

## Prescribed secrecy provisions (clause 28)

**21.1** The Freedom of Information Bill will not be the only enactment which declares what documents can be withheld from the public. At present there are upward of 290 provisions in other Acts, ordinances, regulations and statutory instruments that authorise, empower, or require designated officers and bodies to restrict disclosure of particular categories of information.<sup>1</sup> Indeed it appears to be a fashionable contemporary drafting practice to insert in every new statute a standard provision making it an offence for an official governed by the statute to disclose without authorisation any information of which he has gained knowledge officially. These provisions, which are generally termed secrecy provisions, can still be invoked by an official to refuse access to a document requested under the Bill if two conditions are met: if the provision is one which prohibits or restricts the disclosure of a document or information, and if it is prescribed (that is, incorporated by regulation) under the Bill.

**21.2** Clause 28 is in the following terms:

28 (1) A document is an exempt document if it is a document to which a prescribed provision of an enactment, being a provision prohibiting or restricting disclosure of the document or of information or other matter contained in the document, applies.

(2) In this section, 'enactment' includes an Ordinance of the Northern Territory or an instrument (including rules, regulations or by-laws) made under such an Ordinance.

We have indicated in Chapter 17 our agreement with the view of the Northern Territory Chief Minister that that Territory should be excluded from the operation of the Freedom of Information legislation because of its self-governing status. If that development occurs, clause 28 (2) would be deleted.

**21.3** As one would expect, the form of secrecy provisions and the categories of information they protect vary notably from statute to statute. In general, a large number apply to information of a personal or business nature that has been given to the government in confidence (for instance, section 16, *Income Tax Assessment Act* 1936; and section 11 (1), *Structural Adjustment (Loan Guarantees) Act* 1974). Many others apply to specific categories of information that are thought to warrant protection (such as section 73A of the *Defence Act* 1903; and sections 44–48 of the *Atomic Energy Act* 1953). Clearly the most ubiquitous and well-known secrecy provision is section 70 of the *Crimes Act* 1914, which prohibits the disclosure by a present or former Commonwealth officer of any fact or document which came to his knowledge or into his possession by virtue of his office, and which it was his duty not to disclose (penalty: 2 years jail). (We discuss that section specifically later in this chapter.) A useful classification of secrecy provisions has been prepared by the Attorney-General's Department and appears as Appendix 6. They can be divided into three broad categories:

(a) Provisions that prohibit or restrict the disclosure of information—the provisions referred to above fit into this category.

<sup>1</sup> See Appendix 6, which is a list of secrecy provisions prepared by the Attorney-General's Department.

- (b) Provisions that restrict the *publication* of information—two such examples are section 50 of the *Federal Court of Australia Act* 1976, which empowers the court to make any order forbidding or restricting the publication of evidence, or the name of a party or witness, which appears to the court to be necessary in order to prevent prejudice to the administration of justice or the security of the Commonwealth; and section 14 of the *Administrative Decisions (Judicial Review) Act* 1977, which provides that an official required to prepare a statement of the reasons for an administrative decision may exclude from the statement any matter in respect of which the Attorney-General has certified that disclosure would be contrary to the public interest by reason that it would prejudice security, disclose Cabinet deliberations or decisions, or for any other reason that could form the basis for a claim of privilege by the Crown in judicial proceedings.
- (c) Provisions requiring evidence to be taken, or a meeting to be conducted, in private—for instance, section 19 (2) of the *Broadcasting and Television Act* 1942 empowers the Australian Broadcasting Tribunal to direct that part or all of an inquiry shall be held in private; that evidence (whether taken in public or in private) shall not be published; or that evidence shall not be disclosed to some or all of the persons having an interest in the proceedings.

