

Law enforcement documents (clause 27)

20.1 Clause 27 exempts documents which would prejudice the proper administration of the law including the investigation, enforcement and adjudication of a breach or possible breach of the law. The clause is directed to protecting law enforcement procedures and provides:

27. A document is an exempt document if its disclosure under this Act would, or would be reasonably likely to—
- (a) prejudice the investigation of a breach or possible breach of the law or the enforcement or proper administration of the law in a particular instance;
 - (b) prejudice the fair trial of a person or the impartial adjudication of a particular case;
 - (c) disclose, or enable a person to ascertain, the identity of a confidential source of information in relation to the enforcement or administration of the law;
 - (d) disclose methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of, breaches or evasions of the law, the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures; or
 - (e) endanger the lives or physical safety of persons engaged in or in connexion with law enforcement.

20.2 Clause 27 is based on the law enforcement provision in the United States Freedom of Information Act but differs in three significant respects. First, a separate paragraph is included in the United States provision for the protection of personal privacy. This interest is protected by clause 30 in the Freedom of Information Bill. Secondly, the United States provision is confined to documents described as 'investigatory records compiled for law enforcement purposes'. Clause 27, on the other hand, is directed to the harmful consequences that would result from a disclosure of a document rather than the nature of the document itself. This conforms with the approach adopted in most of the other exemptions. Thirdly, the United States equivalent of paragraph 27 (d) protects 'investigative techniques and procedures' only, which was thought by the drafters of the Australian Freedom of Information Bill to leave unprotected such things as contingency plans for the prevention of unlawful activities.¹ Paragraph 27 (d) therefore specifically includes methods or procedures for the prevention and detection of unlawful activities as well as for their investigation. Because of the similarity between the two provisions United States experience provides some guide as to the likely effectiveness of clause 27 in permitting maximum public access to requested records, consistent with the legitimate interests of law enforcement agencies.

20.3 These agencies include not only those responsible for the detection and punishment of law violation through criminal prosecutions but also, as mentioned above, the prevention of law violation, and, in addition, the enforcement of law through civil and regulatory proceedings. On the face of it, clause 27 would have application to the operations of the federal and Territory law enforcement authorities (including the ACT police force and licensing, health standards and building safety inspectorates), security intelligence operations, personnel investigations within the public service, and the enforcement of legislation on a range of issues

¹ *Transcript of Evidence* p. 316.

embracing trade practices, the environment, broadcasting, securities, customs, export and import controls, immigration, discrimination, labour relations, taxation and social security.² United States experience of the operation of its law enforcement clause reflects the scope of the activities protected by the exemption as well as the public's interest in the conduct of those activities. In the United States in 1975, for instance, the law enforcement exemption was cited in 39% of the 27 300 initial denials and in 33% of the 3247 denials at the agency appellate level.³ This number of requests and appeals has given rise to a series of problems for law enforcement agencies in the United States.

20.4 In April 1978, in forwarding his Department's annual report to Congress on activities under the Freedom of Information Act, the United States Acting Deputy Attorney-General referred to the administrative burdens placed on the Department of Justice in the following terms:

Once again I feel compelled to call to your attention the tremendous costs and administrative burdens this statute has placed on the Department, to the extensive detriment of our traditional missions and the public interest in effective law enforcement. Our ability to protect our most sensitive law enforcement manuals and other records of comparable sensitivity has been called into serious question. Traditional sources of information are becoming unwilling, or at least less willing, to cooperate with us. In several instances, the fact that we are forced to process records in open and active cases has had a serious adverse impact on our ability to complete investigations or prepare cases for trial.⁴

However, it would appear that while the burdens are of major significance they tend, on occasion, to be overstated. In putting this view to the United States Senate inquiry on the Erosion of Law Enforcement Intelligence and its Impact on Public Security in March 1978, a senior officer of the Department of Justice stated that it was 'the firm and unequivocal position of the Department of Justice that there is no inherent conflict between efficient, effective criminal law enforcement and the principles underlying the Freedom of Information and Privacy Acts'.⁵

