

## SUBMISSION BY THE SOCIETY TO THE GOVERNMENT, ON THE ARCHIVES BILL 1978

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**Editors' Note:** *The Australian Government introduced into Federal Parliament in June 1978 a Bill 'relating to the preservation and use of archival resources, and for related purposes'. The Bill was designed to put the Australian Archives on a legislative basis, outlining its functions and powers over the records of the Commonwealth of Australia. The legislation was presented in the Senate by the Attorney-General, and the Senate subsequently referred the Bill, along with a Freedom of Information Bill, to two of its standing committees. The Australian Society of Archivists presented to these committees in December 1978 a detailed submission on various aspects of the proposed legislation. As is stated in the Introduction to the submission, the Council of the Society was anxious to ensure that the submission should be as far as possible representative of the wide range of interests and opinions of members of the Society.*

*Ideally the submission should be read in conjunction with the Archives Bill itself and the Explanatory Memorandum issued by the Attorney-General at the time that the legislation was introduced. Space limitations prevent us from including those texts here, but they are available from the Government Printing Service. On the other hand the submission is largely self-explanatory, and readers should have little difficulty in identifying the issues under discussion since the submission takes pains to present these issues in their wider context.*

*The final draft of the submission was almost entirely the work of the Vice-President of the Australian Society of Archivists, Mr Peter Orlovich.*

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## **THE SUBMISSION**

### **1.0 Introduction**

1.1 The Australian Society of Archivists desires to make the following general observations, embodying the views of its members, on the Archives Bill 1978.

1.2 The membership of the Society represents a wide range of interests in archives. The rules of the Society provide for two broad categories of membership comprising *individual* and *institutional* members, with individual members being further sub-divided into *Professional* and *Associate* categories. Professional membership is available to any person who is or has been an archivist employed in an archival or related institution. Associate membership is available to a person who is proceeding towards qualification for professional membership, or who supports the objectives of the Society. Institutional membership is open to recognised archival institutions and such other organisation or institutions as the Council deems to have compatible objectives.

1.3 As may be expected, therefore, the essential features of the bill

are viewed by members of the Society from a wide spectrum of opinions. It seems to the Society inevitable therefore that conflicting, even irreconcilable, views may be entertained by members about some of the issues which it raises.

1.4 It is, in consequence, considered necessary to preface this submission with an acknowledgement that the views expressed in it cannot necessarily be taken in every case to reflect the unqualified support of the entire membership of the Society. It can, and should be taken, however, to reflect the consensus of opinion of those members who, in response to the Society's request, expressed their views on the many issues of concern to the profession within the bill.

1.5 Since some of the views expressed on certain issues by different members of the Society are bound to represent conflicting opinions, and since, it is assumed, the Society will be looked to for a balanced evaluation of the conflicting opinions expressed on such crucial issues, the approach has been taken, in drafting the submission, that the Society should be firmly committed to the support of those principles embodied in the provisions of the bill designed to preserve the archival resources of the Commonwealth and to facilitate their use for all of the purposes which they may be required to serve, consistent with the interests of all persons and organisations who may be affected by them.

1.6 There are many important issues of principle raised by the bill. Some of these issues are of vital concern to the archivist, and involve principles which are essentially archival in nature. For example, strong representations have been made to the Society that the Archives should *not* be empowered by the bill to accept records which are not clearly Commonwealth records (as provided for in clauses 3(2) and 5(f) and (g)).

1.7 On the other hand, the view is expressed in the Explanatory Memorandum (p. 8) accompanying the bill, that

There is often some difficulty in distinguishing precisely between the private and official nature of records among this kind<sup>1</sup> of material and it is of cardinal importance, in any case, that groups of records should not be divided arbitrarily on the basis of such distinctions. In law, persons and organisations having custody of any Commonwealth records will be prohibited (by clause 24) from depositing them elsewhere than in the Archives but in order that this should not have the result of undesirably separating such records from associated papers, and to meet the difficulty which might arise in having to establish in all cases that records of an official nature are also Commonwealth records as defined in the legislation, the Archives is empowered to take into custody whole groups of records containing or likely to contain official material which ought properly to be preserved in official custody and not seek merely that portion which is of an official character.

1.8 In asserting the former view, it is contended that, since Commonwealth records may not be deposited, pursuant to clause 24, elsewhere than in Archives, that institution possesses a distinct advantage over other custodial institutions in competing for the deposit of whole collections of papers or groups of records in its custody, since a prospective depositor of 'personal papers' has the options of

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1. *The personal papers of Ministers and public officials.*

either depositing them with the Archives or of seeing them dismembered. 'In this situation', it has been contended, 'the advantage is so heavily on the side of the Archives as not to be real competition at all'. It has further been asserted that these provisions of the bill may place the Archives in the position of adopting an 'unctuous attitude' towards other custodial institutions which, should they accept for deposit such papers containing Commonwealth records, may then be held responsible for condoning or permitting the dismemberment of such collections or groups.

1.9 The Society's view, with respect to the principle involved, as expressed in the accompanying submission, is firmly in support of the principle—well established and respected in archival practice—that records or papers originating in a particular source form an organic whole, with an inter-relationship between their component parts, which must be preserved if the integrity of the collection or group as an archival unit—an essential quality of archives—is to be preserved.

1.10 Quite apart from this overriding principle, the Society contends strongly that it is desirable for the personal papers of persons who have been closely associated with a Commonwealth institution, whether or not they include Commonwealth records, to be more conveniently deposited, from the point of view of their consultation, with the official papers relating to such institutions.

1.11 In expressing the views of the Society at large on this and other controversial issues, the approach has been adopted, where conflicting opinions occur, of stating the views which have been put to the Society by its individual members, and of expressing as the views of the Society, those which command the support of the majority of its members.

1.12 In adopting this approach, the Society has not been unmindful of certain reservations expressed, of incorporating within the document views of its individual members which are not considered to accord with those of the Society. In doing so, the Society does not consider itself to be sitting in judgement on the views of its individual members. This approach has been adopted because the Society considers that all of the issues raised are crucial from an archival point of view to the success of the bill and for the future of the archival resources of the Commonwealth, as well as to those relating to Australia generally. The Society's views on them, therefore, should be thoroughly substantiated and explicitly stated to the Committee. For the same motives, the Society has taken the view that it should commend to the Government those features of the bill with which it is in agreement, as well as criticise those which it considers should be amended. The approach has been, in drafting the submission, that critical expressions of opinion should be constructive rather than destructive, pragmatic rather than theoretical.

1.13 Finally, the Society has been urged to consider whether such a bill as that now before the Parliament may not attempt to regulate too many matters connected with the archival arrangements of the Commonwealth in too much detail.

1.14 This view would appear to have as its basis, the assumption that such arrangements work best in a situation of *laissez faire*, which would have the support, presumably, of those who would prefer to see the existing arrangements continue.

1.15 In one respect—that of the exemption categories of clause 31(a), (b) and (c)—the Society is sympathetic to the view expressed. While it does not consider those provisions designed to encourage the deposit of personal papers of Ministers and public officials with the Archives as likely to induce such persons to destroy their papers rather than deposit them in the custody of a government instrumentality, it does not believe that the Government can or should be unduly constrained in the exercise of its discretionary powers under clause 32 to apply certificates in respect of records of a kind referred to in clause 31(a), (b) or (c). Too great an insistence on the application of regulatory controls over the exemption categories referred to may well result in the machinery of the bill being circumvented in order to protect the interests of the Commonwealth and the Government.