**21.4** The Government is yet to announce which secrecy provisions will be prescribed under the Bill. The Attorney-General (in a private meeting with the Committee on 9 March, 1979) promised an announcement as soon as possible on this point, and, in preparation, all ministers are presently examining secrecy provisions in legislation administered by their departments.<sup>2</sup> It is important in our opinion that an announcement be made as soon as possible: first, so that proclamation of the Bill will not be needlessly delayed; and secondly, to afford Parliament and the public adequate time to scrutinise the proposed list of provisions. We are mindful, in particular, that major problems arose in the United States after passage of the Freedom of Information Act because inadequate attention had been given at the outset to existing secrecy provisions. Frequent disputes occurred and a sizeable body of case law developed, until Congress eventually had to amend the relevant exemption in 1976 as it was found that it preserved unnecessarily broad secrecy provisions.<sup>3</sup>

**21.5** Clause 28 is a relatively simple provision, and is certainly more straightforward than the counterpart United States exemption.<sup>4</sup> Even so, it is not free of doubts and these should be resolved. First, a question arises as to whether all the different types of secrecy provisions to which we have referred are capable of being prescribed under clause 28. For instance, the provisions cited above from the Broadcasting and Television Act and the Administrative Decisions (Judicial

<sup>2</sup> The nature of that review, which is being co-ordinated by the Attorney-General's Department is mentioned in *Transcript of Evidence*, page 139 (Mr Curtis).

<sup>3</sup> See, e.g., Berner, *The Effect of the 1976 Amendment to Exemption 3 of the FOIA (1976)* *Columbia Law Review* 76, p. 1029.

<sup>4</sup> The counterpart United States exemption protects matters that are 'Specifically exempted from disclosure by statute, provided that such statute (A) requires that the matter be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.'

Before its amendment in 1976 the exemption protected matters that were 'specifically exempted from disclosure by statute'.

Review) Act do not, strictly speaking, prohibit or restrict the disclosure of information. Rather they either authorise a designated individual to prohibit or restrict the disclosure of information or empower a designated body to direct that proceedings shall be held in private, or that evidence shall be received in private session. Powers of this nature that are exercised by a board, tribunal or other body having power to take evidence on oath, would not need to be prescribed in that they would already be preserved indirectly by clause 35 (b), which provides that a document is exempt if disclosure would be contrary to an order or direction given by a tribunal or other body having power to take evidence on oath. This same analysis would not apply where the body in question does not have this attribute of judicial power; for instance, under section 14 of the Administrative Decisions (Judicial Review) Act it is the Attorney-General who authorises a restriction on the disclosure of information. Probably there is no reason to prescribe a provision of this nature, as it creates a power directed to a specific situation (in this instance the preparation of reasons for a decision). Even if the reasons did not include information to which an individual felt he was entitled, he could make an application under the Freedom of Information Act to obtain any document which contained the required information. However, it is clear that even this dual procedure for obtaining information could cause confusion and that convenience would be served if the Freedom of Information Bill and secrecy provisions such as these were made compatible. For instance, a provision like section 14 could be amended to provide that relevant information could only be deleted from a statement of reasons if the information would be exempt under the Freedom of Information Act.

**21.6** This analysis raises another problem. What effect does a secrecy provision have if it is not prescribed? It would clearly not be effective to prohibit the disclosure of information to a person who had made a request under the Freedom of Information Act, but, apart from that, it would be effective. For instance, in the case just mentioned, where the Attorney-General, pursuant to the Administrative Decisions (Judicial Review) Act, authorises that information to which a person has access under the Freedom of Information legislation be deleted from a statement of reasons for a decision, he is clearly acting within his powers. The same would apply with provisions of a criminal nature (such as section 70 of the Crimes Act and section 73A of the Defence Act) if they were not prescribed. It would still be an offence for an official to disclose information referred to in those sections except in pursuance of the provisions of the Freedom of Information legislation. For example, an officer who was not authorised to handle requests under the Freedom of Information legislation would probably be committing an offence by disclosing without authority any documents, whether or not they were of an exempt or non-exempt nature. Even for authorised officers, difficult questions could theoretically still arise as to whether a disclosure was one made *pursuant to* the Freedom of Information legislation—for instance, disclosure pursuant to an oral inquiry that does not cite the legislation may not be made pursuant to the Act (see, for example, clauses 13 and 17). Mr Curtis of the Attorney-General's Department admitted that this 'could create legal difficulties if we leave some of [the secrecy provisions] in operation and . . . they are not prescribed'.<sup>5</sup> Our own tentative view is that criminal provisions which are not prescribed should be repealed. This will reduce confusion.

