

Adverse effect on agency operations (clause 29)

22.1 The exemption discussed in this chapter is that for certain documents concerning the operations of agencies. It is provided for by clause 29 which is in the following terms:

29. A document is an exempt document if its disclosure under this Act would be contrary to the public interest by reason that the disclosure would have a substantial adverse effect on the financial, property or staff management interests of the Commonwealth or of an agency or would otherwise have a substantial adverse effect on the efficient and economical conduct of the affairs of an agency.

There appears to be little in the expression 'substantial adverse effect on the efficient and economical conduct of the affairs of an agency' which would not be subsumed in the reference to 'the financial, property or staff management interests of the Commonwealth'. We sought clarification as to what documents would fall within the former but not the latter expression from both the Attorney-General's Department and the Public Service Board. Both the Department¹ and the Board² referred to the example given in the Explanatory Memorandum, namely, confidential reports on departmental operations or, as the Board put it, agency efficiency reviews, as a matter that would fall within the expression 'efficient and economical conduct of the affairs of an agency' but not within the expression 'financial, property or staff management interests of the Commonwealth'. The Attorney-General's Department conceded that this matter would, *prima facie*, also fall within the protection of clause 26.³

22.2 In subsequent written advice, the Attorney-General's Department through Mr Lindsay Curtis informed the Committee of the reason for including in clause 29 the words 'or would otherwise have a substantial adverse effect on the efficient and economical conduct of the affairs of an agency', as follows:

Section 17 of the Public Service Act, which gives certain duties to the Public Service Board in relation to the economical and efficient working of departments, was read as an indication by the Parliament that there was a public interest in the efficient and economical conduct of the affairs of a department. Consequently, it was thought that this should be reflected in the provisions of the Freedom of Information Bill. As I explained to the Committee there may be matters not covered by the terms 'financial, property or staff management interests' which, if publicly disclosed, would be contrary to that public interest. The words 'the efficient and economical conduct of the affairs of an agency' in clause 29 of the Bill might be compared with the words 'the economical and efficient working of each department' in paragraph (d) of sub-section 17 (1) of the Public Service Act 1922.⁴

22.3 Paragraph (d) of sub-section 17 (1) of the *Public Service Act* 1922 imposes a duty on the Board to maintain a comprehensive and continuous system of

¹ *Transcript of Evidence*, p. 143.

² *Transcript of Evidence*, p. 879.

³ *Transcript of Evidence*, p. 143.

⁴ Letter of 23 October 1978 from Attorney-General's Department to Committee (Committee Document 5).

measuring and checking 'the economical and efficient working of each Department . . .'. The Board was unable to cast any particular light on the meaning of the words in issue, being guided 'by Section 17 as a whole and the ordinary dictionary meaning of the words'.⁵

22.4 The attitude seems to have been that the expression in question was required in case there were sensitive aspects of agency operations that could not be described in terms of their financial, property or staff management interests. We consider this to be an overly cautious attitude. No allowance seems to have been made for the supplementary protection afforded by other clauses for documents concerning the efficient operations of government which may, in some circumstances, warrant protection. We discuss this matter further in Chapter 19 concerning clause 26. Neither the evidence submitted to the Committee nor the specific advice provided by the Public Service Board and the Attorney-General's Department give us grounds for altering our initial assessment that reference to 'the efficient and economical conduct of the affairs of an agency' is an unnecessary addition to clause 29.

22.5 We were also concerned that if this reference were retained in clause 29, it could be interpreted by an agency unsympathetic to disclosure as enabling it to refuse access on the grounds that the increased demands placed on its resources in complying with requests for access would impede its efficiency in respect of other functions. In other words the final part of clause 29 could operate in much the same way that clause 13 (3) is intended to operate. Recourse to clause 13 (3) by an agency, however, would depend on the request being categorical (that is, requests for all documents of a particular type or category, or all documents on a particular subject) and on the burden placed on agency resources being unreasonable and, as we would amend it, substantial. The danger is that the same power to refuse access to documents would be available under clause 29 without the same, or any, conditions acting to fetter the exercise of that power. We were assured by departmental officers that clause 29 was directed to relieving the mischief caused by public knowledge of the contents of a document rather than the mischief caused by devoting scarce resources to complying with the request. Our point is, however, reinforced by the fact that the interpretation which we have suggested may be placed on the final part of clause 29, was actually adopted in a legal opinion obtained, and submitted to the Committee, by the Australia Council.⁶

22.6 We have concluded that a need for reference to the 'efficient and economical conduct of the affairs of an agency' cannot be clearly demonstrated. We have also concluded that the reference is potentially confusing. Accordingly, we propose that the words in question be deleted from clause 29.

22.7 Recommendation: The words 'or would otherwise have a substantial adverse effect on the efficient and economical conduct of the affairs of an agency' should be deleted from clause 29.

