

PART F
ARCHIVES

The Scope of the Archives Bill

*'Those who cannot remember the past are condemned to repeat it.'*¹

33.1 Throughout time, people and nations have preserved their history, their traditions and their cultures in written form. Vast archives from empires as ancient as the Sumerian, Egyptian, Babylonian and Chinese have been preserved and open to study by succeeding generations. From the outset of European settlement in Australia extensive written records, both of an official and of a personal nature have been maintained. Few nations in fact have written records that go so far back in their history as Australia, and the preservation of one is essential to the other. Reasons why we should wish not only to preserve the documentary record of our history, but to make that record available for public and private research, were outlined recently by Dr W. Kaye Lamb, a former Dominion Archivist of Canada, who advised on the establishment of a National Archives in Australia:

The need for access to recent material is now pressing. The last 25 years have seen a great expansion in the public that wishes to make use of public records. Time was when the major topics of interest were war and politics, and historians were the chief users of archives. They have now been joined in force by economists, economic historians, sociologists, political scientists, geographers, ecologists and members of many other disciplines. The interests of most of these relate to modern times and current problems and they seek access to recent records. Many of their studies are of great importance to those forming and guiding the Government's economic and social policies²

33.2 It is surprising to find that a function as important as preserving the documentary record of our history is not regulated by legislation. Until now, the Australian Archives, with 208 shelf kilometres of material and an annual increment of 30 000 to 50 000 additional shelf metres,³ has been regulated by Executive directions. A view strongly put to us by researchers familiar with the Australian Archives is that:

the inadequacies of the Commonwealth archival programme, and the problems encountered by the Australian Archives, in the past, are in no small measure attributable to the want of a legislative charter as the basis for its operations.⁴

33.3 It is against this background that we welcome the introduction of the Archives Bill simultaneously with the Freedom of Information Bill into the Senate by the Attorney-General on 9 June 1978. The main purpose of the Archives Bill is to place on a statutory basis many of the current activities of the Australian Archives concerning such activities as promoting records management in the Commonwealth, taking custody of records, and both disposing of and preserving

¹ G. Santayana, *Life of Reason*, vol. 1, chapter 12.

² Australia, *Development of the National Archives*, Report by Dr W. Kaye Lamb, (The Lamb Report), Parl. Paper 16/1974, p. 14.

³ Professor Neale, Director-General, Australian Archives, *Transcript of Evidence*, p. 674.

⁴ Australian Society of Archivists Submission no. 130, incorporated in *Transcript of Evidence* p.1448. An account of criticisms that have in the past been made of the Australian Archives is given in R. C. Sharman, 'Australian Archives in Lamb's Clothing', *Archivaria* 1, 2, 1976, pp. 21, 23; R. C. Sharman, Submission no. 133, p. 2; M. Saclier, 'The Lamb Report and its Environment', *Archives and Manuscripts* 5, 8, 1974 p. 200.

records. There are innovative features of the Bill as well, such as the creation of new institutions (the Advisory Council on Australian Archives is an example) and the amendment of some existing practices (particularly access procedures).

33.4 The Archives Bill is the subject of a dual study. The Senate Standing Committee on Education and the Arts is inquiring into those functions of the Archives concerned with the collection, management and preservation of records. Our terms of reference confine us to inquiring into the Bill so far as it relates to issues common to, or related to, the inquiry into the Freedom of Information Bill 1978. In effect, we have been concerned with those functions of the Australian Archives outlined in paragraphs 5 (2) (h) and (j) of the Bill:

(h) to encourage, facilitate, publicise and sponsor the use of Archival material;

(j) to make Commonwealth records available for public access . . .

33.5 This Committee heard evidence relating to the Archives Bill from some eighteen witnesses representing a wide range of interests including historians, archivists, librarians and senior public servants. In addition, on the afternoon of 15 February 1979 we heard evidence in the form of a panel discussion in which individuals with a particular interest in the Archives Bill participated.⁵ Among them were the State Librarian from the Library Board of Western Australia, a former archivist, a librarian and several academics. Institutions represented were the Australian Archives, the Australian Society of Archivists, the Australian Historical Association and the Australian Advisory Council on Bibliographical Studies.

33.6 We have divided the consideration of the Archives Bill into two chapters. This first chapter is concerned with substantive points such as the thirty-year rule and the exemptions. Chapter 34 discusses matters which are more procedural in nature, such as access procedures and provisions for review and appeal.

The present Bill

33.7 For purposes of our analysis, the starting point is clause 30 of the Archives Bill, which provides that:

30. (1) Subject to this Part, the Archives shall cause all Commonwealth records in the open access period that are in the custody of the Archives or of a Commonwealth institution, other than exempt records, to be made available for public access.

Pursuant to clause 3 (7) a document enters the open access period when a period of thirty years has elapsed since the end of the calendar year in which the document came into existence. This ensures that, if a determination is made that a document is non-exempt, access can be given to it automatically, upon request, without any show of need by the applicant, and without the need for any further inspection by the Archives of the contents of the documents. There are two general methods specified in the Bill by which documents that have reached the open access period will not be available for perusal. First, some categories of documents are excluded altogether from the access provisions of Part V, Division 3 of the Bill. This applies to such documents as Executive Council and Cabinet Papers, and the records of the Governor-General. Secondly, in respect of other categories of documents that are subject to the access provisions, the Archives may withhold a document pursuant to one of nine categories of exemption listed in the Bill; these exemptions are similar to many of those in the Freedom of Information Bill. Whether a document is exempt is, by and large, a question that will have been determined before

⁵ *Transcript of Evidence*, pp. 1381-1574.

a document reaches the open access period. The Bill establishes the general rule that departmental records will be transferred to the Archives by the time they are twenty-five years old; during the ensuing five years before the open access period commences, the records are examined, collated, retained if desirable, and a determination made as to whether they are exempt. Whether or not a record is exempt, it will in most cases be listed in an Australian National Guide to Archival Material. An applicant who is denied access to a record has two opportunities to challenge the denial: first, by way of an application for an internal review, and secondly, by appeal to the Administrative Appeals Tribunal.