**21.7** Another problem arising under clause 28 is that there are many secrecy provisions that are very broad and should not be prescribed under the Bill. For

<sup>5</sup> *Transcript of Evidence*, p. 140.

instance, Public Service regulation 35 provides that an officer shall not, without the express authority of the chief officer, disclose any information concerning public business or any matter of which the officer has knowledge officially. There are comparable prohibitions contained in other statutory instruments, like regulation 60 of the Australian Broadcasting Commission (Staff) Regulations. Blanket prohibitions of this kind conflict diametrically with the philosophy espoused in the Bill. There are other provisions which, while not as broad, contain standards that are broader than those in the Freedom of Information Bill. For instance, section 17 (2) of the *Social Services Act* 1947, provides that 'a person shall not, directly or indirectly, except in the performance of his duties . . . divulge or communicate to any person, any information with respect to the affairs of another person acquired by him in the performance of his duties'. Sub-section (4) modifies this by providing that the Minister or the Director-General may certify that it is 'necessary in the public interest' for any such information to be divulged. Whether necessary or not, this provision is clearly broader than clause 30 of the Bill which exempts documents whose disclosure 'would involve the unreasonable disclosure of information relating to the personal affairs of any person'. The same comment can be made about many of the provisions protecting business information—for instance, section 11 (1) of the *Structural Adjustment (Loans Guarantee) Act* 1974 makes it an offence for an officer to 'divulge or communicate to any person, any information concerning the affairs of a firm acquired by him in the course of his duties'. Clearly this is broader than clause 32 of the Bill protecting trade secrets and business and commercial information.

**21.8** As far as possible, provisions such as these should be repealed, as they protect information to which the public might legitimately seek access under the Bill—for instance, the Social Security Department indicated in its submission that it would seek to withhold under section 17 the record of precedents of the Social Security Appeals Tribunals, as a precedent may contain personal details.<sup>6</sup> Were section 17 not available to the Department, it seems quite probable that the personal details would have to be separated and the remainder of the precedents published or made available under Part II of the Bill as part of the internal law of the agency.

**21.9** We cannot foresee that undue difficulties or complications will arise from the repeal of secrecy provisions. Many, it would seem, are inserted or retained in legislation more because of custom or habit than because of necessity. Certainly there is no uniform principle or theme that unites the existing provisions and on the few occasions where they have been repealed no difficulties have arisen. For instance, the *Science and Industry Research Act* 1949 contained a very broad secrecy provision making it an offence for an officer or employee to disclose any information concerning the work of the CSIRO or the contents of any document in the possession of the CSIRO (section 31). When this Act was repealed and replaced in 1978, section 31 was dropped without comment or attention being drawn to the change by the minister.<sup>7</sup> A similar example occurred with the repeal in 1974 of Public Service regulation 34 (b) which provided that 'an officer shall not . . . publicly comment upon any administrative action or upon the administration of any Department'.

<sup>6</sup> Submission no. 117, incorporated in *Transcript of Evidence*, p. 2141; pp. 2212–2214.

<sup>7</sup> See a speech on this change drawing attention to the deletion of section 31 by Senator Puplick: Australia, Senate, *Hansard*, 24 October 1978, p. 1522.

**21.10** We appreciate that personal and business information must often be protected by criminal sanctions to enable a department to obtain necessary information from the public and guarantee confidentiality to those who submit the information. We doubt, however, whether departments need to be safeguarded by provisions of unrestricted breadth and generality. All of the many departments that have personal record holdings appear to protect their confidentiality to the same degree, yet only a few indicated in their submissions that they had secrecy provisions available to protect those records. In any event, we think it is possible, and desirable, that many secrecy provisions be redrafted, so that it is in future only an offence to disclose personal or business information other than in pursuance of the Freedom of Information Act.

**21.11** Another danger with over-broad secrecy provisions was pointed out in the submission of CAGEO.<sup>8</sup> It claimed that staff retiring from the employment of the Australian Atomic Energy Commission are required to declare that they will continue to be bound by section 53 of the Atomic Energy Act and that they will not disclose information on the operation of the Commission. While we cannot verify this claim, it would clearly be inconsistent with the scheme of the Bill if such private arrangements could be operated by agencies without heed to the criteria in the Bill.