22.8 With regard to that part of clause 29 which refers to staff management interests, the Public Service Board identified several documents with which it was particularly concerned, which might require protection in this respect.⁷ These

⁵ Letter of 15 February 1979 from Chairman, Public Service Board to Chairman of the Committee.

⁶ Legal Opinion by Allen, Allen and Hemsley, Solicitors, incorporated in *Transcript of Evidence*, p. 647.

⁷ Submission no. 47, incorporated in *Transcript of Evidence*, p. 841-2.

included examination papers, reports under section 29 of the Public Service Act from Permanent Heads concerning the creation and abolition of offices, documentation of forward staff estimates, reports of classification investigations, correspondence with departments on staffing issues and reports to the Prime Minister on staff ceiling matters. The Board readily conceded that the public interest would by no means require that all information in these categories be protected from disclosure, but said that if such documents warranted protection, an agency would not always be able to rely on other exemptions such as personal privacy or internal working documents.

22.9 We acknowledge the need for an exemption to cover staffing matters beyond those matters encompassed by clause 30 for personal privacy and those by clause 26 for internal working documents. We are also concerned that problems may arise in connection with the Commonwealth's responsibilities in relation to the assessment of personnel other than Commonwealth Government employees or personnel in other than their capacity as Commonwealth Government employees. Two specific situations were brought to our attention. First, the Department of Transport expressed concern that the examination papers for aircraft maintenance engineers' licences and flight crew licences and ratings would be disclosed thereby seriously impairing the Department's ability to examine applicants for such licences in any effective way.⁸ It appears that the subjects under examination are comparatively narrow and the range of possible questions is correspondingly limited. The Department considered that access to past papers would reduce what was intended to be a test of knowledge, understanding and diagnostic skills to a test of memory and accordingly people unprepared for the task would become responsible for the maintenance and operation of aircraft. The examination papers would not come within the ambit of clause 29 as presently drafted for the reason that 'staff management' would be construed simply as the management of Commonwealth public servants.

22.10 The second situation concerns confidential reports by experts on applicants for government grants for artistic purposes. This was the subject of strong representations by the Australia Council. The Council proposed that when competitive grants are made in circumstances where the criteria have been heavily dependent on 'artistic judgment', the subjective opinions should not be available under freedom of information legislation. The Council considered that the opinions might occasion hurt and discouragement to an unsuccessful applicant; they might be regarded as defamatory; their release might lead to a flow of appeals against the decisions of Council; and suitable expert advisers might prove unwilling in the future to offer their services given the possibility of protracted appeals and litigation and, not least, a certain amount of unpleasantness on the part of the unsuccessful applicant and his supporters.⁹

22.11 We have already discussed the question of defamation in Chapter 9. At this stage it is sufficient to state that although clause 46 of the Freedom of Information Bill protects against actions for defamation only those releasing or authorising the release of documents and not the authors of those documents, the defence of qualified privilege would invariably protect the position of a referee. We are more concerned with the possibility that the Council's access to impartial and extensive commentary of the required calibre might be prejudiced.

⁸ Submission no. 125, Paper D.

⁹ Submission no. 154, incorporated in *Transcript of Evidence*, pp. 642-3, and see *Transcript of Evidence*, pp. 693-700.

22.12 We expect that the concern expressed by the Department of Transport and the Australia Council would be shared by a significant number of agencies which are empowered to confer benefits or privileges on people other than Commonwealth public servants or on public servants other than in their capacity as such. Clause 26 which, despite its marginal note, is not restricted to documents that are internally produced, would, we consider, provide the protection required by agencies such as the Australia Council. The relevant part of this clause for the purposes of exempting expert opinion is 'opinion, advice or recommendation, obtained, prepared or recorded . . . 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'. Expert opinion on applicants for government grants, being in the nature of opinion obtained in the course of deliberative processes, appears to be directly contemplated by the words of the clause. The Attorney-General's Department confirmed this in evidence to the Committee when commenting on the narrowness of the equivalent United States provision in comparison to clause 26.¹⁰ That evidence referred to one United States case where the court had extended the United States provision, which is essentially concerned with internally produced documents, to cover referees' opinions submitted by academics on an applicant for a research grant when technically the provision precluded such an interpretation. In Australia, on the other hand, referees' opinions are considered to fall well within the meaning of clause 26. The Department of Transport's problem in relation to examination papers, however, could not be protected in this way. Although it is difficult here as elsewhere to find statutory language which expresses with sufficient precision the changes we propose, we consider that this problem might well be overcome by substituting for the words 'staff management' the words 'personnel management and assessment'. It would be understood that the word 'personnel' would not in this context apply only to Commonwealth employees.

