulation in the public interest that it is one of the basic objectives of any freedom of information legislation to promote. We note in passing that it should not be assumed that the conferring of discretionary powers specifically upon ministers in this area will, any more than anywhere else, necessarily add significantly to ministers' personal workloads; the exercise of such powers can, and of course should, in all but the most intractable cases, be delegated by the minister down the line to his departmental officers.

**11.43** The real problem, as we see it, which arises with respect to the waiver or reduction of fees is whether any such discretionary decision should be appealable to the Administrative Appeals Tribunal. On the one hand, the conferring of a right of appeal, here as elsewhere, has obvious attractions, ensuring both

<sup>22</sup> United States Freedom of Information Act 1974, paragraph 5 U.S.C. 552 (a) (4) (A).

<sup>23</sup> United States, Freedom of Information Act, Sub-part A—*Production or Disclosure under 5 U.S.C. 552 (a)*, 16.9 (a).

<sup>24</sup> e.g. Freedom of Information Legislation Campaign Committee, Submission no. 9, incorporated in *Transcript of Evidence*, p. 164; Women's Electoral Lobby (Victoria), Submission no. 7, incorporated in *Transcript of Evidence*, p. 367; Australian Council of Social Services, Submission no. 48, incorporated in *Transcript of Evidence*, p. 440.

that the ministerial or agency decision will be carefully made in the first place and that it is capable of rectification if manifestly wrong. But on the other hand there is a real problem involved in the Tribunal becoming concerned with any kind of decision which involves it in considering and adjudicating in any way upon the applicant's case: to do so is inevitably, in our view, to commence a slide away from the crucial underlying principle of the legislation, namely, that access to information is a matter of right and not in any sense contingent upon a showing of need or interest or merit. It may be that a distinction can be drawn between a Tribunal finding as to entitlement to access on the one hand, and a finding as to entitlement to fee reduction or waiver on the other: there is a conceptual distinction. But we believe that there is in practice a danger of matters becoming blurred, and that it would be better if the Tribunal confined itself entirely to dealing with matters other than the status or situation of individual applicants. (As we indicated earlier in this chapter, the Tribunal would still retain under clause 37 (6)—or a re-drafted version of it—some jurisdiction in relation to fees questions, but that jurisdiction would be confined to questions of proper calculation rather than to the waiver or reduction issues we are here considering.)

**11.44** The inability to appeal from a ministerial or agency decision on a waiver or reduction application would not mean that a disgruntled applicant would be entirely without redress. The responsible minister would still be answerable to the Parliament for his exercise of discretion in any particular case, and it can be assumed that the political pressures upon him to ensure that such decisions were sensible and appropriate would be not inconsiderable.

**11.45 Recommendation: The Bill should explicitly confer upon ministers and agencies the discretionary power to waive or reduce fees where an applicant is impecunious or where the provision of the information in question can be considered as primarily benefiting the general public. The exercise of such discretionary powers should not be subject to appeal to the Administrative Appeals Tribunal.**

**PART C**  
**EXCEPTIONS AND EXEMPTIONS**

## **Exemptions of agencies and classes of documents (clauses 4 and 5)**

### **The principle of exemption by regulation**

**12.1** The Freedom of Information Bill enables regulations to be made excluding specified bodies or specified documents of an agency from the operation of the legislation. Clause 5 states:

The regulations may provide that—

- (a) a specified body is to be deemed not to be a prescribed authority for the purposes of this Act;
- (b) a body specified in accordance with paragraph (a) is, or is not, to be taken to be included in a specified agency; or
- (c) a specified agency is to be exempt from the operation of this Act in respect of documents relating to specified functions or activities of the agency or in respect of documents of any other prescribed description.

**12.2** This is one of the 'hidden' exemptions of the Bill in that its ultimate scope cannot be assessed until after the regulations are prepared. And when they are prepared there will not be adequate opportunity for either public or parliamentary scrutiny of those regulations. Whereas all other exemptions in the Bill will have been examined in detail by the public, this Committee and the Parliament as a whole, the ultimate scope and effect of the power of exemption conferred by clause 5 will not be subject to any detailed public or parliamentary scrutiny.

**12.3** It might at first glance be thought that the Senate Standing Committee on Regulations and Ordinances would be in a position to examine critically any regulations coming before it which provided for the exemption of specified agencies or specified documents of an agency. But the criteria under which that Committee operates would not permit the wide-ranging inquiry involving policy considerations which necessarily arise in determining whether particular agencies should be exempt from disclosure requirements. The criteria by which regulations are scrutinised by the Regulations and Ordinances Committee are limited to matters such as whether or not the regulations trespass unduly on personal rights and liberties, or unduly delegate parliamentary authority. Within the limits imposed by these criteria, the Committee has performed its review function effectively and in a non-partisan manner. Broadening its criteria to enable it to undertake the examination of the kind of policy issues, which would be involved in weighing arguments for and against the exemption of particular agencies or documents, would detract from the non-partisan character of its proceedings and prejudice its effective operation.

**12.4** Clearly, what is required is that any claim for exemption of any agency or a class of document should come before the Parliament as a whole in this or some future Bill rather than in regulations. It would be appropriate for all agencies which are proposed to be exempted from the Bill to be set out in a schedule to the Bill. While the necessity to determine all such claims before the Bill is enacted might be thought to delay the passage of the Bill, it would not in any way delay the operation of the Bill. Even if agencies were to be exempted by

regulation it could be expected that proclamation of the Bill would be postponed until those regulations were ready as has been the case with the *Administrative Decisions (Judicial Review) Act 1977*. Furthermore, agencies have already had ample time in which to consider whether or not to press their particular claims for exemption. Many agencies have outlined these arguments to the Committee and we consider them later in this chapter.

**12.5** While there is thus no impediment to setting out in a schedule to the Bill those agencies as to which it is clear at the time of enactment that valid claims for exemption exist, problems can be expected to arise in promptly resolving future claims for exemption. The difficulty of finding time in the busy legislative timetable for amendments to Acts is well known. It would clearly be a cumbersome and time-consuming procedure to require that every decision to add a new agency to the schedule or to remove one from it, should be by an amending Act of Parliament. We believe that a solution which enables adequate parliamentary scrutiny of any proposed amendments to the schedule without requiring subsequent amending Acts lies in a combination of amendment of the schedule by regulation and affirmative resolution of both Houses of the Parliament before the regulations can take effect.

**12.6** The device of amending a schedule to an Act by regulation is used in section 26 (3) of the *Administrative Appeals Tribunal Act 1975*. This has the advantage of avoiding the necessity for amending legislation yet still complies with the important principle that any legislative alteration in people's rights and obligations should be readily ascertainable. In the case of regulations this is achieved by the requirement of section 5 (1) of the *Rules Publication Act 1903* that regulations be printed and sold by the Government Printer.

**12.7** The further provision that the regulations should not take effect until affirmed by a resolution of both Houses of the Parliament provides adequate opportunity for parliamentary scrutiny of any proposed amendment. This is a device which has not been as frequently used in the Australian Parliament as in some others, such as the British Parliament. But it has been used here to advantage, and we believe that the exemption of agencies from the Freedom of Information Bill is an appropriate case for its further use. An example of a similar use of the affirmative resolution is to be found in section 24 of the *Commonwealth Electoral Act 1918* which provides that distributions of the States into electoral divisions do not have effect until approved by resolution of both Houses.

**12.8** It may be necessary to draft into the relevant provisions further provision to the effect that the resolutions of each House will have effect notwithstanding a prorogation of the Parliament, a dissolution of the House of Representatives or a simultaneous dissolution of both Houses. We draw attention to the need for this precaution because a resolution binds the Senate only for the current parliamentary session,<sup>1</sup> and there should be no doubt that regulations affirmed by resolution will remain in effect unless amended by the same process.

**12.9** The provision we propose differs from the usual situation with regard to regulations. Under section 48 of the *Acts Interpretation Act 1901*, regulations generally take effect from the date of their notification in the *Gazette*. They must also be tabled in both Houses within fifteen sitting days of being made and are subject to disallowance by a motion of disallowance of which notice has been given within a further fifteen sitting days of their tabling. Unless and until disallowed,

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<sup>1</sup> J. R. Odgers, *Australian Senate Practice*, 5th edn, A.G.P.S., Canberra, 1976, p. 236.

however, they take effect from the date of notification in the *Gazette*. What we propose is that regulations amending the schedule listing exempt agencies should not take effect until after both Houses have passed affirmative resolutions. Such a variation from the usual case appears to be contemplated within the terms of section 48 (1) of the Acts Interpretation Act which provides in part:

48. (1) Where an Act confers power to make regulations, then, unless the contrary intention appears, all regulations made accordingly—

(a) shall be notified in the *Gazette*;

(b) shall, subject to this section, take effect from the date of notification or where another date is specified in the regulations from the date specified;

We see no difficulty in providing that regulations amending the schedule of exempt agencies shall take effect from the date on which both Houses have passed affirmative resolutions.

**12.10** We propose amendment in the same way—by regulation, taking effect only after affirmative resolution of both Houses—to two other provisions of the legislation. In Chapter 8 we recommended that the Bill should be amended to provide for specified reductions over time in the number of days allowed to agencies to respond to requests. Nevertheless, we recognise that circumstances may develop which prevent such reductions and we recommended that the necessary amendment should be achieved by means of regulation and affirmative resolution along the lines discussed in this chapter.

**12.11** Similarly, in Chapter 21, we recommend the inclusion of those secrecy provisions prescribed under the Act for purposes of clause 28 in a schedule to the Bill. Amendment of this schedule would also, in our view, be most satisfactorily achieved by the device discussed above.

**12.12** Turning from exemptions of specified bodies to exemptions of specified documents of agencies, we regard it as desirable that exemption of an agency 'in respect of documents relating to specified functions or activities of the agency or in respect of documents of any other prescribed description' should also be achieved by listing in a schedule to the Bill with amendment thereof occurring by regulation taking effect only after affirmative resolution of both Houses. Had the exemption related simply to 'specified classes of documents' there would be no justification for such an exemption at all since the existing Part IV exemptions more than adequately cater for all conceivable categories of exemption of documents by description. However, the exemption is not this broad. It is limited to documents of a prescribed description *of a specified agency*. It provides for a more limited exemption than total exemption of an agency. Without such a provision the more draconian step of complete exemption of an agency might be called for in situations where not all of the agency's documents really require to be exempt. We envisage, however, that the circumstances would be rare in which it would be appropriate to exempt documents under this section rather than under one of the other grounds of exemption in Part IV. One such case might well be documents which relate to Aboriginal tribal and ceremonial secrets. We refer to this particular example again in our discussion of the question of breach of confidence in Chapter 25.

**12.13** Perhaps the best example of a legitimate use of the power to exempt particular classes of records of an agency is to be found in evidence given to us by representatives of the Australian Broadcasting Commission.<sup>2</sup> In their submission

<sup>2</sup> Submission no. 131, incorporated in *Transcript of Evidence*, pp. 1244–1303.

the ABC made out a persuasive case for exemption of their program material from the provisions of the Bill. On the one hand it is clear that certainly not all, and perhaps very little, of the program material presented on radio and television throughout Australia would fit squarely within the four corners of any of the Part IV exemptions. But it is equally clear that this is not the type of material with which the Bill is concerned. The ABC would also face a problem in determining its copyright obligations for purchased programs, a matter which is discussed in Chapter 10. By the same token, the public has a right to examine the administrative operation of the Commission to ensure that it is efficiently and properly conducted at public expense. It would thus not be appropriate to exempt the agency entirely from the operation of the Act. Nor could all conceivable 'documents' of this kind be adequately excluded from the definition of document in clause 3. The only practical solution is to exempt the program material of the ABC from the provisions of the Act. So that Parliament can be satisfied that only that which should be exempted, is exempted, the exemption should be by way of inclusion in a schedule to the Bill rather than by regulation.

**12.14 Recommendation: The exemption of any agencies or classes of documents of an agency and the determination of whether a body is part of a specified agency should be achieved by listing them in a schedule to the Freedom of Information Bill with subsequent amendment to that schedule occurring by means of regulation taking effect only upon affirmative resolution of both Houses.**

#### **Individual claims to exemption by regulation**

**12.15** In the course of its inquiry the Committee has received submissions from a number of departments and agencies indicating that they will be seeking partial or total exemption from the operation of the Bill when enacted. These included the Australian Broadcasting Commission (in relation to which reference has already been made in paragraph 12.13); the Australia Council;<sup>3</sup> the Department of Transport<sup>4</sup> (in respect of Qantas, Trans Australia Airlines,<sup>5</sup> Australian National Railways, Australian National Line,<sup>6</sup> aircraft accident and incident investigation records, reports of preliminary investigations into marine casualties, and examination papers used in the regulation of the aviation industry); the Commonwealth Employees' Compensation Tribunal;<sup>7</sup> the National Committee on Discrimination in Employment and Occupation;<sup>8</sup> the Confederation of Australian Industry<sup>9</sup> (in respect of a number of consultative and other bodies in the industrial relations arena); and ASIO.<sup>10</sup> Undoubtedly, we have not received submissions from all agencies proposing to seek such exemption. In these circumstances we do not purport to give a list of final recommendations as to those agencies which should be exempted. We do, however, wish to discuss the matters of principle which have been put forward in support of particular claims.

**12.16** *Commercial undertakings.* Perhaps one of the most difficult issues to be resolved in this area is in relation to those statutory authorities which are to all intents and purposes on equal footing with private commercial enterprises.

<sup>3</sup> Submission no. 73, incorporated in *Transcript of Evidence*, pp. 636-740.

<sup>4</sup> Submission no. 125.

<sup>5</sup> Submission no. 166.

<sup>6</sup> Submission no. 168.

<sup>7</sup> Submission no. 55.

<sup>8</sup> Submission no. 145.

<sup>9</sup> Submission no. 96, incorporated in *Transcript of Evidence*, pp. 1145-1188.

<sup>10</sup> In camera evidence given by Director-General of ASIO on 27 March 1979.

Should their competitive position be impaired by the necessity to comply with the requirements of the Bill which imposes no obligations on their competitors? A number of irreconcilable basic principles interact here: for example, that Australia is committed to a mixed economy with government-funded commercial organisations whose cost-efficiency cannot be prejudiced in relation to other competitors without detracting from the reason for their existence; and that any agency which is created by government and/or funded by public money should be accountable to the public. To grant an automatic exemption to any statutory authority which is competing in the marketplace against another commercial organisation would be to deny the public a valuable means of ensuring accountability of a publicly funded organisation. To deny all claims for exemption would be to pay no regard to the element of competition between publicly and privately funded organisations which is part of the established fabric.

**12.17** One of the principal means of ensuring accountability of corporate decision makers to company shareholders and investors is through the accounting and audit requirements of the various Companies Acts and Ordinances. This might suggest, at first glance, that publicly funded commercial enterprises which are subject to these same accounting and audit provisions might justifiably claim exemption from the accountability provided by freedom of information legislation. Conversely, public enterprises not subject to those corporate reporting requirements could be made subject to freedom of information legislation.

**12.18** This test does not, however, provide a satisfactory delineation. In the first place, apart from Qantas, there is only a handful of relatively minor publicly-funded commercial enterprises which are incorporated under Companies Acts or Ordinances. In the second place, some authorities, though not subject to the accounting and audit requirements of the companies legislation, may be required to have their form of accounts approved by the Minister for Finance. Because these accounts will vary to suit the particular needs of individual authorities and to take account of government policies in respect of different authorities, they may in one case be quite detailed and in another case fall far short of normal commercial accounts. Some authorities may be subject to neither companies legislation nor the approval of the Minister for Finance. We do not consider that the present accounting procedures of public enterprises afford an appropriate basis on which to assess whether a particular public enterprise should be subject to freedom of information legislation or not.

**12.19** We believe that the question of accountability of commercial statutory authorities ought to be approached from the presumption that all statutory authorities are subject to the Bill but that many of the documents of such authorities may be exempt under particular Part IV exemptions. In view of the width of the exemptions in Part IV which could be called in aid, we consider that the presumption would be displaced on relatively few occasions so as to call for the total exemption of an agency. In this connection, the protections afforded by clauses 29 and 32 of the Bill should be noted. Clause 29 enables documents to be exempted if their disclosure would have a 'substantial adverse effect on the financial . . . interests of . . . an agency'. Clause 32 enables documents to be exempted if they disclose information concerning a business, commercial or financial undertaking which:

- (i) relates to trade secrets;
- (ii) relates to other matter the disclosure of which would be reasonably likely to expose the undertaking unreasonably to disadvantage; or

(iii) would be reasonably likely to impair the ability of the Commonwealth or of an agency to obtain similar information in the future.

We discuss clauses 29 and 32 in detail in Chapters 22 and 25 respectively. It will be there seen that we do not propose any changes in substance which would detract from the protection they afford to commercial statutory authorities.

**12.20** Several submissions have expressed concern that agencies may not claim exemption in respect of all documents which would meet the criteria set out in clause 32. However, so long as adequate steps are taken to assuage these fears (which we believe our recommendations in Chapter 25 will accomplish), it is clear that clauses 29 and 32 provide sufficient protection to ensure that non-government commercial enterprises will not profit directly from disclosure of information about the activities of their publicly-funded competitors. The more likely advantage would be an indirect one resulting from the fact that the private entities do not need to devote staff to complying with freedom of information requests and are thereby in a position of relative advantage in cost-efficiency terms. However, this would only be a significant consideration if the number of requests made of publicly-funded commercial entities was of such magnitude as to involve deployment of significant resources from other profit-making tasks. We doubt that this would be a frequent occurrence. Furthermore, the existence of information sections of some size in a number of private businesses will lessen the extent of the relative disadvantage which might otherwise exist. Before a claim for exemption from the provisions of the Bill on the part of a commercial statutory authority is accepted, the authority should give details of the extent to which it is in direct competition with non-government entities and establish the extent to which its own resources need to be diverted from other tasks.

**12.21 Recommendation: The fact that an agency is engaged in competition with other non-government commercial enterprises should not of itself be a ground for exemption of the agency or a class of its documents under clause 5 of the Bill. Exemptions of entire commercial agencies or classes of documents should be made only after individual agencies have demonstrated, after experience of the operation of the Bill, that deployment of financial or staff resources made necessary by the Bill would significantly weaken their competitive position.**

**12.22 ASIO.** Those in favour of exempting ASIO from the operation of the Bill argue on the basis that internal security arrangements must be entirely secret if they are to be at all effective.<sup>11</sup> They also argue that helpers, not just agents, would be deterred from assisting officers of ASIO with their investigations, and that the organisation would be subject to excessive demands orchestrated by extreme groups for the purpose of disrupting ASIO operations. The opposing view is that some parts of ASIO's operations, if not all, should be made subject to the Freedom of Information Bill and be considered for exemption on a document by document basis for the purpose of ensuring a degree of accountability and deterring, to some extent, the use of illegal methods and procedures. The Committee was not unanimous as to the extent, if at all, that ASIO should be exempt under clause 5 of the Bill, but was firmly of the view that any such exemption should be by way of a schedule to the Bill and subject to parliamentary debate like any other legislative measure.

**12.23 Inhibiting effect on the supply of future information.** In paragraph 12.33 below we recognise that in the case of the conciliatory bodies set out in paragraph 4 (c) of the Bill there may well be grounds for exempting non-administrative

<sup>11</sup> *ibid.*

functions on the basis of the potential loss of sources of information if the prospect exists of that information being disclosed. However, we do not accept that this will always provide a legitimate ground for exemption. The Department of Transport, in its submission to the Committee, argued that exemption should be granted in respect of aircraft accident and incident investigation records so as not to inhibit the free exchange of information which would enable a full investigation to be made.<sup>12</sup> The submission expressed similar fears about inhibition of the free flow of information which might be occasioned by release of the reports of preliminary investigations into marine casualties. While acknowledging the basis of these fears, we do not believe that they warrant the exemption sought. Indeed, this is precisely the sort of information to which the public is entitled. Persons wishing to pursue legal remedies arising out of such accidents are entitled to have made available to them whatever information is known about such accidents by the agency concerned.

**12.24** It does not require much imagination to realise how broadly this subjective ground could be interpreted by those who were averse to increased access to information held by government agencies. We note that this is a recognised ground of exemption in relation to information supplied by a person in respect of his business or professional affairs, or by a business, commercial or financial undertaking (clause 32). But we believe that it would be unwise to extend this exemption any further.

**12.25 Recommendation:** **The fact that disclosure of particular information may be reasonably likely to impair the ability of an agency to obtain similar information in the future should not invariably give rise to an exemption of the relevant class of documents. But this is a factor, which in all the circumstances of a particular agency, may warrant exemption of some classes of documents.**

**12.26 Personnel assessments.** A special class of documents in respect of which the Department of Transport indicated that it would be seeking exemption was that of examination papers it uses to test applicants for aircraft maintenance engineer's licences and for flight crew licences and ratings.<sup>13</sup> The fear was expressed that, given the limited range of examination papers used for such purposes, disclosure of them could lead to falling standards in the maintenance and operation of aircraft. Undoubtedly this is but one example of a problem which other agencies could be expected to experience.

**12.27** A similar difficulty arises when experts are required to submit reports on applicants for government grants for artistic or research purposes. The Australia Council, for example, sought exemption under clause 5 for all or part of its operations so that these reports which are, in large part, subjective opinions of artistic merit, would not be released under freedom of information legislation.<sup>14</sup> The Council wishes to avoid hurting or discouraging unsuccessful applicants; exposing the experts concerned to possible defamation actions; increasing the flow of appeals to Council; and prejudicing Council's access to impartial and extensive commentary from experts in the future. The Victorian Government, concerned to protect the position of officers of the Victorian Ministry for the Arts who are consulted by, and provide comments to, the Australia Council on art awards, supported the Council's arguments for exemption under clause 5.<sup>15</sup>

<sup>12</sup> Submission no. 125.

<sup>13</sup> *ibid.*

<sup>14</sup> Submission no. 73, incorporated in *Transcript of Evidence*, p. 642-3, pp. 692-705.

<sup>15</sup> Letter to Chairman from Premier of Victoria, 18 April 1979, Committee Document no. 82.

**12.28** We consider that the reports for artistic purposes which are of concern to the Australia Council will be protected by clause 26 of the Bill. The examination papers, however, cannot be protected in this way. We believe that the protection of documents such as the examination papers of the Department of Transport can best be achieved by an amendment to clause 29, which protects *the Commonwealth's financial, property and staff management interests*. This matter is considered further in Chapter 22.

### **Exclusion of the courts, the Parliament and certain industrial bodies**

**12.29** *The courts.* The courts are excluded from the operation of the Freedom of Information Bill by virtue of clause 4. This clause provides, in part, that:

For the purposes of this Act—

- (a) a court, or the holder of a judicial office or other office pertaining to a court in his capacity as the holder of that office, is not to be taken to be a prescribed authority or to be included in a Department;
- (b) a registry or other office of a court, and the staff of such a registry or other office in their capacity as members of that staff, shall not be taken to be part of a Department;

We have reservations about a total exclusion for the courts. There is obviously very good reason for governments not imposing requirements which would interfere with the independence of the judiciary and the proper administration of justice. It would not be appropriate for freedom of information legislation to be the vehicle for obtaining access, where this was otherwise unavailable, to court documents filed by parties to litigation. Nor would it be appropriate for this legislation to operate in any way as a substitute or supplement for discovery procedures presently administered by the courts. However, there are other documents of a more clearly administrative character associated with the functioning of registries and collection of statistics on a host of matters associated with judicial administration which, equally clearly, should be opened up to public gaze. These would include such matters as the number of sitting days, the number of cases determined, the number of cases withdrawn, the cases which were subsequently appealed and the occasions on which bail was awarded. The very existence within the Commonwealth Attorney-General's Department of a Division of Judicial Administration is testimony to the ability to distinguish between the judicial and administrative aspects of the operation of the courts. We therefore propose that the exemption in paragraph (a) and (b) of clause 4 should be limited to the non-administrative functions of the courts.

**12.30 Recommendation: Clause 4 of the Freedom of Information Bill should be amended so as to limit the exemption in respect of courts to documents of a non-administrative character.**

**12.31** *Parliamentary departments.* Clause 3 defines 'agency' to exclude the Departments of Parliament from the operation of the Freedom of Information Bill. The relevant part of clause 3 provides:

In this Act, unless the contrary intention appears—"agency" means a Department or a prescribed authority; "Department" means a Department or the Australian Public Service other than the Department of the Senate, the Department of the House of Representatives, the Department of the Parliamentary Library, the Department of the Parliamentary Reporting Staff and the Joint House Department.

The total exemption for parliamentary departments conferred by clause 3 of the Bill appears even less justified than in respect of the courts. The only official justification given is that the Freedom of Information Bill is concerned with

granting access to the documents of the Executive.<sup>16</sup> Seen as an exercise in ensuring accountability of governmental decision making, there clearly is a difference between the executive and parliamentary departments. But that is not to say that there is not a corresponding need to open up for public inspection the activities of the parliamentary departments. The public has a legitimate interest in ensuring, first, that its parliamentary representatives are properly going about their tasks of representation and executive scrutiny, and secondly, that its parliamentary representatives are properly assisted to fulfil those functions. On the other hand, it is arguable that members of the Parliament, if they are effectively to perform their elective representative function, should not be in any way inhibited in the exercise of their parliamentary and political duties—as they might be, to take one clear example, if the nature of their research requests to the Department of the Parliamentary Library ceased to be confidential.

**12.32** While there would appear to be, on balance, a case for giving the parliamentary departments the somewhat less than total blanket exemption from the Act, we have found it difficult to distinguish clearly or systematically those activities of the parliamentary departments disclosure of which might be thought to have a detrimental effect on the position of members of parliament. We have not found it possible to agree on any formula which would provide a satisfactory general basis for making the distinctions in question. In the event, in the absence of any submission to us from any source, recommending that the parliamentary departments be subject in whole or part to the Bill, we do not at this stage recommend any amendments to the Bill in this respect. We do, however, believe that the parliamentary departments should be encouraged to act as if the legislation were applicable to them in the same way as the executive departments have been instructed to treat requests before the introduction of the legislation as if it were in force.

**12.33** *Certain industrial bodies.* Paragraphs (c) and (d) of clause 4 exempt specific industrial bodies: namely, the Australian Conciliation and Arbitration Commission, the Industrial Registrar, the Flight Crew Officers Industrial Tribunal, the Public Service Arbitrator and the Coal Industry Tribunal. These provisions are in the following terms:

- (c) a tribunal, authority or body specified in this paragraph, or the holder of an office pertaining to such a tribunal, authority or body in his capacity as the holder of that office, is not to be taken to be a prescribed authority or to be included in a Department, namely:
  - (i) the Australian Conciliation and Arbitration Commission;
  - (ii) the Industrial Registrar or a Deputy Industrial Registrar;
  - (iii) the Flight Crew Officers Industrial Tribunal;
  - (iv) the Public Service Arbitrator or a Deputy Public Service Arbitrator; and
  - (v) the Coal Industry Tribunal or any other Tribunal, authority or body appointed in accordance with Part V of the *Coal Industry Act 1946*; and
- (d) a registry or other office of, or under the charge of, a tribunal, authority or body referred to in paragraph (c), and the staff of such a registry or other office in their capacity as members of that staff, shall not be taken to be part of a Department.

As with the courts, we are not satisfied that all aspects of the working of these industrial bodies demand total exemption from public gaze. We do recognise that in conciliatory bodies such as these it is imperative that the persons involved be able, apart from hearings on the public record, to engage in full and frank discussion aimed at resolving particular matters in dispute.

<sup>16</sup> Australia, Attorney-General's Department, *Freedom of Information Bill 1978: Background Notes*, A.G.P.S., Canberra, 1978, (Explanatory Memorandum, p. 1).

Any decision to make these negotiations public can be expected to inhibit the necessary frank exchanges. We believe, however, that even if this is the basis upon which the Government has determined that these bodies should be accorded exempt status, these arguments should be articulated along with those in respect of any other agency for which exemption is to be sought. Even assuming that this ground of exemption is generally regarded as being proper, we do not consider that the inhibiting effect on conciliation warrants total exemption of these industrial bodies. As with the courts, we see no reason why the administrative functions of these conciliatory bodies should be exempt.

**12.34 Recommendation: Paragraph (c) of clause 4 of the Bill should be deleted and any exemption of the conciliatory bodies listed therein be achieved in a schedule to the Bill in respect of their non-administrative functions only.**

#### **Individual claims to exemption by inclusion in clause 4**

**12.35** The Committee received a number of submissions urging that as particular agencies were similar in nature to those set out in clause 4, the agencies should receive similar exempt status. For example, the thrust of one of the arguments put by the Commonwealth Employees' Compensation Tribunal was that the Tribunal is more like a court than the arbitral bodies listed in paragraph (c) of clause 4 and hence should be exempt.<sup>17</sup> Similarly, the Confederation of Australian Industry sought exemption for various bodies on the basis that they were also industrial bodies and hence should be accorded the same exemption as those listed in clause 4.<sup>18</sup> They were: the National Labour Consultative Council; the Central and Local Trades Committee; the Employment Discrimination Committees; the National Employee Participation Steering Committee; Ministers; Heads of Departments of State or agencies of the Commonwealth which recommend the taking of action in industrial relations or staff matters involving the Commonwealth and its employees; the Industrial Relations Bureau involving matters subject to the provisions of the *Conciliation and Arbitration Act* 1904; and the Commonwealth Reporting Service, in so far as it holds transcript of proceedings which are restricted to the court or tribunal and the parties in dispute.

**12.36** None of these bodies, with the possible exception of the National and State Committees on Employment and Occupation, should qualify for exemption under clause 4. The Commonwealth Employees' Compensation Tribunal is a quasi-judicial tribunal, the proceedings of which are normally conducted in public. It neither qualifies for exemption as a court nor as an industrial body before which, in closed session, parties engage in full and frank discussion for the purposes of conciliation. The National Employee Participation Steering Committee, the National Labour Consultative Committee and the Central and Local Trades Committees can be characterised as consultative rather than conciliatory bodies. As such, their proceedings, to the extent that they should be accorded protection, will be protected under clause 26 of the Bill. In contrast, the National and State Committees on Employment and Occupation are essentially conciliatory bodies and in accordance with our views expressed in paragraph 12.33 they should be considered for exemption in a schedule to the Bill in respect of their non-administrative functions only. The whole tenor of the Freedom of Information Bill is directed, in one way or another, to ministers and departmental heads and their involvement in industrial relations is no reason, by itself, why particular ministers or departmental heads

<sup>17</sup> Submission no. 55.

<sup>18</sup> Submission no. 96, and see *Transcript of Evidence*, pp. 1147-50, pp. 1161 ff.

should be removed from the purview of the Bill. The Industrial Relations Bureau is primarily concerned with the enforcement of awards and for this reason the documents in its possession would be protected, if at all, under clause 27, the law enforcement provision. Finally, the transcripts of the Commonwealth Reporting Service including first draft transcripts would, we envisage, enjoy the same exemption, if any, as the respective bodies which they service, whether it be a Commonwealth court or tribunal. Transcripts of public hearings would ordinarily come within clause 10 (1) (c) as documents that are 'available for purchase by the public in accordance with arrangements made by an agency' and for this reason would not be accessible under the Freedom of Information Bill.

## **Refusal of access on administrative grounds (clause 13)**

**13.1** An agency may, by virtue of clause 13 (3), refuse to comply with a request if that request relates to all documents on a specified subject matter and if identification, location or collection of the requested documents would interfere unreasonably with the operations of the agency or the performance by the minister of his functions. Clause 13 (3) provides:

(3) Where a request is expressed to relate to all documents, or to all documents of a specified class, that contain information of a specified kind or relate to a specified subject-matter, compliance with the request may be refused if it would interfere unreasonably with the operations of the agency or the performance by the Minister of his functions, as the case may be, having regard to any difficulty that would exist in identifying, locating or collating documents containing relevant information within the filing system of the agency or of the office of the Minister.

**13.2** It is apparent at the outset that the words provide considerable scope for agencies to refuse access to documents. The provision has, not surprisingly, attracted a great deal of criticism. It is equally apparent, however, that immense burdens could be imposed on an agency by categorical requests (that is, requests for all documents of a particular type or category, or all documents on a particular subject matter).<sup>1</sup> One United States case involved a request for 'all unpublished manuscript decisions' held by the Patents Office which would have required searching through well over three and a half million files built up over more than a century. Senator John Knight,<sup>2</sup> in evidence to the Committee, referred to the difficulties confronting United States agencies in complying with a request for 'the papers of Dean Rusk'. Compliance with such a request would literally involve granting access to truckloads of documents. It is not inconceivable, as the Department of Foreign Affairs maintained,<sup>3</sup> that deliberate campaigns could be undertaken by extreme groups formulating requests of similar magnitude to disrupt the operations of agencies whose practices they found offensive.

**13.3** For these reasons we accept that agencies must on occasion be able to refuse requests which would impose extreme burdens on their operations. It is important, however, that the exemption be used sparingly and only when the agency concerned is subject to considerable interference with its operations. In our view it is the magnitude of the interference with an agency's operations that should determine whether a categorical request should be complied with or not. Accordingly, it is necessary to insert in the exemption some quantitative measure of the interference which would be considered unacceptable. As presently drafted, clause 13 (3) focuses on 'unreasonable' interference with the operations of an agency. While it is difficult to find sufficiently precise language which conveys the appropriate flavour, we believe the sub-clause would be improved by the addition of a quantitative requirement that the interference be 'substantial' as well as unreasonable.

<sup>1</sup> *Irons v. Schuyler* 465 F.2d 608 (D.C. Cir. 1972)

<sup>2</sup> *Transcript of Evidence*, p. 2102

<sup>3</sup> Submission no. 150, incorporated in *Transcript of Evidence*, p. 2378

**13.4 Recommendation: Clause 13 (3) should be amended so that compliance with a categorical request can be refused only if it would 'impose a substantial and unreasonable burden on the operations of the agency or the performance by the minister of his functions'.**

**13.5** Clause 13 (3) is not the appropriate clause on which an agency should rely when the burden arises because of the need to identify, locate and collate the relevant documents within the sixty-day time limit. Instead, recourse should be had to clause 39 (6) which provides that an agency or a minister may apply to the Administrative Appeals Tribunal for an extension of time to deal with requests which invoke the sixty-day time limit. It can be expected that when an agency has acted diligently such applications in the case of categorical requests would rarely be refused.

**13.6** Neither could agencies resort to sub-clause 13 (3) without fulfilling their obligations under sub-clauses 13 (4) and 13 (5). These sub-clauses require an agency to assist a person to make a request in a manner which complies with clause 13. A request could accordingly be voluntarily narrowed in scope. On the other hand, a categorical request may on occasion be more appropriately directed to the Australian Archives. Professor Neale, Director-General of the Australian Archives, informed the Committee that where requests were broadly stated and were for a prescribed purpose, a person may qualify for special access to documents under thirty years old by virtue of clause 39 (3) of the Archives Bill.<sup>4</sup> We assume, however, that access by virtue of clause 39 (2) of the Archives Bill would only be available in exceptional circumstances and the vast majority of categorical requests would have to rely on clause 13.

**13.7** In addition to these existing provisions, we make two series of recommendations elsewhere in this report which also have a bearing on the scope of the exemption in clause 13 (3). The first are our recommendations in Chapter 7 for more detailed indexes to be prepared by agencies as to their 'internal law'. As emphasised in submissions received by the Committee, the greater the indexing requirements imposed on agencies the easier it will be for them, as well as members of the public, to locate speedily the documents to which access is sought. Furthermore, the incidence of categorical requests, to the extent they reflect a person's ignorance of the documents possessed by an agency, can be expected to diminish as the degree of indexation of agency records is increased.

**13.8** Perhaps an even greater safeguard against the too frequent use by agencies of the clause 13 (3) exemption is to be found in our recommendations in Chapter 29 for the conferral of additional powers on the Ombudsman for the purposes of freedom of information. At this stage it is sufficient to note that, armed with these additional powers, the Ombudsman would play a central role in overseeing agencies' compliance with the requirements of clauses 6 and 7 as amended. We envisage that persons experiencing difficulties in obtaining information described simply by subject matter might invoke the assistance of the Ombudsman. The Ombudsman might lessen the frequency with which the clause 13 (3) exemption is invoked by agencies by persuading them to make reasonable efforts to provide the material. He might also be in a position to lessen the frequency of appeals against agency decisions to invoke this exemption by persuading certain applicants that their requests exceeded the limits beyond which it was unreasonable to expect agencies to go in identifying, locating or collating documents.

<sup>4</sup> *Transcript of Evidence*, p. 712.

**13.9** Refusals of categorical requests would be subject to review by the Tribunal in accordance with clause 37 of the present Freedom of Information Bill. This, as well as review by the Ombudsman, would among other things ensure that the undue burden which an agency asserts is not a burden of its own making. A poor information retrieval system or unwise delegation of authority may be the cause of the burden of which it complains. Agencies would realise soon enough that reliance on clause 13 (3) for reasons of their own ineptitude would not be considered a legitimate invocation of the exemption.

**13.10** With the provisions presently occurring in the Bill, and the recommendations we have proposed here and elsewhere in the Report, we believe that clause 13 (3) can be a useful and necessary exemption, and one which we hope will be invoked sparingly by agencies. The notion of unreasonable interference with the operations of an agency also forms part of clause 15 which provides for requests involving the use of computers and other equipment. The similarity between clauses 15 (2) and (13) (3) leads us to propose that the amendment recommended in relation to clause 13 (3) also be considered in relation to clause 15 (2).

**13.11 Recommendation: Clause 15 (2) should be amended so that compliance with a request under clause 15 (1) for information not in discrete form in documents of the agency can only be refused if it would 'impose a substantial and unreasonable burden on the operations of the agency'.**

## Prior documents

**14.1** The present Bill does not provide generally for access to previously existing documents. If enacted in its present form therefore, the Bill would permit access only to documents brought into existence or coming into the possession of agencies or ministers in the future. There is provision for prior documents to be available if they are necessary to the understanding of other documents which have been lawfully obtained. Essentially, however, the Bill rules out access to prior documents. The relevant provision, clause 10 (2) is as follows:

A person is not entitled to obtain access under this Part to a document that became a document of an agency or an official document of a Minister before the date of commencement of this Part, except where access to the document by him is reasonably necessary to enable a proper understanding of a document of an agency or an official document of a Minister to which he has lawfully had access.

**14.2** This provision was strongly criticised in evidence before us and has indeed been the subject of criticism for some years, notably during the deliberations of the 1974 and 1976 Interdepartmental Committees. The justifications offered for the present provision are not strong, and the only one put forward with any degree of conviction relates to the supposed cost of allowing access to prior documents in the Bill. We believe that this objection can be met through arrangements to phase in access to prior documents over a period of time. We are convinced that access to prior documents must be permitted if the legislation is to be of real value. The limited access permitted under the Bill as it stands is an uneasy compromise which in our view is subject to uneven application and will lead to confusion and cost. Access to prior personal records is especially important and arrangements to provide for this should take effect as soon as possible. This chapter reviews the evidence which has led us to these conclusions.

**14.3** Many submissions to the Committee argued that section 10 (2) was too restrictive. *The Sydney Morning Herald*, for example, argued

If it is proper—and it demonstrably is—that people should be able to obtain Federal documents in which they have an interest, then all such documents should be dealt with on the same basis. It is impossible not to read the clause without concluding that it has been inserted merely to make life easier for the bureaucracy.<sup>1</sup>

The Victorian Committee for Freedom of Information similarly argued that

Access to past material is needed to understand if departments have been operating efficiently, incompetently or even illegally. Without access to past material the process of gaining community support for programmes is lost as there cannot be full understanding of present policies. Thus the demand for openness should not be understood as applying simply to allowing public scrutiny of present policies and practices. To understand and contribute to present and future policy requires full understanding of past methods and programmes.<sup>2</sup>

CAGEO also said that the sub-clause was 'both unnecessary and undesirable, and therefore should be deleted'.<sup>3</sup> *The Advertiser* thought that 'ruling out all documents produced before . . . the Act comes in force, is objectionable'.<sup>4</sup>

<sup>1</sup> Submission no. 111, p. 2.

<sup>2</sup> Submission no. 44, incorporated in *Transcript of Evidence*, p. 397.

<sup>3</sup> Submission no. 8, incorporated in *Transcript of Evidence*, p. 995.

<sup>4</sup> Submission no. 128, incorporated in *Transcript of Evidence*, p. 1894.

Witnesses pointed out that other countries with freedom of information legislation have permitted access to prior documents. The Australian Journalists' Association said that

the public must have access to all the documents necessary to the understanding of the subject under inquiry. Accordingly, the Bill should make access to prior documents mandatory, with the onus on the Department to prove they should not be disclosed. The Association notes that the United States Act does not prevent access to documents existing before the Act became law. Much of the effectiveness of the United States Act has been related to the availability of prior documents. The Association regards this as a serious fault and one that must be corrected if the Bill is to have any credibility.<sup>5</sup>

The New South Wales Privacy Committee noted that

Freedom of Information legislation in most overseas countries gives a right of access to documents created before the Act, subject to the usual restraints such as those dealt with in clauses 30 and 34. While we do not recommend that access indiscriminately be made available to documents created prior to the Act, we consider that provided appropriate safeguards are introduced access need not be denied.<sup>6</sup>

**14.4** Public service departments generally took an opposing view. The Department of Immigration and Ethnic Affairs, for example, argued that a 'very restrictive attitude should be taken'<sup>7</sup> to prior documents. However the justifications for such an attitude were not convincing. It was said that prior documents had not been prepared with release in mind and so should be protected. We do not accept this argument. On the contrary, it is just such information to which access very often needs to be permitted. As one witness (Mr D. Bubner) pointed out

Many documents including reports, studies, enquiries and policy proposals deal with issues which have been shelved, deferred, abandoned or even forgotten. For example carefully prepared soundly based reports may be put into the 'too hard basket' or shelved for political, policy or administrative reasons. It's not unheard of for a proposal on the establishment of a new body to serve a particular function to be shuffled sideways as a casualty of departmental territoriality or inter-departmental rivalry. It would be most disappointing if documents of this sort are as a result of the F.O.I. and related legislation virtually relegated to the archives.<sup>8</sup>

The Freedom of Information Legislation Campaign Committee (FOIL) similarly argued that the need to grant access to pre-existing documents was important in order

to facilitate historical research, to reveal the perpetuation of obsolete or deficient values and ideas, to discover methods of decision-making or investigation that might be publicly disapproved, or—in the case of an individual upon whom a file is maintained—to uncover inaccurate information that continues to stain an agency's assessment of him or her.<sup>9</sup>

The Law Institute of Victoria put a similar view

In practice Government policy is not made overnight and many decisions are continuing and being implemented over a number of years. To prevent members of the public from examining documents that came into existence years before the introduction of the Act is to severely affect the assessment of aspects of present Government policy. Decisions, opinions and other influential matters contained in documents disclosed by the legislation

<sup>5</sup> Submission no. 81, incorporated in *Transcript of Evidence*, p. 309.

<sup>6</sup> Submission no. 87, incorporated in *Transcript of Evidence*, p. 492.

<sup>7</sup> Submission no. 158, incorporated in *Transcript of Evidence*, p. 2333.

<sup>8</sup> Submission no. 105, p. 3.

<sup>9</sup> Submission no. 9, incorporated in *Transcript of Evidence*, p. 166.

could be meaningless and unintelligible to the public or any person or corporation seeking to resolve a problem or to use those documents for the purpose for which the applicant applies.<sup>10</sup>

**14.5** But the major argument against altering the sub-section fundamentally was, to quote the Attorney-General in his Second Reading Speech on the Bill, that it would substantially increase the administrative burden and cost of implementing the legislation at a time when the Government is seeking to contain the resources devoted to the Public Service.<sup>11</sup> The Chairman of the Public Service Board similarly said that access to prior documents 'would certainly significantly add to the problems of departments in circumstances in which, even meeting the current demands, the nature of the demand is not known.'<sup>12</sup> The 1976 Report of the Interdepartmental Committee was also concerned

about the additional administrative burdens that departments would face on top of the administrative load imposed by freedom of information generally if all prior documents were subject to disclosure. These difficulties would result both from the increased volume of requests and because of the difficulties in locating prior documents.<sup>13</sup>

**14.6** For a number of reasons we believe that these fears are not well founded. In the survey undertaken at our request by the Public Service Board ('PSB Survey') (see Appendix 4), departments were asked to what extent they anticipated an increased demand for information under the Freedom of Information legislation if disclosure were to be required of past documents. As is apparent from our discussion in Chapter 6, departments were able to make only rough guesses though many anticipated the worst. The amount of prior material held by departments is, however, relatively limited judging by the figures in the survey.<sup>14</sup> For example, the Department of Foreign Affairs indicated that the bulk of files was less than ten years old.<sup>15</sup> Similarly the Department of Defence indicated that some 85% of files were less than ten years old.<sup>16</sup>

**14.7** More positively, the Bill (in clause 10 (2)) does require access to past documents where that is necessary to the understanding of a document to which a person lawfully has access. As the Explanatory Memorandum points out, in paragraph 26, 'relevant access to the other document is not limited to access under the Bill, nor does it matter whether that other document was in existence before the commencement of the Freedom of Information Act or not.'<sup>17</sup> There is disagreement about the likely effect of this provision. We suggest strongly that it would be better to plan for orderly access to prior documents rather than await the uneven application of limited rights of prior access. That could certainly lead to a chaotic situation in which resource demands become considerable because they have not been anticipated.

**14.8** It is certain that some departments are concerned that this provision could produce an uncontrollable situation. The Department of Foreign Affairs, for example, has argued that 'especially in the case of the "research" type of inquiry

<sup>10</sup> Submission no. 112, p. 3.

<sup>11</sup> Australia, Senate, *Hansard*, 9 June 1978, p. 2696.

<sup>12</sup> *Transcript of Evidence*, p. 871.

<sup>13</sup> Australia, *Policy Proposals for Freedom of Information Legislation: Report of Interdepartmental Committee*, Parl. Paper 400/1976, Canberra, 1977, para. 17.5.

<sup>14</sup> Public Service Board summary of responses to survey on resource implications for government agencies of the Freedom of Information Bill (hereafter 'PSB Survey'), Appendix 4, p. 451.

<sup>15</sup> *ibid*, Appendix 4, p. 451.

<sup>16</sup> *ibid*, Appendix 4, p. 451.

<sup>17</sup> Explanatory Memorandum to the *Freedom of Information Bill* 1978, p. 6.

there could be a chain effect with the inquirer seeking access to any document or file referred to in each document to which he has been given access'.<sup>18</sup> The Department of the Capital Territory has similarly said that its view

is that sub-clause 10 (2) in fact opens up a very wide range of "pre-existing" documents to scrutiny, because any existing document which is reasonably necessary to enable a proper understanding of a document to which a person has had lawful access, must be made available. This provision would appear to authorise requests for access in respect of any published decision or report, irrespective of when that decision or report was made.<sup>19</sup>

On the other hand the Australian Journalists' Association sees this limited right of access as a 'narrow qualification'<sup>20</sup> only. Clearly, then, there is room for quite conflicting views to be held. We welcome the attitude demonstrated by the Department of the Capital Territory and hope that other departments share that attitude. We trust that the fears of the Australian Journalists' Association on this provision will be unfounded.

**14.9** There is, however, a degree of uncertainty with respect to personal records. This uncertainty should be clarified. A number of witnesses made this point. The South Australian Council of Social Service, for example, was concerned that section 10 (2)

would mean that files about an individual, created before the Bill being proclaimed, would not be available to that individual for verification of accuracy, yet could still be an active and used file . . . Freedom of Information legislation . . . should apply to documents created before the passing of the Bill.<sup>21</sup>

The State School Teachers' Union of Western Australia said that if the legislation is to work in the interests of both the Government, the employer and the employee, then particularly in the area of personal files the employee should have the right to inspect his file from the date of commencement which may be in some cases up to some 40 years ago.<sup>22</sup>

**14.10** Some departments have conceded the validity of these points. The Department of Social Security, most importantly, said that

clause 10 (2) provides no means whereby access could be refused to personal information compiled prior to the commencement of Part III of the legislation. Quite clearly information obtained after the date of commencement would, in the short term, have little or no value to a person who has been a continuing client of the Department. It is clear therefore that persons seeking access to their personal records will have to be given access to all relevant accessible documents held by the Department.<sup>23</sup>

The Commonwealth Employment Service said

Clause 10 (2) requires that historic documents be produced if they are necessary to enable a proper understanding of a document to which access is granted under the Bill. This may generate additional work in tracing and transferring to the point at which access is to be given, historical documents. It will also generate a need to consider current record handling procedures to ensure that where necessary cross-referencing is carried out. This work should not produce heavy demands and no time has been included for it in the estimates [of staffing needs.]<sup>24</sup>

<sup>18</sup> Submission no. 150 incorporated in *Transcript of Evidence*, p. 2380.

<sup>19</sup> Submission no. 149, incorporated in *Transcript of Evidence*, p. 2222.

<sup>20</sup> Submission no. 81, incorporated in *Transcript of Evidence*, p. 309.

<sup>21</sup> Submission no. 94, incorporated in *Transcript of Evidence*, p.1745.

<sup>22</sup> Submission no. 63, p. 1.

<sup>23</sup> Submission no. 117, incorporated in *Transcript of Evidence*, p. 2132.

<sup>24</sup> Submission no. 164, para. 4.14, p. 24.

**14.11** It is preferable that access to personal records to allow their correction should be permitted under the Bill immediately and without reservation. This would be consistent with the recommendations of Mr Justice Hope that access to the Security Appeals Tribunal should be permitted to employees to enable correction of their own personal records.<sup>25</sup> The questions of access to personal records and associated matters affecting rights of privacy are dealt with in greater detail in Chapter 24.

**14.12 Recommendation: The Bill should be amended to specifically provide individuals with a right of access to prior documents affecting themselves.**

**14.13** Allowing such a right of access by individuals to prior records which affect them, will assist departments to further extend a right of access to prior documents generally. Such a development would, in our view, be highly desirable. Earlier in this chapter (see paragraph 14.8) we alluded to the concern expressed by some departments at the effect which heavy demands for access to prior documents would have on their operations. The question of increased demand arising from the disclosure of prior documents was one of those put to departments in the PSB Survey.<sup>26</sup> Departmental responses varied considerably, although most could not be specific about the effect of making prior documents available. On the side of optimism, two departments (Transport, and Industry and Commerce) took the view that access to prior documents would not affect their operations in a significantly different way from their expectations if the Bill were enacted in its present form.

**14.14** Other agencies (Administrative Services, Attorney-General's, Foreign Affairs, National Development, Industrial Relations Bureau, Australian Bureau of Statistics, Australian Electoral Office) spoke of the effect of granting access to prior documents in such terms as 'substantial increase', 'significant increase' and 'significantly greater impact'. Several agencies were more specific: thus Primary Industry, Prime Minister and Cabinet, Treasury and the Australian Government Retirement Benefits Office predicted that the number of requests could be expected to double. The most pessimistic outlook was that of the Public Service Board which stated that 'if demand was concentrated on material less than five years old, the area (i.e. number of files) within which information would have to be researched would be increased by a factor of five or six'.

**14.15** We note again the vagueness of agency estimates and the significant variations between those estimates. We recognise that this disparity is, to some extent, related to the differences in agency functions. Nevertheless we are firmly of the view that, although there are bound to be greater administrative difficulties, at least in the short term, if access to prior documents is granted, these difficulties are by no means insurmountable. Indeed, as experience of the Act's operation grows and improved record-keeping and retrieval systems are developed, these early administrative problems will diminish. It is our firm view that effective freedom of information legislation demands access to prior documents. Clause 12 already permits the granting of access to documents apart from the provisions of the Act and therefore provides the opportunity for ministers or agencies to grant access to prior documents. Nevertheless, this provision is not adequate to ensure access to prior documents as a matter of right—which, in our view, it should be. Our conviction of the need for access to prior documents is strengthened by our

<sup>25</sup> Australia, Royal Commission on Intelligence and Security, *Report*, AGPS, Canberra, 1977, para. 168.

<sup>26</sup> Question 3 of PSB Survey, cited footnote 14, (see Appendix 4).

knowledge of the situation in the United States, where the greatest effectiveness of the Freedom of Information Act has been in the access it has provided to documents pre-dating its enactment.

**14.16** In recognition of the initial burdens created by granting access to prior documents, we favour a staged introduction of such access. Several witnesses suggested phasing-in arrangements. The Queensland Council for Civil Liberties, for example, suggested that

some interim measures should be framed which will gradually make the Act apply retrospectively. Some of the most important revelations about government activities in the United States have come from access to documents created before the Act was passed. The public interest in such information should not be sacrificed so that public servants may avoid "administrative problems".<sup>27</sup>

The Women's Electoral Lobby (Victoria) also suggested that the Bill should be amended to allow five years retrospective access.<sup>28</sup> Such phasing-in will allow agencies a period to assess the administrative problems involved and develop appropriate systems of retrieval and access to deal with them.

**14.17** From information supplied by agencies in response to the PSB Survey, it appears that for most agencies the greatest proportion of their document holdings is five years old or less,<sup>29</sup> although there were some significant variations from this pattern.<sup>30</sup> We therefore accept that some delay should occur after the proclamation of the Act to enable agencies to prepare for the granting of access to prior documents. In our view it is appropriate that access to documents up to five years old at the time of proclamation should commence one year after proclamation. It would then be possible, after a further specified period of time had elapsed and agencies had made the necessary administrative adjustments, to phase in access to, say, documents aged six to ten years at the time of proclamation. By a gradual process, it would be possible eventually to overcome the gap between documents to which access could be granted under the Freedom of Information Bill as presently drafted (i.e. those coming into existence from the time of proclamation) and those in the open access period under the Archives Bill (i.e. over thirty years old).

**14.18** In our view it is quite undesirable that this gap should exist. When enacted the Freedom of Information and Archives Bills should provide a continuum. There are no convincing reasons why a controlled phasing-in of the sort discussed in the preceding paragraph should not occur to progressively bridge the thirty-year gap which would exist if the Bills were enacted in their present form. The legislation should specifically provide for access to be granted within a year of proclamation to documents up to five years old at the time of proclamation. Such provision will amount to recognition of the importance of access to prior documents for effective freedom of information. Further retrospective access could be brought in as experience showed it to be possible. Decisions about this would depend upon the monitoring of the legislation which is discussed in Chapters 31 and 32. As the

<sup>27</sup> Submission no. 19, incorporated in *Transcript of Evidence*, p. 1343.

<sup>28</sup> Submission no. 7, incorporated in *Transcript of Evidence*, p. 368.

<sup>29</sup> PSB Survey, cited footnote 14, (see Appendix 4); question 3 (c) e.g. Aboriginal Affairs 56.3%, Administrative Services 65%, Defence 60%, Australian Development Assistance Bureau 60%, Housing and Construction 40%, Transport 45%, Auditor-General 50%, Australian Bureau of Statistics 75%.

<sup>30</sup> Finance 0-5 years 4.7%, over 30 years 73.8%; Primary Industry 0-5 years 20%, 5-10 years 40%; Public Service Board 0-5 years 17%, 10-30 years 60%.

Attorney-General has said, departments and authorities will 'become progressively familiar with the operation of legislation of a kind of which there has been no previous experience in Australia'.<sup>31</sup>

**14.19 Recommendation:**

- (a) The Bill should be amended to provide for a right of access to documents up to five years old at the time of proclamation, such right of access to be effective after one year from the date of proclamation.**
- (b) Further retrospective access should be phased in by subsequent amendment to the Act as it becomes administratively possible until access is available to documents within the thirty-year period between proclamation of the Freedom of Information Bill and the open access period provided in the Archives Bill.**

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<sup>31</sup> Senator the Hon. P. Durack, Q.C., 'The Freedom of Information Bill', an address to the Australian Pharmaceutical Manufacturers Association, Press Release, Canberra, 21 August 1978, p. 10.

## Part IV Exemptions—general issues

**15.1** Many submissions to the Committee expressed a belief that the Freedom of Information Bill does more to preserve secrecy than to ensure openness. The exemptions were prominently mentioned whenever this claim was made. According to some descriptions, they 'deprive the Bill of much practical significance' and do nothing more than 'provide legislative backing of existing reticence of the Executive'; 'further reinforce the veil of secrecy which surrounds the decision-making process of governments'; 'leave too much to the whim of those who might possibly have an interest in non-disclosure'; and are 'so broad as to encompass a vast range of innocuous information'.<sup>1</sup>

**15.2** The exemptions were also criticised in other ways. Some community groups, which are well-accustomed to dealing with governments, listed examples of documents that have been withheld from them in the past; the lists were coupled with an apprehension that those same documents could still be withheld under the exemptions once the Bill is enacted. Examples of the broad categories of documents which were claimed to be unavailable included discussion papers; legislative manuals, guidelines and rules; consumer test reports; personal files; reasons for decision; economic forecasts and analyses; licences, contracts and leasing arrangements; reports of advisory committees, interdepartmental committees, consultants, committees of inquiry; and generally documents that are integrally connected with the decision-making processes of government.<sup>2</sup>

**15.3** These examples have been useful to our inquiry, as they provide something of a sounding board against which to discern the meaning, and gauge the coverage, of each exemption. We have been similarly assisted by the responses received by Senator Missen to the 35 questions on notice he asked (see Appendix 5), since in nearly every case the elements were the same: the document dealt centrally with a matter of current public concern, that matter was a non-sensitive one but the non-disclosure of the document could be sustained under the Bill. These examples point up the salient role played by the exemptions in demarcating the areas of permitted secrecy and required openness. This demarcation can never be achieved perfectly, since the set of exemptions, which is necessarily few in

<sup>1</sup> The first two quotations are from the submission from Mr Paul Munro, Submission no. 12, incorporated in *Transcript of Evidence*, p. 599, at p. 606. The other three quotations are from, respectively, Women's Electoral Lobby, (Victoria), Submission no. 7, incorporated in *Transcript of Evidence* p. 365, at p. 369; Australian Council of Social Service Inc., Submission no. 48, incorporated in *Transcript of Evidence*, p. 430, at p. 435; and Freedom of Information Legislation Campaign Committee, Submission no. 9, incorporated in *Transcript of Evidence* p. 159, at p. 164.

<sup>2</sup> See, e.g., the submissions from the Freedom of Information Legislation Campaign Committee (ibid); Australian Council of Social Service Inc. (ibid.); Council of Social Service of New South Wales, Submission no. 53; Australian Consumers' Association, Submission no. 61, incorporated in *Transcript of Evidence*, p. 566, and two further letters from the A.C.A. listing documents claimed to be secret, Committee Document nos. 19 and 93; Library Association of Australia, Submission no. 95, incorporated in *Transcript of Evidence*, p. 2050; Australian Conservation Foundation, Submission no. 100; Women on Welfare Campaign, Submission no. 113, incorporated in *Transcript of Evidence* p. 1773; Mr Andrew Bain, Submission no. 136, incorporated in *Transcript of Evidence*, p. 1810; Victorian Committee for Freedom of Information, Submission no. 147; and Australian Council of Trade Unions, Submission no. 152.

number, will apply to millions of documents, each of which may conceivably have some feature to distinguish it from others when a question of disclosure arises. Special care is therefore needed in drafting the exemptions.

**15.4** There is a further reason why the exemptions should be well-drafted. At present we have a system of discretionary secrecy where the main criteria that guide an official faced with a question of disclosure are his own good sense, administrative experience and (on occasion) political directives. The exemptions replace these criteria which are elastic, unpredictable, variable and inherently productive of inconsistent rulings. Yet if the exemptions themselves are expressed equally broadly, they may be viewed by more timorous officials as a statutory authority to withhold documents that formerly may have been released. It is in this sense that some critics of the present Bill have claimed that its exemptions render it a Freedom *from* Information Act. Charges to this effect have also been made in the United States, initially by critics who claimed that previously available information was withheld under the Act, and more recently by some journalists who say that they are occasionally required by officials to make their requests under the Act and to forgo the informal channels that hitherto were customarily used.

**15.5** There are, then, two broad requirements each exemption must satisfy. First, it must be permissive, in the sense that an official has a discretion to release a document that could be withheld. This discretion is conferred by clause 12 of the Bill, though in our opinion inadequately so. We have discussed this matter already in Chapter 9.

**15.6** The remainder of this chapter is concerned with the second requirement: that an exemption constitute a precise, ascertainable criterion. Our earlier discussion, in Chapter 2, of foreign legislative precedents indicated that, while each country has attempted in the main to protect the same basic interests and categories of documents, a variety of methods has been used. Some additional methods (or forms of exemption) are used for the first time in the Australian Bill. We shall first discuss these different forms before we express our own opinion as to the drafting methods that should and should not be used.

### **Different forms of exemption**

**15.7** In our analysis there are three basic forms of exemption in the Bill:

- (a) Clauses 23, 24 and 25 provide that a designated officer may, if in his opinion a document is of a defined description, sign a certificate which establishes conclusively that the document is of that character and is thus exempt from disclosure. The Administrative Appeals Tribunal has no power to review whether the document does in fact meet that description, the decision to give the certificate, or the existence of proper grounds for the giving of the certificate (clause 37). These certificates can be issued in respect of documents claimed to be Cabinet documents, Executive Council documents, or documents whose disclosure is claimed to be contrary to the public interest for the reason that disclosure would prejudice the security, defence or international relations of the Commonwealth, relations between the Commonwealth and any State, or would divulge matter communicated in confidence by another government.
- (b) Clause 26 incorporates a public interest criterion as an additional and separate condition to be met before a document can be withheld. An agency must be satisfied that a document contains opinion, advice or

recommendation (or the like), and that disclosure would be contrary to the public interest. However, no appeal can be made on the latter question, and the Tribunal has no power to examine whether disclosure would be contrary to the public interest (clause 37 (4)).

- (c) Most of the other exemptions are defined either by reference to the *interest* to be protected (such as national security, law enforcement, or personal privacy); or by reference to the *effect* that disclosure of a particular category of document would have (for instance, expose a business or commercial undertaking unreasonably to disadvantage or adversely affect the Commonwealth in legal proceedings).

**15.8** Within these three basic categories there are other variations that distinguish the exemptions one from another. For instance, clauses 24 and 25 are defined by reference to the *category* of document to be protected. Whether disclosure would have a defined effect or prejudice a defined interest is not a factor to be considered. Clauses 23, 29 and 33 also purport to incorporate a public interest criterion: whether disclosure 'would be contrary to the public interest by reason that' it would have a defined effect, for instance, be reasonably likely to have a substantial adverse effect on the national economy. We indicate our view at paragraph 15.23 that this formulation adds nothing. Lastly, in some exemptions the interest to be protected is not expressed in the exemption but is incorporated by reference. This occurs in clauses 31, 34, 35, and 36, which incorporate common law standards that have themselves been formulated by courts by reference to particular interests to be protected (legal professional privilege, breach of confidence, contempt of court, parliamentary privilege and Crown privilege).

**15.9** There are three other forms of exemption that bear mention:

- (a) The Swedish Secrecy Law, as we explained in Chapter 2, displays a unique variety of approaches with as many as 250 different exemptions. Some of them are defined by reference to protected interests, others by reference to categories of documents. Many contain a time limitation on the life of the exemption, e.g. some documents are only protected until the occurrence of a particular event (for instance, documents prepared for auditing or inspection activities until the audit or inspection has been held). Some exemptions may be waived by the individual for whose benefit protection is given; and others recognise that particular parties may have a special claim to access (such as associations of employers or employees who want access to exempt statistical calculations for use in wage agreement negotiations).
- (b) The Minority Report Bill (published as an appendix to the Royal Commission on Australian Government) proposed that some exemptions should, in addition to specifying the interests to be protected, specify public interest criteria favouring disclosure which had to be considered by an agency. For example, the trade secrets exemption provided that, in deciding whether disclosure would be unreasonably disadvantageous to a corporation, an agency had to consider other matters, one of which was 'whether there are any compelling public interests in favour of disclosure which outweigh any competitive disadvantage to the corporation, for instance, the public interest in improved competition or in evaluating aspects of governmental regulation of trade practices or environmental controls.'<sup>3</sup>

<sup>3</sup> Australia, Royal Commission on Australian Government Administration (Dr H. C. Coombs, Chairman), *Appendix Volume Two*, Parl. Paper 187/1976, Canberra, 1977. Draft Bill for a Freedom of Information Act, clause 32 (2) (d), p. 44.

- (c) An alternative to incorporating a public interest criterion in selected exemptions is to confer upon the Tribunal power to order that access be granted to an exempt document where the Tribunal is of the opinion that the public interest requires that access to the document should be granted. In effect, this would amount to conferring upon the Tribunal the same discretionary power conferred upon an agency to release an exempt document. A variant of this approach is contained in modified form in The Netherlands Openness of Administration Act. Most of the exemptions are contained in a single list preceded by a qualifying phrase that information shall not 'be divulged if and in so far as its importance does not outweigh the following interests' (for example, foreign relations, law enforcement and personal privacy). In effect each of these interests has to be balanced against an unspecified interest in disclosure.

### **Forms of exemption in the Bill**

**15.10** We are satisfied that the different forms used already in the Bill are adequate and that variations used or proposed in other legislation need not be experimented with at this stage. That is not to say that we disapprove of other approaches; rather, we are satisfied that it is appropriate to use at the outset forms that are common in most other freedom of information statutes and conform to the accepted legislative drafting practices used in Australia.

**15.11** The main question then is whether the exemptions in the Bill satisfy the test earlier enunciated of containing precise, ascertainable criteria. They approach this goal in some measure, in that they are defined in the main by reference to the interest to be protected or the effect that disclosure would have. With this method, no document is conclusively assured of protection. The question always is whether a defined interest would be damaged by disclosure of that document. If an appeal can be made to the Tribunal to seek a definition of the interest, it is likely that the exemption can, on the one hand, be confined to the protection of those documents which fairly require withholding and, on the other hand, expand or contract in its application so as to reflect contemporary views as to the proper relationship between the government and the community.

**15.12** Selection of the interests to be protected is not an intractable problem. Our study of foreign legislation and practice and our impressions from many days of public hearings and reading submissions have led us to conclude that there is no real dispute about the nature of the relevant interests. The only dispute concerns how those interests are best defined, and this is a matter to which we return in the remaining chapters of this Part of our Report.

**15.13** We appreciate that it is not always possible to describe every category of documents to be withheld by reference to the interest to be protected. For instance, Cabinet documents and internal working documents are difficult to describe in this fashion because of the multiplicity of interests that are sheltered by non-disclosure and because of the generality of those interests. Recognising this, we favour, where feasible, as an integral part of the exemptions some other criterion representing the effect that disclosure of a document of that description would have (such as, 'disclosure would be contrary to the public interest').

**15.14** In passing, another feature of the exemptions of which we approve is that they are relatively few in number (though, as we later recommend, they could be fewer). We recognise nonetheless that our object of specificity can, in a sense,

be better achieved by extending the number of exemptions and narrowing the coverage of each. This would, however, present other dangers. The first is that not all categories of sensitive documents will be in mind at the time the list of exemptions is compiled; patchwork amendments may later be required, with the consequence that the original scheme of the exemptions may be eroded. Secondly, a longer list of specific exemptions, defining many categories of documents and protected interests, may be less comprehensible by members of the public, who may be less able to predict what types of documents are, or should be, available.

**15.15** Overall there are only three general features of the exemptions about which we are either sceptical or in disagreement. In the remainder of this chapter we deal with these features in turn: absence of appeal rights; the formulation of the public interest criterion; and the incorporation of common law standards. Although we otherwise accept the form of the exemptions used in the Bill, we do think that the wording of some of the exemptions should be altered and that other exemptions are unnecessary. Recommendations on these matters are contained in the remaining chapters of this Part of our Report.

**15.16** *Lack of appeal.* There was a time in the development of our legal system when it was thought that decisions of the executive government were beyond legal reproach and stood to be controlled by the political process. That thinking was disapproved in a decade of cases ranging through *Conway v. Rimmer*<sup>4</sup> (in relation to Crown privilege), *Ridge v. Baldwin*<sup>5</sup> (in relation to natural justice), *Padfield v. Minister for Agriculture*<sup>6</sup> (in relation to ultra vires), and *Anisminic v. Foreign Compensation Commission*<sup>7</sup> (in relation to jurisdictional error). The present understanding that all decisions are subject to judicial review has been cemented strongly in the High Court's recent decision in *Sankey v. Whitlam and Others*<sup>8</sup> (the *Sankey* case), which we have discussed in Chapter 5. The High Court in that case resisted strongly any suggestion that a court was less able than a minister to determine whether particular documents should be disclosed, even if those documents be of the status of Cabinet or State papers. We stated in Chapter 5 that, in our opinion, the judgment in the *Sankey* case has in part undercut the rationale for the system of conclusive certificates and assists the argument that an appeal should be allowed on the public interest criterion in clause 26.

**15.17** This decade of judicial liberalism is clearly in line with community attitudes (as expressed to this Committee), that questions of law and fact disputed between the government on the one hand and the community on the other should be resolved ultimately by an independent tribunal. Those provisions of the Bill which deny an appeal from the conclusive certificate of a minister or principal officer were said, by the *Sydney Morning Herald*, to be 'tailor-made for abuse'; the Uniting Church in Australia felt they denied basic justice by making the minister 'judge in his own cause'; Ranald MacDonald, Chairman of the International Press Institute thought they breached 'the democratic principle of final recourse to an independent judiciary'; and Professor Harry Whitmore echoed the criticism made in a number of submissions: 'To put it bluntly I am not prepared to trust Ministers with powers of this sort that can be used for their political advantage.'<sup>9</sup>

<sup>4</sup> [1968] 1 All E R 874.

<sup>5</sup> [1964] A C 40.

<sup>6</sup> [1968] A C 997.

<sup>7</sup> [1969] 2 A C 147.

<sup>8</sup> (1978) 53 ALJR 11.

<sup>9</sup> Respectively, *Sydney Morning Herald*, Submission no. 111; Uniting Church of Australia, Submission no. 114; Ranald MacDonald, Submission no. 84; Professor Harry Whitmore, Submission no. 1.

**15.18** Putting aside until later the special nature of defence, international relations and security documents,<sup>10</sup> the basic justification offered for the system of conclusive certificates in the Bill is that such a system is needed in Australia because of the special working relationships among Parliament, ministers and public servants.<sup>11</sup> Whatever be the contemporary reality of that relationship (a matter discussed in Chapter 4), we cannot see that there is any logical connection between it and a system of conclusive certificates. The most the relationship requires is that some documents recording communications of political significance among ministers and officials should be protected. It does not follow that it should be for ministers alone to decide conclusively what documents bear upon that relationship and, indeed, the Bill does not confine this power to sign a certificate to a minister but confers it also upon a principal officer. Notwithstanding the seniority of those officers and the close working relationship which they have with ministers in the context of a system where a neutral service is constitutionally distinct from the minister, the conferral of this power upon principal officers itself undercuts the argument that our constitutional system necessitates that ministers alone remain responsible for decisions on particular questions.

**15.19** In our opinion it is for reasons of administrative convenience, not constitutional purity, that the Bill prohibits appeal from a certificate. The nature of the certificates to be issued reinforces this conclusion. For instance, even though no request has been received, a certificate may be issued at the time a document is created when judgments are likely to be clouded as to its importance or sensitivity. The certificate may continue in force indefinitely, regardless of a change in circumstances that may alter the original reason for classifying the document as exempt. This judgment is one to be made solely by the person who signed the certificate. There is not even a duty to produce a certificate for inspection by the Tribunal; evidence of the existence of the certificate 'may be given by affidavit or otherwise and such evidence is admissible without production of the certificate' (clause 45).

**15.20** There is no justification for such a system tailored to the convenience of ministers and senior officers in a Freedom of Information Bill that purports to be enacted for the benefit of, and to confer rights of access upon, members of the public. This can only confirm the opinion of some critics that the Bill is dedicated to preserving the doctrine of executive autocracy.

**15.21** A similar critical opinion was expressed in many submissions about the other clause from which there is no right of appeal: clause 26. In relation thereto an applicant may appeal against a determination under clause 26 (1) (a) that a document contains opinion (or the like) but cannot appeal against a determination under clause 26 (1) (b) that it would be contrary to the public interest to disclose such a document. Typical of the criticisms of this restriction on appeal was that by Mr Andrew Bain:

It assumes that those who have a *self-interest* in non-disclosure are best able to determine whether or not the *public interest* requires that a document be withheld from the public. I do not believe that this is a reasonable assumption . . . [Public servants'] perception of the public interest is often based on notions of stability and of maintaining credibility for government institutions, rather than on a public interest in knowing how its taxes are actually spent and in what the bureaucracy is doing or planning to do.<sup>12</sup>

<sup>10</sup> Discussed in Chapter 16.

<sup>11</sup> See, for example, Australia, *Policy Proposals for Freedom of Information Legislation: Report of Interdepartmental Committee*, Parl. Paper 400/1976, Canberra 1977, Sections 4, 6, 7, 8 and 10.

<sup>12</sup> Submission no. 136 incorporated in *Transcript of Evidence*, p. 1812.

**15.22** We have indicated in Chapter 5 our opinion that it is essential to provide for review by the Tribunal where a determination has to be made on whether disclosure would be contrary to 'the public interest'. At this point we would also place our argument at a more general level, that the lack of appeal against a determination made pursuant to an exemption is inconsistent with the dual notions that the Bill confers rights upon the public and that the onus is upon the government to justify secrecy to some body other than itself. It is clearly desirable in any system of administrative justice that disputed questions of law or fact be subject to settlement by an adjudicative process. This ensures fairness, it produces better decisions on the part of the Executive, and it enhances acceptance of the law and respect for official decisions.

**15.23** *Public interest.* Two different formulas are used in the Bill for incorporating 'public interest' as a relevant criterion. The first is in clauses 23, 29 and 33. Clause 33 serves to illustrate this formula. It is in the following form:

33. A document is an exempt document if its disclosure under this Act would be contrary to the public interest by reason that it would be reasonably likely to have a substantial adverse effect on the national economy.

On the most liberal interpretation of those clauses, an agency would have to prove two things:

- (a) that a disclosure would adversely affect, say, the national economy; and
- (b) that it is against the public interest for this effect to occur.

We are not convinced, however, that even this limited analysis has to be undertaken. A literal interpretation of the clauses suggests that an agency has to do nothing more than determine that disclosure would adversely affect, say, the national economy. If so, it is presumed by the clause that this is of itself an effect that would be contrary to the public interest. On this view the statement of public interest in the clause is superfluous.<sup>13</sup>

**15.24** On any analysis it is quite clear that a much greater burden is cast upon an agency by the second of the formulas, used only in clause 26. Clause 26 provides:

26. (1) Subject to this section, a document is an exempt document if it is a document the disclosure of which under this Act—

- (a) would disclose matter in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of an agency or Minister or of the Government of the Commonwealth; and
- (b) would be contrary to the public interest.

Whether disclosure is contrary to the public interest has there to be considered as a separate test and the agency's finding on that matter has to be recorded in writing if a document is to be withheld (clause 26 (5)). If the clause 26 formulation were used, say in clause 33, the results would be different. An agency would then have to prove not only that it is against the public interest for the national economy to be adversely affected but that it is against the public interest in some more general sense for the document to be released. That is, the question of public interest would be raised at large, and it would be open to an applicant and the Tribunal (if an appeal were allowed on the

<sup>13</sup> The Law Institute of Victoria in its submission (no. 112, p. 9) argued also that the public interest criterion in clause 29 is meaningless.

public interest ground) to suggest some public interest in disclosure that could arguably override the public interest in protecting the economy. As the agency bears the burden of proof, it could, tactically at least, be forced to disprove affirmatively the suggestion made by the applicant or the Tribunal.

**15.25** For these reasons, and reasons already stated in Chapter 5, we favour the clause 26 formulation as the only one that indirectly confers rights on the public by raising at large the question of public interest. There is only one hypothetical disadvantage that we can foresee arising from this approach. The ground of public interest on which the agency relies will have to be stated in any notice informing an applicant of a denial (clause 26 (5)). The decision of the Administrative Appeals Tribunal in *re Palmer and Minister for the Capital Territory*<sup>14</sup> (concerning the form of statement that should be prepared by a department in supplying an applicant with the reasons for a decision pursuant to section 28 of the *Administrative Appeals Tribunal Act 1975*) is arguable of some precedential support for the view that a statement under clause 26 (5) of the Bill will have to be an informative and explanatory statement. On one view, the ground of public interest stated in a clause 26 (5) statement by the agency official preparing the statement will be the ground of public interest that the agency ultimately has to defend in any Tribunal proceedings instituted by the applicant. If the ground is stated inappropriately, or too narrowly or theoretically, the agency might find it difficult to establish its case in any Tribunal proceedings. We doubt however whether the Tribunal would ever confine the issues in such a way that relevant matters could not be raised in argument and one party thereby prejudiced. If there is any fear that the Tribunal will have no alternative but to limit its attention to the ground specified by the agency, the Bill could be amended simply to avert this. For instance, it could provide that before a matter comes on for hearing before the Tribunal the agency may serve upon the applicant a notice broadening the grounds of public interest stated in its earlier notice to the applicant.

**15.26** *Common law standards.* The exemptions should state precise, ascertainable criteria, that can be understood and challenged by members of the public. If an exemption incorporates by reference a common law standard, this objective is frustrated in a number of ways. Members of the public must go beyond the Bill to ascertain what documents are protected. They might even be required to obtain independent legal advice, since the common law itself often contains elusive standards that are not easily understood by non-lawyers. Further, the common law in some areas lays down elastic standards that vary in their application depending upon the circumstances of any individual case, one of which may be the interest of justice that no party to an action should be disadvantaged by restrictions on access to information. In a freedom of information context this factor could render the application of any exemption unpredictable and would, besides, detract from the principle that all applicants have equal rights of access regardless of their particular interest in or need for a document. Lastly, it may be difficult for an applicant to appeal to the Tribunal against the use of such an exemption without resort to legal advice and assistance. Such a practice would conflict with other principles stated elsewhere in our Report (see for instance Chapter 27).

**15.27** We recognise that the use of common law standards in some exemptions may be unavoidable, either because an exemption is designed to preserve the common law position as between the government and the community, or because

<sup>14</sup> (1978) 23 ALR 196.

the exemption should contain the many interests or variations that are contained in a common law standard and that it would be impracticable to draft an exemption recording this position. Nevertheless, we feel that the Bill makes resort to common law standards too often and to this extent we have recommended in subsequent chapters that exemptions defined in this manner either be dropped or reformulated.

## 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)'.<sup>1</sup> 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;<sup>2</sup> while the Department of Defence indicated that 65 000 new files are created annually, 20% of which are classified 'Confidential' or above.<sup>3</sup> 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*<sup>4</sup> 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'.<sup>5</sup> 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.<sup>6</sup>

**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).<sup>7</sup> Secondly, the classification system was itself reformed, initially in 1972 by President Nixon and lately in June 1978 by President Carter.<sup>8</sup>

<sup>1</sup> 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.

<sup>2</sup> *ibid.*, pp. 2379–80.

<sup>3</sup> Submission no. 153, incorporated in *Transcript of Evidence*, p. 1998.

<sup>4</sup> 410 US 73 (1973).

<sup>5</sup> *ibid.* (Slip Opinion p. 5).

<sup>6</sup> 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.

<sup>7</sup> 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.

<sup>8</sup> 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.<sup>9</sup>

**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.<sup>10</sup> 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

<sup>9</sup> See McMillan, cited footnote 7.

<sup>10</sup> 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*<sup>11</sup>:

- (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.<sup>12</sup>

**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

<sup>11</sup> See Appendix 3, p. 00.

<sup>12</sup> 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 Committee<sup>13</sup> 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.<sup>14</sup>

**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

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

<sup>14</sup> 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.<sup>15</sup> 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

<sup>15</sup> 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.<sup>16</sup>

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.'<sup>17</sup> 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

<sup>16</sup> See Appendix 3, p. 431.