**21.12** A final remark concerns the accessibility of the provisions prescribed under the Freedom of Information Act. In our opinion it would be convenient if all such provisions were contained in a schedule to the Bill. Mr Curtis of the Attorney-General's Department indicated to us that one of the principal reasons why this course was not adopted was that the list of prescribed secrecy provisions was not prepared at the time the Bill was introduced into Parliament.<sup>9</sup> At the time of concluding our Report this list had still not been produced. This is a matter for regret but we feel it should certainly be produced before amendments to the Bill are introduced. It can then be included in a schedule to the Bill. In our view clause 28 should therefore be amended to provide for a schedule to be incorporated in the Bill of those secrecy provisions which it is intended should be exempt under the Bill. Any further additions to the list of prescribed secrecy provisions should be incorporated in such a schedule. For convenience (see the general discussion on this point in Chapter 12), and consistently with our recommendations in Chapters 8 and 12, we would accept it as appropriate for such amendment to the schedule to be made by regulation which would be expressed to take effect only upon formal resolution of both Houses.

### **21.13 Recommendations:**

- (a) Clause 28 should be amended so that the list of secrecy provisions to be prescribed under the clause be contained in a schedule to the Bill;**
- (b) Any amendments to the schedule after enactment of the legislation should be made by regulation expressed to take effect only upon affirmative resolution of both Houses of the Parliament;**
- (c) All criminal provisions prohibiting or restricting the disclosure of information that are not prescribed under the Bill should be repealed; and**
- (d) Where possible, other provisions which confer power upon a tribunal, body or person to regulate the disclosure of information should be brought into line with the criteria contained in the exemptions in the Bill.**

<sup>8</sup> Submission no. 106.

<sup>9</sup> *Transcript of Evidence*, p. 140.

## Section 70 of the Crimes Act

**21.14** We have received many criticisms of section 70 of the *Crimes Act* 1914 which is regarded by many people as a catch-all provision reinforcing the present system of discretionary secrecy. Section 70 provides:

70. (1) A person who, being a Commonwealth officer, publishes or communicates, except to some person to whom he is authorized to publish or communicate it, any fact or document which comes to his knowledge, or into his possession, by virtue of his office, and which it is his duty not to disclose, shall be guilty of an offence.

(2) A person who, having been a Commonwealth officer, publishes or communicates, without lawful authority or excuse (proof whereof shall lie upon him), any fact or document which came to his knowledge, or into his possession, by virtue of his office, and which, at the time when he ceased to be a Commonwealth officer, it was his duty not to disclose, shall be guilty of an offence.

Penalty: Imprisonment for two years.

**21.15** Broad though it is, and draconian though its penalties seem to be, section 70 has been little used in Australia. Indeed the Public Service Board in its evidence informed us that the only reported use of the section was in 1971 when a prosecution was instituted against a public servant who had allegedly disclosed official information to the publisher, Maxwell Newton.<sup>10</sup> No conviction was obtained in that case. There are, of course, other provisions under which proceedings can be taken, or public servants can be controlled or disciplined, and the usage of these provisions is not fully known. For example, a public servant can be charged under section 55 (1) of the *Public Service Act* for breaching the regulations. In this context the relevant regulation would be regulation 35 which provides in turn that an officer shall not disclose information gained in the course of duty without the permission of the Chief Officer. We understand that these provisions have been invoked from time to time. In addition, there are other provisions in Part VIII of the *Crimes Act* relating to disclosure of information, and a case was reported in 1977 of proceedings being instituted against an officer of the Australian Security Intelligence Organisation for unauthorised disclosure.<sup>11</sup>

**21.16** It is interesting to compare the situation in Britain where section 2 of the *Official Secrets Act* 1911, the equivalent of section 70, has formed the basis of some thirty prosecutions since 1916.<sup>12</sup> The most recent of these occurred in January 1971 when a prosecution was launched against a journalist, his informant, the *Sunday Times* and its editor over the publication of a report from a British defence adviser in Nigeria.<sup>13</sup> In his speech to the jury at the end of the trial, Mr Justice Caufield made the suggestion that section 2 should be 'pensioned off'. Two weeks later the Franks Committee was established to examine the reform of section 2. In its report it described section 2 as 'a mess' yet one whose 'scope is enormously wide'. The report continued 'any law which impinges on the freedom of information in a democracy should be much more tightly drawn.'<sup>14</sup>

**21.17** Many of the submissions made to this Committee commented in similar terms on section 70 of the *Crimes Act*. Whatever the rationale for section 70

<sup>10</sup> *Transcript of Evidence*, pp. 906-907; *R. v. Pratt* (unreported, 16 July 1969).