22.13 We emphasise, however, that we would not wish this or any similar change of wording in clause 29 to be interpreted as in any way reducing rights of access by individuals to their personal records under the legislation. This is a matter where agencies will be required to exercise their discretion with great care. We trust that this discretion will not be abused.

22.14 Recommendation: The 'staff management interests' referred to in clause 29 should be expressed as 'personnel management and assessment interests' in order to accommodate a wider range of matters legitimately entitled to protection.

22.15 We consider whether there was a need for reference to the financial and property interests of the Commonwealth to be included in clause 29 given that the equivalent section in the United States Freedom of Information Act refers only to matters 'related solely to the internal personnel rules and practices of the agency'. The Explanatory Memorandum states that clause 29 is intended to cover information such as instructions for audit checks on the expenditure of public moneys and proposals for the acquisition of land.¹¹ Submissions to the Committee indicated other documents for which protection might legitimately be claimed such as contract tenders, documents relating to the security of buildings and detention centres, and the documents embodying the procedural tactics

¹⁰ *Transcript of Evidence*, pp. 133-134.

¹¹ Para. 112.

of an agency like the rules on spot investigations and the guidelines to be applied in negotiation, the execution of contracts or settlement of cases.¹²

22.16 A specific question which arises in relation to the Commonwealth's property interests is whether expert opinion on works of art, which the Commonwealth proposes to purchase, would be protected under this clause. It is argued that the disclosure of such assessments could cause embarrassment to, or adversely affect the reputation of, the artists or experts concerned and would be likely to impair the ability of the government to obtain similar assessments in the future.¹³ We assume that the embarrassment or adverse effect on reputation would arise from the subjective element of such assessments. Although it may be arguable that the Commonwealth has a property interest in works of art, the purchase of which is merely in contemplation, we think such an interpretation of clause 29 is unlikely and should not be encouraged. To the extent that reports on such works of art are deserving of protection in the public interest, we think they are covered by clause 26. This application of clause 26 has previously been discussed in paragraph 22.12 in relation to expert opinion on applicants for Commonwealth grants. But where purchases of items of property including works of art are concerned clause 26 (4) comes into play. This provides for the disclosure of the reports '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'. Clause 26 (4) excludes from the ambit of the exemption assessments of an essentially objective nature. Because the concern which has been expressed to us in relation to assessments of works of art arises from their subjective element, we are of the view that the disclosure of such assessments would not be governed by clause 26 (4) and would remain protected by clause 26.

22.17 Aside from what are generally agreed to be the legitimate claims for exemption as financial and property interests of the Commonwealth, it has been contended that less legitimate claims could be made for such documents as consumer test reports on products to be used by an agency, government valuation reports, and details of agency contracts, leasing arrangements, requisitions and second-hand property disposals.¹⁴ We consider that the appropriate way to provide for the legitimate claims for exemption based on the financial and property management interests of the Commonwealth or of an agency, whilst excluding the unwarranted or dubious claims, is to retain reference to these interests on clause 29 and to retain the requirement that such interests be substantially adversely affected but, in addition, require that the public interest be considered 'at large'. We elaborate our views concerning an appropriate public interest test in paragraph 22.18 below. At this stage it is sufficient to state our view that subject to the inclusion in clause 29 of a requirement that the public interest be considered 'at large', we propose that reference to the financial and property management interests of the Commonwealth or of an agency be retained in clause 29.

¹² See Submission no. 9 (Freedom of Information Legislation Campaign Committee), incorporated in *Transcript of Evidence*, p. 168; Submission no. 44, (Victorian Committee for Freedom of Information), incorporated in *Transcript of Evidence*, p. 403.

¹³ Paper of 9 May 1979 from Attorney-General's Department on possible amendments to FOI Bill (Committee Document no. 88).

¹⁴ J. McMillan, 'Freedom of Information in Australia: Issue Closed', *Federal Law Review* 8, 1977, p. 379 at p. 413.

22.18 As clause 29 is presently drafted, it would be contrary to the public interest if disclosure of a document would cause substantial adverse effect on specified interests and there is no requirement to take into account countervailing public interest considerations in favour of disclosure. Undoubtedly, there would be a strong public interest in favour of disclosing documents relating to the interests in question which may, in particular circumstances, override any substantial adverse effect of disclosing the document. Accordingly we propose that clause 29 should be amended so as to require a consideration of the public interest 'at large' as presently provided in clause 26 concerning internal working documents.

22.19 Recommendation: A separate public interest criterion should be added to clause 29 to enable the review on public interest grounds of exemptions claimed under this clause.

22.20 In accordance with the recommendations in paragraphs 22.7, 22.14 and 22.19, clause 29 should be redrafted to read as follows:

A document is an exempt document if its disclosure under this Act—

- (a) would have a substantial adverse effect on the financial, property or personnel management and assessment interests of the Commonwealth or of an agency; and
- (b) would be contrary to the public interest.