<sup>17</sup> 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.<sup>18</sup>

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'.<sup>19</sup> 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.

<sup>18</sup> Executive Order 12065.

<sup>19</sup> *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.**

## 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

## **Cabinet and Executive Council documents (clauses 24 and 25)**

**18.1** Two issues arise in this chapter: What should be the definitions of 'Cabinet documents' (which are exempt under clause 24) and 'Executive Council documents' (which are exempt under clause 25); and what appeal rights should be available to an applicant who has been denied access to either type of document? In our discussion we shall refer, for convenience, to clause 24 and Cabinet documents only; however our remarks apply as well to Executive Council documents and to clause 25, which is phrased in identical terms to clause 24. Clause 24 provides:

24. (1) A document is an exempt document if it is—
- (a) a document that has been submitted to the Cabinet for its consideration or is proposed by a Minister to be so submitted;
  - (b) an official record of the Cabinet;
  - (c) a document that is a copy of, or of a part of, a document referred to in paragraph (a) or (b); or
  - (d) a document the disclosure of which would involve the disclosure of any deliberation or decision of the Cabinet, other than a document by which a decision of the Cabinet was officially published.
- (2) For the purposes of this Act, a certificate signed by the Secretary to the Department of the Prime Minister and Cabinet certifying that a document is one of a kind referred to in a paragraph of sub-section (1) establishes conclusively that it is an exempt document of that kind.
- (3) Where a document is a document referred to in paragraph (1) (d) by reason only of matter contained in a particular part or particular parts of the document, a certificate under sub-section (2) 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) Sub-section (1) does not apply to a document by reason of the fact that it was submitted to the Cabinet for its consideration or is proposed by a Minister to be so submitted if it was not brought into existence for the purpose of submission for consideration by the Cabinet.
- (5) A reference in this section to the Cabinet shall be read as including a reference to a committee of the Cabinet.

### **The scope of the exemption**

**18.2** Clause 24 (1) protects the Cabinet decision-making process, by protecting Cabinet submissions, decisions, and deliberations, and documents containing a copy of, or extract from, one of these categories. Some indication of the scope of the exemption is afforded by the submission from the Department of Prime Minister and Cabinet, in which the Department lists examples of documents that are considered to be protected by the exemption. The examples include Cabinet submissions (and documents prepared in support); Cabinet business lists; departmental notes containing details of proposals in Cabinet submissions and decisions; correspondence between ministers, between ministers and departments and between departments, which disclose Cabinet deliberations and decisions; and drafts of leg-

islation being prepared in accordance with Cabinet decisions.<sup>1</sup> Clearly this exemption is a potentially broad one, yet it is also a very important one (particularly from the point of view of a government). It is not surprising that none of the submissions we received really came to grips with the exemption and suggested detailed proposals for reform. At most we received a few suggestions that background papers and supporting material should not be protected, that Cabinet decisions should be available and that if Cabinet submissions are protected this should be pursuant to clause 26 which incorporates a public interest test. In general the criticisms echoed the sentiments of Gibbs ACJ in *Sankey v. Whitlam*, who counselled that 'State papers do not form a class, all the members of which must be treated alike.'<sup>2</sup>

**18.3** One belief which did appear to be shared in the submissions we received is that it is only Cabinet deliberations themselves, and the contributions by individual ministers, that need protection if we are to preserve Cabinet solidarity and to avoid any inhibition of the interchange of opinions with the Cabinet. According to this view, the public has a right to know the decisions that are made by Cabinet, and the content of the submissions and proposals that may or may not have provided a foundation for these decisions. It is argued that accountability of the Cabinet is not possible unless the public knows what has been decided, what ideas or alternatives have been rejected, and what arguments or research have been accepted as providing an adequate basis for a decision.

**18.4** We sympathise with this view. The main difficulty we foresee, however, is in differentiating legislatively between those Cabinet documents that are to be available and those that are not. For instance, we can see that some Cabinet submissions at least require a measure of protection, such as Cabinet submissions that are identified closely with, or are substantially prepared by, the proposing minister; and we can see also that disclosure of some Cabinet decisions should be deferred, even though the decision does not deal with matters that are exempt under the Bill—such as decisions on purely political matters, or on the appointee to a new statutory position. We are not convinced that the legislative distinction that would be necessary in a clause premised upon the arguments to which we have earlier referred can be adequately drafted.

**18.5** We do feel however that some amendment by the draftsman to clause 24 (1) is necessary to clarify the question of attachments to Cabinet submissions. Currently the exemption includes 'a document that has been submitted to the Cabinet for its consideration or is proposed by a Minister to be so submitted' (para. 24 (1) (a)). The only express limitation upon this provision is sub-clause (4) which provides that the earlier definition

does not apply to a document by reason of the fact that it was submitted to the Cabinet for its consideration or is proposed by a Minister to be so submitted if it was not brought into existence for the purpose of submission for consideration by the Cabinet.

**18.6** Notwithstanding this limitation many documents will possibly be included as Cabinet documents that should not be. For instance, it is possible that a minister

<sup>1</sup> Submission no. 159, incorporated in *Transcript of Evidence* pp. 2279–80. Items on this list are discussed in the *Transcript of Evidence* by Mr (now Sir) Geoffrey Yeend, Secretary, Department of Prime Minister and Cabinet—e.g. at pp. 2295, 2301ff.

<sup>2</sup> (1978) 53 ALJR 11 at pp. 22–3.

may order the compilation of a broad category of important statistics on Australian social or economic life, for consideration by Cabinet, in relation to a proposed policy. Again, Cabinet may require a major study, primarily of a factual nature, on the feasibility of a new policy or on the implications for Australia of a projected proposal. Reference can also be made to important reports prepared by such bodies as the Administrative Review Council on new or proposed legislation, which we understand are often submitted to a minister for consideration by the Cabinet. Of a comparable nature are the reports of consultants. Quite often these are prepared, at considerable cost to the public, to evaluate the efficiency of existing government programs. Each of these examples refers to a document that has been brought into existence for the purpose of submission to Cabinet. In each case the document, which is an important one of public interest, could be treated as conclusively exempt as a Cabinet document.

**18.7** We believe that clause 24 lays down an inappropriate criterion for determining what is exempt. Essentially, the clause is designed to protect the Cabinet decision-making process. Yet, in protecting anything that is submitted or proposed to be submitted to Cabinet, it goes far beyond what is reasonably necessary for this purpose. To disclose documents of the type to which we referred in the previous paragraph is to disclose only the raw material on which the Cabinet process operates; it is not necessarily to disclose anything about Cabinet process itself. Disclosure may conceivably damage the political fortunes of those who participate in the Cabinet process, but this is essentially distinct from, and should not be confused with, the Cabinet process itself. Only the latter should be protected by the exemption.

**18.8** When determining the criterion which should be used in clause 24, useful reference can be made to clause 26. That exemption (for internal working documents) seeks to differentiate between policy documents containing opinion, advice or recommendations (which are protected) and factual, statistical, scientific and technical reports or analyses (which are not protected). We think that a similar distinction can be drawn in clause 24, so that any document or report of that nature which was attached to a Cabinet submission would not be protected. Indeed, we think that an even broader distinction could be drawn than in clause 26. For instance, the draftsman could exclude from clause 24 a range of general categories of documents such as consultants' reports, reports from advisory committees, and so on. These reports would still be entitled to protection under clause 26, but a decision to this effect would have to satisfy the public interest criterion contained in that clause.

**18.9 Recommendation: Clauses 24 and 25 should be amended to limit the scope of the conclusive exemption for Cabinet documents to documents containing opinion, advice or recommendations of a policy nature, thereby excluding documents of a purely factual nature such as consultants' reports, reports from advisory committees and so on.**

### **Appeal rights**

**18.10** Cabinet and Executive Council documents attract conclusive protection—in the case of Cabinet documents, by a certificate signed by the Secretary to the Department of the Prime Minister and Cabinet certifying that the document is of the kind described in clause 24 (1); and in the case of Executive Council documents, by a certificate of the Secretary to the Council. In either

case the certificate states conclusively that the document is an exempt document of the kind described, and the Administrative Appeals Tribunal does not have power to review the decision by the Secretary to issue a certificate; nor does it have power to determine whether there are any grounds, or any proper grounds, which would justify the issuance of a certificate. Whether the document is innocuous in content, or whether it is so old that it is no longer sensitive in content, are questions which could not be examined by the Tribunal; they are decided by the Secretary to the relevant body.

**18.11** We have earlier indicated our opinion that conclusive certificates of this nature are unacceptable in a Freedom of Information Bill. We see no reason why an applicant should not be able to appeal on the question of whether a document is a Cabinet or Executive Council document as defined in either exemption. In most cases this is likely to be a simple question of fact: whether a document alleged to be of a certain description in fact meets that description. In determining this question it will not be necessary for the Tribunal to consider constitutional doctrines that go to the heart of the Cabinet process itself, such as Cabinet solidarity and the role and accountability of ministers. The Tribunal will be deciding a question of classification; clause 24 does not define Cabinet documents by reference to any criteria, the assessment of which requires some special insight (for instance, a criterion describing the effect that disclosure of a document would have upon Cabinet processes). In other words the Tribunal would have to reach a conclusion as to a fact, not an opinion. In so doing, the Tribunal will be deciding questions that are essentially similar to other questions that are routinely decided by the courts. Indeed, the Commonwealth Ombudsman commented in evidence to the Committee that 'from a legal point of view they are easy questions to answer.'<sup>3</sup> We agree; it is our opinion that the question of classification included in clauses 24 and 25 is one that the Tribunal is ideally suited to determine. At the same time, we recognise the apprehension a government would feel that, if a 'wrong' decision were made by the Tribunal, a Cabinet document might be disclosed with damaging results; this danger could be reduced by having such appeals heard by a single presidential (that is, legally qualified) member of the Tribunal.

**18.12 Recommendations:**

- (a) **There should be a right of appeal to the Administrative Appeals Tribunal under clauses 24 and 25 on the limited question whether a document is in fact a Cabinet or Executive Council document; and**
- (b) **The jurisdiction to hear such an appeal against a determination under clause 24 or 25 that a document is a Cabinet or Executive Council document should be exercised by a presidential (legally qualified) member of the Tribunal acting alone.**

**18.13** We have not gone further and recommended that the Tribunal should have a power similar to that proposed for it under clause 26, that is, the power to examine whether a Cabinet document should be disclosed in the public interest. Since the decision in *Sankey v. Whitlam*,<sup>4</sup> such a power is now exercisable by a court in a Crown privilege case. To confer a similar power upon the Tribunal would raise entirely new considerations. For instance, if such a power in the Tribunal existed, most Cabinet documents would be requested at one time or another. It is probably beyond the purview or experience of the Tribunal

<sup>3</sup> *Transcript of Evidence*, p. 1591.

<sup>4</sup> (1978) 53 ALJR 11.

to determine whether disclosure of, say, one or five per cent of the total sum of Cabinet documents would irretrievably damage the Cabinet process. In evidence to the Committee, the Secretary to the Department of the Prime Minister and Cabinet, Mr (now Sir) Geoffrey Yeend, expressed the view (in the context of a general discussion of the need for confidentiality of the Cabinet process) that one tampers with one part of the Cabinet process at the risk of the whole.<sup>5</sup> For the purposes of our analysis we accept the thrust of that argument, as it is not possible to forecast evidentially whether isolated disclosures may ultimately cause irretrievable damage to the Cabinet system. We can see, nonetheless, that there is a more fundamental issue that is perhaps ripe for consideration, as to whether the confidentiality of the Cabinet room should continue to be accorded the importance in our system that it always has. However fundamental questions of that nature are clearly beyond the scope of our present task.

**18.14** If, as we recommend, the protection for Cabinet attachments is narrowed and limited appeals to the Tribunal are allowed, there will be consequences for the system of classification of documents. We have recommended in Chapter 16 that national security classifications should not be used on Cabinet documents unless their contents justify such national security classifications. We envisage a distinctive marking for Cabinet documents (such as 'Cabinet Document') with supplementary national security classification on documents where appropriate. It would of course be important that this special marking of Cabinet documents should be confined to documents (including attachments) for which exemption could be claimed under clause 24 of the Bill.

**18.15** If, on an appeal for release of a document for which exemption had been claimed as a Cabinet document, the Tribunal decided that the document was not properly classified as a Cabinet document but found that the document in question bore a national security classification, the Tribunal would then consider this matter separately on the lines we have recommended in Chapter 16.

#### **18.16 Recommendations:**

- (a) **A special marking should be established to distinguish Cabinet documents and their attachments; and**
- (b) **The special 'Cabinet' marking should be used on attachments to Cabinet documents only where those attachments would be exempt from disclosure under clause 24 of the Bill.**

#### **Judicial power**

**18.17** The final matter we should raise concerns the constitutional validity of the amendment we have proposed to the powers of the Tribunal. The Tribunal is not a federal court created under section 71 of the Commonwealth Constitution, and consequently it cannot exercise the judicial power of the Commonwealth.<sup>6</sup> The Tribunal has in fact been constituted, and hitherto functions have been conferred upon it, in such a way that it is not regarded as being the repository of judicial power.<sup>7</sup> However when new functions are conferred upon it (for

<sup>5</sup> *Transcript of Evidence*, p. 2299.

<sup>6</sup> *R. v. Kirby; ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; affirmed by Privy Council (1957) 95 CLR 529.

<sup>7</sup> See, e.g. the comments of Brennan J in *re Adams and the Tax Agents Board* (1976) 12 ALR 239.

example, the function of determining whether Cabinet documents are exempt documents) the question arises afresh as to whether the discharge of these functions involves the exercise of judicial power.<sup>8</sup>

**18.18** The definition of judicial power is elusive, and has been the subject of a great deal of constitutional litigation. There have been at least four different criteria, or perhaps more accurately, indicia, identified in the cases as bearing upon the question. But the presence or absence of any one of them is not decisive: the question of whether a given function involves an exercise of judicial power is resolved, rather, by weighing and balancing the different criteria against each other in the particular context in issue.<sup>9</sup> The first criterion of judicial power is that it involves the making of authoritative and binding decisions, affecting the rights or liabilities of a person by reference to a pre-existing standard.<sup>10</sup> A second criterion of judicial power is that the function in question does not involve the exercise of inordinate discretion by the decision-maker, especially discretion which can be described as administrative or quasi-legislative in character.<sup>11</sup> A third criterion is the existence of a power in the body in question to enforce its own orders by way of punishment for disobedience of them.<sup>12</sup> The final criterion, and nowadays probably the most important (though by no means the simplest to articulate), is the legislative intent, as revealed by the whole context of the legislation, the history of the body in question and the 'trappings' of its operation.<sup>13</sup>

**18.19** Generally speaking, the decision-making powers vested in the Tribunal under the Freedom of Information Bill are of a very broad discretionary kind; it can range as widely as the original decision-maker, substituting its own decision for his on essentially the same criteria. It is true that the Tribunal, by virtue of clause 37 (3), does not have the same residual power to release exempt material as is vested in agency and ministerial decision-makers under clause 12, but this would not in itself appear to limit the discretion of the Tribunal to an extent that suggested the exercise of judicial rather than non-judicial power. Again, the Tribunal, albeit that its President is a judge, is not established with any of the trappings of a court; the terminology and procedures (especially in relation to the taking of evidence) are quite different from those normally associated with the exercise of judicial power. Nor is the Tribunal in the position of enforcing its own decisions in any way that would be directly suggestive of judicial power.

**18.20** On the other hand, we do acknowledge that it is arguable that if the Tribunal were to be vested, as we propose, with a power, arising out of an amended clause 24, to determine whether a particular document was or was not properly described as a Cabinet document, then this would be a power of a kind which is commonly exercised by the courts. It would involve only the minimal exercise of discretion, no reference to matters of a non-judicial character.

<sup>8</sup> In evidence to the Committee Dr G. D. S. Taylor, Director of Research, Administrative Review Council, queried whether the Tribunal's function under the Freedom of Information Bill is, in respect of any exemption, an exercise of judicial power—see *Transcript of Evidence*, pp. 1670-1674.

<sup>9</sup> See generally C. Howard, *Australian Federal Constitution Law*, 2nd ed. (1972), Law Book Company, Sydney, pp. 154-189.

<sup>10</sup> *R. v. Trade Practices Tribunal; ex-parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, esp. per Kitto J.

<sup>11</sup> See, e.g., *Mikasa (N.S.W.) Pty Ltd v. Festival Stores* (1972) 127 CLR 617.

<sup>12</sup> See, e.g. *Tasmanian Breweries*, cited footnote 10, esp. per Owen and Walsh JJ.

<sup>13</sup> See, e.g. *R. v. Davison* (1954) 90 CLR 353 and *Cominos v. Cominos* (1972) 127 CLR 588.

and the determination of a question by the application of a criterion or criteria reasonably precise in nature. But the question to be resolved is not so much whether the power in question could be regarded as judicial, as whether it *must* be regarded as non-judicial. On this point we venture to suggest that the answer would be in the negative. It is acknowledged over and over again in the cases that there are many kinds of decision-making power which are in practice, and can be in principle, exercised by both judicial and non-judicial bodies, and that the demarcation lines are not sharp, distinct or mutually exclusive. Given the present character of the Tribunal as overwhelmingly non-judicial in its operation and functions, and that the great majority of its proposed new functions are equally unambiguously non-judicial, we do not see that there is any serious risk of constitutional challenge arising out of the conferring on it of one or two additional functions which might be, when looked at individually, consistent with the exercise of a judicial function, but are equally compatible with the exercise of non-judicial power.

## Internal working documents (clause 26)

### Introduction

**19.1** It is clear from the submissions and evidence to the Committee that members of the public and agencies alike regard clause 26, referred to in the marginal note as relating to 'internal working documents', as the most important exemption in the Bill. It is in the following terms:

26. (1) Subject to this section, a document is an exempt document if it is a document the disclosure of which under this Act—
- (a) would disclose matter in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of an agency or Minister or of the Government of the Commonwealth; and
  - (b) would be contrary to the public interest.
- (2) In the case of a document of the kind referred to in sub-section 7 (1), the matter referred to in paragraph (1) (a) of this section does not include matter that is used or to be used for the purpose of the making of decisions or recommendations referred to in sub-section 7 (1).
- (3) This section does not apply to a document by reason only of purely factual material contained in the document.
- (4) This section does not apply to—
- (a) reports (including reports concerning the results of studies, surveys or tests) of scientific or technical experts, whether employed within an agency or not, including reports expressing the opinions of such experts on scientific or technical matters;
  - (b) reports of a prescribed body or organization established within an agency; or
  - (c) the record of, or a formal statement of the reasons for, a final decision given in the exercise of a power or of an adjudicative function.
- (5) Where a decision is made under Part III that an applicant is not entitled to access to a document by reason of the application of this section, the notice under section 22 shall state the ground of public interest on which the decision is based.

Agencies contend, in short, that a broad exemption protecting deliberative processes is essential if agencies are to perform competently and efficiently the tasks assigned to them. Most non-government witnesses have contended, on the other hand, that their interest in scrutinising how and whether agencies perform their functions can be frustrated by this exemption.

**19.2** The comparable exemption in the United States (which is quoted in paragraph 19.22 below) has also, to a similar extent, been a fulcrum for debate concerning the Freedom of Information Act. The first draft of the Bill introduced in the United States Congress contained no exemption to protect internal policy deliberations and one was inserted only after agency witnesses insisted that it was necessary. The Report on the Bill prepared by the House of Representatives explained the rationale for including the exemption:

Agency witnesses argued that a full and frank exchange of opinions would be impossible if all communications were made public. They contended, and with merit, that advice from staff assistants and the exchange of ideas among agency personnel would not be completely frank if they were forced to 'operate in a fish-bowl'. Moreover, a Government agency

cannot always operate effectively if it is required to disclose documents or information which it has received or generated before it completes the process of awarding a contract or issuing an order, decision or regulation.<sup>1</sup>

Critics in the United States have claimed that the exemption goes far beyond protecting these aspects of the policy-making process. Ralph Nader, for instance, claimed in 1975 that agencies were intent on construing nearly every document as one which merited protection under the exemption.<sup>2</sup> One court has also described it as an exemption which 'harbours a vast potential for frustration of the purposes of the Freedom of Information Act when employed by an agency intent on shrouding its operations in a veil of secrecy'.<sup>3</sup> Statistics on the operation of the Act also confirm the popularity of the exemption—for instance, in 1975 it was invoked on 21% of occasions when documents were withheld and it was in issue in 49% of the 292 cases heard at that date.<sup>4</sup>

**19.3** We can readily foresee the problems that this exemption will also cause in Australia. It is an exemption which potentially applies to a large proportion of the documents of an agency—indeed, many critics of the Bill (including those who are presently, or who have formerly been, in government employment) claim that virtually any document satisfies the criteria listed in the exemption. It is also an exemption which, we acknowledge, is difficult to draft. The main reason for this difficulty is that the exemption is designed to protect very many interests, and it is textually challenging to isolate and reproduce in the exemption all the relevant features which those separate interests have in common.

#### **Arguments for protecting internal working documents**

**19.4** A useful summary of the interests to be protected by clause 26 was provided in the submission from the Public Service Board (which termed clause 26 a 'crucial exemption').<sup>5</sup> In the first place, the Board felt that if public servants believed they may be writing, in effect, for publication, they would tend to be careful and less straightforward and frank in internal written communication. This could have two disadvantages. First, advice papers may be prepared more slowly, whereas there is often a need for these to be prepared quickly and in a comparatively informal manner. Slower, more cumbersome decision making was a result anticipated by many departments (such as Defence, Home Affairs and Finance) if access to internal documents is routine.<sup>6</sup> Secondly, in deeper policy assessments there may be a reluctance to write critical comments, but to use instead the guarded language that is common in public reports. This reduction in frankness would, in the Board's view, risk weakening policy formulation and advice to government. One example put to us in evidence by the Chairman of the Board (Mr R. W. Cole) is that frank comments critical of a policy known to be identified with a particular officer would not be written if publicity were expected.<sup>7</sup>

<sup>1</sup> United States Congress, House of Representatives Committee on Government Operations, *89th Clarifying and Protecting the Right of the Public to Information: Report to accompany S. 1160*, Congress, 2nd Sess., 1966, H. Rept. 1497.

<sup>2</sup> Speech to the United States Federal Bar Association's Conference on 'Openness in Government' in Washington, D.C., 22.5.75.

<sup>3</sup> *Deering Milliken, Inc. v. Nash*, 37 Ad. L. 2d, 933, 949 (D.S.C. 1975).

<sup>4</sup> References in J. McMillan, 'Freedom of Information in Australia: Issue Closed' *Federal Law Review* 8, September, 1977, pp. 379-408 f/n 85.

<sup>5</sup> Submission no. 47, incorporated in *Transcript of Evidence* p. 839, pp. 885-901.

<sup>6</sup> Respectively Submission nos. 153, 73 and 139.

<sup>7</sup> *Transcript of Evidence*, pp. 887-888. See also the evidence of Mr J. Stone, Secretary to the Treasury, *Transcript of Evidence*, pp. 1713 ff.

**19.5** The Board also argued that publicity of internal papers could result in individual public servants becoming publicly identified with particular points of view. Those officers could thereby be drawn into public, and possibly political, debate about the views expressed. That would seriously erode the concept of a neutral public service and almost certainly would increase pressures for governments to take responsibility for the appointment of persons to senior policy positions in the service.<sup>8</sup> It is clear too that the Government subscribes to this view and eschews involvement of public servants in public debate. The guidelines recently published by the Government (but not yet considered by the Parliament) as to the appearance of public servants before parliamentary committees, draw the traditional distinction that witnesses may explain government policy but must not comment thereon or defend it.<sup>9</sup>

**19.6** In the third place, the Board in a submission which we have discussed in Chapter 4 pointed out that greater publicity of internal deliberative materials could, on the other hand, give added power to public servants to an extent that is inconsistent with the role and authority of ministers under our system.<sup>10</sup> Public servants could exercise a coercive influence upon ministers by creating material to be placed on the public record which may subsequently indicate that a minister had acted contrary to advice which he had received. If public servants were put in a position where they could be quoted against their minister, this too could add to pressures for a more politicised public service. In short, the publicity could endanger the public service's role of giving to ministers advice that is believed right rather than what the minister wants to hear.

**19.7** Lastly, the likelihood was also argued that more sensitive matters would come to be handled in oral discussion rather than committed to paper. One example given in evidence was that ministers would not be interested in receiving papers setting out and commenting frankly on various policy options, if the papers were to be available for access. Government by informal, oral mechanisms would be conducive to neither efficiency nor responsibility. Another side effect of a lack of documentation (as the Australia Council pointed out) could be a restriction on the ability of the Ombudsman to investigate complaints.<sup>11</sup>

**19.8** Variants of the foregoing arguments were argued in other submissions and by other witnesses. Some stressed that the existing administrative system is one in which the function of the public service is, in part, to provide policy advice to ministers. Disclosure of documents forming part of that process would be subversive of that system and inevitably change the nature of the working relationship between ministers and officials. Preservation of that relationship as it is at present is seen by some to be a desirable end in itself. This argument was advanced in particular by Mr J. Stone, Secretary to the Treasury, and Mr (now Sir) Geoffrey Yeend, Secretary to the Department of the Prime Minister and Cabinet.<sup>12</sup>

**19.9** Others referred to practical or calculable problems that disclosure of internal working documents could cause. Usually these concerned damage to special relations with people outside agencies. For instance, the Australia Council

<sup>8</sup> See also on this point the evidence of Mr L. Curtis, *Transcript of Evidence*, pp. 23–24.

<sup>9</sup> Statement by the Prime Minister (undated): 'Proposed guidelines for official witnesses appearing before parliamentary committees', para. 10.

<sup>10</sup> Submission no. 47, incorporated in *Transcript of Evidence*, p. 840.

<sup>11</sup> *Transcript of Evidence*, p. 693.

<sup>12</sup> As to Mr Stone see e.g. *Transcript of Evidence*, pp. 1697, 1724–6; as to Sir Geoffrey Yeend, see e.g. *Transcript of Evidence*, pp. 2305–2306, 2309.

felt that if its decisions on applications for grants of financial assistance were available to those affected, 'the very careful network of professional, impartial and balanced assessment that has been built up in the Council structure could be destroyed'.<sup>13</sup> They referred to other mechanisms, such as the Ombudsman and an appeal structure, that ensured adequate fairness for applicants. The ABC made a similar point, that frankness could be affected in the qualified opinions it receives assessing the work of writers, actors, music artists and so on.<sup>14</sup> Lastly, Mr L. J. Curtis, First Assistant Secretary of the Attorney-General's Department, gave an example of an instance where a public servant who is responsible for advising the minister in a particular area may need to be acceptable to a number of parties who have competing interests, and confidentiality of the official's views may be the only way of preserving the relationship of frankness between the official and all parties.<sup>15</sup> This consideration is particularly important in areas where government exercises a regulatory function.

### **Arguments favouring greater openness**

**19.10** Many of these opinions or fears (particularly those summarised in the submission from the Public Service Board), stated as they often have been in an unqualified form, appear to us to be a considerable oversimplification of the policy-making process and of human behaviour itself. If the points were to stand unchallenged, they would clearly sustain an extensive blanket being applied to the deliberative processes of government, particularly as regards matters which are politically important or whose release could prove embarrassing. We regret that, in some of the submissions and evidence from departments, no attempt was made to qualify or recognise the limitations which must be placed upon arguments justifying confidentiality of the deliberative processes of government, and we would hope that greater recognition of these limitations will be displayed in the administration of the Bill when enacted.

**19.11** We recognise, for instance, that the prospect of disclosure can cause individuals to be less candid and frank; but the real issue is whether, on balance, the efficiency and the output of deliberative processes is affected. There was a reluctance by departmental witnesses appearing before us to contend that, although the candour of advice rendered by them might be tempered or expressed circumspectly, the advice itself would be materially altered by this stylistic alteration. Even though on some occasions this may occur, while on others the advice will be prepared more slowly and assiduously, it must be recognised that there may be offsetting advantages. Some reports from the United States are to the effect that internal memorandums and reports are now better prepared, more thoroughly researched, and that government has benefited as a result. It is worth comparing also the comments in this respect from Mr Orme, the Executive Member of the N.S.W. Privacy Committee, which has had relevant experience concerning the impact of disclosure on the preparation of advice:

File keepers are divided into two categories. There is the person who does his homework well, prepares his material in a conscientious manner and tries to make a fair decision. Almost without exception he is perfectly happy to be open because he wants to correct his errors. The difficult person is the one who says the public does not understand and does not realise why he has to do this. Rarely is he hiding something which the public does not understand. He is usually hiding something which the public does understand and to which, rightly it would object. What he is trying to hide is the incompetent or sloppy

<sup>13</sup> *Transcript of Evidence*, p. 696.

<sup>14</sup> *Transcript of Evidence*, pp. 1274-5.

<sup>15</sup> *Transcript of Evidence*, p. 29.

manner in which he has gone about doing his work and the unfairness of his decision . . . It is popularly believed that if you have to give your opinion openly it will become wishy-washy and insignificant. That has not been our experience. As we have explained in the submission, the New South Wales Public Service has done it for eight years, [in relation to access by staff to their own files]. It has found that the quality of the reports has improved.<sup>16</sup>

**19.12** We feel also that the departmental opinions overstate the disadvantageous effects which disclosure would have. The power, for instance, which it would afford public servants to pressure ministers or force them to answer publicly, is little greater than the power which can be achieved *de facto* by established techniques, such as the 'leak'. On a similar point, the views of individual public servants are becoming well known, through means such as leaks, but also by legitimate means like the growing participation of public servants in public and scholarly discussions. Our own observations, generally and from the hearings, are that this has not affected either the nature of advice to ministers or the way in which it is styled, nor is there any noticeable drift towards a patronage system in senior appointments. Here again the departments, in our opinion, overstated the ease or freedom with which ministers would choose a patronage system in disregard of administrative style and principles which are deeply rooted in Australian social and administrative values. The argument, to our mind, was well rebutted by Mr Paul Munro:

There are a lot of assumptions about the nature of advice. Independent, balanced advice is not so easily obtained that you will tend to buy it according to the colour of the political adviser's persuasions. Some of the advice contained in internal working documents would only become available after the policy issue was decided. The debate is not about access to information before the decision is taken; it is about final documents. Given that point the quality of advice will be self-evident from what is contained in it. I cannot see that a government would want to get rid of people who gave advice in the correct direction. As well, many of the matters are going to be indifferent to partisan policies. If the advice is right that is a strong argument for retaining the officer in the system which produces that advice. If the advice is consistently wrong certainly it will lead to a desire to change. Whether to get in the people who walk the same creek bed as yourself will depend very much on the wisdom of the people who change the organisation. I do not think the system of administration and the quality of the Second Division is so fragile that it is going to be disturbed by that sort of thing.<sup>17</sup>

**19.13** Our discussion so far is in rebuttal of the arguments presented to us. In many submissions the alternative case was put quite forcefully: that Australian policy making in fact suffers because of the degree of secrecy that presently prevails. It is pointed out, for instance, that under a secretive system bad decisions can be made; decisions are made which are based on inadequate and fallacious research; and questionable assumptions or values may pervade the decision-making process. One organisation which provided useful examples was the Australian Council of Social Service. They pointed out, for example, that

ACOSS obtained access to a document prepared with the then Social Welfare Commission, apparently for use in pre-Budget consideration of the ACOSS grant. Not only was it superficial and subjective, it also had gross inaccuracies and errors in fact (though not all of these were antagonistic to ACOSS), however what it did mean was that the Minister would be likely to receive uninformed and irrelevant information much of which could readily be checked by a simple phone call. There was no pressure on the public servant to worry about whether or not his facts were correct as no-one would be likely to find out.<sup>18</sup>

<sup>16</sup> *Transcript of Evidence*, pp. 499, 501.

<sup>17</sup> *Transcript of Evidence*, p. 617.

<sup>18</sup> Submission no. 48 incorporated in *Transcript of Evidence*, p. 443.

**19.14** It should be readily apparent that some degree of public participation in policy making is desirable. This is shown in part by events of the past decade, from which it appears that many if not most of the major shifts in Australian social policies have originated outside the government administration. Policies on health care, education, censorship, Aboriginal rights, child welfare, prison reform, broadcasting, discrimination, sexual equality, libraries, tenants' rights, worker participation, industrial safety and environmental protection have largely been precipitated by agitation on the part of groups that are formally excluded from the public service decision-making process. (The fact that the agitator has sometimes been a political party in Opposition does not disguise the fact that the initiative has not come from the public service—the largest repository of advice and research for a government.) Community groups and individuals claim that their contribution to Australian social, political and economic development will be even greater if they are given access to the facts, results, analyses, ideas and evidence which is daily originated by government departments. In many cases it is conceded that public access may inhibit (at least initially) the candour of internal communications, and that decisions may be made more slowly. However, it is contended that the better results which will flow from increased public participation will more than compensate for this loss in efficiency.

#### **Drafting of clause 26**

**19.15** Sharply differing arguments have thus been presented to us as to where the dividing line between openness and disclosure should be placed in respect of internal working documents. It is not necessary for us to resolve that dispute, or to allocate priority to one interest or argument as against another. Our main concern (as we have expressed elsewhere in relation to exemptions) is to ensure that the exemption permits *all* relevant interests (but only relevant interests) to be considered and weighed one against another when a question concerning the exemption arises. We have concluded, reluctantly, that the exemption has the potential to meet this test, due to the inclusion of paragraph 26 (1)(b), providing that a document of the type referred to in 26 (1)(a) can be withheld only if disclosure 'would be contrary to the public interest'. We consider this criterion further in paragraph 19.23 and following.

**19.16** We say that we approve of this exemption reluctantly, as we recognise that the exemption can apply to a vast range of documents. Although the marginal note refers to 'internal working documents' and we have headed the chapter in the same way, the exemption in fact covers a much wider category of documents. On the one hand, paragraph 26 (1)(a) employs some broad, perhaps vague, phraseology—it protects documents which contain matter 'in the nature of, or relating to, opinion, advice or recommendation . . . or consultation or deliberation'. Moreover, this advice and so forth need not have been prepared or obtained from an officer in the public service, but can come from outside as well. Potentially, therefore, the clause can protect all consultants' reports, all ideas received from advisory committees with a non-public service membership, indeed any view put forward to government by an individual, community group, or lobby or pressure organisation. There is also the possibility that any documents initially withheld pursuant to the clause might retain that exempt status for thirty years (see Chapter 33 on the Archives Bill).

**19.17** There are, on the other hand, some features of clause 26 which temper this breadth and generality. We have already referred to the public interest criterion. Additionally, various categories of documents are excluded from the

coverage of the exemption. Clause 26 (4) excludes the reports of scientific and technical experts, the reports of prescribed bodies (the Explanatory Memorandum to the Bill comments that bodies such as the Bureau of Agricultural Economics, and the Bureau of Mineral Resources, may be considered for prescription under this provision),<sup>19</sup> and the record of, or a formal statement of the reasons for, a final decision given in the exercise of a power or of an adjudicative function. This latter provision could be of some benefit or importance to the public as shown by the decision of the Administrative Appeals Tribunal in *re Palmer and Minister for the Capital Territory*.<sup>20</sup> Lastly, clause 26 (3) contracts the breadth otherwise existing in the clause by providing that the section 'does not apply to a document by reason only of purely factual material contained in the document'.

**19.18** Some reform to the wording of paragraph 26 (1) (a) would clearly be desirable, although few precise proposals have been made as to how this should be done. The main possibility suggested to us was to confine the protection of the clause to advice, opinion and recommendation received from within the public service, and not from outside it. We have not adopted that proposal, in part because we recognise that quite often consultants and advisory committees are integrated into the decision-making process as though they were employed in a department; and further we have recommended that the clause which would otherwise provide protection for some submissions received from outside the public service (clause 34), be deleted.

**19.19** Another possible approach is one based upon that in the Minority Report Bill published by the Coombs Royal Commission on Australian Government Administration. The exemption in that Bill was similar to clause 26, yet it was qualified by a list of sixteen categories of documents which would be excluded from the protection of the exemption unless premature disclosure of any of the documents would unreasonably impede the making of a decision or the implementation of a policy.<sup>21</sup> Included in the list were documents containing mainly factual material, statistical surveys, cost/benefit analyses, feasibility studies, efficiency audits, reports from advisory committees and internal and inter-departmental committees and task forces, final proposals for the preparation of subordinate legislation, the internal law of agencies and reasons given for the exercise of a statutory discretion. This approach is essentially similar to that in clause 26 (4) of the present Bill, with the exception that many more items were listed and thus excluded from the exemption. We are not prepared at this stage to experiment further with that approach, partly because of the difficulty of defining categories of documents which should be excluded from the exemption, partly because we feel that this approach should be considered more seriously when case law under the exemption has developed, and partly because (as we have already foreshadowed) we are satisfied that the public interest criterion in clause 26 (1) (b) provides a necessary balance in the exemption.

**19.20** The only textual amendment we do propose is to clause 26 (3), which which appears to us to be confusingly drafted. The sub-clause, it would appear, is designed to ensure that factual portions of documents are disclosed, but instead infers that factual material is not deemed to be matter (such as advice or opinions) protected by paragraph 26 (1) (a). It is likely that this would be the

<sup>19</sup> *Explanatory Memorandum to the Freedom of Information Bill 1978*, para. 97.

<sup>20</sup> *Re Palmer and Minister for Capital Territory*, (1978) 23 ALR 196.

<sup>21</sup> Royal Commission on Australian Government Administration, *Appendix Volume Two*, pp. 43, 44, 117-130.

case even without 26 (3), and that it in fact adds nothing to clause 26. Nevertheless, we can see that it is useful to have a provision stating expressly what is not included within the scope of an exemption, and that sub-clause 26 (3) could be transformed into such a provision. Sub-clause 26 (4) in fact performs this role, and it would appear convenient to include the terms of sub-clause 26 (3) within it.

**19.21 Recommendations:**

- (a) **Sub-clause 26 (1) should be left unchanged.**
- (b) **The wording of clause 26 (3) should be clarified so as to provide that clause 26 does not apply to documents, or portion thereof containing purely factual material.**

**19.22** Since we have not proposed any amendment to the broad phraseology of paragraph 26 (1)(a), we think it relevant to point out that nearly every other country that has enacted or proposed freedom of information legislation has defined the internal working documents exemption in a fashion similar to that of clause 26. Different approaches are used mainly in the United States and in Sweden, but in our opinion neither of those approaches is appropriate to our Bill. In the United States the exemption is defined by reference to the government's common law privilege from discovery in litigation: it protects 'inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency'. We have indicated in Chapter 23 that we do not regard the comparable common law privilege in Australia as providing a satisfactory basis on which to fashion an exemption. In Sweden there is no exemption for internal working documents as such. Instead, the Act does not apply to documents physically possessed by an agency, but only to those which have been sent to another agency or have been placed on the public record as recording a decision on a particular matter. In this way some protection is given to drafts of papers and to the normal memoranda which flow from one official to another in the course of policy making.

**Paragraph 26 (1) (b)—The public interest criterion**

**19.23** We are prepared to accept, as we have earlier said, that the requirement in paragraph 26 (1)(b), that disclosure be contrary to the public interest, provides an acceptable mechanism for limiting the exemption and ensuring that all relevant interests are considered when the application of the exemption is in issue. We hope that public servants will attempt faithfully to discern and to give consideration and appropriate weight to all matters which should qualify as public interest considerations. However, to our mind this by itself is not enough. It is of the nature of a public interest criterion (which, as Mr Curtis of the Attorney-General's Department indicated, is a pivot allowing competing interests in publicity and disclosure to be balanced)<sup>22</sup> that an impartial tribunal have jurisdiction ultimately to rule on the interpretation and application of the criterion. Clause 37 (4) of the Bill denies this jurisdiction to the Administrative Appeals Tribunal, and provides that its powers 'do not extend to reviewing a decision of an agency or Minister, for the purposes of sub-section 26 (1), that the disclosure of a document would be contrary to the public interest'.

**19.24** 'Public interest' is, as we indicated in Chapters 5 and 15, not a phrase which should be applied conclusively by a person who has administrative experience only, but one which should be susceptible to application in any individual

<sup>22</sup> *Transcript of Evidence*, pp. 53-54.

case by an adjudicator, skilled at weighing and balancing competing interests, who has had presented to him differing views as to what result the public interest requires in any given case. It is naive to expect that a phrase such as 'public interest' can be administered properly by public servants, who clearly have an interest in non-disclosure. Equally it would be folly to confide this task to a member of the public who was claiming that more information should be disclosed. Both may have sharply contrasting views as to what result the public interest requires, both have interests which are supposed to be protected by the legislation, and it would be patently unfair if one alone were given the right to override the views of the other.

**19.25** We believe that the danger of committing the power of final decision on the application of the clause to the public service in fact surfaced during the hearings held by this Committee. We specifically asked a number of departmental witnesses to outline the public interest considerations dictating against the disclosure of particular documents. Invariably the witnesses formulated the public interest in terms of confidentiality. The competing interest in publicity, that in our view has to be considered under 26 (1)(b), was never articulated. We fear that the same will routinely occur in the administration of the legislation unless there is a supervisory role for, and body of precedent available from, the Administrative Appeals Tribunal. We can also perceive a need for the Tribunal to be able to review the nature of the public interest considerations which were articulated to us. They varied: some suggested by the Public Service Board for application in individual cases were 'preservation of the non-political nature of the Public Service', or that disclosure could 'reveal political issues'.<sup>23</sup> The ABC indicated it would rely on 'candour in internal communications'<sup>24</sup> and the Secretary to the Treasury thought it relevant if disclosure would breach the relationship between ministers and departments.<sup>25</sup> We think it necessary that the Tribunal be empowered to decide not only the weight, if any, which may be given to considerations such as these, but also whether they are in fact ascertainable public interest considerations. For instance, one must seriously question after *Sankey v. Whillam* whether candour in internal communications can hereafter be relied upon as a public interest consideration.<sup>26</sup>

**19.26** In fact, the denial of jurisdiction to the Tribunal in clause 37 (4) is somewhat illogical, since there is no denial in general of review of decisions under clause 26. It was conceded by Mr Curtis that judicial review of a decision under paragraph 26 (1)(b) might well be sought, on the basis that the particular ground of public interest relied upon was not a ground of public interest known to the law.<sup>27</sup> Further, Dr Taylor, Director of Research of the Administrative Review Council, pointed out that the Ombudsman could have jurisdiction pursuant to his general jurisdiction to investigate whether a person properly informed would conclude that the public interest would in fact be prejudiced by release of a document. Jurisdiction may also exist pursuant to section 11 of the *Ombudsman Act* 1976 for the Ombudsman to seek an advisory opinion from the Tribunal on the interpretation of paragraph 26 (1)(b).<sup>28</sup> Indeed, the Ombudsman himself submitted to us that he should be given express power under the Freedom of Information Bill to rule upon decisions under paragraph 26 (1)(b).

<sup>23</sup> *Transcript of Evidence*, p. 891 and see generally, pp. 898-901.

<sup>24</sup> *Transcript of Evidence*, p. 1287.

<sup>25</sup> *Transcript of Evidence*, pp. 1696, 1704.

<sup>26</sup> See Chapter 5 *supra*.

<sup>27</sup> *Transcript of Evidence*, pp. 54-59.

<sup>28</sup> *Transcript of Evidence*, pp. 1643-4.

He put to us that he was accustomed to weighing private against public interests, and that the function in relation to this Bill is one that he 'could comfortably handle'.<sup>29</sup> These matters confirm our view that there is no magic in decisions under 26 (1)(b) and that the Tribunal, which after all is the Commonwealth body established to hear appeals on the merits against Commonwealth decisions, should not be the only body effectively deprived of a role in relation to 26 (1)(b).

**19.27** Another reason why we feel strongly that an appeal should be permitted on the public interest criterion is to allow for a natural growth in the ideas about the way in which government should relate to the community. The public interest in any situation will not require a fixed result. The result will vary from time to time, depending upon many factors—we would refer again to Lord Hailsham's famous dictum that 'the categories of public interest are not closed'.<sup>30</sup> The history of the doctrine of Crown privilege in courts of law, culminating in *Sankey v. Whittam*,<sup>31</sup> indicates clearly the stages that this development of the concept of public interest may go through. In our opinion, the need for change is best perceived by those who stand outside the system, can look at it objectively, and can weigh against the practices which may prevail therein, the practices which elsewhere prevail and the contemporary ideas relating to those practices. Public servants are not in this sense separate from the system of disclosure of documents. Only a neutral tribunal is sufficiently separate and in an adequate position to fashion changes in the doctrine of public interest as required.

**19.28** We are also persuaded of the need for an appeal on the public interest ground after reviewing the shifts in judicial emphasis in the interpretation of the comparable exemption which has occurred in the United States. Because the exemption in the United States Act is defined by reference to a common law privilege, the courts have been able, in effect, to interpret the exemption on a functional or pragmatic basis and thus fashion the exemption to meet the changing requirements of the government on the one hand and the community on the other. For instance, in the early years of interpreting the Act, the courts emphasised that the exemption differentiated between material reflecting deliberative or policy-making processes and purely factual, investigative matter.<sup>32</sup> This fact-opinion dichotomy still remains; however it is no longer viewed as the underlying rationale of the exemption. In later cases it became clear that some documents which were factual in nature may need to be protected (for instance, evidence such as witnesses' statements compiled by agency staff). Hence the courts placed emphasis upon protecting not deliberative *materials*, but the deliberative *processes* of government. Another distinction that arose thereafter was between pre-decisional documents, which are protected, and post-decisional documents which embody or explain a decision, which are not protected. For instance, it was held that the exemption did not protect material that is treated as justification for a decision or pre-decisional recommendations which have been expressly incorporated by reference in a final decision. Even this distinction was later qualified when a question arose as to whether an agency could withhold reports which evaluated agencies' personnel management

<sup>29</sup> *Transcript of Evidence*, p. 1598.

<sup>30</sup> *D v National Society for the Prevention of Cruelty to Children* [1977] 2 WLR 201 at pp. 218–19.

<sup>31</sup> (1978) 53 ALJR 11.

<sup>32</sup> This summary of the United States exemption is condensed from a report dated 28 August 1978, prepared by the Congressional Research Service of the Library of Congress for the House Government Information and Individual Rights Sub-Committee (Committee Document 51).

programs. The court in that case held that documents are not protected merely because they are pre-decisional; they must also be part of the deliberative process by which a decision is made. On the facts of that case it was held that the evaluative reports were 'final objective analyses of agency performance under existing policy' and that they merely provided 'the raw data upon which decisions can be made; they are not themselves a part of the decisional process'.<sup>33</sup> It was thus ordered that they had to be released.

**19.29** To our mind what this survey shows is the development and change in emphasis that must necessarily occur in an exemption which is as broad as clause 26. It is never possible to define such an exemption solely in terms of the types of documents that need protection, or the stages in the administrative process that need to be safeguarded. However, we are not assured that a similar development could occur under clause 26 because an appeal is only allowed upon that part of the exemption which defines the types of documents that need to be protected. If an appeal is not allowed on the public interest criterion, it is likely that we will have an exemption whose meaning and application are static, and that is eventually administered by reference to fixed, limited and inappropriate criteria.

**19.30 Recommendation: Clause 37 (4) of the Bill should be deleted, in order that the powers of the Administrative Appeals Tribunal extend to reviewing a decision of an agency or minister that the disclosure of a document would be contrary to the public interest.**

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<sup>33</sup> *Vaughn v. Rosen* 523 F. 2d. 1136 at 1145. (D.C. Cir. 1975)

## Law enforcement documents (clause 27)

**20.1** Clause 27 exempts documents which would prejudice the proper administration of the law including the investigation, enforcement and adjudication of a breach or possible breach of the law. The clause is directed to protecting law enforcement procedures and provides:

27. A document is an exempt document if its disclosure under this Act would, or would be reasonably likely to—
- (a) prejudice the investigation of a breach or possible breach of the law or the enforcement or proper administration of the law in a particular instance;
  - (b) prejudice the fair trial of a person or the impartial adjudication of a particular case;
  - (c) disclose, or enable a person to ascertain, the identity of a confidential source of information in relation to the enforcement or administration of the law;
  - (d) disclose methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of, breaches or evasions of the law, the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures; or
  - (e) endanger the lives or physical safety of persons engaged in or in connexion with law enforcement.

**20.2** Clause 27 is based on the law enforcement provision in the United States Freedom of Information Act but differs in three significant respects. First, a separate paragraph is included in the United States provision for the protection of personal privacy. This interest is protected by clause 30 in the Freedom of Information Bill. Secondly, the United States provision is confined to documents described as 'investigatory records compiled for law enforcement purposes'. Clause 27, on the other hand, is directed to the harmful consequences that would result from a disclosure of a document rather than the nature of the document itself. This conforms with the approach adopted in most of the other exemptions. Thirdly, the United States equivalent of paragraph 27 (d) protects 'investigative techniques and procedures' only, which was thought by the drafters of the Australian Freedom of Information Bill to leave unprotected such things as contingency plans for the prevention of unlawful activities.<sup>1</sup> Paragraph 27 (d) therefore specifically includes methods or procedures for the prevention and detection of unlawful activities as well as for their investigation. Because of the similarity between the two provisions United States experience provides some guide as to the likely effectiveness of clause 27 in permitting maximum public access to requested records, consistent with the legitimate interests of law enforcement agencies.

**20.3** These agencies include not only those responsible for the detection and punishment of law violation through criminal prosecutions but also, as mentioned above, the prevention of law violation, and, in addition, the enforcement of law through civil and regulatory proceedings. On the face of it, clause 27 would have application to the operations of the federal and Territory law enforcement authorities (including the ACT police force and licensing, health standards and building safety inspectorates), security intelligence operations, personnel investigations within the public service, and the enforcement of legislation on a range of issues

<sup>1</sup> *Transcript of Evidence* p. 316.

embracing trade practices, the environment, broadcasting, securities, customs, export and import controls, immigration, discrimination, labour relations, taxation and social security.<sup>2</sup> United States experience of the operation of its law enforcement clause reflects the scope of the activities protected by the exemption as well as the public's interest in the conduct of those activities. In the United States in 1975, for instance, the law enforcement exemption was cited in 39% of the 27 300 initial denials and in 33% of the 3247 denials at the agency appellate level.<sup>3</sup> This number of requests and appeals has given rise to a series of problems for law enforcement agencies in the United States.

**20.4** In April 1978, in forwarding his Department's annual report to Congress on activities under the Freedom of Information Act, the United States Acting Deputy Attorney-General referred to the administrative burdens placed on the Department of Justice in the following terms:

Once again I feel compelled to call to your attention the tremendous costs and administrative burdens this statute has placed on the Department, to the extensive detriment of our traditional missions and the public interest in effective law enforcement. Our ability to protect our most sensitive law enforcement manuals and other records of comparable sensitivity has been called into serious question. Traditional sources of information are becoming unwilling, or at least less willing, to cooperate with us. In several instances, the fact that we are forced to process records in open and active cases has had a serious adverse impact on our ability to complete investigations or prepare cases for trial.<sup>4</sup>

However, it would appear that while the burdens are of major significance they tend, on occasion, to be overstated. In putting this view to the United States Senate inquiry on the Erosion of Law Enforcement Intelligence and its Impact on Public Security in March 1978, a senior officer of the Department of Justice stated that it was 'the firm and unequivocal position of the Department of Justice that there is no inherent conflict between efficient, effective criminal law enforcement and the principles underlying the Freedom of Information and Privacy Acts'.<sup>5</sup>

**20.5** The Deputy Commissioner of the United States Internal Revenue Service has also reported burdens on his department; notably, the diversion of resources from direct operations to handle the review and editing of materials requested by the public with the effect that investigations were both neglected and disrupted; and a diminution in the flow of criminal intelligence information between the Internal Revenue Service and other federal, state and local law enforcement agencies.<sup>6</sup> In many cases requests and appeals on those requests were being made in connection with substantive tax proceedings by tax payers attempting to use the Freedom of Information Act as a substitute for discovery. Diminution in intelligence information was attributed to a fear on the part of intelligence sources that, with the advent of freedom of information, the Service could no longer guarantee the confidentiality of the information they furnished. Although it was unclear as to

<sup>2</sup> J. McMillan, 'Freedom of Information in Australia: Issued closed', *Federal Law Review* 8, 1977 p. 379.

<sup>3</sup> *ibid.*, p. 409.

<sup>4</sup> B. R. Civiletti, United States Acting Deputy Attorney-General in a letter to the Speaker of Congress, dated 18 April 1978, on forwarding the Department of Justice 1977 Annual Report to Congress on the Freedom of Information Act.

<sup>5</sup> Quinlan J. Shea Jr., Department of Justice, in evidence to the United States Senate, Subcommittee on Criminal Laws and Procedure of the Committee on the Judiciary, Hearings on the Erosion of Law Enforcement Intelligence and its Impact on Public Security, March, 1978—referred to in *Transcript of Evidence* p. 539.

<sup>6</sup> Statement by William E. Williams, Deputy Commissioner of Internal Revenue before the Subcommittee on Criminal Laws and Procedures, 25 April 1978, incorporated in *Transcripts of Evidence* p. 2159.

what the operational impact of these reduced sources had been, short term data and the fact that the Service generated the bulk of its own criminal tax investigation leads internally, suggested that the impact had not been all that great. It was concluded that, while overall the problems created by the Freedom of Information Act were substantial, they remained manageable and many problems would diminish as experience of the statutory provisions increased and the Service demonstrated its ability to protect the confidentiality of information sources. The same witness also commented on the positive effects of the Freedom of Information Act in terms of enhanced public respect for tax law enforcement processes:

I believe that the confidence of taxpayers and tax practitioners in our administration of the revenue laws has been enhanced by this ability to see for themselves, and to comprehend, the complex procedural issues inherent in the application of the tax laws. I further believe that the growing public pressure for tax law simplification must be attributed, at least in part, to this greater appreciation for the administrative complexities inherent in the current law. In a broader context, a January 1978 Harris Poll, citing a significant increase in the public's confidence in Federal Executive Branch institutions may well reflect, at least in part, the overall impact of this Act.<sup>7</sup>

**20.6** More recent commentary on United States experience and its possible application to Australia was provided by two witnesses—Senator John Knight, and Mr Kevin O'Connor, of the Australian Law Reform Commission, who visited the United States in January 1979 and October 1978 respectively. Senator Knight referred to the use of the Freedom of Information Act by organised crime and the inhibition on the supply of information to such bodies as the FBI and the CIA but stated his view that the problems, though major, were considered surmountable and would not necessarily be repeated in Australia.<sup>8</sup> Similarly, Mr O'Connor,<sup>9</sup> after remarking that over 400 staff (6%) of the FBI were engaged in handling requests for access under the Freedom of Information and Privacy Acts, stated his view that many of the requests arose out of concern over the particular operations of the FBI in the late '60s and early '70s and, in his view, this magnitude of public response could not be expected to be repeated in Australia. In noting the general conclusion that the problems confronted by law enforcement agencies under the Freedom of Information Act had been overstated, he referred to the then unpublished General Accounting Office Study commissioned by the United States Senate Erosion of Law Enforcement Intelligence Inquiry, whose author has stated:

We could not conclude the Act had a negative overall impact on the effectiveness of law enforcement. After reading the best cases they could give us, we still couldn't document any way in which the Act seriously hindered their (i.e. the F.B.I.'s) abilities. The F.O.I.A. has posed barriers for many F.B.I. agents, but in most cases they were able to get the job done.<sup>10</sup>

**20.7** It would appear that the problems which law reform agencies in Australia will encounter under freedom of information legislation will be similar in nature to those experienced by their United States counterparts though by no means of a similar scale. We are satisfied, however, that as in the United States, these problems will be manageable and, with time, will diminish significantly. We are also satisfied that the single amendment which we propose to make in relation to clause 27 and the amendments we propose elsewhere in relation to clause 7 would not significantly add to the burdens of freedom of information for law enforce-

<sup>7</sup> William E. Williams, cited footnote 6, *Transcript of Evidence* p. 2158.

<sup>8</sup> *Transcript of Evidence* p. 2105.

<sup>9</sup> *Transcript of Evidence* pp. 538–540.

<sup>10</sup> *Transcript of Evidence* p. 540.

ment agencies. Most of the evidence submitted to the Committee on clause 27 concentrates on the need to ensure the disclosure of documents revealing the use of illegal law enforcement techniques or that an investigation has exceeded the limits imposed by law. The University of Queensland Public Interest Research Group referred to such illegal law enforcement practices as unauthorised 'bugging' (telephone tapping and other electronic surveillance), 'verballing' (fabrication of confessions) and 'entrapment' (solving crime by assisting or encouraging it to take place).<sup>11</sup> These and other unlawful practices are extensively documented in the Australian Law Reform Commission's report *Criminal Investigation*.<sup>12</sup> Given the growing criticism of police practices in recent years,<sup>13</sup> we would favour any measure which would enable the exposure of unlawfulness and which would, in due course, help to enhance public confidence in law enforcement processes. We therefore propose that paragraph 27 (d) be amended to enable disclosure of documents which would reveal unlawfulness in law enforcement procedure. This can best be achieved by inserting the word 'lawful' in paragraph (d) before the words 'methods or procedures'. Unlawful methods and procedures of law enforcement would thereby be excluded from the exemption.

**20.8** The point was raised by the Attorney-General's Department that such an amendment was unnecessary since unlawful methods and procedures would not be protected by the Administrative Appeals Tribunal under the present clause.<sup>14</sup> If this is the case there can be no serious objection to an amendment which merely clarifies an existing situation. However, the further point was raised that

<sup>11</sup> *Transcript of Evidence* pp. 1349-50.

<sup>12</sup> Australia, The Law Reform Commission, Report No. 2 (Interim), *Criminal Investigation*, AGPS, Canberra, 1975.

<sup>13</sup> Australia, The Law Reform Commission, Report No. 1, *Complaints against Police*, AGPS, Canberra, 1975; Report No. 2 (Interim), *Criminal Investigation*, AGPS, Canberra, 1975; Report No. 9, *Complaints against Police—Supplementary Report*, AGPS, Canberra, 1978. Australia, *Report to the Minister for Administrative Services on the organisation of police resources in the Commonwealth area and other related matters* (Sir Robert Mark), AGPS, Canberra, 1978.

Queensland, *Report of the Committee of Inquiry: Enforcement of the criminal law in Queensland* (Hon. Mr Justice Lucas) Government Printer, Brisbane, 1977.

Victoria, *Report on the Victorian Police Force* (Sir Eric St. Johnston) Government Printer, Melbourne, 1971.

South Australia, *Criminal Law and Penal Methods Reform Committee Criminal Investigation* (2nd Report) Government Printer, Adelaide, 1974.

South Australia, *Royal Commission on the September Moratorium Demonstration 1971* (Hon. Mr Justice Bright, Chairman) Government Printer, Adelaide, 1971.

South Australia, *Royal Commission on dismissal from office of Commissioner of Police* (Harold Hubert Salisbury) (Hon. Justice Mitchell, Chairman), *Report*, Government Printer, Adelaide, 1978.

Victoria, Board of Inquiry into allegations against members of the Victoria Police Force (Mr B. W. Beach Q.C.) *Addenda to Report*, Government Printer, Melbourne 1976.

Victoria, Committee to examine the recommendations made by Mr B. W. Beach Q.C. and to advise . . . whether those recommendations should be adopted in whole or in part (Hon. J. G. Norris, Q.C.), *Report*, Government Printer, Melbourne, 1977.

South Australia, Inquiry into the records held by the Special Branch of the South Australian Police. *Initial report to the Hon. D. A. Dunstan by the Hon. Mr Acting Justice White*, Government Printer, Adelaide, 1978.

J. Summers, 'Ministerial Responsibility and the Police in South Australia', *Politics*, XIV (I) May 1979, pp. 101-108.

New South Wales, An inquiry into the structure and administration of the N.S.W. Police Force and its relationship with the State Government was announced by the Premier, Hon. N. Wran, Q.C., on 5 June 1979 under the direction of Mr Justice Cross, but now to be conducted by Mr Justice Lusher.

<sup>14</sup> Notes of private meeting held on 9 March 1979 between the Committee and the Attorney-General and officers of his department.

it would be unacceptable to have a statutory presumption that illegal law enforcement methods existed. We do not accept this point. The Criminal Investigation Bill 1977 which was before the Parliament when it was dissolved in November of that year, amounted to just such a presumption. It was substantially based on the Australian Law Reform Commission's report *Criminal Investigation* referred to above. Further, section 20 of the Australian Security Intelligence Organization Bill 1979 which at the time of writing, is before the House of Representatives, confers a special responsibility on the Director-General to ensure that the Organisation does not pursue functions for which it has no authority. A recognition of past unlawful activities on the part of this law enforcement agency is implicit in this provision. We see no reason to alter our view that specific reference to lawful methods or procedures should be made in paragraph (d) of clause 27.

**20.9 Recommendation: The word 'lawful' should be inserted in paragraph 27 (d) between the words 'disclose' and 'methods' so as to provide for the exemption of lawful methods or procedures of law enforcement only.**

**20.10** The inclusion of the words 'disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures', in paragraph 27 (d) indicates to us that documents revealing commonly known methods and procedures of law enforcement would be subject to disclosure. This was certainly the intention with regard to the United States provision on which paragraph (d) was based.<sup>15</sup> We support this approach in general and, as it concerns the police, in particular. Police General Orders, which are internally produced, govern police procedure on all relevant matters including the conduct of interrogations, the procedure for arrest and the use of firearms. We believe that a substantial proportion, if not all, of Police General Orders could be made available without prejudice to law enforcement. We have, therefore, recommended that clause 7 be extended to require the publication, where appropriate, of manuals concerning law enforcement methods and procedures as well as concerning the administration of the law. Our views on this matter are discussed in some detail in Chapter 7.

**20.11** The Freedom of Information Legislation Campaign Committee and others called for the release of routine reports prepared by regulatory agencies.<sup>16</sup> They contended that agencies such as the Australian Broadcasting Tribunal and the Patents Commissioner prepare routine inspection or monitoring reports of activities they supervise without any intention of enforcing compliance with the relevant regulations. Access to such reports would enable community groups to assess whether agencies are timid in launching prosecutions and provide the public stimulus which, they considered, is often essential before enforcement will occur. We consider that, since the whole tenor of clause 27 is directed to protecting the processes whereby the law can be enforced, this provision would offer no protection at all in circumstances when a law enforcement agency fails to enforce the law. We do not consider it necessary, therefore, to suggest any amendments to take account of this criticism.

**20.12** The Women on Welfare Campaign of South Australia claimed that officers of the Social Security Department engaged in a number of practices when pursuing

<sup>15</sup> United States, *Attorney-General's Memorandum on the 1974 Amendments to the Freedom of Information Act*, United States Government Printing Office, Washington, 1975.

<sup>16</sup> *Transcript of Evidence*, p. 168; McMillan cited footnote 2, p. 379.

their investigations which they regarded as undesirable. These allegations, which we have not sought to verify, included:<sup>17</sup>

- failure of officers to identify themselves;
- failure to inform pensioners of their right to refuse entry to their home to departmental officers;
- failure to inform pensioners of their right to have a witness present during interviews;
- failure to inform pensioners of their right to have a copy of any statement by them;
- questioning of neighbours as to pensioners' living arrangements; and
- use of computers to cross-check addresses of unemployed male and female welfare recipients so as to gain information concerning pensioners' residential arrangements.

In addition, it was claimed that eight out of ten anonymous allegations made to Social Security officers in South Australia are without foundation being of a malicious, vexatious or frivolous nature.<sup>18</sup>

**20.13** The dependants of pensioners and beneficiaries renders them particularly vulnerable to any form of intimidation and abuse which threatens their source of income. Undoubtedly, if these welfare recipients are being subject to unnecessary stress as a result of unethical practices on the part of departmental officers or malicious behaviour on the part of others, then steps should be taken to eliminate such undesirable action. Clause 7, which enables the public to gain access to departmental manuals, may help to strengthen the position of welfare recipients against an unrestrained use of power by departmental officers. In addition to the assistance provided by this clause as presently drafted, we have recommended that clause 7 be extended to cover statements of policy to provide a guide to the public as to the manner in which a department will interpret and administer the legislation for which it is responsible. Clause 7 and its utility in meeting the problems raised by the Women on Welfare Campaign are discussed in Chapter 7. Beyond amending clause 7, there is a limit to what can be achieved by the Freedom of Information Bill to counteract unethical, as opposed to unlawful, practices. The Women on Welfare Campaign agreed that the problem was essentially one which called for a change in attitude of departmental officers and that, to a great extent, the Freedom of Information Bill was an inappropriate vehicle to effect such a change.

**20.14** One further point which was alleged by the Women on Welfare Campaign concerns the ease with which interested parties can obtain information concerning the whereabouts of welfare recipients.<sup>19</sup> Very often welfare recipients had taken elaborate precautions to ensure that such parties would not discover their whereabouts in order to avoid distress which had occurred in the past. We would merely point out here, that, in most circumstances, such information would be denied under clause 30, the personal privacy clause. In fact, a commentator in the United States argues that the personal privacy paragraph in the United States Freedom of Information Act has had the effect of unduly broadening the law enforcement exemption.<sup>20</sup> Indications are, therefore, that information of a personal

<sup>17</sup> *Transcript of Evidence*, p. 1775.

<sup>18</sup> *Transcript of Evidence*, p. 1778.

<sup>19</sup> *Transcript of Evidence*, p. 1806.

<sup>20</sup> 'Developments under the Freedom of Information Act—1977', *Duke Law Journal* 1978, p. 189 at pp. 216–219.

nature will receive the protection which it so clearly warrants by virtue of clause 30, whether or not it is subject to release under clause 27.

**20.15** A problem which might arise in relation to clause 27 is that the interests which are sought to be protected might be prejudiced not only by disclosing the document itself but merely by disclosing the existence of that document.<sup>21</sup> The fact that a certain offence has been committed may in some cases (for example, incest and other offences against children committed by their parents) be known only to the person committing the offence and his immediate family or neighbours. To disclose the existence of a complaint or of information in such cases, even if access were denied to the information itself, might be sufficient to enable the confidential source of the information to be readily identified. Again, the legislation in its present state could be used by a person who suspected that his activities were being investigated by the taxation or customs authorities. The withholding of information under clause 27 that would disclose the fact of the investigation would itself be sufficient confirmation of the existence of such information and the person could change his activities to frustrate the further conduct of the investigation.

**20.16** This problem has been identified by United States authorities in relation to the equivalent provision in the United States Freedom of Information Act. They consider that, in the context of law enforcement documents, there is no method of withholding information that a document exists under the Freedom of Information Act that would not violate the law.<sup>22</sup> Clause 27 is also drafted to permit exemption of a document but not, it would seem, denial of the existence of a document. Furthermore, if the appropriate amendment were made to clause 27 to permit such a denial, an agency which normally denies access to a document and then only occasionally denies the very existence of a document will, by its inconsistency in response, reveal information which it sought to protect. We propose, therefore, that clause 27 be amended to permit an agency to respond to a request with a form of words which denies access to a document without conceding the existence of that document, whether or not the existence of a document is a matter of concern in any particular case. We recognise that this carries with it the possibility of abuse by agencies. Nevertheless we hope, and believe, that they will act responsibly in this matter to see that abuses do not occur. In Chapter 29 we discuss fully the role of the Ombudsman. Here we simply emphasise that this is an area where the Ombudsman will play a crucial role in maintaining the public's confidence that the system is not being abused.

**20.17 Recommendation: Clause 27 should be amended to permit an agency to deny access to a document without conceding the existence of that document, whether or not the existence of a document is a matter of concern in any particular case.**

<sup>21</sup> Paper from Attorney-General's Department, dated 9 May 1979, 'Freedom of Information Bill 1978—Possible Amendments'. Paper confined to clauses 23, 26, 27, 32 and 34. (Committee Document 88).

<sup>22</sup> United States, Commissioner of Customs in a statement to the Senate Sub-Committee on Criminal Laws and Procedures on 5 October 1977. Compare, in the context of defence and foreign policy matters, *Phillippi v. Central Intelligence Agency* 546 F.2d 1009 (D.C. Cir. 1976) and referred to in Attorney-General's paper cited footnote 21, p. 4.

## Prescribed secrecy provisions (clause 28)

**21.1** The Freedom of Information Bill will not be the only enactment which declares what documents can be withheld from the public. At present there are upward of 290 provisions in other Acts, ordinances, regulations and statutory instruments that authorise, empower, or require designated officers and bodies to restrict disclosure of particular categories of information.<sup>1</sup> Indeed it appears to be a fashionable contemporary drafting practice to insert in every new statute a standard provision making it an offence for an official governed by the statute to disclose without authorisation any information of which he has gained knowledge officially. These provisions, which are generally termed secrecy provisions, can still be invoked by an official to refuse access to a document requested under the Bill if two conditions are met: if the provision is one which prohibits or restricts the disclosure of a document or information, and if it is prescribed (that is, incorporated by regulation) under the Bill.

**21.2** Clause 28 is in the following terms:

28 (1) A document is an exempt document if it is a document to which a prescribed provision of an enactment, being a provision prohibiting or restricting disclosure of the document or of information or other matter contained in the document, applies.

(2) In this section, 'enactment' includes an Ordinance of the Northern Territory or an instrument (including rules, regulations or by-laws) made under such an Ordinance.

We have indicated in Chapter 17 our agreement with the view of the Northern Territory Chief Minister that that Territory should be excluded from the operation of the Freedom of Information legislation because of its self-governing status. If that development occurs, clause 28 (2) would be deleted.

**21.3** As one would expect, the form of secrecy provisions and the categories of information they protect vary notably from statute to statute. In general, a large number apply to information of a personal or business nature that has been given to the government in confidence (for instance, section 16, *Income Tax Assessment Act* 1936; and section 11 (1), *Structural Adjustment (Loan Guarantees) Act* 1974). Many others apply to specific categories of information that are thought to warrant protection (such as section 73A of the *Defence Act* 1903; and sections 44–48 of the *Atomic Energy Act* 1953). Clearly the most ubiquitous and well-known secrecy provision is section 70 of the *Crimes Act* 1914, which prohibits the disclosure by a present or former Commonwealth officer of any fact or document which came to his knowledge or into his possession by virtue of his office, and which it was his duty not to disclose (penalty: 2 years jail). (We discuss that section specifically later in this chapter.) A useful classification of secrecy provisions has been prepared by the Attorney-General's Department and appears as Appendix 6. They can be divided into three broad categories:

(a) Provisions that prohibit or restrict the disclosure of information—the provisions referred to above fit into this category.

<sup>1</sup> See Appendix 6, which is a list of secrecy provisions prepared by the Attorney-General's Department.

- (b) Provisions that restrict the *publication* of information—two such examples are section 50 of the *Federal Court of Australia Act 1976*, which empowers the court to make any order forbidding or restricting the publication of evidence, or the name of a party or witness, which appears to the court to be necessary in order to prevent prejudice to the administration of justice or the security of the Commonwealth; and section 14 of the *Administrative Decisions (Judicial Review) Act 1977*, which provides that an official required to prepare a statement of the reasons for an administrative decision may exclude from the statement any matter in respect of which the Attorney-General has certified that disclosure would be contrary to the public interest by reason that it would prejudice security, disclose Cabinet deliberations or decisions, or for any other reason that could form the basis for a claim of privilege by the Crown in judicial proceedings.
- (c) Provisions requiring evidence to be taken, or a meeting to be conducted, in private—for instance, section 19 (2) of the *Broadcasting and Television Act 1942* empowers the Australian Broadcasting Tribunal to direct that part or all of an inquiry shall be held in private; that evidence (whether taken in public or in private) shall not be published; or that evidence shall not be disclosed to some or all of the persons having an interest in the proceedings.

**21.4** The Government is yet to announce which secrecy provisions will be prescribed under the Bill. The Attorney-General (in a private meeting with the Committee on 9 March, 1979) promised an announcement as soon as possible on this point, and, in preparation, all ministers are presently examining secrecy provisions in legislation administered by their departments.<sup>2</sup> It is important in our opinion that an announcement be made as soon as possible: first, so that proclamation of the Bill will not be needlessly delayed; and secondly, to afford Parliament and the public adequate time to scrutinise the proposed list of provisions. We are mindful, in particular, that major problems arose in the United States after passage of the Freedom of Information Act because inadequate attention had been given at the outset to existing secrecy provisions. Frequent disputes occurred and a sizeable body of case law developed, until Congress eventually had to amend the relevant exemption in 1976 as it was found that it preserved unnecessarily broad secrecy provisions.<sup>3</sup>

**21.5** Clause 28 is a relatively simple provision, and is certainly more straightforward than the counterpart United States exemption.<sup>4</sup> Even so, it is not free of doubts and these should be resolved. First, a question arises as to whether all the different types of secrecy provisions to which we have referred are capable of being prescribed under clause 28. For instance, the provisions cited above from the Broadcasting and Television Act and the Administrative Decisions (Judicial

<sup>2</sup> The nature of that review, which is being co-ordinated by the Attorney-General's Department is mentioned in *Transcript of Evidence*, page 139 (Mr Curtis).

<sup>3</sup> See, e.g., Berner, *The Effect of the 1976 Amendment to Exemption 3 of the FOIA (1976)* *Columbia Law Review* 76, p. 1029.

<sup>4</sup> The counterpart United States exemption protects matters that are 'Specifically exempted from disclosure by statute, provided that such statute (A) requires that the matter be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.'

Before its amendment in 1976 the exemption protected matters that were 'specifically exempted from disclosure by statute'.

Review) Act do not, strictly speaking, prohibit or restrict the disclosure of information. Rather they either authorise a designated individual to prohibit or restrict the disclosure of information or empower a designated body to direct that proceedings shall be held in private, or that evidence shall be received in private session. Powers of this nature that are exercised by a board, tribunal or other body having power to take evidence on oath, would not need to be prescribed in that they would already be preserved indirectly by clause 35 (b), which provides that a document is exempt if disclosure would be contrary to an order or direction given by a tribunal or other body having power to take evidence on oath. This same analysis would not apply where the body in question does not have this attribute of judicial power; for instance, under section 14 of the Administrative Decisions (Judicial Review) Act it is the Attorney-General who authorises a restriction on the disclosure of information. Probably there is no reason to prescribe a provision of this nature, as it creates a power directed to a specific situation (in this instance the preparation of reasons for a decision). Even if the reasons did not include information to which an individual felt he was entitled, he could make an application under the Freedom of Information Act to obtain any document which contained the required information. However, it is clear that even this dual procedure for obtaining information could cause confusion and that convenience would be served if the Freedom of Information Bill and secrecy provisions such as these were made compatible. For instance, a provision like section 14 could be amended to provide that relevant information could only be deleted from a statement of reasons if the information would be exempt under the Freedom of Information Act.

**21.6** This analysis raises another problem. What effect does a secrecy provision have if it is not prescribed? It would clearly not be effective to prohibit the disclosure of information to a person who had made a request under the Freedom of Information Act, but, apart from that, it would be effective. For instance, in the case just mentioned, where the Attorney-General, pursuant to the Administrative Decisions (Judicial Review) Act, authorises that information to which a person has access under the Freedom of Information legislation be deleted from a statement of reasons for a decision, he is clearly acting within his powers. The same would apply with provisions of a criminal nature (such as section 70 of the Crimes Act and section 73A of the Defence Act) if they were not prescribed. It would still be an offence for an official to disclose information referred to in those sections except in pursuance of the provisions of the Freedom of Information legislation. For example, an officer who was not authorised to handle requests under the Freedom of Information legislation would probably be committing an offence by disclosing without authority any documents, whether or not they were of an exempt or non-exempt nature. Even for authorised officers, difficult questions could theoretically still arise as to whether a disclosure was one made *pursuant to* the Freedom of Information legislation—for instance, disclosure pursuant to an oral inquiry that does not cite the legislation may not be made pursuant to the Act (see, for example, clauses 13 and 17). Mr Curtis of the Attorney-General's Department admitted that this 'could create legal difficulties if we leave some of [the secrecy provisions] in operation and . . . they are not prescribed'.<sup>5</sup> Our own tentative view is that criminal provisions which are not prescribed should be repealed. This will reduce confusion.

**21.7** Another problem arising under clause 28 is that there are many secrecy provisions that are very broad and should not be prescribed under the Bill. For

<sup>5</sup> *Transcript of Evidence*, p. 140.

instance, Public Service regulation 35 provides that an officer shall not, without the express authority of the chief officer, disclose any information concerning public business or any matter of which the officer has knowledge officially. There are comparable prohibitions contained in other statutory instruments, like regulation 60 of the Australian Broadcasting Commission (Staff) Regulations. Blanket prohibitions of this kind conflict diametrically with the philosophy espoused in the Bill. There are other provisions which, while not as broad, contain standards that are broader than those in the Freedom of Information Bill. For instance, section 17 (2) of the *Social Services Act* 1947, provides that 'a person shall not, directly or indirectly, except in the performance of his duties . . . divulge or communicate to any person, any information with respect to the affairs of another person acquired by him in the performance of his duties'. Sub-section (4) modifies this by providing that the Minister or the Director-General may certify that it is 'necessary in the public interest' for any such information to be divulged. Whether necessary or not, this provision is clearly broader than clause 30 of the Bill which exempts documents whose disclosure 'would involve the unreasonable disclosure of information relating to the personal affairs of any person'. The same comment can be made about many of the provisions protecting business information—for instance, section 11 (1) of the *Structural Adjustment (Loans Guarantee) Act* 1974 makes it an offence for an officer to 'divulge or communicate to any person, any information concerning the affairs of a firm acquired by him in the course of his duties'. Clearly this is broader than clause 32 of the Bill protecting trade secrets and business and commercial information.

**21.8** As far as possible, provisions such as these should be repealed, as they protect information to which the public might legitimately seek access under the Bill—for instance, the Social Security Department indicated in its submission that it would seek to withhold under section 17 the record of precedents of the Social Security Appeals Tribunals, as a precedent may contain personal details.<sup>6</sup> Were section 17 not available to the Department, it seems quite probable that the personal details would have to be separated and the remainder of the precedents published or made available under Part II of the Bill as part of the internal law of the agency.

**21.9** We cannot foresee that undue difficulties or complications will arise from the repeal of secrecy provisions. Many, it would seem, are inserted or retained in legislation more because of custom or habit than because of necessity. Certainly there is no uniform principle or theme that unites the existing provisions and on the few occasions where they have been repealed no difficulties have arisen. For instance, the *Science and Industry Research Act* 1949 contained a very broad secrecy provision making it an offence for an officer or employee to disclose any information concerning the work of the CSIRO or the contents of any document in the possession of the CSIRO (section 31). When this Act was repealed and replaced in 1978, section 31 was dropped without comment or attention being drawn to the change by the minister.<sup>7</sup> A similar example occurred with the repeal in 1974 of Public Service regulation 34 (b) which provided that 'an officer shall not . . . publicly comment upon any administrative action or upon the administration of any Department'.

<sup>6</sup> Submission no. 117, incorporated in *Transcript of Evidence*, p. 2141; pp. 2212–2214.

<sup>7</sup> See a speech on this change drawing attention to the deletion of section 31 by Senator Puplick: Australia, Senate, *Hansard*, 24 October 1978, p. 1522.

**21.10** We appreciate that personal and business information must often be protected by criminal sanctions to enable a department to obtain necessary information from the public and guarantee confidentiality to those who submit the information. We doubt, however, whether departments need to be safeguarded by provisions of unrestricted breadth and generality. All of the many departments that have personal record holdings appear to protect their confidentiality to the same degree, yet only a few indicated in their submissions that they had secrecy provisions available to protect those records. In any event, we think it is possible, and desirable, that many secrecy provisions be redrafted, so that it is in future only an offence to disclose personal or business information other than in pursuance of the Freedom of Information Act.