<sup>11</sup> See *The Canberra Times*, 2 June, 3 June and 2 September, 1977.

<sup>12</sup> Great Britain, *Reform of Section 2 of the Official Secrets Act, 1911*, Cmnd 7285, July 1978, HMSO, London, para. 6.

<sup>13</sup> The case is discussed in Jonathan Aitken, *Officially Secret*, London, Weidenfeld and Nicolson, 1971.

<sup>14</sup> Great Britain, Departmental Committee on Section 2 of the *Official Secrets Act* 1911 (Lord Franks, Chairman), *Report*, Cmnd 5104, HMSO London, September 1972, vol. 1, para. 88.

may have been, we feel that in its present form it would be clearly at variance with the spirit of those reforms which we hope to see enacted in the Freedom of Information Bill. While not falling within our terms of reference, we do take this opportunity to urge the government to reconsider the status of section 70 in the light of this Report and other contemporary developments.

**21.18** We realise that reform of section 70 could involve a separate study in itself, and to that extent we have only indicated in outline the form of the scheme that we propose. We have found it convenient to use as the basis of our discussion the proposals made in Britain in 1972 by the Franks Committee. The Committee, which included representatives of both Houses of Parliament and the media, and which received a formidable volume of written and oral evidence from the public and from official sources, was of the opinion that penal sanctions should only be used to protect the security of the nation, the safety of the people, and the constructive operation of democracy. Documents not covered by the sanctions would still be protected by such things as civil service disciplinary provisions, the formal and informal sanctions which exist in any career service, the code of professional behaviour observed by most civil servants, the procedures for recruiting, vetting and training public employees, and the internal security classification and privacy markings which provide positive guidance for officers on which information requires special protection.

**21.19** The nature of the areas requiring protection would be reflected in an Official Information Act, which the Franks Committee recommended should be enacted containing the following provisions:

- (a) The Act should make it an offence for a Crown servant to communicate, contrary to his official duty, classified information in the areas of:
  - (i) defence and internal security;
  - (ii) foreign relations (meaning the relations between the British government and any other power or any international body the members of which are governments); and
  - (iii) any proposals, negotiations or decisions connected with alterations in the value of sterling, or relating to the reserves, including their extent or any movement in, or threat to, them.
- (b) A document would count as classified if it was correctly graded as 'Top Secret' or 'Secret'. This would cover documents the unauthorised disclosure of which would cause at least serious injury to the interests of the nation. The responsible minister would personally review the correctness of a classification of information before its disclosure became the subject of a prosecution. If satisfied that it was correct, he would give a certificate to that effect to the court and the certificate would be conclusive evidence on the point.
- (c) It should be an offence for a Crown servant to communicate, contrary to his official duty, information (irrespective of classification) in the following categories:
  - (i) Information relating to law enforcement specifically information whose disclosure—
    - is likely to be helpful in the commission of offences;
    - is likely to be helpful in facilitating an escape from legal custody or other acts prejudicial to prison security; or
    - would be likely to impede the prevention or detection of offences or the apprehension or prosecution of offenders;

- (ii) Documents submitted for the consideration of, or recording the proceedings or conclusions of, the Cabinet and Ministerial Cabinet Committees;
  - (iii) Information given to the government by private individuals or concerns, whether given by reason of compulsory powers or otherwise, and whether or not given on an express or implied basis of confidence; and
  - (iv) Information which is used for private gain or disclosed with a view to private gain by some other person.
- (d) It would also be an offence for another person to communicate, without authority, information which they knew, or had reasonable ground to believe, had already been communicated in contravention of the Official Information Act. There would also be specific provisions applying to government contractors and persons entrusted with official information in confidence.
- (e) A prosecution under the Act could not be brought without the consent of the Director of Public Prosecutions, in the case of some offences, or the Attorney-General, in the case of others.

**21.20** The British Home Secretary announced in a statement to the House of Commons on 22 November, 1976<sup>15</sup> that the government intended to introduce legislation based on the Franks Committee Report but with some modifications. The new proposals were subsequently outlined in a White Paper, *Reform of Section 2 of the Official Secrets Act 1911*<sup>16</sup> presented to Parliament in July 1978. The Franks Committee recommendations were altered to reduce the categories of protected information, to add other categories, and to alter the procedures by which prosecutions would be brought.