1.16 Nevertheless, the view expressed in paragraph 1.13 cannot be taken to reflect that of the Society generally which considers 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.

1.17 The Society is pleased to commend the present bill, with such modifications as are proposed in the accompanying submission, as an appropriate basis for accomplishing its major purposes of facilitating the preservation and use of the archival resources relating to Australia.

## **2.0 General**

2.1 The Australian Society of Archivists welcomes the Government's decision to enact legislation that will provide a statutory basis for defining the authority and responsibility of the Commonwealth Government with respect to the preservation, management and use of the records of the nation, including both the 'archival resources of the Commonwealth' as defined in the bill and other archival resources relating to Australia.

2.2 The Society welcomes the proposed establishment of the Australian Archives as an instrumentality of the Commonwealth with the functions and powers as defined in the bill, the appointment of a Director-General of the Archives, and the establishment of an Advisory Council on Australian Archives.

2.3 The Society understands the general purposes of the bill to be

- (i) to provide the Archives with a statutory basis for its operations;
- (ii) to facilitate the proper disposition of all government records and to define the functions and powers of the Archives with respect to this object;
- (iii) to ensure the conservation and preservation of government records of continuing value and of related material of national significance;

- (iv) to facilitate access by scholars and the public to the archival resources of the Commonwealth in accordance with the government's access policy; and
- (v) to invest the Archives with certain advisory and co-ordinating functions in relation to the management, preservation and use of records and other archival material including the archival resources of the Commonwealth and other archival resources relating to Australia.

2.4 The Society believes that the general purposes of the bill, as summarised above, are adequately encompassed within its provisions, but makes the following comments with respect to specific clauses of the bill, some of which, in the Society's opinion, appear to deserve further consideration with a view to their clarification, or in some cases, amendment.

*PART I — PRELIMINARY*

3.0 *Clause 1* No comment.

4.0 *Clause 2* No comment.

5.0 *Clause 3* (in conjunction with cl. 24 and cl. 26):

**5.1 Interpretation of 'Commonwealth Record' and applicability of the provisions of the bill to 'Commonwealth Institutions' hitherto partially or wholly exempt from the control of the Australian Archives.**

**5.2 (A) Implications for staff of statutory authorities of the Commonwealth.**

5.3 Concern has been expressed to the Society about the possible implications, for the staff of certain statutory authorities of the Commonwealth, of the powers conferred under the bill for the Australian Archives to assume responsibility for the records of institutions which have hitherto remained wholly or partially outside of the direct control of the Archives.

5.4 Whilst material in the collections of the Australian War Memorial, the National Library of Australia, the Australian National Gallery, and other collections maintained by such institutions as may be declared by the regulations to be custodial institutions (such as a national museum), is or may be declared to be "exempt material" for the purposes of this section, the material contained in a number of other institutions, including the A.B.C., the Reserve Bank, the Commonwealth Bank and the C.S.I.R.O., which have established their own archival programmes, and the A.N.U., which has not, may, unless exempted under the regulations, become subject to the control and supervision of the Archives.

5.5 It has been pointed out to the Society that

hitherto these institutions have operated independently in relation to their records in all areas—appraisal, disposal and access. They are now to be brought into line with other government agencies and thus the appraisal and disposal functions are to be subject to the Archives' veto. In these circumstances the livelihood of the archivists employed will be in jeopardy since, unless the convenience of in-house storage is paramount, there will be strong economic pressure to do away with the intermediate process.

5.6 Whilst it is somewhat difficult for the Society to foresee the consequences of the implementation of the provisions of the bill with respect to the existing staff of such institutions, the concern of the Society in this respect is reinforced by the statement in the Explanatory Memorandum (p. 7) that the Archives will have, amongst others, the function of

storing semi-current and non-current records which, while not intended for permanent preservation, have a continuing administrative use and are better preserved and more economically housed and serviced in low-cost, centralised archival storage than in high-cost, separately serviced office storage maintained by each government agency.

5.7 As a generalisation, this statement, in respect of some matters of fact, is at variance with the Society's understanding of the relationship existing between some of the statutory authorities alluded to, and the Australian Archives, with respect to the arrangements concerning the management and control of their records.

5.8 In fact, strong representations have been made to the Society in contradiction of the assertion abovementioned.

5.9 It has been emphasised to the Society, for example, that, of the authorities referred to, *not all* have operated 'independently in relation to their records in all areas—appraisal, disposal and access'. The Society is advised, rather, that the existing archival arrangements of the authorities mentioned involve varying degrees of co-operation with the Australian Archives. In the case, for example, of the A.B.C., the Society understands that close co-operation exists with the Archives in relation to the disposal, appraisal, access and storage of records notwithstanding that the A.B.C. retains its own archives establishment and archivist.

5.10 The existence of 'varying degrees' of relationship between the Australian Archives and the statutory authorities referred to with respect to the control and management of their records is, therefore, acknowledged by the Society.

5.11 Whilst not all the relationships appear to be as formalised as that with the A.B.C., with a consultative committee jointly constituted by the Archives and the A.B.C., it nevertheless occurs to the Society that the existence of such arrangements as have been arrived at in the past, and the desirability of maintaining them in the future, in accordance with the degree of Archives control and supervision considered appropriate to the circumstances of each case, are matters which ultimately must be determined by the Australian Archives in consultation with each of the authorities concerned. The Society assumes that it is with this end in view that the bill, as is noted further below, empowers the Archives under clauses 46 and 47, to permit material of the Archives to be kept in the custody of persons (including Commonwealth institutions) other than Archives.

5.12 Indeed, the Society envisages that in certain cases where, for reasons of *administrative necessity and convenience*, or by reason of the *comparatively large measure of autonomy and independence traditionally enjoyed by some authorities* from the exercise of central government control over their affairs, these arrangements, subject to

such modifications as may be required for achieving consistency in the implementation of Archives policy and procedure, may well be continued in the future.

5.13 It has been proposed to the Society that such arrangements as exist between the Archives and the A.B.C. have been mutually accepted by both institutions because, on the one hand, it has been 'considered desirable for the A.B.C. to maintain an archivist', while on the other, 'making use of all Australian Archives facilities'.

5.14 It seems to the Society, both sensible and in keeping with the nature of the requirements of Commonwealth institutions (including statutory authorities) with respect to the use which they make of their records, that the Archives should be empowered to exert uniform and consistent controls over the management (including the disposal, appraisal, access and storage) of the records of *all such* institutions, while at the same time be empowered to make such arrangements as are provided for under sub-clause 47(1), taking into account the considerations referred to in sub-clause 46(2).

5.15 The main objection which appears to the Society to be raised to the inclusion of certain 'authorities of the Commonwealth' within the operation of the provisions of the bill is that 'the livelihood of the archivists employed (by them) will be in jeopardy . . .'