**21.11** Another danger with over-broad secrecy provisions was pointed out in the submission of CAGEO.<sup>8</sup> It claimed that staff retiring from the employment of the Australian Atomic Energy Commission are required to declare that they will continue to be bound by section 53 of the Atomic Energy Act and that they will not disclose information on the operation of the Commission. While we cannot verify this claim, it would clearly be inconsistent with the scheme of the Bill if such private arrangements could be operated by agencies without heed to the criteria in the Bill.

**21.12** A final remark concerns the accessibility of the provisions prescribed under the Freedom of Information Act. In our opinion it would be convenient if all such provisions were contained in a schedule to the Bill. Mr Curtis of the Attorney-General's Department indicated to us that one of the principal reasons why this course was not adopted was that the list of prescribed secrecy provisions was not prepared at the time the Bill was introduced into Parliament.<sup>9</sup> At the time of concluding our Report this list had still not been produced. This is a matter for regret but we feel it should certainly be produced before amendments to the Bill are introduced. It can then be included in a schedule to the Bill. In our view clause 28 should therefore be amended to provide for a schedule to be incorporated in the Bill of those secrecy provisions which it is intended should be exempt under the Bill. Any further additions to the list of prescribed secrecy provisions should be incorporated in such a schedule. For convenience (see the general discussion on this point in Chapter 12), and consistently with our recommendations in Chapters 8 and 12, we would accept it as appropriate for such amendment to the schedule to be made by regulation which would be expressed to take effect only upon formal resolution of both Houses.

### **21.13 Recommendations:**

- (a) Clause 28 should be amended so that the list of secrecy provisions to be prescribed under the clause be contained in a schedule to the Bill;**
- (b) Any amendments to the schedule after enactment of the legislation should be made by regulation expressed to take effect only upon affirmative resolution of both Houses of the Parliament;**
- (c) All criminal provisions prohibiting or restricting the disclosure of information that are not prescribed under the Bill should be repealed; and**
- (d) Where possible, other provisions which confer power upon a tribunal, body or person to regulate the disclosure of information should be brought into line with the criteria contained in the exemptions in the Bill.**

<sup>8</sup> Submission no. 106.

<sup>9</sup> *Transcript of Evidence*, p. 140.

## Section 70 of the Crimes Act

**21.14** We have received many criticisms of section 70 of the *Crimes Act* 1914 which is regarded by many people as a catch-all provision reinforcing the present system of discretionary secrecy. Section 70 provides:

70. (1) A person who, being a Commonwealth officer, publishes or communicates, except to some person to whom he is authorized to publish or communicate it, any fact or document which comes to his knowledge, or into his possession, by virtue of his office, and which it is his duty not to disclose, shall be guilty of an offence.

(2) A person who, having been a Commonwealth officer, publishes or communicates, without lawful authority or excuse (proof whereof shall lie upon him), any fact or document which came to his knowledge, or into his possession, by virtue of his office, and which, at the time when he ceased to be a Commonwealth officer, it was his duty not to disclose, shall be guilty of an offence.

Penalty: Imprisonment for two years.

**21.15** Broad though it is, and draconian though its penalties seem to be, section 70 has been little used in Australia. Indeed the Public Service Board in its evidence informed us that the only reported use of the section was in 1971 when a prosecution was instituted against a public servant who had allegedly disclosed official information to the publisher, Maxwell Newton.<sup>10</sup> No conviction was obtained in that case. There are, of course, other provisions under which proceedings can be taken, or public servants can be controlled or disciplined, and the usage of these provisions is not fully known. For example, a public servant can be charged under section 55 (1) of the *Public Service Act* for breaching the regulations. In this context the relevant regulation would be regulation 35 which provides in turn that an officer shall not disclose information gained in the course of duty without the permission of the Chief Officer. We understand that these provisions have been invoked from time to time. In addition, there are other provisions in Part VIII of the *Crimes Act* relating to disclosure of information, and a case was reported in 1977 of proceedings being instituted against an officer of the Australian Security Intelligence Organisation for unauthorised disclosure.<sup>11</sup>

**21.16** It is interesting to compare the situation in Britain where section 2 of the *Official Secrets Act* 1911, the equivalent of section 70, has formed the basis of some thirty prosecutions since 1916.<sup>12</sup> The most recent of these occurred in January 1971 when a prosecution was launched against a journalist, his informant, the *Sunday Times* and its editor over the publication of a report from a British defence adviser in Nigeria.<sup>13</sup> In his speech to the jury at the end of the trial, Mr Justice Caufield made the suggestion that section 2 should be 'pensioned off'. Two weeks later the Franks Committee was established to examine the reform of section 2. In its report it described section 2 as 'a mess' yet one whose 'scope is enormously wide'. The report continued 'any law which impinges on the freedom of information in a democracy should be much more tightly drawn.'<sup>14</sup>

**21.17** Many of the submissions made to this Committee commented in similar terms on section 70 of the *Crimes Act*. Whatever the rationale for section 70

<sup>10</sup> *Transcript of Evidence*, pp. 906-907; *R. v. Pratt* (unreported, 16 July 1969).

<sup>11</sup> See *The Canberra Times*, 2 June, 3 June and 2 September, 1977.

<sup>12</sup> Great Britain, *Reform of Section 2 of the Official Secrets Act, 1911*, Cmnd 7285, July 1978, HMSO, London, para. 6.

<sup>13</sup> The case is discussed in Jonathan Aitken, *Officially Secret*, London, Weidenfeld and Nicolson, 1971.

<sup>14</sup> Great Britain, Departmental Committee on Section 2 of the *Official Secrets Act* 1911 (Lord Franks, Chairman), *Report*, Cmnd 5104, HMSO London, September 1972, vol. 1, para. 88.

may have been, we feel that in its present form it would be clearly at variance with the spirit of those reforms which we hope to see enacted in the Freedom of Information Bill. While not falling within our terms of reference, we do take this opportunity to urge the government to reconsider the status of section 70 in the light of this Report and other contemporary developments.

**21.18** We realise that reform of section 70 could involve a separate study in itself, and to that extent we have only indicated in outline the form of the scheme that we propose. We have found it convenient to use as the basis of our discussion the proposals made in Britain in 1972 by the Franks Committee. The Committee, which included representatives of both Houses of Parliament and the media, and which received a formidable volume of written and oral evidence from the public and from official sources, was of the opinion that penal sanctions should only be used to protect the security of the nation, the safety of the people, and the constructive operation of democracy. Documents not covered by the sanctions would still be protected by such things as civil service disciplinary provisions, the formal and informal sanctions which exist in any career service, the code of professional behaviour observed by most civil servants, the procedures for recruiting, vetting and training public employees, and the internal security classification and privacy markings which provide positive guidance for officers on which information requires special protection.

**21.19** The nature of the areas requiring protection would be reflected in an Official Information Act, which the Franks Committee recommended should be enacted containing the following provisions:

- (a) The Act should make it an offence for a Crown servant to communicate, contrary to his official duty, classified information in the areas of:
  - (i) defence and internal security;
  - (ii) foreign relations (meaning the relations between the British government and any other power or any international body the members of which are governments); and
  - (iii) any proposals, negotiations or decisions connected with alterations in the value of sterling, or relating to the reserves, including their extent or any movement in, or threat to, them.
- (b) A document would count as classified if it was correctly graded as 'Top Secret' or 'Secret'. This would cover documents the unauthorised disclosure of which would cause at least serious injury to the interests of the nation. The responsible minister would personally review the correctness of a classification of information before its disclosure became the subject of a prosecution. If satisfied that it was correct, he would give a certificate to that effect to the court and the certificate would be conclusive evidence on the point.
- (c) It should be an offence for a Crown servant to communicate, contrary to his official duty, information (irrespective of classification) in the following categories:
  - (i) Information relating to law enforcement specifically information whose disclosure—
    - is likely to be helpful in the commission of offences;
    - is likely to be helpful in facilitating an escape from legal custody or other acts prejudicial to prison security; or
    - would be likely to impede the prevention or detection of offences or the apprehension or prosecution of offenders;

- (ii) Documents submitted for the consideration of, or recording the proceedings or conclusions of, the Cabinet and Ministerial Cabinet Committees;
  - (iii) Information given to the government by private individuals or concerns, whether given by reason of compulsory powers or otherwise, and whether or not given on an express or implied basis of confidence; and
  - (iv) Information which is used for private gain or disclosed with a view to private gain by some other person.
- (d) It would also be an offence for another person to communicate, without authority, information which they knew, or had reasonable ground to believe, had already been communicated in contravention of the Official Information Act. There would also be specific provisions applying to government contractors and persons entrusted with official information in confidence.
- (e) A prosecution under the Act could not be brought without the consent of the Director of Public Prosecutions, in the case of some offences, or the Attorney-General, in the case of others.

**21.20** The British Home Secretary announced in a statement to the House of Commons on 22 November, 1976<sup>15</sup> that the government intended to introduce legislation based on the Franks Committee Report but with some modifications. The new proposals were subsequently outlined in a White Paper, *Reform of Section 2 of the Official Secrets Act 1911*<sup>16</sup> presented to Parliament in July 1978. The Franks Committee recommendations were altered to reduce the categories of protected information, to add other categories, and to alter the procedures by which prosecutions would be brought.

**21.21** The White Paper recommended that three categories of information be dropped from those categories to be protected by criminal sanctions. First, the Franks Committee thought that protection of information relating to the currency or the reserves was necessary, as unauthorised disclosure of information that could enable speculators to raid the reserves on a confident basis would damage the country as much as disclosure of information about defence and national security. The 1978 White Paper rejected this proposal, commenting that it was a proposal 'made in the climate of 1971-72'.<sup>17</sup> The Paper noted that other information dealing with monetary or fiscal policies would not be protected, and the government saw no need for an offence extending to some categories of economic information and not to others. Secondly, the White Paper took the view that Cabinet materials are protected adequately by special distribution and handling procedures, the sanctions of Civil Service discipline and the judgment of ministers. The Paper noted that the great majority of Cabinet documents deal with home and economic affairs, and that in general a distinction should be drawn in the criminal law between information on such policies and on security and intelligence, defence and international relations. 'The unauthorised disclosure of any official information . . . in the domestic area will generally result in embarrassment to the Government of the day and not in any serious damage to the national interest.'<sup>18</sup> Thirdly, the Paper

<sup>15</sup> Great Britain, Parliament, House of Commons, *Debates*, vol. 919, col. 1878-1888.

<sup>16</sup> Cited in footnote 12.

<sup>17</sup> *ibid.*, para. 12.

<sup>18</sup> *ibid.*, para. 11 (quoting the Government's general approach laid down by the Home Secretary, in his statement of 22 November 1976).

stated that the existing law on corruption adequately established offences concerning the use of official information for private gain. The Paper also noted that since 1972 (when the Franks Committee reported) the Royal Commission on Standards of Conduct in Public Life<sup>19</sup> under the chairmanship of Lord Salmon reported with recommendations about the misuse of official information. It was pointed out that, in due course, there would be legislation as a result of the Salmon Report.

**21.22** The British Government expressed in the White Paper its hesitation in accepting the Franks Committee's recommendation that the criterion of criminality should be whether disclosure would cause serious injury to the interests of the nation (the test for classification of 'Secret') rather than prejudice the nation's interests (equivalent to 'Confidential'). The criterion of serious injury was ultimately accepted, and it was further recommended that that criterion should actually be stated in the legislation. The fact that a document was classified 'Secret' would simply raise a presumption that the defendant knew or had reasonable cause to believe that the information in question was protected by the Act. Since the classification system would still be of some importance, the system of classification markings would be contained within the Act. It would contain the basic features of the system, such as the definition of each security marking and an enabling power authorising regulations on classification to be made. Whether any unauthorised disclosure would cause serious injury to the interests of the nation is a question of fact that would still be determined by the responsible minister. If satisfied on the point, he would issue a certificate that would be conclusive evidence on the point. However, as an additional safeguard, the Government proposed in the White Paper that the question would also be studied by the Attorney-General who would have to agree that the information breached the serious injury test before authorising any certificate to be entered in evidence at a trial.

**21.23** The British Government also proposed that criminal sanctions be extended to protect two new categories of information. The first category is information relating to security and intelligence matters, whether classified or not. The Government felt that this area deserved the highest protection, since the gradual accumulation of small items of unclassified information could eventually create a risk for the safety of an individual or constitute a serious threat to the interest of the nation as a whole. The second area relates to the confidences of citizens. The Franks Committee confined the protection to information *given* to the government. The White Paper expressed the view that confidences *held* by a government department, however acquired, require protection. Lastly, the British Government proposed that it should no longer be an offence merely to receive protected information. The substitute offence would be that of communicating information otherwise than in accordance with an authorisation given on behalf of the Crown, if the information is protected by the Act at the time and if the accused knew, or had reasonable cause to believe, that the information was so protected.

**21.24** We would mention in passing that a scheme for the reform of section 70 of the Crimes Act in Australia was contained in the Minority Report Bill, attached to the Coombs Commission Report.<sup>20</sup> Essentially, the recommendations in that Report were based upon the Franks Report. There were, however, the following exceptions: Cabinet documents would not be protected; there would not be a catch-all provision protecting confidences of the citizen, but instead the already

<sup>19</sup> Cmnd 6524, HMSO, London, 1976.

<sup>20</sup> Royal Commission on Australian Government Administration, *Appendix Volume Two*, Parl. Paper 187/1976, pp. 52-56, 146-150.

extensive number of secrecy provisions in legislation would be left to perform that task; and in respect of a prosecution for disclosure of classified information, it would be the court and not the minister who would determine in effect whether the information disclosed was properly classified 'Secret' or above. The Minority Report also proposed that there should be some mental element, or *mens rea*, in the offence so that it would be a defence if a person believed on reasonable grounds that he was not acting contrary to his duty in publishing or communicating protected information.

**21.25** We appreciate that the Australian Government would probably wish to commission further studies before section 70 was reformed and, with that in mind, we think it premature for us to set out in detail our own views on this question. We should, however, express our firm belief that reform of section 70 should accompany the enactment of the Freedom of Information Bill. In theory, and certainly in the mind of the public, it is implausible to enact a presumption of openness while leaving untouched provisions like section 70 that provide the legal foundation for the system of discretionary secrecy that presently exists.

**21.26** In our opinion consideration should be given to the desirability of enacting a scheme that takes into account the recommendations of the Franks Committee and the British White Paper. Although, as we have indicated, it would be premature for us to make exhaustive suggestions as to the form that the revision of section 70 should take, we nevertheless think it desirable that we provide some indication as to what type of legislative scheme would be compatible with the other proposals we have made for revision of the Freedom of Information Bill. The main points we would outline for the Government's consideration are as follows:

- (a) One category of information that should be protected is information in the areas of defence, internal security and foreign relations where disclosure would cause serious injury to the interests of the nation. However in our opinion it should not be for the minister or the Attorney-General to determine conclusively in any criminal prosecution whether disclosure of security information would seriously damage the interests of the nation. This would amount, in effect, to converting a strict liability offence into a discretionary offence, a reform of dubious merit. In relation to the Freedom of Information Bill we have recommended in Chapter 16 that a power of this nature could be exercised by the Administrative Appeals Tribunal. We see no reason why a similar power could not be conferred upon a court hearing a prosecution in relation to unauthorised disclosure.
- (b) The other category of information that should be protected is information relating to law enforcement of the type outlined earlier in paragraph 21.18, sub-paragraph (c) (i).
- (c) For the reasons proposed in the British White Paper, we are of the opinion that the Act should not protect Cabinet documents or information relating to the currency or the reserves.
- (d) From our brief survey of existing secrecy provisions, it would appear to us that the confidences of the citizen are adequately protected. We think it preferable to have provisions such as these making it a criminal offence to disclose specific categories of information, than to have a broad provision applying to any 'confidential' information given to, or held by, a government about a person or corporation.

- (e) There is no separate legislation in Australia either in existence or, to our knowledge, proposed on the question of misuse of official information. Consequently, it would be desirable for the legislation to make it an offence for a person to use official information for private gain or to disclose it with a view to private gain by another person.
- (f) Under section 13 of the Crimes Act any person may institute proceedings prosecuting a person for a breach of the Act. In our opinion all prosecutions for a breach of the provisions replacing section 70 should be instituted by the Attorney-General.
- (g) Section 79 of the Crimes Act supplements section 70 by creating a number of additional offences; for instance making it an offence for a government contractor or a person to whom information has been entrusted to disclose it to an unauthorised person if there is a duty to keep it secret; for a person who has come into possession of information, the disclosure of which has not been authorised, to disclose it to another; for a person to retain any document containing such information when he has no right to retain it, or to fail to take reasonable care of it; and finally, merely to receive any such document or information, unless he proves that the communication was contrary to his desire. It would appear to us desirable that this section be reformed so that it would no longer be an offence to receive protected information, but only to communicate it to another, unless either the person did not know, and had no reason to believe, that the information was protected against disclosure; or the person to whom the information was communicated was an authorised person.

**21.27 Recommendation: Urgent consideration should be given by the Government to the question of reforming section 70 of the Crimes Act so as to limit the categories of information that it is an offence to disclose and to establish procedural safeguards for any person who may face prosecution under that section. Any such reform of section 70 should preferably be enacted either before or simultaneously with the enactment of the Freedom of Information Bill.**

## Adverse effect on agency operations (clause 29)

**22.1** The exemption discussed in this chapter is that for certain documents concerning the operations of agencies. It is provided for by clause 29 which is in the following terms:

29. A document is an exempt document if its disclosure under this Act would be contrary to the public interest by reason that the disclosure would have a substantial adverse effect on the financial, property or staff management interests of the Commonwealth or of an agency or would otherwise have a substantial adverse effect on the efficient and economical conduct of the affairs of an agency.

There appears to be little in the expression 'substantial adverse effect on the efficient and economical conduct of the affairs of an agency' which would not be subsumed in the reference to 'the financial, property or staff management interests of the Commonwealth'. We sought clarification as to what documents would fall within the former but not the latter expression from both the Attorney-General's Department and the Public Service Board. Both the Department<sup>1</sup> and the Board<sup>2</sup> referred to the example given in the Explanatory Memorandum, namely, confidential reports on departmental operations or, as the Board put it, agency efficiency reviews, as a matter that would fall within the expression 'efficient and economical conduct of the affairs of an agency' but not within the expression 'financial, property or staff management interests of the Commonwealth'. The Attorney-General's Department conceded that this matter would, *prima facie*, also fall within the protection of clause 26.<sup>3</sup>

**22.2** In subsequent written advice, the Attorney-General's Department through Mr Lindsay Curtis informed the Committee of the reason for including in clause 29 the words 'or would otherwise have a substantial adverse effect on the efficient and economical conduct of the affairs of an agency', as follows:

Section 17 of the Public Service Act, which gives certain duties to the Public Service Board in relation to the economical and efficient working of departments, was read as an indication by the Parliament that there was a public interest in the efficient and economical conduct of the affairs of a department. Consequently, it was thought that this should be reflected in the provisions of the Freedom of Information Bill. As I explained to the Committee there may be matters not covered by the terms 'financial, property or staff management interests' which, if publicly disclosed, would be contrary to that public interest. The words 'the efficient and economical conduct of the affairs of an agency' in clause 29 of the Bill might be compared with the words 'the economical and efficient working of each department' in paragraph (d) of sub-section 17 (1) of the Public Service Act 1922.<sup>4</sup>

**22.3** Paragraph (d) of sub-section 17 (1) of the *Public Service Act* 1922 imposes a duty on the Board to maintain a comprehensive and continuous system of

<sup>1</sup> *Transcript of Evidence*, p. 143.

<sup>2</sup> *Transcript of Evidence*, p. 879.

<sup>3</sup> *Transcript of Evidence*, p. 143.

<sup>4</sup> Letter of 23 October 1978 from Attorney-General's Department to Committee (Committee Document 5).

measuring and checking 'the economical and efficient working of each Department . . .'. The Board was unable to cast any particular light on the meaning of the words in issue, being guided 'by Section 17 as a whole and the ordinary dictionary meaning of the words'.<sup>5</sup>

**22.4** The attitude seems to have been that the expression in question was required in case there were sensitive aspects of agency operations that could not be described in terms of their financial, property or staff management interests. We consider this to be an overly cautious attitude. No allowance seems to have been made for the supplementary protection afforded by other clauses for documents concerning the efficient operations of government which may, in some circumstances, warrant protection. We discuss this matter further in Chapter 19 concerning clause 26. Neither the evidence submitted to the Committee nor the specific advice provided by the Public Service Board and the Attorney-General's Department give us grounds for altering our initial assessment that reference to 'the efficient and economical conduct of the affairs of an agency' is an unnecessary addition to clause 29.

**22.5** We were also concerned that if this reference were retained in clause 29, it could be interpreted by an agency unsympathetic to disclosure as enabling it to refuse access on the grounds that the increased demands placed on its resources in complying with requests for access would impede its efficiency in respect of other functions. In other words the final part of clause 29 could operate in much the same way that clause 13 (3) is intended to operate. Recourse to clause 13 (3) by an agency, however, would depend on the request being categorical (that is, requests for all documents of a particular type or category, or all documents on a particular subject) and on the burden placed on agency resources being unreasonable and, as we would amend it, substantial. The danger is that the same power to refuse access to documents would be available under clause 29 without the same, or any, conditions acting to fetter the exercise of that power. We were assured by departmental officers that clause 29 was directed to relieving the mischief caused by public knowledge of the contents of a document rather than the mischief caused by devoting scarce resources to complying with the request. Our point is, however, reinforced by the fact that the interpretation which we have suggested may be placed on the final part of clause 29, was actually adopted in a legal opinion obtained, and submitted to the Committee, by the Australia Council.<sup>6</sup>

**22.6** We have concluded that a need for reference to the 'efficient and economical conduct of the affairs of an agency' cannot be clearly demonstrated. We have also concluded that the reference is potentially confusing. Accordingly, we propose that the words in question be deleted from clause 29.

**22.7 Recommendation: The words 'or would otherwise have a substantial adverse effect on the efficient and economical conduct of the affairs of an agency' should be deleted from clause 29.**

**22.8** With regard to that part of clause 29 which refers to staff management interests, the Public Service Board identified several documents with which it was particularly concerned, which might require protection in this respect.<sup>7</sup> These

<sup>5</sup> Letter of 15 February 1979 from Chairman, Public Service Board to Chairman of the Committee.

<sup>6</sup> Legal Opinion by Allen, Allen and Hemsley, Solicitors, incorporated in *Transcript of Evidence*, p. 647.

<sup>7</sup> Submission no. 47, incorporated in *Transcript of Evidence*, p. 841-2.

included examination papers, reports under section 29 of the Public Service Act from Permanent Heads concerning the creation and abolition of offices, documentation of forward staff estimates, reports of classification investigations, correspondence with departments on staffing issues and reports to the Prime Minister on staff ceiling matters. The Board readily conceded that the public interest would by no means require that all information in these categories be protected from disclosure, but said that if such documents warranted protection, an agency would not always be able to rely on other exemptions such as personal privacy or internal working documents.

**22.9** We acknowledge the need for an exemption to cover staffing matters beyond those matters encompassed by clause 30 for personal privacy and those by clause 26 for internal working documents. We are also concerned that problems may arise in connection with the Commonwealth's responsibilities in relation to the assessment of personnel other than Commonwealth Government employees or personnel in other than their capacity as Commonwealth Government employees. Two specific situations were brought to our attention. First, the Department of Transport expressed concern that the examination papers for aircraft maintenance engineers' licences and flight crew licences and ratings would be disclosed thereby seriously impairing the Department's ability to examine applicants for such licences in any effective way.<sup>8</sup> It appears that the subjects under examination are comparatively narrow and the range of possible questions is correspondingly limited. The Department considered that access to past papers would reduce what was intended to be a test of knowledge, understanding and diagnostic skills to a test of memory and accordingly people unprepared for the task would become responsible for the maintenance and operation of aircraft. The examination papers would not come within the ambit of clause 29 as presently drafted for the reason that 'staff management' would be construed simply as the management of Commonwealth public servants.

**22.10** The second situation concerns confidential reports by experts on applicants for government grants for artistic purposes. This was the subject of strong representations by the Australia Council. The Council proposed that when competitive grants are made in circumstances where the criteria have been heavily dependent on 'artistic judgment', the subjective opinions should not be available under freedom of information legislation. The Council considered that the opinions might occasion hurt and discouragement to an unsuccessful applicant; they might be regarded as defamatory; their release might lead to a flow of appeals against the decisions of Council; and suitable expert advisers might prove unwilling in the future to offer their services given the possibility of protracted appeals and litigation and, not least, a certain amount of unpleasantness on the part of the unsuccessful applicant and his supporters.<sup>9</sup>

**22.11** We have already discussed the question of defamation in Chapter 9. At this stage it is sufficient to state that although clause 46 of the Freedom of Information Bill protects against actions for defamation only those releasing or authorising the release of documents and not the authors of those documents, the defence of qualified privilege would invariably protect the position of a referee. We are more concerned with the possibility that the Council's access to impartial and extensive commentary of the required calibre might be prejudiced.

<sup>8</sup> Submission no. 125, Paper D.

<sup>9</sup> Submission no. 154, incorporated in *Transcript of Evidence*, pp. 642-3, and see *Transcript of Evidence*, pp. 693-700.

**22.12** We expect that the concern expressed by the Department of Transport and the Australia Council would be shared by a significant number of agencies which are empowered to confer benefits or privileges on people other than Commonwealth public servants or on public servants other than in their capacity as such. Clause 26 which, despite its marginal note, is not restricted to documents that are internally produced, would, we consider, provide the protection required by agencies such as the Australia Council. The relevant part of this clause for the purposes of exempting expert opinion is 'opinion, advice or recommendation, obtained, prepared or recorded . . . in the course of, or for the purposes of, the deliberative processes involved in the functions of an agency or Minister or of the Government of the Commonwealth'. Expert opinion on applicants for government grants, being in the nature of opinion obtained in the course of deliberative processes, appears to be directly contemplated by the words of the clause. The Attorney-General's Department confirmed this in evidence to the Committee when commenting on the narrowness of the equivalent United States provision in comparison to clause 26.<sup>10</sup> That evidence referred to one United States case where the court had extended the United States provision, which is essentially concerned with internally produced documents, to cover referees' opinions submitted by academics on an applicant for a research grant when technically the provision precluded such an interpretation. In Australia, on the other hand, referees' opinions are considered to fall well within the meaning of clause 26. The Department of Transport's problem in relation to examination papers, however, could not be protected in this way. Although it is difficult here as elsewhere to find statutory language which expresses with sufficient precision the changes we propose, we consider that this problem might well be overcome by substituting for the words 'staff management' the words 'personnel management and assessment'. It would be understood that the word 'personnel' would not in this context apply only to Commonwealth employees.

**22.13** We emphasise, however, that we would not wish this or any similar change of wording in clause 29 to be interpreted as in any way reducing rights of access by individuals to their personal records under the legislation. This is a matter where agencies will be required to exercise their discretion with great care. We trust that this discretion will not be abused.

**22.14 Recommendation: The 'staff management interests' referred to in clause 29 should be expressed as 'personnel management and assessment interests' in order to accommodate a wider range of matters legitimately entitled to protection.**

**22.15** We consider whether there was a need for reference to the financial and property interests of the Commonwealth to be included in clause 29 given that the equivalent section in the United States Freedom of Information Act refers only to matters 'related solely to the internal personnel rules and practices of the agency'. The Explanatory Memorandum states that clause 29 is intended to cover information such as instructions for audit checks on the expenditure of public moneys and proposals for the acquisition of land.<sup>11</sup> Submissions to the Committee indicated other documents for which protection might legitimately be claimed such as contract tenders, documents relating to the security of buildings and detention centres, and the documents embodying the procedural tactics

<sup>10</sup> *Transcript of Evidence*, pp. 133-134.

<sup>11</sup> Para. 112.

of an agency like the rules on spot investigations and the guidelines to be applied in negotiation, the execution of contracts or settlement of cases.<sup>12</sup>

**22.16** A specific question which arises in relation to the Commonwealth's property interests is whether expert opinion on works of art, which the Commonwealth proposes to purchase, would be protected under this clause. It is argued that the disclosure of such assessments could cause embarrassment to, or adversely affect the reputation of, the artists or experts concerned and would be likely to impair the ability of the government to obtain similar assessments in the future.<sup>13</sup> We assume that the embarrassment or adverse effect on reputation would arise from the subjective element of such assessments. Although it may be arguable that the Commonwealth has a property interest in works of art, the purchase of which is merely in contemplation, we think such an interpretation of clause 29 is unlikely and should not be encouraged. To the extent that reports on such works of art are deserving of protection in the public interest, we think they are covered by clause 26. This application of clause 26 has previously been discussed in paragraph 22.12 in relation to expert opinion on applicants for Commonwealth grants. But where purchases of items of property including works of art are concerned clause 26 (4) comes into play. This provides for the disclosure of the reports 'of scientific or technical experts, whether employed within an agency or not, including reports expressing the opinions of such experts on scientific or technical matters'. Clause 26 (4) excludes from the ambit of the exemption assessments of an essentially objective nature. Because the concern which has been expressed to us in relation to assessments of works of art arises from their subjective element, we are of the view that the disclosure of such assessments would not be governed by clause 26 (4) and would remain protected by clause 26.

**22.17** Aside from what are generally agreed to be the legitimate claims for exemption as financial and property interests of the Commonwealth, it has been contended that less legitimate claims could be made for such documents as consumer test reports on products to be used by an agency, government valuation reports, and details of agency contracts, leasing arrangements, requisitions and second-hand property disposals.<sup>14</sup> We consider that the appropriate way to provide for the legitimate claims for exemption based on the financial and property management interests of the Commonwealth or of an agency, whilst excluding the unwarranted or dubious claims, is to retain reference to these interests on clause 29 and to retain the requirement that such interests be substantially adversely affected but, in addition, require that the public interest be considered 'at large'. We elaborate our views concerning an appropriate public interest test in paragraph 22.18 below. At this stage it is sufficient to state our view that subject to the inclusion in clause 29 of a requirement that the public interest be considered 'at large', we propose that reference to the financial and property management interests of the Commonwealth or of an agency be retained in clause 29.

<sup>12</sup> See Submission no. 9 (Freedom of Information Legislation Campaign Committee), incorporated in *Transcript of Evidence*, p. 168; Submission no. 44, (Victorian Committee for Freedom of Information), incorporated in *Transcript of Evidence*, p. 403.

<sup>13</sup> Paper of 9 May 1979 from Attorney-General's Department on possible amendments to FOI Bill (Committee Document no. 88).

<sup>14</sup> J. McMillan, 'Freedom of Information in Australia: Issue Closed', *Federal Law Review* 8, 1977, p. 379 at p. 413.

**22.18** As clause 29 is presently drafted, it would be contrary to the public interest if disclosure of a document would cause substantial adverse effect on specified interests and there is no requirement to take into account countervailing public interest considerations in favour of disclosure. Undoubtedly, there would be a strong public interest in favour of disclosing documents relating to the interests in question which may, in particular circumstances, override any substantial adverse effect of disclosing the document. Accordingly we propose that clause 29 should be amended so as to require a consideration of the public interest 'at large' as presently provided in clause 26 concerning internal working documents.

**22.19 Recommendation: A separate public interest criterion should be added to clause 29 to enable the review on public interest grounds of exemptions claimed under this clause.**

**22.20** In accordance with the recommendations in paragraphs 22.7, 22.14 and 22.19, clause 29 should be redrafted to read as follows:

A document is an exempt document if its disclosure under this Act—

- (a) would have a substantial adverse effect on the financial, property or personnel management and assessment interests of the Commonwealth or of an agency; and
- (b) would be contrary to the public interest.

## 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.

## Privacy (clause 30)

### Privacy—the general issue

**24.1** Both locally and internationally, there is a clear legislative and administrative trend towards the protection of privacy. In our own country there has been an insistent demand that legislation be enacted safeguarding personal privacy since Sir Zelman Cowen, in 1969 in delivering the ABC Boyer Lectures, *'The Private Man'*, expressed the view that a claim to privacy is 'one of the truly profound values of a civilised society'.<sup>1</sup> Professor Cowen described how the privacy of people is invaded by a massing army of government and officialdom, commerce and industry, the plainly curious, mass media, computer banks, technological wiretapping and eavesdropping, wide discretionary powers of policy entry, search and apprehension, and intrusive employment inquiries. The first comprehensive report on the laws relating to privacy in Australia was prepared in 1973 by Professor W. L. Morison of Sydney University Law School, for the Standing Committee of Attorneys-General.<sup>2</sup> In the main, what this report indicated was that in Australia little positive protection or recognition is given to privacy, either in legislation of the various Parliaments or in the common law as developed by the courts.

**24.2** Isolated legislative reforms have surfaced at the State level. For instance, four States (Victoria, New South Wales, Queensland and South Australia) have enacted statutes in relation to electronic eavesdropping, which make it an offence to use a listening device to record or listen to a conversation except in certain circumstances. Queensland in addition has an *Invasion of Privacy Act*, 1971, which regulates private inquiry agents and credit reporting agents. In two States, Tasmania and South Australia, bills were introduced in 1974 creating a civil cause of action for the violation of privacy. Neither Bill has been passed at this stage.<sup>3</sup>

**24.3** Privacy has also been regularly in the news during the last few years due to the efforts of two bodies in particular. The first is the Australian Law Reform Commission which was given a very comprehensive reference on privacy in 1976. The Commission has conducted a number of public seminars and debates on relevant issues, in addition to publishing papers in two areas: privacy issues arising from the publication of personal facts,<sup>4</sup> and the Census.<sup>5</sup> The most recent publication on privacy is an extensive report, *Unfair Publication: Defamation and Privacy*,<sup>6</sup> published in June 1979, that contains the Commission's conclusions on that aspect of its inquiry. In brief, the Report recommends the

<sup>1</sup> The Australian Broadcasting Commission, Sydney, 1969, p. 11.

<sup>2</sup> Australia, *Report on the Law of Privacy*, Parl. Paper 85/1973, Canberra, 1974.

<sup>3</sup> On State legislation, see generally H. Storey, *Infringement of Privacy and its Remedies*, *Australian Law Journal*, 47, 1973, p. 498; and Jane Swanton, *'Protection of Privacy'*, *Australian Law Journal*, 48, 1974, p. 91.

<sup>4</sup> Australia, Law Reform Commission, *Defamation*. Background paper on present law and possible changes, Working Paper No. 4, ALRC Sydney, 1977; *Defamation—options for reform*, Discussion Paper No. 1, ALRC Sydney, 1977; *Privacy and publication—proposals for protection*, Discussion Paper No. 2, ALRC Sydney, 1977; *Defamation and publication privacy—a draft uniform bill*, Discussion Paper No. 3, ALRC Sydney, 1977.

<sup>5</sup> Discussion Paper No. 8, ALRC Sydney, 1979.

<sup>6</sup> Report No. 11, AGPS, Canberra, 1979.

enactment of uniform legislation throughout Australia, replacing and revising the existing law on defamation and enabling individuals to take action with respect to the publication about them of sensitive private facts. The other body that has been active in this area is the N.S.W. Privacy Committee. This Committee was established in 1975, and has since actively encouraged government and private industry to adopt voluntary codes of conduct and to implement guidelines relating to the collection, storage, dissemination and destruction of information of a private nature. The Privacy Committee has also done much to foster public interest in, and concern with, questions of privacy, by participating in public seminars and discussions, publishing information bulletins, making submissions to inquiries (such as our own into freedom of information), and publishing to date close to fifty background papers on privacy issues.<sup>7</sup>

**24.4** The other general area where developments have occurred, and to which preliminary reference should be made, relates to personnel files. Because of the highly personal nature of the information that these files often contain, the obvious career implications of such information being inaccurately maintained, and further because of the effect that the mere existence of this information can have on the stability of a person, much attention has focused on privacy issues and there has been a substantial development of ideas and rules. For instance, in N.S.W. the Privacy Committee has published draft *Guidelines for the Operation of Personal Data Systems* for the use of those controlling record holdings in the private or the public sector.<sup>8</sup> Federally, the Public Service Board has also reached the stage of circulating for comment a draft of *Guidelines on the Keeping of Personal Records on Staff in the Australian Public Service*.<sup>9</sup> The Guidelines will regulate such matters as the nature of the information which may be contained on files, correction of errors, custody of the records, disclosure to third parties, and access by the party affected.

**24.5** We mention these developments, which are not directly related to this Bill, as we feel it is important to view an exemption like clause 30 in the light of the wider changes that are occurring in relation to privacy. Developments that occur in one area can clearly have an effect on the development of doctrine in another area. For instance, it is relevant to our inquiry that the emphasis in the development of rules on personnel data systems appears to be on permitting individuals to inspect their files (including adverse or critical assessments that may be contained thereon) and on providing a mechanism for challenge to, and correction of, allegedly false or inaccurate information. This question of correction is taken up later in this chapter.

**24.6** Another reason why we think it is important to bear in mind the general trends in relation to privacy is that there appears to be a view in some quarters that freedom of information and privacy are conflicting objectives: that, while the trend of legislative and administrative reform is to safeguard private information about individuals, this Bill seeks to create a right of access which emphasises the disclosure and dissemination of material. In our opinion there is no conflict between freedom of information and privacy so long as freedom of information legislation contains an exemption permitting the government

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<sup>7</sup> The work of the Privacy Committee is well demonstrated in one of its recent publications, *N.S.W. Privacy Committee Report 1975-1978*, Sydney, 1979. The published papers of the Committee are listed in that Report.

<sup>8</sup> N.S.W. Privacy Committee, Background Paper no. 31, Sydney, The Committee, 1977.

<sup>9</sup> See discussion in *Transcript of Evidence*, pp. 902-3; see also the PSB's Submission (no. 47), incorporated in *Transcript of Evidence*, pp. 842-4, which discusses the PSB's holdings of records containing personal information.

to withhold from public access information of a personal nature. Ideally, separate legislation could be enacted, a privacy statute, placing an *obligation* upon the government to withhold and safeguard personal information. We note that the United States has adopted this course, and we return to this matter later in the chapter.

**24.7** Furthermore, it is our understanding of the history of the concern with privacy that one of the main elements of that debate has been the need to enable individuals to ascertain when information is held about them, in part to dispel fear and ignorance, but also to enable correction of false or misleading information. This Bill goes some way towards the pursuit of those objectives, and to that extent is compatible with the concern for privacy. More is said in the second part of this chapter about the need for some mechanism in the Bill to enable individuals to correct information which is held about them.

### **Protection of privacy in the Bill**

**24.8** The clause protecting documents which affect personal privacy is clause 30. It provides as follows:

30. (1) A document is an exempt document if its disclosure under this Act would involve the unreasonable disclosure of information relating to the personal affairs of any person (including a deceased person).

(2) Subject to sub-section (3), the provisions of sub-section (1) do not have effect in relation to a request by a person for access to a document by reason only of the inclusion in the document of matter relating to that person.

(3) Where a request is made to an agency or Minister for access to a document of the agency, or an official document of the Minister, that contains information of a medical or psychiatric nature concerning the person making the request and it appears to the principal officer of the agency, or to the Minister, as the case may be, that the disclosure of the information to that person might be prejudicial to the physical or mental health or well-being of that person, the principal officer or Minister may direct that access to the document, so far as it contains that information, that would otherwise be given to that person is not to be given to him but is to be given instead to a medical practitioner to be nominated by him.

**24.9** The need for this exemption is apparent, and indeed many departments gave examples of their personal record holdings that would clearly qualify for exemption. Some claims were made, however, especially in the submissions from government departments, that clause 30 is not broad enough to enable departments to protect personal information from general distribution. The Department of Immigration and Ethnic Affairs in its submission pointed out that they had approximately 180 000 active personal files, with information ranging from intimate personal and family details to fairly basic passenger movement records maintained in respect of persons entering and leaving Australia. They pointed out that numerous persons and organisations, including debt collection agencies and private investigators, would be interested in seeing the passenger movement records. The Department feared that it might not be able to withhold these, as it may not be able to establish that disclosure would involve the unreasonable disclosure of information relating to the personal affairs of a person.<sup>10</sup> A different concern was expressed by the Commonwealth Employees' Compensation Tribunal. It was indicated that a claimant is sometimes asked to leave a hearing room when medical evidence is given about him which it is not in his interest to hear—for example, evidence in psychiatric cases or where a claimant has a terminal illness. However, when the Bill is enacted the Compensation Tribunal

<sup>10</sup> Submission no. 158, incorporated in *Transcript of Evidence*, p. 2341.

may not be able to withhold such information from an applicant, and at best will be able to refer it to a medical practitioner chosen by him.<sup>11</sup> The Commissioner for Employees' Compensation also expressed the same fear. In addition, that office thought that, by combination of clauses 20 and 30 of the Bill, it might be required to disclose a person's compensation application to another person with the name of the claimant deleted.<sup>12</sup> The Commissioner felt that this would, in any case, still constitute an unreasonable disclosure of information relating to the personal affairs of the person.

**24.10** We do not intend in this Report to answer all of the individual criticisms and fears which may be expressed about the operation of clause 30. In our opinion, after carefully considering the matter, clause 30 lays down an adequate standard to regulate disclosure of personal information. In the cases just outlined, the agencies will have every opportunity to present to the Administrative Appeals Tribunal their opinions as to why disclosure would be unreasonable in the circumstances; there is every reason why sensible argument should prevail. We also feel many people frequently overstate the calamity that will result if individuals are given access to their own files, particularly medical files. For instance, the Department of Health strongly opposed the disclosure to patients of the results of pathology tests and clinical notes of doctors. One of the reasons advanced was the difficulty patients would have in correctly interpreting the information.<sup>13</sup> By contrast, the N.S.W. Privacy Committee reported on moves it had successfully taken to persuade hospitals to allow patients access to their own files, either directly or via a medical practitioner nominated by the client, and concluded that:

So far these procedures have satisfied all requests . . . Nor have we heard of any instance where access has had a harmful effect on a patient's medical condition. In addition, where psychiatric files were the subject of access requests, it was thought that granting of access would be both tedious and fraught with difficulty. In fact, accesses have been carried out without complications. The emerging view appears to be that those patients who wish access to their files are few in number and are more likely to be harmed by the fear of a secret file than by actual access.<sup>14</sup>

Mr W. Orme, the Executive Member of the Privacy Committee, also reported in evidence that a United States joint House and Senate study of privacy and access reported in July 1977 that it had not been able to find a single instance where direct or indirect access to a medical file had caused a problem.<sup>15</sup>

**24.11** We should also mention that most departments expressed satisfaction with the exemption and, indeed, we were encouraged by the constructive attitude that some are already adopting towards its interpretation. For instance, the Departments of Social Security and the Capital Territory indicated that they would not confine an individual's access to personal information created after the date of the commencement of the Bill. They intend to show individuals their full files.<sup>16</sup> The Department of Social Security also indicated that their files will henceforth show the decision which has been made and that staff will be provided to enable them to understand the information recorded on their files.

<sup>11</sup> Submission no. 55, p. 3.

<sup>12</sup> Submission no. 99, p. 3.

<sup>13</sup> Submission no. 83, incorporated in *Transcript of Evidence*, pp. 1031-33; and see extensive discussion of this matter in *Transcript of Evidence*, pp. 1034-59.

<sup>14</sup> Submission no. 87, incorporated in *Transcript of Evidence*, p. 496.

<sup>15</sup> *Transcript of Evidence*, p. 503.

<sup>16</sup> Submission no. 117 (Social Security) incorporated in *Transcript of Evidence*, p. 2132-34; Submission no. 149 (Capital Territory) incorporated in *Transcript of Evidence*, p. 2235.

**24.12** While, in general, submissions to the Committee were critical of the use of qualifying adjectives like 'unreasonable' there seemed to be broad acceptance that that standard was appropriate in clause 30. Mr Orme indicated that his Committee preferred to work with broad standards of that nature, and that in practice they could be utilised effectively on a case to case basis.<sup>17</sup> Our only hesitation in accepting the clause without qualification concerns the inclusion of the words 'disclosure under this Act'. Mr Curtis (First Assistant Secretary, Attorney-General's Department), indicated that this meant 'disclosure to the world at large'.<sup>18</sup> That is, when a request is received for information that contains some personal or private details, the agency must assess whether it would be unreasonable to disclose the information generally, rather than whether it would be unreasonable to disclose to the particular applicant. This means that researchers, or trade union groups, could not seek preferential access (as they can under the United States Act)<sup>19</sup> on the basis that the documents requested will be used for research purposes and not otherwise published. While we can see the benefit in having a clause that operates in this broader fashion, we are inclined at the moment to retain clause 30 as it is because of the general principle underlying all clauses that all persons have equal rights of access, and no person need establish a need for a document. Whether this principle should be amended in relation to clause 30 is obviously a matter which can be reconsidered when a review of the Bill is undertaken after 3 years of operation (see Chapter 32).

**24.13 Recommendation: The privacy exemption in clause 30 should be retained in its present form but it should be given particular attention when the legislation is subject to its first major review.**

#### **Desirability of a Right to Privacy Act**

**24.14** It has been suggested to us that the Freedom of Information Bill should contain provisions designed to protect the personal privacy of those who are, or could be referred to, in government records. We have reached the conclusion that it is impracticable for us to make general recommendations on the form of privacy legislation. While the Freedom of Information Bill is simply an access statute, privacy legislation would have objectives going far beyond access to personal records. In general, such legislation is designed to enable individuals to control how, when and to what extent information about them is communicated to others. Consequently, privacy legislation normally contains provisions designed to control the national data bank of personal information, with controls on collection, storage, dissemination, retention and correction of personal information. There are numerous issues arising on each of these points which this Committee is not in a position to consider. We refer again to the fact that the Australian Law Reform Commission presently has a reference that encompasses these matters.

**24.15** The United States enacted in 1974 a general Privacy Act dealing with all the matters listed in the previous paragraph. A consideration of developments under the United States Act also suggests the difficulty of legislating generally on privacy at this time. The United States Act, broadly speaking, imposes upon agencies a large number of record-keeping obligations with respect to each 'system of records' maintained by the agency. As many as 8000 individual systems of

<sup>17</sup> *Transcript of Evidence*, p. 524.

<sup>18</sup> *Transcript of Evidence*, p. 148.

<sup>19</sup> See e.g. *Getman v. N.L.R.B.* 450 F. 2d 670 (D.C. Cir. 1971).

records have been uncovered since passage of the Act (compared to an estimated 850 before passage).<sup>20</sup> In addition the cost of administering the Act in its first year of operation (September 1975–September 1976), excluding one-time start up costs, was \$36.59 million (though the estimate had been as high as \$200–\$300 million per year.<sup>21</sup> In 1977, 1 417 214 requests were received under the Act (1 355 515 being granted in whole or in part).<sup>22</sup> These figures alone indicate that there will be resource implications which will also have to be investigated before general privacy legislation can be enacted.

### **Correction of personal files**

**24.16** However, there is one matter which has been suggested to us in many submissions about which we do feel confident enough to make a recommendation, and that is the correction of personal files. It is convenient at the outset to summarise the provisions of the United States Privacy Act on this point. An individual is empowered to request the amendment of a record relating to him to which he could lawfully have access under the Act, on the basis that the record or any portion thereof 'is not accurate, relevant, timely, or complete'. The agency must acknowledge the request within ten working days of receipt, and thereafter promptly amend the record or notify the individual of the refusal, the reasons therefor, and of the right to seek a review of the refusal. If an internal review is requested, this has to be completed within thirty days. Judicial review is thereafter available if the applicant is dissatisfied. In addition, an applicant who has been unsuccessful on an internal review may file with the agency a concise statement setting forth the reasons for his disagreement with the decision of the agency. If the disputed information is thereafter disclosed, the disputed portions must be noted and the applicant's statement must be appended; the agency may also append a concise explanation as to why the applicant's request was rejected. Further, any correction or notation of a dispute must be notified to any person to whom the record was earlier disclosed, where an account of that disclosure has been maintained. If the earlier recipient of an amended record was also a Federal agency, it must amend its record accordingly.

**24.17** We are of the opinion that a similar scheme modified to complement Australian legislative provisions should be contained in the Freedom of Information Bill. Following are the main features which in our opinion should be inserted in the Bill:

- (a) the right of correction should apply to any personal information of a factual nature contained in a document which is public or has been released or obtained under the Freedom of Information legislation. That is, the right of correction would be tied to the release of information under the Freedom of Information Bill. No additional right of access would be created for the purpose of enabling a person to ascertain whether information is liable to correction.
- (b) The right of correction should extend to those prior documents to which we have recommended in Chapter 14 that access should be granted.

<sup>20</sup> United States, University of Missouri, School of Journalism, Freedom of Information Centre, *FOI Digest*, 18, January–February 1976, No. 1, p. 2.

<sup>21</sup> See Submission by K. P. O'Connor (no. 88), incorporated in *Transcript of Evidence*, p. 537.

<sup>22</sup> Report compiled by the Office of Management and Budget presented to President Carter on 20 July 1978—see *Access Reports*, Newsletter on Freedom of Information and Privacy, 8 August 1978.

- (c) Information should be subject to correction on the grounds that it is inaccurate, or is incomplete and would give a misleading impression. We do not recommend that the other grounds stated in the United States Act, 'relevance' and 'timeliness' be adopted in Australia. Those standards have meaning only in the context of their Act when read with other provisions which regulate the nature of the information which departments may collect, and the purposes for which they may retain that information.
- (d) Basically the same access procedures and time limits in the Freedom of Information legislation should apply to the right of correction as are applicable to requests for information generally.
- (e) The same mechanisms available under the Freedom of Information legislation for an applicant to challenge an adverse decision—that is, internal review, complaint to the Ombudsman, and appeal to the Administrative Appeals Tribunal—should also apply to the right of correction.
- (f) An applicant whose request that a record be amended has been rejected should be permitted (as in the United States) to lodge on the record a concise statement of the reasons for his disagreement.
- (g) While it is difficult to reproduce in Australia the United States stipulation that earlier recipients of information be notified of any correction or notation of dispute, as, unlike the United States, no record of disclosures is required to be kept in Australia the Bill should contain an exhortation to the effect that agencies should make all practicable efforts to notify significant changes or notations to earlier known recipients.
- (h) To ensure that these provisions are manageable, we recommend that the right to seek correction of records should be limited to Australian citizens and permanent residents.

**24.18 Recommendation: The Bill should be amended to incorporate a system whereby rights are conferred upon Australian citizens and permanent residents to request the correction of inaccurate or misleading facts concerning personal information pertaining to the applicant.**

## **Commercially sensitive and other confidential information (clauses 32 and 34)**

**25.1** In this chapter we deal with the need to balance the interests of commercial undertakings which have supplied material to government agencies and the interests of members of the public in gaining access to that information. There are two key provisions of the Bill relevant to this issue: namely, clause 32 concerning documents relating to trade secrets and clause 34 concerning material obtained in confidence. The relevant provisions in clause 32 provide:

32. (1) A document is an exempt document if its disclosure under this Act would disclose information concerning a person in respect of his business or professional affairs or concerning a business, commercial or financial undertaking, and—
- (a) the information relates to trade secrets or relates to other matter the disclosure of which under this Act would be reasonably likely to expose the person or undertaking unreasonably to disadvantage; or
  - (b) the disclosure of the information under this Act would be contrary to the public interest by reason that the disclosure would be reasonably likely to impair the ability of the Commonwealth or of an agency to obtain similar information in the future.

**25.2** The overwhelming flavour of the submissions received as regards both these clauses has been one of concern on the part of the business organisations that, irrespective of how broadly these provisions are drafted and subsequently interpreted, they will not necessarily be invoked by public servants responding to requests for access to such material. Thus the Committee was told in a submission by one corporate witness:

We have some concern however as to the possibility that data supplied by us in confidence or otherwise to a Government agency will be disclosed by that agency under the provisions of the proposed Act without consultation with us about the repercussions such disclosure may have on our business activities. . . . Our concern relates to the potential use by trade competitors as distinct from legitimate use by the Agency involved.<sup>1</sup>

We were advised by the Attorney-General's Department that clause 32 was intended to protect not only information obtained by a government agency from outside sources but also information concerning the agency itself in respect of any business, commercial or financial undertaking in which it might be engaged. The Department has admitted, however, that clause 32 does not clearly have that effect, a view which the Committee shares.

**25.3** In this matter we have some sympathy with the view expressed by the Australian National Airlines Commission in a submission to us:

Information required to be disclosed under the Act or by order of the Tribunal would often be information not only of the Commission but also information supplied by customers, suppliers, business associates, partners in joint ventures or companies in which the shareholding is not totally owned by the Commission. Although Clauses 29, 32 and 34 on a superficial examination appear to afford some relief in this area, any decisions made by the Commission to withhold access to information on the grounds specified in

<sup>1</sup> Submission no. 123 by Dow Chemical (Australia) Limited incorporated in *Transcript of Evidence*, p. 1190.

these Clauses would be reviewable by the Tribunal. This would have a serious impact on the Commission's business relationships, as companies and individuals would be loath to enter into arrangements or deal with us.<sup>2</sup>

This concern arises from the provision in clause 12 that nothing in the Bill is intended to prevent or discourage agencies from giving access even to exempt documents where they can properly do so. As a result, material which may include a trade secret or, which, if disclosed, may expose a person or undertaking unreasonably to disadvantage or impair the ability of the Commonwealth or of an agency to obtain similar information in the future might still be lawfully disclosed notwithstanding any harm which could result.

**25.4** We readily concede that these concerns have some validity. We note that there is strong evidence that the United States legislation has been used for purposes of industrial espionage. Figures published by the United States Food and Drug Administration (FDA) indicated the receipt of some 20 000 requests under the Freedom of Information Act in 1975. Of these, 86% were from industry and private attorneys, while only 14% were from the general public, consumers, press, health professionals and scientists. The FDA suggested that the large bulk of these requests were associated with industrial espionage in which many commercial firms engage.<sup>3</sup>

**25.5** Nevertheless, these legitimate fears do not justify granting a complete veto over the release of commercial information to the supplier of that information, a course which was urged upon us by some witnesses. The Committee takes the view that there is no right to total corporate privacy. Business corporations are created under Federal and State laws and are properly subject to regulation by governments for the common good. A corollary of this is the public's right to know how well that regulation is being carried out on its behalf. In the words of Theodore Roosevelt, corporations 'exist only because they are created and safeguarded by our institutions; and it is therefore our right and our duty to see that they work in harmony with those institutions'.<sup>4</sup> It would be totally unacceptable to allow a situation in which a corporation could prevent the public disclosure, for an indefinite period, of information provided by it to a government agency (in many cases with a view to receiving some benefit) simply by marking the documents in question as confidential. Yet this is a view which was put to us by a number of corporate witnesses.

**25.6** The Committee does not doubt, however, that the suppliers of commercially sensitive information should be afforded some protection against disclosure of material which falls within the categories listed in clause 32. The difficulty lies, of course, in determining the extent of protection to be afforded so as not to negate the legitimate interests of other members of the public in gaining access to some material supplied by business organisations which the latter might prefer not to be disclosed. The conferral of a right on the suppliers of information to limit or deny access by others to that information, or at least to be a party to the access decision, is generally referred to by the title of 'Reverse-FOI' signifying that the right is the antithesis of a right to freedom of information. In the remainder of this chapter we discuss in turn, Breach of Confidence (clause 34), Trade Secrets (clause 32) and 'Reverse-FOI'.

<sup>2</sup> Submission no. 166, p. 3.

<sup>3</sup> Submission no. 123 incorporated in *Transcript of Evidence*, pp. 1195-96.

<sup>4</sup> First message to Congress (1901) quoted in M. V. Nadel, 'Corporate Secrecy and Political Accountability', *Public Administration Review* 35, Jan.-Feb. 1975, pp. 14-23.

## **Breach of confidence**

### **25.7** Clause 34 provides:

A document is an exempt document if its disclosure under this Act would constitute a breach of confidence.

The Committee has had some difficulty in determining the meaning of this clause. The difficulty arises from the fact that 'breach of confidence' is the name given to an equitable doctrine which enables people to sue in the courts in respect of the disclosure of confidential information supplied by them. It is by no means clear, on the face of it, whether or not clause 34 is intended to be confined to this actionable breach of confidence or whether it is intended to enable exemption to be claimed in respect of every document held by agencies as to which the author sought that it be treated in confidence.

**25.8** The Explanatory Memorandum<sup>5</sup> does not resolve the ambiguity as to what was intended. On the one hand it states that this exemption 'extends to protect confidential information that might not be covered by [the trade secrets and personal privacy exemptions] if it can be shown that disclosure of the information would amount to a breach of confidence'.<sup>6</sup> This suggests that actionable breach of confidence is intended. On the other hand the Explanatory Memorandum relies on the recommendation of the 1976 Interdepartmental Committee Report which argued for the recommendation on the basis that 'an understanding that information is being supplied on a confidential basis ought to be respected'.<sup>7</sup> Whatever else might be uncertain about actionable breach of confidence it is at least clear that it does not encompass every understanding of confidentiality on the part of the submitter. The wide view put forward in the 1976 Interdepartmental Committee Report was, however, rejected as the basis of clause 34 by Mr L. Curtis of the Attorney-General's Department who appeared before us. On the subject of clause 34 he put the following view:

Clause 34 was intended to operate only in those cases where the law would now restrain disclosure as a breach of confidence. That is, the information must be inherently of a confidential nature, it must have been given and received either in an express or implied undertaking of confidentiality, and the disclosure of the information must result in some detriment, not necessarily a financial detriment, but some detriment to the party who disclosed the information. That is, it must continue to remain information inherently of a confidential character. That was what those words 'breach of confidence' in clause 34 were intended to mean and those conditions would not be satisfied simply by a department saying to somebody who was providing information from outside or providing a document from outside: 'We will treat this in confidence'.<sup>8</sup>

**25.9** As regards actionable breach of confidence, the elements of which are stated in the above quotation, the Committee notes that confidential information in this context is confined to facts, schemes or theories which the law regards as of sufficient value or importance to afford protection against use of them by the defendant otherwise than in accordance with the plaintiff's wishes. In its present state of development, the law of confidential information has been limited almost entirely to the category of trade secrets. It has been suggested that actions in the courts to enforce this type of confidence have resulted from the delays, inconveniences and uncertainties of the patent system in both Australia and Britain.<sup>9</sup>

<sup>5</sup> Australia, *Freedom of Information Bill 1978: Explanatory Memorandum*, Canberra, 1978.

<sup>6</sup> *ibid.*, para. 127.

<sup>7</sup> Australia, Report of the Interdepartmental Committee on Policy Proposals for Freedom of Information Legislation, *Parliamentary Paper* no. 400/1976, Canberra, 1977, para. 12.16.

<sup>8</sup> *Transcript of Evidence*, pp. 82-83.

<sup>9</sup> See R. P. Meagher, W. M. C. Gummow and G. R. F. Lehane, *Equity: Doctrines and Remedies*, Butterworths, Sydney, 1975, p. 713.

The other type of confidence protected by the equitable doctrine is private domestic secrets. The best-known recent example of this type is recorded in *Argyll v. Argyll*,<sup>10</sup> where the plaintiff obtained an injunction restraining publication of newspaper articles by her divorced husband dealing with secrets of the plaintiff's private life communicated to her spouse during their marriage.

**25.10** We are concerned that the existence of a clause open to such potentially wide interpretation as clause 34 could lead to abuses such as the covering up of acts of malfeasance or the denial of access to material held by government and indicating malfeasance in either the public or private sector. Against this it might be argued that the law of breach of confidence does in fact make allowances for such a situation in that it does not protect conduct of this kind.

**25.11** In a document provided to the Committee by the Attorney-General<sup>11</sup> there is a helpful discussion of the law relating to confidentiality, in which it is suggested that the courts have made it clear that the law of confidentiality does not protect misconduct. Thus in *Gartside v. Ouram*, Wood V.C. said: 'There is no confidence as to the disclosure of iniquity.'<sup>12</sup> The English Court of Appeal applied this principle in *Initial Services Ltd v. Putterill*<sup>13</sup> a case where an employee disclosed an alleged breach of the Restrictive Trade Practices Act by his employer. Lord Denning, M.R. rejected a suggestion that the public interest in disclosure of confidential information was limited to cases where the person whose confidence has been breached has been 'guilty of a crime or fraud'. He said that 'it extends to any misconduct of such a nature that it ought in the public interest to be disclosed to others'.<sup>14</sup> While we find these judicial pronouncements reassuring as far as they go, they are not of sufficient number, precision, weight or authority in Australia to persuade us of themselves that a breach of confidence exemption in all conceivable cases would not be open to abuse by governments anxious to avoid embarrassing disclosures.

**25.12** The Explanatory Memorandum is instructive in demonstrating the lack of any clearly perceived category of information for which it is necessary to have a separate breach of confidence exemption. It states in paragraph 12.8:

This clause therefore overlaps with clause 30, relating to personal privacy, and clause 32, relating to business privacy, but extends to protect confidential information that might not be covered by those clauses if it can be shown that disclosure of the information would amount to a breach of confidence.

The document from the Attorney-General's Department referred to in paragraph 25.11 also makes it clear that most grounds that would serve as the basis for an action for breach of confidence would be covered by clauses 30 and 32. The document points out that confidential material of the kind protected by the Court in the *Argyll* case would clearly be covered by clause 30. It also states that business or commercial information of the kind protected by the courts in breach of confidence actions would be capable of protection from mandatory disclosure under clause 32 of the Bill.

<sup>10</sup> [1967] Ch. 302.

<sup>11</sup> Paper prepared by the Attorney-General's Department dated 9 May 1979. The paper covers clauses 23, 26, 27, 32 and 34, together with a detailed paper on breach of confidence. (Committee Document no. 88).

<sup>12</sup> (1856) 26 L.J. Ch. 113, at p. 114.

<sup>13</sup> [1968] 1 Q.B. 396.

<sup>14</sup> *ibid.*, p. 405.

**25.13** In our view there are no areas of necessary confidentiality which would require the existence of this clause. Confidential matter referred to the Commonwealth by the States would be covered by the exemption in paragraph 23 (1)(b) which is discussed in Chapter 17 of our Report. Examples of other areas of confidentiality were raised in the document provided to us by the Attorney-General. These were the protection of Aboriginal tribal secrets; artistic assessments by experts of works of art under consideration for purchase; confidential reports of referees on applicants for appointment; confidential reports on applicants for government grants for artistic purposes; and information of a technical kind produced by a non-commercial research organisation such as a university. We are satisfied that each of these could be protected under some other provision in the Bill and are not of themselves sufficient to warrant the retention of clause 34.

**25.14** Thus, Aboriginal tribal secrets<sup>15</sup> are sufficiently important to warrant exemption by inclusion in the schedule which we recommend should be included in the Bill to list those matters exempted under clause 5. We have discussed the protection from disclosure of assessments of works of art which the Government is considering purchasing, elsewhere in our Report (see Chapter 22), and it is our view that such assessments could be protected from disclosure under clause 26 which exempts matter in the nature of opinion or advice prepared or recorded in the course of, or for the purposes of the deliberative processes involved in the functions of an agency or minister, the disclosure of which would be contrary to the public interest. Such assessments could also, if necessary, be protected under clause 29 insofar as they pertain to the Commonwealth's property interests (see also Chapter 22). Reports of referees on applicants for appointment, or on applicants for government grants for artistic purposes, given in confidence would also fall within the terms of clause 26, or alternatively, would be exempted under clause 29, which we have recommended (see Chapter 22) should be amended to cover the disclosure of matters affecting personnel assessment.

**25.15** There may be some such assessments which would not fall within any of the exemption provisions. In that case, the possibility of defamation would arise. We discuss that issue in Chapter 9.

**25.16** The final example put forward in the Attorney-General's paper was information of a technical kind produced by a non-commercial research organisation such as a university. Such information could be protected in a number of ways; for example, by applying for a patent thereby invoking the protection of the patent legislation. In some cases the secrecy provisions of the Australian Research Grants Council legislation would operate to protect such information. Some such bodies, for example, the Australian National University, could come within the definition of 'prescribed authority' in clause 3 (1), thus bringing them within the definition of 'agency'. If the body in question were an agency, it could claim exemption from disclosure of the information under clause 29. In the last resort we are of the view that it would be possible to specify a class of documents to cover such information for inclusion in the schedule under clause 5.

**25.17** In summary, we reject as totally inappropriate any provision which could enable exemption to be claimed for any document which the author wished to be treated in confidence. To vest such a veto power in individuals supplying information to government agencies, whether voluntarily or by force of statute, would be inimical to the interests of the wider community. Moreover, one

<sup>15</sup> Protected under the law relating to breach of confidence in *Foster v. Mountford and Rigby Ltd* (1977) 14 ALR 71.

of the necessary conditions to be satisfied when applying the law relating to confidentiality is that the matter is inherently confidential. That is, it is not sufficient that the matter be treated as confidential by the person conveying it; an objective test must also be applied to determine whether the information should be treated as confidential. In this context we note the view of the Attorney-General's Department that a 'unilateral declaration of confidentiality, for example by a person marking any document he forwards to a Government agency 'Confidential' regardless of its contents, would not, therefore, by itself be sufficient to invoke clause 34.'<sup>16</sup> But we would go further and assert that, as the matters currently covered by the law of breach of confidence are narrower in scope than clauses 30 and 32, the need for a separate breach of confidence exemption has not been made out.

**25.18** Our decision to recommend the deletion of clause 34 is reinforced by the view of the Department of Business and Consumer Affairs which stated in a submission to us that 'the analysis required to assess the law of breach of confidence (clause 34) is complex and resources will certainly not enable it to be undertaken in other than a few cases'.<sup>17</sup> If, in the future, it becomes apparent that there are specific kinds of confidences deserving of protection and which are not protected within the legislation then amendments should be made at that time to cover such confidences.

**25.19 Recommendation: Clause 34 of the Bill, exempting documents the disclosure of which would constitute a breach of confidence, should be deleted.**

### **Trade secrets**

**25.20** While the marginal note to clause 32 of the Bill refers to 'trade secrets, etc.', the exemption is considerably broader than the common law definition of trade secrets. It relates also to other matter the disclosure of which would be reasonably likely to expose unreasonably to disadvantage, a business, commercial or financial undertaking or a person in respect of his business or professional affairs. It also encompasses the disclosure of information 'which would be contrary to the public interest by reason that the disclosure would be reasonably likely to impair the ability of the Commonwealth or of an agency to obtain similar information in the future'. Both these elements of clause 32 are of potentially wide ambit. Not surprisingly, the business sector has not expressed any concern that the clause is drafted too narrowly so as not to include certain information which should be exempted. Rather, their fears in respect of clause 32 have focused solely on whether or not public servants making the decisions on access requests will in fact invoke the exemption. This is further discussed later.

**25.21** In Chapter 12 we recommend that the inhibiting effect of disclosure on the supply of similar information in the future should not be regarded in all cases as a valid reason for exempting an agency or class of documents from the operation of the Bill. We noted that the subjective judgments involved in making such decisions provided scope for excessive use of an exemption of that nature. By contrast, we consider that the danger of excessive invocation of this exemption is considerably less for the more limited category of documents concerning business, commercial or financial undertakings. Furthermore, it is to be expected that public servants might not have the same vested interest in claiming exemption for documents submitted from outside an agency as they would have for documents prepared by their colleagues. This factor may give some comfort to those persons

<sup>16</sup> Paper by Attorney-General's Department, cited footnote 11, 'Breach of Confidence' paper, p. 8.

<sup>17</sup> Submission no. 165, p. 2.

seeking access to such documents, but may be a cause of concern to those supplying the information. We believe that the interests of the two groups should be reconciled by ensuring that decisions as to whether or not disclosure of a document would, for example, expose a commercial undertaking unreasonably to disadvantage should be made only after the suppliers of information and those seeking access have both had the opportunity to put their view. The method of consultation which we propose is the subject of the next section on Reverse-FOI. So long as these rights are guaranteed, we believe that the wording of clause 32 is appropriate as it stands.

## **Reverse-FOI**

**25.22** Reverse-FOI is the term used to describe the process whereby the supplier of information to an agency seeks to limit or deny access to that information to others, or at least to be a party to the access decision. In the United States a type of law-suit has grown up known as a 'Reverse-FOIA' action because the supplier sues to prohibit the disclosure of information it had provided to the government. There is no provision in the United States for this type of action and its development has depended upon the willingness of United States courts to find jurisdiction for entertaining a Reverse-FOIA lawsuit. However, a recent decision of the United States Supreme Court, *Chrysler Corporation v. Brown*<sup>18</sup> discussed further below, has held against Reverse-FOIA actions in that country.

**25.23** In terms of the history of the United States legislation, Reverse-FOIA suits are a relatively recent development. The United States Freedom of Information Act came into operation in 1967, yet it was not until 1973 that the first Reverse-FOI decision was given. Some figures from recent years are significant indicators of the development of the action. The United States Department of Justice has reported that some 76 cases were instituted in 1976, 63 in 1977 with an estimated 111 in 1978.<sup>19</sup> The United States experience has been that the overwhelming majority of these cases is concerned with release of business information.

**25.24** An obvious prerequisite to the institution of a Reverse-FOI suit is notice to the supplier from the agency which has received a request for information. In the United States there is no legislative requirement that a supplier be given notice that disclosure of information supplied by it is under consideration by an agency. Nor has any court held that notice is required by due process.

**25.25** Nevertheless, as the 25th Report by the Committee on Government Operations of the United States House of Representatives points out, notice serves an important and useful purpose, as it allows suppliers of information an opportunity to object to the unwarranted disclosure of information by agencies and to take action to prevent it.<sup>20</sup> At the same time notice can be of considerable advantage to the agency faced with the disclosure decision. Frequently the issues raised by a request for a business document will be complex and the agency's consideration of the factors leading to a disclosure decision can be assisted by hearing the views of the supplier. An example could be where one piece of information in isolation may seem innocuous, yet the supplier may be able to show that when several such isolated items are collected and put into context they have a significant and detrimental impact on the affairs of the supplier.

<sup>18</sup> (1979) 47 Law Week 4434 (U.S. Court of Appeals).

<sup>19</sup> United States, Twenty-fifth Report by the (House) Committee on Government Operations, *Freedom of Information Act Requests for Business Data and Reverse-FOIA Lawsuits*, Washington, 1978, p. 54.

<sup>20</sup> *ibid.*, p. 27.

**25.26** In fact, despite the absence of any legal requirement in the United States, it has become almost universal practice among agencies to give notice to suppliers of business information before a disclosure decision is made. In our view, there are sound reasons for including in the Australian Bill a requirement that agencies should give notice of a request for access and the opportunity for consultation to suppliers of confidential business information and also, in the case of information supplied by the States, to State governments and their authorities (see Chapter 17).

**25.27** At the beginning of this chapter, we referred to the legitimate concern of business organisations to protect from disclosure some of the information they supply to government, whether in fulfilment of some statutory obligation or in seeking some government benefit. It is because we accept the legitimacy of the concern that we are convinced of the need for a formalised system of notice, with the opportunity of appeal by the supplier against an agency decision to disclose in the form of a Reverse-FOI mechanism. This appeal would be to the Administrative Appeals Tribunal.

**25.28** Leaving aside the area of Commonwealth-State relations, this obligation on agencies to notify suppliers of the receipt of a request for access to information supplied by them, to provide them with the opportunity for consultation and (if the supplier opposes the intended release by the agency) to notify them of the intended release of the document only arises for documents for which confidential treatment is sought by a person in respect of his/her business or professional affairs or by a business, commercial or financial undertaking. Upon notification, these persons, if they wish to maintain their claim for confidentiality either in consultation with the agency or in subsequent appeal procedures, must seek exemption under clause 32. That is, they must allege that at the time of the request the document contains information which is a trade secret or whose disclosure would be reasonably likely to expose them unreasonably to disadvantage.

**25.29** Our views are reinforced by our consideration of developments in the United States. The United States Act has no provision for notice of intended disclosure to be given to the supplier and no provision for Reverse-FOI. Yet experience of the operation of the United States legislation has led to the development of both. The recent decision of the United States Supreme Court in *Chrysler Corporation v. Brown*, is further evidence, in our view, of the need to give statutory sanction to Reverse-FOI. In that case, the Supreme Court rejected the existence of a Reverse-FOIA procedure in the United States, holding that the United States Act is exclusively a disclosure statute and gives suppliers of information no private right of action to prevent disclosure. The concern of Congress had been with the agency's need or preference for confidentiality; the Act by itself protects the interest in confidentiality of private entities submitting information only to the extent that this interest is endorsed by the agency collecting the information.

**25.30** We note that in the paper from the Attorney-General's Department there is support in principle, although with some reservations, for consultations between government agencies and individuals or business agencies for the purpose of deciding questions of access.<sup>21</sup> The principal reservation expressed is the possibility that a supplier consulted over a disclosure relating to business information could in the course of consultation indicate that it could not supply similar information

<sup>21</sup> Paper by Attorney-General's Department, cited footnote 11, pp. 10-11.

in the future if its documents were disclosed, thereby bringing the situation within the scope of paragraph 32 (1)(b). The Committee acknowledges this as a possibility. However, it is our view that paragraph 32 (1)(b) should be interpreted to cover such situations as industry surveys where an agency seeks information from a number of organisations on a basis of confidence with the understanding that it is for survey purposes only and will not otherwise be revealed. Generally, we would not see paragraph 32 (1)(b) applying to individual organisations. Rather the tests to be applied in the case of individual organisations would be whether the information related to trade secrets or to other matter whose disclosure would be reasonably likely to expose the organisation unreasonably to disadvantage. Certainly we would not expect the test of future availability of similar information laid down in paragraph 32 (1)(b) to be invoked in cases where the information sought to be disclosed had been provided in pursuit of some statutory obligation or in the expectation of receiving some government benefit or assistance.

**25.31** Another matter which needs to be referred to is the cost of Reverse-FOI procedures. The evidence in the United States indicates that the cost of Reverse-FOI can be very high. In our view, the United States experience is not an accurate guide in the area of costs and should not be used to preclude any attempt at institution of notice and Reverse-FOI procedures here. This view is based on a number of factors. First, the much greater scale and complexity of the United States corporate world compared to our own means that costs are proportionately greater even before other factors are taken into consideration. This scale and complexity means that the process of deciding whether disclosure will reveal trade secrets has been longer and consequently more costly than would be the case in Australia. As well, the costs of litigation in the United States are greater than in Australia. In addition, the Reverse-FOI process in the United States has grown within the established court system, with all the attendant legal formalities and delays of the adversary process. Our recommendations envisage referral of Reverse-FOI matters to the Administrative Appeals Tribunal, a more informal administrative review body used to dealing expeditiously with such matters. This should be a significant factor in reducing costs.

**25.32 Recommendation: The Bill should be amended to include provision for:**

- (a) notification by an agency to the supplier of documents which come within the terms of clause 32 that the agency has received a request for access to those documents and seeks the supplier's view as to whether disclosure should occur;**
- (b) further notification to the supplier where the agency after consultation has decided to go ahead with disclosure; and**
- (c) a recognised right of Reverse-FOI by means of an appeal to the Administrative Appeals Tribunal by the supplier against intended disclosure.**

## National economy (clause 33)

### 26.1 Clause 33 provides that:

A document is an exempt document if its disclosure under this Act would be contrary to the public interest by reason that it would be reasonably likely to have a substantial adverse effect on the national economy.

The Explanatory Memorandum does not amplify the meaning of the clause; it simply refers in paragraph 125 to the recommendation of the 1976 Interdepartmental Committee Report. The 1976 IDC Report<sup>1</sup> does not put forward any arguments of substance in favour of such an exemption, merely stating that it is 'desirable'. The 1974 IDC Report<sup>2</sup> did not contain a national economy exemption. The 1976 IDC Report noted that in the 1974 IDC Report the provision enabling deferment of access to a document where premature disclosure was not in the public interest would have enabled a document to be withheld where premature release would have been contrary to Australia's economic interests. The 1976 Report then states the Interdepartmental Committee's view that it is preferable, where possible, to specify the public interest which is necessary to be protected by an exemption category.<sup>3</sup>

**26.2** The Committee fully accepts the need to protect Australia's vital economic interests. However, in our view this can be achieved without the use of a clause as wide and as vague as clause 33. We agree with the view expressed in the Australian Council of Trade Unions' (ACTU) submission to us that the clause is 'too broadly framed'.<sup>4</sup> We foresee difficulties in determining in particular situations whether the release of a document or documents would be 'reasonably likely' to have a 'substantial adverse effect' on the national economy. Although similar tests apply in other exemption clauses (e.g. clause 31), we take the view that the width and vagueness of the interest sought to be protected by clause 33 (i.e. the 'national economy') could lead to a presumption on the part of officials in favour of withholding information. Such an undesirable development would be quite contrary to the spirit and intention of the legislation. A further difficulty lies in the fact that effects on the national economy need not be solely the result of economic action; political action which bears no direct relationship to economic affairs can have an effect on the economy.

**26.3** The Committee received evidence from the Secretary to the Treasury.<sup>5</sup> It is our impression, based on that evidence, that the Treasury would not seek to rely very much on clause 33 but is satisfied that other exemption clauses will be adequate to protect vital economic information. We share that view and feel that it is preferable to rely on those clauses rather than an exemption of the width and vagueness of clause 33. It is our firm belief that exemptions should be kept

<sup>1</sup> Australia, Parliament, *Policy Proposals for Freedom of Information Legislation: Report of Interdepartmental Committee* (1976 IDC), Parl. Paper no. 400/1976, Canberra, 1977, para. 12.20.

<sup>2</sup> Australia, Attorney-General's Department, *Policy Proposals for Freedom of Information Legislation: Report of Interdepartmental Committee*, Canberra, AGPS, 1974.

<sup>3</sup> 1976, IDC, cited footnote 1, paras. 12.18 and 12.19.

<sup>4</sup> Submission no. 152, p. 8.

<sup>5</sup> *Transcript of Evidence*, pp. 1684-1726.

to a minimum. Accordingly we do not see the need for continuing the existence of an exemption clause whose purpose can be adequately served by other exemption clauses which, in our view of the legislation, should continue in the Bill.

**26.4** The clauses which can be used to protect vital economic information which the national interest would require to remain undisclosed are clauses 19, 23, 24, 26 and 29. Clause 19 which is discussed in Chapter 10, permits the deferment of access to a document by the minister or an agency until the happening of a particular event (including the taking of some action required by law or some administrative action), or until the expiration of a specified time where it is reasonable to do so in the public interest or having regard to normal and proper administrative practices. (Obvious examples to which this would apply are changes in sales tax or custom duties or changes in the exchange rate.)

**26.5** Clause 23 exempts, among others, documents whose disclosure would be contrary to the public interest because their disclosure would be prejudicial to Commonwealth-State relations or would divulge information communicated in confidence to the Commonwealth Government by a State government. It is discussed in detail in Chapter 17, and it is sufficient to note here that it would be adequate to protect details of sensitive economic matters involving the Commonwealth and States.

**26.6** Clause 24 provides exemption for Cabinet documents (see detailed discussion in Chapter 18), and it is clear that sensitive economic documents which have been the subject of Cabinet deliberations or which a minister proposes to submit to Cabinet would come within its terms.

**26.7** Clause 26, the internal working documents exemption which we discuss in detail in Chapter 19, clearly provides any necessary protection to those documents containing economic information the disclosure of which would be contrary to the public interest and which contain opinion, advice or recommendation or details of consultations or deliberations and which are part of the deliberative process. Documents such as option papers put by officials to a minister on matters like movements in bank lending rates or sales or excise tax would probably come within the scope of this clause.

**26.8** Clause 29 (see Chapter 22 for detailed discussion) provides exemption for, among other things, documents the disclosure of which would be contrary to the public interest because disclosure would have a substantial adverse effect on the financial interests of the Commonwealth. It is arguable that this clause also contains scope for protection of matters which would adversely affect the national economy. Here we are referring to matters such as a sale or acquisition of land or property.

