

## 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)