20.5 The Deputy Commissioner of the United States Internal Revenue Service has also reported burdens on his department; notably, the diversion of resources from direct operations to handle the review and editing of materials requested by the public with the effect that investigations were both neglected and disrupted; and a diminution in the flow of criminal intelligence information between the Internal Revenue Service and other federal, state and local law enforcement agencies.⁶ In many cases requests and appeals on those requests were being made in connection with substantive tax proceedings by tax payers attempting to use the Freedom of Information Act as a substitute for discovery. Diminution in intelligence information was attributed to a fear on the part of intelligence sources that, with the advent of freedom of information, the Service could no longer guarantee the confidentiality of the information they furnished. Although it was unclear as to

² J. McMillan, 'Freedom of Information in Australia: Issued closed', *Federal Law Review* 8, 1977 p. 379.

³ *ibid.*, p. 409.

⁴ B. R. Civiletti, United States Acting Deputy Attorney-General in a letter to the Speaker of Congress, dated 18 April 1978, on forwarding the Department of Justice 1977 Annual Report to Congress on the Freedom of Information Act.

⁵ Quinlan J. Shea Jr., Department of Justice, in evidence to the United States Senate, Subcommittee on Criminal Laws and Procedure of the Committee on the Judiciary, Hearings on the Erosion of Law Enforcement Intelligence and its Impact on Public Security, March, 1978—referred to in *Transcript of Evidence* p. 539.

⁶ Statement by William E. Williams, Deputy Commissioner of Internal Revenue before the Subcommittee on Criminal Laws and Procedures, 25 April 1978, incorporated in *Transcripts of Evidence* p. 2159.

what the operational impact of these reduced sources had been, short term data and the fact that the Service generated the bulk of its own criminal tax investigation leads internally, suggested that the impact had not been all that great. It was concluded that, while overall the problems created by the Freedom of Information Act were substantial, they remained manageable and many problems would diminish as experience of the statutory provisions increased and the Service demonstrated its ability to protect the confidentiality of information sources. The same witness also commented on the positive effects of the Freedom of Information Act in terms of enhanced public respect for tax law enforcement processes:

I believe that the confidence of taxpayers and tax practitioners in our administration of the revenue laws has been enhanced by this ability to see for themselves, and to comprehend, the complex procedural issues inherent in the application of the tax laws. I further believe that the growing public pressure for tax law simplification must be attributed, at least in part, to this greater appreciation for the administrative complexities inherent in the current law. In a broader context, a January 1978 Harris Poll, citing a significant increase in the public's confidence in Federal Executive Branch institutions may well reflect, at least in part, the overall impact of this Act.⁷

20.6 More recent commentary on United States experience and its possible application to Australia was provided by two witnesses—Senator John Knight, and Mr Kevin O'Connor, of the Australian Law Reform Commission, who visited the United States in January 1979 and October 1978 respectively. Senator Knight referred to the use of the Freedom of Information Act by organised crime and the inhibition on the supply of information to such bodies as the FBI and the CIA but stated his view that the problems, though major, were considered surmountable and would not necessarily be repeated in Australia.⁸ Similarly, Mr O'Connor,⁹ after remarking that over 400 staff (6%) of the FBI were engaged in handling requests for access under the Freedom of Information and Privacy Acts, stated his view that many of the requests arose out of concern over the particular operations of the FBI in the late '60s and early '70s and, in his view, this magnitude of public response could not be expected to be repeated in Australia. In noting the general conclusion that the problems confronted by law enforcement agencies under the Freedom of Information Act had been overstated, he referred to the then unpublished General Accounting Office Study commissioned by the United States Senate Erosion of Law Enforcement Intelligence Inquiry, whose author has stated:

We could not conclude the Act had a negative overall impact on the effectiveness of law enforcement. After reading the best cases they could give us, we still couldn't document any way in which the Act seriously hindered their (i.e. the F.B.I.'s) abilities. The F.O.I.A. has posed barriers for many F.B.I. agents, but in most cases they were able to get the job done.¹⁰

20.7 It would appear that the problems which law reform agencies in Australia will encounter under freedom of information legislation will be similar in nature to those experienced by their United States counterparts though by no means of a similar scale. We are satisfied, however, that as in the United States, these problems will be manageable and, with time, will diminish significantly. We are also satisfied that the single amendment which we propose to make in relation to clause 27 and the amendments we propose elsewhere in relation to clause 7 would not significantly add to the burdens of freedom of information for law enforce-

⁷ William E. Williams, cited footnote 6, *Transcript of Evidence* p. 2158.