**26.9** In concluding that there is no need for a specific exemption to protect the national economy, we note the concern expressed in several submissions at the width and potential for abuse of this clause.<sup>6</sup> In its submission, the ACTU, an important national organisation in the context of economic debate in this country, made the following statement as part of its argument against the inclusion of clause 33 in the Bill:

The Treasury's penchant for secrecy is well known. Treasury's attitude to disclosure of information—combined with the fact that, with the possible exception of the Reserve

<sup>6</sup> e.g. Federation of Australian Commercial Television Stations (FACTS), Submission no. 143; Australian Council of Trade Unions (ACTU), Submission no. 152.

Bank, there is no public body responsible for research into macroeconomic problems that has any degree of independence with regard to publication means that policy development is unduly inhibited. The development of ideas which would arise from a greater knowledge of the factors influencing Australia's political economy is constrained by the present inaccessibility of much official information.<sup>7</sup>

**26.10** Looking to the experience of other Western democracies with freedom of information legislation, we observe that while all acknowledge that vital economic information must at times be protected from public disclosure, some countries feel it necessary to specify a national economy exemption and others do not. Countries which specify such an exemption are The Netherlands, Denmark and Sweden. In The Netherlands legislation<sup>8</sup>, article 4 provides that information need not be divulged if its importance does not outweigh specified interests, one of which is the 'economic and financial interests of the State'. The Danish legislation<sup>9</sup> has a similarly broad exemption providing that documents can be withheld out of consideration to 'the public's economic interests' or 'the accomplishment of public control, regulation or planning activities'. The Swedish Act exempts documents whose release would cause damage to 'the national economy or the proper progress of industry'.<sup>10</sup>

**26.11** The United States, on the other hand, has not felt it necessary to specify a national economy exemption. There are significant differences between the ways in which economic policy is framed in Australia and the United States; for example, in the United States the President (who is not subject to the legislation) has the primary responsibility for pruning the Budget. Nevertheless important United States economic agencies such as Treasury and the Internal Revenue Service are subject to the legislation. Yet there is nothing to indicate that the United States economy has suffered substantial adverse effect because of the absence of a national economy exemption. With this in mind, and our desire to keep exemption clauses to a minimum, we are confident that clause 33 can be deleted from the Bill without endangering Australia's vital economic interests.

**26.12** Although we do not endorse it as a replacement for clause 33, it is interesting to note that the Minority Report Bill has a provision equivalent to clause 33 which seeks to protect the 'legitimate economic interests of Australia'. It is much less broad than clause 33 and provides examples of the sorts of documents which should properly be protected from disclosure. We draw attention to it as a possible alternative to clause 33 if a national economy exemption of some sort is required. The relevant parts of the clause are in the following terms:

36. An agency may refuse to disclose a document as follows:

- (a) a document the premature disclosure of which could be reasonably expected to have a substantial adverse effect on the legitimate economic interests of Australia, for instance, by revealing consideration of a contemplated movement in Bank interest or tariff rates, in sales or excise tax, the imposition of credit controls, a sale or acquisition of land or property, urban re-zoning, or a like proposal, or by impeding supervision of foreign investment or the stock exchange, or control of imports and exports;
- (b) a document containing sensitive information relating to the currency or to the coinage or legal tender;

<sup>7</sup> Submission no. 152, p. 6.

<sup>8</sup> The Netherlands, Openness of Administration Act, 1978.

<sup>9</sup> Denmark, Act on Public Access to Documents in Administrative Files (Act no. 280 of 10 June 1970), section 2, para. 2 (3).

<sup>10</sup> Sweden, Law on Curtailment of the Right to Demand Official Documents (the Secrecy Act).

- (c) a document containing information generated by an agency relating to the regulation or supervision of financial institutions, in so far as disclosure might result in unwarranted harm to the economy; . . .<sup>11</sup>

**26.13 Recommendation: Clause 33 of the Bill, exempting documents the disclosure of which would be contrary to the public interest by reason that they would be reasonably likely to have a substantial adverse effect on the national economy, should be deleted.**

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<sup>11</sup> Australia, Parliament, Royal Commission on Australian Government Administration (Dr H. C. Coombs, Chairman), *Appendix, Volume Two*, Parl. Paper 187/1976, Canberra 1977, p. 45.

**PART D**  
**REVIEW AND APPEAL**

## Present and proposed review procedures

**27.1** In this chapter we describe the review and appeal procedures provided in the present Freedom of Information Bill, discuss what we consider to be the inadequacies of these procedures, and indicate in outline the changes we believe to be necessary. In the three following chapters, entitled respectively 'Internal Review', 'Role of the Ombudsman' and 'Proceedings before the Administrative Appeals Tribunal', we spell out our proposed changes in more detail and deal with a number of associated machinery matters.

**27.2** The whole question of review and appeal loomed large throughout our inquiry. Most witnesses either made or acknowledged the point that it could not be assumed that the new legislation would always be applied with proper sensitivity at first instance; resort to inexpensive appellate machinery would be a necessary condition of its effective implementation. Written submissions tended to concentrate on the pros and cons of an expanded role for the Administrative Appeals Tribunal,<sup>1</sup> rather than on the question of internal review or the desirability of giving an extended role to the Ombudsman or some analogous mediating authority. The latter issues, however, were fully debated with many witnesses in the course of our public hearings, and we believe that the scheme we propose—which, while making many more matters appealable to the Tribunal, simultaneously places much more emphasis than does the present Bill on dispute resolution by informal conciliation—will meet with quite widespread acceptance.

### Review procedures under the present Bill

**27.3** *Internal review.* Where an applicant is unhappy with a decision made otherwise than by the minister or head of the department concerned, he may apply under clause 38 of the Bill for an internal review of that decision—i.e. a reconsideration and fresh decision by a different officer. Where the decision is subject to review by the Administrative Appeals Tribunal, and the applicant intends to proceed to the Tribunal, he must in the first instance apply for an internal review. The applicant would, however, be entitled to appeal directly to the Tribunal if a decision on his request for an internal review was not made within fourteen days of his application.

**27.4** *Investigation by the Ombudsman.* The Commonwealth Ombudsman is mentioned in the Bill, and has specific powers conferred upon him by it, only in the context of a very narrow area of its administration, namely, complaints of unreasonable delay in respect to meeting requests for information. Clause 39 enables the Ombudsman to certify in relation to a request (except where it is being

<sup>1</sup> Submissions which advocated an expansion of the Tribunal's power of review included: Council of Australian Government Employee Organisations, Submission no. 8, incorporated in *Transcript of Evidence*, p. 995; Mr J. Goldring, Submission no. 15, incorporated in *Transcript of Evidence* pp. 750–752; Australian Journalists' Association, Submission no. 81, incorporated in *Transcript of Evidence*, pp. 307–8; Women's Electoral Lobby (Vic.), Submission no. 7, incorporated in *Transcript of Evidence*, p. 370; Victorian Committee for Freedom of Information, Submission no. 44, incorporated in *Transcript of Evidence*, p. 397; The Law Institute of Victoria, Submission no. 112, pp. 1, 5–8; Australian Council of Social Service, Submission no. 48, incorporated in *Transcript of Evidence*, pp. 436–439; and, Freedom of Information Legislation Campaign Committee (ACT), Submission no. 9, incorporated in *Transcript of Evidence*, p. 170.

considered by a minister) that there has been, in all the circumstances, an unreasonable delay in responding to it, notwithstanding that the sixty-day maximum set up by clause 17 has not yet expired, in which case the matter can be appealed to the Tribunal as if it were a refusal.

**27.5** In addition to this specific provision, however, the Ombudsman does have a general jurisdiction under the *Ombudsman Act* 1976 to investigate administrative practices, procedures and decisions generally, and this would enable him, subject to three important constraints set by that Act, to roam at large over the area covered by the Freedom of Information Bill. The first constraint is section 6 (3) of the Ombudsman Act, which provides that:

(3) Where the Ombudsman is of the opinion that a complainant has or had a right to cause the action to which the complaint relates to be reviewed by a court or by a tribunal constituted by or under an enactment but has not exercised that right, the Ombudsman shall not investigate, or continue to investigate, as the case may be, the complaint unless the Ombudsman is of the opinion that, in all the circumstances of the case, the failure to exercise the right is not or was not unreasonable.

This would operate to limit the Ombudsman's powers in respect of all those matters under the Freedom of Information Bill which are appealable to the Administrative Appeals Tribunal. The second constraint is section 9 (3) of the Ombudsman Act, which provides, among other things, that where the Attorney-General certifies that disclosure of information would prejudice security, defence or international relations, or relations between the Commonwealth and a State, or would disclose the deliberations of Cabinet or a Cabinet Committee, the Ombudsman is barred from gaining access to any information concerning the matter. The third constraint is paragraph 5 (2)(a) of the Ombudsman Act, which expressly prohibits the Ombudsman investigating any action taken by a minister personally (as distinct from officers acting on his behalf).

**27.6** *Review by the Administrative Appeals Tribunal.* The general right to seek a review by the Administrative Appeals Tribunal is laid down by clause 37 (1) of the Bill. This provides for applications to be made to the Tribunal for review 'of a decision refusing to grant access to a document in accordance with a request or deferring provision of access to a document'. The form of words is sufficiently wide to encompass all the clauses of Part IV, 'Exempt Documents' (although of course the Tribunal's jurisdiction is expressly excluded or curtailed in certain particular clauses), and also a major proportion of Part III, 'Access to Documents': the following paragraphs summarise the decisions which are caught under these Parts. Clauses 6 and 7 of Part II of the Bill, which require agencies to publish certain documents and make available certain information, do not give rise to decisions of refusal or deferment in relation to particular requests and consequently are not subject to review by the Tribunal.

**27.7** As to Part III of the Bill, a decision to withhold a document on any of the following grounds would be reviewable by the Administrative Appeals Tribunal:

- a document in the possession of a minister does not relate to the affairs of a department (clause 9);
- a document is more than 30 years old, is available for inspection at a charge under another enactment, is available for purchase, or is a prior document and not reasonably necessary for the understanding of another lawfully obtained document (clause 10);

- a document was donated by a person, other than an agency, to the collection of Commonwealth war relics, or to the National Library or to the Australian Archives (clause 11);
- a document was not reasonably identified or that the identification, location or collation of requested documents would interfere unreasonably with the operations of the agency (clause 15);
- a charge required to be paid has not been paid (clause 16);
- the provision of a document in the form requested would interfere unreasonably with the operations of an agency, would be detrimental to the preservation of the document, would be inappropriate, or would involve an infringement of copyright (other than copyright owned by the Commonwealth) (clause 18);
- the production ought to be deferred in the public interest or having regard to normal and proper administrative practices (clause 19); or
- a document contains exempt as well as non-exempt information, and it is not practicable to delete the exempt information and produce the remainder of the document (clause 20).

**27.8** There is also provision in the Bill for review by the Administrative Appeals Tribunal where an agency is dilatory in handling a request made under clause 17. A failure on the part of an agency to respond to such a request within the sixty-day time limit set by clause 17, is, by virtue of clause 39 (1), deemed to be a decision to refuse access on the sixtieth day for the purpose of enabling an application to be made to the Tribunal. Furthermore, as has already been briefly noted in paragraph 27.4 above, where the sixty-day period has not elapsed but it is alleged that an agency has failed to notify a decision 'as soon as practicable' as required by clause 17, the applicant may, by virtue of clause 39 (3), complain to the Ombudsman; if the Ombudsman is of the opinion that there has been unreasonable delay by an agency, he may grant a certificate to that effect, in which case a decision to refuse access will be deemed to have been made on the date on which the certificate is granted for the purpose of enabling an application to be made to the Tribunal. It is to be noted, however, that where a request is not made strictly in accordance with clause 17 (which requires that requests be made not only in writing but be 'expressed to be made in pursuance of this Act' and be forwarded to the right address), then there is no time limit with which the agency has to comply and no mechanism conferring power on the Tribunal to consider cases of unreasonable delay.

**27.9** As to Part IV of the Bill, all the categories of exemption there set out are, under clause 37, reviewable with the following exceptions:

- a decision of a minister or principal officer of an agency to give a certificate under clause 23 of the Bill, certifying that disclosure of a document would be contrary to the public interest for the reason that the disclosure:
  - (a) would prejudice the security or defence of the Commonwealth, international relations or Commonwealth-State relations; or
  - (b) would divulge information communicated in confidence by or on behalf of another government.
- a certificate by the Secretary to the Department of the Prime Minister and Cabinet or the Secretary to the Executive Council certifying that a document is a Cabinet document or an Executive Council document, as the case may be (clauses 24 and 25).

- a decision that disclosure of an internal working document would be contrary to the public interest (clause 26 (1)(b)).

**27.10** The Administrative Appeals Tribunal has no general residuary discretion, of the kind that is conferred upon ministers and agencies by clause 12, to release documents notwithstanding that they might qualify as exempt documents under the Bill: clause 37 (3) makes this clear.

### **Proposed review procedures**

**27.11** In general terms, we perceive as major inadequacies of the present review procedure the unnecessarily restricted jurisdiction of the Administrative Appeals Tribunal and the limited role which the Ombudsman is given in freedom of information matters.

**27.12** *Review by the Administrative Appeals Tribunal.* We believe that the major inadequacy in the present review procedures, so far as the powers of the Administrative Appeals Tribunal are concerned, relates to the Part IV exemptions and in particular to clauses 23–26. We have already discussed, in large part, our criticisms of the non-existent or restricted power of review conferred on the Tribunal in relation to these clauses in Chapters 5 and 15–19. In brief, the relevant points were as follows:

- no Executive decisions ought to be regarded in principle as beyond legal reproach;
- this applies to decisions recorded in Cabinet, Executive Council and general policy documents as well as to decisions concerning defence, security, international and inter-governmental relations;
- to the extent that any special relationship can be claimed to exist between Parliament, ministers and public servants it would only require that some, not all, documents of political significance should be protected and it would not follow that ministers, or senior public servants, alone should decide conclusively what documents bear upon that relationship;
- case law indicates that judicial officers are considered fitted to weigh all relevant factors bearing upon the public interest, giving due respect to defence and like matters; and
- case law indicates the extent of review possible by the courts and the fact that it can on occasion approach review on the merits.

**27.13** A question to which we have given attention, though it was not much pressed in evidence before us, is the scope of the review function capable of being performed by the *courts*, as opposed to the Administrative Appeals Tribunal, and the implications this may have for the restriction of the Tribunal's power of review in relation to clauses 23 to 26. Judicial review, as compared with tribunal review, of decisions made under these clauses, has not been excluded by the Bill; nor has it been suggested to us that it is intended to exclude it under the *Administrative Decisions (Judicial Review) Act 1977* or other legislation.

**27.14** Generally speaking, on application to the courts for review of an administrative decision, the courts are restricted to questions of whether the decision-maker has acted fairly, within his powers and according to the law. The applicant will usually face major difficulties in establishing a breach on the part of the decision-maker in any of these respects, not least because the

matter will often turn on establishing the decision-maker's particular state of mind at the time of the breach. And if the administrator is shown to have acted unfairly, beyond power or unlawfully the court may only quash the decision leaving the administrator free to reinstate his decision (albeit taking care not to leave this time any evidence of actionable conduct). The Tribunal, on the other hand, may exercise all the powers and discretions conferred on the original decision-maker. It may affirm or vary the decision under review; or it may set it aside and either make a suitable decision or refer the decision back for further consideration in the light of directions or recommendations of the Tribunal.

**27.15** While it is the case, as we indicated in Chapter 5 (paragraph 5.12) that the distinction between review by the Administrative Appeals Tribunal and review by the courts can, in certain circumstances, be blurred, it remains generally true that, whereas the court focuses on the decision-making process, the Tribunal focuses on the decision itself and examines the merits of that decision. The restriction of the power of review by the Tribunal in relation to decisions made under clauses 23 to 26, would not abrogate the courts' powers of review in regard to these same decisions. Conclusive certificates under these sections preclude recourse to the Tribunal, but not to the courts. Thus in regard to these decisions the Executive has not avoided review by an independent body as such. Rather, what it has sought to do is limit that review to the traditionally rather narrow (though increasingly in practice, less so) area of judicial review, and avoid the overtly wide-ranging reconsideration of merits issue that is associated with tribunal review.

**27.16** While we do not go so far as to urge that the whole range of sensitive matters presently subject to conclusive certificates should be subject to full scale review on the merits by the Administrative Appeals Tribunal, we do believe that, bearing in mind the extent to which the courts can already pass on these matters, the Bill as presently drawn is unnecessarily restrictive. As we have made clear in other chapters, we propose in respect of clause 26 (relating to internal working documents) that the existing public interest criterion be appealable to the Tribunal, and that in relation to that part of clause 23 which deals with Commonwealth-State relations, a specific public interest criterion be incorporated in the Bill, and that this too be appealable (see Chapters 17, 19). On the other hand, in relation to those parts of clause 23 which concern defence, security and international relations, we confine our recommendation to the proposal that the threshold decision as to whether the document in question is properly classified as one whose disclosure could damage defence, security or international relations, as the case may be, should be appealable to the Tribunal, constituted in this instance by a presidential member; we do not propose in these cases that the Tribunal should have any residual power to determine that over-riding public interest considerations nonetheless require disclosure (see Chapter 16). Similarly, in relation to clauses 24 and 25 (dealing with Cabinet and Executive Council documents), we propose that there be appealable to the Tribunal (again constituted for this purpose by a presidential member), only the threshold question as to whether the document in issue is properly categorised as a Cabinet or Executive Council document (see Chapter 18). We envisage all the proceedings before a single presidential member of the Tribunal to which we have referred as being essentially inquisitorial rather than adversarial in character, with the applicant's role being limited to the submission of affidavit evidence.

**27.17** As to the other heads of exemption in Part IV, we have proposed the abolition of certain exemptions and substantial amendments to several others. Those clauses that remain would, under the present Bill, be fully reviewable by the Administrative Appeals Tribunal. We would not consider anything less than full review as acceptable. This point should perhaps be emphasised in relation to two clauses, in particular, where we have recommended changes to the existing provisions. One of our proposed amendments to clause 29—documents concerning the operations of agencies—requires the introduction of a public interest test in the same form as the public interest test in clause 26; that public interest test would be reviewable by the Tribunal, like its equivalent in clause 26. In relation to clause 30—documents affecting personal privacy—we have proposed the conferral of a right to correct personal records. If an agency refuses an individual the right to correct his own personal records maintained by that agency, the individual should have the right to appeal to the Tribunal for a review of the decision.

**27.18** The proposed scheme of Tribunal review which thus emerges in relation to the Part IV exemptions may be summarised as follows:

- (a) Decisions concerning documents relating to national security, defence and international relations (clause 23) will be reviewable by a single presidential member of the Administrative Appeals Tribunal in a non-adversarial proceeding with the applicant's role limited to the submission of affidavit evidence. The question at issue would be whether a document could reasonably be expected to cause damage to the security, defence or international relations of the Commonwealth.
- (b) Decisions concerning Cabinet and Executive Council documents (clauses 24 and 25) would be reviewable in the same manner as outlined above in paragraph (a). The question here would be whether or not a document was properly characterised as a Cabinet or Executive Council document.
- (c) Decisions concerning all other exempt documents (clauses 26, 27–32 and 35—the deletion of clauses 33, 34 and 36 having been proposed) would be reviewable in the ordinary way by the Tribunal. The question at issue would be whether the document came within the particular description of an exemption clause.

**27.19** As to Part III of the Bill, dealing with the procedures governing access to documents, the existing rights of appeal to the Administrative Appeals Tribunal are generally speaking comprehensive and adequate. The only change that we recommend here arises out of our discussion of Reverse-FOI actions in Chapter 25. Decisions under clause 12, which enables an agency to release a document notwithstanding its exempt status, are presently not subject to review by the Tribunal. We propose that third parties wishing to prevent the release of information which they have submitted to government should be enabled to challenge a decision made under clause 12 in the same way that they would be enabled to challenge a decision that a document is not exempt.

**27.20** As to Part II of the Bill, there is, as has already been noted, no provision whereby a failure to make available manuals, indexes and guidelines in accordance with clauses 6 and 7 is in any way actionable. Given the crucial importance of these provisions, we see this as a deficiency needing rectification, and we envisage a partial role in this respect for the Administrative Appeals Tribunal. The problem, of course, with devising a scheme of review for clauses 6 and 7 is that many complaints will centre on matters which cannot be satisfactorily resolved in adjudicative proceedings. There are three clear obligations

laid down by clauses 6 and 7 which could be the subject of a complaint: a requirement to act within the 12 months time limits, to act 'as soon as practicable', and to publish and make available certain information. Non-compliance with the time requirements will not always be an appropriate subject for application to the Tribunal since it is often likely to be the result of inefficiency or insufficient resources, matters which would not be especially capable of correction by a decision of the Tribunal. Omissions of items of information from either the published statements or available documents are, on the other hand, much more likely to be appropriate for review by the Tribunal, as they are the likely result of intransigence on the part of an agency or misinterpretation of the law.

**27.21** To enable these omissions to be rectified and to provide for those occasions when the time constraints can and should be enforced by a Tribunal decision, we propose that the Ombudsman act as a filter of complaints so that where application to the Tribunal would satisfactorily resolve a dispute which cannot be resolved by conciliation, he would grant a certificate permitting application to be made to the Tribunal. This mechanism is, to a certain extent, based on section 10 of the Ombudsman Act. That section enables applicants to obtain relief when decisions are unreasonably delayed; a certificate granted by the Ombudsman deems an adverse decision to have been made for the purpose of review by the Tribunal.

**27.22** As a remaining matter relating to the basic jurisdiction of the Administrative Appeals Tribunal, we considered the question of whether it should be empowered to release documents notwithstanding their exempt status. We took the view, however, that if the exemption clauses were sufficiently restrictive in their operation and if public interest tests were inserted, where appropriate, a supervening discretion to release would not be necessary. We therefore do not recommend such a power for the Tribunal.

**27.23** *Complaints to the Ombudsman.* We believe that there is a very strong case for an intermediate conciliatory mechanism being built into the structure of the Freedom of Information legislation. It is important to have formal adjudicative bodies like the Administrative Appeals Tribunal to deal with intractable or precedent-setting cases, where the issues have crystallised and attitudes have hardened. But it is equally important that means be devised to resolve speedily and informally those inherently less intractable disputes that will usually constitute the great majority of the disputes which arise; it is important that there be some cheap, convenient and unintimidating machinery to filter out those disputes where compromise and consensus are, after all, possible. The utility of this kind of intermediate level grievance-remedying mechanism has come increasingly to be recognised in Australia and overseas with the appointment, to tackle various kinds of administrative and civil rights disputes, not only of Ombudsmen, but of a whole miscellany of Human Rights and Equal Opportunity Commissioners, Privacy Committees and the like.<sup>2</sup>

<sup>2</sup> e.g. The Commissioner for Community Relations established under the *Racial Discrimination Act 1975*; Commissioners for Equal Opportunity established under the *Sex Discrimination Act 1975* (S.A.), and *Equal Opportunity Act 1977* (Vic.); the Counsellor for Equal Opportunity established under the *Anti-Discrimination Act 1975* (N.S.W.) and the N.S.W. Privacy Committee established under the *Privacy Committee Act 1975* (N.S.W.); a Canadian model for much subsequent legislation of this type is the Ontario Human Rights Commission established under the Ontario Human Rights Code (1961-62); see: D. G. Hill, 'The Role of a Human Rights Commission: The Ontario Experience', *University of Toronto Law Journal*, 1969 p. 390; see also: Sir G. Powles, 'Ombudsmen and Human Rights Commissions,' *ICJ Review*, no. 21, December 1978, pp. 31-36.

**27.24** We accordingly believe that a more substantial, prominent and active role should be played by the Ombudsman under the Freedom of Information legislation than seems so far to have been envisaged for him. As we have already noted, it is a feature of the present scheme of administrative review that by virtue of section 6 (3) of the Ombudsman Act, an extension of the power of the Administrative Appeals Tribunal means, save in exceptional circumstances, a corresponding curtailment of the power of the Ombudsman. Where a complainant has the right to appeal to the Tribunal, the Ombudsman is required not to investigate the matter further unless he is satisfied in all the circumstances that the failure to appeal was not unreasonable. It may be that section 6 (3) does not in practice constitute a significant barrier to the Ombudsman exercising his investigative and conciliatory powers wherever he feels it appropriate to do so, but it certainly amounts to a clear expression of legislative policy which we regard, in the present freedom of information context, as quite unfortunate. The simple and cheap procedure of investigation and conciliation by the Ombudsman is a particularly valuable avenue of relief to members of the public and, accordingly, it is a matter of some concern that, as the legislation is drawn, the provision of a right of review by the Tribunal in freedom of information matters is grounds in itself for the non-intervention of the Ombudsman.

**27.25** In considering these matters the reality, rather than the theory, of review by the Administrative Appeals Tribunal must be taken into account. Theoretically, the Tribunal provides a cheap and simple remedy. As opposed to the courts, there are no filing fees and the Administrative Appeals Tribunal Act requires the Tribunal to conduct its proceedings as informally as possible. In reality, however, the Tribunal strikes a different balance between the administrative and adjudicative elements of its review function according to the subject matter with which it is concerned at any particular time. Thus in some areas an inquisitorial procedure with a relaxed atmosphere and few rules of evidence may prevail, while in others strict evidential rules and adversarial approach may operate.

**27.26** It remains to be seen which approach the Administrative Appeals Tribunal adopts towards freedom of information disputes, but if proceedings become unduly legalistic the applicant will have to choose between seeking legal representation and paying his own costs, or proceeding without legal representation and perhaps prejudicing his case. Even if cost were not a factor, some may prefer the direct and private assistance, flexibility and conciliatory approach of the Ombudsman to the more rigid, adjudicative process of the Tribunal. Others, through fear of litigation, might never contemplate pursuing a claim before a court or tribunal. The Ombudsman cannot of course make a binding decision and, if conciliation fails to resolve a dispute, recourse to the Tribunal may be necessary. Nevertheless, within these limitations, complaint to the Ombudsman would represent, to many members of the community, the most attractive avenue of relief.

**27.27** Our recommendation, then, which is developed in more detail in Chapter 29, is that there be no legislative barrier or hindrance placed in the way of the Ombudsman playing a full and active role in the resolution of freedom of information disputes of any kind; that administrative arrangements positively encourage his early intervention as a mediator, conciliator and negotiator should it

be the wish of an applicant that he so act; and that, generally speaking, applicants should always have a choice as to whether to seek the help of the Ombudsman in the first instance, or to proceed directly to the Administrative Appeals Tribunal. We will also propose in Chapter 29 that for the purposes of freedom of information, and in addition to these powers of investigation and conciliation, the Ombudsman should also be empowered to act as counsel on behalf of applicants before the Tribunal, and should have certain advisory and critical functions in relation to the general administration of the Act.

**27.28** For convenience, we append to this chapter a self-explanatory summary table indicating, in respect of each major decision-empowering clause in the Bill, both the present and proposed review arrangements as they involve the Ombudsman and the Administrative Appeals Tribunal.

**27.29** *Internal review.* We have no significant quarrel with the statutory procedure laid down in the present Bill for internal review. There are a number of points to be made, however, as to how a system of preliminary internal review might best be administered, and we take up these matters in the next chapter.

**Present and proposed external review procedures: Clauses in parts II, III and IV**

<i>Clause</i>	<i>Present review procedure</i>	<i>Proposed review procedure</i>
<i>Part II</i>		
Clause 6 . . .	Complaint to Ombudsman only	Complaint to Ombudsman with the possibility of a certificate to proceed to the AAT
Clause 7 . . .	Complaint to Ombudsman only	Complaint to Ombudsman with the possibility of a certificate to proceed to the AAT
<i>Part III</i>		
Clause 9 . . .	Appeal to the AAT; Ombudsman has a limited discretion to investigate	Complaint to the Ombudsman and/or appeal to the AAT
Clause 10 . . .	Appeal to the AAT; Ombudsman has a limited discretion to investigate	Complaint to the Ombudsman and/or appeal to the AAT
Clause 11 . . .	Appeal to the AAT; Ombudsman has a limited discretion to investigate	Complaint to the Ombudsman and/or appeal to the AAT
Clause 12 . . .	Complaint to Ombudsman only	Complaint to Ombudsman; appeal to the AAT in Reverse-FOI cases
Clause 13 . . .	Appeal to the AAT; Ombudsman has a limited discretion to investigate	Complaint to the Ombudsman and/or appeal to the AAT
Clause 15 . . .	Appeal to the AAT; Ombudsman has a limited discretion to investigate	Complaint to the Ombudsman and/or appeal to the AAT
Clause 16 (b) . . .	<i>Fees</i> Appeal to AAT under clause 37 (6); Ombudsman has a limited discretion to investigate <i>Failure to respond</i> Complaint to Ombudsman only	<i>Fees</i> Complaint to the Ombudsman and/or appeal to the AAT <i>Failure to respond</i> Complaint to Ombudsman only

<i>Clause</i>	<i>Present review procedure</i>	<i>Proposed review procedure</i>
Clause 17	<p><i>Failure to respond within 60 days</i> Appeal to the AAT; Ombudsman has a limited discretion to investigate</p> <p><i>Unreasonable delay</i> Complaint to Ombudsman with the possibility of a certificate to proceed to the AAT (clause 39 (3) )</p>	<p><i>Failure to respond within time limit</i> Complaint to the Ombudsman and/or appeal to the AAT</p> <p><i>Unreasonable delay</i> Complaint to Ombudsman with the possibility of a certificate to proceed to the AAT</p>
Clause 18	Appeal to the AAT; Ombudsman has a limited discretion to investigate	Complaint to Ombudsman and/or appeal to AAT
Clause 19	Appeal to the AAT; Ombudsman has a limited discretion to investigate	Complaint to Ombudsman and/or appeal to AAT
Clause 20	Appeal to the AAT; Ombudsman has a limited discretion to investigate	Complaint to Ombudsman and/or appeal to AAT
<i>Part IV</i>		
Clause 23	<p><i>Defence, security, and international relations</i> Appeal to the AAT only in the absence of a conclusive ministerial certificate; Ombudsman has a limited discretion to investigate (in the absence of a certificate from Attorney-General)</p> <p><i>Commonwealth-State relations</i> Appeal to the AAT only in the absence of a conclusive ministerial certificate; Ombudsman has a limited discretion to investigate (in the absence of a certificate from Attorney-General)</p>	<p><i>Defence, security, and international relations</i> Complaint to Ombudsman with no power to inspect documents for which exemption claimed; review by single presidential member of AAT in closed inquisitorial proceedings, with participation by applicant limited to submission of affidavit evidence</p> <p><i>Commonwealth-State relations</i> Complaint to Ombudsman and/or appeal to AAT; Reverse-FOI proceedings available</p>
Clause 24	Appeal to AAT only in the absence of a conclusive ministerial certificate; Ombudsman has a limited discretion to investigate	Complaint to Ombudsman with no power to inspect documents for which exemption claimed; review by single presidential member of AAT in closed inquisitorial proceedings, with participation by applicant limited to submission of affidavit evidence
Clause 25	Appeal to AAT only in the absence of a conclusive ministerial certificate; Ombudsman has a limited discretion to investigate	Complaint to Ombudsman with no power to inspect documents for which exemption claimed; review by single presidential member of AAT in closed inquisitorial proceedings, with participation by applicant limited to submission of affidavit evidence

<i>Clause</i>	<i>Present review procedure</i>	<i>Proposed review procedure</i>
Clause 26	Appeal to the AAT does not extend to question of public interest; Ombudsman has a limited discretion to investigate	Complaint to Ombudsman and/or appeal to AAT on all issues
Clauses 27-36	Appeal to the AAT; Ombudsman has a limited discretion to investigate	Complaint to Ombudsman and/or appeal to AAT (clauses 33, 34 and 36 to be deleted); Reverse-FOI proceedings available under clause 32.

## Internal review

### Procedures generally

**28.1** The internal review procedure proposed by the Bill is fully set out in clause 38:

38. (1) Where a decision has been made, in relation to a request to an agency, otherwise than by the responsible Minister or principal officer of the agency (not being a decision on a review under this section), the applicant may, within 28 days after the day on which notice of the decision was given to the applicant in accordance with section 22, apply to the principal officer of the agency for a review of the decision in accordance with this section.

(2) A person is not entitled to apply to the Tribunal for a review of a decision in relation to which sub-section (1) applies unless—

- (a) he has made an application under that sub-section in relation to the decision; and
- (b) he has been informed of the result of the review or a period of 14 days has elapsed since the day on which he made that application.

(3) Where an application for a review of a decision is made to the principal officer in accordance with sub-section (1), he shall forthwith arrange for himself or a person (not being the person who made the decision) authorized by him to conduct such reviews to review the decision and to make a fresh decision on the original application.

(4) Where—

- (a) an application for a review of a decision has been made in accordance with sub-section (1); and
- (b) the applicant has not been informed of the result of the review within 14 days after the day on which he made that application,

an application to the Tribunal for a review of the decision may be treated by the Tribunal as having been made within the time allowed under the *Administrative Appeals Tribunal Act 1975* if it appears to the Tribunal that there was no unreasonable delay in making the application to the Tribunal.

Put shortly, this means that when a decision is made otherwise than by a minister or agency head refusing or deferring access to documents, the applicant may—and if he intends to appeal to the Administrative Appeals Tribunal, must—apply to the head of the agency for the decision to be internally reviewed, that is, reconsidered by a different officer and a fresh decision made.

**28.2** We believe that internal review, if properly administered, has a number of beneficial aspects, and are essentially in agreement with the procedure laid down. For one thing, it should encourage delegation of the primary power to decide whether documents should be disclosed and permit requests to be handled in the first place more expeditiously than an agency might otherwise consider advisable. The Department of the Capital Territory regarded internal review as a critical element in freedom of information matters for the very reason that it allowed greater delegation.<sup>1</sup> Internal review would also permit an agency to ensure that a decision of refusal or deferral did not go to the Tribunal without the full authority of the minister or head of agency and certainly not without reconsideration by a responsible officer who appreciates the full implications of his decision. In

<sup>1</sup> Submission no. 149, incorporated in *Transcript of Evidence*, p. 2226.

supporting the concept of internal review the Department of Social Security advised that an internal review procedure which had been adopted by the Department in relation to various disputes with members of the public had succeeded in reducing appeals to the Social Security Tribunal by half.<sup>2</sup>

**28.3** We recommend no significant variation to the various procedural details laid down. We acknowledge that it is appropriate to dispense with the need for an applicant to apply for internal review before proceeding to the Administrative Appeals Tribunal when the initial decision refusing and deferring access was made by the minister or head of agency concerned: internal review in such circumstances would be superfluous. Nor do we object to the limit of twenty-eight days from notification of an adverse decision placed on the applicant's right to seek an internal review. To allow an indefinite period for review could seriously inconvenience agency operations and in many cases the time limit will not be crucial, for a person's right to make a fresh request for the same document is not excluded by the Bill.

**28.4** Again, we support the requirement that internal review must be formally requested by making application to the principal officer of the agency concerned. A minor detail which could, nevertheless, be a source of confusion, is the fact that clause 38 requires application to be made to the 'principal officer' of the agency, yet under clause 22 an agency is not obliged to include this item of information in its statement of reasons and other particulars. Neither is there any mention as to whether the request should be in writing. We believe these omissions ought to be rectified, and recommend accordingly.

**28.5 Recommendation: The notice required to be supplied to the applicant under clause 22 should include particulars of the manner in which application for internal review should be made.**

**28.6** The agency is free, except in one respect, to conduct its internal review as it sees fit. The one stricture placed on the agency's freedom is provided by clause 38 (3) which requires the review to be conducted by a person other than the person who made the original decision. We were advised of a new procedure for handling complaints which had recently been adopted by the Department of Social Security.<sup>3</sup> Under this informal procedure an officer is designated as a Review Officer to examine and review a decision made by another officer in the department which has been objected to by the member of the public concerned. The Review Officer is required to perform the task of an impartial arbiter in so far as he is able, but in the event of the dispute remaining unresolved the formal appeal procedure would then be engaged. Designating a review officer in an agency to hear all internal reviews concerning freedom of information may or may not have merit. The experience which such an officer would accumulate and the expertise which he would develop might make this proposal an attractive one for an agency in the long term. Initially, however, such a rigid system might work against the agency's interests. We consider that these are essentially matters of internal organisation which are best left to the principal officer of each agency. However we do support, in principle, the development of an effective internal review procedure and express the hope that agencies will give serious consideration to the appropriate mechanism for their requirements.

<sup>2</sup> *Transcript of Evidence*, pp. 2201-2.

<sup>3</sup> *ibid.*

**28.7 Recommendation: Agencies should give consideration to the most appropriate internal review machinery for their own needs and take steps to ensure that such machinery is fully operational by the time of proclamation of the Act.**

**Time limits**

**28.8** We accept the need for an agency to be under some time constraint in conducting its internal review, otherwise it will be claimed that this internal review process is being used to delay the making of a final decision. Clause 38 provides, in effect, a time limit of fourteen days for internal review, this being under paragraph 38 (2)(b) the time after which an appeal can be made to the Tribunal notwithstanding that the result of the review has not been notified. We believe on balance that this period is appropriate. One department which did indicate that a fourteen day time limit would place undue administrative burdens on its operations was the Department of Immigration and Ethnic Affairs.<sup>4</sup> The Department requested that the time be extended for a further seven or fourteen days. This would mean that a request for access to information which was ultimately denied might conceivably take three months before an application could be made to the Administrative Appeals Tribunal. The Women's Electoral Lobby (Victoria) (WEL), having rejected the need for internal review, described the following scenario:

An applicant is refused access to a document (maximum time lapse—60 days from date of request). If this request is refused by other than a Minister or Principal Officer, the dissenting applicant must ask for an internal review of the decision (maximum time lapse—14 days). If this review supports the denial, the applicant may then apply to the Tribunal. The applicant has now been seeking information for a potential 74 days.<sup>5</sup>

An additional two weeks for internal review would make this total period three months. While, contrary to the views expressed by WEL, we support the concept of internal review, we cannot agree with the Department of Immigration and Ethnic Affairs that there is any justification for further extending the period of fourteen days. Since the necessary information on which to base a decision will have already been assembled, or could be reassembled in minimum time, delay is likely to be justified only by the fact that particular personnel are not, at times, available, in which case responsibility for internal review should, we believe, simply be delegated to other available personnel.

**Internal review and the Ombudsman**

**28.9** Given that an applicant is required by clause 38 to await the outcome of an internal review, or the expiration of a period of fourteen days, before proceeding to the Administrative Appeals Tribunal, we considered whether an applicant's right to complain to the Ombudsman should be similarly delayed. We concluded that it would be to everyone's advantage, if there were the slightest possibility of settlement without the intervention of an independent party, for internal review to take its course before the Ombudsman commences an investigation. At the same time there will conceivably be occasions when early intervention by the Ombudsman might be advisable; for example where an application is important, extremely urgent and the agency concerned has reached a decision and is merely marking time.

<sup>4</sup> Submission no. 158, incorporated in *Transcript of Evidence*, p. 2343.

<sup>5</sup> Submission no. 7, incorporated in *Transcript of Evidence*, p. 368. Also see p. 370.

**28.10** The Ombudsman's present general jurisdiction under the Ombudsman Act would allow him to investigate a complaint before the completion of internal review, although section 9 (4) of that Act does allow him a discretion to refuse such an investigation pending a department's or authority's own review of the decision in question. We considered whether it might be appropriate to incorporate in the Freedom of Information Bill a specific provision (analogous in some respects to the present section 9 (3) of the Ombudsman Act) requiring that the Ombudsman should not investigate a complaint before the completion of the time specified for internal review unless in his opinion, taking into account the urgency and importance of the complaint and the attitude of the agency concerned, his intervention was warranted. Certainly we envisage that such intervention would be unnecessary save on the rarest occasions. On balance, however, we believe that the Ombudsman can, as a practical matter, be relied upon not to unwarrantably or unnecessarily intrude on the internal review process, and it is unnecessary to place a legislative restriction upon him in this respect. We couch our own recommendation, then, in this respect, in purely administrative terms.

**28.11 Recommendation: For the purposes of freedom of information the Ombudsman should make it a practice not to investigate a complaint before the completion of internal review unless he is of the opinion, taking account of the urgency and importance of the complaint and the attitude of the agency concerned, that his intervention is warranted at that time.**

## Role of the Ombudsman

### Introduction

**29.1** As we have foreshadowed in Chapter 27 and elsewhere, we believe that there is a strong case for supplementing the formal Administrative Appeals Tribunal external review procedure with a less formal, conciliatory rather than arbitral, dispute settling mechanism of a kind that would be an attractive and inexpensive alternative to the Tribunal in the first instance, and substantially lessen the necessity of frequent recourse to it. After considering various alternative mechanisms which exist or could be created for this purpose, we have concluded, for reasons spelt out in paragraphs 29.29–31 below, that the functions we have in mind could most effectively be performed by the Commonwealth Ombudsman, or at least from his office in the person of a Deputy Ombudsman with special responsibility for freedom of information.

**29.2** The functions we have in mind for the Ombudsman in respect of freedom of information include not just his familiar powers in investigation, conciliation and recommendation, but also a role as counsel before the Tribunal on behalf of applicants where in his opinion such intervention was justified. We also envisage the Ombudsman performing a number of useful advisory and critical functions in relation to the general operation of freedom of information legislation.

**29.3** In developing a role for the Ombudsman which is significantly greater than appears to have been contemplated by the present Bill, our intention has been to facilitate the task of the individual who seeks to assert his right of access to information. We are keenly aware that expense and fear of litigation are prime obstacles for an individual seeking administrative review by normal adjudicative processes. These, and other considerations such as the inequality of the parties to the dispute, the difficulty of an individual assessing the merits of his claim without some knowledge of the contents of a document, likely bureaucratic resistance to radical legislation, and the realisation that the objectives of the Bill will only be accomplished by the persistence of members of the public making individual claims, have convinced us of the particular appropriateness of an Ombudsman capable of acting as conciliator and counsel in matters concerning freedom of information.

**29.4** We have also taken account of overseas precedents which illustrate the wide variety of powers which governments have given, or groups and individuals have proposed, for their Ombudsmen for the purposes of freedom of information. In Britain, for example, Mr Clement Freud's Private Member's Bill, which was introduced into the House of Commons in January 1979, provided that a complaint would be investigated by the Ombudsman with an ultimate right of appeal to the courts.<sup>1</sup> The Canadian Green Paper<sup>2</sup> suggests a variety of possible review procedures including the appointment of a special Information Commissioner with power to order the release of documents. The Canadian House of Commons

<sup>1</sup> Great Britain, House of Commons, 'Official Information Bill', *Hansard*, 19 January 1979, cols 2131–2213 and see Chapter 2 para. 2.47.

<sup>2</sup> Canada, Department of the Secretary of State, *Legislation on Public Access to Government Documents*, Supply and Services Canada, Ottawa, 1977, p. 39.

Standing Joint Committee on Regulations and other Statutory Instruments proposed in June 1978 that there should be a right of review to an Information Commissioner with advisory powers, and, regardless of the opinion of the Commissioner, an ultimate right of appeal to the courts.<sup>3</sup> Legislation enacted in New Brunswick in June 1978 provides that an appeal may be made to the Ombudsman or to a Judge of the Supreme Court.<sup>4</sup> A Bill proposed by the Prince Edward Island Government provides for the appointment of an Information Commissioner with a power to order release as the sole avenue of appeal.<sup>5</sup> And, in British Columbia and Ontario private member's Bills have provided for appeal to the provincial Ombudsmen instead of the courts.<sup>6</sup>

### **The Ombudsman as conciliator**

**29.5** The procedure to be followed by the Ombudsman in investigating disputed claims for information would be similar to the procedure adopted by the Commonwealth Ombudsman in relation to general administrative complaints. The Ombudsman would investigate complaints from an aggrieved member of the public and, subject to proposed restrictions in relation to clauses 23, 24 and 25 which are outlined in a subsequent paragraph, examine the documents in question on a confidential basis. The Ombudsman would, where circumstances warranted it, be free to seek an advisory opinion from the Administrative Appeals Tribunal concerning a freedom of information matter, in the same way that he is now able to do so in relation to his general administrative duties (*Ombudsman Act 1976*, s. 11). If he formed the opinion that a complaint was unjustified then he would advise the complainant accordingly and inform him of his rights under the Bill. It could be expected that the Ombudsman's advice would normally be accepted by the complainant, though he would still be free, regardless of the opinion of the Ombudsman, to proceed for review by the Tribunal where applicable.

**29.6** If the Ombudsman were of the opinion that a complaint was justified and, for example, that a document should be released he would inform the minister or agency concerned. If the Ombudsman's opinion did not prevail with the minister or agency he would advise the complainant of his right to proceed for review before the Administrative Appeals Tribunal if applicable. It is to be anticipated, however, that most complaints found to be justified by the Ombudsman during the course of investigation would be remedied by the agency concerned without resort to either the adverse publicity of a public report or a full hearing before the Tribunal. The experience of the Commonwealth Ombudsman has been that in the two years or so in which his office has been operating there has been no case where an agency has directly refused to effect an appropriate remedy.

**29.7** We have recommended in paragraph 28.11, and repeat here for convenience, that for the purposes of freedom of information the Ombudsman should not investigate a complaint before the completion of internal review unless he is of the opinion, taking into account the urgency and importance of the complaint and the attitude of the agency concerned, that his intervention is warranted at that time. It is important for the long-term future of freedom of

<sup>3</sup> *Minutes of Proceedings and Evidence*, Issue no. 34, Third Session of the Thirteenth Parliament, 1977-78 (June 27 1978), pp. 3-12.

<sup>4</sup> New Brunswick, Legislative Assembly, Right to Information Act, assented 28 June 1978.

<sup>5</sup> Prince Edward Island, 'Access to Public Documents Bill'—no. 53. Given first reading in May 1977, but was not passed by the legislature and appears to have been dropped.

<sup>6</sup> Private members' bills are given little consideration in the Canadian provincial legislature and are rarely passed. See Chapter 2, para. 2.41.

information that proper and effective internal review procedures develop, and the unnecessarily premature intrusion of the Ombudsman may well impede that development.

**29.8** On the other hand, there ought to be no such inhibition about the Ombudsman playing an active conciliatory role merely because a matter is or may be on its way to the Tribunal. We have already noted (paragraphs 27.5 and 27.24) the inhibiting role that section 6 (3) of the Ombudsman Act does specifically play in this respect, and our view that—whatever its utility may be in other contexts—it ought to have no application in freedom of information matters.

**29.9 Recommendation: For the purposes of the Freedom of Information Bill, the Ombudsman should not be precluded in any way by section 6 (3) of the Ombudsman Act or otherwise from investigating a matter which is also subject to review by the Administrative Appeals Tribunal.**

**29.10** We also noted earlier (paragraph 27.5) that section 9 (3) of the Ombudsman Act bars the Ombudsman from gaining access to any information the disclosure of which the Attorney-General certifies would, inter alia, prejudice security, defence, international or Commonwealth–State relations, or would disclose Cabinet or Cabinet Committee deliberations. This has sweeping implications for the Ombudsman’s capacity to usefully conciliate disputes arising under clauses 23, 24 and 25. Except for Commonwealth–State matters which, here as elsewhere, we do not see as possessing the same degree of sensitivity as the other categories in the list, we do accept that there should be some limitation on the Ombudsman’s powers in this area, and would regard it as justifiable that he not be empowered to physically inspect the documents in question. But we are concerned that the Attorney-General’s certificate under section 9 (3) of the Ombudsman Act might be construed as cutting off not only access to the documents but to all information concerning them, which would reduce the Ombudsman to impotence in a freedom of information context. We are concerned to ensure that the Ombudsman does maintain the right to investigate and conciliate in these areas, and that he is able accordingly to discuss the matters with relevant officials, inspect other relevant documents, and to advise applicants of their rights.

**29.11 Recommendation: In relation to clauses 23, 24 and 25 of the Bill the Ombudsman’s powers should include those of investigation and conciliation insofar as he is able, but not include (except in the case of Commonwealth–State relations matters) the power to inspect the documents for which exemption is claimed.**

**29.12** The other important general restriction on the Ombudsman’s powers imposed by the Ombudsman Act, and previously noted, is paragraph 5 (2)(a)—preventing him investigating action taken by a minister personally, as distinct from the minister’s delegate. The question of the Ombudsman’s power in relation to ministerial decisions is a very important consideration in freedom of information. By virtue of clause 9 of the present Freedom of Information Bill a person has a legally enforceable right to obtain access not only to a document of an agency, other than an exempt document, but also an official document of a minister, other than an exempt document. An official document of a minister is a document relating to the affairs of an agency in the possession of a minister. It follows that on some occasions a decision to refuse access to a document will be made by the minister concerned. Furthermore there is a real likelihood

that where clauses 23, 24, 25 and 26 are argued as the grounds for withholding documents, the decision to refuse access might also be made by the minister concerned. In view of the likelihood of ministerial involvement in the withholding of policy documents, it is crucial for the Ombudsman to be empowered to investigate ministerial decisions refusing or deferring access to information. While this is a significant departure from the present position of the Commonwealth Ombudsman who, in his investigation of administration in general, is precluded from examining ministerial decisions, the two areas are, however, different and warrant a different approach. The statutory right conferred on the public at large by freedom of information legislation carries with it an obligation to provide an effective means of legally enforcing that right. If, as we believe, the intervention of the Ombudsman is required to enforce that right he must have power to review ministerial decisions in matters concerning freedom of information. We accordingly propose that for the purposes of freedom of information, ministerial decisions be within the purview of the Ombudsman. We note that this would also require a reconsideration and possible deletion of paragraph 39 (4) which prevents the Ombudsman granting a certificate of unreasonable delay where a matter has been made, or referred to, a minister.

**29.13 Recommendation: For the purposes of freedom of information, ministerial decisions should be within the jurisdiction of the Ombudsman.**

**29.14** Nearly all witnesses with whom we discussed the Ombudsman's proposed conciliatory role endorsed the concept wholeheartedly, seeing it as a natural extension of that officer's present work and a useful informal way of resolving disputes without becoming enmeshed from the outset in the time-consuming complexities of Tribunal procedures. Some reservations were expressed on the basis that conciliation would most probably be ineffective following reconsideration and reaffirmation at the internal review stage, and that an activity involving 'conciliation' (as distinct from 'administrative oversight') could more appropriately be exercised by an extended preliminary conference procedure at the Tribunal level than by someone in the position of the Ombudsman.<sup>7</sup> We do not believe, however, that these concerns justify any modification of the role we propose for the Ombudsman; the former underestimates the proven force and utility of the Ombudsman's position in securing a rethinking of even the most apparently entrenched positions, while the latter both understates the extent to which the Ombudsman plays now a straightforward conciliatory role and possibly overstates the likely utility of a Tribunal preliminary conference.

**29.15** We sought a reaction to our proposals at an early stage in their formulation from the Commonwealth Ombudsman, Professor Richardson, himself. He gave clear general support in principle, but drew attention to one particular area of possible difficulties. He was concerned that two sometimes conflicting bodies of jurisprudence would develop, for example, on the question of public interest, if a complainant were allowed to pursue a claim either before the Tribunal or the Ombudsman according to his preference.<sup>8</sup> He also considered it inappropriate for an independent statutory office holder to apply, as a matter of law, the jurisprudence of the Administrative Appeals Tribunal.<sup>9</sup> He proposed instead a filtering process whereby the Ombudsman, not the complainant, would

<sup>7</sup> See especially Department of the Capital Territory, *Transcript of Evidence*, pp. 2254-57.

<sup>8</sup> *Transcript of Evidence*, p. 1587.

<sup>9</sup> *ibid.*

on each occasion choose whether his office or the Tribunal was the appropriate avenue for review and, in doing so, would ensure that appeals based on particular clauses were always reviewed by the same body.

**29.16** Having given the matter careful consideration, we do not share Professor Richardson's concern that the jurisprudence developed by the Ombudsman would differ from, and conflict with, the jurisprudence of the Administrative Appeals Tribunal. Clearly the interpretations and rules laid down by the Tribunal would form the precedents which the Ombudsman would apply in conciliation and, in doing so, the Ombudsman would no doubt develop rules of thumb to avoid any possibility that decisions made by his office would conflict with those of the Tribunal. We also prefer a scheme which would permit the individual, rather than the Ombudsman, to elect the avenue of relief according to his own personal and financial resources.

### **The Ombudsman as counsel**

**29.17** While conciliation has, so far, proved very satisfactory as a method of dispute resolution in the first two years of the Commonwealth Ombudsman's oversight of administration in general, it must be acknowledged that the heavier policy and political flavour of most freedom of information disputes is likely to give rise to a number of conflicts which can only be resolved by the Administrative Appeals Tribunal. We have little doubt that professional representation will be necessary in a great many of the freedom of information cases which thus come before the Tribunal. Officers of the Department of the Capital Territory gave evidence that, from their experience, there was little need for applicants to be represented before the Tribunal since proceedings were inquisitorial, with members of the Tribunal doing all in their power to assist applicants, intervening on their behalf where necessary.<sup>10</sup> They conceded, however, that most of the Department's cases before the Tribunal involved residential ratings with hearings concentrating on disputed matters of fact and the construction of relatively straightforward criteria. Accordingly there was little comparability between these cases and potential freedom of information disputes which would, to a great extent, involve the application of more vague, shifting criteria, involving a weighing of public interests which would raise complex legal questions requiring for their effective presentation proper professional representation.

**29.18** As the legislation now stands, however, there is a built-in disincentive to applicants obtaining professional advice of the quality and in the quantity they may need; the Administrative Appeals Tribunal, here as elsewhere, has no general power to award costs in favour of a successful applicant. Since all but the most trivial matters are likely to be expensive to litigate, only well-off individuals, organisations and corporations will enjoy the luxury. In Chapter 30, we discuss this difficult and sensitive question at some length, and make the recommendation, among others, that the Tribunal be empowered to exercise a discretion in appropriate circumstances to recommend to the Attorney-General that a successful applicant's costs be paid. It is an integral part of our general solution to the problem, however (and one also further developed in Chapter 30), that the Ombudsman be available to act as counsel for applicants in appropriate circumstances. We believe it is only by this means, and not by either ordinary cost rules or the (uncertain) availability of legal aid, that the majority of freedom of information cases demanding resolution by the Tribunal will, in fact, be resolved.

<sup>10</sup> Cited footnote 7, pp. 2258-59.

**29.19** We do not suggest that representation by the Ombudsman should be automatic or as of right. In deciding whether to represent an applicant before the Tribunal, the Ombudsman should be required to give due weight to such considerations as the importance of the principle involved in the matter; the precedential value of the case; the financial means of the complainant; the complainant's prospects of success; and the reasonableness of the agency's action in withholding the information. These criteria would ensure that the Ombudsman only intervenes in circumstances which justify his so doing.

**29.20** It may be that our proposal that one office should be responsible for the dual functions of conciliation and counsel will be controversial to some who consider that the Ombudsman's essential quality of objectivity will be prejudiced. We note however, that when questioned as to the desirability of this combination for freedom of information purposes, witnesses generally indicated their approval; some saw a similarity between the conciliator-counsel role proposed here, and the various State Commissioners for Consumer Affairs who were empowered to both conciliate and to argue the cases before the relevant Credit Tribunal.<sup>11</sup>

**29.21** This joint role was, in fact, initially proposed for the Commonwealth Ombudsman by the Commonwealth Administrative Review Committee (Kerr Committee 1971),<sup>11a</sup> although it was subsequently rejected by the Committee on Administrative Discretions (Bland Committee 1973).<sup>11b</sup> It is certainly a principle well known to the Swedes. The Swedish Ombudsman has long been empowered to institute proceedings against those who, in the execution of their official duties, have acted illegally or negligently. It is a principle which the Canadian government proposes to apply in the case of the Privacy Commissioner. A Bill has been introduced providing that the Privacy Commissioner would become an Assistant Ombudsman with strong powers of access to information, and, in the case of a minister's refusal of a request for a document, he could apply to the Federal Court for a determination.<sup>12</sup> It is a principle which we believe is practicable and appropriate in the Australian context.

**29.22** To the extent that it is necessary, the functions of conciliation and counsel can be kept separate in the Ombudsman's office. But whether agencies show a reluctance to speak and provide documents as freely or negotiate as co-operatively will depend more on their perception of the role of Tribunal proceedings than on administrative arrangements within the Ombudsman's office. If they perceive these proceedings as adversarial rather than inquisitorial, they will adopt the litigant's philosophy of 'hiding one's hand'. This philosophy is misguided. The real purpose of a hearing before the Tribunal is not to enable argument as to whether a decision-maker was wrong in the sense of allocating praise or blame but rather to determine, from the material presented by the parties and all other relevant material, what is the right or preferable decision in the circumstances. Provision for universal discovery and pre-trial conferences in the Administrative Appeals Tribunal Act recognise this different approach in Tribunal proceedings. Once the necessary attitudinal change is made, then negotiations between agencies and the Ombudsman should proceed smoothly despite his additional role as counsel.

<sup>11</sup> M. Jacobs, journalist with *The Advertiser* (Adelaide), *Transcript of Evidence*, p. 1909 and J. Goldring, *Transcript of Evidence*, p. 767.

<sup>11a</sup> Australia, Parliament, *Commonwealth Administrative Review Committee Report* (Hon. Mr Justice Kerr, Chairman), Parl. Paper 144/1971, Canberra, 1971.

<sup>11b</sup> Australia, Attorney-General's Department, *Committee on Administrative Discretions* (Sir Henry Bland, Chairman), *Final Report*, AGPS, Canberra, 1973.

<sup>12</sup> Canada, House of Commons, Ombudsman Bill (C-43) introduced 5 April 1978.

**29.23 Recommendation:** For the purposes of freedom of information the Ombudsman should be empowered to act as counsel before the Administrative Appeals Tribunal on behalf of an applicant if he forms the opinion that his intervention is warranted. In forming his opinion he should take account of such considerations as:

- (a) the importance of the principle involved in the matter;
- (b) the precedential value of the case;
- (c) the financial means of the complainant;
- (d) the complainant's prospects of success; and
- (e) the reasonableness of the agency's action in withholding the information.

#### **The Ombudsman and Reverse-Freedom of Information cases**

**29.24** We have considered whether, and to what extent, the services of the Ombudsman should be available in Reverse-Freedom of Information cases (discussed in Chapter 25) to third parties who wish to prevent the release of information which they have provided to government. The question which concerned us was whether, if the Ombudsman chose to represent a third party before the Tribunal, such representation would reflect adversely on, and unfairly prejudice, the applicant's case for release. Circumstances could arise when the Ombudsman would be called upon to represent both parties. In view of the complications of enabling the Ombudsman to appear on behalf of third parties, as well as other applicants, we propose that the Ombudsman's powers in relation to third parties be restricted to the power of investigation and conciliation.

**29.25 Recommendation:** The Ombudsman's powers in Reverse-Freedom of Information cases, in relation to people seeking to prevent the release of information which they have submitted to government, should include the power of investigation and conciliation but not include the power to act as counsel before the Administrative Appeals Tribunal on their behalf.

#### **The Ombudsman as adviser and critic**

**29.26** With the Ombudsman playing a major role in the enforcement of the rights and obligations under the Bill, his office would, after a comparatively short period of time, develop a body of expertise on all aspects of the Freedom of Information Bill. In view of this, we considered whether the Ombudsman should also be charged with administrative responsibility for monitoring compliance with the Bill and of systematic report as to the extent to which agencies had fulfilled their obligations. We concluded that it was more appropriate to vest this function in a particular department headed by a minister directly responsible, and answerable on a regular basis, to the Parliament. The subject of administrative monitoring, and the particular role we propose in this respect for the Attorney-General's Department, is discussed in detail in Chapter 31.

**29.27** We formed the view that the Ombudsman's knowledge and expertise could best and most appropriately be utilised by vesting general advisory and critical functions in his office. The Ombudsman and his officers would advise agencies, at their request, concerning their obligations under the Bill and in the course of their reports to Parliament would offer from time to time suggestions for improvements and reform in relation to procedure, practice, the

regulations or the text of the Bill itself. In Chapter 32 we make further comment and recommendation as to the nature and content of the Ombudsman's reports.

**29.28 Recommendation: The Ombudsman should be empowered to advise agencies, at their request, concerning their obligations under the Freedom of Information Act and, in his reports to Parliament, to offer suggestions for improvement and reform in relation to freedom of information in general.**

### **Establishing the appropriate machinery**

**29.29** We gave careful consideration to the most appropriate way of formally establishing the machinery to exercise the various functions described above. It became clear to us very early that, because of the close comparability of these functions with the general administrative role performed by the Ombudsman, such machinery should, as a practical budgetary matter, be physically located within, or alongside, the present office of the Ombudsman, and be administered along with the ordinary functions of that office. There were still several options available, however, so far as the formal delineation of function was concerned:

- (1) the appointment of a separate statutory office-holder, perhaps known as the 'Information Commissioner' or 'Information Ombudsman' for freedom of information purposes;<sup>13</sup>
- (2) the vesting of all relevant powers and duties in the Commonwealth Ombudsman himself;
- (3) the vesting of the relevant powers and duties in a specifically designated office-bearer, perhaps known as the 'Deputy Ombudsman (Information)', within the Ombudsman hierarchy; or
- (4) the vesting of all relevant powers and duties in the Ombudsman himself, but on the understanding that these freedom of information matters would be delegated to a Deputy Ombudsman specifically appointed for this purpose.

**29.30** Our preference is, on balance, for option (4). Option (1) could be expected to be resisted on the basis that, even if this was more a matter of appearance than reality, it would involve the establishment of a new bureaucracy. Options (2), (3) and (4) all pick up the advantage of overt association with the Ombudsman's office, with its prestige, public visibility and accessibility and its accumulated experience of investigation and conciliation. Options (3) and (4) have the advantage over (2), as they would achieve a certain separation

<sup>13</sup> We have noted overseas trends towards vesting Ombudsmen with specific limited functions. There are single-purpose Ombudsmen in correctional institutions in Canada and the United States, Military Ombudsmen in several countries, Privacy Ombudsmen and Press Ombudsmen. The concept of an Ombudsman with such a specific and limited jurisdiction is not unique in Australia and was proposed in the Defence Force Ombudsman Bill 1975. This Bill passed the House of Representatives and reached second reading stage when Parliament was dissolved in November 1975. The proposed Defence Force Ombudsman was authorised by clause 5 to investigate, within certain limits, administrative action 'taken by the Defence Force, or by a public authority, with respect to a matter that is related to the service of a member of the Defence Force'. He could also refer any complaint to the Commonwealth Ombudsman, if the action was taken by a public authority, and the matter was consented to and could more conveniently be investigated by the Commonwealth Ombudsman. Although the Bill was not passed, a Defence Ombudsman was appointed and has continued to function under administrative arrangements made in 1974. See 'Citizens hope: Ombudsman for the 1980s', an address given by the former Chief Ombudsman for New Zealand, Sir Guy Powles at the Law Centre, University of Alberta, Canada, October 1978, *Commonwealth Law Bulletin* 5, 2 April 1979, pp. 522-34.

consonant with the difference in powers and responsibilities between freedom of information matters and administrative oversight in general. Of these two, option (3) obviously better formalises this distinction, but has a number of technical difficulties associated with it, not least the consideration that a Deputy Ombudsman simply so created would have no staff of his own to perform freedom of information work. The simplest solution is thus option (4), which would preserve a de facto separation by virtue of delegation from the Ombudsman to an appropriate deputy; this would not of course remove the power of the Ombudsman himself to also exercise the delegated powers should he so choose.

**29.31 Recommendation: The relevant powers and duties should be vested in the Commonwealth Ombudsman for delegation to a Deputy Ombudsman appointed for freedom of information purposes.**

## Proceedings before the Administrative Appeals Tribunal

**30.1** We have discussed in a number of previous chapters, and endeavoured to summarise in Chapter 27, the various grounds upon which appeals may be—and in our view should be—able to be brought. The present chapter does not traverse this ground again. Rather it focuses on a number of matters of general procedure which arise with respect to Administrative Appeals Tribunal proceedings: the initiation of proceedings; powers with respect to costs and fees; discovery procedures; the expedition of priority matters; and the language of Tribunal decisions.

### Initiation of proceedings

**30.2** Section 29 of the *Administrative Appeals Tribunal Act 1975* requires that all applications for review must be lodged within twenty-eight days of the day on which notice in writing of the decision in question was furnished to the applicant. This basic time limit is not altered by anything in the Freedom of Information Bill, except insofar as the Bill makes an application for internal review a condition precedent of an appeal to the Tribunal. Clause 38 of the Bill requires that an application for internal review be made within twenty-eight days of the giving of the original decision, and in effect prohibits an appeal to the Tribunal until either the review decision is made or fourteen days have elapsed, whichever occurs earlier. It would appear that once the notice of the internal review decision has been given, section 29 of the Administrative Appeals Tribunal Act applies and the applicant has twenty-eight days from that date to lodge his appeal. Where no internal review decision has been forthcoming within fourteen days, or more, of the request for it, clause 38 (4) of the Freedom of Information Bill applies to deem an appeal to the Tribunal 'as having been made within the time allowed under the *Administrative Appeals Tribunal Act 1975*' provided the Tribunal is satisfied there was 'no unreasonable delay' in lodging it.

**30.3** There is an imprecision about the expression 'unreasonable delay' which is regrettable but probably unavoidable in the no-answer context in which it applies. What is perhaps avoidable is the strict requirement of twenty-eight days which otherwise routinely applies. We regard this period as, in all the circumstances, somewhat too brief. The applicant would wish to be adequately prepared for what may be a complex and legalistic hearing. The time constraint should be more realistic regardless of the applicant's right under section 29 (7) of the Administrative Appeals Tribunal Act to seek an extension of time. While one rationale for the relatively short twenty-eight-day time limit in general administrative matters may well be to ensure that no department is kept in an unduly prolonged state of uncertainty about the status of decisions involving general operating procedures or the expenditure of significant funds, we do not see this kind of practical administrative consideration as having any real application in the freedom of information area: a greater lapse of time before the result of an appeal application is known is unlikely to prejudice departmental operations in any way.

**30.4** We are aware that the Administrative Review Council is presently conducting a review of time limits provided by the Administrative Appeals Tribunal Act

and is seeking the views of departments, applicants and lawyers. Rather than refer this matter for further consideration by the Council, we are sufficiently persuaded of the need for an extension of time in the specific context of freedom of information to recommend accordingly. We therefore propose that, for the purposes of freedom of information, a period of sixty days be substituted for the twenty-eight days presently provided.

**30.5 Recommendation: For the purposes of freedom of information, the time within which an application for review must be made to the Administrative Appeals Tribunal should be extended from twenty-eight days to sixty days commencing on the day on which notice in writing of the decision is furnished to the applicant.**

#### **Awarding costs**

**30.6** Both the Commonwealth Administrative Review Committee (Kerr Report 1971) and the Committee on Administrative Discretions (Bland Report 1973) recommended that the then proposed Administrative Appeals Tribunal be empowered to award costs in favour of an aggrieved person where the Tribunal considered that the application for review was reasonably justified.<sup>1</sup> Despite this, the Administrative Appeals Tribunal Act makes no provision for the award of costs, providing only that if a person is indigent, legal aid can be given at the discretion of the Attorney-General.

**30.7** One of the most frequently recurring criticisms of the scheme of review provided by the present Freedom of Information Bill was that the Administrative Appeals Tribunal's inability to award costs in favour of an applicant would render the right of review by the Tribunal an impracticable one for the vast majority of potential applicants. Specific submissions on this matter were made by organisations such as the FOIL Campaign Committee, WEL (Victoria), the Victorian Committee for Freedom of Information, the Australian and South Australian Councils for Social Services, the Queensland and South Australian Councils for Civil Liberties, and the Australian Consumers' Association.<sup>2</sup>

**30.8** The exclusion from the Administrative Appeals Tribunal Act of a power to award costs appears to reflect, in part, a policy that those seeking review of administrative decisions before the Tribunal should be discouraged from seeking legal representation. Nevertheless there will be cases where, because difficult questions are involved, or because the facts are complex, or because of personal factors, the individual would need to have legal representation.

**30.9** Some see the power to award costs by tribunals in general as a mechanism for equalising the power of individuals and government or, by reflecting adversely on the performance of particular officers, as ensuring a greater measure of accountability on the part of public servants. In any case the government would only have to pay costs if the agency loses the action. There are in fact precedents for costs being awarded against the Commonwealth in certain Tribunal proceedings. Under section 85 of the *Compensation (Commonwealth Employees) Act*

<sup>1</sup> Australia, Parliament, *Commonwealth Administrative Review Committee Report* (Hon. Mr Justice Kerr, Chairman), Parl. Paper 144/1971, Canberra, 1971; Australia, Attorney-General's Department, Committee on Administrative Discretions (Sir Henry Bland, Chairman), *Final Report*, AGPS, Canberra, 1973.

<sup>2</sup> See *Transcript of Evidence*, p. 217; Submission no. 7, incorporated in *Transcript of Evidence* pp. 366-7 and 385-6; Submission no. 44, incorporated in *Transcript of Evidence*, p. 397; Submission no. 48, incorporated in *Transcript of Evidence*, p. 439 and *Transcript of Evidence* pp. 1766-7; Submission no. 19, incorporated in *Transcript of Evidence*, p. 1342, and *Transcript of Evidence*, p. 1973; Submission no. 61, incorporated in *Transcript of Evidence*, p. 577.

1971 the Commonwealth has to pay the costs of the applicant if the Tribunal under that Act sets aside the decision of the Commissioner and remits it for re-determination, and the costs of a party not initiating the proceedings if the Tribunal affirms the decision. In income tax challenges it has been an administrative practice of the Commonwealth to bear the costs of an appeal by the Commissioner against a decision of a Board of Review favouring a taxpayer in certain specified circumstances.

**30.10** There are, in addition, compelling reasons why costs should be awarded in favour of the aggrieved individual in the specific case of freedom of information actions before the Administrative Appeals Tribunal. For instance, a person is less likely to bring an action in which he might incur costs if the object at stake is information, and not—as will usually be the case in other actions before the Tribunal—an item of property or a pecuniary benefit. Further, an individual who brings an action and successfully asserts his right to information will be helping to change bureaucratic attitudes of secrecy in favour of more open government and should not have to bear the financial burden for what is of benefit to the community in general. Even from the point of view of a personal benefit an action under the Freedom of Information legislation may be an essential precursor for an individual who wishes to challenge a government decision concerning his personal monetary or property rights.

**30.11** United States experience indicates that a power to award costs may be crucial if denials of information are to be subject to external review. Before 1974 when United States courts were given power to award costs under the United States Freedom of Information Act, the government won only 25% of court cases, yet less than 4.5% of people denied information were prepared to appeal to a court.<sup>3</sup> It is true that the Australian procedure of appeal to the Administrative Appeals Tribunal (simpler than court appeals under the United States Freedom of Information Act), together with the power of the Ombudsman to investigate complaints, might help to counter the same anti-litigation pressures arising here, but it is arguable that Australians have been traditionally reluctant to assert their rights and to this extent a costs incentive is justified.

**30.12** While we agree with the rationale for relieving the financial burden of an appeal to the Administrative Appeals Tribunal for freedom of information purposes, we have contrived to resolve the problem by means other than conferring a power on the Tribunal to award costs for all freedom of information cases. Our proposal, set out in Chapter 29, that the Ombudsman be empowered to act as counsel on behalf of an applicant before the Tribunal will, we believe, go a long way to resolving the question for the great majority of deserving cases.

**30.13** Where the applicant seeks the assistance of the Ombudsman in the first instance, it is only if conciliation fails and the Ombudsman declines to represent the applicant before the Administrative Appeals Tribunal that the applicant will be faced with the prospect of paying his own costs. We propose that in these circumstances, if the applicant substantially prevails in his case before the Tribunal, the Tribunal should be empowered to recommend to the Attorney-General that costs be awarded in the applicant's favour. Since it is highly improbable that the government will change a clear policy decision not to confer a power to award

<sup>3</sup> United States, Congress, House of Representatives, *U.S. Government Policies and Practices—Administration and Operation of Freedom of Information Act: Hearings before Sub-Committee of House Committee on Government Operations*, 92nd Congress, 2nd Session, Washington, 1972.

costs directly on the Tribunal itself, whether in relation to freedom of information or other cases, our proposal leaves the ultimate decision with the government in any particular case when the Tribunal decides that an award of costs is justified.

**30.14** Where, on the other hand, an applicant does not seek the assistance of the Ombudsman in the first instance but decides to invoke his right to proceed directly to the Administrative Appeals Tribunal as he would be entitled to do under most clauses of the Freedom of Information Bill in our scheme of review, the Tribunal would have no power to recommend to the Attorney-General that costs be awarded in the applicant's favour. The purpose of this proposal is to encourage procedure by way of the Ombudsman, thus relieving pressure on the Tribunal without closing off the opportunity of direct appeal to the Tribunal. The same proposals would apply both to applicants seeking release of information and third parties pursuing Reverse-Freedom of Information actions. In line with our objective of removing the financial burden of appealing to the Tribunal it is, of course, a necessary corollary of our proposals, that the Tribunal have no corresponding power to recommend an award of costs in favour of the government.

**30.15 Recommendation: Where an applicant, having pursued his right of review through the Ombudsman, proceeds for review before the Administrative Appeals Tribunal without representation by the Ombudsman, and he substantially prevails in his case, the Tribunal should be empowered, in its discretion, to recommend to the Attorney-General that costs be awarded in the applicant's favour.**

**30.16** The criteria by which the Tribunal might exercise its discretion to recommend an award of costs could include consideration of the public benefit, the possible commercial benefit to the applicant, and the reasonableness of the agency's action in withholding the document, or, in the case of a Reverse-Freedom of Information action, the reasonableness of the agency's decision to release the document. For example, where disclosure is less in the interest of the public than in the interest of the individual applicant, an award of costs may not be appropriate. There would be no need or justification for public financial support to be given when an application is made to advance private commercial interests. In the case of mixed motives it would be possible to recommend a partial award.

**30.17 Recommendation: In deciding whether to exercise its discretion to recommend an award of costs, the matters to which the Administrative Appeals Tribunal is to have regard should include:**

- (a) the public benefit;
- (b) the possible commercial benefit to the applicant; and
- (c) the reasonableness of the agency's action in withholding the document or (in the case of a Reverse-Freedom of Information action) deciding to release it.

**30.18** We consider that one additional benefit that would flow from a power being vested in the Administrative Appeals Tribunal to award, or at least recommend, the payment of costs to a successful applicant is that this would act as a financial disincentive to agencies unreasonably withholding information. Such awards would certainly represent a budgetary burden on individual departments and authorities which it may be assumed they would be anxious to avoid. It is true that, as a matter of law and legal procedure, court and tribunal actions are taken against the Commonwealth and not against individual departments, except in

the case of statutory authorities and departments headed by statutory office holders, and that costs awarded against the Commonwealth are paid out of Consolidated Revenue. But as a matter of accounting rather than law, such costs would be reflected in the accounts of the relevant department, and if such a department did not have sufficient funds to satisfy an award of costs, it would need an advance from the Minister for Finance.

**30.19** There is another aspect of the financial disincentive involved in agencies contesting appeals to the Administrative Appeals Tribunal which may be conveniently mentioned at this point. This is the matter of the cost of the agencies' own representation, which must be borne by the government, whatever the outcome of the case. We note that in the United States the escalating cost of defending freedom of information suits has prompted the Attorney-General to limit the availability of representation assistance for government agencies to a quite narrow range of cases. In a letter to the heads of all federal departments and agencies dated 5 May 1977, the then Attorney-General, Griffin B. Bell, stated the guiding principle in this way:

The government should not withhold documents unless it is important to the public interest to do so, even if there is some arguable legal basis for the withholding. In order to implement this view, the Justice Department will defend Freedom of Information Act suits only when disclosure is demonstrably harmful, even if the documents technically fall within the exemptions in the Act.<sup>4</sup>

We regard it as wholly desirable that principles of this kind should be applied in Australia. If cost considerations do act as a disincentive to departments and agencies resisting disclosure in all but the most obviously defensible cases, then so much the better.

**30.20** Defending freedom of information cases before the Administrative Appeals Tribunal will have budgetary implications not only for the government as a whole, but also for individual departments and authorities. There is, it is true, a less immediate nexus between the financial burden and the individual agency in the case of the government's own costs than there is with respect to amounts of applicant's costs which the government might be obliged to pay if our recommendation above is accepted. This is because, for the most part, departments use (without being obliged to pay for) the services of the Deputy Crown Solicitor's Office rather than their own house counsel in tribunal matters. However a few departments, notably Capital Territory and the Department of Business and Consumer Affairs, already provide their own representation. Other departments are usually billed by the Deputy Crown Solicitor when, as often happens, disbursements are incurred in the briefing of private counsel; moreover all statutory authorities (as distinct from departments) using Deputy Crown Solicitor services are billed for the costs so incurred. We have been advised by the Attorney-General's Department that this general pattern is likely to continue in the future for freedom of information matters and it seems clear to us that the trend will be more and more towards departments as well as authorities either directly providing their own legal services or having to pay for them out of departmental budgets. These considerations should help to ensure that resistance to disclosure is not unnecessarily pursued to the Tribunal stage, and accordingly to reinforce the effect of the several other recommendations we have made with this end in mind.

<sup>4</sup> Committee Document no. 58.

## Power to waive fees

**30.21** We have given close consideration to whether the Administrative Appeals Tribunal should have the power to order the waiver or reduction of fees and charges (other than litigation costs) in appropriate cases. For reasons fully discussed in Chapter 11, paragraphs 11.40–11.45, and which need not be repeated here, we have recommended that the Tribunal have no jurisdiction in this respect, and that the sanctions for misuse of ministerial or agency discretion in this area should remain political only.

## Discovery

**30.22** The particular circumstances of a freedom of information action, where the applicant must conduct his case without access to the documents claimed to be exempt, raises the question of whether some extra provision should be made in this context to augment the present provisions of the Administrative Appeals Tribunal Act requiring the production of documents by a decision-maker. Under section 37 of the Administrative Appeals Tribunal Act (which continues to apply to non-exempt documents under the Freedom of Information Bill) a decision-maker is required, within fourteen days of having been advised that an application for review of a decision has been lodged with the Tribunal, to lodge copies of all documents in his possession relating to the decision being reviewed. Unless, following application by the decision-maker, the Tribunal orders that certain of these documents should not be furnished to the applicant, all these documents will, by virtue of section 35 (2) of the Administrative Appeals Tribunal Act, be made available to the applicant. It was suggested to the Committee that in the particular circumstances of freedom of information, an applicant should have extra power of discovery, or power to make interrogatories, or, at the very least, an agency should be required to produce as a public record a detailed index of the withheld documents accompanied by specific justifications for its action.

**30.23** In the United States the trend has been for courts to require the creation of as complete a record as possible so that the applicant will not be unduly disadvantaged in freedom of information proceedings. *Vaughn v. Rosen*<sup>5</sup> established that an agency must produce a detailed index of the withheld documents accompanied by specific justifications for its action. This general principle was modified in *Phillippi v. CIA*<sup>6</sup> where the United States Central Intelligence Agency claimed that the fact of the existence or non-existence of the requested documents was itself exempt information and the agency submitted sealed affidavits to the court explaining its position. While the court held that an agency must create as complete a public record as possible, it stated that no *Vaughn* index would be required unless the court determined that the refusal to admit or deny the existence of the records was unjustified.

**30.24** There are sound reasons for not importing all or any of these specific aids for the applicant. The provision of greater powers of discovery, or a power to make interrogatories or the requirement for an index would import a formidable apparatus for the applicant, one normally associated with the courts. It would raise once again the spectre of a constitutional issue, adding weight to the view that to a certain extent the functions of the Administrative Appeals Tribunal in relation to freedom of information can be characterised as judicial and not

<sup>5</sup> 484 F. 2d 820 (D.C. Cir. 1975).

