

## **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.