5.16 Whereas, on the one hand, the bill *makes no express provision* for dispensing with the independent archival units maintained by the statutory authorities abovementioned, and, on the other, *does make provision* for the Archives, subject to any other Commonwealth law and to the rights of Commonwealth institutions, where the Director-General considers it appropriate to do so, to make arrangements for material of the Archives to be kept in the custody of Commonwealth institutions other than Archives (clause 47(1)), the Society considers insufficient grounds exist on which to base an objection that the bill, as it stands, *will* jeopardise the livelihood of the archivists employed by such authorities of the Commonwealth as those in respect of which the objection was raised.

5.17 Furthermore, it has been brought to the Society's attention that, of the large number of statutory authorities of the Commonwealth, only the Reserve Bank, the Commonwealth Bank, the A.B.C. and the C.S.I.R.O. have appointed their own archivists. It is further noted that the A.B.C., the Reserve Bank and the C.S.I.R.O. were each consulted and have expressed their concurrence in the provisions of the bill. The Society considers it not unreasonable to assume that few, if any, other authorities of the Commonwealth, under the bill, would consider it desirable to create their own archives establishment or to appoint their own archivists.

5.18 Although the Society encourages and supports the view that the records of *all* 'Commonwealth institutions' (including 'authorities of the Commonwealth') should be dealt with only in accordance with the provisions of the bill, it nevertheless expresses its concern for the employees of such institutions who may be affected by the consequences of bringing the records of such institutions under direct



Archives' control. The Society believes that employees who may be affected by such altered circumstances should not be prejudiced or disadvantaged in respect of their present employment conditions, salaries, security of tenure, promotional opportunities, career prospects, etc.

5.19 An alternative proposal suggested to the Society is that provision could be made for such 'authorities of the Commonwealth' to

have the *right* to maintain their own archives, to carry out all the archival functions, and that such archives should be subject to inspection to ensure that those functions were being carried out in a manner which will ensure the preservation of the archives and proper records management. Such a provision should also require authorities which have not yet made provision for their archives to do so or else to fall into line with the general system for 'Commonwealth institutions'.

5.20 With respect to this latter suggestion, the Society notes that the Archives is empowered, in accordance with clauses 46 and 47, and where the Director-General considers it appropriate to do so, to make arrangements for material of the Archives to be kept in the custody of persons (or Commonwealth institutions) other than Archives.

5.21 The Society has, on the other hand, been informed that the proposed alternative could lead to wide inconsistencies or else a detailed (and therefore time-consuming) procedure for inspection which would have to be related to a set of established standards if it were to be effective.

5.22 The Society acknowledges that, while in such cases as those abovementioned it may be competent for the Archives to make such arrangements, the question of conferring, under the bill, the 'right' of such authorities of the Commonwealth to 'maintain their own archives' and 'to carry out all the archival functions' is one which the Society believes requires careful consideration.

5.23 The relationship of statutory authorities to the Commonwealth government and the degree of autonomy or independence which they enjoy from the control of centralised government are not matters on which the Society believes it need comment here. The degree of control exerted by the Commonwealth government over the affairs of statutory authorities in general is largely determined by historical and administrative circumstances and involves matters of government policy. They are not, in the Society's view, essentially archival matters. The Society, therefore, expresses no particular view on the question of the propriety of extending closer Commonwealth control over the affairs of statutory authorities.

5.24 Notwithstanding, however, that the Society concurs with those provisions in the bill which empower the Archives to make arrangements for material of the Archives to be kept in the custody of an institution other than the Archives, it nevertheless contends, *as a general principle only*, but with a sound basis in archives practice,<sup>2</sup>

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2. The Society advocates the establishment, in general, of a single Commonwealth archival agency with responsibility for all Commonwealth institutions (except where, for the reasons expressed in sub-clause 46(2) of the bill, it is

that the records of *all* Commonwealth institutions should be subject to the control and management of the Archives.

5.25 The Society is aware, of course, that strong views are held with respect to the autonomy of certain statutory authorities in the management and control of their affairs generally, and of their records in particular.

5.26 In the Society's view, the relation between the two is an important one. The records of any organisation or agency are vitally necessary to the proper discharge of its functions and the conduct of its affairs. The proposed assertion of government control over the records of certain statutory authorities is clearly viewed by some as a precursor to the more general assertion of control over the affairs of such authorities.<sup>3</sup>

5.27 It is not the Society's intention to comment on these views, which raise issues beyond the immediate concern of this submission. Yet the Society cannot ignore the fact that in certain cases, notably those of the Australian National University, and potentially other tertiary institutions,<sup>4</sup> as well as the Commonwealth and Reserve Banks, there are compelling circumstances which argue forcibly in favour of the view that such statutory bodies should exercise some measure of responsibility for the control and management of their own records.

5.28 The archives of an academic institution frequently include the records of bodies and the papers of individuals closely associated with it, but not actually constituted or appointed by the institution. Nonetheless, its records form an integral and composite whole which reflect the corporate identity and activities of the entire institution. It is, therefore, in the Society's view, important that *all* the records of such an institution be kept together in the same place, and the Society considers the best place for such records to be within the institution itself. Clause 46 would seem to the Society to provide an adequate mechanism for facilitating such arrangements.

5.29 It has been pointed out to the Society that

Since the statutory authorities referred to are government agencies, they should adhere to government policy. Since none has provision in their legislation for archival arrangements, it is logical, if their records are to be safeguarded statutorily, for them to be brought within the provisions of the legislation which embodies the government's general policy.

5.30 It has further been put to the Society that the wishes of the

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considered appropriate by the Director-General for such material to be kept at places other than the Archives), principally for the reasons that consistency in the implementation of Commonwealth archive policy in respect of the records of all Commonwealth institutions may be more conducive to the efficient and convenient control, management and facilitation of the use of the material of the Archives.

3. It has been pointed out to the Society that a number of statutory authorities have had an established history of *de facto* autonomy in their relationship to the Commonwealth government, and that this, and other provisions of the bill may be viewed by some authorities as initiatives which could result ultimately in the circumscription of the autonomy of these bodies.

4. The proposed Defence Forces Academy to be known as Casey University.

government with respect to the archival treatment of the records of *all* the agencies which serve it should be paramount.

5.31 However, it has been objected, in response to this, that since the bill only *arbitrarily* defines them as such (that is, as authorities of the Commonwealth), it does not necessarily follow that, in the conduct and management of their affairs (including the control and management of their records), they are most appropriately conducted and managed according to the dictates of government policy or political influence.

5.32 The Society reiterates the view expressed earlier that the degree of control exercised by the Archives over the records of statutory authorities generally, and this is a matter which in the opinion of the degree of control exercised by the government over the affairs of such authorities is a matter which is or will be largely determined by the Society, is not essentially archival. In any case, the bill would appear to make adequate provision for such circumstances as are contemplated in clause 46(2) to enable statutory authorities of the kind referred to to keep their records in their own custody, albeit in accordance with the policies and procedures of the Archives.

#### **6.0 (B) Implications of the bill for estrays (or ‘Commonwealth Records’ not in the custody of a ‘Commonwealth Institution’)**

6.1 It has been pointed out to the Society that some reservations exist with respect to the ‘status’ of collections of papers containing ‘Commonwealth records’ in the custody of institutions not being ‘Commonwealth institutions’.

6.2 The Society has been told, in this regard, that a number of librarians and others in charge of or connected with institutions which hold the papers of major political and administrative figures have expressed concern about the effects of the bill on their collections. The concern is expressed that certain provisions of the bill may be interpreted as empowering the Archives to compulsorily acquire, by ‘retrospective collection’, ‘Commonwealth records’ which are not in the custody of ‘Commonwealth institutions’.