<sup>6</sup> 546 F. 2d 1009 (D.C. Cir. 1976).

administrative review. Furthermore since the proceedings of the Tribunal should be inquisitorial there should be no need to rely on the applicant to supply either the necessary information or argumentation. We note that section 38 of the Administrative Appeals Tribunal Act, which enables the Tribunal to obtain additional statements, would permit the Tribunal to order that a *Vaughn* index be produced. However, we see no merit in importing a United States court practice in this regard as standard procedure in the Australian Tribunal. We prefer to leave a decision as to the need or desirability of such an index to the discretion of the Tribunal in each particular case. We also accept clause 44 of the Freedom of Information Bill, which precludes the Tribunal from examining the exempt documents *in camera* unless it is not satisfied of their exempt status by affidavit evidence or otherwise.

### **Expedition of priority matters**

**30.25** Several witnesses expressed the view that the Freedom of Information Bill should provide that freedom of information matters be accorded some degree of priority before the Administrative Appeals Tribunal. The rationale for according priority to freedom of information cases is that the value of information may tend to diminish rapidly with time. On the other hand, it must be acknowledged that a great many other matters which come before the Tribunal, for example deportation appeals, may have an equal or greater degree of urgency.

**30.26** We are aware that although there is a priority provision in the United States Freedom of Information Act, a large number of other United States statutes contain equivalent provisions on particular matters, with the net result that a system of priority no longer appears to operate in practice.

**30.27** We do not consider it appropriate to expressly provide in the Freedom of Information Bill that freedom of information matters should be accorded priority before the Tribunal. We do however express the hope that freedom of information proceedings will be expedited, if the particular circumstances of the case demand it, and that the Tribunal will, in scheduling its cases, give consideration to the particular need for an early resolution of freedom of information cases.

### **The language of Tribunal decisions: disclosing the existence of a document**

**30.28** We have already discussed, in paragraphs 9.27–34 and 20.14–16 the problem which arises in respect to certain specially sensitive documents as to whether the initial decision-maker should be entitled to answer a request in a form of words which neither confirms nor denies the existence of the document in question. We recommended, albeit with some hesitation, that a minister or agency should have such a power in respect of documents relating to security, defence or international relations (clause 23), Cabinet and Executive Council documents (clauses 24 and 25), and law enforcement documents (clause 27). We emphasised our concern that this power be not abused, and pointed to the role the Ombudsman might be expected to play—by means of his informal, conciliatory access to agency decision-makers—to ensure that it was not.

**30.29** A similar problem obviously arises with respect to decisions that are made, in the areas in question, by the Administrative Appeals Tribunal itself. Such matters will come before the Tribunal in the normal way, the giving of a 'no confirmation or denial' response being treated for appeal purposes as amounting to a

straightforward refusal to grant access. The Tribunal will, no more or less than is the case with claims of exemption generally, be in the position of having to reach a conclusion about the justification for the exemption without the benefit of argument from a fully informed applicant. In the case of appeals under clauses 23, 24 and 25 we have recommended already that any such consideration take place in closed inquisitorial proceedings, with the applicant limited to the submission of affidavit evidence, so no additional problems of maintaining secrecy will arise. In the case of matters of this kind arising in respect to law enforcement documents, claimed to be exempt under clause 27, it may be that some variation in existing procedures will be required in order to preserve, at least up to the point of the decision, secrecy as to whether the document in question does exist or not.

**30.30** The Administrative Appeals Tribunal's decision on appeal will either be that the document (if in fact it does exist) is exempt from disclosure or it is not. In the latter event the document whose existence has neither been confirmed nor denied will have to be disclosed. In the former event, where the document does exist but access is to continue to be denied, then we see no reason why the Tribunal, any less than the original decision-maker, should not be empowered to announce its finding, if it regards it as appropriate to do so, in exactly the same 'no confirmation or denial' terms as the original decision-maker.

**30.31 Recommendation:** In relation to appeals under clauses 23 (relating to security, defence, or international relations) 24 and 25 (relating to Cabinet and Executive Council documents) and 27 (relating to law enforcement documents) the Administrative Appeals Tribunal should be empowered, if it regards it as appropriate to do so, to announce its findings in terms which neither confirm nor deny the existence of the document in question.

**PART E**

**MONITORING THE OPERATION OF THE ACT**

## Administrative Monitoring

**31.1** Once the Bill is enacted it will be necessary for agencies to monitor the operation of the Act with care. In this way they will gain an awareness of the ramifications of meeting their obligations under the Freedom of Information legislation. To some extent, this will simply provide a sound basis for future planning. But it is also likely that defects will become apparent in the day to day operation of the Act. Improvements to overcome such defects as emerge will need to be instituted by the Executive as required.

### Departmental responsibilities

**31.2** It is in the interests of agencies themselves that they keep the operation of the legislation under close scrutiny, especially in its early stages. Many departments have recognised this. The Department of Housing and Construction,<sup>1</sup> for example, said that it would organise within its central office a 'general advising role particularly on questions of exemption'. It would 'establish a system to record all requests for information, and monitor their volume, type, and main topics of interest, so that an efficient response system can be set up for the Department as a whole'. The Department of Foreign Affairs<sup>2</sup> suggested the creation of a section with its own registry to enable it 'to monitor the progress of applications and to facilitate the compilation of statistical data which may be required for the annual report on the operation of the Act (section 48 (2)), which may assist in identifying workloads arising from this legislation and which can provide the basis for the calculation of fees'. The Department of the Capital Territory<sup>3</sup> also argued for 'a continuing process of review and evaluation of the legislation and, indeed, of the new processes of administrative law'. Its submission continued 'the Department would favour the introduction of the present legislation . . . on the understanding that it could be modified in the light of experience'.

**31.3** In our view each agency should be free, especially during the early stages of the legislation's operation, to develop whatever supervisory techniques it decides are appropriate to its particular functions. Differences in function will result in widely different demands being made on agencies as a result of the Freedom of Information legislation. Accordingly, it is important to cater to these differences by allowing agencies initiative in the way they monitor the effects of the legislation upon their functions.

**31.4** Nevertheless in order to enable the Public Service and the Parliament to make decisions about the effective discharge of agency operations under the legislation, and to ensure that an assessable case is made for the allocation of resources to agencies in order to fulfil these obligations, we consider that a good deal of information should be assembled in common form by agencies, both for internal and comparative purposes and to provide a basis for annual departmental reports to Parliament (as to which, see Chapter 32). As the Public

<sup>1</sup> Submission no. 135, para. 2.7.

<sup>2</sup> Submission no. 150, incorporated in *Transcript of Evidence*, p. 2384.

<sup>3</sup> Submission no. 149, incorporated in *Transcript of Evidence*, p. 2237.

Service Board has pointed out, 'departments will . . . need to devise, in advance of the legislation becoming law, systems recording requests for information [which are] . . . accurate and consistent'.<sup>4</sup> We believe that the information to be covered should include:

- (a) Requests made
  - number made, granted, rejected, partly-rejected, deferred
  - exemptions claimed
  - time lapse to decision
  - subject-matter of requests
  - reasons for rejection
  - use of internal appeals systems
- (b) Handling of rejections
  - nature of Ombudsman's involvement
  - cases on appeal: summary, outcomes
  - secrecy claims (under present clause 28)
- (c) Costs of freedom of information
  - fees received
  - attributed costs (staff time, etc.); extra staff positions sought and/or approved
- (d) Internal procedures
  - rules made about monitoring procedures
  - changes to fee schedules
  - disciplinary action related to freedom of information; summary figures; notes on more serious cases
  - innovations in information-handling associated with freedom of information
  - levels of delegation under the Freedom of Information legislation; changes during period
  - any special arrangements made to implement legislation; special problems experienced; efforts to encourage compliance
- (e) Staff training and development
  - instruction courses offered; duration and scope; who attended
  - proposed courses.

**31.5 Recommendation: In order to facilitate the administrative monitoring of the Freedom of Information legislation and to provide a basis for agency reports to Parliament, agencies should, in consultation with the Attorney-General's Department and the Public Service Board, assemble in common form information relating to the following matters:**

- (a) requests made;
- (b) the handling of rejections;
- (c) the costs of freedom of information;
- (d) internal procedures; and
- (e) staff training and development.

**31.6** Through monitoring of this sort, we expect the quality of government administration to be noticeably improved. This will flow from specific factors such as the improvement of record and index systems on the one hand and

<sup>4</sup> Submission no. 47, para. 3.10., incorporated in *Transcript of Evidence*, p. 847.

from such general factors as the awareness of a greater degree of public accountability on the other. We mention this because we are aware that many of the costs and difficulties which will be attributed to the Act would have arisen anyway. Nevertheless, insofar as the Act will be an undoubted catalyst to better administration, it will be convenient for agencies to collate such improvements and costs under the heading of freedom of information.

**31.7** While acknowledging that some elements of general administration such as the cost of preparing manuals, indexes and guides and of operating improved information retrieval systems, will thus be attributed to the Act, we are confident that agencies will be as anxious as we are to quantify and assess as far as possible the precise impact of the Freedom of Information Act. Perhaps the most frustrating, if largely inevitable, aspect of departmental appearances before the Committee was the element of speculation as to the administrative impact of the legislation. We hope that this will be ended as a result of careful internal monitoring by agencies. Agencies will be able to call on the Attorney-General's Department, the Department of the Prime Minister and Cabinet and the Ombudsman for aid, advice and guidelines. We now consider the role of these central agencies in the effective functioning of the legislation.

#### **Attorney-General's Department**

**31.8** The role of the Attorney-General's Department will be crucial to the effectiveness of the Act. Above all we expect the Department to place the Attorney-General in a position where he can argue effectively in Cabinet for such resources and such directives as may prove to be necessary for the implementation and continuing scrutiny of the legislation. The special responsibilities of the Attorney-General, as Minister responsible for this legislation, cannot be minimised.

**31.9** In addition, we expect that the Department will help agencies with needs related to freedom of information. In particular, this will involve providing legal advice; but it will also involve meeting departmental requests for information and guidance of a more general nature. The Department of the Capital Territory, for example, said, in relation to the lists of documents to be made available for inspection and purchase under clause 7, that 'the Attorney-General's Department will have to turn its mind to the problem of how to co-ordinate . . . across departments and across the Commonwealth structure'.<sup>5</sup> The Department itself has recognised its role and stated that it will, in association with the Public Service Board, 'conduct seminars and the like to inform Departments about the legislation'; and that it will engage in 'the preparation of guidelines and instructions to other Departments on the application of the legislation'.<sup>6</sup> The Department also expects that other departments 'particularly in the early stages of the legislation, will frequently seek advice on whether documents are required to be made available'. We expect, from the role already played by the Attorney-General's Department in alerting agencies to their respective responsibilities under the Freedom of Information Act, that it has already gained their confidence in this area.

**31.10** In addition, the Department has said that it contemplates that 'there would be a continuing monitoring of this and other legislation in the administrative law

<sup>5</sup> *Transcript of Evidence*, pp. 2265-6.

<sup>6</sup> Reply of 20 March 1979 by Attorney-General's Department to Public Service Board Survey on resource implications of Freedom of Information Bill, Committee Document no. 67, p. 4.

area'.<sup>7</sup> Although the Department correctly sees its task as being carried out in conjunction with the Public Service Board and the Department of the Prime Minister and Cabinet, we emphasise that the role of the Attorney-General's Department in keeping the operation of the legislation throughout the Public Service under constant scrutiny is crucial to the success of the legislation. These tasks require preparation and the Department has recognised this. It has said that 'additional resources will be required . . . for providing advice and guidance to other Departments, in the preparation and conduct of appeals to the Administrative Appeals Tribunal and in the production of an annual report to Parliament on the operation of this Act'.<sup>8</sup>

**31.11 Recommendation: The Attorney-General's Department should be provided with sufficient resources to enable it to undertake its responsibilities in implementing the legislation and monitoring its operation.**

#### **Department of the Prime Minister and Cabinet**

**31.12** The Department of the Prime Minister and Cabinet will have a role in offering advice to other departments about decisions which will have to be made under the legislation. As the Department has said, it expects 'referrals where requests are made which raise major policy issues, because of the Department's co-ordinating role in administration'.<sup>9</sup> The Department will therefore also be required to offer advice to the Government on progressive amendments to the legislation. We would expect such advice to be publicly available. In addition, the Department will be required to advise other departments about what papers attached to Cabinet documents may properly be separable and so made available under the legislation without delay or review. The Secretary of the Department indicated that the Department expected to be consulted by other agencies on this matter and that the Department has been 'putting [itself] in a position to respond to the various obligations that [it] will have'.<sup>10</sup> We believe that the Department will have an important part to play in making departmental practices consistent in this way.

**31.13 Recommendation: The Department of the Prime Minister and Cabinet should, in its annual report to Parliament, report not only upon its internal implementation of the Freedom of Information Act, but also upon its advisory role as to the Act's implementation in relation to other agencies.**

#### **Public Service Board**

**31.14** The Public Service Board will also play a part, as we have indicated above, in referring to staff development and training and to the need to keep staffing levels under review. The Council of Australian Government Employee Organisations raised this issue during the course of its evidence to the Committee. It said that the Government should 'give a commitment that it will review staff ceilings in an appropriate measure, with that measure being related to the proven additional workloads generated. We see that as a review process which should perhaps be carried out at least every three months during the introduction period'.<sup>11</sup> The Public Service Board has already, on our behalf, conducted a survey designed

<sup>7</sup> *ibid.*

<sup>8</sup> *ibid.*, p. 1.

<sup>9</sup> Paper from Department of Prime Minister and Cabinet to Committee, March 1979, p. 3.

<sup>10</sup> *Transcript of Evidence*, p. 2293.

<sup>11</sup> *Transcript of Evidence*, p. 1014.

to elicit information from departments about the expected operation of the Act, and we have referred to this survey extensively in previous chapters. Once the Act is in operation we would expect the Public Service Board to ensure the most economical and efficient discharge by agencies of their obligations under the Act, so furthering its effectiveness. The Board has indicated that it would expect to be consulted by departments, along with other key agencies, on such matters as administrative and staffing arrangements. It stated that 'consequent staffing proposals would be handled by the Board in the usual way'.<sup>12</sup>

**31.15 Recommendation: The Public Service Board should continue to develop special monitoring processes which will make possible an assessment of any addition workloads generated as a result of the implementation of the legislation.**

### **The Ombudsman**

**31.16** In our view the Ombudsman has a highly significant role to fulfil in monitoring the effective operation of the Act. In Chapter 29, we have discussed in detail his role in advising agencies which need assistance in complying with their obligations under the Act. In this way, the Ombudsman will be able to ensure improved responses by agencies to their statutory obligations in keeping with the general method of operation of his office. In observing the nature of different cases as they arise throughout the Public Service, the Ombudsman will be well placed to offer useful advice to agencies which will necessarily have a more restricted view of the operations of the Act. He will be able to advise agencies both as to the emerging practices of other agencies and the difficulties which individual members of the community may experience in using the legislation. The Ombudsman will thus be in a position to advise on possible changes to agency practice and then, if necessary, on changes required to the formal structure of regulations and legislation.

**31.17** Responsibility for assessing the effectiveness of the legislation in a continuing way will thus rest with a number of agencies. Our remarks in this chapter have been directed principally to self-assessment by agencies of the operation of the legislation. But ultimately that self-assessment must itself be scrutinised by the elected representatives of those whom the legislation is designed to benefit. We turn to this complementary and ultimate role of the Parliament in the next chapter.

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<sup>12</sup> Submission no. 47, incorporated in *Transcript of Evidence*, p. 847.

## Parliamentary monitoring

**32.1** It has been a constant assumption of this Report that the 'right to information' inheres in Australian society as a whole, although it is of course exercisable by individuals and groups within the society. Every request granted to a person is a gain and benefit for Australian society as a whole; every request illegally or needlessly refused is a detriment to the society as a whole. It is therefore appropriate that the elected representatives of that society should ensure that this far-reaching social advance is secured and improved. If Parliament is to achieve this end, it must be put in an informed position to enable it to assess the current operation of the legislation and suggested amendments.

### Reports by agencies

**32.2** A full and comparable set of reports on the operation of the Freedom of Information legislation should therefore be placed before the Parliament at least annually to enable it to put under close scrutiny the performance of agencies in relation to the Freedom of Information Act. We would anticipate that the necessary information for this purpose would be contained in the annual reports of agencies which in accordance with a recent government decision<sup>1</sup> are to be published and tabled in the Parliament, and especially in the annual report which the Attorney-General is required under clause 48 (1) to table in the Parliament.

**32.3** Agencies are required under sub-clause 48 (2) to furnish to the minister administering the Act whatever information he requires to enable him to prepare an annual report as required under sub-clause 48 (1). This requirement will provide agencies with the opportunity to collate valuable information as to their operations under the legislation, which we expect would be included in their annual reports on their normal activities. In our view, each such report should contain a statistical evaluation of the duties executed in relation to the Bill including the number of agency determinations to withhold information requested; the reasons for such denials of access; the number of appeals against such adverse determinations with the result and summary of the reasons for each; a copy of the agency's fee schedule with the total amount of fees collected by the agency during the year; and any other information which evidences the agency's efforts to properly administer the legislation.

**32.4 Recommendation: Agencies should include in their annual reports to Parliament sufficient information concerning their operations in relation to freedom of information as will enable adequate parliamentary review.**

### The Attorney-General's report

**32.5** The report which the Attorney-General, as minister responsible for the Bill, is required to make pursuant to clause 48 (1) will provide comparative information concerning agencies' performance of their obligations under the Bill and details of the overall impact of the legislation. We believe that it is important for clause 48 to lay down the specific matters which should be included in the

<sup>1</sup> Australia, Senate, *Hansard*, 9 June 1978, p. 2689. Ministerial Statement on 'Access to Official Information' by Senator the Hon. P. D. Durack, QC Attorney-General.

Attorney-General's report to Parliament. The Attorney-General's Department will play a vital role in monitoring agencies' compliance with the legislation and the Attorney-General's annual report to Parliament will be a valuable source of information on the operations of the legislation. Expressly providing in the Bill for the matters to be covered in the annual report will ensure that important matters are not overlooked. These matters should include: the number of requests for the year per agency; the number of deferments; the rank of persons refusing access; exemptions claimed under the legislation; the number of freedom of information requests refused for contravention of a prescribed secrecy provision under clause 28; information on appeals activities; administrative manhours, costs and fees collected in relation to freedom of information requests; average time for compliance; extra staff positions sought and/or approved; changes in administrative procedures occasioned by freedom of information; guidelines issued by the Attorney-General's Department; and description of efforts by that department to encourage compliance with the legislation.

**32.6** We have proposed in Chapter 9 that agencies publish in their annual reports the titles of officers with authority to refuse access. We also propose that in the Attorney-General's report there should be a comparative table indicating for each agency of the Public Service the rank of all officers with authority to refuse access. We note that in the United States it is common practice not only to identify by rank and name those officers with authority to refuse access but also to specify the number of refusal decisions made by them in a particular year. We do not go so far as to suggest that, in Australia, the number of refusals made by any particular officer should be published in any annual report, either the general report from the Attorney-General or the report from the particular agency. Although it might be thought that to do so would be a disincentive to any given officer making excessive refusals, we believe on balance that information of this kind would be more likely than not to mislead. Certainly the number of decisions a particular officer may make has no necessary connection with the quality of each such decision and, in the absence of a finding from the Administrative Appeals Tribunal, it would not be possible to indicate whether any particular refusal was squarely in accordance with the legislation or not. We note that clause 22 of the Bill requires that the statement of reasons which is provided to an applicant who is denied access to a document should state both the name and rank or designation of the person giving the decision; this is a sufficient statutory guarantee that the identity of a particular refusing officer will become known when this is necessary for the proper administration of the Act.

**32.7 Recommendation: Clause 48 of the Freedom of Information Bill should be extended to expressly state the matters on which the Attorney-General, as Minister responsible for the administration of the legislation, should report to Parliament. These should include:**

- (a) the number of requests for the year per agency;
- (b) the number of refusals;
- (c) the number of deferments;
- (d) exemptions claimed under the legislation;
- (e) the secrecy provisions invoked under clause 28;
- (f) the level of persons refusing access;
- (g) information on appeals activities;

- (h) **administrative manhours, costs and fees collected in relation to freedom of information requests;**
- (i) **average time for compliance;**
- (j) **extra staff positions sought and/or approved;**
- (k) **changes in administrative procedures occasioned by freedom of information;**
- (l) **guidelines issued by the Attorney-General's Department; and**
- (m) **a description of efforts by the Department to encourage compliance with the legislation.**

**32.8** In addition we would expect that the Attorney-General's first report on freedom of information would contain a detailed account of agencies' compliance with the publication requirements of clauses 6 and 7 including an account of the guidance which the Department has provided to other agencies concerning their obligations under this Bill. Subsequent reports would detail agencies' efforts to update the information published or made available under clauses 6 and 7. The detailed reports of the Attorney-General on the subject of agency compliance with the requirements of clauses 6 and 7, and their scrutiny by Parliament, may be a more effective means of ensuring compliance with these requirements than an individual complaint to the Ombudsman and possible review by the Administrative Appeals Tribunal which we proposed in Chapter 30.

**32.9 Recommendation: The Attorney-General's first report to Parliament should contain an extensive account of agencies' compliance with the publication requirements of clauses 6 and 7. Subsequent reports should detail agencies' efforts to update the information published or made available under clauses 6 and 7.**

**32.10** Clause 48 (1) requires the minister responsible for the Bill to report 'as soon as practicable after the end of each year ending on 31 December'. We were advised by the Attorney-General's Department that there was no particular reason why clause 48 (1) specified the requirement for reporting to the Parliament in terms of calendar years.<sup>2</sup> It is possible that clause 48 (1) is merely a copy of the United States provision. We would propose that, in common with normal reporting requirements, the Attorney-General, as minister responsible for the Bill, should be required to report as soon as practicable after 30 June each year. Furthermore, the considerable delays by some agencies in submitting annual reports to the Parliament in the past, prompts us to recommend that the Department report as soon as practicable after 30 June but in any case no later than 31 October.

**32.11 Recommendation: Clause 48 (1) should be amended to require the minister administering the Freedom of Information Bill to report to Parliament as soon as practicable after the end of each year ending on 30 June and in any case no later than 31 October.**

### **Report by the Ombudsman**

**32.12** The Ombudsman is presently required under sub-section 19 (1) of the *Ombudsman Act* 1976 to report to the Parliament as soon as practicable after 30 June each year on his operations during that year. In addition to these annual reports, sub-section 19 (2) enables the Ombudsman to submit reports to the minister for presentation to the Parliament at any time he considers appropriate 'during parts of a year'. In view of the active role which we advocate for the

<sup>2</sup> Letter to Committee from Attorney-General's Department, dated 20 April 1979.

Ombudsman in relation to freedom of information, he would be particularly well placed to observe any deficiencies in the operation of the legislation and make appropriate recommendations to resolve these difficulties. The information supplied by the Ombudsman would accordingly be valuable in assisting Parliament to evaluate the effectiveness of the Freedom of Information legislation and administrative practices in relation to freedom of information.

**32.13 Recommendation: The Ombudsman should report to Parliament on the operations of his office in relation to freedom of information as part of his annual report to Parliament and by way of special reports to Parliament concerning freedom of information as required.**

#### **Future review by parliamentary committee**

**32.14** Our objective in evaluating the provisions of the Freedom of Information Bill in this inquiry has been to achieve the correct balance between necessary confidentiality and ease of access to information. Our investigations have gone some way toward establishing something of the real position with regard to this balance, but an element of uncertainty remains which can best be resolved by a subsequent investigation in the light of actual experience.

**32.15** Various submissions made to the Committee referred to the need for review by a non-government committee. The Australian Council of Social Service, for example, put forward a tentative proposal for a 'Freedom of Information Act Implementation Advisory Committee'.

The purpose of this committee would be to advise the public service, and the Government, on the detailed implementation of the Act over its first eighteen months of operation. Its membership should consist of a mix of persons from the community with a background in law, community organisations, organisational behaviour, self help/advocacy groups, and the Freedom of Information Legislative Committee, and the public service trade unions.<sup>3</sup>

**32.16** The South Australian Freedom of Information Working Party proposed a similar advisory committee but one which consisted of both users and providers.<sup>4</sup> The Law Institute of Victoria recommended review after the legislation has been in operation for two years by a Committee chaired by a presidential member of the Administrative Appeals Tribunal which would be empowered to obtain comments from members of the public.<sup>5</sup> The Council of Australian Government Employee Organisations (CAGEO) considered the possibilities of review by a Parliamentary Committee and review by a three member committee including a representative of the Government.<sup>6</sup>

**32.17** In the United States, this review or oversight function has been performed by two Congressional Committees—the Foreign Operations and Government Information Subcommittee of the House of Representatives Committee on Government Operations, and the Administrative Practice and Procedure Subcommittee (formerly the Special Subcommittee on Government Operations) of the Senate Judiciary Committee. The United States Government's first Freedom of Information Act, which was signed into law in July 1966 and became effective one year later, was the culmination of years of investigation by both House and Senate subcommittees. Since that time, these subcommittees have been responsible for

<sup>3</sup> Submission no. 48, incorporated in *Transcript of Evidence*, p. 442.

<sup>4</sup> Submission no. 46, incorporated in *Transcript of Evidence*, p. 1854.

<sup>5</sup> Submission no. 112, p. 13.

<sup>6</sup> *Transcript of Evidence*, p. 1013.

a general oversight of the Act's implementation and administration. In 1971 and 1972 a comprehensive study of the operation of the Act was conducted with numerous public hearings, which resulted in the adoption of substantial amendments to the Act in 1974. Oversight of the amended Act has continued and various reports have been produced: for example, the House Committee Report on 'Freedom of Information Act requests for Business Data and Reverse-FOIA Lawsuits'.<sup>7</sup>

**32.18** We readily support the principle of review of the operations of the Freedom of Information legislation by an independent body and favour review by a committee of the Parliament. Not only are we impressed by the record of achievement of the United States subcommittees, we also consider it highly appropriate that the operation of legislation which essentially concerns the rights of the public in relation to the Government should be subject to review by a Parliamentary Committee on behalf of the Parliament. In fact, the annual reports of the Attorney-General's Department, the Ombudsman and agencies concerning freedom of information, and the annual reports by the Attorney-General as minister responsible for the legislation will, in the normal course, be referred to the Senate Standing Committee on Constitutional and Legal Affairs. Consideration of these annual reports will provide an opportunity for further assessment of the operation of the legislation. For these reasons it may well be appropriate for this review function to be vested in the Constitutional and Legal Affairs Committee.

**32.19** The Senate Regulations and Ordinances Committee would have jurisdiction to examine the report on the regulations made under the Freedom of Information legislation in accordance with its terms of reference. It could therefore not adequately perform the sort of review function we envisage as its jurisdiction does not extend to looking at matters of policy. Clearly the proposed parliamentary committee should be concerned with every aspect—both of a policy and an administrative nature—of the Act's operation.

**32.20** We consider that this review by a parliamentary committee should be conducted three years after proclamation of the Act, or in the event that the Act is proclaimed into effect in stages, from the date of the first such proclamation. This three year period would allow a reasonable time to elapse in order to provide both applicants and agencies with experience of the operation of the legislation without the distortion which could otherwise arise if the period were any shorter. It is to be expected that there will be some upheaval during the early stages of the Act's operations, but after three years of operating under the Act both agencies and the public will be in a much better position to assist the reviewing committee in its task.

**32.21 Recommendation: The operation of the Freedom of Information legislation should be subject to review by the Senate Standing Committee on Constitutional and Legal Affairs three years after the first proclamation of the legislation.**

**32.22** We emphasise that the various measures by way of reports to the Parliament, both annual and special, and culminating in the presentation of a comprehensive review by the Senate Committee three years after proclamation time are not ends in themselves. In fact, they will only be justified and significant if they

<sup>7</sup> United States, House of Representatives, *Freedom of Information Act Requests for Business Data and Reverse-FOIA Lawsuits*, Twenty-fifth Report of House of Representatives Committee on Government Operations, 95th Congress, 2nd Session, 1978, House Report 95-1382.

stimulate such discussion and comment within the public domain that Parliament is led to make a correct response. The great number of submissions by members of the public, both individual and within organisations, and the general level of community interest reflected in the media, lead us to expect that such public debate and evaluation will occur.

**PART F**  
**ARCHIVES**

## The Scope of the Archives Bill

*'Those who cannot remember the past are condemned to repeat it.'*<sup>1</sup>

**33.1** Throughout time, people and nations have preserved their history, their traditions and their cultures in written form. Vast archives from empires as ancient as the Sumerian, Egyptian, Babylonian and Chinese have been preserved and open to study by succeeding generations. From the outset of European settlement in Australia extensive written records, both of an official and of a personal nature have been maintained. Few nations in fact have written records that go so far back in their history as Australia, and the preservation of one is essential to the other. Reasons why we should wish not only to preserve the documentary record of our history, but to make that record available for public and private research, were outlined recently by Dr W. Kaye Lamb, a former Dominion Archivist of Canada, who advised on the establishment of a National Archives in Australia:

The need for access to recent material is now pressing. The last 25 years have seen a great expansion in the public that wishes to make use of public records. Time was when the major topics of interest were war and politics, and historians were the chief users of archives. They have now been joined in force by economists, economic historians, sociologists, political scientists, geographers, ecologists and members of many other disciplines. The interests of most of these relate to modern times and current problems and they seek access to recent records. Many of their studies are of great importance to those forming and guiding the Government's economic and social policies . . .<sup>2</sup>

**33.2** It is surprising to find that a function as important as preserving the documentary record of our history is not regulated by legislation. Until now, the Australian Archives, with 208 shelf kilometres of material and an annual increment of 30 000 to 50 000 additional shelf metres,<sup>3</sup> has been regulated by Executive directions. A view strongly put to us by researchers familiar with the Australian Archives is that:

the inadequacies of the Commonwealth archival programme, and the problems encountered by the Australian Archives, in the past, are in no small measure attributable to the want of a legislative charter as the basis for its operations.<sup>4</sup>

**33.3** It is against this background that we welcome the introduction of the Archives Bill simultaneously with the Freedom of Information Bill into the Senate by the Attorney-General on 9 June 1978. The main purpose of the Archives Bill is to place on a statutory basis many of the current activities of the Australian Archives concerning such activities as promoting records management in the Commonwealth, taking custody of records, and both disposing of and preserving

<sup>1</sup> G. Santayana, *Life of Reason*, vol. 1, chapter 12.

<sup>2</sup> Australia, *Development of the National Archives*, Report by Dr W. Kaye Lamb, (The Lamb Report), Parl. Paper 16/1974, p. 14.

<sup>3</sup> Professor Neale, Director-General, Australian Archives, *Transcript of Evidence*, p. 674.

<sup>4</sup> Australian Society of Archivists Submission no. 130, incorporated in *Transcript of Evidence* p.1448. An account of criticisms that have in the past been made of the Australian Archives is given in R. C. Sharman, 'Australian Archives in Lamb's Clothing', *Archivaria* 1, 2, 1976, pp. 21, 23; R. C. Sharman, Submission no. 133, p. 2; M. Saclier, 'The Lamb Report and its Environment', *Archives and Manuscripts* 5, 8, 1974 p. 200.

records. There are innovative features of the Bill as well, such as the creation of new institutions (the Advisory Council on Australian Archives is an example) and the amendment of some existing practices (particularly access procedures).

**33.4** The Archives Bill is the subject of a dual study. The Senate Standing Committee on Education and the Arts is inquiring into those functions of the Archives concerned with the collection, management and preservation of records. Our terms of reference confine us to inquiring into the Bill so far as it relates to issues common to, or related to, the inquiry into the Freedom of Information Bill 1978. In effect, we have been concerned with those functions of the Australian Archives outlined in paragraphs 5 (2) (h) and (j) of the Bill:

(h) to encourage, facilitate, publicise and sponsor the use of Archival material;

(j) to make Commonwealth records available for public access . . . .

**33.5** This Committee heard evidence relating to the Archives Bill from some eighteen witnesses representing a wide range of interests including historians, archivists, librarians and senior public servants. In addition, on the afternoon of 15 February 1979 we heard evidence in the form of a panel discussion in which individuals with a particular interest in the Archives Bill participated.<sup>5</sup> Among them were the State Librarian from the Library Board of Western Australia, a former archivist, a librarian and several academics. Institutions represented were the Australian Archives, the Australian Society of Archivists, the Australian Historical Association and the Australian Advisory Council on Bibliographical Studies.

**33.6** We have divided the consideration of the Archives Bill into two chapters. This first chapter is concerned with substantive points such as the thirty-year rule and the exemptions. Chapter 34 discusses matters which are more procedural in nature, such as access procedures and provisions for review and appeal.

### **The present Bill**

**33.7** For purposes of our analysis, the starting point is clause 30 of the Archives Bill, which provides that:

30. (1) Subject to this Part, the Archives shall cause all Commonwealth records in the open access period that are in the custody of the Archives or of a Commonwealth institution, other than exempt records, to be made available for public access.

Pursuant to clause 3 (7) a document enters the open access period when a period of thirty years has elapsed since the end of the calendar year in which the document came into existence. This ensures that, if a determination is made that a document is non-exempt, access can be given to it automatically, upon request, without any show of need by the applicant, and without the need for any further inspection by the Archives of the contents of the documents. There are two general methods specified in the Bill by which documents that have reached the open access period will not be available for perusal. First, some categories of documents are excluded altogether from the access provisions of Part V, Division 3 of the Bill. This applies to such documents as Executive Council and Cabinet Papers, and the records of the Governor-General. Secondly, in respect of other categories of documents that are subject to the access provisions, the Archives may withhold a document pursuant to one of nine categories of exemption listed in the Bill; these exemptions are similar to many of those in the Freedom of Information Bill. Whether a document is exempt is, by and large, a question that will have been determined before

<sup>5</sup> *Transcript of Evidence*, pp. 1381-1574.

a document reaches the open access period. The Bill establishes the general rule that departmental records will be transferred to the Archives by the time they are twenty-five years old; during the ensuing five years before the open access period commences, the records are examined, collated, retained if desirable, and a determination made as to whether they are exempt. Whether or not a record is exempt, it will in most cases be listed in an Australian National Guide to Archival Material. An applicant who is denied access to a record has two opportunities to challenge the denial: first, by way of an application for an internal review, and secondly, by appeal to the Administrative Appeals Tribunal.

**33.8** There are two other methods by which access may be gained. First, the minister, or a person authorised by him, may cause any single class or category of records that are not in the open access period (that is, less than thirty years old) to be made available for public access (called 'accelerated' access; see clause 39 (1)). Secondly, the minister or authorised person may grant to an individual special access to records that are either exempt, or have not reached the open access period, for a purpose specified in the regulations (called 'special' access; see clause 39 (2)).

### **Thirty-year rule**

**33.9** Perhaps the most prominent feature of the public debate on the Archives Bill has been the thirty-year archival period. It is recognised both by critics and by official spokesmen that the period is an arbitrary one. It was first adopted in Australia in December 1970 as the period applying to normal departmental records and it was later extended in January 1972 to Cabinet documents as well.<sup>6</sup> There appears to be a number of reasons why the period of thirty years has been adopted. In the first place, it is the period adopted in most other countries of the British Commonwealth; other countries like the United States, which generally speaking do not have a closed access period, tend to adopt the thirty-year period as the closed access period for documents supplied by foreign governments. It was submitted to us<sup>7</sup> that the main reason why these and other countries have adopted this archival period is that internationally thirty years is regarded as a necessary period in order to protect the position of civil servants. On the one hand, it allows sufficient time for a civil servant to complete his career, retire from office and be sufficiently removed from public affairs to avoid criticism of his activities while in office; and, on the other hand, it assures public servants that they can carry out their duties frankly and fearlessly, without having the public contemporaneously gazing at their activities.

**33.10** We do not subscribe to this view as an adequate justification for a closed period of thirty years. It is a view that is clearly inconsistent with the philosophy behind the Freedom of Information Bill, which could in many cases require the disclosure of deliberative materials at a very early date where the public interest so requires. We also agree with some of the criticisms expressed to this Committee that there are countervailing interests, particularly the interests of researchers who can provide a useful service to Government by analysing recent history. One can point to recent disclosures, such as the Crossman Diaries, to

<sup>6</sup> The history of the Australian Archives and of the access rules is discussed in Sharman, *Archivaria* cited footnote 4.

<sup>7</sup> P. Orlovich, Vice-President, Australian Society of Archivists, *Transcript of Evidence*, p. 1527.

illustrate the proposition that early disclosure can assist research and understanding of government without prejudicing the efficiency and practices of government.<sup>8</sup>

**33.11** An alternative period which was suggested to us in a few submissions was an archival period of ten years.<sup>9</sup> We should add that a period as short as this is not adopted in any other country, though there are some countries with a shorter period than thirty years—for instance, Zambia has a twenty-year rule, and Nigeria, Malaysia, and Singapore adopt twenty-five years. Most other countries that vary from Australia still retain the old fifty-year rule.<sup>10</sup> Another alternative adopted in some countries is to have different periods for different categories of documents. It is explained in Chapter 2 that Sweden has archival periods of two years, five years, ten years, twenty-five years, up to seventy-five years. The United States also follows a similar system. The disclosure of documents relating to defence and security is regulated by the security classification system, which requires the declassification of most documents by the age of six years. Documents requiring protection for a longer period are presumed to be available within twenty years, unless a very senior officer makes a determination that the document must remain secret for an even longer period. Disclosure of other documents is regulated by and large under the Freedom of Information Act, but some Departments adopt archival periods by which their own records should be released—for instance, fifteen years is the guideline adopted for law enforcement records and records of the Department of State (though there are exceptions). Under the newly enacted Presidential Records Act of 1978 the records of an outgoing President are to be available for public access (subject to the exemptions of the United States Freedom of Information Act) twelve years after the term of office ceases.

**33.12** The second reason for adopting thirty years is because of the understanding between ourselves and our defence allies that material given by one government will not be released by another within this period. This is clearly an important consideration, although it only applies to a small segment of government documents. We also note that there are exemptions both in the Freedom of Information Bill and in the Archives Bill, to provide adequate protection for documents given in confidence and for our international relations. We would in passing mention also that the observation of these international understandings appears to be discretionary, and that Australia has insisted upon observance of them more so than others appear to think is necessary. In the past, the practice of the British government has been to inform Australia that it proposes to release selected categories of documents and seeks Australia's cooperation in not releasing documents not within those categories.<sup>11</sup> This happened particularly with records of the Second World War, the release of which eventually caused Australia to accept the inevitability of the thirty-year rule applying to departmental and Cabinet documents alike. The same occurred with the United States government, which had Second World War documents concerning its communications with as many as eighty countries; a unilateral decision to disclose seems

<sup>8</sup> R. Crossman, *The Diaries of a Cabinet Minister*, Hamish Hamilton Ltd, London, 1975–1977, vols 1–3.

<sup>9</sup> Submission no. 9 (FOIL Campaign), p. 7; Submission no. 60 (Dr D. Coward), pp. 2–4; and also see A. R. Horton, Library Association of Australia, *Transcript of Evidence*, p. 2207.

<sup>10</sup> The archival periods adopted in other countries are summarised in a report prepared for the Committee by the Legislative Reference Service, Department of the Parliamentary Library, Committee Document no. 64.

<sup>11</sup> Professor Neale, *Transcript of Evidence*, p. 732.

almost inevitable in cases of this nature. Publicity has also been given in recent years to matters of defence interest to Australia which have become the subject of public knowledge as a result of disclosures made in United States Congressional hearings.<sup>12</sup>

**33.13** The third, and to our mind persuasive, justification for the thirty-year rule is one of administrative efficiency. One of the objectives of an official archival system is that, at some time before the open access period is reached, documents will be examined in order to determine whether they can be released. A determination is made independently of any request for the document being received. Those documents which cannot initially be cleared for public access are re-examined at programmed intervals (or whenever a request is received) in order to determine whether disclosure can then occur. The shorter the period between creation of a document and its movement into a potential open access period, the more likely it is that one of the exemptions will still be effective. The number of closures will be greater, and more reviews will subsequently have to be undertaken by Archives staff. This we should say is the main reason proffered by Archives spokesmen for the adoption of the thirty-year archival period in the Bill.<sup>13</sup>

**33.14** In our opinion this is an important consideration, as an open access period really should operate as such; the public should be able to expect that most documents will be available for perusal when they have reached a predetermined age. We are aware that thirty years is a lengthy period (and in fact would preclude people from learning the full story about many events which happened during their life as electors) and we would not have concurred in the adoption of this period had we thought that it would unduly hamper public analysis of the history of Australian Government activities. In this respect we note that there are two mechanisms under the Archives Bill for disclosure of documents before they reach the age of thirty years. These mechanisms, accelerated and special access, are discussed in Chapter 34. More importantly, we note also that many records will in fact be available under the Freedom of Information Bill long before the open access period is reached. Most exemptions in that Bill contain their own time limitation—that is, a document can only be withheld for so long as disclosure would injure a defined interest or have a defined effect. Even the internal working documents exemption, which is subject to a public interest criterion, is defined in this fashion. The main exceptions to this rule are, first, the Cabinet and Executive Council exemptions (clauses 24 and 25 of the Freedom of Information Bill); and secondly, the fact that the Freedom of Information Bill will not apply retrospectively to documents created before proclamation. We have proposed in Chapter 14 that the application of the Bill to prior documents should be phased in at predetermined stages. The archival period is thus less important than many people have supposed it to be. Apart from the restriction it imposes on access to Cabinet and Executive Council records and the records of the Governor-General, its main importance is that it is the period beyond which all documents will have been reviewed, listed in a public index, and their availability made certain.

**33.15** Another factor which influenced our thinking is the apparent absence of any strong pressure among historians, archivists and other researchers for a reduction of the period. They were, for the most part, content with this aspect of

<sup>12</sup> United States, Congress, House of Representatives, House Appropriation Committee, *Hearings on Military Construction: Fiscal Year 1978* (1977 part 2) p. 183, Washington, 1977; and see article, 'Australia Gets a New US Defence Station', *Australian Financial Review*, 8 May 1978, p. 16.

<sup>13</sup> C. Hurley, Australian Archives, *Transcript of Evidence* pp. 1530–1531.

the Bill, and were more concerned with the possibility that documents could be withheld subsequent to this period under the exemptions. Only a small number of historians and associations urged a reduction of the period.<sup>14</sup> Experience and time will tell whether a reduction is ultimately necessary. As a result of the enactment of the legislation and the public interest that this has already engendered, and by virtue of the creation of a National Guide to Archival Material, we expect that the Australian Archives will enter a new phase where there is much greater interest in utilising Australian archival resources and in writing Australia's history. We recommend later in this chapter that the operation of the Archives Bill should be reviewed by a parliamentary committee three years after its enactment, along with the review of the Freedom of Information Bill proposed in Chapter 32. The experience that will by then be gained concerning the operation of the thirty-year rule will no doubt be a useful element in the proposed review.

**33.16 Recommendation: The open access period defined in clause 3 (7) of the Archives Bill should remain at thirty years.**

### **Exclusions and exemptions**

**33.17** There are three ways stipulated in the Bill by which documents can be withheld during the open access period. First, certain categories of documents are excluded from the open access provisions of the Bill; secondly Archives can invoke any one of nine exemptions to withhold a document from public access; and thirdly, in respect of three of the nine categories of exempt records a minister or an authorised officer may issue a certificate certifying conclusively that the document is exempt under that provision. We shall discuss these three matters in turn.

**33.18 Exclusions.** Part V, Division 1 of the Bill provides that the open access provisions of the Bill do not apply to the following categories of documents:

- records of the Governor-General or of a former Governor-General;
- records in the possession of the Senate, the House of Representatives or a Parliamentary Department;
- records in the possession of a court or the registry of a court;
- Cabinet records (as defined in the Freedom of Information Bill, to include Cabinet submissions, official records of the Cabinet and documents disclosing Cabinet decisions or deliberations);
- Executive Council records (which are similarly defined); and
- records protected by a Commonwealth secrecy provision that is prescribed in the regulations made pursuant to the Bill as a category or records to which the access provisions do not apply.

**33.19** With the exception of the last mentioned category of records, a person having the control of the custody of records referred to in the previous paragraph may enter into arrangements with the Archives allowing access in accordance with the arrangements agreed upon. With respect to those same categories of documents, their identification is established conclusively by a certificate signed by a designated officer. We say more about conclusive certificates later in this chapter.

**33.20** Witnesses from the Australian Archives appearing before this Committee have been anxious to point out that it is unlikely that the documents referred to

<sup>14</sup> See references footnote 9 and Dr H. Radi, *Transcript of Evidence*, pp. 1569-70.

in Part V, Division 1 would, as it appears, be absolutely exempt from public access. Access to these records would under the Bill remain discretionary. It is, however, contended that access is likely to be given but on the basis of different rules or practices. It is pointed out, for instance, that Cabinet documents up to 1948 have already been cleared by Cabinet officers and placed in the custody of the Archives Office. Of all the records of the full Cabinet, the War Cabinet and the Economic Cabinet for the duration of World War II, only forty-nine documents are individually withheld from public access at the moment, twenty-nine of these on the grounds of privacy.<sup>15</sup> Be that as it may, our present task is to appraise a Bill that purports to confer rights of access upon the public. In any such system, those who urge the creation of broad discretionary powers bear a heavy onus.

**33.21** The Explanatory Memorandum to the Bill explains the exclusion of vice-regal records and the records of Parliament and the courts on the basis that it would be inappropriate for the regulatory powers of the Archives 'to be made applicable to the records of those arms of the Government which traditionally enjoy a certain degree of independence and autonomy'.<sup>16</sup> In part this independence can be viewed on constitutional grounds, particularly the separation of the powers of the Executive, the Legislature and the Judiciary. It is also felt that, as a practical matter, it should be for bodies like the Parliament and courts to determine what is to happen to their own records. For instance, attention is drawn to the difficult questions involved in determining what should happen to judges' notebooks.

**33.22** In the case of records of the Governor-General other considerations are involved. The Governor-General is in direct correspondence with the Monarch, and consequently identical holdings will exist in Britain and in Australia of the correspondence passing between them. In Britain, royal documents are not made available until sixty years has elapsed since the date of creation (though special access is sometimes given earlier than this date).<sup>17</sup> This consideration will apply to only a very small number of vice-regal documents. Apart from that, however, the Director-General of Archives was not able to suggest additional justifications for the exclusion of these records, indicating to the Committee that it was a matter of government policy that the records described in Part V should be excluded.<sup>18</sup>

**33.23** These explanations may suggest the need for special treatment to be given to a few categories of records, such as judges' notebooks and correspondence with the Monarch, but they do not to our mind suggest the need for the total exclusion of broad categories of documents from the access provisions of the Bill. The purpose of the Archives Bill is to guarantee that our national history can be both preserved and reconstructed. This guarantee must exist with respect to the operation of the Head of State, of the Legislature and of the Judiciary, much as it exists in relation to the operation of departments. We are not dealing in the Archives Bill with contemporary access to records, where there may exist special reasons for allowing organs of the State like the Legislature and the Judiciary to regulate access. Rather we are dealing with access to records that are thirty years of age. To argue that the Legislature and the

<sup>15</sup> Professor Neale, *Transcript of Evidence*, p. 726.

<sup>16</sup> Australia, Parliament, *Archives Bill 1978: Explanatory Memorandum*, Commonwealth Government Printer, Canberra, 1978, p. 14.

<sup>17</sup> Professor Neale, *Transcript of Evidence*, pp. 714-715.

<sup>18</sup> *Transcript of Evidence*, p. 715.

courts should regulate access to their own documents is to disguise the fact that at the time access is desired the particular legislature or court that would decide upon access is constituted quite differently to that of the time at which the document was created; it is a fiction to suppose that the institution still has some association with, or understanding of, the records that a trained and professional archivist would not have.

**33.24** Very strong objection was expressed by archivists, historians and others to the exclusion of Cabinet records from the open access provisions. No one, it seems, was content with the assurance that these records would probably be made available for public access in the same fashion as other records. We clearly detected a residual fear among critics that these records would in fact be exempt from public access, and in any case it was felt that these records are so central to any examination of Australian history that their availability should be assured. Professor B. Mansfield, appearing before the Committee as President of the Australian Historical Association, indicated agreement with the view that Cabinet papers are 'absolutely essential to the history of government and from the historian's point of view that blanket exemption seems a vital one'.<sup>19</sup> Mr H. J. Gibbney, a retired archivist, thought that the exemption of Cabinet records was 'quite absurd' and was 'one of those things which I think stems from inflated ideas of what in fact the Executive really is'. He continued, 'it seems to me that this is equivalent to attempting to create the archives of a company without the board of directors, and that is quite ridiculous'.<sup>20</sup> Professor A. G. L. Shaw expressed the contention of most that Cabinet records should only be withheld beyond thirty years on the same grounds as other records, such as national security or privacy of the individual.<sup>21</sup>

**33.25** Apart from contending that the exclusion of these records, like the exclusion of vice-regal records, was a matter of government policy, Professor Neale suggested two reasons that could explain the exclusion.<sup>22</sup> The first is that Cabinet records are the property of the Government with which they are associated, and according to the convention presently observed as to the records of former governments, it is for the leader for the time being of the party that constituted that government to be consulted upon and permit access. This convention is still observed even though records may be thirty years old. This reason it would seem is the predominant reason why Cabinet documents are excluded. The second reason is that Cabinet documents are 'the fundamental documents in government administration. Therefore their security and their custody must primarily be the concern of the Cabinet Office'. Indeed, we understand that Cabinet papers are maintained in a separate repository and to that extent it may seem impracticable to subject them to the access provisions which require a decision on access to be made by the Australian Archives.

**33.26** We are not convinced by these arguments. There must come a time when public interest in obtaining access to information necessary for the understanding of Australian government and history overrides the niceties of constitutional arrangements, and in our opinion that time has certainly arrived when an event is thirty years of age. It is our view that Cabinet records should not

<sup>19</sup> *Transcript of Evidence*, p. 1533.

<sup>20</sup> *Transcript of Evidence*, p. 1533.

<sup>21</sup> *Transcript of Evidence*, p. 248.

<sup>22</sup> *Transcript of Evidence*, pp. 724-25. The convention of disclosure of records of other governments is explained in Committee Document no. 43, a paper on the matter prepared by the Department of Prime Minister and Cabinet.

be excluded from the access provisions. The functions of the Australian Archives, as defined in clause 5 of the Bill, include making a Commonwealth record available for public access, and encouraging, facilitating, publicising and sponsoring the use of archival material. It is difficult to see that any of these functions can be properly undertaken if the most important categories of Commonwealth records are beyond the control of the Archives and thus beyond the eyes of the public. Moreover it appears to us that the distinctions created by these provisions will create administrative inefficiencies. Cabinet records are not defined in clause 18 by reference to their physical location in a separate archival repository, but are defined by reference to their character (for instance, whether something is a submission or contains details of Cabinet deliberations or decisions). When archival officers are examining documents to see whether they can be made available for public access, they will have to look not only for sensitive or exempt elements in the documents, but also for indications that the document is a 'Cabinet record' as defined in the Bill. It has been claimed that Archives staff have formerly experienced difficulties in recognising Cabinet papers.<sup>23</sup> Dr Lamb, in his appraisal of the Australian Archives, also drew critical attention to the practice that all Cabinet papers, no matter how old or innocuous, must be referred to the Cabinet Office for full clearance.<sup>24</sup>

**33.27** We recognise that some Cabinet records may be physically located in separate repositories, and if that continues to be so, the Director-General of Archives would need to exercise special powers to inspect all Commonwealth records (including legislative and judicial records, if necessary) which are retained in separate repositories. Clause 27, provides that 'the Archives is entitled, for the purposes of this Act, to full and free access, at all reasonable times, to all Commonwealth records in the custody of a Commonwealth institution other than the Archives'. Presently that clause is contained in Part V, Division 2 of the Bill which (pursuant to clauses 18 and 19) does not apply to vice-regal, parliamentary and judicial records. However, if this restriction in clauses 18 and 19 is removed, then clause 27 would appear to confer adequate power upon the Director-General to inspect all Cabinet records. The Director-General would also need power to organise all records to enable him to respond to requests received pursuant to the Archives Bill. This power could arise, at best, by implication from clause 27, and it seems to us preferable that the power be expressly conferred.

**33.28** No reason has been suggested to us why records protected by secrecy provisions should potentially be excluded from the access provisions. At most we can assume that these records may, in certain circumstances, be retained by agencies like the Australian Bureau of Statistics, the Department of Social Security and the Commissioner of Taxation, pursuant to the statutory obligations those agencies have to protect confidential material. If this is the case, these obligations can be adjusted legislatively so that no conflict arises between this Bill and other legislation. A possible conflict of obligations would not, to our mind, justify or necessitate the exclusion of some categories of records from the access provisions. Indeed, their exclusion creates the anomaly that, for the first thirty years of their life such records may be subject to the Freedom of Information Bill, but thereafter cease to be subject to an access statute—a strange result for records that initially did not possess any such sensitivity.

<sup>23</sup> Sharman, *Archivaria*, cited footnote 4, p. 23.

<sup>24</sup> Lamb, cited footnote 2, p. 13.

### 33.29 Recommendations:

- (a) **Part V, Division 1 of the Archives Bill should be amended so that no category of records is excluded from the open access provisions of the Bill.**
- (b) **The Director-General of the Australian Archives should be given express power in the Bill to enable him to organise all Commonwealth records so that the Archives can respond to requests received pursuant to the Bill.**

**33.30** A final matter arising under Part V, Division 1, concerns clause 23, which lays down special provisions applying to the records of royal commissions. We mention this clause as it appears to have been assumed by many people that these records are also excluded from the access provisions of the Bill. This misunderstanding is quite explicable, as the clause is contained in a Part of the Bill which otherwise deals with exclusions. However, a close reading of clause 23 indicates that royal commission records, though they may be withheld from the physical custody of the Australian Archives, are nevertheless subject to the access provisions of the Bill.

**33.31** *Exemptions in general.* There are nine exemptions in the Archives Bill, many of which are similar to those in the Freedom of Information Bill. The exemptions in the Freedom of Information Bill which are not repeated in the Archives Bill are:

- internal working documents (clause 26);
- documents subject to legal professional privilege (clause 31);
- documents whose disclosure would prejudice the national economy (clause 33);
- documents whose disclosure would be in contempt of court, of the privileges of Parliament, or contrary to an order of a Royal Commission or tribunal (clause 35); and
- documents certified privileged by the Attorney-General (clause 36)

(As previously discussed, there are also special provisions contained in the Archives Bill for documents such as Cabinet documents, Executive Council documents, and documents protected by the secrecy provisions.)

**33.32** Exemptions have evoked a mixed reaction. On the one hand, some welcome the fact that executive discretion to withhold documents will now be regulated by statute; indeed, as recently as 1974, it was pointed out that

the Archives, encumbered with an embarrassing set of Cabinet instructions which it must apply but cannot disclose or explain, reacts with what appears to the user as, at best, pettifogging bureaucracy at work and at worst deliberate obstructionism.<sup>25</sup>

Typical of those commentators who welcomed the creation of statutory exemptions was a representative from the Australian Society of Archivists:

It seems to the Society that a good deal of latitude must be allowed for the Government to determine whether records in each individual case do or do not fit into that category . . . . At least [the exemptions] are stated; they are neither capable of being expanded or decreased. We know where we stand in respect of them. I think that is an important thing . . . . I think a very considerable concession at least has been obtained here by getting the Government to declare itself on the categories of exemption.<sup>26</sup>

<sup>25</sup> Saclier, *Archives and Manuscripts*, cited footnote 4, pp. 203–204.

<sup>26</sup> *Transcript of Evidence*, pp. 1553–4; and see Submission no. 130, incorporated in *Transcript of Evidence*, p. 1440 ff.

**33.33** Many other critics, on the other hand, found the exemptions wanting, in particular as they could result in documents being withheld from public scrutiny for longer than thirty years. Phrases such as 'overbroad', 'open-ended', 'catch-all', 'sweeping' and 'arbitrary' were used liberally in the submissions and evidence submitted to the Committee. The gist of the criticisms is summarised in the remarks by Dr Coward:

I consider the entire Bill to be grossly weighted in favour of protecting the so-called interests of Government agencies, but with regard to [the exemptions], if the 30 year period is to be retained, why is it necessary to have such sweeping, broadly worded, catch-all phrases that will net only a small proportion of the total record? . . . We preserve records fundamentally so that they can be used and so that we can understand and come to grips with our own history. If we cannot do this then we might as well not preserve any records at all.<sup>27</sup>

**33.34** It has been suggested in some quarters that guidelines should be issued by the Australian Archives to supplement the exemptions. The uncertain nature of the power that those exemptions confer upon the Archives could be significantly confined in favour of the public if guidelines were issued indicating the nature of the criteria that would be applied by the Archives in respect of any individual exemptions. In our opinion this is a very sensible suggestion and we would urge the Australian Archives to adopt an administrative practice to this effect.

**33.35** Before we discuss each of the exemptions, we think it worthwhile to record our opinion that the enactment of exemptions is definitely a step forward in archival reform in Australia generally. By contrast, most of the State governments have an archival system under which access is still a discretionary matter, notwithstanding that in some cases the archival system has a legislative basis. We have been advised by the Australian Archives that the rules applying in the States are as follows:

- (a) *N.S.W.*—there is a thirty-year archival period that can be varied at the discretion of a department in respect of its own records.
- (b) *Queensland*—there is a thirty-year archival period.
- (c) *South Australia*—there is a thirty-year archival period, but much departmental material is still retained and controlled by departments.
- (d) *Tasmania*—there is a fifty-year archival period, though each department still controls access to its own records.
- (e) *Western Australia*—there is no archival period fixed, and the Library Board decides upon access at its own discretion.
- (f) *Victoria*—there is no archival period. Records are required to be transferred to the Archives Office after five years, though departments can determine which records are to be cleared for public access, and classified material is usually not transferred to the Archives Office.

*Clause 31 exemptions.*

31. (a) information or matter the disclosure of which under this Division would prejudice the defence, security or international relations of the Commonwealth;

**33.36** We recognise that an exemption protecting these areas is necessary, and we do not propose any change to the exemption. In passing, we draw attention to our earlier discussion in Chapter 16 to the effect that the standard adopted

<sup>27</sup> *Transcript of Evidence*, pp. 1555–1556.

in the Bill should be consistent with the rules contained in the *Protective Security Handbook*. We indicated that the *Handbook* should establish a system for declassification of documents. Any system which effectively did this would probably contain a provision to the effect that a classification could not continue past a designated period (for instance, thirty years) unless the classification is personally approved by a minister or permanent head. We expect that, as with the Freedom of Information Bill, the classification will be used as a guide by the Archives in determining whether records are exempt. However, the classification would not be binding, and the governing standard would be that contained in the legislation.

31. (b) 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, the disclosure of which under this Division would constitute a breach of that confidence;

**33.37** We recommended in Chapter 16 that the comparable exemption in the Freedom of Information Bill be deleted, and we recommend that the same amendment should be made to the Archives Bill. There would still be an exemption protecting documents the disclosure of which would prejudice Australia's international relations, and as we have said in Chapter 16 that exemption establishes the appropriate standard to determine whether documents of foreign governments should be disclosed. We do not foresee that deletion of this exemption will create problems concerning exchanges of documents with other countries, particularly in light of the international understanding explained earlier in this chapter, that documents from other governments are withheld from public access for thirty years. While there will not be any other exemption in the Bill to protect communications from State governments, it is our opinion that none is needed and that confidences existing between Federal and State governments will, at the age of thirty years, either have expired or be outweighed by the public interest in access. One salient factor is that the governments (including members of parliament and public servants) between whom the confidences were exchanged will have been changed in composition.

31. (c) information or matter the disclosure of which under this Division would prejudice the relations between the Commonwealth and any State;

**33.38** We cannot envisage that the interest in Federal-State relations thirty years after the event would not be overridden in every case by the public interest in disclosure. One retired archivist of many years experience, Mr H. J. Gibbney, said that in his opinion the need for such an exemption 'would vanish in five or at most ten years'.<sup>28</sup> Dr Radi voiced a similar view, and indicated an apprehension that an exemption such as this, by establishing a standard, invites recourse to that standard,<sup>29</sup> in effect, that the exemption creates the need for its own existence. A representative of the Archives declined to suggest any instances where the exemption would be needed, adding it 'is very difficult to say there would be no case'.<sup>30</sup> We feel confident that there is no relevant interest in Federal-State relations to be protected at the stage a document is thirty years of age, and accordingly recommend the exemption be deleted from the Bill.

31. (d) information or matter the disclosure of which under this Division would have substantial adverse effect on the financial or property interests of the Commonwealth or of a Commonwealth institution;

<sup>28</sup> Submission no. 56, incorporated in *Transcript of Evidence*, p. 1389.

<sup>29</sup> *Transcript of Evidence*, p. 1543.

<sup>30</sup> T. H. Exley, *Transcript of Evidence*, p. 1552.

**33.39** We are surprised to find an exemption protecting the financial and property interests of the Commonwealth, when there is no exemption protecting the economic interests of the nation which one would have thought were of greater importance. We are also disappointed that no case has been made out to support the inclusion of this exemption, and that no examples have been given as to types of documents that may require protection under this exemption longer than thirty years. After considering the matter no examples come to mind, and to that extent we are of the opinion that the exemption should be deleted. Should there be some examples that do in fact justify an exemption as broad as this, we would draw attention to a disparity between this exemption and the comparable clause 29 in the Freedom of Information Bill which is qualified by a public interest criterion.

31. (e) information or matter the disclosure of which under this Division would be reasonably likely to have a substantial adverse effect on the interests of the Commonwealth or of a Commonwealth institution in or in relation to pending or likely legal proceedings;

**33.40** We have earlier recommended in Chapter 23 in relation to the Freedom of Information Bill that the comparable exemption should be deleted and that the only relevant standard should be whether disclosure would breach legal professional privilege. We see no reason to retain even that standard in the Archives Bill. In light of the various statutes of limitations, most actions, generally speaking, have to be brought within six years of the cause of action arising. It is difficult therefore to conceive of documents which, thirty years from creation, could still be protected by legal professional privilege. Perhaps the only categories would be legal opinions on the interpretation of current statutes that are more than thirty years old, or opinions as to the Commonwealth's legal rights or obligations. In our opinion the public interest in access overrides continued secrecy for longer than thirty years.

31. (f) information or matter the disclosure of which under this Division would constitute a breach of confidence;

**33.41** We have recommended in Chapter 25 that the comparable exemption in the Freedom of Information Bill be deleted, on the basis that relevant information is already protected adequately by other exemptions, such as those for internal working documents, trade secrets, and personal privacy. Although not all the freedom of information exemptions have been preserved in this Bill, we do not see the need to retain this exemption. We note in particular that the main exemptions applying to confidences (trade secrets and privacy) are a part of the Archives Bill.

31. (g) information or matter the disclosure of which under this Division would—

- (i) prejudice the enforcement or proper administration of the law in a particular case;
- (ii) prejudice the fair trial of a person or the impartial adjudication of a particular case;
- (iii) contrary to the public interest, disclose or enable a person to ascertain, the identity of a confidential source of information in relation to the enforcement or administration of the law;
- (iv) disclose methods or procedures for investigation of breaches or evasions of the law the disclosure of which would prejudice the effectiveness of those methods or procedures; or
- (v) endanger the lives or physical safety of persons engaged in or in connection with law enforcement;

**33.42** This exemption is identical to the law enforcement exemption in the Freedom of Information Bill except that sub-paragraphs (i) and (iv) are worded differently to the comparable paragraphs (a) and (d) of clause 27 in the Freedom of

Information Bill. There does not appear to be any rationale for this variation, and in our opinion it would be preferable if both Bills used parallel wording where an identical result is intended.

31. (h) information or matter the disclosure of which under this Division would involve the unreasonable disclosure of information relating to the personal affairs of any person (including a deceased person);

**33.43** This exemption is similar to the privacy exemption in the Freedom of Information Bill. It was accepted, in the evidence and submissions received by this Committee, that personal privacy is an interest that may need protection for longer than thirty years. We agree, and do not see any need for altering this exemption. Historians have, however, expressed the reservation that neither this exemption nor the Bill in general should be used to prevent biographical research from being undertaken. This is a matter of administration of the Bill that will need to be monitored when it is operating. We recognise that there are mechanisms in the Bill (such as the procedure for special access, which we discuss in Chapter 34) that are available to allow biographical and other research to be undertaken, notwithstanding that privacy interests may need to be protected.

31. (j) information or matter, including commercial or financial information, the disclosure of which under this Division would be likely to expose unreasonably to disadvantage the material interests of an undertaking.

**33.44** There are variations between this exemption and the comparable clause 32 of the Freedom of Information Bill, some of which contract the coverage of the exemption and others of which broaden it. It is broadened in one respect, in that it applies to *all* undertakings, not just business, commercial and financial ones. It is narrowed in other respects: 'material interests' is added; there is no alternative criterion protecting documents where the disclosure would impair the ability of an agency to obtain similar information; and the exemption does not protect information concerning a *person* in respect of his business or commercial affairs. No evidence has been presented to us as to why these differences exist. The main contribution, it appears, is to create confusion as to the range of documents which are in fact protected by the exemption in contrast with the Freedom of Information Bill. The differences do not appear to be such a central part of the exemption that they are worth retaining. Accordingly, in our opinion the exemption should be altered so that it is consistent with clause 32 of the Freedom of Information Bill, with the exception that paragraph (j) should not contain the additional criterion of clause 32 protecting the ability of an agency to obtain similar information in the future. The utility of that additional criterion should have expired by the time a document is thirty years old.

**33.45 Recommendation: Clause 31 of the Archives Bill, which contains the exemptions, should be dealt with in the following way:**

- (a) paragraph 31 (a), protecting defence, defence, security or international relations should be retained;
- (b) paragraph 31 (b), protecting information obtained in confidence from other governments, should be deleted;
- (c) paragraph 31 (c), protecting Commonwealth–State relations, should be deleted;
- (d) paragraph 31 (d), protecting the financial and property interests of the government, should be amended by the addition of a phrase providing that information referred to in that paragraph is protected only if disclosure would be contrary to the public interest;

- (e) paragraph 31 (e), protecting pending or likely legal proceedings involving the Commonwealth, should be deleted;
- (f) paragraph 31 (f), protecting information where disclosure would constitute a breach of confidence, should be deleted;
- (g) in paragraph 31 (g), protecting law enforcement, sub-paragraphs (i) and (iv) should be redrafted so that they are identical with the comparable paragraphs in the Freedom of Information Bill;
- (h) paragraph 31 (h), protecting personal privacy, should be retained; and
- (i) paragraph 31 (j), protecting commercial or financial information, should be amended so that it is consistent with clause 32 (1) (a) of the Freedom of Information Bill.

**33.46** There is also a de facto exemption created by clause 35 of the Archives Bill which empowers the Director-General of Archives to withhold a record from public access 'for the purpose of ensuring the safe custody and proper preservation of any record'. A copy of the record *may* be provided if in his opinion 'it is practicable to do so'. An example was given by Professor Neale as to when this power might apply:

There are some records at the moment dealing with naturalisation. The records are in such a bad state—they are in old volumes—that if the volume is opened it breaks and the records are destroyed. The only form in which they can be made available is by photographing and we are not equipped with the type of camera that can photograph curved surfaces and bring up a reasonable document to be placed in the hands of people who are entitled to a copy of that document.<sup>31</sup>

In a case such as this there is no right of appeal to the Tribunal against the decision of the Director-General. We do not propose that any right of appeal should be given, as we appreciate that the Director-General will make a decision under this clause in accordance with his professional experience and insights. There is no question of law involved, nor a question of fact that is capable of ascertainment by a tribunal which follows the normal evidentiary procedures, and there is little that could be achieved by providing for an appeal.

**33.47** Nevertheless the clause confers a very broad discretionary power on the Director-General, and in our view the exercise of this power should be controlled or reviewed at least by a non-judicial method. We would suggest, therefore, that the clause should be amended to make it mandatory for the Director-General to provide a copy of a record if in his opinion it can be done without detriment to the preservation of the record. In addition we think that the discretion of the Director-General could be further reduced to acceptable limits by making it mandatory for the Director-General to provide a copy of a record to an applicant in a case where the record could be *copied* even though inspection might endanger its preservation. Finally it is appropriate that any decision made pursuant to clause 35 should be tabled before the Advisory Council on Australian Archives.

**33.48 Recommendation: Clause 35 should be amended to provide:**

- (a) that it is mandatory for the Director-General to provide a copy of a document withheld from public inspection pursuant to clause 35 if in his opinion this can be done without detriment to the preservation of the record; and

<sup>31</sup> *Transcript of Evidence*, p. 676.

- (b) that details of any decision by the Director-General pursuant to the clause should be tabled at a meeting of the Advisory Council on Australian Archives.

### Conclusive Certificates

33.49 Clause 32 of the Archives Bill provides that a minister may issue a certificate certifying a record as conclusively exempt on the basis that disclosure would prejudice the defence, security or international relations of the Commonwealth, would disclose information or matter communicated in confidence by another government, or prejudice the relations between the Commonwealth and any State. This means there is no right of appeal against the minister's decision, and the Administrative Appeals Tribunal may not review the decision to give the certificate or the existence of proper grounds for the giving of it (clause 37 (4)). A certificate may be of limited or indefinite duration, although the regulations may prescribe a maximum period during which certificates remain in force. A new certificate may be issued at any time, whether or not the earlier certificate has lapsed. There is no requirement that the minister consult with the Director-General concerning issuance of a certificate. A minister may delegate the power to issue certificates to a permanent head (or a person of equivalent status), or a person holding a prescribed office. The delegation may be a general one, or its exercise may be limited to specified categories of documents. This system, it will be readily noted, is substantially similar to the system of conclusive certificates established by clauses 23–25 of the Freedom of Information Bill.

33.50 We have earlier expressed our opinion (particularly in Chapters 15 and 18) that we see no justification for a system of conclusive certificates in a public access statute. There should be less justification for restricting the right of appeal, so basic in our legal system, to a dissatisfied applicant for a document that is thirty years of age. The information or matter that might lead the Executive to decide that exemption is necessary is well able to be reviewed by a tribunal on the few occasions when an exemption might be justified. As one of the witnesses, Dr Coward, expressed strongly to us, 'if secrecy is a rational policy in respect of particular records after they are 30 years old, then that decision is capable of reasoned defence before an independent tribunal'.<sup>32</sup> Interestingly, the Archives Bill does not itself adopt a consistent line that documents relating to national security and other State activities are in some way special and should be treated differently from other areas of government. It is possible under the Bill that documents relating to security and so forth can be classified as exempt by the Archives independently of any ministerial certificate being issued in respect of the document. If such is the case and no certificate is in force, the Administrative Appeals Tribunal can review the decision that the document is exempt. We should say that we are not opposed to the idea of ministerial certificates in themselves, only to the conclusive status that is attached to them. We recognise that ministerial decisions can still be an important element of an archival policy in some areas of government.

**33.51 Recommendation: Clauses 32 and 37 (4) of the Archives Bill should be amended so that a certificate issued by a minister in respect of a document is not conclusive, but can be reviewed by the Administrative Appeals Tribunal in the same way, and to the same extent, as any other decision by the Australian Archives classifying a document as exempt from public access.**

<sup>32</sup> Submission no. 60, incorporated in *Transcript of Evidence*, p. 1393.

## Procedures under the Archives Bill

**34.1** This chapter deals with issues arising under the Archives Bill that are more procedural in nature. In particular, we deal in turn with the procedures that must be observed by any applicant when requesting access to a document, with the special procedures for accelerated and special access to documents, with the mechanisms for review of decisions internally and by the Administrative Appeals Tribunal, and lastly with the role of the Advisory Council on Australian Archives.

### Access procedures

**34.2** Three different access procedures are specified in the Bill: open, accelerated and special. They will be dealt with in turn. The most common procedure relates to the period of *open access*, which commences in respect of any record thirty years from 31 December of the year in which the record was created. The Director-General is expected to have examined all records before they reach the open access period in order to determine whether they are exempt (clause 33). The examination by the Director-General is to be carried out in accordance with arrangements entered into between him and the responsible minister. If it is decided that a record is not exempt, the Archives staff is required to grant access when a request is received. Pursuant to clause 34, access may be given in one of a number of forms: inspection of the document, for which no fee is imposed; provision of a copy of the document, for which a copying fee is levied; access by use of a computer or projector or use of other similar equipment, for which a prescribed fee is levied; access in a different form from the form requested if that would infringe copyright, interfere unreasonably with the operations of the Archives, be detrimental to the preservation of the record, or would not be appropriate having regard to the physical nature of the record. When it is determined that a record is exempt, access would be refused whenever a request was received; it appears that the Archives is not intended to exercise a discretion to release exempt records, other than pursuant to the provisions for special access.<sup>1</sup> There are procedures laid down in the Bill for the review of determinations that a record is exempt. Such a determination must be reviewed, first, whenever an application for reconsideration is received under clause 38 (which is discussed below) and, secondly, 'at such intervals as the Director-General thinks appropriate having regard to the nature of records concerned and any other relevant circumstances' (clause 33 (4)).

**34.3** It appears to us that these procedures for access are sensible ones, and we would draw attention to only two small matters that in our opinion require amendment. First, it would appear that the Administrative Appeals Tribunal cannot review the amount of a fee imposed on access. The Tribunal does have this power under clause 37 (6) of the Freedom of Information Bill, and in our opinion

<sup>1</sup> Cf. clause 41 which may be susceptible to the interpretation that Archives does have a discretion to release exempt records (see *infra* para. 34.17). See also the statement in the Explanatory Memorandum to the Bill, which indicates that clause 41 is designed to preserve other legislation which confers rights of access upon named people or the public (e.g. the *Ombudsman Act 1976* and the Freedom of Information Bill). Australia, Senate, *Archives Bill 1978 Explanatory Memorandum*.

it should have a similar power under this Bill. Secondly, there is no indication in clause 33 as to whether the arrangements entered into between the Director-General and the minister will be recorded in writing. In our opinion, these arrangements could be important ones that materially affect the nature of the right of access, and in that light they should be formal arrangements that are recorded in writing. If this is done, opportunity could thereby be given for public scrutiny of the arrangements by having them tabled at a meeting of the Advisory Council on Australian Archives, which is likely to include representatives of the public.

#### **34.4 Recommendation:**

- (a) Power should be conferred upon the Administrative Appeals Tribunal to review the amount of a fee imposed on access to documents under the Archives Bill; and**
- (b) Clause 33 of the Archives Bill should be amended to provide that the arrangements made by the Director-General in consultation with the responsible minister pursuant to clause 33 (1) for the review of records shall be recorded in writing and tabled before the Advisory Council on Australian Archives.**

**34.5** The second method of access is *accelerated access*, which may occur when the minister, in accordance with arrangements approved by the Prime Minister, causes all records in a class of Commonwealth records that have not reached the age of thirty years to be made available for public access. According to the Director-General, accelerated access is not a practice which has been adopted by the Archives in the past, except for documents such as weather reports.<sup>2</sup> Accelerated access is a procedure by which whole categories of documents of any age can be made available to the public in general. It is a procedure that can lessen the rigor of both the thirty-year rule and the exemptions in the Freedom of Information Bill; to that extent we applaud the insertion of this procedure in the Archives Bill. The only matter to which we would draw attention is the wording of clause 39 (1) which appears to be potentially restrictive. The clause empowers the minister or person authorised by him to make available for public access 'all records in a class of Commonwealth records not in the open access period'. The choice appears to be one of making all records available, or none at all; it is not open to the minister or an authorised person to make available some records in a class of Commonwealth records. This matter has not been explained either in the Explanatory Memorandum<sup>3</sup> or in the evidence presented to us, and we draw attention to the matter lest this apparent restriction was not intended.

**34.6** The third method of access is *special access* which may be granted to a particular individual. It is provided for in clause 39 (2). Special access may be given to records which

are not available for public access under this Act . . . for a purpose specified in the regulations as a purpose for which access may be given under this sub-section.

The records may be made available to the person on a condition and if that condition is contravened, the person may be fined a maximum of \$200.

**34.7** The Australian Archives has already had some experience in according special access to individuals. For instance, the Agricultural Research Unit of the Australian National University has access to records created in the last

<sup>2</sup> *Transcript of Evidence*, p. 730.

<sup>3</sup> Clause 39 is dealt with on p. 25 of the *Explanatory Memorandum*, cited footnote 1.

thirty years (including very recent records) on the agricultural development of northern Australia.<sup>4</sup> Another of our witnesses, Dr C. A. Price, Professional Fellow in the Department of Demography, Research School of Social Sciences, Australian National University made a useful submission to the Committee outlining the benefits that he had gained by acquiring special access to immigration records for the purposes of a study on the settlement and integration of immigrants and their families in Australia.<sup>5</sup> On the other hand, the procedures for special access are not free from criticism. It would appear that there is a feeling that the power to grant special access to some but not to others is akin to a power of censorship. Mr L. Dillon, Archivist, University of Wollongong, termed the power one of 'patronage'.<sup>6</sup> Dr H. Radi thought it was discriminatory to grant access to some and not to others. In her opinion, emphasis should be placed upon granting special access to particular documents, not conferring the right upon specific individuals.<sup>7</sup> Another possible danger that could arise is if a condition is imposed on special access to the extent that any manuscript subsequently written will be submitted to the Archives for vetting. If permission to publish is refused, there may be a lingering feeling that the Archives has engaged in censorship. Another problem that arises with the procedure for special access is the inconsistency that it creates with the Freedom of Information Bill. A person may use either that Bill or the special access provisions to seek access to a record that is less than thirty years of age. However, under the Freedom of Information Bill, it is unnecessary for the applicant to prove any interest in, or need for a document, whereas this may be the prime consideration under the Archives Bill. While these criticisms do not to our mind undermine the utility of the special access provisions, they do suggest the need for circumventing them where possible. When a request for special access is received, emphasis should be placed not only on making documents available to the applicant alone, but also on reviewing the documents with a view to determining whether they can be released. In some cases this may entail release to the public generally; in others, Archives may decide that special access can be given to other individuals.

**34.8 Recommendation: When the Archives is considering a request for special access to documents made pursuant to clause 39 (2), the Archives should also consider the question whether the documents could be released generally to the public or to other special applicants.**

**34.9** Some of the doubts about the special access provisions would have subsided had some information been available as to the circumstances in which, and the conditions on which, special access would be granted. The Director-General in evidence indicated that the Australian Archives was already in the position of being able to draft regulations specifying the circumstances in which special access would be granted, and he indicated that a copy of guidelines outlining those circumstances would be provided to the Committee.<sup>8</sup> Unfortunately, these have not been received. In our opinion it would assist public analysis of this Bill if guidelines of this nature were published in the near future. We note also that under clause 39 (2) special access is to be given 'in accordance with arrangements approved by the Prime Minister'. For reasons similar to those

<sup>4</sup> *Transcript of Evidence*, p. 706.

<sup>5</sup> Submission no. 143, incorporated in *Transcript of Evidence*, pp. 1515-6.

<sup>6</sup> Submission no. 22, p. 3.

<sup>7</sup> *Transcript of Evidence*, p. 1563.

<sup>8</sup> *Transcript of Evidence*, p. 740.

we have already stated in paragraph 34.3, we are of the opinion that arrangements such as these should be recorded in writing and tabled at a meeting of the Advisory Council.