33.8 There are two other methods by which access may be gained. First, the minister, or a person authorised by him, may cause any single class or category of records that are not in the open access period (that is, less than thirty years old) to be made available for public access (called 'accelerated' access; see clause 39 (1)). Secondly, the minister or authorised person may grant to an individual special access to records that are either exempt, or have not reached the open access period, for a purpose specified in the regulations (called 'special' access; see clause 39 (2)).

Thirty-year rule

33.9 Perhaps the most prominent feature of the public debate on the Archives Bill has been the thirty-year archival period. It is recognised both by critics and by official spokesmen that the period is an arbitrary one. It was first adopted in Australia in December 1970 as the period applying to normal departmental records and it was later extended in January 1972 to Cabinet documents as well.⁶ There appears to be a number of reasons why the period of thirty years has been adopted. In the first place, it is the period adopted in most other countries of the British Commonwealth; other countries like the United States, which generally speaking do not have a closed access period, tend to adopt the thirty-year period as the closed access period for documents supplied by foreign governments. It was submitted to us⁷ that the main reason why these and other countries have adopted this archival period is that internationally thirty years is regarded as a necessary period in order to protect the position of civil servants. On the one hand, it allows sufficient time for a civil servant to complete his career, retire from office and be sufficiently removed from public affairs to avoid criticism of his activities while in office; and, on the other hand, it assures public servants that they can carry out their duties frankly and fearlessly, without having the public contemporaneously gazing at their activities.

33.10 We do not subscribe to this view as an adequate justification for a closed period of thirty years. It is a view that is clearly inconsistent with the philosophy behind the Freedom of Information Bill, which could in many cases require the disclosure of deliberative materials at a very early date where the public interest so requires. We also agree with some of the criticisms expressed to this Committee that there are countervailing interests, particularly the interests of researchers who can provide a useful service to Government by analysing recent history. One can point to recent disclosures, such as the Crossman Diaries, to

⁶ The history of the Australian Archives and of the access rules is discussed in Sharman, *Archivaria* cited footnote 4.

⁷ P. Orlovich, Vice-President, Australian Society of Archivists, *Transcript of Evidence*, p. 1527.

illustrate the proposition that early disclosure can assist research and understanding of government without prejudicing the efficiency and practices of government.⁸

33.11 An alternative period which was suggested to us in a few submissions was an archival period of ten years.⁹ We should add that a period as short as this is not adopted in any other country, though there are some countries with a shorter period than thirty years—for instance, Zambia has a twenty-year rule, and Nigeria, Malaysia, and Singapore adopt twenty-five years. Most other countries that vary from Australia still retain the old fifty-year rule.¹⁰ Another alternative adopted in some countries is to have different periods for different categories of documents. It is explained in Chapter 2 that Sweden has archival periods of two years, five years, ten years, twenty-five years, up to seventy-five years. The United States also follows a similar system. The disclosure of documents relating to defence and security is regulated by the security classification system, which requires the declassification of most documents by the age of six years. Documents requiring protection for a longer period are presumed to be available within twenty years, unless a very senior officer makes a determination that the document must remain secret for an even longer period. Disclosure of other documents is regulated by and large under the Freedom of Information Act, but some Departments adopt archival periods by which their own records should be released—for instance, fifteen years is the guideline adopted for law enforcement records and records of the Department of State (though there are exceptions). Under the newly enacted Presidential Records Act of 1978 the records of an outgoing President are to be available for public access (subject to the exemptions of the United States Freedom of Information Act) twelve years after the term of office ceases.

33.12 The second reason for adopting thirty years is because of the understanding between ourselves and our defence allies that material given by one government will not be released by another within this period. This is clearly an important consideration, although it only applies to a small segment of government documents. We also note that there are exemptions both in the Freedom of Information Bill and in the Archives Bill, to provide adequate protection for documents given in confidence and for our international relations. We would in passing mention also that the observation of these international understandings appears to be discretionary, and that Australia has insisted upon observance of them more so than others appear to think is necessary. In the past, the practice of the British government has been to inform Australia that it proposes to release selected categories of documents and seeks Australia's co-operation in not releasing documents not within those categories.¹¹ This happened particularly with records of the Second World War, the release of which eventually caused Australia to accept the inevitability of the thirty-year rule applying to departmental and Cabinet documents alike. The same occurred with the United States government, which had Second World War documents concerning its communications with as many as eighty countries; a unilateral decision to disclose seems

⁸ R. Crossman, *The Diaries of a Cabinet Minister*, Hamish Hamilton Ltd, London, 1975–1977, vols 1–3.

⁹ Submission no. 9 (FOIL Campaign), p. 7; Submission no. 60 (Dr D. Coward), pp. 2–4; and also see A. R. Horton, Library Association of Australia, *Transcript of Evidence*, p. 2207.