6.3 It has been proposed to the Society, on the one hand, that  
the legislation is perfectly consistent in requiring that records which have gone out of official custody (say amongst a Minister’s papers) must be lodged with the Archives like any others and it is very hard to see how this principle can be challenged.

6.4 On the other hand, the view has been expressed that ‘the bill would require the Archives to gather in “Commonwealth records” in (say) the Evatt Papers’.

6.5 The Society, by its own interpretation, and from assurances given to it, understands that the bill definitely does *not* give the Archives or the Commonwealth power to recover Commonwealth records out of official custody.

6.6 A further reassurance is given to the Society, in response to initial reservations entertained by it, that a declaration under sub-

clause 3(6)<sup>5</sup> could *not* be used as the basis for a legal action for recovery. The Society is advised, in this respect, that

a prescription under sub-clause 3(6) would not be necessary before legal proceedings under existing law to recover Commonwealth-owned records out of custody were commenced. Such legal proceedings would be entered into without reference to the Archives legislation. A declaration under sub-clause 3(6) would have no relevance to an action for recovery of a record out of custody since

- (1) the bill gives no grounds for compulsory transfer of a Commonwealth record out of custody and a declaration under sub-clause 3(6) does not give the Commonwealth or the Archives an additional power to compel transfer, and
- (2) therefore, an action for recovery could not be based upon a declaration under sub-clause 3(6).

6.7 The Society concurs in the view that the Archives should be empowered to seek to obtain and to have the custody and management of Commonwealth records, including Commonwealth records not in the custody of a Commonwealth institution, and other associated material as provided for in sub-clause 5(2) (f) of the bill.

6.8 It further understands that there is no express provision within the bill for the indiscriminate 'retrospective recovery' of estrays, and as the Explanatory Memorandum states (p. 8) 'the Commonwealth's right to seek the recovery of Commonwealth records under existing laws is unchanged by this legislation . . .'

In this connection, the Society notes, according to the Explanatory Memorandum (p. 8), that

it is open to the Commonwealth to seek to recover by legal action any Commonwealth records out of official custody where the records can be shown to be the property of the Commonwealth but such an action could not extend to records containing official information which were not the property of the Commonwealth.

6.9 The Society supports the intention of the bill, as expressed in clause 5(2), that it should be 'a function of the Archives to encourage the deposit of all records of an official character in its custody' (Explanatory Memorandum, p. 8).

6.10 It has, however, been represented to the Society that clause 3(1) and 3(6) could be interpreted to mean that if *any* Commonwealth institution considers itself to be entitled to *any* records, these records could, *in cases or circumstances not defined*, be made, by regulations, Commonwealth records. In this connection, it was further represented that the Explanatory Memorandum indicates that these sections should only be applied to those records which are normally in the possession of the Commonwealth, but to which the application of the bill may be in doubt.<sup>6</sup>

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5. Under sub-clause 3(6), the regulations may provide that certain records, normally in the possession of a Commonwealth institution (e.g. seized enemy property *or* exempt material comprising 'war relics of the Commonwealth' in the custody of the Australian War Memorial), are Commonwealth records for all or any of the purposes of the legislation. (Explanatory Memorandum, p. 5-6).

6. On a point of accuracy, the Society does not accept the inference that the powers conferred under sub-clause 3(6) may be invoked to resolve questions of

6.11 The Society, in its interpretation of the bill, however, cannot accept the construction that *any* Commonwealth institution may consider itself entitled to *any* records; nor can it accept that such records ‘could, in cases or circumstances not defined, be made, by regulations, Commonwealth records’. It is the Society’s understanding, rather, that the Archives may ‘seek to obtain, and have the custody and management’ *only* of such materials as are defined in clause 5(2) (f) of the bill, including material that forms part of the ‘archival resources of the Commonwealth’ as defined in clause 3(2).

6.12 The Society further understands that the Archives may, subject to the opinion of the Director-General, ‘*have the custody and management*’ *only* of such materials as are defined in clause 5(2) (e); and that it may, with the approval of the Minister, ‘*accept and have the custody and management*’ *only* of material defined in clause 5(2) (g).

6.13 The Society’s view is that these provisions cannot be taken to mean that *any* Commonwealth institution could ‘consider itself to be entitled to *any* records . . .’

6.14 The Society, in this matter, accepts the view expressed to it that Sub-clause 3(6) can be applied only by regulation, that is by action of Parliament not by action of “any Commonwealth institution which considers itself to be entitled to any records”. Before it can be applied, the Commonwealth must be able to show a possessory right in the records and should any person or institution feel disadvantaged or ill-used by such a declaration it would be possible to challenge the Commonwealth’s claim to possession in the courts . . . Moreover a declaration under sub-clause 3(6) could not be used . . . as the basis for a legal action for recovery.

6.15 Likewise, the Society cannot concur that clause 3(6) may be interpreted as empowering any Commonwealth institution ‘*in cases or circumstances not defined*’, by regulation, to make such records ‘Commonwealth records’.

The Society’s understanding is that the Commonwealth (presumably the Archives) may, in certain ‘*prescribed cases or circumstances*’, defined by regulation made pursuant to clause 54, determine which records, of which the Commonwealth or a Commonwealth institution has, or is entitled to have possession (as distinct from the custody), may be deemed to be Commonwealth records for the purposes of the bill.

## **7.0 (C) Implications of the bill for collections of personal papers of Ministers and public officials containing official records.**

7.1 The Society firmly supports the provisions of the bill (sub-clauses 5(2) (e), (f) and (g) ) which empower the Archives to seek to obtain the custody and management of material comprising ‘the records of persons (e.g. ex-Ministers and officials) and organisations who are or have been closely associated with the Commonwealth and whose

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possessory rights to records not in the custody of Commonwealth institutions, but which the Archives considers it may be entitled to seek to obtain possession. The Society rather interprets sub-clauses 3(1) and 3(6), as being applied to those records normally in the possession of the Commonwealth, *and to which the Commonwealth is entitled to have possession.*

records often contain a high proportion of official material or material most properly and conveniently associated with Commonwealth records already deposited in the custody of the Archives from Commonwealth institutions' (Explanatory Memorandum, p. 7-8).

7.2 In other words, according to the Society's understanding, these provisions extend to the case of a person closely associated with the Commonwealth whose personal papers, while not containing actual estrays from or copies of official records may relate very closely to that person's official activities and hence to Commonwealth records proper.

7.3 The Society, furthermore, supports in particular, the same provisions of the bill which empower the Archives 'to take into custody *whole groups of records* containing or likely to contain official material which ought properly to be preserved in official custody *and not seek merely that portion which is of an official character*', (Explanatory Memorandum, p.8).

7.4 In supporting these provisions the Society acknowledges the validity of the statement made in the Explanatory Memorandum (p. 8) that 'there is often some difficulty in distinguishing precisely between the private and official nature of records amongst this kind of material', and strongly endorses the archival principle that 'it is of cardinal importance . . . that groups of records should not be divided arbitrarily on the basis of such distinctions'. (*Ibid*).