**34.10** The only remaining matter we would mention is that a person who is denied special access to records cannot appeal against the refusal, nor can a person who has been granted access subject to conditions appeal against the imposition or the terms of those conditions. We have not proposed that such a right of appeal be created, as we recognise that practical difficulties could arise. For instance, if an appellant had been refused special access to a very large volume of records, a tribunal may feel that inspection of the records is the only way of determining whether the denial was warranted. Further, a tribunal may not be possessed in some cases of the necessary expertise to determine whether special access is warranted. The judgment may be a professional one to be made by the Director-General of Archives, who could balance a number of factors including the value of contemporary historical research, the practical difficulties in placing large categories of Commonwealth records at the disposal of individuals, and other relevant Commonwealth interests which may incline against special access. However, these same considerations do not necessarily apply to the Advisory Council on Australian Archives which is a body that is so constituted that it is representative of a number of interests. It is among the functions of the Advisory Council to deliberate generally on archival matters. While it would obviously be impractical to confer upon an advisory council appellate functions such as hearing and determining individual grievances, we can see merit in requiring the Director-General to table on a regular basis before the Advisory Council details of all requests for special access and the determinations made on those requests. By this procedure the Advisory Council may also express opinions on the purposes for which special access should or should not be given.

**34.11 Recommendation: Clause 39 of the Archives Bill should be amended to provide that the following matters will be tabled by the Director-General at a meeting of the Advisory Council on Australian Archives:**

- (a) details of all decisions made pursuant to clause 39 (2) either granting or refusing to grant special access to records; and
- (b) arrangements approved by the Prime Minister, pursuant to clause 39 (2), for regulating special access to documents.

### **Review and appeal**

**34.12 *Internal review.*** In respect of certain decisions an applicant has two avenues of appeal: first, an internal review of the decision may be sought within twenty-eight days of the decision being notified; and if that review is not favourable to the applicant an appeal may thereafter be taken to the Administrative Appeals Tribunal. The internal review is regulated by clause 38 of the Bill. An internal review or reconsideration is conducted by the Director-General or the person authorised by him to deal with such applications, and must be completed 'as expeditiously as practicable' provided that if the applicant is not notified of the outcome within fourteen days, he or she may appeal directly to the Tribunal. If the earlier decision is confirmed, the notice to the applicant must state the findings on any material questions of fact, referring to the material on which those findings are based and the reasons for the decision, and must inform the applicant of the right to apply to the Tribunal for a review of the decision.

**34.13** There are three aspects of the internal review procedure which in our opinion require amendment. First, the applicant who wishes to challenge a determination that a document is exempt may be required to comply with an unnecessarily complicated procedure. Even though the applicant has ascertained from the Australian Guide to Archival Material that a record is exempt, the applicant is still required to make an initial application for the document, and when this is rejected, seek an internal review. In cases where it is clear from the National Guide that a document is exempt, in our opinion an applicant should be entitled to proceed directly to the internal review stage. The Archives would then have an opportunity to reconsider the earlier decision before any proceedings are instituted in the Tribunal. Secondly, there is no time limit specified within which the initial application for access must be considered. In our opinion a sixty-day time limit, similar to that in the Freedom of Information Bill, should be established. Although it is possible that the Archives will be dealing with requests for large volumes of documents, the likelihood is that these documents will already have been reviewed pursuant to clause 33 before the open access period was reached. In any case, we do not think a sixty-day period imposes unnecessary restrictions on the Archives. We consider that some time limitation is necessary for the protection of the public rights conferred by this legislation. Thirdly, there is no requirement in the legislation that, when an initial decision refusing access is notified, the applicant is to be informed of the right to seek an internal review. Such an obligation should be cast upon the Archives.

**34.14 Recommendations:**

- (a) Where it is clear from the Australian National Guide to Archival Material that a record is exempt, an applicant who seeks access to that record should be permitted to seek an internal review of the decision pursuant to clause 38 of the Archives Bill without being required to make an initial application for access to the document;**
- (b) The Archives Bill should be amended to require the Australian Archives to make a decision on any request for a document within sixty days of receiving the request; and**
- (c) The Australian Archives should be required to notify an applicant who has been refused access to a document on the ground that it is exempt of the right to seek an internal review of that decision under clause 38 of the Bill.**

**34.15** *Review by the Administrative Appeals Tribunal.* A person may appeal to the Administrative Appeals Tribunal on a decision of the following nature:

- that a document is exempt;
- that the access provisions do not apply to the document;
- that partial access will not be given to the non-exempt portions of the records; or
- that access in a particular form will not be given.

The Bill provides that in any proceedings before the Tribunal the Director-General is the defendant, and has the onus of establishing that a record is an exempt record. The Tribunal exercises much the same powers as it exercises under the Freedom of Information Bill.

**34.16** It has been suggested to us that the Archives Bill should be amended so that a residual discretion is conferred upon the Tribunal to order that an exempt

document be released.<sup>9</sup> We have not proposed this course, as we have earlier recommended that some of the exemptions contain a public interest criterion which can be balanced against the interests to be protected by the exemptions, and to our mind this provides sufficient leeway for the Tribunal to consider all relevant matters in appeals that arise before it. However, we would draw attention to what in our opinion appears to be a doubt arising from the drafting of the Archives Bill as to whether the Tribunal in fact has the discretion to make an exempt record available. There are three reasons for thinking that the Tribunal has this discretion. First, paragraph 37 (3) (b) provides that

the Tribunal is not restricted by any determination made at any time under section 33 in relation to the record.

Secondly, there is nothing in the Bill comparable to clause 37 (3) of the Freedom of Information Bill which provides that once

it is established that a document is an exempt document, the Tribunal does not have power to decide that access to the document, so far as it contains exempt matter, is to be granted.

Thirdly, it is possible that clause 41 ('Nothing in this Act prevents a person from publishing or otherwise giving access to records (including exempt records), otherwise than in pursuance of this Act where he can properly do so or is required by law to do so') confers upon the Archives staff the discretion to release exempt records. Clause 12 in the Freedom of Information Bill, which is similarly but not identically drafted, is meant to be interpreted in this way. If the Archives does have this discretion, then the Tribunal would under its enabling Act exercise the same discretion.

**34.17 Recommendation: The Archives Bill should be amended to make it clear that no residual discretion is conferred upon the Administrative Appeals Tribunal to order that an exempt document be released.**

**34.18** A final matter relating to appeals is whether the Tribunal should be the only appellate body under the Archives Bill, or whether the Tribunal should be differently constituted for appeals heard under the Bill. For instance, in the United States there is an Inter-agency Classification Review Committee established by Executive Order with power to oversee the security classification system and to give advisory opinions on whether documents more than ten years old should be declassified. The Committee may act of its own motion or at the request of an individual who has been denied access to classified material. This provides an alternative to judicial review under the Freedom of Information Act, and is a review that has been available frequently—for instance, in 1975 there were 1993 requests for review, 86% of which were upheld in whole or in part.<sup>10</sup> A similar system was recommended in the Coombs Minority Report Bill. That Bill proposed the creation of a Classification Review Committee comprising representatives of agencies, the Parliament and the public.<sup>11</sup> Dr Lamb also proposed that the Tribunal hearing appeals should be constituted by three persons, one of whom is a distinguished social scientist.<sup>12</sup>

<sup>9</sup> e.g. Dr Dan Coward, submission no. 60, incorporated in *Transcript of Evidence*, p. 1396; see also Australia, Parliament, *Development of the National Archives*, Report by Dr W. Kaye Lamb, Parl. Paper 16/1974, Canberra, 1975, p. 14.

<sup>10</sup> J. McMillan, 'Freedom of Information in Australia: Issue Closed', *Federal Law Review* 8, 1977, p. 379 at p. 404.

<sup>11</sup> Australia, Parliament, Royal Commission on Australian Government Administration (Dr H. C. Coombs, Chairman), *Appendix Volume Two*, Parl. Paper 187/1976, Canberra, 1977, pp. 47-50.

<sup>12</sup> Lamb, cited footnote 9, p. 14.

**34.19** In our opinion the appellate functions are best exercised by the Administrative Appeals Tribunal, and it should be constituted in the normal manner provided for in the Administrative Appeals Tribunal Act. The questions which will be appealed to the Tribunal are likely to concern the interpretation of the exemptions in the Bill and their application to various fact situations. This, it appears to us, will be akin to the normal quasi-judicial function exercised by the Tribunal, and is unlikely to involve issues where the insights of an archivist, an historian or a social scientist may be directly needed. Nevertheless, we note that the Advisory Council on Australian Archives which is established by the Bill could to some extent exercise the advisory powers that are elsewhere exercised by different bodies. While it would be impractical for the Council, which has a part-time membership of thirteen people, to exercise an advisory function as to the review of denials, we feel that it could play a useful role in monitoring in the manner it thinks fit the administration of the Act. We would urge the Advisory Council, once it is established, to adopt procedures whereby it may be regularly informed of the nature of records declared or determined to be exempt from public access under the Bill.

**34.20** *Role of the Ombudsman.* In Chapter 29 we proposed that the Commonwealth Ombudsman should have a role in freedom of information cases. We recommended that, in addition to his normal functions of investigation, conciliation and recommendation, his powers in freedom of information cases should be extended so that he could investigate all matters arising under the Freedom of Information Bill (including ministerial decisions); could act as a general counsel appearing on behalf of applicants before the Administrative Appeals Tribunal; and advise agencies on freedom of information matters.

**34.21** There is no reason why the Ombudsman (or more accurately, the Deputy Ombudsman for freedom of information matters) should not exercise similar powers in relation to matters arising under the Archives Bill. The access procedures in that Bill and the Freedom of Information Bill are very similar, as too are the matters that can be appealed to the Administrative Appeals Tribunal. In both statutes similar criteria are established and the role of the Ombudsman would be to seek to ensure that questions were determined in accordance with those criteria. The only relevant difference between both bills appears to be that an Advisory Council on Australian Archives provides a forum for the airing of grievances that does not exist under the Freedom of Information Bill. However, the Advisory Council is not intended (nor do we expect that it would be suited) to devote its time to investigating and resolving the grievances of individuals who have encountered difficulties in obtaining access to information. Matters such as these are within the jurisdiction of the Ombudsman. Since, under the *Ombudsman Act 1976* as it presently stands, the Ombudsman already has a general role in relation to archival matters, we think it would be illogical if his powers were not extended in relation to archival matters to the extent that we have proposed in Chapter 29 that they be extended in relation to freedom of information matters.

**34.22** **Recommendation: Powers should be conferred upon the Ombudsman in relation to the matters arising under the Archives Bill similar to those which we recommended (in paragraphs 29.9, 29.11, 29.13, 29.23, 29.28) in relation to freedom of information matters.**

## **Advisory Council on Australian Archives**

**34.23** There was much discussion in the submissions and in the evidence as to the creation and functions of the Advisory Council. Researchers appreciated clearly the importance that this body could have in shaping archival policy in Australia, and hence there was much discussion of such matters as the constitution of the Advisory Council, the preparation by it of annual reports, and its role in the collection of archival resources and destruction of Commonwealth records. By and large, questions concerning the Advisory Council fall within the terms of reference of the Senate Standing Committee on Education and the Arts. However, we have proposed at a number of points throughout this chapter that specific functions be conferred upon the Advisory Council, and we think it prudent and useful to collect and summarise briefly the various recommendations we have made.

**34.24** The functions of the Advisory Council should include:

- reviewing arrangements approved by the minister pursuant to clause 33, and by the Prime Minister pursuant to clause 39;
- reviewing decisions by the Director-General on requests for special access;
- monitoring the policy of the Archives concerning the determination as to what records are exempt from public access; and
- consultation before destruction of archival material.

**34.25** There is one other power of the Archives in the exercise of which, in our opinion, the Advisory Council ought also to play a role. Hitherto we have emphasised the importance of making information available to the public as to which of the Commonwealth's archival resources have been preserved. Equal emphasis must be placed upon availability of information as to which archival resources are to be destroyed. Pursuant to clause 25 of the Bill, any Commonwealth record can be destroyed by agreement between the Archives and the Commonwealth institution from which the record was received. It was conceded by a spokesman from the Archives that 'it is certainly possible that records can be destroyed without the potential users of those records knowing of that action'.<sup>13</sup>

**34.26** Some of the witnesses stressed to us the importance of consultation between the Archives and users before records are destroyed. Mr A. Horton, from the Library Association of Australia, rated as 'the most important point we are going to make' the undesirability of a situation whereby 'the destruction of records created by a Commonwealth department should be in the hands of an official and not of a body on which the public is represented'.<sup>14</sup> Dr Coward suggested that the Archives Bill be amended to empower,

the Archives to consult with leading scholars in the relevant fields and permit them conditional access to records proposed to be destroyed. By this means the possibility of irretrievable mistakes being made may be minimised.<sup>15</sup>

In his submission Dr Price illustrated how he, as a user, was able to assist the Archives when asked to act as a consultant on the destruction of immigration records. He further indicated how valuable records were being lost when unilateral destruction was undertaken by archival officers.<sup>16</sup>

<sup>13</sup> *Transcript of Evidence*, p. 1520.

<sup>14</sup> *Transcript of Evidence*, p. 2077.

<sup>15</sup> Submission no. 60, incorporated in *Transcript of Evidence*, p. 1398.

<sup>16</sup> Submission no. 143, incorporated in *Transcript of Evidence*, pp. 1515-6.

**34.27** In our opinion it is possible to involve users in a consultative role via the Advisory Council on Australian Archives. Mr C. Hurley, from the Australian Archives, indicated that written destruction schedules are prepared.<sup>17</sup> In our opinion these ought to be tabled at a meeting of the Advisory Council before any records listed in the schedule are actually destroyed.

**34.28 Recommendation: The Archives Bill should be amended to provide that the Australian Archives shall not permit or approve the destruction of a Commonwealth record until the proposal to destroy the record has first been notified to a meeting of the Advisory Council on Australian Archives.**

#### **Review of operation of Bill**

**34.29** In Chapter 32 we have recommended that the operation of the Freedom of Information Bill should be reviewed by this Committee after the Bill has been operating for three years. We think it appropriate that the operation of the Archives Bill be reviewed at the same time, either by this Committee or another committee such as the Senate Standing Committee on Education and the Arts.

**34.30 Recommendation: The administration of the Archives Bill should be reviewed by a parliamentary committee after the Bill has been in operation for three years.**

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<sup>17</sup> *Transcript of Evidence*, p. 1522.

**PART G**  
**RECOMMENDATIONS**

### **Resource implications**

1. All agencies, and in particular the Public Service Board and Attorney-General's Department, should give urgent attention to the planning and implementation of programs to train and develop staff in freedom of information matters, it being neither necessary nor desirable that the commencement of such programs wait upon the passage of the legislation in its final form (paragraph 6.26).
2. (a) While clause 2 of the Bill should not be amended to specifically so provide, the legislation should commence general operation not later than twelve months after its passage through the Parliament;  
(b) Part II of the Bill should be proclaimed immediately upon assent (paragraph 6.33).
3. Close attention should be given, in particular by the task force presently examining government information services, to the utilisation of existing government information and public relations resources in the administration of the Freedom of Information legislation (paragraph 6.47).

### **Directories, indexes and manuals**

4. The list of matters required to be published under clause 6 (1) (a) should be rewritten to encompass, among other things:
  - (a) all possible institutional avenues presently existing (and which it is practicable to identify) for direct and indirect public participation in governmental decision making;
  - (b) facilities provided for physical access to agency information;
  - (c) informational literature available by way of subscription services or free mailing lists; and
  - (d) basic information about Freedom of Information legislation access procedures, including initial contact points for each agency (paragraph 7.14).
5. The matters to be considered by the minister under clause 6 (2) in approving the form in which information about agencies and their documents is to be published should be widened to include what is necessary to enable members of the public:
  - (a) to take advantage of existing avenues for participation in governmental policy formulation and decision making;
  - (b) to avail themselves of agency facilities and information resources; and
  - (c) to exercise effectively the rights conferred under the Freedom of Information legislation as a whole (paragraph 7.16).
6. The categories of 'internal law' documents described in clause 7 (1), and required (subject to exemptions) to be published, should be extended so as to clearly encompass:
  - (a) letters of advice (of precedential status) to persons outside the agency;
  - (b) statements of policy; and
  - (c) documents used in enforcing the law (as distinct from administering it) (paragraph 7.32).
7. Clause 7 (2) should be amended to require the publication, where necessary, of an index-updating statement at not less than three-monthly intervals rather than twelve-monthly as presently provided (paragraph 7.34).

### **Processing access requests**

**8.** The words 'where practicable' should be omitted from clause 13 (4) in order to make unequivocally clear the responsibility of agencies to respond helpfully to persons making requests (paragraph 8.13).

**9.** The training given to public servants to equip them to implement the legislation should emphasise the underlying principles of the legislation and make it clear that the assistance they give inquirers should be given in an equitable, even-handed way without regard to the public servant's view of the quality of the application or of its likely outcome (paragraph 8.15).

**10.** (a) Preparatory work should commence at once on the production of a Freedom of Information Handbook, explaining the nature of the rights conferred by the Freedom of Information legislation and the procedures by which they might be exercised.

(b) Such handbook should be written in plain and accessible English, produced also—if necessary in abbreviated form—in the principal migrant languages, and distributed free or at a minimal charge.

(c) The Attorney-General's Department should have the responsibility for producing the basic handbook, but other agencies should consider, where appropriate, producing their own information brochures and other publicity.

(d) The basic handbook should if possible be available at the time of proclamation of the legislation, but delays in its production at that time should not be used as an excuse to delay such proclamation (paragraph 8.20).

**11.** For purposes of clarification, the requirement in clause 16 (1) (a) that a request be 'duly made' should be replaced by one that it be 'made in writing' (paragraph 8.23).

**12.** The Attorney-General's Department should, in consultation with the agencies most closely concerned, consider the arrangements which will guide transfers from one agency to another, and formulate guidelines for the effective administration of all aspects of clause 14 (paragraph 8.30).

**13.** The qualification in clause 15 (2) should be amended to require that compliance interfere 'substantially' as well as 'unreasonably' with the operation of the agency (paragraph 8.34).

**14.** (a) The Bill should provide for the reduction of the sixty-day time limit prescribed by clause 17 to forty-five days two years after the legislation has come into operation, and to thirty days four years after its operation.

(b) Further reductions in the time limit are in principle desirable, but should wait upon future reviews of the legislation's operation.

(c) Either or both of the initial time reduction steps should be capable of waiver only by an affirmative parliamentary resolution (paragraph 8.43).

### **Making the access decision**

**15.** The Bill should contain an additional clause specifically exhorting agencies, when processing requests for documents, to do so with a view to making the maximum amount of information promptly and inexpensively available to the public (paragraph 9.5).

16. The Ombudsman should, where appropriate, draw public attention to misbehaviour or maladministration by particular officers in relation to freedom of information matters in his annual reports or in special reports, and such reports should be referred to the agency concerned and to the Public Service Board (paragraph 9.12).

17. (a) In the decision-making arrangements adopted by agencies for the handling of freedom of information requests, the general principle to be applied should be that authority to grant requests be delegated downward as far as realistically possible, while authority to deny requests should be confined to a small group of officers of at least Second Division status.

(b) Officers who are delegated authority to deny access requests should be specifically identified by title in annual departmental reports and in the material required to be published or made available under Part II of the Bill (paragraph 9.20).

18. Clause 22 should be amended to specifically include, among the matters of which the applicant must be notified, the procedures by which he might secure a review of the decision (paragraph 9.26).

19. (a) The Bill should be amended to provide that where an agency relies upon an exemption relating to security, defence or international relations (clause 23), Cabinet or Executive Council documents (clauses 24 and 25) or law enforcement (clause 27), it should be entitled to respond in a form of words which denies access to the document without confirming or denying the existence of that document.

(b) A response in these terms should be treated for the purposes of appeal to the Administrative Appeals Tribunal as a refusal to grant access (paragraph 9.34).

20. Clause 46 should be amended to place beyond doubt the principle that the original authors of defamatory material, whether within or outside the Public Service, should not incur liability merely by virtue of its being published under, or as a result of, the Freedom of Information legislation (paragraph 9.40).

21. Further to our recommendations in paragraph 10.19, the Bill should be amended to provide:

(a) that no action for breach of copyright shall lie against an officer for providing access to a copy of a document pursuant to the Bill; and

(b) that the giving of access to a person to a copy of a document shall not be taken for the purposes of the law relating to copyright to constitute an authorisation or approval of any 'copyright act' (as referred to in section 31 of the *Copyright Act 1968*) in relation to the document or its contents by the person to whom access was given (paragraph 9.49).

### **Meeting successful requests**

22. (a) In order to enable public discussion of proposed access arrangements, agencies should announce the arrangements they propose to make under clause 18 before the regulations are gazetted and the legislation commences operation.

(b) Agencies should, where at all practicable, establish reading rooms to assist the public to peruse manuals, indexes and other information required to be made available.

- (c) The Bill should be amended to provide that where access is granted, pursuant to clause 18 (3), in a form other than that requested, a person should not be required to pay a fee greater than the fee that would have been payable if access were given in the form requested.
  - (d) Applicants should be entitled to inspect documents at their closest regional Commonwealth Government office without paying any copying costs that may necessarily be incurred by the agency to make such inspection possible (paragraph 10.8).
- 23.** Clause 18 (3) (c) of the Bill should be deleted, and the Bill amended to provide that the granting of access to the document in any form does not amount to a breach of copyright (paragraph 10.19).
- 24.** Clause 19 should be amended so as to:
- (a) delete the words 'or having regard to normal and proper administrative practices';
  - (b) require the notification of the intended deferment to be communicated to the applicant as soon as practicable but in any event not later than sixty days after the request is received (paragraph 10.23).

### **Charges and fees**

- 25.** Charges for the search and retrieval of information should be fixed on a single set hourly rate basis, with provision for the agency to waive or reduce any such charge if it deems it appropriate in the circumstances (paragraph 11.17).
- 26.** No charge should be made for the time spent in examining material to determine whether access should be granted to it (paragraph 11.24).
- 27.** Agencies should be entitled to charge an applicant the identifiable direct on-cost incurred in supervising the inspection by him of material to which he is granted access (paragraph 11.26).
- 28.** Agencies should be entitled to charge applicants the reasonable costs incurred by them in supplying copies of paper documents, sound and video-recordings and similar materials (paragraph 11.29).
- 29.** Where it is anticipated that fees and charges in excess of \$25 are likely to be incurred by an applicant, a mandatory system of advance notification should apply before such charges can be levied (paragraph 11.31).
- 30.** Clause 49 should be amended to specifically provide for the imposition of fees and charges on a uniform basis as between different agencies. There should be no variation of scale charges as between different classes of applicants (paragraph 11.35).
- 31.** (a) Normally charges levied under the Bill should not be required to be paid until an affirmative access decision has been made;
- (b) Agencies should be entitled to require, where the anticipated fee chargeable exceeds \$25, an advance deposit of 25% of the anticipated fee; and
- (c) Where an applicant has previously failed to pay a charge under the legislation, agencies should be entitled to require an advance deposit of the full amount of the anticipated fee (paragraph 11.39).
- 32.** The Bill should explicitly confer upon ministers and agencies the discretionary power to waive or reduce fees where an applicant is impecunious or

where the provision of the information in question can be considered as primarily benefiting the general public. The exercise of such discretionary powers should not be subject to appeal to the Administrative Appeals Tribunal (paragraph 11.45).

### **Exemptions of agencies and classes of documents**

33. The exemption of any agencies or classes of documents of an agency and the determination of whether a body is part of a specified agency should be achieved by listing them in a schedule to the Freedom of Information Bill with subsequent amendment to that schedule occurring by means of regulation taking effect only upon affirmative resolution of both Houses (paragraph 12.14).

34. The fact that an agency is engaged in competition with other non-government commercial enterprises should not of itself be a ground for exemption of the agency or a class of its documents under clause 5 of the Bill. Exemptions of entire commercial agencies or classes of documents should be made only after individual agencies have demonstrated, after experience of the operation of the Bill, that deployment of financial or staff resources made necessary by the Bill would significantly weaken their competitive position (paragraph 12.21).

35. The fact that disclosure of particular information may be reasonably likely to impair the ability of an agency to obtain similar information in the future should not invariably give rise to an exemption of the relevant class of documents. But this is a factor, which in all the circumstances of a particular agency, may warrant exemption of some classes of documents (paragraph 12.25).

36. Clause 4 of the Freedom of Information Bill should be amended so as to limit the exemption in respect of courts to documents of a non-administrative character (paragraph 12.30).

37. Paragraph (c) of clause 4 of the Bill should be deleted and any exemption of the conciliatory bodies listed therein be achieved in a schedule to the Bill in respect of their non-administrative functions only (paragraph 12.34).

### **Refusal of access on administrative grounds**

38. Clause 13 (3) should be amended so that compliance with a categorical request can be refused only if it would 'impose a substantial and unreasonable burden on the operations of the agency or the performance by the minister of his functions' (paragraph 13.4).

39. Clause 15 (2) should be amended so that compliance with a request under clause 15 (1) for information not in discrete form in documents of the agency can only be refused if it would 'impose a substantial and unreasonable burden on the operations of the agency' (paragraph 13.11).

### **Prior documents**

40. The Bill should be amended to specifically provide individuals with a right of access to prior documents affecting themselves (paragraph 14.12).

41. (a) The Bill should be amended to provide for a right of access to documents up to five years old at the time of proclamation, such right of access to be effective after one year from the date of proclamation.

(b) Further retrospective access should be phased-in by subsequent amendment to the Act as it becomes administratively possible until access is

available to documents within the thirty-year period between proclamation of the Freedom of Information Bill and the open access period provided in the Archives Bill (paragraph 14.19).

### **Security, defence and international relations**

42. 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* (paragraph 16.13).

43. (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 content (paragraph 16.18).

44. *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 (paragraph 16.22).

45. A system for automatic declassification of national security documents should be instituted on an administrative basis (paragraph 16.26).

46. 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 (paragraph 16.29).

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

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

49. (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 (paragraph 16.38).

### **Commonwealth–State relations**

50. 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 (paragraph 17.11).

### **Cabinet and Executive Council documents**

51. Clauses 24 and 25 should be amended to limit the scope of the conclusive exemption for Cabinet documents to documents containing opinion, advice or recommendations of a policy nature, thereby excluding documents of a purely factual nature such as consultants' reports, reports from advisory committees and so on (paragraph 18.9).

- 52. (a) There should be a right of appeal to the Administrative Appeals Tribunal under clauses 24 and 25 on the limited question whether a document is in fact a Cabinet or Executive Council document; and
- (b) The jurisdiction to hear such an appeal against a determination under clause 24 or 25 that a document is a Cabinet or Executive Council document should be exercised by a presidential (legally qualified) member of the Tribunal acting alone (paragraph 18.12).
- 53. (a) A special marking should be established to distinguish Cabinet documents and their attachments; and
- (b) The special 'Cabinet' marking should be used on attachment to Cabinet documents only where those attachments would be exempt from disclosure under clause 24 of the Bill (paragraph 18.16).

#### **Internal working documents**

- 54. (a) Sub-clause 26 (1) should be left unchanged.
- (b) The wording of clause 26 (3) should be clarified so as to provide that clause 26 does not apply to documents, or portion thereof containing purely factual material (paragraph 19.21).
- 55. Clause 37 (4) of the Bill should be deleted, in order that the powers of the Administrative Appeals Tribunal extend to reviewing a decision of an agency or minister that the disclosure of a document would be contrary to the public interest (paragraph 19.30).

#### **Law enforcement documents**

- 56. The word 'lawful' should be inserted in clause 27 (d) between the words 'disclose' and 'methods' so as to provide for the exemption of lawful methods or procedures of law enforcement only (paragraph 20.9).
- 57. Clause 27 should be amended to permit an agency to deny access to a document without conceding the existence of that document, whether or not the existence of a document is a matter of concern in any particular case (paragraph 20.17).

#### **Prescribed secrecy provisions**

- 58. (a) Clause 28 should be amended so that the list of secrecy provisions to be prescribed under the clause be contained in a schedule to the Bill;
- (b) Any amendments to the schedule after enactment of the legislation should be made by regulation expressed to take effect only upon affirmative resolution of both Houses of the Parliament;
- (c) All criminal provisions prohibiting or restricting the disclosure of information that are not prescribed under the Bill should be repealed; and
- (d) Where possible, other provisions which confer power upon a tribunal, body or person to regulate the disclosure of information should be brought into line with the criteria contained in the exemptions in the Bill (paragraph 21.13).
- 59. Urgent consideration should be given by the Government to the question of reforming section 70 of the Crimes Act so as to limit the categories of information that it is an offence to disclose and to establish procedural safeguards for any person who may face prosecution under that section. Any such reform of section 70 should preferably be enacted either before or simultaneously with the enactment of the Freedom of Information Bill (paragraph 21.27).

### **Adverse effect on agency operations**

60. The words 'or would otherwise have a substantial adverse effect on the efficient and economical conduct of the affairs of an agency' should be deleted from clause 29 (paragraph 22.7).

61. The 'staff management interests' referred to in clause 29 should be expressed as 'personnel management and assessment interests' in order to accommodate a wider range of matters legitimately entitled to protection (paragraph 22.14).

62. A separate public interest criterion should be added to clause 29 to enable the review on public interest grounds of exemptions claimed under this clause (paragraph 22.19).

### **Privilege and contempt**

63. (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' (paragraph 23.9).

64. Clause 36 should be deleted on the grounds that it is redundant and contrary to the principle of the Bill (paragraph 23.21).

### **Privacy**

65. The privacy exemption in clause 30 should be retained in its present form but it should be given particular attention when the legislation is subject to its first major review (paragraph 24.13).

66. The Bill should be amended to incorporate a system whereby rights are conferred upon Australian citizens and permanent residents to request the correction of inaccurate or misleading facts concerning personal information pertaining to the applicant (paragraph 24.18).

### **Commercially sensitive and other confidential information**

67. Clause 34 of the Bill, exempting documents the disclosure of which would constitute a breach of confidence, should be deleted (paragraph 25.19).

68. The Bill should be amended to include provision for:

- (a) notification by an agency to the supplier of documents which come within the terms of clause 32 that the agency has received a request for access to those documents and seeks the supplier's view as to whether disclosure should occur;
- (b) further notification to the supplier where the agency after consultation has decided to go ahead with disclosure; and
- (c) a recognised right of Reverse-FOI by means of an appeal to the Administrative Appeals Tribunal by the supplier against intended disclosure (paragraph 25.32).

### **National economy**

69. Clause 33 of the Bill, exempting documents the disclosure of which would be contrary to the public interest by reason that they would be reasonably likely to have a substantial adverse effect on the national economy, should be deleted (paragraph 26.13).

### **Internal review**

70. The notice required to be supplied to the applicant under clause 22 should include particulars of the manner in which application for internal review should be made (paragraph 28.5).

71. Agencies should give consideration to the most appropriate internal review machinery for their own needs and take steps to ensure that such machinery is fully operational by the time of proclamation of the Act (paragraph 28.7).

72. For the purposes of freedom of information the Ombudsman should make it a practice not to investigate a complaint before the completion of internal review unless he is of the opinion, taking account of the urgency and importance of the complaint and the attitude of the agency concerned, that his intervention is warranted at that time (paragraph 28.11).

### **Role of the Ombudsman**

73. For the purposes of the Freedom of Information Bill, the Ombudsman should not be precluded in any way by section 6 (3) of the Ombudsman Act or otherwise from investigating a matter which is also subject to review by the Administrative Appeals Tribunal (paragraph 29.9).

74. In relation to clauses 23, 24 and 25 of the Bill the Ombudsman's powers should include those of investigation and conciliation insofar as he is able, but not include (except in the case of Commonwealth-State relations matters) the power to inspect the documents for which exemption is claimed (paragraph 29.11).

75. For the purposes of freedom of information, ministerial decisions should be within the jurisdiction of the Ombudsman (paragraph 29.13).

76. For the purposes of freedom of information the Ombudsman should be empowered to act as counsel before the Administrative Appeals Tribunal on behalf of an applicant if he forms the opinion that his intervention is warranted. In forming his opinion he should take account of such considerations as:

- (a) the importance of the principle involved in the matter;
- (b) the precedential value of the case;
- (c) the financial means of the complainant;
- (d) the complainant's prospects of success; and
- (e) the reasonableness of the agency's action in withholding the information (paragraph 29.23).

77. The Ombudsman's powers in Reverse-FOI cases, in relation to people seeking to prevent the release of information which they have submitted to government, should include the power of investigation and conciliation but not include the power to act as counsel before the Administrative Appeals Tribunal on their behalf (paragraph 29.25).

78. The Ombudsman should be empowered to advise agencies, at their request, concerning their obligations under the Freedom of Information Act and, in his reports to Parliament, to offer suggestions for improvement and reform in relation to freedom of information in general (paragraph 29.28).

79. The relevant powers and duties should be vested in the Commonwealth Ombudsman for delegation to a Deputy Ombudsman appointed for freedom of information purposes (paragraph 29.31).

### **Proceedings before the Administrative Appeals Tribunal**

**80.** For the purposes of freedom of information, the time within which an application for review must be made to the Administrative Appeals Tribunal should be extended from twenty-eight days to sixty days commencing on the day on which notice in writing of the decision is furnished to the applicant (paragraph 30.5).

**81.** Where an applicant, having pursued his right of review through the Ombudsman, proceeds for review before the Administrative Appeals Tribunal without representation by the Ombudsman, and he substantially prevails in his case, the Tribunal should be empowered, in its discretion, to recommend to the Attorney-General that costs be awarded in the applicant's favour (paragraph 30.15).

**82.** In deciding whether to exercise its discretion to recommend an award of costs, the matters to which the Administrative Appeals Tribunal is to have regard should include:

- (a) the public benefit;
- (b) the possible commercial benefit to the applicant; and
- (c) the reasonableness of the agency's action in withholding the document or (in the case of a Reverse-FOI action) deciding to release it (paragraph 30.17).

**83.** In relation to appeals under clauses 23 (relating to security, defence, or international relations) 24 and 25 (relating to Cabinet and Executive Council documents) and 27 (relating to law enforcement documents) the Administrative Appeals Tribunal should be empowered, if it regards it as appropriate to do so, to announce its findings in terms which neither confirm nor deny the existence of the document in question (paragraph 30.31).

### **Administrative monitoring**

**84.** In order to facilitate the administrative monitoring of the Freedom of Information legislation and to provide a basis for agency reports to Parliament, agencies should, in consultation with the Attorney-General's Department and the Public Service Board, assemble in common form information relating to the following matters:

- (a) requests made;
- (b) the handling of rejections;
- (c) the costs of freedom of information;
- (d) internal procedures; and
- (e) staff training and development (paragraph 31.5).

**85.** The Attorney-General's Department should be provided with sufficient resources to enable it to undertake its responsibilities in implementing the legislation and monitoring its operation (paragraph 31.11).

**86.** The Department of the Prime Minister and Cabinet should in its annual report to Parliament, report not only upon its internal implementation of the Freedom of Information Act, but also upon its advisory role as to the Act's implementation in relation to other agencies (paragraph 31.13).

**87.** The Public Service Board should continue to develop special monitoring processes which will make possible an assessment of any additional workloads generated as a result of the implementation of the legislation (paragraph 31.15).

### **Parliamentary monitoring**

**88.** Agencies should include in their annual reports to Parliament sufficient information concerning their operations in relation to freedom of information as will enable adequate parliamentary review (paragraph 32.4).

**89.** Clause 48 of the Freedom of Information Bill should be extended to expressly state the matters on which the Attorney-General, as Minister responsible for administration of the legislation, should report to Parliament. These should include:

- (a) the number of requests for the year per agency;
- (b) the number of refusals;
- (c) the number of deferments;
- (d) exemptions claimed under the legislation;
- (e) the secrecy provisions invoked under clause 28;
- (f) the level of persons refusing access;
- (g) information on appeals activities;
- (h) administrative manhours, costs and fees collected in relation to freedom of information requests;
- (i) average time for compliance;
- (j) extra staff positions sought and/or approved;
- (k) changes in administrative procedures occasioned by freedom of information;
- (l) guidelines issued by the Attorney-General's Department; and
- (m) a description of efforts by the Department to encourage compliance with the legislation (paragraph 32.7).

**90.** The Attorney-General's first report to Parliament should contain an extensive account of agencies' compliance with the publication requirements of clauses 6 and 7. Subsequent reports should detail agencies' efforts to update the information published or made available under clauses 6 and 7 (paragraph 32.9).

**91.** Clause 48 (1) should be amended to require the minister administering the Freedom of Information Bill to report to Parliament as soon as practicable after the end of each year ending on 30 June and in any case no later than 31 October (paragraph 32.11).

**92.** The Ombudsman should report to Parliament on the operations of his office in relation to freedom of information as part of his annual report to Parliament and by way of special reports to Parliament concerning freedom of information as required (paragraph 32.13).

**93.** The operation of the Freedom of Information legislation should be subject to review by the Senate Standing Committee on Constitutional and Legal Affairs three years after the first proclamation of the legislation (paragraph 32.21).

### **The scope of the Archives Bill**

**94.** The open access period defined in clause 3 (7) of the Archives Bill should remain at thirty years (paragraph 33.16).

**95.** (a) Part V, Division 1 of the Archives Bill should be amended so that no category of records is excluded from the open access provisions of the Bill.

- (b) The Director-General of the Australian Archives should be given express power in the Bill to enable him to organise all Commonwealth records so that the Archives can respond to requests received pursuant to the Bill (paragraph 33.29).

**96.** Clause 31 of the Archives Bill, which contains the exemptions, should be dealt with in the following way:

- (a) paragraph 31 (a), protecting defence, security or international relations, should be retained;
- (b) paragraph 31 (b), protecting information obtained in confidence from other governments, should be deleted;
- (c) paragraph 31 (c), protecting Commonwealth–State relations, should be deleted;
- (d) paragraph 31 (d), protecting the financial and property interests of the government, should be amended by the addition of a phrase providing that information referred to in that paragraph is protected only if disclosure would be contrary to the public interest;
- (e) paragraph 31 (e), protecting pending or likely legal proceedings involving the Commonwealth, should be deleted;
- (f) paragraph 31 (f), protecting information where disclosure would constitute a breach of confidence, should be deleted;
- (g) in paragraph 31 (g), protecting law enforcement, sub-paragraphs (i) and (iv) should be redrafted so that they are identical with the comparable paragraphs in the Freedom of Information Bill;
- (h) paragraph 31 (h), protecting personal privacy, should be retained; and
- (i) paragraph 31 (j), protecting commercial or financial information, should be amended so that it is consistent with clause 32 (1) (a) of the Freedom of Information Bill (paragraph 33.45).

**97.** Clause 35 should be amended to provide:

- (a) that it is mandatory for the Director-General to provide a copy of a document withheld from public inspection pursuant to clause 35 if in his opinion this can be done without detriment to the preservation of the record; and
- (b) that details of any decision by the Director-General pursuant to the clause should be tabled at a meeting of the Advisory Council on Australian Archives (paragraph 33.48).

**98.** Clauses 32 and 37 (4) of the Archives Bill should be amended so that a certificate issued by a minister in respect of a document is not conclusive, but can be reviewed by the Administrative Appeals Tribunal in the same way, and to the same extent, as any other decision by the Australian Archives classifying a document as exempt from public access (paragraph 33.51).

### **Procedures under the Archives Bill**

- 99.** (a) Power should be conferred upon the Administrative Appeals Tribunal to review the amount of a fee imposed on access to documents under the Archives Bill; and
- (b) Clause 33 of the Archives Bill should be amended to provide that the arrangements made by the Director-General in consultation with the responsible minister pursuant to clause 33 (1) for the review of records shall be recorded in writing and tabled before the Advisory Council on Australian Archives (paragraph 34.4).

**100.** When the Archives is considering a request for special access to documents made pursuant to clause 39 (2), the Archives should also consider the question whether the documents could be released generally to the public or to other special applicants (paragraph 34.8).

**101.** Clause 39 of the Archives Bill should be amended to provide that the following matters will be tabled by the Director-General at a meeting of the Advisory Council on Australian Archives:

- (a) details of all decisions made pursuant to clause 39 (2) either granting or refusing to grant special access to records; and
- (b) arrangements approved by the Prime Minister, pursuant to clause 39 (2), for regulating special access to documents (paragraph 34.11).

**102.** (a) Where it is clear from the Australian National Guide to Archival Material that a record is exempt, an applicant who seeks access to that record should be permitted to seek an internal review of the decision pursuant to clause 38 of the Archives Bill without being required to make an initial application for access to the document;

(b) The Archives Bill should be amended to require the Australian Archives to make a decision on any request for a document within sixty days of receiving the request; and

(c) The Australian Archives should be required to notify an applicant who has been refused access to a document on the ground that it is exempt of the right to seek an internal review of that decision under clause 38 of the Bill (paragraph 34.14).

**103.** The Archives Bill should be amended to make it clear that no residual discretion is conferred upon the Administrative Appeals Tribunal to order that an exempt document be released (paragraph 34.17).

**104.** Powers should be conferred upon the Ombudsman in relation to the matters arising under the Archives Bill similar to those which we recommend (in paragraphs 29.9, 29.11, 29.13, 29.23, 29.28) in relation to freedom of information matters (paragraph 34.22).

**105.** The Archives Bill should be amended to provide that the Australian Archives shall not permit or approve the destruction of a Commonwealth record until the proposal to destroy the record has first been notified to a meeting of the Advisory Council on Australian Archives (paragraph 34.28).

**106.** The administration of the Archives Bill should be reviewed by a parliamentary committee after the Bill has been in operation for three years (paragraph 34.30).

### **Report**

The Committee having examined the matter referred, and having considered the evidence given and submissions received, now reports back to the Senate.

ALAN MISSEN  
*Chairman*

The Senate  
Canberra  
November 1979

## **The Freedom of Information Bill 1978**

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

### **THE SENATE**

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*(As read a first time)*

## **FREEDOM OF INFORMATION BILL 1978**

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1978

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA  
THE SENATE

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(Presented pursuant to leave granted and read 1<sup>o</sup>, 9 June 1978)

(ATTORNEY-GENERAL, SENATOR DURACK)

**A BILL**  
FOR  
**AN ACT**

To give to members of the public rights of access to  
official documents of the Government of the  
Commonwealth and of its agencies.

**No. 108**

BE IT ENACTED by the Queen, and the Senate and House of  
Representatives of the Commonwealth of Australia, as follows:

PART I—PRELIMINARY

1. This Act may be cited as the *Freedom of Information Act* 1978. Short title
- 5    2. The several Parts of this Act shall come into operation on such  
respective dates as are fixed by Proclamation. Commence-  
ment
3. (1) In this Act, unless the contrary intention appears— Interpretation  
“agency” means a Department or a prescribed authority;  
“applicant” means a person who has made a request;
- 10    “Department” means a Department of the Australian Public Service  
other than the Department of the Senate, the Department of the  
House of Representatives, the Department of the Parliamentary

Library, the Department of the Parliamentary Reporting Staff and the Joint House Department;

- “document” includes any written or printed matter, any map, plan or photograph, and any article or thing that has been so treated in relation to any sounds or visual images that those sounds or visual images are capable, with or without the aid of some other device, of being reproduced from the article or thing, and includes a copy of any such matter, map, plan, photograph, article or thing, but does not include library material maintained for reference purposes; 5 10
- “document of an agency” or “document of the agency” means a document in the possession of an agency, or in the possession of the agency concerned, as the case requires, whether created in the agency or received in the agency; 15
- “enactment” means— 15
- (a) an Act;
  - (b) an Ordinance of the Australian Capital Territory; or
  - (c) an instrument (including rules, regulations or by-laws) made under an Act or under such an Ordinance;
- “exempt document” means— 20
- (a) a document which, by virtue of a provision of Part IV, is an exempt document;
  - (b) a document in respect of which, by virtue of regulations made in accordance with section 5, an agency is exempt from the operation of this Act; or 25
  - (c) an official document of a Minister that contains some matter that does not relate to the affairs of an agency or of a Department of State;
- “exempt matter” means matter the inclusion of which in a document causes the document to be an exempt document; 30
- “officer”, in relation to an agency, includes a member of the agency or a member of the staff of the agency;
- “official document of a Minister” or “official document of the Minister” means a document in the possession of a Minister, or in the possession of the Minister concerned, as the case requires, that relates to the affairs of an agency or of a Department of State and, for the purposes of this definition, a Minister shall be deemed to be in possession of a document that has passed from his possession if he is entitled to access to the document and the document is not a document of an agency; 35 40
- “Ombudsman” means the Commonwealth Ombudsman;
- “Ordinance”, in relation to the Australian Capital Territory or the Northern Territory, includes a law of a State that applies, or the provisions of a law of a State that apply, in the Territory by virtue of an enactment; 45

“prescribed authority” means—

(a) a body corporate, or an unincorporated body, established for a public purpose by, or in accordance with the provisions of, an enactment, other than—

(i) an incorporated company or association;

(ii) a body that, under sub-section (2), is not to be taken to be a prescribed authority for the purposes of this Act;

(iii) the Australian Capital Territory Legislative Assembly;

(iv) the Legislative Assembly of the Northern Territory or the Executive Council of the Northern Territory; or

(v) a Royal Commission;

(b) any other body, whether incorporated or unincorporated, declared by the regulations to be a prescribed authority for the purposes of this Act, being—

(i) a body established by the Governor-General or by a Minister; or

(ii) an incorporated company or association over which the Commonwealth is in a position to exercise control;

(c) subject to sub-section (3), the person holding, or performing the duties of, an office established by an enactment; or

(d) the person holding, or performing the duties of, an appointment declared by the regulations to be an appointment the holder of which is a prescribed authority for the purposes of this Act, being an appointment made by the Governor-General, or by a Minister, otherwise than under an enactment;

“principal officer” means—

(a) in relation to a Department—the person holding, or performing the duties of, the office of Permanent Head of the Department; and

(b) in relation to a prescribed authority—

(i) if the regulations declare an office to be the principal office in respect of the authority—the person holding, or performing the duties of, that office; or

(ii) in any other case—the person who constitutes that authority or, if the authority is constituted by 2 or more persons, the person who is entitled to preside at any meeting of the authority at which he is present;

“request” means a request made in accordance with sub-section

13 (1);

“ responsible Minister ” means—

- (a) in relation to a Department—the Minister administering the relevant Department of State;
- (b) in relation to a prescribed authority referred to in paragraph (a) of the definition of “ prescribed authority ”— 5  
the Minister administering the enactment by which, or in accordance with the provisions of which, the prescribed authority is established;
- (c) in relation to a prescribed authority referred to in paragraph (c) of that definition—the Minister administering 10  
the enactment by which the office is established; or
- (d) in relation to any other prescribed authority—the Minister declared by the regulations to be the responsible Minister in respect of that authority,

or another Minister acting for and on behalf of that Minister; 15

“ Tribunal ” means the Administrative Appeals Tribunal.

(2) An unincorporated body, being a board, council, committee, sub-committee or other body established by, or in accordance with the provisions of, an enactment for the purpose of assisting, or performing functions connected with, a prescribed authority shall not be taken to be 20  
a prescribed authority for the purposes of this Act, but shall be deemed to be comprised within that prescribed authority.

(3) A person shall not be taken to be a prescribed authority—

- (a) by virtue of his holding an office of member of the Australian Capital Territory Legislative Assembly, member of the Legislative 25  
Assembly of the Northern Territory or Administrator or Minister of the Northern Territory; or
- (b) by virtue of his holding, or performing the duties of—
  - (i) a prescribed office;
  - (ii) an office the duties of which he performs as duties of his 30  
employment as an officer of a Department or as an officer of or under a prescribed authority;
  - (iii) an office of member of a body; or
  - (iv) an office established by an enactment for the purposes of 35  
a prescribed authority.

(4) For the purposes of this Act, the Defence Force shall be deemed to be comprised in the Department of Defence.

(5) For the purposes of this Act, the Commonwealth Police Force and the Police Force of the Australian Capital Territory shall each be 40  
deemed to be a prescribed authority.

4. For the purposes of this Act—

Act not to  
apply to  
courts and  
certain  
tribunals

- 5 (a) a court, or the holder of a judicial office or other office pertaining to a court in his capacity as the holder of that office, is not to be taken to be a prescribed authority or to be included in a Department;
- (b) a registry or other office of a court, and the staff of such a registry or other office in their capacity as members of that staff, shall not be taken to be part of a Department;
- 10 (c) a tribunal, authority or body specified in this paragraph, or the holder of an office pertaining to such a tribunal, authority or body in his capacity as the holder of that office, is not to be taken to be a prescribed authority or to be included in a Department, namely:
- 15 (i) the Australian Conciliation and Arbitration Commission;
- (ii) the Industrial Registrar or a Deputy Industrial Registrar;
- (iii) the Flight Crew Officers Industrial Tribunal;
- (iv) the Public Service Arbitrator or a Deputy Public Service Arbitrator; and
- 20 (v) the Coal Industry Tribunal or any other Tribunal, authority or body appointed in accordance with Part V of the *Coal Industry Act* 1946; and
- 25 (d) a registry or other office of, or under the charge of, a tribunal, authority or body referred to in paragraph (c), and the staff of such a registry or other office in their capacity as members of that staff, shall not be taken to be part of a Department.

5. The regulations may provide that—

Exemption  
of bodies by  
regulations

- (a) a specified body is to be deemed not to be a prescribed authority for the purposes of this Act;
- 30 (b) a body specified in accordance with paragraph (a) is, or is not, to be taken to be included in a specified agency; or
- (c) a specified agency is to be exempt from the operation of this Act in respect of documents relating to specified functions or activities of the agency or in respect of documents of any other prescribed description.

PART II—PUBLICATION OF CERTAIN DOCUMENTS AND INFORMATION

Publication of information concerning functions and documents of agencies

- 6. (1) The responsible Minister of an agency shall—
  - (a) cause to be published, as soon as practicable after the commencement of this Part but not later than 12 months after that commencement, in a form approved by the Minister administering this Act—
    - (i) a statement setting out particulars of the organization and functions of the agency, indicating, as far as practicable, the decision-making powers and other powers affecting members of the public that are involved in those functions and particulars of any arrangement that exists for consultation with, or representations by, bodies and persons outside the Commonwealth administration in relation to the formulation of policy in, or the administration of, the agency; and
    - (ii) a statement of the categories of documents that are maintained in the possession of the agency; and
  - (b) within 12 months after the publication, in respect of the agency, of the statement under sub-paragraph (i) or (ii) of paragraph (a) that is the first statement published under that sub-paragraph, and thereafter at intervals of not more than 12 months, cause to be published statements bringing up to date the information contained in the previous statement or statements published under that sub-paragraph.
- (2) A form approved by the Minister under sub-section (1) shall be such as he considers appropriate for the purpose of assisting members of the public to exercise effectively their rights under Part III.
- (3) The information to be published in accordance with this section may be published by including it in the publication known as the Commonwealth Government Directory.
- (4) Nothing in this section requires the publication of information that is of such a nature that its inclusion in a document of an agency would cause that document to be an exempt document.
- (5) Sub-section (1) applies in relation to an agency that comes into existence after the commencement of this Part as if the references in that sub-section to the commencement of this Part were references to the day on which the agency comes into existence.

Certain documents to be available for inspection and purchase

- 7. (1) This section applies, in respect of an agency, to documents that are provided by the agency for the use of, or are used by, the agency or its officers in making decisions or recommendations, under or for the purposes of an enactment or scheme administered by the agency, with respect to rights, privileges or benefits, or to obligations, penalties or

other detriments, to or for which persons are or may be entitled or subject, being—

- (a) manuals or other documents containing interpretations, rules, guidelines, practices or precedents; or
- 5 (b) documents containing particulars of such a scheme, not being particulars contained in an enactment as published apart from this Act,

but not including documents that are available to the public as published otherwise than by an agency or as published by another agency.

- 10 (2) The principal officer of an agency shall—
  - (a) cause copies of all documents to which this section applies in respect of the agency that are in use from time to time to be made available for inspection and for purchase by members of the public;
  - (b) not later than 12 months after the commencement of this Part, cause to be published in the *Gazette* a statement (which may take the form of an index) specifying the documents of which copies are, at the time of preparation of the statement, so available and the place or places where copies may be inspected and may be purchased; and
  - 15 (c) within 12 months after the publication of the statement under paragraph (b) and thereafter at intervals of not more than 12 months, cause to be published in the *Gazette* statements bringing up to date the information contained in the previous statement or statements.
  - 20

- 25 (3) The principal officer is not required to comply fully with paragraph (2) (a) before the expiration of 12 months after the date of commencement of this Part, but shall, before that time, comply with that paragraph so far as is practicable.

- (4) This section does not require a document of the kind referred to in sub-section (1) containing exempt matter to be made available in accordance with sub-section (2), but, if such a document is not so made available, the principal officer of the agency shall, if practicable, cause to be prepared a corresponding document, altered only to the extent necessary to exclude the exempt matter, and cause the document so prepared to be dealt with in accordance with sub-section (2).
- 30
- 35

(5) Sub-sections (2) and (3) apply in relation to an agency that comes into existence after the commencement of this Part as if the references in those sub-sections to the commencement of this Part were references to the day on which the agency comes into existence.

- 40 (6) In this section, “enactment” includes an Ordinance of the Northern Territory or an instrument (including rules, regulations or by-laws) made under such an Ordinance.

Unpublished  
documents  
not to be  
published

8. If a document required to be made available in accordance with section 7, being a document containing a rule, guideline or practice relating to a function of an agency, was not made available, and included in a statement in the *Gazette*, as referred to in that section, before the time (being more than 12 months after the date of commencement of this Part or the day on which the agency came into existence, whichever is the later) at which a person did, or omitted to do, any act or thing relevant to the performance of that function in relation to him (whether or not the time allowed for publication of a statement in respect of the document had expired before that time), that person, if he was not aware of that rule, guideline or practice at that time, shall not be subjected to any prejudice by reason only of the application of that rule, guideline or practice in relation to the thing done or omitted to be done by him if he could lawfully have avoided that prejudice had he been aware of that rule, guideline or practice. 5 10 15

### PART III—ACCESS TO DOCUMENTS

Right of  
access

9. Subject to this Act, every person has a legally enforceable right to obtain access in accordance with this Act to—

- (a) a document of an agency, other than an exempt document; or
- (b) an official document of a Minister, other than an exempt document. 20

Part not  
to apply  
to certain  
documents

10. (1) A person is not entitled to obtain access under this Part to—

- (a) a document, or a copy of a document, where a period of 30 years has elapsed since the end of the year ending on 31 December in which the document came into existence; 25
- (b) a document that is open to public access, as part of a public register or otherwise, in accordance with another enactment, where that access is subject to a fee or other charge; or
- (c) a document that is available for purchase by the public in accordance with arrangements made by an agency. 30

(2) A person is not entitled to obtain access under this Part to a document that became a document of an agency or an official document of a Minister before the date of commencement of this Part, except where access to the document by him is reasonably necessary to enable a proper understanding of a document of an agency or an official document of a Minister to which he has lawfully had access. 35

Documents  
in certain  
institutions

11. (1) A document shall not be deemed to be a document of an agency for the purposes of this Act by reason of its being—

- (a) in the collection of war relics of the Commonwealth within the meaning of the *Australian War Memorial Act 1962*; 40

(b) in the collection of library material maintained by the National Library of Australia; or

5 (c) in the custody of the Australian Archives (otherwise than as a document relating to the administration of the Australian Archives),

if the document was placed in that collection, or in that custody, by or on behalf of a person (including a Minister or former Minister) other than an agency.

10 (2) For the purposes of this Act, a document that has been placed in the custody of the Australian Archives, or in a collection referred to in sub-section (1), by an agency shall be deemed to be in the possession of that agency or, if that agency no longer exists, the agency to the functions of which the document is most closely related.

15 (3) Notwithstanding sub-sections (1) and (2), records of a Royal Commission that are in the custody of the Australian Archives shall, for the purposes of this Act, be deemed to be documents of an agency and to be in the possession of the Department administered by the Minister administering the *Royal Commissions Act 1902*.

20 (4) Nothing in this Act affects the provision of access to documents by the Australian Archives in accordance with the *Archives Act 1978*.

12. Nothing in this Act is intended to prevent or discourage Ministers and agencies from publishing or giving access to documents (including exempt documents), otherwise than as required by this Act, where they can properly do so or are required by law to do so. Access to documents apart from Act

25 13. (1) A person who wishes to obtain access to a document of an agency or an official document of a Minister may make a request in writing to the agency or Minister for access to the document. Requests for access

30 (2) Subject to sub-section (3), a request shall provide such information concerning the document as is reasonably necessary to enable a responsible officer of the agency, or the Minister, as the case may be, to identify the document.

35 (3) Where a request is expressed to relate to all documents, or to all documents of a specified class, that contain information of a specified kind or relate to a specified subject-matter, compliance with the request may be refused if it would interfere unreasonably with the operations of the agency or the performance by the Minister of his functions, as the case may be, having regard to any difficulty that would exist in identifying, locating or collating documents containing relevant information within the filing system of the agency or of the office of the Minister.

(4) It is the duty of an agency, where practicable, to assist a person who wishes to make a request, or has made a request that does not comply with this section or has not been directed to the appropriate agency or Minister, to make a request in a manner that complies with this section or to direct a request to the appropriate agency or Minister. 5

(5) Where a request in writing is made to an agency for access to a document, the agency shall not refuse to comply with the request on the ground—

- (a) that the request does not comply with sub-section (2); or
- (b) that, in the case of a request of the kind referred to in sub-section (3), compliance with the request would interfere unreasonably with the operations of the agency, 10

without first giving the applicant a reasonable opportunity of consultation with the agency with a view to the making of a request in a form that would remove the ground for refusal. 15

Transfer of requests

**14. (1) Where—**

- (a) a request is made to an agency for access to a document; and
- (b) the document is not in the possession of that agency but is in the possession of another agency or the subject-matter of the document is more closely connected with the functions of another agency than with those of the agency to which the request is made, 20

the agency to which the request is made may transfer the request to the other agency and inform the person making the request accordingly and, if it is necessary to do so in order to enable the other agency to deal with the request, send the document to the other agency. 25

(2) Where a request is transferred to an agency in accordance with this section, it shall be deemed to be a request made to that agency and received at the time at which it was originally received.

(3) In this section “ agency ” includes a Minister.

Requests involving use of computers, &c.

**15. (1) Where—** 30

- (a) a request (including a request of the kind described in sub-section 13 (3)) is duly made to an agency;
- (b) it appears from the request that the desire of the applicant is for information that is not available in discrete form in documents of the agency; and 35
- (c) the agency could produce a written document containing the information in discrete form by—

- (i) the use of a computer or other equipment that is ordinarily available to the agency for retrieving or collating stored information; or 40
- (ii) the making of a transcript from a sound recording held in the agency,

the agency shall deal with the request as if it were a request for access to a written document so produced and containing that information and, for that purpose, this Act applies as if the agency had such a document in its possession.

5 (2) An agency is not required to comply with sub-section (1) if compliance would interfere unreasonably with the operations of the agency.

16. (1) Subject to this Act, where—

Access to documents to be given on request

10 (a) a request is duly made by a person to an agency or Minister for access to a document of the agency or an official document of the Minister; and

(b) any charge that, under the regulations, is required to be paid before access is granted has been paid,

the person shall be given access to the document in accordance with this Act.

15 (2) An agency or Minister is not required by this Act to give access to a document at a time when the document is an exempt document.

17. If a request to an agency or Minister—

Time within which formal requests to be decided

20 (a) is made in writing and is expressed to be made in pursuance of this Act; and

25 (b) is sent by post to the agency or Minister, or delivered to an officer of the agency or a member of the staff of the Minister, at an address of the agency or of the Minister, as the case may be, that is, under the regulations, an address to which requests made in pursuance of this Act may be sent or delivered in accordance with this section,

the agency or Minister shall take all reasonable steps to enable the applicant to be notified of a decision on the request as soon as practicable but in any case not later than 60 days after the day on which the request is received by or on behalf of the agency or Minister.

30 18. (1) Access to a document may be given to a person in one or more of the following forms:

Forms of access

(a) a reasonable opportunity to inspect the document;

(b) provision by the agency or Minister of a copy of the document;

35 (c) in the case of a document that is an article or thing from which sounds or visual images are capable of being reproduced, the making of arrangements for the person to hear or view those sounds or visual images;

40 (d) in the case of a document by which words are recorded in a manner in which they are capable of being reproduced in the form of sound or in which words are contained in the form of

shorthand writing or in codified form, provision by the agency or Minister of a written transcript of the words recorded or contained in the document.

(2) Subject to sub-section (3) and to section 20, where the applicant has requested access in a particular form, access shall be given in that form. 5

(3) If the form of access requested by the applicant—

(a) would interfere unreasonably with the operations of the agency, or the performance by the Minister of his functions, as the case may be; 10

(b) would be detrimental to the preservation of the document or, having regard to the physical nature of the document, would not be appropriate; or

(c) would involve an infringement of copyright (other than copyright owned by the Commonwealth) subsisting in the document, 15

access in that form may be refused and access given in another form.

Deferment  
of access

19. (1) An agency which, or a Minister who, receives a request may defer the provision of access to the document concerned until the happening of a particular event (including the taking of some action required by law or some administrative action), or until the expiration of a specified time, where it is reasonable to do so in the public interest or having regard to normal and proper administrative practices. 20

(2) Where the provision of access to a document is deferred in accordance with sub-section (1), the agency or Minister shall, in informing the applicant of the reasons for the decision, indicate, as far as practicable, the period for which the deferment will operate. 25

Deletion of  
exempt  
matter

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 30

(c) it appears from the request, or the applicant subsequently indicates, that the applicant would wish to have access to such a copy, 35

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 40

(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.

5     **21.** A decision in respect of a request made to an agency may be made, on behalf of the agency, by the responsible Minister or the principal officer of the agency or, subject to the regulations, by an officer of the agency acting within the scope of authority exercisable by him in accordance with arrangements approved by the responsible Minister or the  
10 principal officer of the agency.

Decisions to be made by authorized persons

15     **22.** (1) Where, in relation to a request for access to a document of an agency or an official document of a Minister, a decision is made under this Part that the applicant is not entitled to access to the document in accordance with the request or that provision of access to the document  
be deferred, the agency or Minister shall cause the applicant to be given notice in writing of the decision, and the notice shall—

Reasons and other particulars of decisions to be given

(a) state the findings on any material questions of fact, referring to the material on which those findings were based, and the reasons for the decision;

20     (b) where the decision relates to a document of an agency, state the name and designation of the person giving the decision; and

(c) inform the applicant of his right to apply for a review of the decision.

(2) An agency or Minister is not required to include in a notice under  
25 sub-section (1) any matter that is of such a nature that its inclusion in a document of an agency would cause that document to be an exempt document.

#### PART IV—EXEMPT DOCUMENTS

30     **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—

Documents affecting national security, defence, international relations and relations with States

(a) would prejudice—

(i) the security of the Commonwealth;

(ii) the defence of the Commonwealth;

35     (iii) the international relations of the Commonwealth; or

(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  
40 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). 5

(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. 10

(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. 15

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

Cabinet  
documents

24. (1) A document is an exempt document if it is— 20

- (a) a document that has been submitted to the Cabinet for its consideration or is proposed by a Minister to be so submitted;
- (b) an official record of the Cabinet;
- (c) a document that is a copy of, or of a part of, a document referred to in paragraph (a) or (b); or 25
- (d) a document the disclosure of which would involve the disclosure of any deliberation or decision of the Cabinet, other than a document by which a decision of the Cabinet was officially published.

(2) For the purposes of this Act, a certificate signed by the Secretary to the Department of the Prime Minister and Cabinet certifying that a document is one of a kind referred to in a paragraph of sub-section (1) establishes conclusively that it is an exempt document of that kind. 30

(3) Where a document is a document referred to in paragraph (1) (d) by reason only of matter contained in a particular part or particular parts of the document, a certificate under sub-section (2) 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. 35

(4) Sub-section (1) does not apply to a document by reason of the fact that it was submitted to the Cabinet for its consideration or is proposed by a Minister to be so submitted if it was not brought into existence for the purpose of submission for consideration by the Cabinet. 40

(5) A reference in this section to the Cabinet shall be read as including a reference to a committee of the Cabinet.

25. (1) A document is an exempt document if it is—

Executive  
Council  
documents

- 5 (a) a document that has been submitted to the Executive Council for its consideration or is proposed by a Minister to be so submitted;
- (b) an official record of the Executive Council;
- (c) a document that is a copy of, or of a part of, a document referred to in paragraph (a) or (b); or
- 10 (d) a document the disclosure of which would involve the disclosure of any deliberation or advice of the Executive Council, other than a document by which an act of the Governor-General, acting with the advice of the Executive Council, was officially published.

15 (2) For the purposes of this Act, a certificate signed by the Secretary to the Executive Council, or a person performing the duties of the Secretary, certifying that a document is one of a kind referred to in a paragraph of sub-section (1) establishes conclusively that it is an exempt document of that kind.

20 (3) Where a document is a document referred to in paragraph (1) (d) by reason only of matter contained in a particular part or particular parts of the document, a certificate under sub-section (2) 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.

25 (4) Sub-section (1) does not apply to a document by reason of the fact that it was submitted to the Executive Council for its consideration, or is proposed by a Minister to be so submitted, if it was not brought into existence for the purpose of submission for consideration by the Executive Council.

30 26. (1) Subject to this section, a document is an exempt document if it is a document the disclosure of which under this Act—

Internal  
working  
documents

- 35 (a) would disclose matter in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of an agency or Minister or of the Government of the Commonwealth; and
- (b) would be contrary to the public interest.

40 (2) In the case of a document of the kind referred to in sub-section 7 (1), the matter referred to in paragraph (1) (a) of this section does not include matter that is used or to be used for the purpose of the making of decisions or recommendations referred to in sub-section 7 (1).

(3) This section does not apply to a document by reason only of purely factual material contained in the document.

(4) This section does not apply to—

- (a) reports (including reports concerning the results of studies, surveys or tests) of scientific or technical experts, whether employed within an agency or not, including reports expressing the opinions of such experts on scientific or technical matters; 5
- (b) reports of a prescribed body or organization established within an agency; or
- (c) the record of, or a formal statement of the reasons for, a final decision given in the exercise of a power or of an adjudicative function. 10

(5) Where a decision is made under Part III that an applicant is not entitled to access to a document by reason of the application of this section, the notice under section 22 shall state the ground of public interest on which the decision is based. 15

Documents affecting enforcement or administration of the law

27. A document is an exempt document if its disclosure under this Act would, or would be reasonably likely to—

- (a) prejudice the investigation of a breach or possible breach of the law or the enforcement or proper administration of the law in a particular instance; 20
- (b) prejudice the fair trial of a person or the impartial adjudication of a particular case;
- (c) disclose, or enable a person to ascertain, the identity of a confidential source of information in relation to the enforcement or administration of the law; 25
- (d) disclose methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of, breaches or evasions of the law, the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures; or 30
- (e) endanger the lives or physical safety of persons engaged in or in connexion with law enforcement.

Documents to which secrecy provisions of enactments apply

28. (1) A document is an exempt document if it is a document to which a prescribed provision of an enactment, being a provision prohibiting or restricting disclosure of the document or of information or other matter contained in the document, applies. 35

(2) In this section, “enactment” includes an Ordinance of the Northern Territory or an instrument (including rules, regulations or by-laws) made under such an Ordinance. 40

29. A document is an exempt document if its disclosure under this Act would be contrary to the public interest by reason that the disclosure would have a substantial adverse effect on the financial, property or staff management interests of the Commonwealth or of an agency or would  
 5 otherwise have a substantial adverse effect on the efficient and economical conduct of the affairs of an agency.

Certain documents concerning operations of agencies

30. (1) A document is an exempt document if its disclosure under this Act would involve the unreasonable disclosure of information relating to the personal affairs of any person (including a deceased person).  
 10 (2) Subject to sub-section (3), the provisions of sub-section (1) do not have effect in relation to a request by a person for access to a document by reason only of the inclusion in the document of matter relating to that person.

Documents affecting personal privacy

(3) Where a request is made to an agency or Minister for access to a  
 15 document of the agency, or an official document of the Minister, that contains information of a medical or psychiatric nature concerning the person making the request and it appears to the principal officer of the agency, or to the Minister, as the case may be, that the disclosure of the information to that person might be prejudicial to the physical or mental  
 20 health or well-being of that person, the principal officer or Minister may direct that access to the document, so far as it contains that information, that would otherwise be given to that person is not to be given to him but is to be given instead to a medical practitioner to be nominated by him.

25 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.

Documents affecting legal proceedings or subject to legal professional privilege

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

(3) A document of the kind referred to in sub-section 7 (1) is not an exempt document by virtue of sub-section (2) of this section by reason  
 35 only of the inclusion in the document of matter that is used or to be used for the purpose of the making of decisions or recommendations referred to in sub-section 7 (1).

32. (1) A document is an exempt document if its disclosure under this Act would disclose information concerning a person in respect of his business or professional affairs or concerning a business, commercial or  
 40 financial undertaking, and—

Documents relating to trade secrets, &c.

- (a) the information relates to trade secrets or relates to other matter the disclosure of which under this Act would be reasonably likely to expose the person or undertaking unreasonably to disadvantage; or

- (b) the disclosure of the information under this Act would be contrary to the public interest by reason that the disclosure would be reasonably likely to impair the ability of the Commonwealth or of an agency to obtain similar information in the future.

(2) The provisions of sub-section (1) do not have effect in relation to a request by a person for access to a document by reason only of the inclusion in the document of information concerning that person in respect of his business or professional affairs or of information concerning a business, commercial or financial undertaking of which that person, or a person on whose behalf that person made the request, is the proprietor. 5  
10

Documents affecting national economy

33. A document is an exempt document if its disclosure under this Act would be contrary to the public interest by reason that it would be reasonably likely to have a substantial adverse effect on the national economy.

Documents containing material obtained in confidence

34. A document is an exempt document if its disclosure under this Act would constitute a breach of confidence. 15

Documents disclosure of which would be contempt of Parliament or contempt of court

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 20
- (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. 25

Privileged documents

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. 30  
35

(2) A certificate under sub-section (1) in relation to a particular document shall be deemed to refer also to every document that is substantially identical to that document.

## PART V—REVIEW OF DECISIONS

37. (1) Application may be made to the Administrative Appeals Tribunal for review of a decision refusing to grant access to a document in accordance with a request or deferring the provision of access to a document.

Applications  
to Adminis-  
trative  
Appeals  
Tribunal

(2) Subject to sub-section (3), in proceedings under this Part, the Tribunal has power, in addition to any other power, to review any decision that has been made by an agency or Minister in respect of the request and any decision of the Attorney-General to give a certificate under section 36 that is applicable to the document and to decide any matter in relation to the request that, under this Act, could have been or could be decided by an agency or Minister, and any decision of the Tribunal under this section has the same effect as a decision of the agency or Minister.

(3) Where, in proceedings under this section, it is established that a document is an exempt document, the Tribunal does not have power to decide that access to the document, so far as it contains exempt matter, is to be granted.

(4) The powers of the Tribunal do not extend to reviewing a decision of an agency or Minister, for the purposes of sub-section 26 (1), that the disclosure of a document would be contrary to the public interest.

(5) Where, under a provision of Part IV, it is provided that a certificate of a specified kind establishes conclusively, for the purposes of this Act, that a document is an exempt document and such a certificate has been given in respect of a document, the powers of the Tribunal do not extend to reviewing the decision to give the certificate or the existence of proper grounds for the giving of the certificate.

(6) The powers of the Tribunal under this section extend to matters relating to charges payable under this Act in relation to a request.

38. (1) Where a decision has been made, in relation to a request to an agency, otherwise than by the responsible Minister or principal officer of the agency (not being a decision on a review under this section), the applicant may, within 28 days after the day on which notice of the decision was given to the applicant in accordance with section 22, apply to the principal officer of the agency for a review of the decision in accordance with this section.

Internal  
review

(2) A person is not entitled to apply to the Tribunal for a review of a decision in relation to which sub-section (1) applies unless—

- (a) he has made an application under that sub-section in relation to the decision; and
- (b) he has been informed of the result of the review or a period of 14 days has elapsed since the day on which he made that application.

(3) Where an application for a review of a decision is made to the principal officer in accordance with sub-section (1), he shall forthwith arrange for himself or a person (not being the person who made the decision) authorized by him to conduct such reviews to review the decision and to make a fresh decision on the original application. 5

(4) Where—

(a) an application for a review of a decision has been made in accordance with sub-section (1); and

(b) the applicant has not been informed of the result of the review within 14 days after the day on which he made that application, 10  
an application to the Tribunal for a review of the decision may be treated by the Tribunal as having been made within the time allowed under the *Administrative Appeals Tribunal Act 1975* if it appears to the Tribunal that there was no unreasonable delay in making the application to the Tribunal.

Application  
to Tribunal  
where  
decision  
delayed

39. (1) Subject to this section, where— 15

(a) a request has been made to an agency or Minister in accordance with section 17;

(b) a period of 60 days has elapsed since the day on which the request was received by or on behalf of the agency or Minister; and

(c) notice of a decision on the request has not been received by the 20  
applicant,

the principal officer of the agency or the Minister shall, for the purpose of enabling an application to be made to the Tribunal under section 37, be deemed to have made, on the last day of that period, a decision refusing to grant access to the document. 25

(2) Where a complaint is made to the Ombudsman under the *Ombudsman Act 1976* concerning failure to make and notify to the applicant a decision on a request (whether the complaint was made before or after the expiration of the period referred to in sub-section (1)), an application to the Tribunal under section 37 of this Act by virtue of this section shall not be made before the Ombudsman has informed the applicant of the result of the complaint in accordance with section 12 of the *Ombudsman Act 1976*. 30

(3) Where such a complaint is made before the expiration of the period referred to in sub-section (1), the Ombudsman, after having 35  
investigated the complaint, may, if he is of the opinion that there has been unreasonable delay by an agency in connexion with the request, grant to the applicant a certificate certifying that he is of that opinion, and, if the Ombudsman does so, the principal officer of the agency or the Minister, as the case requires, shall, for the purposes of enabling applica- 40  
tion to be made to the Tribunal under section 37, be deemed to have made, on the date on which the certificate is granted, a decision refusing to grant access to the document.

(4) The Ombudsman shall not grant a certificate under sub-section (3) where the request to which the complaint relates was made to, or has been referred to, a Minister and is awaiting decision by him.

(5) Where, after an application has been made to the Tribunal by virtue of this section but before the Tribunal has finally dealt with the application, a decision, other than a decision to grant, without deferment, access to the document in accordance with the request, is given, the Tribunal may, at the request of the applicant, treat the proceedings as extending to a review of that decision in accordance with this Part.

(6) Before dealing further with an application made by virtue of this section, the Tribunal may, on the application of the agency or Minister concerned, allow further time to the agency or Minister to deal with the request.

40. For the purposes of this Part and of the application of the *Administrative Appeals Tribunal Act 1975* in respect of proceedings under this Part—

(a) a decision given by a person on behalf of an agency shall be deemed to have been given by the agency; and

(b) in the case of proceedings by virtue of section 39, the agency or Minister to which or to whom the request was made shall be a party to the proceedings.

41. In proceedings under this Part, the agency or Minister to which or to whom the request was made has the onus of establishing that a decision given in respect of the request was justified or that the Tribunal should give a decision adverse to the applicant.

42. Where, in relation to a request, the applicant has been given a notice in writing complying with section 22, section 28 of the *Administrative Appeals Tribunal Act 1975* does not apply to the decision on that request.

43. In proceedings under this Part, the Tribunal shall make such order under sub-section 35 (2) of the *Administrative Appeals Tribunal Act 1975* as it thinks necessary having regard to the nature of the proceedings and, in particular, to the necessity of avoiding the disclosure to the applicant, in the proceedings, of exempt matter.

44. (1) Where there are proceedings before the Tribunal under this Act in relation to a document that is claimed to be an exempt document, section 37 of the *Administrative Appeals Tribunal Act 1975* does not apply in relation to the document but if the Tribunal is not satisfied, by evidence on affidavit or otherwise—

(a) that the document is an exempt document; and

Parties

Onus

Application of section 28 of Administrative Appeals Tribunal Act

Orders under section 35 of Administrative Appeals Tribunal Act

Production of exempt documents

- (b) in the case of a document that is an exempt document by virtue of a certificate of the Attorney-General under section 36, that the giving of the certificate was justified,

it may require the document to be produced for inspection by members of the Tribunal only and if, upon the inspection, the Tribunal is satisfied that the document is an exempt document and, in the case of a document referred to in paragraph (b), that the giving of the certificate was justified, the Tribunal shall return the document to the person by whom it was produced without permitting any person other than a member of the Tribunal as constituted for the purposes of the proceeding, or a member of the staff of the Tribunal in the course of the performance of his duties as a member of that staff, to have access to the document or disclosing the contents of the document to any such person. 5 10

(2) The Tribunal may require the production, for inspection by members of the Tribunal only, of an exempt document for the purposes of determining whether it is practicable for an agency or a Minister to grant access to a copy of the document with such deletions as to make the copy not an exempt document and, where an exempt document is produced by reason of such a requirement, the Tribunal shall, after inspection of the document by the members of the Tribunal as constituted for the purposes of the proceeding, return the document to the person by whom it was produced without permitting any person other than such a member of the Tribunal, or a member of the staff of the Tribunal in the course of the performance of his duties as a member of that staff, to have access to the document or disclosing the contents of the document to any such person. 15 20 25

(3) Notwithstanding sub-sections (1) and (2) but subject to sub-section (4), the Tribunal is not empowered, in any proceedings, to require the production of a document in respect of which there is in force a certificate under section 23, 24 or 25.

(4) Where a certificate of a kind referred to in sub-section (3) identifies a part or parts of the document concerned in the manner provided in sub-section 23 (3), 24 (3) or 25 (3), sub-section (3) does not prevent the Tribunal from requiring the production, in proceedings before the Tribunal under this Act in relation to the document, of a copy of so much of the document as is not included in the part or parts so identified. 30 35

(5) Sub-sections (1) and (2) apply in relation to a document in the possession of a Minister that is claimed by the Minister not to be an official document of the Minister as if references in those sub-sections to an exempt document were references to a document in the possession of a Minister that is not an official document of the Minister. 40

(6) Sub-section (1) or (2) does not operate so as to prevent the Tribunal from causing a document produced in accordance with that sub-section to be sent to the Federal Court of Australia in accordance with section 46 of the *Administrative Appeals Tribunal Act 1975*, but, where such a document is so sent to the Court, the Court shall do all things necessary to 45

ensure that the contents of the document are not disclosed (otherwise than in accordance with this Act) to any person other than a member of the Court as constituted for the purpose of the proceeding before the Court or a member of the staff of the Court in the course of the performance of his  
5 duties as a member of that staff.

45. In proceedings before the Tribunal under this Part, evidence of a certificate under section 23, 24 or 25, including evidence of the identity or nature of the document to which the certificate relates, may be given by affidavit or otherwise and such evidence is admissible without production  
10 of the certificate or of the document to which it relates.

Evidence of certificates

#### PART VI—MISCELLANEOUS

46. (1) Where access has been given to a document and—  
 (a) the access was required by this Act to be given; or  
 (b) the access was authorized by a Minister, or by an officer having  
15 authority, in accordance with section 21 or 38, to make decisions in respect of requests, in the *bona fide* belief that the access was required by this Act to be given,

Protection against actions for defamation or breach of confidence

no action for defamation or breach of confidence lies, by reason of the authorizing or giving of the access, against the Commonwealth or an agency  
20 or against the Minister or officer who authorized the access or any person who gave the access.

(2) The giving of access to a document (including an exempt document) in consequence of a request shall not be taken, for the purposes of the law relating to defamation or breach of confidence, to constitute an authoriz-  
25 ation or approval of the publication of the document or of its contents by the person to whom the access was given.

47. Where access has been given to a document and—  
 (a) the access was required by this Act to be given; or  
 (b) the access was authorized by a Minister, or by an officer having  
30 authority, in accordance with section 21 or 38, to make decisions in respect of requests, in the *bona fide* belief that the access was required by this Act to be given,

Protection in respect of offences

neither the person authorizing the access nor any person concerned in the giving of the access is guilty of a criminal offence by reason only of the  
35 authorizing or giving of the access.