¹⁰ The archival periods adopted in other countries are summarised in a report prepared for the Committee by the Legislative Reference Service, Department of the Parliamentary Library, Committee Document no. 64.

¹¹ Professor Neale, *Transcript of Evidence*, p. 732.

almost inevitable in cases of this nature. Publicity has also been given in recent years to matters of defence interest to Australia which have become the subject of public knowledge as a result of disclosures made in United States Congressional hearings.¹²

33.13 The third, and to our mind persuasive, justification for the thirty-year rule is one of administrative efficiency. One of the objectives of an official archival system is that, at some time before the open access period is reached, documents will be examined in order to determine whether they can be released. A determination is made independently of any request for the document being received. Those documents which cannot initially be cleared for public access are re-examined at programmed intervals (or whenever a request is received) in order to determine whether disclosure can then occur. The shorter the period between creation of a document and its movement into a potential open access period, the more likely it is that one of the exemptions will still be effective. The number of closures will be greater, and more reviews will subsequently have to be undertaken by Archives staff. This we should say is the main reason proffered by Archives spokesmen for the adoption of the thirty-year archival period in the Bill.¹³

33.14 In our opinion this is an important consideration, as an open access period really should operate as such; the public should be able to expect that most documents will be available for perusal when they have reached a predetermined age. We are aware that thirty years is a lengthy period (and in fact would preclude people from learning the full story about many events which happened during their life as electors) and we would not have concurred in the adoption of this period had we thought that it would unduly hamper public analysis of the history of Australian Government activities. In this respect we note that there are two mechanisms under the Archives Bill for disclosure of documents before they reach the age of thirty years. These mechanisms, accelerated and special access, are discussed in Chapter 34. More importantly, we note also that many records will in fact be available under the Freedom of Information Bill long before the open access period is reached. Most exemptions in that Bill contain their own time limitation—that is, a document can only be withheld for so long as disclosure would injure a defined interest or have a defined effect. Even the internal working documents exemption, which is subject to a public interest criterion, is defined in this fashion. The main exceptions to this rule are, first, the Cabinet and Executive Council exemptions (clauses 24 and 25 of the Freedom of Information Bill); and secondly, the fact that the Freedom of Information Bill will not apply retrospectively to documents created before proclamation. We have proposed in Chapter 14 that the application of the Bill to prior documents should be phased in at predetermined stages. The archival period is thus less important than many people have supposed it to be. Apart from the restriction it imposes on access to Cabinet and Executive Council records and the records of the Governor-General, its main importance is that it is the period beyond which all documents will have been reviewed, listed in a public index, and their availability made certain.

33.15 Another factor which influenced our thinking is the apparent absence of any strong pressure among historians, archivists and other researchers for a reduction of the period. They were, for the most part, content with this aspect of

¹² United States, Congress, House of Representatives, House Appropriation Committee, *Hearings on Military Construction: Fiscal Year 1978* (1977 part 2) p. 183, Washington, 1977; and see article, 'Australia Gets a New US Defence Station', *Australian Financial Review*, 8 May 1978, p. 16.

¹³ C. Hurley, Australian Archives, *Transcript of Evidence* pp. 1530–1531.

the Bill, and were more concerned with the possibility that documents could be withheld subsequent to this period under the exemptions. Only a small number of historians and associations urged a reduction of the period.¹⁴ Experience and time will tell whether a reduction is ultimately necessary. As a result of the enactment of the legislation and the public interest that this has already engendered, and by virtue of the creation of a National Guide to Archival Material, we expect that the Australian Archives will enter a new phase where there is much greater interest in utilising Australian archival resources and in writing Australia's history. We recommend later in this chapter that the operation of the Archives Bill should be reviewed by a parliamentary committee three years after its enactment, along with the review of the Freedom of Information Bill proposed in Chapter 32. The experience that will by then be gained concerning the operation of the thirty-year rule will no doubt be a useful element in the proposed review.

33.16 Recommendation: The open access period defined in clause 3 (7) of the Archives Bill should remain at thirty years.

Exclusions and exemptions

33.17 There are three ways stipulated in the Bill by which documents can be withheld during the open access period. First, certain categories of documents are excluded from the open access provisions of the Bill; secondly Archives can invoke any one of nine exemptions to withhold a document from public access; and thirdly, in respect of three of the nine categories of exempt records a minister or an authorised officer may issue a certificate certifying conclusively that the document is exempt under that provision. We shall discuss these three matters in turn.

33.18 Exclusions. Part V, Division 1 of the Bill provides that the open access provisions of the Bill do not apply to the following categories of documents:

- records of the Governor-General or of a former Governor-General;
- records in the possession of the Senate, the House of Representatives or a Parliamentary Department;
- records in the possession of a court or the registry of a court;
- Cabinet records (as defined in the Freedom of Information Bill, to include Cabinet submissions, official records of the Cabinet and documents disclosing Cabinet decisions or deliberations);
- Executive Council records (which are similarly defined); and
- records protected by a Commonwealth secrecy provision that is prescribed in the regulations made pursuant to the Bill as a category or records to which the access provisions do not apply.

33.19 With the exception of the last mentioned category of records, a person having the control of the custody of records referred to in the previous paragraph may enter into arrangements with the Archives allowing access in accordance with the arrangements agreed upon. With respect to those same categories of documents, their identification is established conclusively by a certificate signed by a designated officer. We say more about conclusive certificates later in this chapter.