7.5 The Society supports the objectives of the bill in encouraging the deposit with the Archives of *whole* collections of papers or groups or records because it believes that such a course will be conducive to the observance of the well-recognised principles<sup>7</sup> calculated to preserve the integrity of the archive group or manuscript collection.

#### **8.0 (D) Implications of the bill for acquisition or collection policies of custodial institutions other than archives, with particular reference to personal papers of Ministers and public officials.**

8.1 It has been contended that competition between national and other custodial institutions for archival materials would be inhibited by the powers conferred under the bill to prevent the deposit of Commonwealth records in any other custodial institution than the Archives.

8.2 It has been asserted that

the word 'competition' does not adequately describe the situation in relation to the prospective collection of personal papers of political figures. If the bill means that the Archives has the power to recover 'Commonwealth records' then a prospective depositor of 'personal papers' has the options of either depositing them with the Archives or of seeing them dismembered, the 'Commonwealth records' going to the Archives, the others to wherever he likes. In this situation the advantage is so heavily on the side of the Archives as not to be real competition at all.

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7. 'He (the Archivist) should maintain each archival group, established on an administrative basis, as an integral unit' (p. 165); 'As a general rule, he (the Archivist) should maintain each collection (of private papers) as a separate and integral unit' (p. 177): T. R. Schellenberg *The Management of Archives*, N.Y., Columbia U.P., 1966.

8.3 The advocates of this argument would appear to contend that, by virtue of clause 24(1) and (2), which prohibits the transfer of custody or ownership of a 'Commonwealth record' to any other custodial institution than Archives, those custodial institutions would be at a disadvantage, for the abovementioned reasons, in competing for the acquisition and deposit of *whole* groups of archives or collections of manuscripts which contained 'Commonwealth records'.

8.4 The principles involved here represent two apparently conflicting points of view. On the one hand, the view is expressed that the Commonwealth should have the right to recover estrays, including those which may form part of a larger collection of personal papers of public officials or ministers, by 'taking into custody whole groups of records containing or likely to contain official material which ought properly to be preserved in official custody', and not seeking 'merely that portion which is of an official character' (Explanatory Memorandum, p. 8; clause 5(2) (e), (f) and (g)).

8.5 On the other hand, since the custody or ownership of a 'Commonwealth record' may not be transferred (clause 24(1) (b) and (c), except for the purpose of placing an stray in the custody of the Commonwealth or of a Commonwealth institution that is entitled to its custody (clause 24(2) (d)) and since most donors may be expected to prefer to keep collections of personal papers intact by depositing *whole* collections of papers, it is contended that the Archives would, in such cases, have a distinct advantage in acquiring such materials over other custodial institutions.

8.6 It has, in fact, been asserted that the authority to acquire such collections of personal papers containing 'Commonwealth records', conferred on the Archives by clauses 5(2) (e), (f) and (g) 'verges on the prescriptive'.

8.7 Irrespective of whether such competition is considered to be desirable or not, the view has been expressed that potential donors of personal papers containing Commonwealth records have no real choice in deciding with which institution they shall deposit their material if it is to remain intact as a collection.

8.8 It has also been objected, in respect of clause 5(2) (f) and (g) that, by empowering the Archives to proceed with the recovery of estrays, and to accept and have the custody and management of material other than material forming part of the archival resources of the Commonwealth, notably the papers of ministers and public officials, the effect of these provisions 'may well cause such people to destroy papers or refuse to record matters . . .'

8.9 The Society is sceptical of the validity of the argument, to which it is not inclined to give much prominence, that the provisions contained in clause 5(2) (f) and (g) might operate in such a way as to discourage ministers and public officials from recording their views and decisions on public matters, or perhaps even encourage them in destroying the papers on which they are recorded, rather than deposit them with the Archives.

8.10 The Society supports the encouragement afforded within the bill for the deposit with the Archives of the papers of ministers and other high officials of state, primarily because it conceives of the role of the Australian Archives as being determined by the obligation imposed upon it of discharging its custodial responsibilities with the highest degree of integrity and impartiality of administration.

8.11 The measure of success with which the provisions contained in clauses 5(2) (f) and (g) are met, will, in the Society's view, depend predominantly upon the acceptance of the Archives, and the staff employed within it, as the proper and responsible custodians of the nation's most important and sensitive records of state.

8.12 In any case, it is felt by the Society that clause 6(2) affords an adequate safeguard for protecting the confidentiality of information which may be contained in personal papers of ministers and public officials which may be deposited in the custody of Archives.

8.13 In supporting these provisions of the bill which facilitate the deposit with the Archives, not only of material containing, or likely to contain Commonwealth records out of official custody, but also records which, though not necessarily containing estrays, may be 'most properly and conveniently associated with Commonwealth records' (Explanatory Memorandum, p. 8), the Society strongly supports the intention of conferring upon the Archives the power to preserve records which are closely associated with matters recorded in Commonwealth records in an institution where they may be used in conjunction with those records. For this purpose, the Society acknowledges, of course, that in order to acquire papers in this category, it is necessary for the Archives to have the power to 'seek to obtain' them—that is, to take such action as is necessary to obtain, and not just passively accept them.

8.14 That the Archives may be in an advantageous position, on the other hand, in acquiring such personal papers, by virtue of clause 24, is acknowledged by the Society, but whatever disadvantages (if any) may be thought to derive from this circumstance it is the Society's view that these supposed disadvantages are outweighed by the desirability of preserving

- (i) Commonwealth records (including estrays) in the custody of the Commonwealth;
- (ii) relevant personal papers together with official papers to facilitate consultation;
- (iii) related records of both private and official character originating in the same collection together;
- and
- (iv) the archival integrity of whole collections of papers whether or not they include 'Commonwealth records'.

#### **9.0 (E) Scope of the authority conferred on the Archives to acquire material other than 'Commonwealth Records'.**

9.1 It has been proposed to the Society that, by an interpretation of clause 3(2) (a), (c), (d) and (g), and in consideration



that the records of any Australian citizen or organistaion related to the history of Australia, this clause could be interpreted as an authority to the Australian Archives to receive any Australian records, Government or private, except those that relate principally to the history of a government or a state, or former colony or territory.

9.2 The Society's general view is that this is, on the face of it, an over-simplification of the scope of the authority conferred on the Archives under the provisions of this bill, to acquire material other than Commonwealth records (comprising both material included within, and material other than, the 'archival resources of the Commonwealth').

9.3 Specifically, the Society considers that material intended to be comprehended within the 'archival resources of the Commonwealth' is confined to 'such Commonwealth records *and other material as are of national significance or public interest . . .*' The Society does not construe this as conferring or implying 'an authority to the Australian Archives to receive any Australian records, Government or private . . .' Nevertheless, it acknowledges that, in accordance with certain specified conditions embodied in clause 5(2) (e) (iii) and 5(2) (g), the Archives is empowered 'to accept and have the custody and management of material' that does not form part of 'the archival resources of the Commonwealth'. This, in view of the foregoing, the Society considers to be proper and justified.

9.4 A further representation made to the Society asserts that clause 3(2) (f) requires the Australian Archives to collect archival resources of the Commonwealth, as defined in clause 3(2), and clause 5(2) (g) directs the Archives to accept other records, including state government records, if the Minister considers that they ought to be in the Australian Archives. Presumably, under the latter clause, a State may agree with the Commonwealth Government on the deposit of certain state records in the Australian Archives, but this is not mentioned in the Explanatory Memorandum.