⁸ *Transcript of Evidence* p. 2105.

⁹ *Transcript of Evidence* pp. 538–540.

¹⁰ *Transcript of Evidence* p. 540.

ment agencies. Most of the evidence submitted to the Committee on clause 27 concentrates on the need to ensure the disclosure of documents revealing the use of illegal law enforcement techniques or that an investigation has exceeded the limits imposed by law. The University of Queensland Public Interest Research Group referred to such illegal law enforcement practices as unauthorised 'bugging' (telephone tapping and other electronic surveillance), 'verballing' (fabrication of confessions) and 'entrapment' (solving crime by assisting or encouraging it to take place).¹¹ These and other unlawful practices are extensively documented in the Australian Law Reform Commission's report *Criminal Investigation*.¹² Given the growing criticism of police practices in recent years,¹³ we would favour any measure which would enable the exposure of unlawfulness and which would, in due course, help to enhance public confidence in law enforcement processes. We therefore propose that paragraph 27 (d) be amended to enable disclosure of documents which would reveal unlawfulness in law enforcement procedure. This can best be achieved by inserting the word 'lawful' in paragraph (d) before the words 'methods or procedures'. Unlawful methods and procedures of law enforcement would thereby be excluded from the exemption.

20.8 The point was raised by the Attorney-General's Department that such an amendment was unnecessary since unlawful methods and procedures would not be protected by the Administrative Appeals Tribunal under the present clause.¹⁴ If this is the case there can be no serious objection to an amendment which merely clarifies an existing situation. However, the further point was raised that

¹¹ *Transcript of Evidence* pp. 1349-50.

¹² Australia, The Law Reform Commission, Report No. 2 (Interim), *Criminal Investigation*, AGPS, Canberra, 1975.

¹³ Australia, The Law Reform Commission, Report No. 1, *Complaints against Police*, AGPS, Canberra, 1975; Report No. 2 (Interim), *Criminal Investigation*, AGPS, Canberra, 1975; Report No. 9, *Complaints against Police—Supplementary Report*, AGPS, Canberra, 1978. Australia, *Report to the Minister for Administrative Services on the organisation of police resources in the Commonwealth area and other related matters* (Sir Robert Mark), AGPS, Canberra, 1978.

Queensland, *Report of the Committee of Inquiry: Enforcement of the criminal law in Queensland* (Hon. Mr Justice Lucas) Government Printer, Brisbane, 1977.

Victoria, *Report on the Victorian Police Force* (Sir Eric St. Johnston) Government Printer, Melbourne, 1971.

South Australia, *Criminal Law and Penal Methods Reform Committee Criminal Investigation* (2nd Report) Government Printer, Adelaide, 1974.

South Australia, *Royal Commission on the September Moratorium Demonstration 1971* (Hon. Mr Justice Bright, Chairman) Government Printer, Adelaide, 1971.

South Australia, *Royal Commission on dismissal from office of Commissioner of Police* (Harold Hubert Salisbury) (Hon. Justice Mitchell, Chairman), *Report*, Government Printer, Adelaide, 1978.

Victoria, Board of Inquiry into allegations against members of the Victoria Police Force (Mr B. W. Beach Q.C.) *Addenda to Report*, Government Printer, Melbourne 1976.

Victoria, Committee to examine the recommendations made by Mr B. W. Beach Q.C. and to advise . . . whether those recommendations should be adopted in whole or in part (Hon. J. G. Norris, Q.C.), *Report*, Government Printer, Melbourne, 1977.

South Australia, *Inquiry into the records held by the Special Branch of the South Australian Police. Initial report to the Hon. D. A. Dunstan by the Hon. Mr Acting Justice White*, Government Printer, Adelaide, 1978.

J. Summers, 'Ministerial Responsibility and the Police in South Australia', *Politics*, XIV (I) May 1979, pp. 101-108.

New South Wales, An inquiry into the structure and administration of the N.S.W. Police Force and its relationship with the State Government was announced by the Premier, Hon. N. Wran, Q.C., on 5 June 1979 under the direction of Mr Justice Cross, but now to be conducted by Mr Justice Lusher.