33.20 Witnesses from the Australian Archives appearing before this Committee have been anxious to point out that it is unlikely that the documents referred to

¹⁴ See references footnote 9 and Dr H. Radi, *Transcript of Evidence*, pp. 1569-70.

in Part V, Division 1 would, as it appears, be absolutely exempt from public access. Access to these records would under the Bill remain discretionary. It is, however, contended that access is likely to be given but on the basis of different rules or practices. It is pointed out, for instance, that Cabinet documents up to 1948 have already been cleared by Cabinet officers and placed in the custody of the Archives Office. Of all the records of the full Cabinet, the War Cabinet and the Economic Cabinet for the duration of World War II, only forty-nine documents are individually withheld from public access at the moment, twenty-nine of these on the grounds of privacy.¹⁵ Be that as it may, our present task is to appraise a Bill that purports to confer rights of access upon the public. In any such system, those who urge the creation of broad discretionary powers bear a heavy onus.

33.21 The Explanatory Memorandum to the Bill explains the exclusion of vice-regal records and the records of Parliament and the courts on the basis that it would be inappropriate for the regulatory powers of the Archives 'to be made applicable to the records of those arms of the Government which traditionally enjoy a certain degree of independence and autonomy'.¹⁶ In part this independence can be viewed on constitutional grounds, particularly the separation of the powers of the Executive, the Legislature and the Judiciary. It is also felt that, as a practical matter, it should be for bodies like the Parliament and courts to determine what is to happen to their own records. For instance, attention is drawn to the difficult questions involved in determining what should happen to judges' notebooks.

33.22 In the case of records of the Governor-General other considerations are involved. The Governor-General is in direct correspondence with the Monarch, and consequently identical holdings will exist in Britain and in Australia of the correspondence passing between them. In Britain, royal documents are not made available until sixty years has elapsed since the date of creation (though special access is sometimes given earlier than this date).¹⁷ This consideration will apply to only a very small number of vice-regal documents. Apart from that, however, the Director-General of Archives was not able to suggest additional justifications for the exclusion of these records, indicating to the Committee that it was a matter of government policy that the records described in Part V should be excluded.¹⁸

33.23 These explanations may suggest the need for special treatment to be given to a few categories of records, such as judges' notebooks and correspondence with the Monarch, but they do not to our mind suggest the need for the total exclusion of broad categories of documents from the access provisions of the Bill. The purpose of the Archives Bill is to guarantee that our national history can be both preserved and reconstructed. This guarantee must exist with respect to the operation of the Head of State, of the Legislature and of the Judiciary, much as it exists in relation to the operation of departments. We are not dealing in the Archives Bill with contemporary access to records, where there may exist special reasons for allowing organs of the State like the Legislature and the Judiciary to regulate access. Rather we are dealing with access to records that are thirty years of age. To argue that the Legislature and the

¹⁵ Professor Neale, *Transcript of Evidence*, p. 726.

¹⁶ Australia, Parliament, *Archives Bill 1978: Explanatory Memorandum*, Commonwealth Government Printer, Canberra, 1978, p. 14.

¹⁷ Professor Neale, *Transcript of Evidence*, pp. 714-715.

¹⁸ *Transcript of Evidence*, p. 715.

courts should regulate access to their own documents is to disguise the fact that at the time access is desired the particular legislature or court that would decide upon access is constituted quite differently to that of the time at which the document was created; it is a fiction to suppose that the institution still has some association with, or understanding of, the records that a trained and professional archivist would not have.

33.24 Very strong objection was expressed by archivists, historians and others to the exclusion of Cabinet records from the open access provisions. No one, it seems, was content with the assurance that these records would probably be made available for public access in the same fashion as other records. We clearly detected a residual fear among critics that these records would in fact be exempt from public access, and in any case it was felt that these records are so central to any examination of Australian history that their availability should be assured. Professor B. Mansfield, appearing before the Committee as President of the Australian Historical Association, indicated agreement with the view that Cabinet papers are 'absolutely essential to the history of government and from the historian's point of view that blanket exemption seems a vital one'.¹⁹ Mr H. J. Gibbney, a retired archivist, thought that the exemption of Cabinet records was 'quite absurd' and was 'one of those things which I think stems from inflated ideas of what in fact the Executive really is'. He continued, 'it seems to me that this is equivalent to attempting to create the archives of a company without the board of directors, and that is quite ridiculous'.²⁰ Professor A. G. L. Shaw expressed the contention of most that Cabinet records should only be withheld beyond thirty years on the same grounds as other records, such as national security or privacy of the individual.²¹

33.25 Apart from contending that the exclusion of these records, like the exclusion of vice-regal records, was a matter of government policy, Professor Neale suggested two reasons that could explain the exclusion.²² The first is that Cabinet records are the property of the Government with which they are associated, and according to the convention presently observed as to the records of former governments, it is for the leader for the time being of the party that constituted that government to be consulted upon and permit access. This convention is still observed even though records may be thirty years old. This reason it would seem is the predominant reason why Cabinet documents are excluded. The second reason is that Cabinet documents are 'the fundamental documents in government administration. Therefore their security and their custody must primarily be the concern of the Cabinet Office'. Indeed, we understand that Cabinet papers are maintained in a separate repository and to that extent it may seem impracticable to subject them to the access provisions which require a decision on access to be made by the Australian Archives.

33.26 We are not convinced by these arguments. There must come a time when public interest in obtaining access to information necessary for the understanding of Australian government and history overrides the niceties of constitutional arrangements, and in our opinion that time has certainly arrived when an event is thirty years of age. It is our view that Cabinet records should not

¹⁹ *Transcript of Evidence*, p. 1533.