9.5 Whilst no express provision appears to the Society to be made in clause 5(2) (g) for the Archives to accept State Government records, it nevertheless concedes that, according to its interpretation of the clause, such records may be comprehended within the material which 'forms part of the archival resources relating to Australia', which, in the opinion and with the approval of the Minister, 'ought to be in the custody of the Archives in order to ensure its preservation or for any other reason'.

9.6 The Society concurs, however, in the view that, in accordance with clause 5(2) (g), a State (or indeed any other institution other than a Commonwealth institution) may, by agreement with the Commonwealth, and subject to the approval of the Minister, deposit such records in the custody of the Archives. The Society notes, in this connection, that the Australian Archives has already entered into co-operative arrangements with some State Archives to hold State Government records on their behalf (notably, for example, State Government films in Western Australia).

9.7 The Society acknowledges further that certain material that relates 'only or principally to the history or government of a state or of a colony that became part of the Commonwealth' and which

forms part of 'the archival resources of the Commonwealth', may, pursuant to clause 3(2) (g) (iii), be 'transferred to the Commonwealth by a State under a law or agreement'. Furthermore, clause 6(2) appears to the Society implicitly to confer upon the Archives a power to enter into arrangements to accept the custody of records from a person other than a Commonwealth institution, including arrangements to provide for the extent (if any) to which the Archives or other persons are to have access to those records.

**10.0 (F) Extent of the power conferred on the Archives to acquire material in the custody of State Archives relating to functions transferred to the Commonwealth after Federation.**

10.1 The Society is aware that certain records at present in the custody of State Archives relate to functions which were, either at the time of, or subsequent to, the federation of the colonies, and in accordance with the Constitution, transferred to the Commonwealth.

10.2 The Society's attention has been directed to the question of whether the bill confers a power on the Archives to acquire (compulsorily or otherwise) such records in the custody of State Archives relating to functions transferred to the Commonwealth in accordance with the original powers conferred under the Constitution (e.g. customs records) or subsequently conferred under legislative alterations to the Constitution (e.g. aboriginal affairs records).

10.3 In general the Society accepts the practice that, where functions are transferred from one agency or organisation to another, or from one or more governments to another, the records, under normal circumstances, should accompany the functions. This, the Society considers, to be in accordance with the view that the records of an agency, organisation or government, are an indispensable element in the transaction of its business, and are therefore necessary for providing those responsible for its administration with the means of securing continuity and direction in the formulation of its policy and the conduct of its affairs.

10.4 The Society is, of course, aware that certain pre-federation records of colonial government agencies whose functions were transferred to the Commonwealth subsequent to 1901 are in the custody of the Australian Archives. It is also aware that certain records relating to functions transferred to the Commonwealth after 1901 are in the custody of State Archives.

10.5 The Society does not, in this submission, propose to express a view with respect to the propriety or otherwise of such circumstances, as each circumstance needs to be evaluated on its merits. Nor does the Society consider this an appropriate occasion to deliberate upon schemes for the rationalisation of such situations.

10.6 However, the Society, in its consideration of the bill, feels some reassurance is required that, in empowering the Archives to acquire records which 'in the opinion of the Director-General ought to be in the custody of the Archives' (sub-clause 5(2) (f)), records relating to functions formerly of agencies of the colonial governments in the custody of State Archives may only be transferred to, or acquired

by the Australian Archives after a thorough consideration of all the factors involved in each case, and with the concurrence of the State Governments or State Archives concerned.

10.7 The Society expresses this view in the light of its interpretation of the possible implications of the bill for the custody of such records.

10.8 The bill appears to make no special provision for the circumstances of records of colonial or state agencies remaining in the custody of State Archives, the functions to which they related having been formerly transferred to the Commonwealth.

10.9 The Society's concern, however, is twofold:

- (i) whether the bill empowers the Archives to acquire such records; and
- (ii) what mechanism, if any, either under the bill or otherwise, is available to the Archives to acquire those records.

10.10 The Society inclines to the view, in respect of the former, that the bill *does not* empower the Archives to compulsorily acquire such records. It is somewhat speculative as to whether such records would not be excluded from the definition of 'archival resources of the Commonwealth' (sub-clause 3(J)) because they may be conceived of as 'material . . . that relates only or principally to the history or government of a State or of a Colony that became part of the Commonwealth'. It does appear to the Society, however, that the circumstances of such records may be considered analogous to that material in the collections of 'national institutions' (including such Commonwealth records as were transferred there 'prior to the passage of the Archives legislation'), which is excluded from the operation of the Archives Bill. (Explanatory Memorandum, p. 5).

The Society assumes, therefore, in respect of the latter concern, that for the Archives to acquire such records, the only course open to it, other than in accordance with sub-clause 6(2), would be for the Archives to proceed by an action at law in the same way that it might also seek to recover estrays (or Commonwealth records not lawfully in the custody of the Commonwealth or a Commonwealth institution). (cf. section 6).

11.0 *Clause 4* No comment.

## ***PART II — ESTABLISHMENT, FUNCTIONS AND POWERS OF THE AUSTRALIAN ARCHIVES.***

12.0 *Sub-clause 5(1):*

### **12.1 Placement of the Archives in the Government administrative structure.**

12.2 It has been submitted to the Society that the placement of the Archives within the normal departmental structure, rather than its establishment as an authority or commission 'will simply ensure cautious policies continue'.

12.3 The question has also been put for the Society's consideration as to whether the government has heard arguments on this point 'other than those of the Australian Archives'.

12.4 The Society is, of course, aware that the government has had the benefit of the advice of Dr W. Kaye Lamb in his report on the *Development of the National Archives* (Parliamentary Paper No. 16/1974, p. 4). Dr Lamb recommended that the position most advantageous for the Archives would be within the normal departmental structure. In the Society's view, adequate opportunity appears to have been available to make representations on Dr Lamb's recommendation, prior to the drafting of the legislation.

12.5 While the Society sees some merits in the proposal for a quasi-autonomous authority, it accepts that there are compelling reasons for placing the Archives within the normal departmental structure not the least being the necessity of determining upon an arrangement which would be most conducive to the encouragement of *all* Commonwealth institutions, particularly those whose records are of an especially sensitive nature, to entrust the Archives with the custody and management of their records.

13.0 *Clause 5-6 generally:*

### **13.1 Functions and powers of the Archives**

13.2 The Society notes with satisfaction that clauses 5 and 6 provide the Archives with a legislative character probably more comprehensive than any other national archives. This is to be warmly applauded, the more especially as, in the Society's view, Australia has so far lacked both an effectively constituted archival authority to deal with the nation's records and the central promotional, educational and leadership agency in the archival field which a national archives should provide. The Society is confident that these can be attained if the bill is enacted and the Archives is able to grasp the initiative provided.

13.3 Dr Lamb recommended in his report in 1973 that

the heart and centre of any system must be a strong National Archives that can assume leadership in professional matters and in the development of improved techniques. Its success as a national institution will depend upon the extent to which its influence is felt and its services are provided outside its own walls and outside Canberra. (p. 15).

13.4 If this is to be accomplished, it will require the development of the 'greatly expanded operation' which Dr Lamb envisaged (p. 11). The Society looks to the Government to ensure that the means are provided by which the purposes of the bill may be fully realised.

