

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'.¹

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.²

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

¹ 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.

² 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.'³

³ 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*⁴ (in relation to Crown privilege), *Ridge v. Baldwin*⁵ (in relation to natural justice), *Padfield v. Minister for Agriculture*⁶ (in relation to ultra vires), and *Anisminic v. Foreign Compensation Commission*⁷ (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*⁸ (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.'⁹

⁴ [1968] 1 All E R 874.

⁵ [1964] A C 40.

⁶ [1968] A C 997.

⁷ [1969] 2 A C 147.

⁸ (1978) 53 ALJR 11.

⁹ 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,¹⁰ 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.¹¹ 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.¹²

¹⁰ Discussed in Chapter 16.

¹¹ 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.

¹² 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.¹³

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

¹³ 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*¹⁴ (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

¹⁴ (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.