²⁰ *Transcript of Evidence*, p. 1533.

²¹ *Transcript of Evidence*, p. 248.

²² *Transcript of Evidence*, pp. 724-25. The convention of disclosure of records of other governments is explained in Committee Document no. 43, a paper on the matter prepared by the Department of Prime Minister and Cabinet.

be excluded from the access provisions. The functions of the Australian Archives, as defined in clause 5 of the Bill, include making a Commonwealth record available for public access, and encouraging, facilitating, publicising and sponsoring the use of archival material. It is difficult to see that any of these functions can be properly undertaken if the most important categories of Commonwealth records are beyond the control of the Archives and thus beyond the eyes of the public. Moreover it appears to us that the distinctions created by these provisions will create administrative inefficiencies. Cabinet records are not defined in clause 18 by reference to their physical location in a separate archival repository, but are defined by reference to their character (for instance, whether something is a submission or contains details of Cabinet deliberations or decisions). When archival officers are examining documents to see whether they can be made available for public access, they will have to look not only for sensitive or exempt elements in the documents, but also for indications that the document is a 'Cabinet record' as defined in the Bill. It has been claimed that Archives staff have formerly experienced difficulties in recognising Cabinet papers.²³ Dr Lamb, in his appraisal of the Australian Archives, also drew critical attention to the practice that all Cabinet papers, no matter how old or innocuous, must be referred to the Cabinet Office for full clearance.²⁴

33.27 We recognise that some Cabinet records may be physically located in separate repositories, and if that continues to be so, the Director-General of Archives would need to exercise special powers to inspect all Commonwealth records (including legislative and judicial records, if necessary) which are retained in separate repositories. Clause 27, provides that 'the Archives is entitled, for the purposes of this Act, to full and free access, at all reasonable times, to all Commonwealth records in the custody of a Commonwealth institution other than the Archives'. Presently that clause is contained in Part V, Division 2 of the Bill which (pursuant to clauses 18 and 19) does not apply to vice-regal, parliamentary and judicial records. However, if this restriction in clauses 18 and 19 is removed, then clause 27 would appear to confer adequate power upon the Director-General to inspect all Cabinet records. The Director-General would also need power to organise all records to enable him to respond to requests received pursuant to the Archives Bill. This power could arise, at best, by implication from clause 27, and it seems to us preferable that the power be expressly conferred.

33.28 No reason has been suggested to us why records protected by secrecy provisions should potentially be excluded from the access provisions. At most we can assume that these records may, in certain circumstances, be retained by agencies like the Australian Bureau of Statistics, the Department of Social Security and the Commissioner of Taxation, pursuant to the statutory obligations those agencies have to protect confidential material. If this is the case, these obligations can be adjusted legislatively so that no conflict arises between this Bill and other legislation. A possible conflict of obligations would not, to our mind, justify or necessitate the exclusion of some categories of records from the access provisions. Indeed, their exclusion creates the anomaly that, for the first thirty years of their life such records may be subject to the Freedom of Information Bill, but thereafter cease to be subject to an access statute—a strange result for records that initially did not possess any such sensitivity.

²³ Sharman, *Archivaria*, cited footnote 4, p. 23.

²⁴ Lamb, cited footnote 2, p. 13.

33.29 Recommendations:

- (a) **Part V, Division 1 of the Archives Bill should be amended so that no category of records is excluded from the open access provisions of the Bill.**
- (b) **The Director-General of the Australian Archives should be given express power in the Bill to enable him to organise all Commonwealth records so that the Archives can respond to requests received pursuant to the Bill.**

33.30 A final matter arising under Part V, Division 1, concerns clause 23, which lays down special provisions applying to the records of royal commissions. We mention this clause as it appears to have been assumed by many people that these records are also excluded from the access provisions of the Bill. This misunderstanding is quite explicable, as the clause is contained in a Part of the Bill which otherwise deals with exclusions. However, a close reading of clause 23 indicates that royal commission records, though they may be withheld from the physical custody of the Australian Archives, are nevertheless subject to the access provisions of the Bill.

33.31 *Exemptions in general.* There are nine exemptions in the Archives Bill, many of which are similar to those in the Freedom of Information Bill. The exemptions in the Freedom of Information Bill which are not repeated in the Archives Bill are:

- internal working documents (clause 26);
- documents subject to legal professional privilege (clause 31);
- documents whose disclosure would prejudice the national economy (clause 33);
- documents whose disclosure would be in contempt of court, of the privileges of Parliament, or contrary to an order of a Royal Commission or tribunal (clause 35); and
- documents certified privileged by the Attorney-General (clause 36)

(As previously discussed, there are also special provisions contained in the Archives Bill for documents such as Cabinet documents, Executive Council documents, and documents protected by the secrecy provisions.)

33.32 Exemptions have evoked a mixed reaction. On the one hand, some welcome the fact that executive discretion to withhold documents will now be regulated by statute; indeed, as recently as 1974, it was pointed out that

the Archives, encumbered with an embarrassing set of Cabinet instructions which it must apply but cannot disclose or explain, reacts with what appears to the user as, at best, pettifogging bureaucracy at work and at worst deliberate obstructionism.²⁵

Typical of those commentators who welcomed the creation of statutory exemptions was a representative from the Australian Society of Archivists:

It seems to the Society that a good deal of latitude must be allowed for the Government to determine whether records in each individual case do or do not fit into that category At least [the exemptions] are stated; they are neither capable of being expanded or decreased. We know where we stand in respect of them. I think that is an important thing I think a very considerable concession at least has been obtained here by getting the Government to declare itself on the categories of exemption.²⁶

²⁵ Saclier, *Archives and Manuscripts*, cited footnote 4, pp. 203–204.