## ***PART III — THE DIRECTOR-GENERAL AND STAFF OF THE ARCHIVES.***

14.0 *Clauses 7, 8 and 9 generally:*

### **14.1 Omission of the designation 'Archivist' from the bill and professional qualifications for the post of Director-General.**

14.2 An objection has been raised to the omission, from the bill, of any reference to the existence of officers who may be designated 'archivists'. Concern is expressed that members of the archival profession should be accorded some recognition in this respect; it has

been contended, indeed, that 'the whole institution could be staffed with people not called archivists—perhaps not even necessarily archivists'. The post of Director-General, it has been asserted, furthermore, 'could apply to anyone . . .'

14.3 The Society assumes that, since the staff of the Archives shall be, in accordance with clause 9, persons appointed or employed under the Public Service Act, 1922, the determination of such matters is properly the prerogative of the Public Service Board in consultation with the Archives. The Society does not consider this to be a matter required to be embodied in the legislation. Nor is it aware that such provision is made in other legislation, including the National Library Act, 1960.

14.4 While not considering it directly relevant to the bill, it does, however, strongly endorse the view expressed by Dr Lamb in his report (p. 16) that the post of Director-General

certainly should not be closed to an archivist, for this would be stating in effect that no archivist could hope to qualify for the top position in the institution and in his profession in Australia. The National Archives will certainly benefit greatly if it is headed by a professionally qualified Director-General who has had substantial research experience.

#### *PART IV — THE ADVISORY COUNCIL ON AUSTRALIAN ARCHIVES.*

15.0 *Clauses 10-17:*

##### **15.1 Omission of express provision for an Archivist on the Advisory Council on Australian Archives.**

15.2 The Society's attention has been drawn to the omission, regretably, from clause 10, of any express provision for representation of the archives profession on the Advisory Council on Australian Archives.

15.3 Nor does it appear to be contemplated in the Explanatory Memorandum (p. 13) that such representation is envisaged. The Society believes that the membership of the Council should include an archivist principally for the reason that the functions of the Council, as defined in clause 11, embrace a broad range of matters within the purview of the profession, and upon which the profession may be expected to contribute usefully in an advisory capacity.

15.4 The Society strongly recommends that this omission be remedied by the amendment of clause 10(2) to include, by express provision, a nominee or representative of the governing body of the Australian Society of Archivists.

##### **16.0 Report of the Advisory Council on Australian Archives.**

16.1 The Society further regrets that no provision has been made in the Bill for the Advisory Council on Australian Archives to furnish to the Parliament, or to the Minister for presentation to the Parliament, a regular report of its deliberations.

16.2 The view was expressed to the Society that 'Advisory bodies which have no voice can be safely ignored if their advice is unpalatable.'

They can be ignored anyway, but with less peace of mind if they are able to speak out'.

16.3 The Society concurs in this view, and believes that an Advisory Council, such as that proposed to be established under the bill, can fulfil the vital function of invigilation of the arrangements for the management of the archival resources of the Commonwealth in the interests both of the users of the archives and of the public. It also strongly supports the recommendation of Dr Lamb in his report (p. 5) that

the Advisory Council should submit reports and comments to the Archives from time to time and these reports should be printed in the annual report of the Archives, thus giving the Council an opportunity to state publicly any opinions it may wish to express.

***PART V — COMMONWEALTH RECORDS DIVISION 1  
(PRELIMINARY).***

**17.0 Clauses 18-23:**

**17.2 Exclusion of certain records from the application of Divisions 2 and 3 of the bill.**

17.2 The Society notes that the bill provides for the exclusion, from the application of Divisions 2 and 3 of the bill

- of the records of the Governor-General or a former Governor-General, or
- in the possession of the Senate, the House of Representatives, or
- a Parliamentary Department, or
- a court or court registry (cl. 18);
- of a record that has been submitted, or was proposed by a Minister to be submitted for Cabinet consideration, or a copy or part thereof, or
- an official record of Cabinet or a Cabinet committee, or a copy or part thereof, or
- a record containing any deliberation or decision of Cabinet, other than a record which by a decision of Cabinet was officially published (cl. 19);
- of a record that has been submitted, or was proposed by a Minister to be submitted for Executive Council consideration, or a copy or part thereof, or
- an official record of the Executive Council, or a copy or part thereof, or
- a record containing any deliberation or advice of the Executive Council, other than a record by which an act of the Governor-General, acting with the advice of the Executive Council, was officially published.

**18.0 Inapplicability of Division 2 (Dealings with Commonwealth Records) and Division 3 (Access to Commonwealth Records) to the above records.**

18.1 It has been represented to the Society that Clauses 18, 19 and 20,

by their negation of Divisions 2 and 3, have the effect of making legal the destruction, transfer, damaging and alteration of the records of the Courts and the highest levels of Executive Government. The fact that records *may* be transferred to the Archives (clause 21) has no bearing on the matter since a record destroyed cannot be transferred and a damaged or altered record is worse than useless to posterity—an archival and historical obscenity.

18.2 The remedy, it is proposed, would be to amend the bill so as to provide for the application of sub-clause 24(1) forbidding the destruction, transfer, damage or alteration of any record.

18.3 The strongest objections have been raised to the exemption of these records from the application, particularly of Division 2, but also of Division 3, of the bill.

18.4 The Society believes that, since certain of them are Commonwealth records by definition—the records of the Governor-General and Executive Council, of Parliament, the High Court and Federal and Territorial Courts—inadequate provision exists in other Divisions of the bill to secure the permanent preservation of these records.<sup>8</sup>

18.5 Whilst the Society acknowledges that other legislative provision may exist for *detering* the destruction or alteration (and possibly other actions mentioned in clause 24(1) of the bill, as illegal, even though such express provision were not made in this bill, it nevertheless raises strong objection to the omission from the bill of any provision for extending some measure of control over the destruction or alteration of the abovementioned records, and over the discretion, which appears to the Society to reside with the particular agencies concerned, to destroy their records at will.

18.6 But irrespective of the question of whether Commonwealth records not subject to the provisions of Divisions 2 and 3 of Part V of the bill may or may not be legally destroyed, the Society firmly believes that they are far too important as records of the nation and as a future source of its history to be left to the fate of administrative caprice.

18.7 Whilst the Society is aware of the reasons<sup>9</sup> for excluding these records from the application of Division 2 and 3 of the bill it nevertheless views with deep concern the decision to regard them as being excluded from the normal operation of controls and access conditions to which all other Commonwealth records are subject.

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8. It appears to the Society that the Archives is empowered *only* to 'encourage and foster' (clause 5(1) (a), (b) and (f)) their preservation, as well as 'to seek to obtain, and to have the custody and management' of the records of Cabinet, the latter not being Commonwealth records within the meaning of the bill, but nevertheless part of 'the archival resources of the Commonwealth'.

9. In part, because they are 'the records of those arms of the Government which traditionally enjoy a certain degree of independence an autonomy' (Explanatory Memorandum, p. 14); presumably, also in part, because certain of them, in particular the records of the Governor-General, the Executive Council, and the Cabinet, may contain matter, the disclosure of which would be inimical to the interests of the Commonwealth; and partly, in accordance with the Westminster convention of not disclosing the deliberations and decisions of Cabinet other than by official publication.