¹⁴ Notes of private meeting held on 9 March 1979 between the Committee and the Attorney-General and officers of his department.

it would be unacceptable to have a statutory presumption that illegal law enforcement methods existed. We do not accept this point. The Criminal Investigation Bill 1977 which was before the Parliament when it was dissolved in November of that year, amounted to just such a presumption. It was substantially based on the Australian Law Reform Commission's report *Criminal Investigation* referred to above. Further, section 20 of the Australian Security Intelligence Organization Bill 1979 which at the time of writing, is before the House of Representatives, confers a special responsibility on the Director-General to ensure that the Organisation does not pursue functions for which it has no authority. A recognition of past unlawful activities on the part of this law enforcement agency is implicit in this provision. We see no reason to alter our view that specific reference to lawful methods or procedures should be made in paragraph (d) of clause 27.

20.9 Recommendation: The word 'lawful' should be inserted in paragraph 27 (d) between the words 'disclose' and 'methods' so as to provide for the exemption of lawful methods or procedures of law enforcement only.

20.10 The inclusion of the words 'disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures', in paragraph 27 (d) indicates to us that documents revealing commonly known methods and procedures of law enforcement would be subject to disclosure. This was certainly the intention with regard to the United States provision on which paragraph (d) was based.¹⁵ We support this approach in general and, as it concerns the police, in particular. Police General Orders, which are internally produced, govern police procedure on all relevant matters including the conduct of interrogations, the procedure for arrest and the use of firearms. We believe that a substantial proportion, if not all, of Police General Orders could be made available without prejudice to law enforcement. We have, therefore, recommended that clause 7 be extended to require the publication, where appropriate, of manuals concerning law enforcement methods and procedures as well as concerning the administration of the law. Our views on this matter are discussed in some detail in Chapter 7.

20.11 The Freedom of Information Legislation Campaign Committee and others called for the release of routine reports prepared by regulatory agencies.¹⁶ They contended that agencies such as the Australian Broadcasting Tribunal and the Patents Commissioner prepare routine inspection or monitoring reports of activities they supervise without any intention of enforcing compliance with the relevant regulations. Access to such reports would enable community groups to assess whether agencies are timid in launching prosecutions and provide the public stimulus which, they considered, is often essential before enforcement will occur. We consider that, since the whole tenor of clause 27 is directed to protecting the processes whereby the law can be enforced, this provision would offer no protection at all in circumstances when a law enforcement agency fails to enforce the law. We do not consider it necessary, therefore, to suggest any amendments to take account of this criticism.

20.12 The Women on Welfare Campaign of South Australia claimed that officers of the Social Security Department engaged in a number of practices when pursuing

¹⁵ United States, *Attorney-General's Memorandum on the 1974 Amendments to the Freedom of Information Act*, United States Government Printing Office, Washington, 1975.

¹⁶ *Transcript of Evidence*, p. 168; McMillan cited footnote 2, p. 379.

their investigations which they regarded as undesirable. These allegations, which we have not sought to verify, included:¹⁷

- failure of officers to identify themselves;
- failure to inform pensioners of their right to refuse entry to their home to departmental officers;
- failure to inform pensioners of their right to have a witness present during interviews;
- failure to inform pensioners of their right to have a copy of any statement by them;
- questioning of neighbours as to pensioners' living arrangements; and
- use of computers to cross-check addresses of unemployed male and female welfare recipients so as to gain information concerning pensioners' residential arrangements.

In addition, it was claimed that eight out of ten anonymous allegations made to Social Security officers in South Australia are without foundation being of a malicious, vexatious or frivolous nature.¹⁸

20.13 The dependants of pensioners and beneficiaries renders them particularly vulnerable to any form of intimidation and abuse which threatens their source of income. Undoubtedly, if these welfare recipients are being subject to unnecessary stress as a result of unethical practices on the part of departmental officers or malicious behaviour on the part of others, then steps should be taken to eliminate such undesirable action. Clause 7, which enables the public to gain access to departmental manuals, may help to strengthen the position of welfare recipients against an unrestrained use of power by departmental officers. In addition to the assistance provided by this clause as presently drafted, we have recommended that clause 7 be extended to cover statements of policy to provide a guide to the public as to the manner in which a department will interpret and administer the legislation for which it is responsible. Clause 7 and its utility in meeting the problems raised by the Women on Welfare Campaign are discussed in Chapter 7. Beyond amending clause 7, there is a limit to what can be achieved by the Freedom of Information Bill to counteract unethical, as opposed to unlawful, practices. The Women on Welfare Campaign agreed that the problem was essentially one which called for a change in attitude of departmental officers and that, to a great extent, the Freedom of Information Bill was an inappropriate vehicle to effect such a change.