48. (1) The Minister administering this Act shall, as soon as practicable after the end of each year ending on 31 December, prepare a report on the operation of this Act during that year and cause a copy of the report to be laid before each House of the Parliament.

Reports to Parliament

(2) Each agency shall, in relation to the agency, and each Minister shall, in relation to his official documents, furnish to the Minister administering this Act such information as he requires for the purposes of the preparation of reports under this section and shall comply with any prescribed requirements concerning the furnishing of that information and the keeping of records for the purposes of this section. 5

**Regulations**

**49.** (1) The Governor-General may make regulations, not inconsistent with this Act, prescribing all matters that by this Act are required or permitted to be prescribed, or are necessary or convenient to be prescribed for carrying out or giving effect to this Act, and in particular, making provision for or in relation to— 10

- (a) the making of charges of amounts, or at rates, fixed by or in accordance with the regulations for access to documents (including the provision of copies or transcripts) in accordance with this Act, including requiring deposits on account of such charges; and 15
- (b) the officers who may give decisions on behalf of an agency.

(2) Where, as a result of a request, access is given to an exempt document, regulations under this Act relating to charges apply as if the access had been given in accordance with this Act.

## **The Archives Bill 1978**

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA  
THE SENATE

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*(As read a first time)*

### **ARCHIVES BILL 1978**

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1978

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

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(Presented pursuant to leave granted and read 1°, 9 June 1978)

(ATTORNEY-GENERAL, SENATOR DURACK)

## A BILL

FOR

## AN ACT

Relating to the preservation and use of archival resources, and for related purposes.

**No. 110**

BE IT ENACTED by the Queen, and the Senate and House of Representatives of the Commonwealth of Australia, as follows:

### PART I—PRELIMINARY

1. This Act may be cited as the *Archives Act 1978*. Short title
- 5 2. The several Parts of this Act shall come into operation on such respective dates as are fixed by proclamation. Commencement
3. (1) In this Act, unless the contrary intention appears— Interpretation
- “Archives” means the Australian Archives established by this Act;
- “authority of the Commonwealth” means—
- 10 (a) an authority, body, tribunal or organization, whether incorporated or unincorporated, established for a public purpose—
- 15 (i) by, or in accordance with the provisions of, an Act, regulations made under an Act or a law of a Territory;
- (ii) by the Governor-General; or
- (iii) by a Minister;

- (b) the holder of a prescribed office under the Commonwealth; or
- (c) a prescribed company or association over which the Commonwealth is in a position to exercise control, but does not include a court; 5
- “Chairman” means the Chairman of the Council;
- “Commonwealth institution” means—
- (a) a body, other than a State, established by or in accordance with the Constitution, including the Senate, the House of Representatives and the High Court; 10
- (b) a Department;
- (c) a Federal court or a court of a Territory;
- (d) an authority of the Commonwealth; or
- (e) the Administration of a Territory;
- “Commonwealth record” means— 15
- (a) a record that is the property of the Commonwealth or of a Commonwealth institution; or
- (b) a record that is deemed to be a Commonwealth record by virtue of a regulation under sub-section (6) or by virtue of section 23, 20
- but does not include a record that is exempt material or a register or guide maintained in accordance with Part VIII;
- “Council” means the Advisory Council on Australian Archives established by this Act;
- “current Commonwealth record” means a Commonwealth record 25 that is required to be readily available for the purposes of a Commonwealth institution, other than purposes under this Act;
- “Department” means a Department of the Australian Public Service or a Department of the Public Service of the Northern Territory;
- “Deputy Chairman” means the Deputy Chairman of the Council; 30
- “Director-General” means the person for the time being occupying the office, or performing the duties of the office, of Director-General of the Australian Archives under the *Public Service Act* 1922;
- “exempt material” means— 35
- (a) material included in the war relics of the Commonwealth within the meaning of the *Australian War Memorial Act* 1962, other than material to which a regulation under sub-section (6) applies;
- (b) material in the collection of library material maintained 40 by the National Library of Australia;
- (c) material in the collection of works of art maintained by the Australian National Gallery; or

(d) material in a collection maintained by an institution declared by the regulations to be a custodial institution for the purposes of this definition,

5 other than material (if any) that came to be included in those war relics or to be in a collection referred to in paragraph (b), (c) or (d) by reason of a contravention of section 24;

“material” means records and other objects;

“material of the Archives” means—

10 (a) records in the custody of the Archives (other than current Commonwealth records relating to the administration of the Archives); or

(b) an object, other than a record, that forms part of the archival resources relating to Australia and is in the custody of the Archives,

15 and includes material kept in the custody of a person in accordance with arrangements made under section 47;

“object” does not include a building or other structure or a vessel, aircraft or vehicle, other than a prescribed vessel, aircraft or vehicle;

20 “Parliamentary Department” means the Department of the Senate, the Department of the House of Representatives, the Department of the Parliamentary Library, the Department of the Parliamentary Reporting Staff or the Joint House Department;

“person” includes a Commonwealth institution or an organization;

25 “record” means a document (including any written or printed material) or object (including a sound recording, coded storage device, magnetic tape or disc, microform, photograph, film, map, plan or model or a painting or other pictorial or graphic work) that is, or has been, kept by reason of any information or matter that it contains or can be obtained from it or by reason of its connexion with any event, person, circumstance or thing;

30 “responsible Minister”, in relation to a Commonwealth record, means the Minister to whose ministerial responsibilities the record is most closely related;

35 “Royal Commission” means a Commissioner or Commissioners appointed by the Governor-General in the name of the Queen to make inquiry and report upon any matter;

“Tribunal” means the Administrative Appeals Tribunal.

40 (2) For the purposes of this Act, the archival resources of the Commonwealth consist of such Commonwealth records and other material as are of national significance or public interest and relate to—

(a) the history or government of Australia;

(b) the legal basis, origin, development, organization or activities of the Commonwealth or a Commonwealth institution;

- (c) a person who is, or has at any time been, associated with a Commonwealth institution;
- (d) the history or government of a Territory; or
- (e) an international or other organization the membership of which includes, or has included, the Commonwealth or a Commonwealth institution, 5

but do not include—

- (f) material that, in the opinion of the Minister, ought to be in the archives of another country or in the archives of an international organization; 10
- (g) material, not being—
  - (i) Commonwealth records;
  - (ii) property referred to in section 85 of the Constitution; or
  - (iii) material transferred to the Commonwealth by a State under a law or agreement, 15
 that relates only or principally to the history or government of a State or of a Colony that became part of the Commonwealth;
- (h) material, other than Commonwealth records, relating only to a place that has been, but has ceased to be, a Territory; or
- (j) exempt material. 20

(3) For the purposes of this Act, the Defence Force shall be deemed to be comprised in the Department of Defence.

(4) For the purposes of this Act, each of the following Forces shall be deemed to be an authority of the Commonwealth, namely—

- (a) the Commonwealth Police Force; 25
- (b) the Police Force of the Australian Capital Territory; and
- (c) the Police Force of the Northern Territory.

(5) For the purposes of this Act, a record held by or on behalf of the Parliament or a House of the Parliament shall be taken to be the property of the Commonwealth. 30

(6) The regulations may make provision under which, in prescribed cases or circumstances, records of which the Commonwealth or a Commonwealth institution has, or is entitled to have, possession are deemed to be Commonwealth records for all or any of the purposes of this Act.

(7) For the purposes of this Act, a record is in the open access period 35 if a period of 30 years has elapsed since the end of the year ending on 31 December in which the record came into existence.

PART II—ESTABLISHMENT, FUNCTIONS AND POWERS OF  
THE AUSTRALIAN ARCHIVES

5. (1) There shall be, within the Department administered by the Minister, an organization by the name of the Australian Archives.
- 5 (2) The functions of the Australian Archives are, subject to this Act—
- (a) to ensure the conservation and preservation of the existing and future archival resources of the Commonwealth;
- (b) to encourage and foster the preservation of all other archival resources relating to Australia;
- 10 (c) to promote the keeping of current Commonwealth records in an efficient and economical manner and in a manner that will facilitate their use as part of the archival resources of the Commonwealth by providing advice and other assistance to Commonwealth institutions;
- 15 (d) to ascertain the material that constitutes the archival resources of the Commonwealth;
- (e) to have the custody and management of Commonwealth records, other than current Commonwealth records, that—
- 20 (i) are part of the archival resources of the Commonwealth;
- (ii) ought to be examined to ascertain whether they are part of those archival resources; or
- (iii) although they are not part of those archival resources, are required to be permanently or temporarily preserved;
- 25 (f) to seek to obtain, and to have the custody and management of, material, including Commonwealth records, not in the custody of a Commonwealth institution, that forms part of the archival resources of the Commonwealth and, in the opinion of the Director-General, ought to be in the custody of the Archives;
- 30 (g) with the approval of the Minister, to accept and have the custody and management of material that, though not part of the archival resources of the Commonwealth, forms part of archival resources relating to Australia and, in the opinion of the Minister, ought to be in the custody of the Archives in order to ensure its preservation or for any other reason;
- 35 (h) to encourage, facilitate, publicise and sponsor the use of archival material;
- (j) to make Commonwealth records available for public access in accordance with this Act and to take part in arrangements for other access to Commonwealth records;
- 40 (k) to conduct research, and provide advice, in relation to the management and preservation of records and other archival material;
- (l) to develop and foster the co-ordination of activities relating to the preservation and use of the archival resources of the Commonwealth and other archival resources relating to Australia; and

Establishment and functions of Australian Archives

- (m) with the approval of the Minister, and in accordance with arrangements made with a person responsible for exempt material, to perform any of the foregoing functions in relation to exempt material as if that material formed part of the archival resources of the Commonwealth. 5

(3) Nothing in this Part derogates from the powers and functions of the Public Service Board or any other Commonwealth institution in relation to the keeping of current Commonwealth records.

**Powers of  
Archives**

6. (1) The Archives may do all things that are necessary or convenient to be done for or in connexion with the performance of its functions and, in particular, without limiting the generality of the foregoing, may— 10

- (a) establish and control repositories or other facilities to house or exhibit material of the Archives and, in association with a State or other person, control repositories or other facilities in which material of the Archives is housed or exhibited; 15
- (b) undertake the survey, appraisal, accessioning, arrangement, description and indexing of Commonwealth records;
- (c) make arrangements for the acquisition by the Commonwealth of, or of copyright in relation to, or arrangements relating to the custody of, material that forms part of the archival resources of the Commonwealth; 20
- (d) chronicle and record matters relating to the structure and functioning of Commonwealth institutions or other matters of archival significance and make records for the purpose of adding to the archival resources of the Commonwealth; 25
- (e) make copies, by microfilming or otherwise, of archival material, but not so as to infringe copyright (other than copyright owned by the Commonwealth) subsisting in the material;
- (f) arrange for the publication of material forming part of the archival resources of the Commonwealth or works based on such material, but not so as to infringe copyright (other than copyright owned by the Commonwealth) subsisting in the material or works; 30
- (g) publish indices of, and other guides to, archival material; 35
- (h) authorize the disposal or destruction of Commonwealth records;
- (j) on request, assist Commonwealth institutions in the training of persons responsible for the keeping of current Commonwealth records;
- (k) train, or assist in the training of, persons, other than persons responsible for the keeping of current Commonwealth records, for work in connexion with records and other archival material; 40
- (l) obtain and maintain equipment for use in retrieving, or otherwise obtaining, information from records; and
- (m) provide information and facilities for persons using the material of the Archives. 45

(2) Where, in the performance of its functions, the Archives enters into arrangements to accept the custody of records from a person other than a Commonwealth institution, those arrangements may provide for the extent (if any) to which the Archives or other persons are to have access to those records and any such arrangements have effect notwithstanding anything contained in Division 3 of Part V.

### PART III—THE DIRECTOR-GENERAL AND STAFF OF THE ARCHIVES

7. (1) There shall be a Director-General of the Australian Archives, who shall hold office under the *Public Service Act* 1922. Director-General

(2) The Director-General, in addition to exercising any powers or performing any duties expressly conferred or imposed on him by this Act, may, in the name of the Archives, exercise any powers and perform any duties which are by this Act expressed to be conferred or imposed on the Archives.

(3) The Minister may give directions, not inconsistent with this Act, to the Director-General in relation to the exercise of his powers, and the performance of his duties, under this Act.

8. (1) The Director-General may, either generally or as otherwise provided by the instrument of delegation, by writing under his hand, delegate to a person any of his powers under this Act, other than this power of delegation. Delegation  
by Director-  
General

(2) A power so delegated, when exercised by the delegate, shall, for the purposes of this Act, be deemed to have been exercised by the Director-General.

(3) A delegation under this section does not prevent the exercise of a power by the Director-General.

9. The staff of the Archives shall be persons appointed or employed under the *Public Service Act* 1922. Staff

### 30 PART IV—THE ADVISORY COUNCIL ON AUSTRALIAN ARCHIVES

10. (1) There is established by this Act a Council by the name of the Advisory Council on Australian Archives. Advisory  
Council on  
Australian  
Archives

(2) The Council shall consist of—

- 35 (a) the Director-General;
- (b) a Senator chosen by the Senate;
- (c) a member of the House of Representatives chosen by that House;  
and
- (d) 10 other members.

40 (3) The members referred to in paragraph (2) (d) shall be appointed by the Minister.

(4) A member chosen by either House of the Parliament holds office, subject to this Act, for such period, not exceeding 3 years, as is fixed by that House at the time of his choice.

(5) A member appointed by the Minister holds office, subject to this Act, for such period, not exceeding 3 years, as the Minister specifies in the instrument of his appointment. 5

(6) A member chosen by either House of the Parliament or appointed by the Minister is eligible for further choice or re-appointment.

(7) The performance of the functions of the Council is not affected by reason of there being a vacancy or vacancies in the membership of the Council. 10

**Functions of Council**

**11.** (1) The Council shall furnish advice to the Minister and the Director-General with respect to matters to which the functions of the Archives relate.

(2) The Minister or the Director-General may refer any matter of the kind referred to in sub-section (1) to the Council for advice and the Council may, if it thinks fit, consider and advise the Minister or the Director-General on a matter of that kind of its own motion. 15

**Chairman and Deputy Chairman of Council**

**12.** (1) The Minister shall appoint a member to be Chairman of the Council and another member to be Deputy Chairman of the Council. 20

(2) The Director-General is not eligible to be appointed as the Chairman or Deputy Chairman.

**Deputies of members**

**13.** (1) The Director-General may appoint a member of the staff of the Archives to be his deputy for the purposes of this Part.

(2) A member chosen by the Senate or by the House of Representatives may appoint a Senator or a member of that House, as the case may be, to be his deputy. 25

(3) The Minister may appoint a person to be a deputy of a member referred to in paragraph 10 (2) (d).

(4) The deputy of a member is, in the event of the absence of the member of whom he is the deputy from a meeting of the Council, entitled to attend that meeting and, when so attending, shall be deemed to be a member of the Council. 30

**Remuneration and allowances of members**

**14.** (1) A member referred to in paragraph 10 (2) (d), or the deputy of such a member, shall be paid such remuneration as is determined by the Remuneration Tribunal but, if no determination of that remuneration by the Tribunal is in operation, he shall be paid such remuneration as is prescribed. 35

(2) A member referred to in paragraph 10 (2) (d), or the deputy of such a member, shall be paid such allowances as are prescribed. 40

(3) A member referred to in paragraph 10 (2) (b) or (c), or the deputy of such a member, shall be reimbursed such expenses as he reasonably incurs by reason of his attendance at meetings of the Council or of his engagement, with the approval of the Council, on the affairs of the Council.

(4) This section has effect subject to the *Remuneration Tribunals Act 1973*.

15 (1) The Minister may terminate the appointment of a member, being a member appointed by the Minister, by reason of misbehaviour or physical or mental incapacity. Termination of office of member

(2) If a member appointed by the Minister is absent, except on leave granted by the Council, from 3 consecutive meetings of the Council, the Minister may terminate the appointment of the member.

15 (3) A member chosen by either House of the Parliament may be removed from office by that House.

(4) If a member chosen by either House of the Parliament or a deputy of such a member ceases to be a member of that House, he shall cease to be a member of the Council or a deputy of such a member.

20 (5) For the purposes of sub-section (4), a member of either House of the Parliament shall be deemed not to have ceased to be a member of that House while he continues to be entitled to the Parliamentary allowances that became payable to him as such a member.

16. (1) A member appointed by the Minister may resign his office by writing signed by him and delivered to the Minister. Resignation of member

25 (2) A member chosen by the Senate may resign his office by writing signed by him and delivered to the President of the Senate.

(3) A member chosen by the House of Representatives may resign his office by writing signed by him and delivered to the Speaker of the House of Representatives.

30 17. (1) The Council shall hold such meetings as are necessary for the performance of its functions. Meetings of the Council

(2) The Chairman may at any time convene a meeting of the Council.

(3) The Chairman shall, on receipt of a request in writing signed by 2 other members of the Council, convene a meeting of the Council.

35 (4) At a meeting of the Council a majority of the members of the Council constitute a quorum.

(5) The Chairman shall preside at all meetings of the Council at which he is present.

(6) If, at a meeting of the Council, the Chairman is not present but the Deputy Chairman is present, the Deputy Chairman shall preside at the meeting.

(7) If neither the Chairman nor the Deputy Chairman is present at a meeting of the Council, the members present shall elect one of their number to preside at the meeting. 5

(8) Questions arising at a meeting of the Council shall be determined by a majority of the votes of the members present and voting.

(9) The member presiding at a meeting of the Council has a deliberative vote and, in the event of an equality of the votes, also has a casting vote. 10

(10) In sub-sections (2) and (3), a reference to the Chairman shall, if there is no Chairman or the Chairman is absent from Australia or unable to perform the duties of his office, be read as a reference to the Deputy Chairman.

## PART V—COMMONWEALTH RECORDS 15

### *Division 1—Preliminary*

Non-  
application  
to certain  
records

18. (1) Divisions 2 and 3 do not apply to—

- (a) records of the Governor-General or of a former Governor-General;
- (b) records in the possession of the Senate, the House of Representatives or a Parliamentary Department; or 20
- (c) records in the possession of a court or the registry of a court.

(2) For the purposes of this Act, a certificate signed by the Official Secretary to the Governor-General, or a person performing the duties of the Official Secretary, certifying that a record is one of a kind referred to in paragraph (1) (a) establishes conclusively that it is such a record. 25

Cabinet  
records

19. (1) Divisions 2 and 3 do not apply to—

- (a) a record that has been submitted to the Cabinet for its consideration or is or was proposed by a Minister to be so submitted;
- (b) an official record of the Cabinet; 30
- (c) a copy of, or of a part of, a record referred to in paragraph (a) or (b); or
- (d) a record the disclosure of which would involve the disclosure of any deliberation or decision of the Cabinet, other than a record by which a decision of the Cabinet was officially published. 35

(2) For the purposes of this Act, a certificate signed by the Secretary to the Department of the Prime Minister and Cabinet certifying that a record is one of a kind referred to in sub-section (1) establishes conclusively that it is such a record.

(3) Where a record is a record referred to in paragraph (1) (d) by reason only of matter contained in a particular part or particular parts of the record, a certificate under sub-section (2) in respect of the record shall identify that part or those parts of the record as containing the matter by reason of which the certificate is given.

(4) Sub-section (1) does not apply in relation to a record by reason of the fact that it was submitted to the Cabinet for its consideration, or is or was proposed by a Minister to be so submitted, if it was not brought into existence for the purpose of submission for consideration by the Cabinet.

(5) A reference in this section to the Cabinet shall be read as including a reference to a committee of the Cabinet.

20. (1) Divisions 2 and 3 do not apply to—

(a) a record that has been submitted to the Executive Council for its consideration or is or was proposed by a Minister to be so submitted;

(b) an official record of the Executive Council;

(c) a copy of, or of a part of, a record referred to in paragraph (a) or (b); or

(d) a record the disclosure of which would involve the disclosure of any deliberation or advice of the Executive Council, other than a record by which an act of the Governor-General, acting with the advice of the Executive Council, was officially published.

(2) For the purposes of this Act, a certificate signed by the Secretary to the Executive Council, or a person performing the duties of the Secretary, certifying that a record is one of a kind referred to in sub-section (1) establishes conclusively that it is such a record.

(3) Where a record is a record referred to in paragraph (1) (d) by reason only of matter contained in a particular part or particular parts of the record, a certificate under sub-section (2) in respect of the record shall identify that part or those parts of the record as containing the matter by reason of which the certificate is given.

(4) Sub-section (1) does not apply in relation to a record by reason of the fact that it was submitted to the Executive Council for its consideration, or is or was proposed by a Minister to be so submitted, if it was not brought into existence for the purpose of submission for consideration by the Executive Council.

21. (1) A person having the control of the custody of any records referred to in section 18, 19 or 20 may enter into arrangements with the Archives for the Archives to have or retain the custody of those records.

Executive  
Council  
records

Archives  
may be  
given  
custody of  
exempt  
Common-  
wealth  
records

(2) Arrangements referred to in sub-section (1) relating to the custody of records may provide for the extent (if any) to which the Archives or other persons are to have access to those records.

Records to which secrecy provisions of enactments apply

22. The regulations may provide that all or any of the provisions of Divisions 2 and 3 do not apply, or apply only to a specified extent, to or in relation to a record to which a prescribed provision of a law of the Commonwealth or of a Territory, being a provision prohibiting or restricting disclosure of the record or of information or matter contained in the record, applies. 5

Records of Royal Commissions

23. (1) This section applies to the records kept by a Royal Commission, whether the inquiry was commenced or was completed before or after the commencement of this Act. 10

(2) The Commonwealth is entitled to the possession of the records kept by a Royal Commission that are no longer required for the purposes of the Commission, and all such records shall be deemed to be Commonwealth records for the purposes of this Act. 15

(3) Records referred to in sub-section (2) shall be kept in such custody as the responsible Minister directs and the Archives is not entitled to the custody of any such records except in accordance with such a direction.

(4) A direction given by a Royal Commission prohibiting the publication of any document or matter does not apply to the provision of public access under this Act to any records that are in the open access period or to the publication by any person of any records which are open to public access in accordance with this Act. 20

(5) For the purposes of this Act, the Minister administering the *Royal Commissions Act* 1902 shall be deemed to be the responsible Minister in relation to the records of a Royal Commission. 25

(6) Where a Royal Commission has conducted an inquiry by virtue of a commission issued by the Governor of a State in conjunction with its inquiry under the commission issued by the Governor-General, sub-sections (2) and (3) apply only to such of the records of the Royal Commission as are determined by agreement between the Commonwealth and the State. 30

*Division 2—Dealings with Commonwealth Records*

Disposal, destruction, &c., of Commonwealth records

24. (1) Subject to this Part, a person shall not— 35  
 (a) destroy or otherwise dispose of;  
 (b) transfer, or be a party to arrangements for the transfer of, the custody of;

(c) transfer, or be a party to arrangements for the transfer of, the ownership of; or

(d) damage or alter,

a Commonwealth record.

5 Penalty: \$200.

(2) Sub-section (1) does not apply to anything done—

(a) as required by any law;

(b) with the permission of the Archives or in accordance with a practice or procedure approved by the Archives;

10 (c) in accordance with a normal administrative practice other than a practice of a Department or authority of the Commonwealth as to which the Archives has notified the Department or Authority that it disapproves of the practice; or

15 (d) for the purpose of placing Commonwealth records that are not in the custody of the Commonwealth or of a Commonwealth institution in the custody of the Commonwealth or of a Commonwealth institution that is entitled to custody of the records.

(3) Sub-section (1) does not apply to the destruction of a Commonwealth record, being a record to which sub-section 47 (1), 70 (1) or 107  
20 (1) of the *Copyright Act* 1968 applies, where the Director-General has declined to consent to the delivery of the record to the Australian Archives.

(4) This section does not authorize the Archives to permit the destruction or other disposal of a Commonwealth record that is in the possession of, or has been received into the custody of the Archives from, a Commonwealth institution without the consent of that institution or of a Commonwealth institution that has succeeded to the relevant functions of that institution.  
25

(5) For the purposes of the application of sub-section (1) to a record of a kind used by means of any mechanical or electronic device or equipment, including a computer, any treatment or modification of the record that would prevent the obtaining from the record of information or matter that could previously have been obtained from the record shall be deemed to be destruction of the record.  
30

35 25. (1) Where a Commonwealth record has been in existence for more than 25 years, a person shall not add to, or otherwise alter, the record without the approval of the Archives. Alteration of Commonwealth records

Penalty: \$200.

(2) Sub-section (1) does not apply to anything done—

(a) as required by any law; or

40 (b) with the permission of the Archives or in accordance with practice or procedure approved by the Archives.

Transfer of  
Common-  
wealth  
records to  
Archives

26. (1) Subject to this Division, when a Commonwealth record in the possession of a Commonwealth institution has ceased (whether before or after the commencement of this Act) to be required to be readily available for the purposes of a Commonwealth institution, the person responsible for the custody of the record shall, unless the record is lawfully destroyed, cause it to be transferred to the custody of the Archives in accordance with arrangements approved by the Archives.

5

(2) Subject to this Division, where a Commonwealth record in the possession of a Commonwealth institution other than the Archives has been in existence as a Commonwealth record for 25 years, the Commonwealth institution shall cause the record to be transferred to the custody of the Archives as soon as it is practicable to do so.

10

Archives to  
have access  
to records

27. Subject to this Division, the Archives is entitled, for the purposes of this Act, to full and free access, at all reasonable times, to all Commonwealth records in the custody of a Commonwealth institution other than the Archives.

15

Exemption  
of certain  
records

28. (1) A Commonwealth institution, or a person having authority to act on behalf of a Commonwealth institution, may, with the concurrence of the Director-General, determine that a Commonwealth record, or each record in a class of Commonwealth records, being a record or class of records in the possession of the Commonwealth institution or relating to the functions of the Commonwealth institution, is—

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- (a) a record that is not required to be transferred to the custody of the Archives under section 26; or
- (b) a record to which the Archives is not to be entitled to have access under section 27 or is not to be entitled to have access under that section otherwise than on specified conditions to be observed by the Archives,

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and such a determination has effect for such period as is specified in the determination, but may at any time be revoked by the Commonwealth institution or a person having authority to act on behalf of the Commonwealth institution.

30

(2) Notwithstanding sub-section (1), the responsible Minister may determine that a Commonwealth record, or each record in a class of Commonwealth records, is—

35

- (a) a record that is not required to be transferred to the custody of the Archives under section 26; or
- (b) a record to which the Archives is not to be entitled to have access under section 27 or is not to be entitled to have access under that section otherwise than on specified conditions to be observed by the Archives,

40

and such a determination takes effect upon its being notified to the Archives and has effect for such period as is specified in the determination but may at any time be revoked by the responsible Minister.

(3) The Archives may agree with a Commonwealth institution that records accepted into the custody of the Archives are to be held on certain conditions to be observed by the Archives, not being conditions inconsistent with Division 3.

5 (4) Where—

(a) the Archives seeks access to a Commonwealth record that is not in the custody of the Archives; and

10 (b) a person responsible for the custody of the record considers that it might be appropriate for a determination to be made under sub-section (2) applying paragraph (2) (b) to the record,

the person so responsible may forthwith notify the Archives that he so considers and take appropriate action for enabling consideration to be given by the responsible Minister to the making of such a determination.

15 (5) Where a notification under sub-section (4) has been given in respect of a record, the Archives is not entitled to have access to the record for a period of one month from the date on which the notification was given, but, if the notification is withdrawn by the person responsible for the custody of the record before the expiration of that period, this sub-section ceases to have effect in relation to the record.

20 (6) A record that is in the open access period is not, by virtue of a determination under sub-section (1), a record to which paragraph (1) (b) applies unless there is in force a certificate of a Minister under section 32 in respect of the record.

25 (7) A record in the open access period is not, by virtue of a determination under sub-section (2), a record to which paragraph (2) (b) applies unless there is in force a certificate of a Minister under section 32 in respect of the record.

30 (8) The concurrence of the Director-General is not required for the making by the Director-General of the Australian Security Intelligence Organization of a determination under sub-section (1).

35 29. (1) The Archives shall ensure that all Commonwealth records received into its custody from a Commonwealth institution are made available, as reasonably required, for use by, or at the direction of, that institution, or a Commonwealth institution that has succeeded to the relevant functions of that institution.

Commonwealth records to be available to Commonwealth institutions

40 (2) Where a record that has been in existence for more than 25 years is made available to a Commonwealth institution under sub-section (1), the record shall not be made available in a manner that involves its leaving the custody of the Archives except as necessary for the proper conduct of the business of the Commonwealth institution.

*Division 3—Access to Commonwealth Records*Open access  
period

30. (1) Subject to this Part, the Archives shall cause all Commonwealth records in the open access period that are in the custody of the Archives or of a Commonwealth institution, other than exempt records, to be made available for public access. 5

(2) The Archives may withhold a Commonwealth record or a class of Commonwealth records from public access for a reasonable time pending examination in accordance with section 33.

Exempt  
records

31. For the purposes of this Division, a Commonwealth record is an exempt record if it contains information or matter of any of the following kinds: 10

- (a) information or matter the disclosure of which under this Division would prejudice the defence, security or international relations of the Commonwealth;
- (b) 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, the disclosure of which under this Division would constitute a breach of that confidence; 15 20
- (c) information or matter the disclosure of which under this Division would prejudice the relations between the Commonwealth and any State;
- (d) information or matter the disclosure of which under this Division would have a substantial adverse effect on the financial or property interests of the Commonwealth or of a Commonwealth institution; 25
- (e) information or matter the disclosure of which under this Division would be reasonably likely to have a substantial adverse effect on the interests of the Commonwealth or of a Commonwealth institution in or in relation to pending or likely legal proceedings; 30
- (f) information or matter the disclosure of which under this Division would constitute a breach of confidence;
- (g) information or matter the disclosure of which under this Division would— 35
  - (i) prejudice the enforcement or proper administration of the law in a particular case;
  - (ii) prejudice the fair trial of a person or the impartial adjudication of a particular case;
  - (iii) contrary to the public interest, disclose, or enable a person to ascertain, the identity of a confidential source of information in relation to the enforcement or administration of the law; 40

- (iv) disclose methods or procedures for investigation of breaches or evasions of the law the disclosure of which would prejudice the effectiveness of those methods or procedures; or
- 5 (v) endanger the lives or physical safety of persons engaged in or in connexion with law enforcement;
- (h) information or matter the disclosure of which under this Division would involve the unreasonable disclosure of information relating to the personal affairs of any person (including a deceased person);
- 10 (j) information or matter, including commercial or financial information, the disclosure of which under this Division would be likely to expose unreasonably to disadvantage the material interests of an undertaking.

32. (1) Where a Minister is satisfied that a record contains information or matter of a kind referred to in paragraph 31 (a), (b) or (c), whether or not the record has been examined in accordance with section 33 and whether or not a decision has been given in respect of the record under that section, he may sign a certificate to that effect and such a certificate, so long as it remains in force, establishes conclusively that the record is an exempt record referred to in the relevant paragraph of section 31.

Certificates  
by Ministers  
as to certain  
exempt  
records

(2) Where a Minister is satisfied as mentioned in sub-section (1) by reason only of information or matter contained in a particular part or particular parts of a record, the certificate under that sub-section in respect of the record shall identify that part or those parts of the record as containing the information or matter by reason of which the certificate is given.

(3) The regulations may prescribe a period as the period during which certificates under sub-section (1), or any class of such certificates, remain in force unless sooner revoked.

(4) Regulations made in pursuance of sub-section (3) may be expressed to apply to certificates signed before the day on which the regulations take effect, but a certificate that is in force at the time when any such regulations take effect does not, by reason of the regulations, cease to be in force before the expiration of a period of 1 year from the date on which the regulations take effect.

(5) Notwithstanding sub-section (3) and any regulations under that sub-section, where a certificate under this section has been signed in respect of a record, a further certificate under this section in respect of the record may be signed at any time, whether or not the first-mentioned certificate is still in force.

(6) Where a certificate under this section is in force in respect of a record, the record is not subject to examination under section 33.

(7) A Minister may, either generally or as otherwise provided by the instrument of delegation, by writing signed by him, delegate his powers under this section, other than this power of delegation, to—

- (a) the Permanent Head of a Department of the Australian Public Service; 5
- (b) the person holding an office the holder of which has, in relation to a branch of the Australian Public Service, all the powers of, or exercisable by, a Permanent Head under the *Public Service Act* 1922;
- (c) the holder of an office that is a prescribed office, or is included 10 in a class of offices that is a prescribed class of offices, for the purposes of this sub-section; or
- (d) a person performing the duties of an office referred to in paragraph (a), (b) or (c).

(8) A power delegated by a Minister under sub-section (7), when 15 exercised by the delegate, shall, for the purposes of this Act, be deemed to have been exercised by the Minister.

(9) A delegation by a Minister under sub-section (7) does not prevent the exercise of a power by the Minister.

Identification  
of exempt  
records

33. (1) The Director-General, in consultation with the responsible 20 Minister or a person authorized by him, shall make arrangements for determining the Commonwealth records in the open access period that are to be treated by the Archives as being exempt records and may make arrangements for determining the extent to which access in part to 25 Commonwealth records identified as exempt records may be given without disclosing the information or matter by reason of which the records are exempt records.

(2) Except in the case of records exempted from transfer to the custody of Archives by virtue of a determination under section 28, an examination of records for the purposes of sub-section (1) shall be con- 30 ducted on premises of the Archives.

(3) The identification of records as exempt records in accordance with this section shall be conducted in accordance with programs approved by the Director-General and may take place before the records concerned 35 become records in the open access period.

(4) Determinations under sub-section (1) in respect of records identified as exempt records shall be reviewed, in accordance with arrangements made as referred to in that sub-section, at such intervals as the Director-General thinks appropriate having regard to the nature of records concerned and any other relevant circumstances and whenever necessary 40 for the purposes of reconsideration of a decision in accordance with section 38.

(5) The functions of the Archives with respect to public access to Commonwealth records in the open access period shall be performed in conformity with the determinations made from time to time under this section, except to the extent that any such determination is inconsistent  
5 with a decision of the Administrative Appeals Tribunal on a review under this Act.

34. (1) Where the Archives is required by this Division to cause a record to be made available for public access, any person is, subject to this Division, entitled to access to the record in any one or more of the  
10 following forms:

- (a) an opportunity to inspect the record;
- (b) on payment of a fee determined in accordance with the regulations, provision to the person of a copy of the record;
- 15 (c) in the case of a record from which information or matter can be produced or made available in a particular form by means of a computer, projector or other equipment, provision, on payment of a fee determined in accordance with the regulations, of access to that information or matter by the use of that equipment; and
- 20 (d) in the case of a record by which words are recorded in a manner in which they are capable of being reproduced in the form of sound or in which words are contained in the form of shorthand writing or in codified form, provision, on payment of a fee determined in accordance with the regulations, of a written transcript of the words recorded or contained in the record.

25 (2) Where—

- (a) the giving of access under this Division to a record in a particular form other than the form referred to in paragraph (1) (a) would interfere unreasonably with the operations of the Archives or of another Commonwealth institution that has the custody of the record;
- 30 (b) the giving of access under this Division to a record in a particular form would not, having regard to the physical nature of the record, be appropriate;
- 35 (c) the giving of access under this Division to a record in a particular form would be detrimental to the preservation of the record; or
- (d) the giving of access under this Division to a record in a particular form would involve an infringement of copyright (other than copyright owned by the Commonwealth) subsisting in the record,

40 the Archives may decide that access to the record is not to be given in that form and cause access to be given in another form.

35. (1) The Director-General may, for the purpose of ensuring the safe custody and proper preservation of any record, determine reasonable conditions to which access to the record is to be subject, or determine that the record is to be withheld from public access.

Conditions  
in respect  
of proper  
care of  
records

(2) Where a record is withheld in accordance with sub-section (1), a copy may be provided where, in the opinion of the Director-General, it is practicable to do so without detriment to the proper preservation of the record.

Access to part of exempt record

36. Where a record that would otherwise be required to be made available for public access under this Division is an exempt record, the Archives may, where it is practicable to do so, make arrangements for part of, or a copy of part of, that record to which access could be given without disclosing information or matter by reason of which the record is an exempt record to be made available for public access in accordance with this Division. 5 10

Review of decisions by Administrative Appeals Tribunal

37. (1) Subject to section 38, an application may be made to the Administrative Appeals Tribunal for a review of a decision of the Archives in respect of access to a record, being—

- (a) a decision refusing to grant to the applicant access to the record on the ground that the record is an exempt record or is a Commonwealth record to which this Division does not apply; 15
- (b) a decision refusing to grant an extension of partial access to the record on the ground that the record is an exempt record and it is not practicable to make arrangements for giving the further access desired by the applicant in a form that would not disclose information or matter by reason of which the record is an exempt record; or 20
- (c) a decision refusing to grant to the applicant access to the record in a particular form by reason of paragraph 34 (2) (a), (b) or (d). 25

(2) For the purposes of the application of the *Administrative Appeals Tribunal Act 1975* to a review under this section of a decision, the Director-General shall be deemed to be the person who made the decision.

(3) In proceedings before the Tribunal under this section—

- (a) the onus of establishing that a record is an exempt record is on the party claiming that it is an exempt record; and 30
- (b) the Tribunal is not restricted by any determination made at any time under section 33 in relation to the record.

(4) Where, under a provision of Part V, it is provided that a certificate of a specified kind establishes conclusively, for the purposes of this Act, that a record is one of a kind referred to in that provision, the powers of the Tribunal do not extend to reviewing the decision to give the certificate or the existence of proper grounds for the giving of the certificate. 35

(5) On a review under this section, the Tribunal may, if it is satisfied it would be practicable to give access to, or to a copy of, part of an exempt record in a form that would not disclose information or matter by reason of which the record is an exempt record, direct that access be given accordingly. 40

(6) In proceedings under this section, the Tribunal shall make such order under sub-section 35 (2) of the *Administrative Appeals Tribunal Act* 1975 as it thinks necessary having regard to the nature of the proceedings and, in particular, to the necessity of avoiding the disclosure to the applicant, in the proceedings, of matter by reason of which section 31 applies to a record.

(7) Section 37 of the *Administrative Appeals Tribunal Act* 1975 does not apply in relation to a document that is claimed to be an exempt record but, in proceedings before the Tribunal in relation to such a document, if the Tribunal is not satisfied, by evidence on affidavit or otherwise, that the document is an exempt record, it may require the document to be produced for inspection by members of the Tribunal only and if, upon the inspection, the Tribunal is satisfied that the document is an exempt record, the Tribunal shall return the document to the person by whom it was produced without permitting any person other than a member of the Tribunal as constituted for the purposes of the proceeding, or a member of the staff of the Tribunal in the course of the performance of his duties as a member of that staff, to have access to the document or disclosing the contents of the document to any such person.

(8) The Tribunal may require the production, for inspection by members of the Tribunal only, of an exempt record for the purpose of determining whether, and to what extent, it is practicable for arrangements to be made in accordance with section 36 and, where an exempt record is produced by reason of such a requirement, the Tribunal shall, after inspection of the record by the members of the Tribunal as constituted for the purposes of the proceeding, return the record to the person by whom it was produced without permitting any person other than such a member of the Tribunal, or a member of the staff of the Tribunal in the course of the performance of his duties as a member of that staff, to have access to the record or disclosing the contents of the record to any such person.

(9) Notwithstanding sub-sections (7) and (8) but subject to sub-section (10), the Tribunal is not empowered, in any proceedings, to require the production of a record in respect of which there is in force a certificate under section 18, 19, 20 or 32.

(10) Where a certificate of a kind referred to in sub-section (9) identifies a part or parts of the record concerned in the manner provided in sub-section 19 (3), 20 (3) or 32 (2), sub-section (9) does not prevent the Tribunal from requiring the production, in proceedings before the Tribunal under this section in relation to the record, of a copy of so much of the record as is not included in the part or parts so identified.

(11) Sub-section (7) or (8) does not operate so as to prevent the Tribunal from causing a document produced in accordance with that sub-section to be sent to the Federal Court of Australia in accordance with section 46 of the *Administrative Appeals Tribunal Act* 1975, but, where such a document is so sent to the Court, the Court shall do all things necessary to

ensure that the contents of the document are not disclosed (otherwise than in accordance with this Act) to any person other than a member of the Court as constituted for the purpose of the proceeding before the Court or a member of the staff of the Court in the course of the performance of his duties as a member of that staff.

5

(12) In proceedings before the Tribunal under this section, evidence of a certificate under section 18, 19, 20 or 32, including evidence of the identity or nature of the record to which the certificate relates, may be given by affidavit or otherwise and such evidence is admissible without production of the certificate or of the record to which it relates.

10

Internal  
recon-  
sideration of  
decisions

38. (1) An application under section 37 to the Tribunal for a review of a decision (other than a decision on a reconsideration under this section) shall not be made unless—

- (a) the decision was made on an application to the Archives for access, or for an extension of partial access, to the record, being an application that complied with sub-section (2);
- (b) the applicant has, within 28 days after the day on which notice of the decision was given to the applicant, applied in writing to the Archives for a reconsideration of the decision; and
- (c) the applicant has been informed of the result of the reconsideration or a period of 14 days has elapsed since the day on which he made the application for reconsideration.

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(2) An application referred to in paragraph (1) (a)—

- (a) shall be in writing;
- (b) shall be expressed to be made in accordance with this section; and
- (c) shall provide such particulars, if any, concerning the record to which it relates as are contained in the Australian National Guide to Archival Material.

25

(3) The Archives shall give all reasonable assistance to persons to enable them to make applications complying with the requirements of paragraph (2) (c).

30

(4) Where an application for reconsideration of a decision is made in accordance with this section, the Archives shall—

- (a) reconsider the decision and for that purpose arrange for any necessary review under section 33 of a determination under that section; and
- (b) give notice to the applicant of the decision reached on the reconsideration (whether or not that decision confirms the previous decision).

35

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(5) Where the decision on the reconsideration does not grant access as sought by the applicant, the notice referred to in paragraph (4) (b) shall—

- 5 (a) state the findings on any material questions of fact, referring to the material on which those findings were based, and the reasons for the decisions; and
- (b) inform the applicant of his right to apply to the Tribunal for a review of the decision.

10 (6) The Archives is not required to include in a notice under sub-section (5) any matter that is of such a nature that its inclusion in a Commonwealth record would cause that record to be an exempt record.

(7) Section 28 of the *Administrative Appeals Tribunal Act 1975* does not apply in relation to an application to the Tribunal under this Act where a notice in compliance with sub-section (5) of this section has been given to the applicant.

15 (8) If an application to the Tribunal for review of a decision is made before a reconsideration of the decision in accordance with this section has been completed and the result notified to the applicant, the Tribunal may, if it is satisfied that further time is reasonably necessary to enable the reconsideration to be completed, adjourn the proceedings for such time

20 as it thinks fit.

(9) Decisions by the Archives on applications in accordance with this section shall be made, and notified in writing to the applicant, as expeditiously as practicable and, in the case of an application for reconsideration of a decision, shall be made after consideration of the application by the Director-General or a person authorized by him to deal

25 with such applications.

(10) Where—

- (a) an application for a reconsideration of a decision has been made in accordance with sub-section (1); and
- 30 (b) the applicant has not been informed of the result of the reconsideration within 14 days after the day on which he made that application,

an application to the Tribunal for a review of the decision may be treated by the Tribunal as having been made within the time allowed under the

35 *Administrative Appeals Tribunal Act 1975* if it appears to the Tribunal that there was no unreasonable delay in making the application to the Tribunal.

39. (1) The Minister or a person authorized by him may, in accordance with arrangements approved by the Prime Minister, cause all records

40 in a class of Commonwealth records not in the open access period to be available for public access.

Arrangements for accelerated or special access

(2) The Minister or a person authorized by him may, in accordance with arrangements approved by the Prime Minister, cause Commonwealth records which are not available for public access under this Act to be made available to a person for a purpose specified in the regulations as a purpose for which access may be given under this sub-section. 5

(3) Where records made available to a person by virtue of sub-section (2) are so made available on conditions to be observed by that person, that person shall not contravene those conditions.

Penalty: \$200.

Protection  
against  
certain  
actions

40. Where, in the ordinary course of the administration of this Act, access is given by the Archives to a record as being a record required by this Division to be made available for public access— 10

- (a) no action for defamation or breach of confidence lies, by reason of the authorizing or giving of the access, against the Commonwealth or any person concerned in the authorizing or giving of the access; 15
- (b) the giving of the access shall not be taken, for the purposes of the law relating to defamation or breach of confidence, to constitute an authorization or approval of the publication of the record or of its contents by the person to whom the access was given; and 20
- (c) a person concerned in the authorizing or giving of the access is not guilty of a criminal offence by reason only of the authorizing or giving of the access.

Access to  
records  
apart from  
Act

41. Nothing in this Act prevents a person from publishing or otherwise giving access to records (including exempt records), otherwise than in pursuance of this Act where he can properly do so or is required by law to do so. 25

Security  
classifi-  
cations

42. Where a record has become available for public access in accordance with this Division, any security classification applicable to the record ceases to have effect for any purpose. 30

Transitional  
provisions  
relating to  
access

43. For the purposes of this Division, where, in accordance with the administrative arrangements in operation before the commencement of this Part, a record in the open access period has been withheld from public access or has been made available for public access, a determination shall be deemed to have been made in accordance with section 33 immediately after the commencement of this Part that the record is to be treated as an exempt record, or that the record is not to be treated as an exempt record, as the case may be. 35

#### PART VI—OBJECTS OF ARCHIVAL SIGNIFICANCE

Declaration  
of objects  
of archival  
significance

44. (1) Where it appears to the Minister that a particular object that is the property of the Commonwealth or of a Commonwealth institution is, or that such objects of a particular description as are the property of the Commonwealth or of a Commonwealth institution are, part of the 40

archival resources of the Commonwealth, he may, by notice in the *Gazette*, declare the object, or every such object, to be an object to which this section applies.

(2) If an object to which this section applies has ceased (whether before or after the commencement of this Act) to be required to be readily available for the purposes of a Commonwealth institution, the person responsible for the custody of the object shall, if the Archives so requires, cause it to be transferred to the custody of the Archives in accordance with arrangements approved by the Archives.

(3) A person shall not destroy or otherwise dispose of or damage any object to which this section applies without the permission of the Archives.

Penalty: \$200.

45. (1) The Minister may, by notice published in the *Gazette*, declare that a specified class of objects, not being objects referred to in sub-section (3), (4) or (5), is a class to which sub-section (2) applies.

Samples of material for Archives

(2) The Archives may require any Commonwealth institution to cause to be delivered to the custody of the Archives samples of objects included in a class of objects to which this sub-section applies that are the property of the Commonwealth or of the Commonwealth institution.

(3) The Reserve Bank of Australia shall cause to be delivered to the custody of the Archives such samples as the Archives requires of notes printed by, or under the authority of, the bank that are legal tender throughout the Commonwealth.

(4) The Controller of the Royal Australian Mint shall cause to be delivered to the custody of the Archives such samples as the Archives requires of current coins caused by the Treasurer to be made.

(5) The Australian Postal Commission shall cause to be delivered to the custody of the Archives such samples of current postage stamps issued by the Commission as the Archives requires.

### 30 PART VII—CARE OF MATERIAL OF THE ARCHIVES

46. (1) Subject to this Part, material of the Archives shall be kept at such places as the Director-General considers appropriate.

Location of material of the Archives

(2) In considering the place at which material of the Archives should be kept, the Director-General shall take into account—

(a) the convenience of persons who are likely to require access to the material;

(b) the desirability of keeping related material in the same place; and

(c) the appropriateness of keeping in a State or Territory material that relates in particular to that State or Territory or to places in that State or Territory.

(3) Copies of records forming part of the material of the Archives may be kept in such places as the Director-General considers appropriate.

Custody of material of the Archives other than by Archives

47. (1) Subject to any other law of the Commonwealth and to the rights of Commonwealth institutions, where the Director-General considers it appropriate to do so, the Archives may make arrangements with a person for material of the Archives to be kept in the custody of that person.

5

(2) Arrangements referred to in sub-section (1) shall provide for the care of the material of the Archives to which they relate and for the regular inspection of that material by the Archives.

(3) All material of the Archives which has been delivered to the Archives in accordance with the *Copyright Act 1968*, other than Commonwealth records, shall, subject to the consent of the Director-General of the National Library of Australia, be deposited by the Archives with the National Library of Australia.

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#### PART VIII—REGISTERS AND GUIDE RELATING TO ARCHIVES

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Australian National Register of Records

48. (1) The Archives shall maintain a register to be known as the Australian National Register of Records.

(2) The Register shall contain such particulars of the material of the Archives as the Director-General considers appropriate.

(3) The Register may also contain such particulars as the Director-General considers appropriate of—

- (a) current Commonwealth records;
- (b) material in State archives;
- (c) material in other archives, including private archives; and
- (d) other archival resources relating to Australia.

25

(4) For the purposes of this section, the Archives shall seek the co-operation of the owners and custodians of material in State archives and other archives.

Australian National Guide to Archival Material

49. (1) The Archives shall maintain a guide to be known as the Australian National Guide to Archival Material.

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(2) Subject to sub-section (4), the Guide shall contain particulars, in such form as the Director-General considers appropriate, of all Commonwealth records in the open access period which have been examined in accordance with sub-section 33 (1), other than records in respect of which a notation in accordance with section 32 is in force.

35

(3) Subject to sub-section (4), the Guide may also contain copies of particulars contained in the Australian National Register of Records.

(4) The Guide shall not include—

- (a) particulars that would disclose any information or matter of a kind referred to in section 31; or
- (b) particulars the disclosure of which would be contrary to any arrangements entered into by the Archives in accordance with this Act.

5

(5) A copy of the Guide shall be kept at the principal office of the Archives in each State and Territory in which the Archives maintains an office and may be kept at such other offices of the Archives as the Director-General considers appropriate.

- 10 (6) A person may inspect the Guide and is entitled, on the payment of any prescribed fee, to receive a copy of an entry in the Guide.

- 15 50. (1) The Archives shall establish and maintain a register to be known as the Australian National Register of Research Involving Archives in which the Archives shall endeavour to list all research that is being, or that has been, conducted in or in relation to Australia that has involved, or will involve, the use of archival material.

Australian  
National  
Register of  
Research  
Involving  
Archives

- (2) For the purposes of sub-section (1), the Archives shall seek the co-operation of all persons and organizations interested in research of the kind referred to in that sub-section, including the authorities of the States responsible for State archives and the universities.

- 20 (3) A copy of the Register shall be kept at the principal office of the Archives in each State and Territory in which the Archives maintains an office and may be kept at such other offices of the Archives as the Director-General considers appropriate.

- 25 (4) A person may inspect the Register and is entitled, on the payment of any prescribed fee, to receive a copy of an entry in the Register.

#### PART IX—MISCELLANEOUS

- 30 51. (1) The Archives shall, as soon as practicable after 30 June in each year, prepare and furnish to the Minister, for presentation to the Parliament, a report of its operations during the 12 months ending on that date.

Annual  
Report

(2) The first report under this section shall relate to the period commencing on the date of commencement of this Part and ending on the next following 30 June.

- 35 52. (1) The Director-General may give a certificate that a record referred to in the certificate is a true copy of a record that is a record in the custody of the Archives.

Certified  
copies of  
records

- 40 (2) A writing purporting to be a certificate given under this section shall, unless the contrary is proved, be deemed to be such a certificate and to have been duly given and such a certificate is *prima facie* evidence in all courts of the matter stated in the certificate.

**Transitional**

**53.** (1) A reference in any law of the Commonwealth or of a Territory, or in any agreement or arrangement, made before the commencement of Part II to the Commonwealth Archives Office, to the Archival Authority or to the authority concerned with the preservation of the archives shall, in respect of any time after the commencement of Part II, be read as a reference to the Archives. 5

(2) Notwithstanding Part II, arrangements in operation immediately before the commencement of Part II relating to the disposal or custody of Commonwealth records may continue in operation until the Director-General otherwise directs. 10

(3) Where, immediately before the commencement of this Part, any records were in the custody of the establishment known as the Australian Archives, as existing at that time, under arrangements by which the custody of the records was accepted from a person other than a Commonwealth institution by the Commonwealth, or an authority or person acting on behalf of the Commonwealth, those arrangements (including any provision of those arrangements concerning access to or disposal of those records) have effect from that commencement as if they were made, after that commencement, by that person with the Archives, and subsection 6 (2) applies accordingly. 15 20

**Regulations**

**54.** The Governor-General may make regulations, not inconsistent with this Act, prescribing all matters that are required or permitted by this Act to be prescribed or are necessary or convenient to be prescribed for carrying out or giving effect to this Act.

*Appendix 3*

**The 'Protective Security Handbook'**

**FOR OFFICIAL USE**



**COMMONWEALTH OF AUSTRALIA**

**PROTECTIVE SECURITY  
HANDBOOK**

**JUNE 1978**

# **PROTECTIVE SECURITY HANDBOOK**

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Issued by authority of the Attorney-General

## FOREWORD

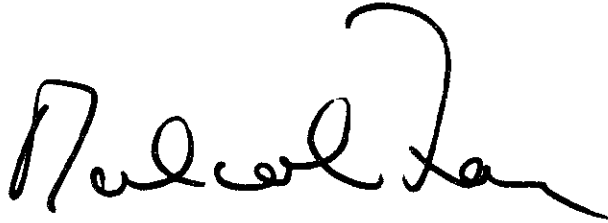
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It is the firm view of the Government that Australian citizens should have access to information held by or on behalf of Government, unless there are strong reasons for non-disclosure.

One of the most important reasons for such non-disclosure is national security. It is hardly necessary to explain why nations must keep secret their defence arrangements; and there are other equally important areas where confidentiality, in the national interest, must prevail over private or public rights to information.

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. I look to all officers dealing with it to observe both the letter and the spirit of these requirements.

A handwritten signature in black ink, appearing to read 'Robert Menzies', written in a cursive style.

PRIME MINISTER

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# INTRODUCTION

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The purpose of this book is to outline the main requirements to protect:

- (a) information relating to the national security, that is to say the defence of Australia, the security of Australia or the international relations of Australia, which, if disclosed to unauthorised persons, would prejudice national security;
- (b) Cabinet documents;
- (c) other official information affecting the national interest; and
- (d) information given in confidence to government.

2. Detailed requirements applying to the protection of information of national security significance are contained in classified instructions including departmental security instructions; in relation to protection of Cabinet documents, such requirements are contained in the Cabinet Handbook. This Protective Security Handbook sets out procedures for classification of both of these matters.

3. Detailed requirements as to other official information affecting the national interest (e.g. communications between Commonwealth and State Ministers and Federal Executive Council matters, where appropriate) are contained in departmental security instructions.

4. The final category referred to in paragraph 1 above is information concerning the private affairs of individuals, companies and organisations, or other information obtained by government, under an assurance of confidentiality. Departmental instructions specify the degree of protection to be given to and appropriate measures for safeguarding these privacy matters.

5. Unauthorised disclosure of classified matters or of other official matters affecting the national interest may attract penal sanctions. Unauthorised disclosure of privacy matters may constitute breaches of statutory requirements including special legislation dealing with such matters, e.g. taxation and census.

6. Access to classified matter is to be no wider than is necessary for the efficient performance of duties and is to be restricted to authorised persons. This requirement of access on a 'need to know' basis is fundamental to all aspects of security.

7. The Permanent Head is responsible for ensuring that departmental staff are made aware of the contents of this book and of departmental security instructions. The heads of statutory authorities and other governmental agencies have the same responsibility in relation to their staffs. In the case of Ministerial staff the responsibility rests with the Minister for Administrative Services.

## *Chapter 1*

# **SECURITY ORGANISATION**

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**1.1** The Permanent Head is responsible for security within his department. The heads of statutory authorities and other governmental agencies and the Chief of the Defence Force Staff and the Chiefs of Staff of the Navy, Army and Air Force are responsible for security within their organisations. All these office holders are included, hereinafter, in the term 'Permanent Head', and all such authorities, agencies and forces are included in the word 'department'.

**1.2** All departmental staff, particularly supervisory staff, have a responsibility to the Permanent Head for appropriate security arrangements in their own operational areas.

**1.3** The Permanent Head should ensure that there is clear allocation of responsibility for physical and personnel security within his department. Normally, responsibility for security arrangements will be assigned to a senior officer, who may in turn exercise that responsibility through a security officer on a full-time or part-time basis, or through a security section, according to requirements.

**1.4** Departmental security instructions, setting out detailed security arrangements for the department, are issued by, or on the authority of, the Permanent Head.

**1.5** The Australian Security Intelligence Organisation (A.S.I.O.) is required to advise and assist departments in their security responsibilities. It is not the function of A.S.I.O. to carry out or enforce measures for security.

## Chapter 2

# SYSTEM OF CLASSIFICATION

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### National security information

**2.1** National security information is information affecting the defence, security or international relations of Australia. According to the estimated prejudice to national security which might result from unauthorised disclosure, national security information should be given one of the four national security classifications—TOP SECRET, SECRET, CONFIDENTIAL and RESTRICTED—which are defined hereunder:

#### *TOP SECRET*

National security information which requires the highest degree of protection, is to be classified TOP SECRET. The test for assigning the classification is whether its unauthorised disclosure could cause *exceptionally grave damage* to the national security. Very little information in fact belongs in the TOP SECRET category, and the classification should be used with the utmost restraint.

#### *SECRET*

National security information which requires a substantial degree of protection is to be classified SECRET. The test for assigning the classification is whether unauthorised disclosure of the information could reasonably be expected to cause *serious damage* to the national security. It should be sparingly used.

#### *CONFIDENTIAL*

National security information which requires a decided degree of protection is to be classified CONFIDENTIAL. The test for assigning the classification is whether its unauthorised disclosure could reasonably be expected to *cause damage* to the national security. Most national security information will merit classification no higher than CONFIDENTIAL. All Cabinet documents are also to be classified CONFIDENTIAL unless requiring a higher national security classification.

#### *RESTRICTED*

National security information which requires some protection but does not warrant a higher classification is to be classified RESTRICTED. The test for assigning the classification is whether unauthorised disclosure could possibly be *harmful* to the national security.

**2.2** Documents which do not contain more information than has been published in the press or otherwise issued by unofficial agencies may nevertheless confirm the accuracy or otherwise of such published material, or give official views thereon. Provided they are related to national security, such documents should be appropriately classified.

### Cabinet documents

**2.3** Cabinet documents are those covered by the Cabinet Handbook. Cabinet documents are given the appropriate national security classification of CONFIDENTIAL, SECRET or TOP SECRET.

## **Other official information affecting the national interest**

**2.4** Documents containing other official information affecting the national interest (e.g. communications between Commonwealth and State Ministers, and Executive Council matters, where appropriate) may be given the marking of **IN CONFIDENCE**. Detailed requirements for handling documents of this nature are included in departmental security instructions.

## **Privacy information**

**2.5** Certain documents containing information concerning the private affairs of individuals, companies and organisations, or other information obtained under an assurance of confidentiality, may require the protection of an '-in-Confidence' marking and appropriate special measures for safeguarding, as provided for in departmental instructions. This marking can be varied depending upon the area concerned, e.g. Staff-in-Confidence; Medical-in-Confidence; Census-in-Confidence; Commercial-in-Confidence. Many privacy matters presently being marked **CONFIDENTIAL** should be marked '-in-Confidence'.

## **Importance of proper classification**

**2.6** Over-classification is a problem of continuing importance since it has the following undesirable effects: information and material that is properly classified may be inadequately protected because the volume of classified material is too large; unnecessary and costly administrative arrangements have to be made to protect information and material improperly classified; and classification and security procedures generally are brought into contempt.

**2.7** Over-classification constitutes a serious defect in the security system. It may stem from a genuine uncertainty as to the proper standards of classification or from a tendency to be over cautious. Whatever the cause, the result is a loss of confidence in the various levels of classification and a tendency to over-classify by way of compensation.

## **Guidance to staff**

**2.8** For the guidance of staff, departmental security instructions set out examples to assist with proper classification.

## Chapter 3

# PROCEDURES FOR CLASSIFICATION

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### Requirements for classifying and confirming classification

3.1 The originator is responsible for the initial classification of a document. In the interests of accuracy and uniformity, the initial classification given by the originator is to be confirmed by a confirming authority prior to the distribution of the document unless the originator himself is listed below, under the appropriate security classification, as a confirming authority.

3.2 The requirements for confirming authorities are:

#### *TOP SECRET matter*

To be confirmed by:

- (a) Commonwealth Government Ministers, for those areas under their control;
- (b) any person in a department listed at, or above, the public service rank of Assistant Secretary or its equivalent;
- (c) the head of a diplomatic mission or special mission or the head of a consular post or the chief representative of a department in an overseas country; and
- (d) in special circumstances, any person or class of persons in a department below the Assistant Secretary level as authorised by a Minister or Permanent Head.

#### *SECRET matter*

To be confirmed by:

- (a) any person having authority to confirm the classification of matter as TOP SECRET;
- (b) any person in a department listed at, or above, the public service level Class 9 or its equivalent; and
- (c) in special circumstances, any person or class of persons in a department below the public service level Class 9 as authorised by a Minister or Permanent Head.

#### *CONFIDENTIAL, RESTRICTED and IN CONFIDENCE matter*

To be confirmed by:

- (a) any person having authority to confirm the classification of matter as TOP SECRET or SECRET; and
- (b) any person or class of persons in a department as authorised by a Minister or Permanent Head.

3.3 The file copy of a document originating in a department and classified CONFIDENTIAL or above is to indicate on its face the identity of the person confirming the classification. Where such a classified document is signed by an officer authorised to confirm the particular classification, that person is to be deemed to be the person confirming the classification.

**3.4** The sole criterion in the selection of the appropriate classification is the estimated damage unauthorised disclosure would cause to national security or the national interest.

### **General rules for classifying documents**

**3.5** The following are the more important requirements to be followed in classifying documents:

- (1) A document is to be classified at the earliest stage necessary during its preparation.
- (2) The classification of each individual document depends solely on its content—not on the classification of the file on which it was drafted or of another document to which it refers. There is no need to allot to a subsequent document a classification as high as an earlier one which it quotes or refers to, provided the quotation is limited to the reference number, the date and matter not in itself justifying a classification higher than that otherwise required for the content of the subsequent document.
- (3) Factors other than the contents of an individual document may need to be considered when classifying it, e.g. protection of the source of information.
- (4) The classification of a file will normally be that of the highest classified document it contains. Certain compilations of information may require a higher classification than that of the component parts because of the greater intelligence value of the comprehensive picture available.
- (5) A document must not bear a lower classification than the highest classification of any of its appendixes or attachments. On brief notes or covering letters which do not require as high a classification as an attachment, a formula such as

CONFIDENTIAL

covering

TOP SECRET

may be used provided that both classifications are stamped in red block letters.

- (6) A classified document may have a lower classified or unclassified attachment.
- (7) Where it is known that any information contained in a document can be 'reclassified after a certain date', that should be indicated in the text or in a sideline.

### **Classification of committee papers**

**3.6** The classification of committee papers and minutes of government and inter-departmental committees is ultimately the responsibility of the chairman of the committee who should consult the committee when in doubt. Each document should be classified according to its content. For example, where considered necessary, each item of the minutes should be classified individually according to its content in order to facilitate extraction and separate filing.

### **Classification of tapes including computer tapes**

**3.7** The classification of each item recorded on magnetic tape is to be clearly stated at the beginning and end of each recording. Because erasure of information from magnetic tapes is seldom complete, once classified material has been recorded on a tape, the tape thereafter retains, until totally destroyed, the same classification as the highest classified material ever recorded on it, and that classification should be clearly marked on each spool.

### **Marking of classifications on documents**

**3.8** All classified books, pamphlets, letters, memoranda, papers and other classified material, and all copies thereof, 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. In the case of typed documents the classification marking should be stamped in a contrasting colour, preferably red, and letters should be a minimum of 6.35 mm ( $\frac{1}{4}$ " ) in height. The classification marking should be stamped in such a manner that it does not interfere with or overstamp any other headings, addresses or instructions. In the case of printed documents the classification marking should be set in type which is larger and heavier than the largest type used in the text of the document.

**3.9** The classification on maps and drawings is to be printed or stamped near to the map scale or drawing numbers in addition to being printed at the top and bottom centre of the document.

**3.10** Classified photographs, film and microfilm and their containers are to be conspicuously marked with the classification. Photographic negatives are to be marked so that the classification will be reproduced on all copies made from the original.

### **Reassessment of classified material**

**3.11** The classification given to national security or other official information affecting the national interest may alter with the passage of time and departments should reassess in accordance with a departmental review program as provided for in departmental security instructions.

**3.12** The classification of information received from other departments is not to be changed without the approval of the originating authority.

**3.13** When reclassifying a document the old classification is to be deleted in ink and the new one stamped on the document. The amendment is to be signed by the officer making the change and a note made of any documentary authority for the change.

### **Requirements for marking and reassessment of other official information affecting the national interest and privacy information**

**3.14** The requirements for the marking and reassessing of IN CONFIDENCE information are to follow, as far as applicable, the requirements set out above for classified information.

## *Chapter 4*

# **PERSONNEL ENGAGED ON CLASSIFIED WORK**

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### **The 'need to know' requirement**

**4.1** Access to classified matter is to be no wider than is necessary for the efficient performance of duties and is to be restricted to authorised persons. This rule applies both within a department and in dealing with authorised persons outside the department.

### **Persons in government employment, consultants and contractors**

**4.2** Permanent Heads or their delegates are responsible for determining and authorising persons employed in their departments, consultants and contractors who are to have access to classified matter.

**4.3** Supervising officers are responsible to the Permanent Head for ensuring that effective measures are taken to prevent access to classified matter by unauthorised persons and that authorised persons are familiar with the requirements to safeguard it.

### **Persons not in government employment**

**4.4** Classified matter may be made available on a strict 'need to know' basis to authorised persons or organisations not in government employment, but only with the approval of the originating department.

### **Authorisation**

**4.5** Information as to persons authorised for access to classified matter is available from the departmental security officer.

**4.6** Before classified matter is passed to authorised persons not in government employment, the Permanent Head is to ensure that such persons are familiar with the special handling procedures required by the department and that adequate arrangements have been made for those procedures to be observed.

**4.7** Authorisations are to be reviewed from time to time.

## *Chapter 5*

# **CONTROL OF CLASSIFIED DOCUMENTS**

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### **Storage and access to classified matter**

**5.1** Classified matter is to be stored securely in locked containers when not in use and keys and combinations are to be safeguarded. Care is to be taken to ensure that unauthorised persons do not view or have access to the classified matter. Detailed information on storage and access is to be found in departmental security instructions.

### **Combination settings**

**5.2** Combination settings are to be committed to memory. The only written record of the setting for use in an emergency is to be held by departments in sealed envelopes classified with the highest security classification of the matter held in the container. The setting is to be changed when a container is first received by the department; after servicing of the lock at any time subsequently; when there has been a change of custodian; or when there is reason to believe the setting has been compromised; and, in any case, not less frequently than every six months.

### **Loss or compromise**

**5.3** The loss or compromise of a classified document or of a security key or combination setting must be reported immediately to the appropriate departmental security authorities and, as necessary, to the Permanent Head.

### **Handling classified matter**

**5.4** Typing, reproduction, recording and transmission of classified matter is only to be made in accordance with departmental security instructions or, in the case of Cabinet documents, in accordance with the Cabinet Handbook.

### **Removal of classified matter**

**5.5** Classified matter is not to be taken out of departmental premises without the approval of an authorised officer and then only in accordance with departmental security instructions. In the case of Cabinet documents, the requirements of the Cabinet Handbook are to be observed.

### **Carriage within that part of a department located within a single building or complex**

**5.6** National security matter classified TOP SECRET is to be covered and passed by hand between officers who have the need to know. If that is not practicable, it is to be locked in an approved case or enclosed in two envelopes and handed to an authorised messenger for immediate delivery personally to the addressee or authorised representative. Matter classified SECRET may be enclosed in a single envelope endorsed SECRET, where the use of an approved case is not practicable, provided it is delivered direct by hand of an authorised messenger. Other classified matter is to be carried in accordance with departmental security instructions.

### **Carriage outside a building or complex**

**5.7** Classified matter is to be carried in accordance with procedures set out in departmental security instructions.

### **Retention of classified matter**

**5.8** Classified matter is not to be retained by an officer longer than is necessary for the efficient performance of his duties.

### **Destruction of classified matter**

**5.9** As careless disposal of classified matter constitutes one of the most likely sources of leakage of information, destruction of classified matter is only to be made in accordance with departmental security instructions or, in the case of Cabinet documents, in accordance with the Cabinet Handbook.

### **Use of telephones**

**5.10** Great caution should be exercised in discussing classified matters on the telephone. The normal telephone, even if fitted with speech privacy equipment of the inverter type (known as secraphone, scrambler, green telephone etc.) does not provide sufficient security for discussion of matter classified higher than RESTRICTED.

### **Facsimile transmission**

**5.11** Users of facsimile machines should be aware that the facsimile process, while offering some measure of protection against casual eavesdropping or inadvertent cross connection, also does not provide sufficient security for the transmission of matter classified higher than RESTRICTED.

## Chapter 6

# BREACHES OF SECURITY

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**6.1** A communication to any unauthorised person of any classified information is a serious breach of security which may damage national security or the national interest, and may attract sanctions pursuant to the Crimes Act or Defence legislation, or render an officer liable to disciplinary action under the Public Service Act and Regulations.

**6.2** The protective security system is intended to safeguard classified information and is aimed at preventing security breaches from occurring. Accordingly, it is necessary that any breaches of protective security measures (including infringement of departmental security instructions) be reported immediately to the appropriate departmental security authorities and, as necessary, to the Permanent Head.

**6.3** As regards privacy information, a communication to any unauthorised person may be a breach of statutory requirements that such information is not to be disclosed without proper authority. Such disclosures may lead to disciplinary action under the Public Service Act and Regulations and may also attract sanctions under special legislation dealing with such matters, e.g. taxation and census.

**6.4** Officers having access to material of a classified nature or subject to privacy markings should be informed of the relevant legislation relating to the protection of information from unauthorised disclosure. Departmental instructions should list the relevant legislative provisions.

**6.5** The security of classified information depends on the integrity, discretion and vigilance of all those who deal with it and on the existence of and compliance with effective security arrangements within each department. The strict observance of these arrangements may involve additional work and administrative inconvenience, but is essential in the national interest.

## **Public Service Board summary of responses to the survey conducted on the Committee's behalf on the resource implications for government agencies of the Freedom of Information Bill**

### **Question 1:**

What steps have already been taken by departments to identify the 'manuals or other documents containing interpretations, rules, guidelines, practices or precedents' which would need to be made available under clause 7 of the Freedom of Information Bill 1978?

#### *Departments*

##### **ABORIGINAL AFFAIRS**

Most of these documents are already available to the public although material may need to be excised from the Loans Commission manual.

##### **ADMINISTRATIVE SERVICES**

Most of these documents have already been identified and can be made available though some need editing before general release.

'A range of documents which have not been identified are those which make up the Department's policy in many areas of its operations.'

##### **ATTORNEY-GENERAL'S**

A survey of the Department was conducted in May 1978. However, there is still considerable work to be done to identify all manuals and other documents which would need to be made available under clause 7.

##### **BUSINESS AND CONSUMER AFFAIRS**

No specific steps have been taken to date. A number of departmental manuals is already publicly available but 'there will be a considerable effort involved in not only rendering the balance in a form suitable for public dissemination but in identifying and locating that balance'.

##### **CAPITAL TERRITORY**

In May 1978, Division Heads were asked to list categories of documents which would become available under the legislation. In June 1978 a minute was prepared for all Branch Heads explaining the effects of the Bill. A similar procedure was adopted in the statutory authorities in the Minister's portfolio.

In December 1978 the Department issued guidelines for the preparation of departmental manuals. Manuals will be needed to cover more than 400 functions.

##### **DEFENCE**

No direct steps have been taken to identify manuals, etc. Although there has been a broad appraisal, it appears that the relevant area will be that of conditions of service both for public servants and members of the Defence Force.

##### **EDUCATION**

There has not been an in-depth examination of this area. It is a major on-going activity of the Department.

##### **EMPLOYMENT AND YOUTH AFFAIRS**

Department is currently considering implications of legislation for CES. It has compiled a list of the schemes and programs in respect of which manuals,

guidelines, etc., may have to be published. The National Committee on Discrimination in Employment and Occupation has separately provided a submission to the Senate Committee on this and other aspects of the legislation.

#### FINANCE

The Department has identified manuals, etc., subject to a clearer definition of the word 'available'.

#### FOREIGN AFFAIRS

About a dozen manuals, etc., have been identified. All need to be vetted and some will have to be re-written.

#### HEALTH

The Department's preliminary estimates are:

- (a) 169 documents or categories of documents (cl. 6 (1)(a)(ii)).
- (b) 176 manuals exceeding 17 000 pages (cl. 7 (1)(a)).
- (c) 10 guidelines and interpretations (cl. 7 (1)(b)).

#### HOME AFFAIRS

Work has been started in all areas of the Department but limited staff resources, other urgent priorities and uncertainties about the date of effect and final content of the legislation will lead to delays until this work is completed.

#### HOUSING AND CONSTRUCTION

The Department has conducted a preliminary survey which resulted in the identification of 5 manuals which would come under clause 7.

#### IMMIGRATION AND ETHNIC AFFAIRS

Preliminary lists of such documents have been compiled by the Department's central office. The Department is still surveying the local practices of outpost offices. Existing manuals cover only part of the Department's procedures. There will be numerous separate documents, some of which cannot easily be put into standard manual form.

#### INDUSTRY AND COMMERCE

The Department has established a working group to examine and make recommendations on the likely effects of the Freedom of Information Bill on departmental operations and procedures.

An early task of the group will be to examine the subject of manuals and other interpretative documents.

#### INDUSTRIAL RELATIONS

Some manuals, etc., have been identified: those maintained by the Trades Qualifications and Industrial Training Branch will require major effort to review and revise ready for public scrutiny. Manuals, etc., relating to other areas of the Department have not yet been specifically identified. 'Even with provision of extra staff several months could be needed for a thorough review and consolidation of the instructions.'

#### NATIONAL DEVELOPMENT

The Department is carrying out investigations to identify those areas where new documentation or collation of existing instructions is required.

#### POSTAL AND TELECOMMUNICATIONS

'Overall, considerable progress has been made in identifying manuals, etc., and no difficulty is seen in publishing a list.'

#### PRIMARY INDUSTRY

The Department has identified and determined the availability of manuals, etc., under clause 7. Many of these need revision and updating.

#### PRIME MINISTER AND CABINET

The Department has no responsibilities for enactments or schemes of the type envisaged by clause 7.

#### PRODUCTIVITY

The Department has allocated a Class 6 officer to co-ordinate identification of manuals, etc. Action is proceeding.

#### SCIENCE AND THE ENVIRONMENT

These documents are currently being identified.

#### SOCIAL SECURITY

Instructions and guidelines from central office are embodied in 9 different manuals, which are currently being prepared. Of these, some contain material which would be exempt under clause 7 (4). Accordingly, those manuals are being prepared in two cuts, the first part being available for perusal and purchase by members of the public. Some of the manuals are so technical that lay persons would require some assistance in interpretation. There are also plans for the preparation of additional manuals. The State offices sometimes supplement the manuals with instructions relative to local conditions. These will also need to be covered. There are also manuals covering operational procedures, e.g., for making payments, for guarding against fraud, which will be exempt. Finally, availability of manuals is a matter for consideration.

#### SPECIAL TRADE REPRESENTATIVE

'It is considered that the Department holds little information which would require preparation for public access.'

#### TRADE AND RESOURCES

The Department has few manuals or other documents stemming from enactments or schemes administered by the Department. The degree to which 'broad guidelines' would, or should, be recorded in the form of manuals has not been investigated.

#### TRANSPORT

A list has been prepared of the categories of documents which will become publicly available under the legislation. Work is still underway on a 'Catalogue of Information Sets' held by the Department.

#### TREASURY

The only document that might be caught under clause 7 is the *Handbook of Practices and Procedures for Processing Foreign Investment Review Board Papers*. Pending clarification of status of organisations associated with Treasury, e.g., the Reserve Bank, the inquiry as to whether they possess such documents is in abeyance. Other organisations, e.g., the Government Actuary and the Life Insurance Commissioner have said they do not have such documents.

#### VETERANS' AFFAIRS

A survey has been made of the material of all the State Branches and Central Office. The information is extensive but has not yet been edited or analysed.

## *Statutory Authorities*

### AUDITOR-GENERAL

The practical implications of the Bill are still under examination. One view is that the Auditor-General's Office will have no obligations under clause 7 as presently drafted.

### AUSTRALIAN BROADCASTING TRIBUNAL

The *Broadcasting and Television Act* 1942 specifies the areas in which the Tribunal operates, including publication of relevant material.

### AUSTRALIAN BUREAU OF STATISTICS

The Bureau has taken no action to date to identify documents under clause 7. There may be some internal guideline documents, e.g. relevant to the *Australian Bureau of Statistics Act* 1975 and the *Census and Statistics Act* 1905 which would come within the operation of clause 7.

### AUSTRALIAN ELECTORAL OFFICE

The Office has identified 9 categories of records and materials which relate to the operation of its functions.

### AUSTRALIAN GOVERNMENT RETIREMENT BENEFITS OFFICE

Many of these documents are yet to be identified. Some documents such as manuals are already available or in course of preparation but there is still much work to be done.

### AUSTRALIAN TAXATION OFFICE

The Office has established a working party to examine the effect of clause 7.

### INDUSTRIAL RELATIONS BUREAU

The Bureau has taken no steps as yet although it will shortly be producing documents setting out its policies for the information and guidance of its own staff.

### INDUSTRIES ASSISTANCE COMMISSION

There are no manuals, etc., within the Commission which are used for 'making decisions or recommendations'. The Commission sets out the reasons for its recommendations in its public reports.

### PUBLIC SERVICE BOARD

The Board has initiated work to identify manuals, etc., produced in accordance with its responsibilities. Preliminary results indicate at least 60 documents or categories of documents which would be covered by clause 7.

### TRADE PRACTICES COMMISSION

Some preliminary work has been done. This is now being followed up in detail. It is intended to re-draft standing instructions where that is appropriate. The task will probably be completed by 1 January 1980.

## **Question 2:**

- (i) What is the number of people wholly or partly employed at present in preparing such manuals or other similar documents and in supplying information to the public?
- (ii) Is it anticipated that the introduction of the Freedom of Information Bill 1978 (as drafted) would require an increase in those numbers?

## *Departments*

### ABORIGINAL AFFAIRS

- (i) Officers who provide information to the public number one officer per region (full-time or part-time) other than the Northern Territory, and one officer full-time and one part-time in central office. The production and maintenance of manuals, etc., is estimated at less than one man-year p.a.
- (ii) No extra staff would be needed in the Information Section which would probably be used only as a first point of reference.

### ADMINISTRATIVE SERVICES

Total resources involved in preparation of manuals, etc., is equivalent to about 10 man-years p.a.

It is expected that only a minimal increase of staff relative to total staff numbers will be required to implement clause 7.

However, the AGPS has estimated that it will need an additional 40 staff to meet increased publishing and printing demands from other Departments and authorities.

### ATTORNEY-GENERAL'S

- (i) Divisions are continually preparing and reviewing manuals, etc., and it is not easy to quantify the staff involved.
- (ii) Increases required are conservatively estimated as 1-2 for receipt and recording of requests; 3-5 for information retrieval; and 6-7 (from Senior Legal Officer to Senior Assistant Secretary level) for processing of requests.

In addition, the Department's role in general administration of the legislation will require a further 5-6 staff with an addition of 5-6 in the Crown Solicitor's Division.