²⁶ *Transcript of Evidence*, pp. 1553–4; and see Submission no. 130, incorporated in *Transcript of Evidence*, p. 1440 ff.

33.33 Many other critics, on the other hand, found the exemptions wanting, in particular as they could result in documents being withheld from public scrutiny for longer than thirty years. Phrases such as 'overbroad', 'open-ended', 'catch-all', 'sweeping' and 'arbitrary' were used liberally in the submissions and evidence submitted to the Committee. The gist of the criticisms is summarised in the remarks by Dr Coward:

I consider the entire Bill to be grossly weighted in favour of protecting the so-called interests of Government agencies, but with regard to [the exemptions], if the 30 year period is to be retained, why is it necessary to have such sweeping, broadly worded, catch-all phrases that will net only a small proportion of the total record? . . . We preserve records fundamentally so that they can be used and so that we can understand and come to grips with our own history. If we cannot do this then we might as well not preserve any records at all.²⁷

33.34 It has been suggested in some quarters that guidelines should be issued by the Australian Archives to supplement the exemptions. The uncertain nature of the power that those exemptions confer upon the Archives could be significantly confined in favour of the public if guidelines were issued indicating the nature of the criteria that would be applied by the Archives in respect of any individual exemptions. In our opinion this is a very sensible suggestion and we would urge the Australian Archives to adopt an administrative practice to this effect.

33.35 Before we discuss each of the exemptions, we think it worthwhile to record our opinion that the enactment of exemptions is definitely a step forward in archival reform in Australia generally. By contrast, most of the State governments have an archival system under which access is still a discretionary matter, notwithstanding that in some cases the archival system has a legislative basis. We have been advised by the Australian Archives that the rules applying in the States are as follows:

- (a) *N.S.W.*—there is a thirty-year archival period that can be varied at the discretion of a department in respect of its own records.
- (b) *Queensland*—there is a thirty-year archival period.
- (c) *South Australia*—there is a thirty-year archival period, but much departmental material is still retained and controlled by departments.
- (d) *Tasmania*—there is a fifty-year archival period, though each department still controls access to its own records.
- (e) *Western Australia*—there is no archival period fixed, and the Library Board decides upon access at its own discretion.
- (f) *Victoria*—there is no archival period. Records are required to be transferred to the Archives Office after five years, though departments can determine which records are to be cleared for public access, and classified material is usually not transferred to the Archives Office.

Clause 31 exemptions.

31. (a) information or matter the disclosure of which under this Division would prejudice the defence, security or international relations of the Commonwealth;

33.36 We recognise that an exemption protecting these areas is necessary, and we do not propose any change to the exemption. In passing, we draw attention to our earlier discussion in Chapter 16 to the effect that the standard adopted

²⁷ *Transcript of Evidence*, pp. 1555–1556.

in the Bill should be consistent with the rules contained in the *Protective Security Handbook*. We indicated that the *Handbook* should establish a system for declassification of documents. Any system which effectively did this would probably contain a provision to the effect that a classification could not continue past a designated period (for instance, thirty years) unless the classification is personally approved by a minister or permanent head. We expect that, as with the Freedom of Information Bill, the classification will be used as a guide by the Archives in determining whether records are exempt. However, the classification would not be binding, and the governing standard would be that contained in the legislation.

31. (b) information or matter communicated in confidence by or on behalf of the Government of another country or of a State to the Government of the Commonwealth or a person receiving the communication on behalf of that Government, the disclosure of which under this Division would constitute a breach of that confidence;

33.37 We recommended in Chapter 16 that the comparable exemption in the Freedom of Information Bill be deleted, and we recommend that the same amendment should be made to the Archives Bill. There would still be an exemption protecting documents the disclosure of which would prejudice Australia's international relations, and as we have said in Chapter 16 that exemption establishes the appropriate standard to determine whether documents of foreign governments should be disclosed. We do not foresee that deletion of this exemption will create problems concerning exchanges of documents with other countries, particularly in light of the international understanding explained earlier in this chapter, that documents from other governments are withheld from public access for thirty years. While there will not be any other exemption in the Bill to protect communications from State governments, it is our opinion that none is needed and that confidences existing between Federal and State governments will, at the age of thirty years, either have expired or be outweighed by the public interest in access. One salient factor is that the governments (including members of parliament and public servants) between whom the confidences were exchanged will have been changed in composition.

31. (c) information or matter the disclosure of which under this Division would prejudice the relations between the Commonwealth and any State;

33.38 We cannot envisage that the interest in Federal-State relations thirty years after the event would not be overridden in every case by the public interest in disclosure. One retired archivist of many years experience, Mr H. J. Gibbney, said that in his opinion the need for such an exemption 'would vanish in five or at most ten years'.²⁸ Dr Radi voiced a similar view, and indicated an apprehension that an exemption such as this, by establishing a standard, invites recourse to that standard,²⁹ in effect, that the exemption creates the need for its own existence. A representative of the Archives declined to suggest any instances where the exemption would be needed, adding it 'is very difficult to say there would be no case'.³⁰ We feel confident that there is no relevant interest in Federal-State relations to be protected at the stage a document is thirty years of age, and accordingly recommend the exemption be deleted from the Bill.