20.14 One further point which was alleged by the Women on Welfare Campaign concerns the ease with which interested parties can obtain information concerning the whereabouts of welfare recipients.¹⁹ Very often welfare recipients had taken elaborate precautions to ensure that such parties would not discover their whereabouts in order to avoid distress which had occurred in the past. We would merely point out here, that, in most circumstances, such information would be denied under clause 30, the personal privacy clause. In fact, a commentator in the United States argues that the personal privacy paragraph in the United States Freedom of Information Act has had the effect of unduly broadening the law enforcement exemption.²⁰ Indications are, therefore, that information of a personal

¹⁷ *Transcript of Evidence*, p. 1775.

¹⁸ *Transcript of Evidence*, p. 1778.

¹⁹ *Transcript of Evidence*, p. 1806.

²⁰ 'Developments under the Freedom of Information Act—1977', *Duke Law Journal* 1978, p. 189 at pp. 216–219.

nature will receive the protection which it so clearly warrants by virtue of clause 30, whether or not it is subject to release under clause 27.

20.15 A problem which might arise in relation to clause 27 is that the interests which are sought to be protected might be prejudiced not only by disclosing the document itself but merely by disclosing the existence of that document.²¹ The fact that a certain offence has been committed may in some cases (for example, incest and other offences against children committed by their parents) be known only to the person committing the offence and his immediate family or neighbours. To disclose the existence of a complaint or of information in such cases, even if access were denied to the information itself, might be sufficient to enable the confidential source of the information to be readily identified. Again, the legislation in its present state could be used by a person who suspected that his activities were being investigated by the taxation or customs authorities. The withholding of information under clause 27 that would disclose the fact of the investigation would itself be sufficient confirmation of the existence of such information and the person could change his activities to frustrate the further conduct of the investigation.

20.16 This problem has been identified by United States authorities in relation to the equivalent provision in the United States Freedom of Information Act. They consider that, in the context of law enforcement documents, there is no method of withholding information that a document exists under the Freedom of Information Act that would not violate the law.²² Clause 27 is also drafted to permit exemption of a document but not, it would seem, denial of the existence of a document. Furthermore, if the appropriate amendment were made to clause 27 to permit such a denial, an agency which normally denies access to a document and then only occasionally denies the very existence of a document will, by its inconsistency in response, reveal information which it sought to protect. We propose, therefore, that clause 27 be amended to permit an agency to respond to a request with a form of words which denies access to a document without conceding the existence of that document, whether or not the existence of a document is a matter of concern in any particular case. We recognise that this carries with it the possibility of abuse by agencies. Nevertheless we hope, and believe, that they will act responsibly in this matter to see that abuses do not occur. In Chapter 29 we discuss fully the role of the Ombudsman. Here we simply emphasise that this is an area where the Ombudsman will play a crucial role in maintaining the public's confidence that the system is not being abused.

20.17 Recommendation: Clause 27 should be amended to permit an agency to deny access to a document without conceding the existence of that document, whether or not the existence of a document is a matter of concern in any particular case.

²¹ Paper from Attorney-General's Department, dated 9 May 1979, 'Freedom of Information Bill 1978—Possible Amendments'. Paper confined to clauses 23, 26, 27, 32 and 34. (Committee Document 88).

²² United States, Commissioner of Customs in a statement to the Senate Sub-Committee on Criminal Laws and Procedures on 5 October 1977. Compare, in the context of defence and foreign policy matters, *Phillippi v. Central Intelligence Agency* 546 F.2d 1009 (D.C. Cir. 1976) and referred to in Attorney-General's paper cited footnote 21, p. 4.