### BUSINESS AND CONSUMER AFFAIRS

The introduction of the Bill would mean a substantial increase of effort in terms of the preparation and distribution of manuals. Overall, it would involve many staff who currently contribute as part of their duties to the preparation, amendment and/or dissemination of manuals. Additionally, these and other officers would provide ' . . . some information to the public . . . '

### CAPITAL TERRITORY

- (i) Currently, the manual preparation is an additional task for existing staff involving at least one officer in each of the 20 functional areas plus a fluctuating number of officers who supply to the public information which may later be put in manual form.
- (ii) The enactment of the Bill would require an increase of staff throughout the Department. In particular, the Administrative Law Review Section will employ a Class 8. The Information and Public Relations Section has estimated it will require 6 positions to edit and publish manuals.

### DEFENCE

It is not possible to give an estimate of total resources used in the preparation of manuals, etc. However, the Department's Directorate of Instructions, Orders and Manuals operates with a full-time staff of nine, assisted by five typists. Similarly, it has not been possible to estimate how many people currently supply information to the public. Increases in resources devoted to the above activities are not anticipated as a result of Freedom of Information legislation.

Additional resources will be necessary to prepare for the implementation of the Freedom of Information legislation and further increases will be needed to administer requests once the legislation is enacted. The extent of the latter will depend on the type and number of requests.

#### EDUCATION

Preparing these sorts of documents and providing information to the public are major on-going activities within the Department.

The impact of the Freedom of Information legislation will depend on the number and likely complexity of inquiries and the response times which are stipulated under the legislation.

#### EMPLOYMENT AND YOUTH AFFAIRS

Department has provided detailed analysis of staff required in situation of low and high estimated demand in year 1 and in subsequent years in respect of each relevant clause of the Freedom of Information Bill.

Under *low* estimated demand it estimates requirement for:

- (i) Clauses 6 and 7 —21 additional staff in year 1  
9 additional staff in subsequent years.
- (ii) Other clauses —91 additional staff in year 1  
47 additional staff in subsequent years.

#### FINANCE

At present, four people of Class 9 level or below are heavily involved in continuous up-dating of the Finance Manual—three senior officers are involved part-time. Other officers are involved part-time on relevant duties in other areas.

'No firm indication of additional resources needed to prepare or consolidate manuals, etc. can be given until we have a clearer understanding of precisely what will need to be "available".'

#### FOREIGN AFFAIRS

- (i) One Class 8 officer is engaged part-time on up-dating manuals, etc.
- (ii) The process will require considerable effort and time and could not be achieved under existing staff ceilings. Additional qualified staff would need to be assigned on a temporary basis to prepare new manuals, etc.

#### HEALTH

Not possible to give exact numbers. However, every function of the Department is involved and a substantial proportion of Central Office staff, at least, would be involved in preparation of manuals, etc. A significant proportion of Central Office and Divisional Office staff are also employed in providing information to the public.

The Freedom of Information Bill would result in additional work in both areas. The only way to cope would be either by re-allocation of work priorities or by provision of additional staff.

#### HOME AFFAIRS

The equivalent of 7 full-time staff prepare such documentation, primarily in the Archives area. The equivalent of 98 full-time officers are engaged in the provision of information (mainly in the Archives area but also through ministerial correspondence, answers to monthly lists of relevant Parliamentary Questions and in the Office of Women's Affairs Shopfront).

The anticipated number of additional staff that would be needed following enactment of Freedom of Information legislation is 30 officers. The breakdown is:

Archives (19); Functional Policy areas (4); Management Services (6); Freedom of Information Co-ordinator (1).

#### HOUSING AND CONSTRUCTION

There are no staff employed in preparation of manuals at present. Most existing manuals are in the form of internal instructions which will need to be collated, reviewed and edited before being made available to the public. The staff required will be 4 Clerks (Class 9) for about 9 months, then for 4 weeks every year to update. A Class 11 or Level 1 would be needed for policy direction.

With regard to supplying information, it is envisaged that a small 'Freedom of Information' unit will be set up to apply disclosure guidelines and organise action for disclosure. It will comprise a Class 10, 2 Class 9s, 4 Class 7s, and other officers as required.

#### IMMIGRATION AND ETHNIC AFFAIRS

- (i) Central Office has the equivalent of 8 officers full-time and most branches have at least 1 officer engaged part-time on the preparation of manuals, etc. It is envisaged that a small unit of about 11 officers could be formed to collate and standardise departmental operational manuals for freedom of information purposes. In the short-term, this should be a force of 16 officers for speedy production.
- (ii) At present, up to 500 staff supply information to the public. Assuming people pursue their right to know, an increase of 125 positions (including support staff) would be a conservative estimate.

#### INDUSTRY AND COMMERCE

At present operating procedures are decided on in the areas responsible for policy. They aren't necessarily in manual form. Once the working group has defined the need for manuals, it is likely that each of the five Divisions of the Department will need to allocate at least one officer on a part-time basis for this task.

In the Public Relations Section, three officers are involved in supplying information. Their duties are unlikely to be affected by Freedom of Information legislation.

#### INDUSTRIAL RELATIONS

The Department has not indicated the number of staff still engaged on preparing manuals and providing information to the public, and has not estimated possible increases required under Freedom of Information legislation.

#### NATIONAL DEVELOPMENT

No officers are currently employed in preparing manuals of the 3 main areas handling requests for information at present:

- (a) there are 31 people in the Public Information and Sales Section;
- (b) 30 people would handle direct requests to Divisions;
- (c) 4 officers are engaged full-time on ministerial correspondence plus drafting by officers in policy Divisions.

The Department anticipates no increase in group (a). Groups (b) and (c) are expected to encounter a significantly increased workload, the former for information on how decisions were taken in granting or withholding Commonwealth assistance, the latter in handling specific requests for information.

#### POSTAL AND TELECOMMUNICATIONS

An estimated 10 staff are engaged on the preparation of manuals each year. The Freedom of Information legislation will not necessitate an increase.

#### PRIMARY INDUSTRY

The Department estimates the accumulated man-hours devoted to preparing manuals, etc., would be the equivalent of 43 full-time staff.

The staff required to update manuals, etc., under clause 7 would be minimal (estimated 3). However, because of the technical nature of the subject-matter, professional staff would need to be involved.

#### PRIME MINISTER AND CABINET

The equivalent of 45 officers are involved full-time in providing information to the public.

It is anticipated that there will be an increase in the volume of requests as a result of the Freedom of Information Bill. This will be in the form of direct requests arising out of a general growth in desire for information on government activities, from campaign mail, and from referrals from other Departments. The demand or resources may be equivalent to 10–20 officers—often at senior level.

#### PRODUCTIVITY

Three full-time officers are preparing and updating manuals assisted by senior staff also, whenever possible.

The Public Relations Section (3 officers) in Central Office provides information on demand to inquiries.

At least 20 people would be involved part-time in any one year in the preparation and up-dating of manuals, etc.

Extra staff needed to cope with freedom of information activities in general would be:

Regions 3–6 (up to one each).

Central Office 2 additional to existing resources.

#### SCIENCE AND THE ENVIRONMENT

The Department estimates that about 1% of its manpower would be involved in the preparation of manuals, etc.

The effect of the Bill would be to bring about a need for current resources to be doubled in the short term with perhaps a levelling out once the initial impact of the Bill has receded.

#### SOCIAL SECURITY

In Central Office, the equivalent of 7 full-time officers are engaged in the preparation of manuals, etc. The anticipated effect of the Freedom of Information legislation is that additional temporary staff would be required, initially equivalent to a total of 5½ man-years at a cost of about \$82 000. The equivalent of another 2 full-time officers would be needed at an additional cost of \$20 000. For State offices, it is estimated that ½ man-year each will be required to put the instructions into suitable form and one full-time officer to maintain the system thereafter.

With regard to the supply of information to the public, there are several categories. There are 59 positions for supplying brochures and general information. No increase is anticipated. A team of 3 officers would be needed to complete and consolidate a list of decision-makers. A team of 3 senior officers for one year would be needed to co-ordinate departmental activities under the Freedom of Information legislation. The Registry system would need revision

with an overall addition of 45 permanent staff, and 13 temporary positions. Training programs would be devised by a team of 4 officers over 9 months. 380 extra staff would be needed to keep up productivity as well as coping with the Freedom of Information legislation. Depending on the volume of requests for personal files, there would need to be a considerable increase in staff, especially as there may be more than one file on a particular person and they may be held in more than one location.

#### SPECIAL TRADE REPRESENTATIVE

Resource demands for indexing and cataloguing of material or the preparation of manuals for public use are expected to be minimal. Requests for information have been confined to ministerial correspondence and it is not expected that the legislation will have much impact on staff resources.

#### TRADE AND RESOURCES

The Department receives inquiries for information mainly from different types of trading and producer bodies in Australia and overseas. These will continue to be dealt with as part of the day-to-day work of the Department.

The Department would need an increase in numbers if its clientele widened to include academics, pressure groups, the media and members of the general public.

#### TRANSPORT

There are three groups of officers involved in responding to requests for information: (a) a group of 2 or 3 officers in each Regional Office and Central Office whose work includes the preparation of manuals, etc.; (b) a group of about 60 people who are involved in activities relating to all printed material produced by the Department; (c) a large proportion of all staff who write for publication and answer individual requests in their areas.

For monitoring and administration, it would take 3 officers in Central Office and 10 across the Regions, 14 man-months on these tasks with a progressively increasing involvement in other tasks associated with administrative review.

#### TREASURY

Eleven officers have been involved full-time or part-time in preparing the *Handbook of Practices and Procedures for Processing Foreign Investment Review Board Papers*. It would require revision again before public release. Overall, 150 persons would be involved part-time during the year in the processing of ministerials imparting information. The Freedom of Information legislation would require an increase in these numbers.

#### VETERANS' AFFAIRS

The number of officers involved in the preparation of manuals, etc., is equivalent to 55 full-time staff. The Department does not anticipate a need for much increase in this area in the long term.

There are the equivalent of 245 full-time staff supplying information to the public.

It is considered that about 30 additional staff would be required to cope with work generated by the Bill.

#### *Statutory Authorities*

#### AUDITOR-GENERAL

The Office spends an insignificant amount of time responding to requests and supplying information to the public.

#### AUSTRALIAN BROADCASTING TRIBUNAL

The Tribunal is required to publish material, including evidence, except where there are overriding considerations of commercial confidentiality.

#### AUSTRALIAN BUREAU OF STATISTICS

Few resources are currently employed in preparing and distributing internal guidelines documents.

The Freedom of Information legislation would mean an increase in manpower requirements, particularly for the removal of exempt material. The Bureau estimates a requirement for 2 additional full-time positions p.a.

#### AUSTRALIAN ELECTORAL OFFICE

One Class 10 officer is working part-time on the identification of categories of material for publication. 150 staff are engaged full-time in supplying information to or for the public with a further 372 doing so on a part-time basis.

To deal with routine index inquiries, the Office would require an additional 30 clerical assistant positions, and for access to policy files another 20 clerical and clerical assistant positions would be required.

#### AUSTRALIAN GOVERNMENT RETIREMENT BENEFITS OFFICE

The equivalent of 2-3 full-time staff work on the preparation of manuals. Many officers provide information as part of their routine work.

It has been estimated that a minimum of 4 additional staff of appropriate status (at least one Class 9) would be needed for a period of 18 months in order that the initial requirements of clause 7 (and clause 6) could be met. A minimum of a further 4 additional staff would be required to handle day-to-day requests for information. There may be a significant impact on senior staff as well.

#### AUSTRALIAN TAXATION OFFICE

750 officers prepare manuals or other documents that would be covered by clause 7. About 3500 officers supply information to the public, some on a part-time basis.

To implement Part II of the Bill would require 250 man-years at a senior level, plus support staff. Once guidelines have been established, probably existing staff could cope. There would also need to be facilities in each Branch Office and Head Office to provide information for direct requests, plus skilled staff to provide written answers.

#### INDUSTRIES ASSISTANCE COMMISSION

'There are no staff presently employed in preparing manuals, etc., or in supplying information to the public; nor is it envisaged that passage of the legislation would require special deployment of staff for this purpose.'

#### INDUSTRIAL RELATIONS BUREAU

Production of the *Bureau's Operations Handbook* involves four officers on a part-time basis and is expected to involve an additional five (part-time) following acquisition of additional functions. Eight officers on a part-time basis would service other information systems of the Bureau. There would also be support staff.

The Bureau anticipates no particular need for additional staff following enactment of the Freedom of Information Bill.

#### PUBLIC SERVICE BOARD

The preparation of manuals, etc., and the provision of information is part of the normal duty of many of the Board's officers. At any one time about 30 Third and Fourth Division officers would be so engaged full-time. Associated duties would amount to a further 3 man-years of the time of senior staff.

In the first year after enactment of the Freedom of Information Bill, preparation and up-dating of manuals, etc., would probably take 15 man-years. The Board estimates it would require 2 additional full-time positions in Central Office and 8 additional part-time staff in Regional Offices to implement the legislation as drafted.

#### TRADE PRACTICES COMMISSION

No officers currently prepare manuals.

A number of officers, equivalent to 4 officers full-time, obtain documents for inspection under the existing law.

About 2 officers would be needed to prepare manuals in the near future.

Further officers would be needed for training staff on the implications of the Freedom of Information Bill.

#### Question 3:

- (a) To what extent does the department anticipate an increased demand for information under the Freedom of Information legislation if disclosure were to be required of past or existing documents?
- (b) What percentage of material is stored on computer?
- (c) What is the age of the material expressed in percentage terms (i) 0-5 years (ii) 5-10 years (iii) 10-30 years (iv) over 30 years?

#### *Departments*

#### ABORIGINAL AFFAIRS

- (a) 96% of the information held by the Department is less than 10 years old. However, most requests will probably be for current documents. Therefore, probably no increase in staff will be necessary.
- (b) None.
- (c) (i) 56.3%, (ii) 40.6%, (iii) 3.1%, (iv) Nil.

#### ADMINISTRATIVE SERVICES

- (a) Some increase in demand would be inevitable because the range and number of available documents would be greater and there would probably be a need to extend access to related documents to give an historical perspective. All this would entail extensive research and would have 'significant impact on scarce resources'.
- (b) Less than 10%.
- (c) (i) 65%, (ii) 26%, (iii) 7%, (iv) 2%.

#### ATTORNEY-GENERAL'S

- (a) A considerable increase in demand for information could be expected 'because of the use of precedents and legal opinions in the administration of enactments and schemes for this and other Departments. It would also involve a great deal of work to process requests for information which would normally be caught under clause 10 (2) for the reason that many or most of the prior or existing documents are necessary to explain current decisions'.
- (b) Negligible.
- (c) (i) files 29%, opinions 30%, (ii) files 15%, opinions 15%, (iii) 31%, 25%, (iv) 25%, 30%.

#### BUSINESS AND CONSUMER AFFAIRS

- (a) There would be increased demand 'because of the thereby increased population of accessible documents'.
- (b) Department is unable to estimate percentage of information held on computer or otherwise.
- (c) Department is unable to estimate percentage of documents by age.

#### CAPITAL TERRITORY

- (a) Assuming this question is directed primarily to the effect of Part III of the Bill, the demand for access (or information under Part II) 'would be a function of the level of charges that may be levied for the material produced and/or made available'—whether it is a token charge (larger demand) or realistic (less demand because expensive).
- (b) Impossible to estimate percentage of total records held on computer.
- (c) (i) 40%, (ii) 25%, (iii) 22%, (iv) 13%.

#### DEFENCE

- (a) The impact of this extension is unpredictable. Two obvious effects are the increased volume of requests and the difficulties in locating prior documents.
- (b) A substantial proportion of the Department's records are on computer.
- (c) (i) 60%, (ii) 25%, (iii) 14%, (iv) 9%.

#### EDUCATION

- (a) Extension of this provision could cause extremely time-consuming searches and would depend on the assistance of archival agencies.
- (b) A proportion of the department's records is computer based.
- (c) Virtually all records would be less than 10 years old.

#### EMPLOYMENT AND YOUTH AFFAIRS

- (a) Department anticipates no significant increase in demand if provisions of clause 10 were extended to prior documents.
- (b) Records of CES and of training schemes are not computerised.
- (c) CES records on individual job seekers are destroyed 12 months after job seeker no longer requires CES help. Records of current employment programs are less than 5 years old.

#### FINANCE

- (a) The Department cannot make any meaningful estimate.
- (b) Considerable amount of information is computerised.
- (c) (i) 4.7%, (ii) 5.3%, (iii) 16.2%, (iv) 73.8%.

#### FOREIGN AFFAIRS

- (a) The initial impact on the Department would probably be significantly greater.
- (b) —
- (c) Current file holdings (including ADAB) estimated to contain 6 million documents, the bulk of which are less than 10 years old. For ADAB only:  
(i) 60%, (ii) 30%, (iii) 10%.

## HEALTH

- (a) The Department receives a high level of correspondence, most of which represents requests for information. The Minister receives 16 000 letters p.a. It is difficult to predict what the increase would be. Estimates are based on 3 alternatives, viz.: an increase of 16 000 (low), 32 000 (medium) and 48 000 (high).

Additional staff resources required could range from 23 to 55.

The additional cost could range from \$750 000 to \$1 890 000 p.a.

## HOME AFFAIRS

The main areas that would be affected would be Archives, particularly as to its services to other agencies, and which would need up to 20 additional staff, and the Office of Women's Affairs. The records of the latter are mostly less than 5 years old. The balance of the Department would have some difficulty if records prior to December 1977 were available as all functional areas have been through a series of reorganisation over recent years. Inquiries should be minimal. The Department does not have appreciable record holdings on computer. It has not estimated the age of material held on file.

## HOUSING AND CONSTRUCTION

- (a) In light of recent experience, the Department anticipates demands for past documents to be negligible.
- (b) Approximately 20% of current records is stored on computer.
- (c) (i) 50%, (ii) 30%, (iii) 20%.

## IMMIGRATION AND ETHNIC AFFAIRS

The Department offered no specific comment but pointed out that there could be a certain amount of cross reference between personal files (which could be separated into migration and citizenship files) and earlier files or even to security files. Citizenship files are maintained indefinitely. Location in Central Office, State or overseas offices might also provide a logistics problem. The Department raises some 250 000 files each year, of which 56 000 would relate to immigrants.

## INDUSTRY AND COMMERCE

There would be some increase in demand for information on the Department's files of which about 14 000 are less than 5 years old. The Department anticipates no significant increase in requests under the Freedom of Information legislation whether or not prior documents are available for access.

## INDUSTRIAL RELATIONS

The Department has not estimated increased demand for information if disclosure of prior documents was required: it opposes such disclosures. Its files are held jointly with Employment and Youth Affairs. It estimates that combined file holdings at Central Office would be 50 000 files of which 15 000 relate solely to DIR functions. None is held on computer. Thousands of files are also held in each State office. Some 2500 DIR files are created each year.

If access was given to records under 5 years old, possibly 2 senior and 1 junior additional staff would be required.

## NATIONAL DEVELOPMENT

- (a) This would initially create a major problem because the present staff is largely unfamiliar with past records. The problem of exemptions would be accentuated.
- (b) No comment.
- (c) (i) 40%, (ii) 28%, (iii) 18%, (iv) 14%.

#### POSTAL AND TELECOMMUNICATIONS

- (a) No comment.
- (b) No records held on computer.
- (c) The Department estimates the age of its documents by division.

#### PRIMARY INDUSTRY

- (a) Workload would more than double. Combined with the possibility of a shorter period for replies, it would make the legislation unworkable unless there were substantial increases in staff.
- (b) Less than 10%.
- (c) (i) 20%, (ii) 40%, (iii) 39%, (iv) 1%.

#### PRIME MINISTER AND CABINET

- (a) Possibly the workload would double. In particular, if access to policy papers was allowed, the demand could be heavy and the material would require vetting in order to decide whether there should be deletion or exclusion of exempt matter in accordance with clause 20 of the Bill.
- (b) No information stored on computer.
- (c) Registry files (i) 30 141, (ii) 31 138, (iii) 95 000. Cabinet files are listed separately.

#### PRODUCTIVITY

- (a) The Department has information pre-dating 1976 only in relation to the Defence Production function. Information on this would probably be sought from or through the Department of Defence. It anticipates little demand for prior documents on other areas.
- (b) No comment.
- (c) Percentages are listed separately for the Department, the Patents Office and the Industrial Research and Development Incentives Board.

#### SCIENCE AND THE ENVIRONMENT

The Department has a rather limited clientele in a number of selective services. Because of the nature of the material provided by these areas, no more than a moderate increase in demand would be expected under Freedom of Information legislation.

#### SOCIAL SECURITY

The Department currently holds an enormous amount of material. However, it is difficult to quantify the likely public demand under the Freedom of Information legislation. Moreover, even though the Bill, as currently drafted, excludes prior documents from access, it would not be possible for the Department to refuse an individual access to papers on his person files even though some were created before the enactment of the Bill.

#### SPECIAL TRADE REPRESENTATIVE

The Department is relatively new, is performing a specialised function and has a very small establishment. It anticipates few requests under Freedom of Information legislation.

#### TRADE AND RESOURCES

The Department would have some problems in ascertaining whether it still held or ever had held certain documents because of the different identities which it has had. 'If unrestricted access to retrospective material was to be sanctioned it would undoubtedly increase workloads.'

## TRANSPORT

- (a) It could be assumed that there would be a very much higher demand for information in the early phase of the Act's operation but that the effect of this would decline at an accelerating rate over a period of about two years. This situation would not be affected by the extent of back-dating.
- (b) No comment.
- (c) (i) 45%, (ii) 30%, (iii) 20%, (iv) 10%.

## TREASURY

An informal guess is that the demand might be double that for current documents. It is not possible to estimate the age of documents held but it should be noted that all Treasury documentation is held permanently and is never destroyed.

## VETERANS' AFFAIRS

- (a) Generally, past documents would be required to understand documents which would be made available as envisaged by the Bill.
- (b) 1%.
- (c) (i) 24%, (ii) 22%, (iii) 34%, (iv) 20%.

## *Statutory Authorities*

### AUDITOR-GENERAL

- (a) If the Bill includes prior documents, probably the full-time services of a Class 9 officer would be required, at least for the first year. Auditor-General expects few requests under Freedom of Information legislation.
- (b) A small amount of data is stored on computers.
- (c) (i) 50%, (ii) 30%, (iii) 20%.

### AUSTRALIAN BROADCASTING TRIBUNAL

The Tribunal expects the Freedom of Information legislation to have little or no effect on its activities.

### AUSTRALIAN BUREAU OF STATISTICS

- (a) There would be a significant increase in demand if prior documents were accessible. An estimate would be 5-10 man-years of effort in the first year of the law's operation, 2-5 man-years in the second year and 0-2 man-years in the third.
- (b) 5% of relevant material is computer stored.
- (c) (i) 75%, (ii) 15%, (iii) 10%, (iv) negligible.

### AUSTRALIAN ELECTORAL OFFICE

There could be a substantial increase in the requests received from academic institutions and students. Some election records date back to the early 1900s. An estimate of staff numbers needed to satisfy this expected demand has not been made.

### AUSTRALIAN GOVERNMENT RETIREMENT BENEFITS OFFICE

It is anticipated that the bulk of requests will be from individuals who are members of the various schemes seeking information about their own cases that is not already available. These fall into two categories: (a) medical examination reports and (b) computer history records. Unless a charge is made, imposing a deterrent, there could be up to 10 000 requests p.a. to see or be provided with a copy of this material. If the Bill also gives access to prior documents, the requests could

double in the first instance. There could also be problems with referrals where other agencies held the reports. AGRBO has provided total figures on files and other records held by the Department.

#### AUSTRALIAN TAXATION OFFICE

- (a) It has been the Office's practice to provide as much information as possible to the public at large. No increase in routine requests is expected and probably the total number of requests would not be excessive, at least in early years.
- (b) 20-25% stored on computer.
- (c) (i) 20%, (ii) 49%, (iii) 26%, (iv) 5%.

#### INDUSTRIES ASSISTANCE COMMISSION

It is not expected that Freedom of Information legislation will produce any significant increase in demand.

#### INDUSTRIAL RELATIONS BUREAU

- (a) Due to publicity and public interest in its establishment and role, the Bureau would expect a substantial demand for prior documents especially those related to the most recent past (1977 and 1978).
- (b) A negligible proportion of documents is stored on computer.
- (c) (i) 46%, (ii) 26%, (iii) 22%, (iv) 6%.

#### PUBLIC SERVICE BOARD

- (a) The Board cannot make any objective estimate of increased demand if access to prior documents were available. If demand was concentrated on material less than 5 years old, the area (i.e. number of files) within which information would have to be researched would be increased by a factor of five or six.
- (b) The Board has not estimated the proportion of information held on computer in respect of its own office: it would be negligible.
- (c) (i) 17%, (ii) 23%, (iii) 60%.

#### TRADE PRACTICES COMMISSION

- (a) This would mean an increased workload.
- (b) None of the Commission's primary documentation is stored on computer.
- (c) All of the current Commission's documents are less than 5 years old: documents inherited from the previous Commission date back to 1967.

#### Question 4:

What is the anticipated impact on staff resources if decisions on request for access were to be notified within

- (a) 60 days, (b) 28 days, or (c) 14 days?

#### *Departments*

#### ABORIGINAL AFFAIRS

- (a) No comment.
- (b) Would be difficult until impact of legislation was ascertained but would settle down.
- (c) Would not necessarily cause a need for extra staff but could cause pressure from competing priorities.

#### ADMINISTRATIVE SERVICES

- (a) Preferred.
- (b) Since the Department is decentralised and has diverse functions it would be difficult to satisfy this deadline in terms of the logistic aspect alone.
- (c) ' . . . the greater the reduction below 60 days, the greater would be the demands on departmental resources which could only result in a greater allocation of staff to meet the requests for information.'

#### ATTORNEY-GENERAL'S

Additional staff would be required. The number would depend on the number and pattern of requests. The workload on senior staff would be increased as response time diminished.

- (a) Up to 14 extra staff would be required.
- (b) Additional resources to (a).
- (c) Additional resources to (b).

#### BUSINESS AND CONSUMER AFFAIRS

- (a) May prove manageable.
- (b) Would be difficult unless inordinate resources were deployed.
- (c) Impossible, on basis of experience with AAT Act.

#### CAPITAL TERRITORY

- (a) The only possible period in light of existing staff resources though Department would make every effort to comply with the request as soon as possible.
- (b) Full consideration and response within 28 days requires diversion of staff resources.
- (c) —

#### DEFENCE

The impact on staff resources is unpredictable. However, any period shorter than 60 days would impose a correspondingly heavier administrative burden which could necessitate more staffing resources at the operational level and also impinge on the other functions of senior policy officers who would be required to review documents. The geographical spread of the Department and the Defence Force presents substantial communication problems if a period less than 60 days were implemented.

#### EDUCATION

Twenty-eight days 'would be ample in the vast majority of cases'. However, there would be problems if there was a great demand during peak processing periods (December to April).

#### EMPLOYMENT AND YOUTH AFFAIRS

- (a) (b) Bulk of requests would probably be for access to personal records and could be handled, with most other more formal requests for information, within 28 days.
- (c) Department estimates a 10% increase in workload with requirement for additional staff of from 2.5 to 7 in year 1 and from 1.5 to 2.5 in subsequent years.

#### FINANCE

- (a) Even the 60-day limit is going to require a re-arrangement of priorities and an increase in staffing. The busiest areas would be PRA administration and ex-gratia payments and waivers.

- (b) If the response time was 28 days, at least one additional position would be required in ex-gratia payments and waivers.
- (c) Full-time positions would be required to answer all requests. This would mean one additional position in PRA and two in ex-gratia payments and waivers plus one for each Division—a total of 8 additional positions.

#### FOREIGN AFFAIRS

The time taken to answer a request would depend on its nature. A 60-day response time is regarded as reasonable. The Department would generally wish to clear its books as soon as practicable anyway but a 60-day period provides enough latitude for unexpected contingencies.

#### HEALTH

Unless there were additional resources to handle requests, the majority of requests could not be handled promptly, regardless of statutory deadline.

- (a) Endorsed.
- (b) Doubtful for some requests regardless of reasonable resources.
- (c) Impracticable.

#### HOME AFFAIRS

- (a) All questions have been answered on the assumption of a 60-day limit; additional staff as indicated would be required.
- (b) This would not affect staff levels much but would affect other priority tasks in Archives and should be manageable in the Office of Women's Affairs.
- (c) This would place considerable strain on Archives even with augmented resources while it would affect priorities in other areas.

#### HOUSING AND CONSTRUCTION

- (a) Requests could be dealt with in this period provided that the Department can establish a separate freedom of information unit staffed by a class 10, 2 class 9s, 4 class 7s and 4 extra staff in central and regional registries.
- (b) The result could be to treble the effect on resources.
- (c) Impracticable except for the simplest inquiries.

#### IMMIGRATION AND ETHNIC AFFAIRS

The Department did not comment on this question.

#### INDUSTRY AND COMMERCE

- (a) While this period is a necessary upper limit, in cases of complex requests the Department would always attempt notification as soon as possible.
- (b) Difficulties in complying, particularly where complex requests are involved.
- (c) Difficult.

#### INDUSTRIAL RELATIONS

- (a) The Department implies that it could cope with a 60-day response period without additional staff.
- (b) The appointment of 'responsible officers' in Canberra and Melbourne would be required; severe pressure would be imposed on Branch Heads.
- (c) Specialist officers, full-time, in Canberra and Melbourne would be required but the Department would not be able to meet a 14-day limit in more than a few cases.

#### NATIONAL DEVELOPMENT

If reduced response periods were imposed, this would make necessary either an increase in resources or a re-ordering on priorities within the Department.

- (a) Preferred option.

- (b) The increase in workload would be substantial though not as drastic as if the limit were 14 days.
- (c) This would double the workload involved in implementing the legislation. It would deploy staff needed for the mainstream of the Department's work.

#### POSTAL AND TELECOMMUNICATIONS

- (a) No problems.
- (b) Would be possible though there could be some difficulties if requests were made to Regional Offices and authority to release was only available from Central Office.
- (c) Would only be possible with an increase in staff (at least two) because of the widespread geographical location of the Department.

#### PRIMARY INDUSTRY

- (a) Reasonable. The applicant has recourse to the Ombudsman if any delay appears inordinate.
- (b) Would mean an unacceptable situation where freedom of information requests 'would take precedence over all current work except ministerial and other priority tasks'. Would require 5 extra staff.
- (c) Impracticable.

#### PRIME MINISTER AND CABINET

Any period shorter than 60 days means that senior staff will have to forego work on current policy responsibilities in order to concentrate on requests for clearances. Referrals from other departments would be difficult to cope with in less than 60 days from the date of first receipt if there was any delay in initial referral. If resource time was less than 60 days, additional senior staff would probably be needed.

#### PRODUCTIVITY

- (a) Regions: 3-6 staff; Central Office: another 2.
- (b) Regions: no change; Central Office: 1 additional position.
- (c) Regions: no change; Central Office: 2 additional positions.

#### SCIENCE AND THE ENVIRONMENT

On the basis of additional 1% increase in resources:

- (a) No problem.
- (b) Most decisions could be managed.
- (c) Timescale could be met with one or two extra staff.

#### SOCIAL SECURITY

The Department has different categories of information, viz., personal information, manuals of instruction and policy and administrative data, for which different time limits would be appropriate.

- (a) Within existing resources, this limit is necessary with regard to supply of policy and administrative data. It is a necessary maximum for the supply of amendments to manuals.
- (b) —
- (c) This period is desirable for the supply of personal information although logistics problems may sometimes arise.

#### SPECIAL TRADE REPRESENTATIVE

Because the Department's establishment is a small one, if there is a greater demand for information than anticipated, the impact will be considerable. It will be even greater if the response period is shortened to 28 or 14 days.

#### TRADE AND RESOURCES

'If the time to comply with requests for information were to be progressively shortened, clearly this would have an impact on present staff resources; either necessary day-to-day activity would have to be correspondingly deferred or more staff obtained.'

#### TRANSPORT

The Department offered no comment.

#### TREASURY

- (a) Five extra staff (plus probably about 3 support staff).
- (b) Eight extra staff (6 support staff).
- (c) Fourteen extra staff (12 support staff).

#### VETERANS' AFFAIRS

Based on predictions of future workload and adequate staff.

- (a) Little adverse effect on the Department's operation.
- (b) Possible on most occasions.
- (c) Difficult.

#### *Statutory Authorities*

#### AUDITOR-GENERAL

Assuming the Bill does not cover prior documents:

- (a) No increase in staff resources.
- (b) Probably no increase in resources.
- (c) One full-time officer.

#### AUSTRALIAN BROADCASTING TRIBUNAL

The Tribunal expects the Freedom of Information legislation to have little or no effect on its activities.

#### AUSTRALIAN BUREAU OF STATISTICS

On the assumption that ABS will not be inundated with requests:

- (a) Satisfactory.
- (b) Probably practicable.
- (c) Difficult. Would require greater use of senior staff.

#### AUSTRALIAN ELECTORAL OFFICE

The length of time will depend upon the staff resources which can be applied, how complicated the request is and so on. However, the provision of information should not be allowed to interfere with the performance of the Electoral Office's specific statutory functions.

#### AUSTRALIAN GOVERNMENT RETIREMENT BENEFITS OFFICE

Assuming additional staff was provided, as outlined in answer 2.

- (a) Would be necessary for more complex requests and transferred requests.
- (b) This would be feasible for straightforward requests, not including prior documents.
- (c) Impracticable: would require re-ordering of priorities at the expense of other essential work and additional staff.

#### AUSTRALIAN TAXATION OFFICE

- (a) The majority of information requests now take about 5-7 weeks to answer.
- (b) Totally unreasonable with existing resources. Diversion of resources would detract from tax-collecting function.
- (c) Totally unreasonable with existing resources.

#### INDUSTRIES ASSISTANCE COMMISSION

The Commission expects the legislation to have little impact on its operations.

#### INDUSTRIAL RELATIONS BUREAU

- (a) 4 full-time, 4 part-time staff.
- (b) 12 full-time staff.
- (c) Impracticable.

#### PUBLIC SERVICE BOARD

Work or decisions taken under a statutory deadline, especially if the period is relatively short, will result in a distortion of work priorities and impose a heavy burden on senior officers and their staff. It would also necessitate a significant increase in clerical staff.

- (a) Favoured.
- (b) Difficult.
- (c) Impracticable.

#### TRADE PRACTICES COMMISSION

- (a) No comment.
- (b) Decisions could be achieved in most cases.
- (c) The extra burden would require about 5 additional full-time staff.

#### Question 5:

On the basis of the department's experience of requests for information at present, what is the anticipated annual number of requests under the Freedom of Information legislation?

#### *Departments*

#### ABORIGINAL AFFAIRS

Has no accurate statistics. Does not expect a great volume.

#### ADMINISTRATIVE SERVICES

It is expected that initially requests under the legislation would be about 1000 p.a.

#### ATTORNEY-GENERAL'S

The level of requests will fluctuate depending on whether there is a contentious issue currently under scrutiny. The estimate is at least 3000-5000 requests p.a.

#### BUSINESS AND CONSUMER AFFAIRS

Has not kept statistics. Probably would not help anyway since it is too difficult to assess the likely effect of the Bill.

#### CAPITAL TERRITORY

No accurate statistics but amounts to hundreds per month. Department unable to make any accurate forecast as to the proportion of requests that would arise from the Bill. Topical areas where manuals would not be enough and applicants would seek access to files include: the ratings area; housing; transport; welfare and municipal management.

#### DEFENCE

Past experience is not a reliable guide to estimating anticipated annual numbers of requests under Freedom of Information legislation especially as the Department supplies information through a wide variety of channels.

#### EDUCATION

The majority of requests would be from existing or potential beneficiaries of student assistance schemes administered by the Department while there would

be some from education interest groups. With regard to the former, there are now about 250 000 inquiries p.a. Any appreciable increase (e.g. 5–10%) would require additional staff.

#### EMPLOYMENT AND YOUTH AFFAIRS

Current experience does not provide an appropriate guide to estimate probable number of requests under Freedom of Information legislation. Estimates in response to question 2 based on an annual throughput of 2 million employment and training records and on the assumption of a high rate of requests for access (25% in year 1, 10% in subsequent years) or a low rate (10% and 5% respectively).

#### FINANCE

The Department currently receives 2000 ministerial representations p.a. A considerable number of these could be covered under the Freedom of Information legislation, e.g. 500 requests p.a. requiring a detailed response or refusal.

However, too much uncertainty is involved to predict accurate figures.

#### FOREIGN AFFAIRS

The Department already provides a lot of information to inquiries from a wide cross-section of the community. Any increase arising from the Freedom of Information Bill is difficult to forecast. Could be of the order of 300 to 400 requests p.a. Requests for access are likely to be more onerous than requests for information and the workload may be disproportionately spread over the Department. Also, there will be inquiries on matters affecting individuals and another category on broader policy issues, e.g. from academic researchers.

#### HEALTH

The present best guess is that about 16 000 additional requests may emerge in Central Office.

#### HOME AFFAIRS

The Department provided annual statistics which were admittedly incomplete. They were—ministerial correspondence (2100); parliamentary questions (114); Shopfront (3000); Women's Film Fund (300).

The anticipated increases were: Archives—substantial; Office of Women's Affairs (350–400 requests p.a.); Sports and Recreation Branch (20 p.a.); Administration of National Estate—some increase; and a flow-through to supporting areas in management area.

#### HOUSING AND CONSTRUCTION

The Department anticipates that the current number of requests (about 10 000 p.a.) will increase by about 10%, i.e. there will be about 1000 inquiries p.a. as a result of the Freedom of Information legislation. Most of these will be routine but a significant number (about 100 p.a.) may be very much more complex and fall into the category of disclosure of specific documents. 'It is possible that in the order of 10% of decisions will result in appeal actions and therefore involvement of senior Second Division officers would be significant in some actions.'

#### IMMIGRATION AND ETHNIC AFFAIRS

The Department expects requests for information related to a number of subject-matters. They are: files on applications to immigrate—a feasible figure is 50 000 requests p.a.; ministerial letters related to appeals against decisions—possible 20 000 requests p.a.; files on change of status—possibly 500 requests p.a.; refusals

of citizenship applications—2000 requests p.a.; refusals of visitor's permits—1000 requests p.a.; files on overseas student applications could be more than 30 000 requests p.a.; refusals of grants-in-aid—100 requests p.a.; requests from researchers—100 requests p.a. It should be noted that sometimes there may be duplicate requests from the same individual. One could also compare the use of the Ombudsman—163 complaints lodged in Australia and 12 complaints lodged overseas last year.

#### INDUSTRY AND COMMERCE

The Department anticipates that requests for information would number at most 50 to 100 p.a.

#### INDUSTRIAL RELATIONS

Department receives normally about 50 requests per year. Provided campaigns against the Department or issue-oriented publicity did not produce unusual peaks in requests under Freedom of Information legislation, the Department would not anticipate major increase in the normal level of requests following enactment of the Freedom of Information Bill.

#### NATIONAL DEVELOPMENT

Requests are at about the rate of 6000 p.a. to the Information Section. The anticipated increase as a result of the Freedom of Information Bill would be 600 p.a. An unquantifiable additional increase is expected in ministerial correspondence, etc.

#### POSTAL AND TELECOMMUNICATIONS

This is impossible to quantify. However, much of the Department's documentation is already freely available. The Department does not expect much of its information will be of great interest to the public at large. The Department should be able to meet additional requests without difficulty.

#### PRIMARY INDUSTRY

On the basis of current requests, there could be up to 12 500 formal requests in the first year. If there is major public interest in a particular issue, the figure would be higher.

#### PRIME MINISTER AND CABINET

Over recent years, some 800 requests p.a. would have been within the perview of the Freedom of Information legislation had it existed.

The anticipated increase would be at least 1000 requests p.a. In addition, there would probably be another 1000 requests p.a. by referral.

#### PRODUCTIVITY

Perhaps about 1500 requests p.a. could be expected under the Freedom of Information legislation.

#### SCIENCE AND THE ENVIRONMENT

Apart from information services of the Bureau of Meteorology, the Department would anticipate about 400 requests p.a.

#### SOCIAL SECURITY

The Department has not quantified its estimates of increases in inquiries likely under Freedom of Information legislation. Page 24 of its submission contains detailed breakdown of current inquiry levels.

#### SPECIAL TRADE REPRESENTATIVE

The Department does not expect that there will be any significant change to the current pattern of requests for information which, at present, is generally confined to ministerial correspondence.

#### TRADE AND RESOURCES

Any estimate could only be speculative. 'It is expected that the overall increase in the Department's workload could well be substantial.'

#### TRANSPORT

It would be hard to choose a figure anywhere between 50 to 500 as an estimate of the likely number of requests for information. If the requests were regular and about 50 p.a., the impact on people handling the published material would not be great. However, an increase of 2 or 3 positions may be required if several hundred requests were received or if the flow of requests was not regular.

The impact on the Department generally would be diffuse and might result in the need for an increase of staff depending on the number and nature of requests.

#### TREASURY

The freedom of information demand could be of the order of 600 requests p.a. or 12 requests per week. This includes ministerials and 'raw-source' information. Specialised researchers could take the demand up to 20 per week though the latter could, to some extent, be 'event-orientated'.

#### VETERANS' AFFAIRS

The annual number of requests is anticipated at about 6000.

#### *Statutory Authorities*

##### AUDITOR-GENERAL

At present the Office receives about 20 requests p.a. It would anticipate 100 to 150 requests p.a. under the Bill.

##### AUSTRALIAN BROADCASTING TRIBUNAL

The Tribunal expects the Freedom of Information legislation to have little or no effect on its activities.

##### AUSTRALIAN BUREAU OF STATISTICS

At a rough guess, the Bureau estimates 300 requests in the first year and 200 requests p.a. thereafter.

##### AUSTRALIAN ELECTORAL OFFICE

There is no data on which to base reliable estimates. It notes, 'If only 1% of electors each year were involved, there would be 86 000 index inquiries'. The Office anticipates large numbers of requests from people inquiring about the index, 'commercial' inquiries (e.g. insurance companies, debt collection agencies) and researchers.

##### AUSTRALIAN GOVERNMENT RETIREMENT BENEFITS OFFICE

It is expected that AGRBO will receive about 10 000 requests p.a. This figure would initially double if access were also given to prior documents.

##### AUSTRALIAN TAXATION OFFICE

The Office has well-established regional inquiry facilities already (265 officers nationally). In addition, the equivalent of some 80 officers respond to some 4000 written inquiries p.a.

Tax has not estimated the likely number of requests under Freedom of Information legislation but anticipates a heavy appeal workload.

#### INDUSTRIES ASSISTANCE COMMISSION

The Commission does not expect that the Freedom of Information legislation will cause any significant increase in the amount of requests for information, either in relation to particular or general inquiries. It is expected that the majority of requests will be readily answered by reference to the Commission's reports and other published information.

#### INDUSTRIAL RELATIONS BUREAU

The Bureau has provided a detailed breakdown of complaints and requests for information received during the 1977-78 financial year. It estimates additional requests under Freedom of Information legislation at 600 p.a.

#### PUBLIC SERVICE BOARD

The Board and its offices currently respond to about 10 000 ad hoc requests for information p.a. Most of these require individual written responses.

The Board estimates an increase of 20-50% in this figure under Freedom of Information legislation.

#### TRADE PRACTICES COMMISSION

The Commission currently receives about 2000 formal requests for information p.a. There are also oral inquiries. The Commission expects about 2000 additional requests p.a. under Freedom of Information legislation.

### **Question 6:**

**What consideration, if any, has been given to the staff levels at which officers will be delegated power to grant and/or deny access to information under Freedom of Information legislation?**

#### *Departments*

##### ABORIGINAL AFFAIRS

At Central Office, the Branch Head (Level 1) will approve or deny access to information with the Division Head or Deputy Secretary responsible for reviews under clause 38 of the Bill.

In the regions, the decision-maker will be the Regional Director except where reference to Central Office is required.

##### ADMINISTRATIVE SERVICES

Initially, approval to grant or deny access would most likely be given at Branch or Division Head level.

##### ATTORNEY-GENERAL'S

Initially, a decision to grant or deny access would be made at least at 2nd Division level. The decisions in contentious matters could rest with Division Head, a Deputy Secretary or the Permanent Head.

##### BUSINESS AND CONSUMER AFFAIRS

Due to the sensitivity of the information, would have requests centrally handled by the Administrative Review Section of the Legislation Branch in consultation with 'line Branch' officers. The delegated decision-maker would be at least at Director (Class 11) level and in cases of disagreement would be referred to a more senior level.

#### CAPITAL TERRITORY

These decisions would be made by the Minister, the principal officer of the department or by an authorised officer. No detailed consideration has been given and no decisions made as to the level of authorised officers for this power. It would probably be delegated to the officer responsible for the function or area to which the document sought refers, i.e. Section Head (Class 10-11) or Branch Head (Level 1).

#### DEFENCE

This has not yet been determined. Since the respondent will need to be aware of and recognise both the implications for release and the overall defence, national security and freedom of information considerations, the decision will have to be made by an officer at high level.

#### EDUCATION

Guidelines for the availability of particular categories of information would be developed by Central Office. Eventually, delegations for the release of information could be issued to State offices. Delegations for denial of access may need to be at a higher level, possibly Class 10 or equivalent. Subsequent review/appeal action may absorb time of senior staff.

#### EMPLOYMENT AND YOUTH AFFAIRS

With regard to CES matters, Class 11 level in Central Office and Class 8 level at Regional Offices.

With regard to other matters, Branch Head (Level 1) in Central Office, and Branch Head (Level 1 to Class 7) in the Regions.

#### FINANCE

A general delegation to approve release of information might be placed at Branch Head level although the release of freely available documents might be placed at Class 8 level. For cases falling within the exemption clauses, decisions could be at Branch or Division Head level. For the most sensitive cases, the decision would be with the Secretary.

#### FOREIGN AFFAIRS

The Department envisages establishing a Section within the Public Affairs and Cultural Relations Division with a structure of one Class 11 (Section Head), a Class 9, a Class 5 or 6, a Clerical Assistant/Registrar and a Stenographer. The Section would act principally as a co-ordinator of the distribution of requests and of the answers from the relevant Branches. The Department would provide accommodation for counter inquiries and for training of the staff to be involved.

#### HEALTH

Probably the powers to grant or withhold information would be delegated to the Commonwealth Directors of Health in all States, First Assistant Directors-General in charge of Divisions and Directors of outrider bodies.

#### HOME AFFAIRS

Officers handling freedom of information matters within the Department will be at Class 9-11 (3rd Division) level. Decisions under the legislation will require the authorisation of a 2nd Division officer. Those handling Archives duties arising out of freedom of information inquiries directed to Departments will be classified at the level appropriate to their duties.

#### HOUSING AND CONSTRUCTION

It is anticipated that senior Third Division officers will grant access in accordance with departmental guidelines and will also be responsible for initial recommendations on exempt documents. Initially, the final decision whether to deny access to information will be delegated to one Division Head (First Assistant Secretary) in Central Office.

#### IMMIGRATION AND ETHNIC AFFAIRS

Initially, denial of access would be delegated to Assistant Secretaries and above in Central Office, to Regional Directors in the State offices and to senior migration officers in overseas posts.

Authority to grant access would be delegated to section leaders in Central Office (Class 11), to Assistant Regional Directors in State offices (Class 8 to Class 11) and to the senior migration officer in overseas posts.

#### INDUSTRY AND COMMERCE

Initially, decisions on access would be delegated no lower than Divisional Head level, i.e. at and above Level 3, Second Division.

#### INDUSTRIAL RELATIONS

Central Office Branch Heads could decide most cases: refusal of access would be delegated only to First Assistant Secretaries or the Deputy Secretary. State offices would not be delegated authority to release material under freedom of information.

#### NATIONAL DEVELOPMENT

Initially, responsibility would be delegated to Second Division officers.

#### POSTAL AND TELECOMMUNICATIONS

'It is intended to delegate to the most junior level of officer the power to grant access to identified documents. Requests for documents not identified for general release will be forwarded to Central Office . . . for decision on granting access. This decision will be made at Clerk Class 10 level. A decision to deny access will be made by a Second Division officer.'

#### PRIMARY INDUSTRY

Initially, the decision would be at least at Branch Head level (2nd Division, Level 1). With experience, decisions on routine requests could be delegated to Section Head (senior 3rd Division) level.

#### PRIME MINISTER AND CABINET

Probably delegation to grant access would be limited to Senior Advisers (Class 11) and Branch Heads. In addition, the Secretary to the Executive Council and the Secretary of the Department would be involved in particular cases because of their prescribed responsibilities under the Bill.

#### PRODUCTIVITY

The Department has not considered the matter.

Access would probably be granted at about the level of Central Office Co-ordinator. Refusals would initially be limited to the Permanent Head and/or 'Secretarial line officers'.

#### SCIENCE AND THE ENVIRONMENT

The matter is under review.

Delegations would probably rest at Branch Head level with some devolution dependent on the nature of requests.

#### SOCIAL SECURITY

With regard to the preparation of the Manuals of Instruction, where part of the manual will contain exempt material, the determination of exemption will probably follow the present procedure where the decision is made either by the relevant First Assistant Director-General or by the Director-General. This will also apply to policy and administrative data. Authority to grant access to personal information would be delegated to either review officers or office managers.

#### SPECIAL TRADE REPRESENTATIVE

The Department offered no comment.

#### TRADE AND RESOURCES

Because it is impossible to assess what kind of requests will be made under the Freedom of Information legislation, it is impossible to categorise at what level access would be granted or denied. Initially, probably considerable time of senior officers would be involved.

#### TRANSPORT

The authority to grant access will be given to Assistant Secretaries and Assistant Directors in Regional offices; the authority to deny access will be given to First Assistant Secretaries and Directors of Regions.

#### TREASURY

The Department would establish a co-ordinating section/sub-section to process freedom of information requests, consisting of an officer in charge (Class 8-10), a second in command and a number of support staff. Refusal of access would require Division Head clearance, at least initially.

#### VETERANS' AFFAIRS

In the Regions, the authority to grant access should be with group leaders (Class 5-8) and to withhold it with the Regional Managers or Assistant Managers (Class 9-11). At Central Office, the granting of access would be at Section Leader level (Class 8-11) and denial of access would be vested in Division Heads.

#### *Statutory Authorities*

#### AUDITOR-GENERAL

'The special independence and responsibilities of the Auditor-General are such that no delegation of his power is envisaged in the short term.'

#### AUSTRALIAN BROADCASTING TRIBUNAL

The Tribunal expects the Freedom of Information legislation to have little or no effect on its activities.

#### AUSTRALIAN BUREAU OF STATISTICS

This responsibility should be with line managers. In Central Office this would be the Director (Class 11) level, in State Offices, at the Director (Class 9) level. Initially, however, Central Office would handle requests and decision making would be at Assistant Statistician level.

#### AUSTRALIAN ELECTORAL OFFICE

Initially, politically and electorally sensitive matters including individual privacy should be decided on a 'case by case' basis by a senior officer—probably at Class 8 to 10, Third Division.

#### AUSTRALIAN GOVERNMENT RETIREMENT BENEFITS OFFICE

The level of staff will depend on the nature of the material for release.

- (a) The kind of information *currently* made available to an individual about his own case will continue to be provided in writing signed by officers in Class 6-8 range.
- (b) Information *not presently* provided to an individual will be authorised by Class 9 level or above.
- (c) Request for information other than by an individual about his own case will be handled at Class 10-11 level or above.
- (d) Only Level 1 officers and above will have authority to deny access.

#### AUSTRALIAN TAXATION OFFICE

No formal consideration has yet been given to staff levels at which decisions would be taken. By analogy with responses to inquiries at present decisions would probably be at least at Level 1, Second Division.

#### INDUSTRIES ASSISTANCE COMMISSION

In view of the small effect expected, the Commission has not considered it necessary to make formal arrangements at this stage on delegations to grant or deny access to its information.

#### INDUSTRIAL RELATIONS BUREAU

Due to the sensitive nature of the subject-matter, initially decisions on access would be made at Director or Deputy Director level. Later, it could be delegated to State Executive Officer level (i.e. N.S.W., Vic.—Level 1, 2nd Division; other Regions—Classes 9 and 8, 3rd Division).

Also, of the number of refusals, some could be expected to go to the Administrative Appeals Tribunal. This could mean one full-time position in the Central Office.

#### PUBLIC SERVICE BOARD

Initially, where the matter has significant implications for the Board, Board members may have to make the decision. Once the impact of the legislation has been assessed, 'routine' requests can be handled by relatively junior clerical staff while more complicated decisions would need to be taken at least at Second Division/Regional Director level.

#### TRADE PRACTICES COMMISSION

Initially decisions on access will be taken by relatively senior officers in Canberra (Second Division or perhaps senior Third Division level).

Appendix 5

**Responses received to 35 questions placed on notice by Senator Alan Missen on 5 April 1978, seeking access to reports and documents held by the Commonwealth Government**

<i>Quest. No.</i>	<i>Minister responsible</i>	<i>Department responsible</i>	<i>Subject matter</i>	<i>Answer in Hansard</i>	<i>Response</i>	<i>Comment</i>
318	Fraser	Prime Minister and Cabinet	Continental Airlines: Submission to United States	9.5.78 Page 1535	Disclosure refused	Disclosure would be 'prejudicial to the international relations of the Commonwealth'.
319	Fraser	Prime Minister and Cabinet	Seas and Submerged Lands IDC Report	9.5.78 Pages 1535-6	Disclosure refused	'Internal working documents . . . are not normally available for public access'.
320	Fraser	Prime Minister and Cabinet	Unemployment Benefits IDC Report	9.5.78 Page 1536	Disclosure refused	As above.
321	Fraser	Prime Minister and Cabinet	Counter Staff Services IDC Report	9.6.78 Page 2797	Access granted	Can study Report once Cabinet has finished with it.
322	Peacock	Foreign Affairs	Survey of Japan	1.6.78 Pages 2317-8	Access granted to summary only	Complete access would be a breach of 'confidence' and 'contractual obligations'.
323	Fraser	Prime Minister and Cabinet	Number of Inter-departmental Committees	4.5.78 Page 1418	Disclosure refused	It is convention not to answer such a question.
324	Ellicott	Home Affairs	Commonwealth Police Report on Christmas Island	15.8.78 Pages 38-9	Access granted to precis only	Complete access would 'prejudice the investigation of a breach of the law'.
325	Withers now Chaney	Administrative Services	Museums and Libraries IDC Reports	12.10.78 Page 1301	Disclosure refused	Access will not be allowed while the Government is considering the reports.

<i>Quest. No.</i>	<i>Minister responsible</i>	<i>Department responsible</i>	<i>Subject matter</i>	<i>Answer in Hansard</i>	<i>Response</i>	<i>Comment</i>
326	Sinclair	Primary Industry	Cheynes Beach licences	15.8.78 Page 39	Access granted	Previous denial was reconsidered.
327	Street	Employment and Industrial Relations	Public Service Board Report on Government Administration	9.5.78 Pages 1536-7	Disclosure refused	'Advice furnished to Ministers by public service advisers . . . should remain confidential'.
328	Street	Employment and Industrial Relations	Instructions of eligibility criteria for unemployment benefits	22.8.78 Page 280	Disclosure refused	This matter should be pursued with the Minister for Social Security.
329	Nixon	Transport	IDC Report on Transport Funding	12.8.78 Page 496	Disclosure refused	'It contains reference to Cabinet deliberations'.
330	Nixon	Transport	ANR Report on accidents	10.10.78 Page 1169	Access granted to edited report	Complete access would have an 'adverse effect on staff management interests of the ANR'.
331	Nixon	Transport	Duty Free Shop Tenders and Lease	12.8.78 Page 496	Access granted	Previous denial was reconsidered.
332	Nixon	Transport	McNeil Reports on TAA, Qantas and ANR	12.8.78 Pages 496-7	Disclosure refused	Disclosure 'could disadvantage the undertakings in their commercial operations'.
333	Guilfoyle	Social Security	South Sea Islanders IDC Report	23.8.78 Page 351	Access granted	Previous denial was reconsidered.
334	Howard	Treasury	Report on Proportional Income Tax	19.9.78 Page 732	Disclosure refused	It is not 'appropriate that they should be publicly released'.
335	MacKellar	Immigration and Ethnic Affairs	Handbook of Hate	9.5.78 Page 1537	Disclosure refused	'There was no intention that the material should be published'.

336	Viner	Aboriginal Affairs	Report on the Redfern Aboriginal Medical Centre	15.8.78 Page 39	Request not granted	'There was no Departmental Report' on this specific topic.
337	Hunt	Health	Medibank Review Committee Reports	15.8.78 Pages 39-40	Disclosure refused	'Policy advice from officials to Ministers on a matter of Government Policy such as this should not be publicly disclosed'.
338	Staley	Postal and Telecommunications	IDC Report on FM Broadcasting	12.8.78 Page 497	Disclosure refused	The Report 'is an internal working document prepared for the Government's consideration'.
339	Staley	Postal and Telecommunications	ABC Complaint Files	10.10.78 Page 1169	Disclosure refused	Access 'would interfere unreasonably with the operations of the agency'.
340	Staley	Postal and Telecommunications	Report on reason for increase in telegram prices	17.10.78 Page 1365	Disclosure refused pending reconsideration	While report is 'confidential', Telecom will be asked to reconsider its decision.
341	Staley	Postal and Telecommunications	Financial returns furnished to Australian Broadcasting Tribunal	10.10.78 Pages 1169-70	Request not granted	There is no record of such a request. If requested, Tribunal would decide.
342	Staley	Postal and Telecommunications	IDC Report on implementation of the Green Report	12.8.78 Page 497	Disclosure refused pending reconsideration	While the report is 'confidential', may be able to segregate it and publish part of its contents.
343	Durack	Attorney-General	Pecuniary Interests statement by Australian Broadcasting Tribunal Chairman	12.8.78 Pages 497-8	Disclosure refused	Disclosure 'would constitute an unreasonable disclosure of the personal affairs of a person'.
344	Adermann	Northern Territory	Interim Report on N.T. Electricity Supply	24.5.78 Page 1809	Access granted	Access was not allowed until the final report was completed.
345	Adermann	Northern Territory	IDC Report on N.T. Legislative Assembly	15.8.78 Page 40	Disclosure refused	The report concerns material 'prepared for the deliberative process involved in the functions of the Government'.

<i>Quest. No.</i>	<i>Minister responsible</i>	<i>Department responsible</i>	<i>Subject matter</i>	<i>Answer in Hansard</i>	<i>Response</i>	<i>Comment</i>
346	Webster	Science	Department submissions on the Antarctic	15.8.78 Pages 40-1	Disclosure refused	'The submissions had been prepared for Cabinet's consideration . . . and . . . were not available for public access'.
347	Groom	E.H.C.D.	Report on Uranium debate	12.10.78 Page 1301	Access granted	The report was 'confidential' but 'can now be made public'.
348	Fife	Business and Consumer Affairs	Submission on Trade Practices Act	19.10.78 Page 1496	Disclosure refused	'The submissions should not be publicly disclosed'.
349	Fife	Business and Consumer Affairs	Report on six A.C.T. companies	12.8.78 Page 498	Disclosure refused	Complete disclosure could 'affect the interests' of those who acted as witnesses in the inquiry.
350	Fife	Business and Consumer Affairs	IDC Report on application of Trade Practices Act	12.8.78 Page 498	Disclosure refused	'The report comprised confidential policy advice to the Government'.
351	Fife	Business and Consumer Affairs	Submission on the Swanson Report	19.10.78 Page 1496	Disclosure refused	'The submissions should not be publicly disclosed'.
352	Garland	Veterans' Affairs	Submissions on the Toose Report	22.8.78 Page 280	Access granted	Access had never been denied.

Position as at Monday, 23 October 1978:

Access now granted	. . . . .	7
Partial access granted	. . . . .	3
Disclosure refused	. . . . .	21
Disclosure refused pending reconsideration	. . . . .	2
Request not granted	. . . . .	2

All questions have been answered.

## Provisions of Commonwealth Legislation which restrict access to information\*

### 1. Commonwealth Acts

#### A: Provisions prohibiting or restricting the disclosure of information

- Aboriginal Land Rights (Northern Territory) Act, 1976 s.23E
- Administrative Appeals Tribunal Act, 1975 s.66
- Atomic Energy Act, 1953 ss.44-48 (s.5 'restricted information'), 52, 53
- Audit Act, 1907 s.14c
- Australian Capital Territory Taxation (Administration) Act, 1969 s.7
- Australian Film Commission Act, 1975 s.43
- Australian Science and Technology Council Act, 1978 s.26
- Broadcasting and Television Act, 1942 s.106B
- Census and Statistics Act, 1905 ss.7, 24
- Commonwealth Banks Act, 1959 s.15
- Commonwealth Electoral Act, 1918 ss.93 (1) (c), 155 (ii)
- Crimes Act, 1914 ss.70, 79
- Defence Act, 1903 s.73A
- Defence (Transitional Provisions) Act, 1949 s.9
- Environment Protection (Alligator Rivers Region) Act, 1978 s.31
- Export Finance and Insurance Corporation Act, 1974 s.85
- Export Incentives Grants Act, 1971 s.8
- Export Market Development Grants Act, 1974 s.37
- Family Law Act, 1975 s.19
- Financial Corporations Act, 1974 s.27
- Gift Duty Assessment Act, 1941 s.10
- Health Insurance Act, 1973 s.130
- Home Savings Grant Act, 1964 s.13
- Home Savings Grant Act, 1976 s.41
- Hospitals and Health Service Commission Repeal Act, 1978 s.9
- Housing Loans Insurance Act, 1965 s.45
- Income Tax Assessment Act, 1936 s.16
- Industrial Research and Development Grants Act, 1967 s.23
- Industrial Research and Development Incentives Act, 1976 s.22
- Insurance Acts, 1973 ss.74, 126, 127
- Life Insurance Act, 1945 s.57
- National Health Act, 1953 s.135A
- National Parks and Wildlife Conservation Act, 1975 s.17E
- Ombudsman Act, 1976 s.35
- Patents Act, 1952 ss.19 (a), 131
- Pay Roll Tax Assessment Act, 1941 s.11
- Pay Roll Tax (Territories) Assessment Act, 1971 s.8
- Port Statistics Act, 1977 s.7
- Postal and Telecommunications Commissions (Transitional Provisions) Act, 1975, s.37
- Re-establishment and Employment Act, 1945 ss.70, 71
- Reserve Bank Act, 1959 s.16
- Sales Tax Assessment Act (No. 1), 1930 s.10

\* This list was provided by the Attorney-General's Department on 5 June 1979.

Social Services Act, 1947 s.17  
 Social Welfare Commission (Repeal) Act, 1976 s.8  
 State Receipts Duties (Administration) Act, 1970 s.21  
 Stevedoring Industry Charge Assessment Act, 1947 s.10  
 Structural Adjustment (Loan Guarantees) Act, 1974 s.11  
 Supply and Development Act, 1939 s.25  
 Taxation Administration Act, 1953 s.14F  
 Telecommunications Act, 1975 s.82  
 Telephonic Communications (Interception) Act, 1960 s.5 (3)  
 Tobacco Charges Assessment Act, 1955 s.10  
 Trade Practices Act, s.149  
 Wool Tax (Administration) Act, 1964 s.8

**B: Provisions restricting publication of information**

Administrative Appeals Tribunal Act, 1975 ss.28 (2), 35 (2), 36, 36A, 46 (2)  
 Administrative Decisions (Judicial Review) Act, 1977 s.14  
 Atomic Energy Act, 1953 s.62  
 Aliens Act, 1947 s.6  
 Australian Citizenship Act, 1948 s.46A (5)  
 Australian Industry Development Corporation Act, 1970 s.8A (3)  
 Banking Act, 1959 ss.31, 59, 61 (3)  
 Bounties Procedure Act, 1907 ss.6, 9  
 Census and Statistics Act, 1905 s.20 (3)  
 Commonwealth Electoral Act, 1918 ss.93, 155  
 Conciliation and Arbitration Act, 1904 s.186  
 Copyright Act, 1968 s.163  
 Courts-Martial Appeals Act, 1955 s.18  
 Crimes Act 1904, s.85B  
 Defence (Special Undertakings) Act, 1952 s.31  
 Environment Protection (Impact of Proposals) Act, 1974 ss.11 (5), 14 (2)  
 Environment Protection (Nuclear Codes) Act, 1978 s.15 (1) (d)  
 Export Finance and Insurance Corporation Act, 1974 s.32 (3)  
 Family Law Act, 1975 ss.18, 121  
 Federal Court of Australia Act, 1976 s.50  
 Financial Corporations Act, 1974 s.22  
 Fisheries Act, 1952 s.17 (3)  
 Health Insurance Act, 1973 s.106G (4)  
 Industrial Research and Development Grants Act, 1967 s.38 (2) (c)  
 Industrial Research and Development Incentives Act, 1976 s.40 (2) (c)  
 Industries Assistance Commission, 1973 s.33 (5)  
 Life Insurance Acts, 1945 s.145  
 National Health Act, 1953 ss.73 (4), 134A (6)  
 National Labour Consultative Council Act, 1977 s.5 (2) (c)  
 Patents Act, 1952 ss.55, 131  
 Petroleum (Submerged Lands) Act, 1967 ss.86 (2), 118 (6)  
 Prices Justification Acts, 1973 s.23 (5)  
 Primary Industry Bank Act, 1977 s.11  
 Public Accounts Committee Act, 1951 s.11  
 Public Works Committee Act, 1969 s.23  
 Racial Discrimination Act, 1975 s.22 (5)  
 Royal Commissions Act, 1902 s.6D  
 Trade Marks Act, 1955 s.74 (7)  
 Trade Practices Act, 1974 ss.89 (5)-(5E), 95 (3)-(8), 106 165 (3)

*C: Provisions requiring evidence to be taken or meeting to be conducted in private*

- Broadcasting and Television Act, 1942 s.19 (2)
- Compensation (Australian Government Employees) Act, 1971 s.81 (2)
- Conciliation and Arbitration Act, 1904 ss.27 (6), 41 (g)
- Customs Act, 1901 s. 183G
- Health Insurance Act, 1973 ss.60 (2), 76 (2), 91 (2), 97 (1), 118 (1)
- Home Savings Grant Act, 1976 s.42 (1)
- Industries Assistance Commission Act, 1973 s.33 (2)
- Insurance Acts, 1973 s.81
- National Health Act, 1953 s.123
- Nursing Homes Assistance Act, 1974 ss.23 (2), 26 (1)
- Public Service Act, 1922 s.60 (2)
- Trade Practices Act, 1973 s.21 (2) (cf. s.21 (3) (b))
- Repatriation Act, 1920 s.121
- Re-establishment and Employment Act, 1945 s.86
- Social Services Act, 1947 s.141
- Student Assistance Act, 1973 s.29 (2)

**2. Statutory Rules**

*A: Provisions prohibiting or restricting the disclosure of information*

- Australian Broadcasting Commission (Staff) Regulations, rr.59, 60
- Australian Capital Territory Representation Regulations, r.64
- Broadcasting and Television Regulations, r.25
- Census Regulations, r.9
- Commonwealth Banks Regulations, rr.33, 34
- Commonwealth Inscribed Stock Regulations, r.61
- Commonwealth Police Regulations, r.19
- Electoral and Referendum Regulations, r.34 (1)
- Family Law Regulations, r.20
- Gift Duty Regulations, r.4
- High Commissioner (Staff) Regulations, r.88
- Income Tax Regulations, r.4
- Life Insurance Regulations, r.24
- National Security (War Damage to Property) Regulations, r.59
- Northern Territory Electoral Regulations, r.127 (1)
- Papua New Guinea (Staff Assistance) (Terms and Conditions of Employment) Regulations, rr.18, 19
- Pay-roll Tax Regulations, r.4
- Public Service Regulations, r.35
- Public Service (Parliamentary Officers) Regulations, rr.23, 24
- Repatriation (Far East Strategic Reserve) Regulations, r.18
- Repatriation (Special Overseas Service) Regulations, r.18
- Reserve Bank Regulations, rr.4, 6
- Sales Tax Procedure Regulations, r.35
- Statistics Regulations, r.4
- Supply and Development Regulations, r.56
- Telecommunications (Telecom Australia Stock) Regulations, r.26
- Wireless Telegraphy Regulations, r.36
- Wool Tax (Administration) Regulations, r.8

*B: Provisions restricting publication of information*

- Air Navigation Regulations, rr.107 (3), 283 (1), 291 (7), 295
- Australian Citizenship Regulations, rr.7B (5), 7C

Australian Military Regulations, r.770  
Australian Military (Places of Detention) Regulations, r.11 (2)  
Marriage Regulations, r.70 (4)  
National Security (Industrial Property) Regulations, r.5  
Naval Forces Regulations, r.130  
Postal Services Regulations, r.47  
Re-establishment and Employment (Allowances and Loans) Regulations,  
rr.35, 37  
Repatriation Regulations, r.45  
Trade Practices Regulations, rr.24, 27 (3), 33

*C: Provisions requiring evidence to be taken or meeting to be conducted in private*

Air Force (Courts of Inquiry) Regulations, r.9  
Commonwealth Teaching Service Regulations, r.38  
Customs (Quota Orders Review Tribunal) Regulations, r.15  
Excise (Quota Orders Review Tribunal) Regulations, r.13  
Postal Services Regulations, r.20  
Sales Tax Regulations, r.43 (2)  
States Receipts Duties Regulations, r.17 (2)  
Taxation Administration Regulations, r.7  
Telecommunications Regulations, r.20

### 3. A.C.T. Legislation

*A: Provisions prohibiting or restricting the disclosure of information*

Companies Ordinance, 1962, s.7 (9)  
Consumer Affairs Ordinance, 1973 s.15E  
Enquiry Ordinance, 1938 s.5B (3)  
Fire Brigade (Administration) Ordinance, 1974 ss.42, 63  
Legal Aid Ordinance, 1977 s.92  
Legal Practitioners Ordinance (No. 2), 1970 ss.65, 68  
Liquor Ordinance, 1975 s.17 (6)  
Police (Disciplinary Provisions) Ordinance, 1972 s.16  
Prices Regulation Ordinance, 1949 s.8  
Statistics Ordinance, 1929 s.7

*B: Provisions restricting publication of information*

Adoption of Children Ordinance, 1965 ss.49, 50, 59–61, 65  
Adoption of Children Regulations, ss.10, 10A (5)  
Agents Ordinance, 1968 s.93 (13)  
Child Welfare Ordinance, 1957 s.14 (2) (c), 14 (3)  
Companies Ordinance, 1962 ss.169 (4), 177 (5) (b)  
Evidence Ordinance, 1971 ss.83, 85  
First Offenders (Women) Ordinance, 1947 ss.3, 4  
Inebriates Act, 1900 (N.S.W.) s.12  
Maintenance Ordinance, 1971 ss.19 (3A), 20 (10A)  
Mining Ordinance, 1930 s.55  
Registration of Births, Deaths and Marriages Ordinance, 1963 ss.45 (3),  
51 (4)–(6)  
Small Claims Ordinance, 1974 s.18 (2)  
Statistics Ordinance, 1929 s.17

*C: Provisions requiring evidence to be taken or meeting to be conducted in private*

- Agents Ordinance, 1968 s.88 (4)
- Landlord and Tenant Ordinance, 1949 s.74
- Liquor Ordinance, 1975 ss.31 (7) and (8), 57 (2) and (3)
- Milk Authority Ordinance, 1971 s.18 (4)
- Poker Machine Control Regulations, s.6
- Remand Centres Ordinance, 1976 s.25
- Sale of Motor Vehicles Ordinance, 1977 s.14
- Venereal Diseases Ordinance, 1956 s.14

**4. Applied Imperial Legislation**

*A: Provisions prohibiting or restricting the disclosure of information*

- Naval Discipline Act, 1957 (Imp.) s.34, applied by the Naval Defence Act, 1910 s.34 and Naval Forces Regulations, r.8
- Army Act, 1881 (Imp.) s.36, applied by the Defence Act, 1903 s.55 and Australian Military Regulations, r.9
- Air Force Act, 1917 (Imp.) s.36, applied by the Air Force Act, 1923 and Air Force Regulations, r.13

*C: Provisions requiring evidence to be taken or meeting to be conducted in private*

- Naval Discipline Act, 1957 (Imp.) s.61, applied as above
- Rules of Procedure (Army), r.63, applied as above
- Rules of Procedure (Air Force) r.63, applied as above

Appendix 7

**Witnesses**

	<i>Submission no.</i>
Agafonoff, Mr A., Chief Finance Officer, Foreign Investment Division, the Treasury . . . . .	124
Aho, Mr A. J., Legal Officer, Confederation of Australian Industry, (National Trade and Industry Council) . . . . .	96
Alexander, Mr P. W., Director, Secretariat and Information Services, Department of Industry and Commerce . . . . .	89
Applegarth, Mr P. D. T., President, University of Queensland Public Interest Research Group . . . . .	33
Aujard, Mr E. M., member of the Humanist Society of South Australia Inc. . . . .	76
Bain, Mr A. A. . . . .	136
Barry, Miss M. M., Committee Member, Australian Council of Social Service . . . . .	48
Bennett, Mr F. N., Deputy Secretary, Department of Industry and Commerce . . . . .	89
Bergin, Mr A. S., Committee Member, Victorian Committee for Freedom of Information . . . . .	44
Blunn, Mr A. S., First Assistant Secretary (Government), Department of the Capital Territory . . . . .	149
Bourke, Mr M., Treasurer, Rupert Information and Referral Service, and member of the Freedom of Information Legislation Campaign Committee . . . . .	9
Boxer, Mr A. H., Assistant Secretary, Economics Branch, General Financial and Economic Policy Division, the Treasury . . . . .	124
Bowden, Mr I. G., First Assistant Secretary, Public Affairs and Cultural Relations Division, Department of Foreign Affairs . . . . .	150
Boxhall, Mr G. L., Freedom of Information Working Party, Public Service Board, South Australia . . . . .	155
Branson, Mrs M. A., South Australian Council of Social Services Inc. . . . .	30
Bray, Mr B., Acting Assistant Secretary, Finance and Services Branch, Australian Development Assistance Bureau . . . . .	150
Brett, Mr B. B., Executive Director of the Agricultural and Veterinary Chemicals Association of Australia . . . . .	79
Briggs, Mr P. G., Liaison Officer, Victorian Committee for Freedom of Information . . . . .	44
Broome, Mr J. H., Acting Director, Administrative Law Review Section (Government), Department of the Capital Territory . . . . .	149
Brudenhall, Mr M. J., President, Library Association of Australia . . . . .	95
Bryan, Mr H., Chairman, Standing Committee, Australian Advisory Council on Bibliographical Services . . . . .	75
Brydon, Mr W. H., South Australian Council of Social Service Inc. . . . .	30
Burt, Mr J. G., Assistant Director-General, ADP Branch, Department of Health . . . . .	83
Cameron, Mr J. R. A., General Manager, Australian Council . . . . .	73
Clark, Mr J. A., Acting Chairman, Australian Industrial Research and Development Incentives Board . . . . .	58
Codd, Mr M. H., Deputy Secretary, Department of the Prime Minister and Cabinet . . . . .	159
Cole, Mr D. A., Honorary Secretary, Conservation Council of South Australia Inc. . . . .	62
Cole, Mr R. W., Chairman, Public Service Board . . . . .	47

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Colebatch, Dr P. R., representative, Australian Consumers Association . . . . .	97
Connolly, Mr B. J., Secretary, Australian Broadcasting Tribunal . . . . .	142
Cook, Ms J. A., Women on Welfare Campaign, Adelaide . . . . .	113
Coward, Dr D. . . . .	60
Curtis, Mr L. J., First Assistant Secretary, Federal Courts Division, Attorney-General's Department . . . . .	..
Dillon, Mr L. T. . . . .	22
Doyle, Mr R. S., Senior Research Officer, Administrative and Clerical Officers Association . . . . .	42
Emerton, Mr I. D., Deputy Commonwealth Ombudsman . . . . .	..
Engledow, Mr L. W. B., Secretary, Department of Immigration and Ethnic Affairs . . . . .	158
Exley, Miss T. M., Chief Archivist, Australian Archives . . . . .	74 and 86
Fielding, Mr F. D. O., President, Queensland Council for Civil Liberties . . . . .	19
Findlay, Mr R. J., Assistant Director-General, Policy Secretariat and Legislation Branch, Department of Health . . . . .	83
Fisher, Mr N. W. F., First Assistant Secretary, Division No. 2, Department of Immigration and Ethnic Affairs . . . . .	158
Friemann, Mr C. H., Assistant Secretary, Department of Productivity, Patent Office . . . . .	58
Gibbney, Mr H. J. . . . .	56
Goldring, Mr J. L. . . . .	15
Gradwell, Mr R. L., Federal Secretary, Council of Australian Government Employee Organisations . . . . .	8
Grills, Mr P. J., Cabinet Liaison Officer, Department of Home Affairs . . . . .	73
Harris, Miss J. M. McD., Principal Legal Officer, Australian Broadcasting Commission . . . . .	131
Hartley, Mr J. G., Director, Corporate Affairs, Australian Broadcasting Commission . . . . .	131
Hedley, Mr A. R., Assistant Secretary (Government), Department of the Capital Territory . . . . .	149
Henderson, Mr W. J., Director-General, Confederation of Australian Industry, (National Trade and Industry Council) . . . . .	96
Hill, Mr R. J., Assistant Commissioner, Benefits, Department of Veterans' Affairs . . . . .	115
Horton, Mr A. R., member, Library Association of Australia . . . . .	95
Hosking, Ms C. A., spokesperson, Women's Electoral Lobby (Victoria) . . . . .	7
Hudson, Dr W. J., Editor of Historical Documents, Department of Foreign Affairs . . . . .	150
Hunt, Mr C. T., Assistant Commissioner, Public Service Board . . . . .	47
Hurley, Mr C., Senior Project Officer, Australian Archives . . . . .	74
Jacobs, Mr M. C., journalist, <i>The Advertiser</i> . . . . .	128
Jamison, Mr R., Counsel for South Australian Council for Civil Liberties . . . . .	30
Kehoe, Dr M. M., Deputy Chief Director, Medical Services, Department of Veterans' Affairs . . . . .	115
Knight, Senator J. W. . . . .	..
Knox, Miss J., General Secretary, Library Association of Australia . . . . .	95
Lade, Mr B. S., Acting Director, Technical Services Branch, Department of Productivity . . . . .	58
Lane, Mr L. W., First Assistant Director-General, Management Services Division, Department of Health . . . . .	83

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Lanigan, Mr P. J., Director-General, Department of Social Security . . . . .	117
Large, Mr D. McK., Chief Executive Officer, Policy Division, Postal and Telecommunications Department . . . . .	98
Lawrence, Mr J., Federal President, Australian Journalists' Association . . . . .	81
Lewis, Mr S. R., Assistant Secretary, Citizenship Branch, Department of Immigration and Ethnic Affairs . . . . .	158
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  - 9 (3) State Librarians' Council
  - 9 (4) Victorian Committee for Freedom of Information (brief version of Submission no. 44)
  - 9 (5) The Australian Journalists' Association (see also Submission no. 81)
  - 9 (6) The Young Liberal Movement of Australia
  - 9 (7) Council for Civil Liberties in Western Australia
  - 9 (8) The Freedom of Information Lobby (S.A.) (see also Submission no. 46)
  - 9 (9) Australian Greek Welfare Society
  - 9 (10) Civil Liberties Association of W.A.
  - 9 (11) Women's Electoral Lobby, Perth (see also Submission no. 71)
  - 9 (12) Women's Electoral Lobby (Victoria) (see also Submission no. 7)
  - 9 (13) Conservation Council of South Australia Inc.
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