31. (d) information or matter the disclosure of which under this Division would have substantial adverse effect on the financial or property interests of the Commonwealth or of a Commonwealth institution;

²⁸ Submission no. 56, incorporated in *Transcript of Evidence*, p. 1389.

²⁹ *Transcript of Evidence*, p. 1543.

³⁰ T. H. Exley, *Transcript of Evidence*, p. 1552.

33.39 We are surprised to find an exemption protecting the financial and property interests of the Commonwealth, when there is no exemption protecting the economic interests of the nation which one would have thought were of greater importance. We are also disappointed that no case has been made out to support the inclusion of this exemption, and that no examples have been given as to types of documents that may require protection under this exemption longer than thirty years. After considering the matter no examples come to mind, and to that extent we are of the opinion that the exemption should be deleted. Should there be some examples that do in fact justify an exemption as broad as this, we would draw attention to a disparity between this exemption and the comparable clause 29 in the Freedom of Information Bill which is qualified by a public interest criterion.

31. (e) information or matter the disclosure of which under this Division would be reasonably likely to have a substantial adverse effect on the interests of the Commonwealth or of a Commonwealth institution in or in relation to pending or likely legal proceedings;

33.40 We have earlier recommended in Chapter 23 in relation to the Freedom of Information Bill that the comparable exemption should be deleted and that the only relevant standard should be whether disclosure would breach legal professional privilege. We see no reason to retain even that standard in the Archives Bill. In light of the various statutes of limitations, most actions, generally speaking, have to be brought within six years of the cause of action arising. It is difficult therefore to conceive of documents which, thirty years from creation, could still be protected by legal professional privilege. Perhaps the only categories would be legal opinions on the interpretation of current statutes that are more than thirty years old, or opinions as to the Commonwealth's legal rights or obligations. In our opinion the public interest in access overrides continued secrecy for longer than thirty years.

31. (f) information or matter the disclosure of which under this Division would constitute a breach of confidence;

33.41 We have recommended in Chapter 25 that the comparable exemption in the Freedom of Information Bill be deleted, on the basis that relevant information is already protected adequately by other exemptions, such as those for internal working documents, trade secrets, and personal privacy. Although not all the freedom of information exemptions have been preserved in this Bill, we do not see the need to retain this exemption. We note in particular that the main exemptions applying to confidences (trade secrets and privacy) are a part of the Archives Bill.

31. (g) information or matter the disclosure of which under this Division would—

- (i) prejudice the enforcement or proper administration of the law in a particular case;
- (ii) prejudice the fair trial of a person or the impartial adjudication of a particular case;
- (iii) contrary to the public interest, 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;
- (iv) disclose methods or procedures for investigation of breaches or evasions of the law the disclosure of which would prejudice the effectiveness of those methods or procedures; or
- (v) endanger the lives or physical safety of persons engaged in or in connection with law enforcement;

33.42 This exemption is identical to the law enforcement exemption in the Freedom of Information Bill except that sub-paragraphs (i) and (iv) are worded differently to the comparable paragraphs (a) and (d) of clause 27 in the Freedom of

Information Bill. There does not appear to be any rationale for this variation, and in our opinion it would be preferable if both Bills used parallel wording where an identical result is intended.

31. (h) information or matter the disclosure of which under this Division would involve the unreasonable disclosure of information relating to the personal affairs of any person (including a deceased person);

33.43 This exemption is similar to the privacy exemption in the Freedom of Information Bill. It was accepted, in the evidence and submissions received by this Committee, that personal privacy is an interest that may need protection for longer than thirty years. We agree, and do not see any need for altering this exemption. Historians have, however, expressed the reservation that neither this exemption nor the Bill in general should be used to prevent biographical research from being undertaken. This is a matter of administration of the Bill that will need to be monitored when it is operating. We recognise that there are mechanisms in the Bill (such as the procedure for special access, which we discuss in Chapter 34) that are available to allow biographical and other research to be undertaken, notwithstanding that privacy interests may need to be protected.

31. (j) information or matter, including commercial or financial information, the disclosure of which under this Division would be likely to expose unreasonably to disadvantage the material interests of an undertaking.

33.44 There are variations between this exemption and the comparable clause 32 of the Freedom of Information Bill, some of which contract the coverage of the exemption and others of which broaden it. It is broadened in one respect, in that it applies to *all* undertakings, not just business, commercial and financial ones. It is narrowed in other respects: 'material interests' is added; there is no alternative criterion protecting documents where the disclosure would impair the ability of an agency to obtain similar information; and the exemption does not protect information concerning a *person* in respect of his business or commercial affairs. No evidence has been presented to us as to why these differences exist. The main contribution, it appears, is to create confusion as to the range of documents which are in fact protected by the exemption in contrast with the Freedom of Information Bill. The differences do not appear to be such a central part of the exemption that they are worth retaining. Accordingly, in our opinion the exemption should be altered so that it is consistent with clause 32 of the Freedom of Information Bill, with the exception that paragraph (j) should not contain the additional criterion of clause 32 protecting the ability of an agency to obtain similar information in the future. The utility of that additional criterion should have expired by the time a document is thirty years old.