**21.21** The White Paper recommended that three categories of information be dropped from those categories to be protected by criminal sanctions. First, the Franks Committee thought that protection of information relating to the currency or the reserves was necessary, as unauthorised disclosure of information that could enable speculators to raid the reserves on a confident basis would damage the country as much as disclosure of information about defence and national security. The 1978 White Paper rejected this proposal, commenting that it was a proposal 'made in the climate of 1971-72'.<sup>17</sup> The Paper noted that other information dealing with monetary or fiscal policies would not be protected, and the government saw no need for an offence extending to some categories of economic information and not to others. Secondly, the White Paper took the view that Cabinet materials are protected adequately by special distribution and handling procedures, the sanctions of Civil Service discipline and the judgment of ministers. The Paper noted that the great majority of Cabinet documents deal with home and economic affairs, and that in general a distinction should be drawn in the criminal law between information on such policies and on security and intelligence, defence and international relations. 'The unauthorised disclosure of any official information . . . in the domestic area will generally result in embarrassment to the Government of the day and not in any serious damage to the national interest.'<sup>18</sup> Thirdly, the Paper

<sup>15</sup> Great Britain, Parliament, House of Commons, *Debates*, vol. 919, col. 1878-1888.

<sup>16</sup> Cited in footnote 12.

<sup>17</sup> *ibid.*, para. 12.

<sup>18</sup> *ibid.*, para. 11 (quoting the Government's general approach laid down by the Home Secretary, in his statement of 22 November 1976).



stated that the existing law on corruption adequately established offences concerning the use of official information for private gain. The Paper also noted that since 1972 (when the Franks Committee reported) the Royal Commission on Standards of Conduct in Public Life<sup>19</sup> under the chairmanship of Lord Salmon reported with recommendations about the misuse of official information. It was pointed out that, in due course, there would be legislation as a result of the Salmon Report.

**21.22** The British Government expressed in the White Paper its hesitation in accepting the Franks Committee's recommendation that the criterion of criminality should be whether disclosure would cause serious injury to the interests of the nation (the test for classification of 'Secret') rather than prejudice the nation's interests (equivalent to 'Confidential'). The criterion of serious injury was ultimately accepted, and it was further recommended that that criterion should actually be stated in the legislation. The fact that a document was classified 'Secret' would simply raise a presumption that the defendant knew or had reasonable cause to believe that the information in question was protected by the Act. Since the classification system would still be of some importance, the system of classification markings would be contained within the Act. It would contain the basic features of the system, such as the definition of each security marking and an enabling power authorising regulations on classification to be made. Whether any unauthorised disclosure would cause serious injury to the interests of the nation is a question of fact that would still be determined by the responsible minister. If satisfied on the point, he would issue a certificate that would be conclusive evidence on the point. However, as an additional safeguard, the Government proposed in the White Paper that the question would also be studied by the Attorney-General who would have to agree that the information breached the serious injury test before authorising any certificate to be entered in evidence at a trial.

**21.23** The British Government also proposed that criminal sanctions be extended to protect two new categories of information. The first category is information relating to security and intelligence matters, whether classified or not. The Government felt that this area deserved the highest protection, since the gradual accumulation of small items of unclassified information could eventually create a risk for the safety of an individual or constitute a serious threat to the interest of the nation as a whole. The second area relates to the confidences of citizens. The Franks Committee confined the protection to information *given* to the government. The White Paper expressed the view that confidences *held* by a government department, however acquired, require protection. Lastly, the British Government proposed that it should no longer be an offence merely to receive protected information. The substitute offence would be that of communicating information otherwise than in accordance with an authorisation given on behalf of the Crown, if the information is protected by the Act at the time and if the accused knew, or had reasonable cause to believe, that the information was so protected.

**21.24** We would mention in passing that a scheme for the reform of section 70 of the Crimes Act in Australia was contained in the Minority Report Bill, attached to the Coombs Commission Report.<sup>20</sup> Essentially, the recommendations in that Report were based upon the Franks Report. There were, however, the following exceptions: Cabinet documents would not be protected; there would not be a catch-all provision protecting confidences of the citizen, but instead the already

<sup>19</sup> Cmnd 6524, HMSO, London, 1976.