33.45 Recommendation: Clause 31 of the Archives Bill, which contains the exemptions, should be dealt with in the following way:

- (a) paragraph 31 (a), protecting defence, defence, security or international relations should be retained;
- (b) paragraph 31 (b), protecting information obtained in confidence from other governments, should be deleted;
- (c) paragraph 31 (c), protecting Commonwealth–State relations, should be deleted;
- (d) paragraph 31 (d), protecting the financial and property interests of the government, should be amended by the addition of a phrase providing that information referred to in that paragraph is protected only if disclosure would be contrary to the public interest;

- (e) paragraph 31 (e), protecting pending or likely legal proceedings involving the Commonwealth, should be deleted;
- (f) paragraph 31 (f), protecting information where disclosure would constitute a breach of confidence, should be deleted;
- (g) in paragraph 31 (g), protecting law enforcement, sub-paragraphs (i) and (iv) should be redrafted so that they are identical with the comparable paragraphs in the Freedom of Information Bill;
- (h) paragraph 31 (h), protecting personal privacy, should be retained; and
- (i) paragraph 31 (j), protecting commercial or financial information, should be amended so that it is consistent with clause 32 (1) (a) of the Freedom of Information Bill.

33.46 There is also a de facto exemption created by clause 35 of the Archives Bill which empowers the Director-General of Archives to withhold a record from public access 'for the purpose of ensuring the safe custody and proper preservation of any record'. A copy of the record *may* be provided if in his opinion 'it is practicable to do so'. An example was given by Professor Neale as to when this power might apply:

There are some records at the moment dealing with naturalisation. The records are in such a bad state—they are in old volumes—that if the volume is opened it breaks and the records are destroyed. The only form in which they can be made available is by photographing and we are not equipped with the type of camera that can photograph curved surfaces and bring up a reasonable document to be placed in the hands of people who are entitled to a copy of that document.³¹

In a case such as this there is no right of appeal to the Tribunal against the decision of the Director-General. We do not propose that any right of appeal should be given, as we appreciate that the Director-General will make a decision under this clause in accordance with his professional experience and insights. There is no question of law involved, nor a question of fact that is capable of ascertainment by a tribunal which follows the normal evidentiary procedures, and there is little that could be achieved by providing for an appeal.

33.47 Nevertheless the clause confers a very broad discretionary power on the Director-General, and in our view the exercise of this power should be controlled or reviewed at least by a non-judicial method. We would suggest, therefore, that the clause should be amended to make it mandatory for the Director-General to provide a copy of a record if in his opinion it can be done without detriment to the preservation of the record. In addition we think that the discretion of the Director-General could be further reduced to acceptable limits by making it mandatory for the Director-General to provide a copy of a record to an applicant in a case where the record could be *copied* even though inspection might endanger its preservation. Finally it is appropriate that any decision made pursuant to clause 35 should be tabled before the Advisory Council on Australian Archives.

33.48 Recommendation: Clause 35 should be amended to provide:

- (a) that it is mandatory for the Director-General to provide a copy of a document withheld from public inspection pursuant to clause 35 if in his opinion this can be done without detriment to the preservation of the record; and

³¹ *Transcript of Evidence*, p. 676.

- (b) that details of any decision by the Director-General pursuant to the clause should be tabled at a meeting of the Advisory Council on Australian Archives.

Conclusive Certificates

33.49 Clause 32 of the Archives Bill provides that a minister may issue a certificate certifying a record as conclusively exempt on the basis that disclosure would prejudice the defence, security or international relations of the Commonwealth, would disclose information or matter communicated in confidence by another government, or prejudice the relations between the Commonwealth and any State. This means there is no right of appeal against the minister's decision, and the Administrative Appeals Tribunal may not review the decision to give the certificate or the existence of proper grounds for the giving of it (clause 37 (4)). A certificate may be of limited or indefinite duration, although the regulations may prescribe a maximum period during which certificates remain in force. A new certificate may be issued at any time, whether or not the earlier certificate has lapsed. There is no requirement that the minister consult with the Director-General concerning issuance of a certificate. A minister may delegate the power to issue certificates to a permanent head (or a person of equivalent status), or a person holding a prescribed office. The delegation may be a general one, or its exercise may be limited to specified categories of documents. This system, it will be readily noted, is substantially similar to the system of conclusive certificates established by clauses 23–25 of the Freedom of Information Bill.

33.50 We have earlier expressed our opinion (particularly in Chapters 15 and 18) that we see no justification for a system of conclusive certificates in a public access statute. There should be less justification for restricting the right of appeal, so basic in our legal system, to a dissatisfied applicant for a document that is thirty years of age. The information or matter that might lead the Executive to decide that exemption is necessary is well able to be reviewed by a tribunal on the few occasions when an exemption might be justified. As one of the witnesses, Dr Coward, expressed strongly to us, 'if secrecy is a rational policy in respect of particular records after they are 30 years old, then that decision is capable of reasoned defence before an independent tribunal'.³² Interestingly, the Archives Bill does not itself adopt a consistent line that documents relating to national security and other State activities are in some way special and should be treated differently from other areas of government. It is possible under the Bill that documents relating to security and so forth can be classified as exempt by the Archives independently of any ministerial certificate being issued in respect of the document. If such is the case and no certificate is in force, the Administrative Appeals Tribunal can review the decision that the document is exempt. We should say that we are not opposed to the idea of ministerial certificates in themselves, only to the conclusive status that is attached to them. We recognise that ministerial decisions can still be an important element of an archival policy in some areas of government.

33.51 Recommendation: Clauses 32 and 37 (4) of the Archives Bill should be amended so that a certificate issued by a minister in respect of a document is not conclusive, but can be reviewed by the Administrative Appeals Tribunal in the same way, and to the same extent, as any other decision by the Australian Archives classifying a document as exempt from public access.

³² Submission no. 60, incorporated in *Transcript of Evidence*, p. 1393.