<sup>20</sup> Royal Commission on Australian Government Administration, *Appendix Volume Two*, Parl. Paper 187/1976, pp. 52-56, 146-150.

extensive number of secrecy provisions in legislation would be left to perform that task; and in respect of a prosecution for disclosure of classified information, it would be the court and not the minister who would determine in effect whether the information disclosed was properly classified 'Secret' or above. The Minority Report also proposed that there should be some mental element, or *mens rea*, in the offence so that it would be a defence if a person believed on reasonable grounds that he was not acting contrary to his duty in publishing or communicating protected information.

**21.25** We appreciate that the Australian Government would probably wish to commission further studies before section 70 was reformed and, with that in mind, we think it premature for us to set out in detail our own views on this question. We should, however, express our firm belief that reform of section 70 should accompany the enactment of the Freedom of Information Bill. In theory, and certainly in the mind of the public, it is implausible to enact a presumption of openness while leaving untouched provisions like section 70 that provide the legal foundation for the system of discretionary secrecy that presently exists.

**21.26** In our opinion consideration should be given to the desirability of enacting a scheme that takes into account the recommendations of the Franks Committee and the British White Paper. Although, as we have indicated, it would be premature for us to make exhaustive suggestions as to the form that the revision of section 70 should take, we nevertheless think it desirable that we provide some indication as to what type of legislative scheme would be compatible with the other proposals we have made for revision of the Freedom of Information Bill. The main points we would outline for the Government's consideration are as follows:

- (a) One category of information that should be protected is information in the areas of defence, internal security and foreign relations where disclosure would cause serious injury to the interests of the nation. However in our opinion it should not be for the minister or the Attorney-General to determine conclusively in any criminal prosecution whether disclosure of security information would seriously damage the interests of the nation. This would amount, in effect, to converting a strict liability offence into a discretionary offence, a reform of dubious merit. In relation to the Freedom of Information Bill we have recommended in Chapter 16 that a power of this nature could be exercised by the Administrative Appeals Tribunal. We see no reason why a similar power could not be conferred upon a court hearing a prosecution in relation to unauthorised disclosure.
- (b) The other category of information that should be protected is information relating to law enforcement of the type outlined earlier in paragraph 21.18, sub-paragraph (c) (i).
- (c) For the reasons proposed in the British White Paper, we are of the opinion that the Act should not protect Cabinet documents or information relating to the currency or the reserves.
- (d) From our brief survey of existing secrecy provisions, it would appear to us that the confidences of the citizen are adequately protected. We think it preferable to have provisions such as these making it a criminal offence to disclose specific categories of information, than to have a broad provision applying to any 'confidential' information given to, or held by, a government about a person or corporation.

- (e) There is no separate legislation in Australia either in existence or, to our knowledge, proposed on the question of misuse of official information. Consequently, it would be desirable for the legislation to make it an offence for a person to use official information for private gain or to disclose it with a view to private gain by another person.
- (f) Under section 13 of the Crimes Act any person may institute proceedings prosecuting a person for a breach of the Act. In our opinion all prosecutions for a breach of the provisions replacing section 70 should be instituted by the Attorney-General.
- (g) Section 79 of the Crimes Act supplements section 70 by creating a number of additional offences; for instance making it an offence for a government contractor or a person to whom information has been entrusted to disclose it to an unauthorised person if there is a duty to keep it secret; for a person who has come into possession of information, the disclosure of which has not been authorised, to disclose it to another; for a person to retain any document containing such information when he has no right to retain it, or to fail to take reasonable care of it; and finally, merely to receive any such document or information, unless he proves that the communication was contrary to his desire. It would appear to us desirable that this section be reformed so that it would no longer be an offence to receive protected information, but only to communicate it to another, unless either the person did not know, and had no reason to believe, that the information was protected against disclosure; or the person to whom the information was communicated was an authorised person.

**21.27 Recommendation: Urgent consideration should be given by the Government to the question of reforming section 70 of the Crimes Act so as to limit the categories of information that it is an offence to disclose and to establish procedural safeguards for any person who may face prosecution under that section. Any such reform of section 70 should preferably be enacted either before or simultaneously with the enactment of the Freedom of Information Bill.**