18.8 The Society does not see why an exception needs to be made in the case of those records excluded by clauses 18, 19 and 20 from the controls and access conditions which would normally apply to all other Commonwealth records subject to the application of Divisions 2 and 3 of Part V of the bill. There seems no good reason to the Society why, in the normal course of events, the interests of the Crown, the Commonwealth, other governments, the states, as well as the public and individuals may not be just as adequately protected by these provisions of the bill applied equally to the records of other Commonwealth institutions as to the records of these institutions which have been somewhat arbitrarily<sup>10</sup> excluded from their application.

18.9 If, upon further consideration, however, the government were resolutely determined to exclude these records from the application of Divisions 2 and 3 of Part V of the bill, the Society considers the situation could still be adequately met by exempting them only from the provisions of clauses 25, 26 and 27, which would effectively allow them to be added to or altered after 25 years without the necessity of seeking the permission of Archives; would not require their transfer to Archives when they had ceased to be required for current purposes or after 25 years; and would restrict the access of Archives to these records.

18.10 If the Government were also resolutely determined that the public should not have access to these records, the Society would be prepared to concede that they might be exempted altogether from the operation of Division 3 of Part V of the bill (relating to access to Commonwealth records). According to the Society's interpretation, this would mean that such records would *not* be available for public access, but, in accordance with sub-clause 21(2), it would leave determination of access to the agencies themselves, the extent (if any) of access provided being in accordance with arrangements to be entered into under clause 21(1). They would not, however, by virtue of exemption from Division 3, be precluded from acting consistently with access policy for the generality of Commonwealth records as provided for in that Division, subject, of course, to such arrangements as might be made pursuant to clause 21.

18.11 Whilst the Society would prefer to see a compromise of this kind rather than the complete exclusion of these records from the application of the provisions of bill, as is contemplated by clauses 18, 19 and 20, it is nevertheless resolutely committed to the view that the records of the Governor-General, the Executive Council, the Parliament and the Courts—all vital and unique archival resources of the Commonwealth—should be subject to the same controls and access conditions as other Commonwealth records.

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10. 'Arbitrarily', since it is difficult to conceive that information or matter of the kind referred to in clause 31, especially 31(a), (b) and (c) may not also be found in records of other Commonwealth institutions which would be subject to the provisions of Divisions 2 and 3, and which are considered to be adequately protected by these Divisions *c.f.* Clause 28(3).



18.12 The Society also expresses its alarm at the implications of setting a legislative precedent for the withholding of the records of the highest executive, legislative and judicial offices of the nation from the operation of the very provisions of the bill which, amongst other objectives, are intended to ensure the preservation of such Commonwealth records and other material 'as are of national significance or public interest and relate to

- (a) the history or government of Australia;
- (b) the legal basis, origin, development, organisation or activities of the Commonwealth or a Commonwealth institution;
- (c) a person who is, or has at any time been, associated with a Commonwealth institution;
- (d) the history or government of a Territory; or
- (e) an international or other organisation the membership of which includes, or has included, the Commonwealth or a Commonwealth institution'. (clause 3(2)).

18.13 The Society apprehends that such a precedent may be taken as an encouragement to other governments, and organisations of a private nature, to exclude the crucial records of the highest levels of government and administration from the operation or application of established archival procedures, capable of protecting all of the interests inherent in such records, while at the same time ensuring that they are preserved for all of the purposes that are served by archives.

#### **19.0 Alleged arbitrary certification of certain records as being excluded from the application of Divisions 2 and 3 of Part V.**

19.1 It has been objected to the Society that

sub-clauses 18(2), 19(2) and 20(2) provide that three officers have the power to declare *any* record to be a record of the Governor-General, the Cabinet or the Executive Council respectively. While it would be quite inappropriate and unjustifiable to imply that officers holding these positions are likely to certify records falsely to remove them from the provisions of Divisions 2 and 3 of the Bill, likelihood is not really at issue. What is at issue is that certain officials, as prone to political pressure as any others, are given the opportunity to remove records from the protection of the legislation absolutely—without any appeal, and this, even if never used, is still an appalling temptation to place in the path of Ministers and officials by Act of Parliament.

19.2 On an important matter of interpretation, the Society does not place the same construction on sub-clauses 18(2), 19(2) and 20(2) as represented in the foregoing objection, which appears to misconstrue the precise intention of these sub-clauses. The Society's interpretation is that such certification as may be issued under these sections relates *specifically* and *only* to those records referred to in sub-section (1) of each of the clauses 18, 19 and 20.

19.3 Furthermore, the Society's view appears to be re-affirmed by its interpretation of sub-clauses 19(4) and 20(4) which would appear to provide adequate assurance that only records 'brought into existence for the purpose of submission for consideration' by the Cabinet and Executive Council respectively may be so certified.

**PART V—DIVISION 2—DEALINGS WITH COMMONWEALTH RECORDS.**

20.0 *Clauses 24-27, 29.* In the Society's view, these clauses appear to provide a strong and satisfactory basis for the functions set out in clauses 5(2) (a)-(e).

21.0 *Clause 28:*

**21.1 Potential abuse of exemption provisions.**

21.2 It has been alleged that this clause has been the subject of considerable criticism on the grounds that it provides too great an opportunity for agencies to frustrate the operations of the Archives under the bill.

21.3 It is not clear to the Society in what specific ways it is envisaged that agencies may frustrate the operations of the Archives under this clause. In the absence of specific instances, it can only be assumed that it is implied that the clause allows too great a degree of latitude,

- (i) to Commonwealth institutions (with the concurrence of the Director-General) pursuant to clause 28(1), or
- (ii) to a responsible Minister, pursuant to clause 28(2).

to make a determination to withhold Commonwealth records or classes of such records

- (a) from transfer to the custody of Archives, or
- (b) from access by Archives, whether or not in accordance with certain specified conditions.

21.4 The Society can appreciate the reason for the concern expressed in this objection with respect to the power conferred upon a Commonwealth institution, or a person having authority to act on behalf of a Commonwealth institution, or a responsible Minister, to determine that a Commonwealth record, or each record in a class of Commonwealth records, *is a record that is not required to be transferred to the custody of the Archives under clause 26.*

21.5 This concern, in particular, would appear to be that (1) neither this clause, nor the bill at large, contains any express provision specifying the categories of records, or the kind of information or matter contained within them, on the basis of which they may be determined to be records not required to be transferred to the custody of, or made accessible to the Archives; and (2) whereas, pursuant to clauses 28(6) and 28(7), a Commonwealth record or a class of Commonwealth records, with respect to which such a determination has been made, shall, *if in the open access period*, be regarded as one to which the Archives is entitled to have access (except if there is in force a certificate of a Minister under clause 32 in respect of the record or class of records), no explicit provision exists either in the clause or the bill at large, to prescribe *a period of time upon the expiration of which such records may be transferred to the custody of the Archives.*

21.6 A principal objection with respect to this provision may be that it appears that neither a Commonwealth institution nor a responsible Minister, in determining that Commonwealth records shall be with-

held from *transfer to* or *access by* the Archives, are bound to specify the reasons for such determinations. The effect of this would appear to confer upon Commonwealth institutions and Ministers power to withhold from transfer to, or access by, the Archives Commonwealth records both of the kind, presumably, referred to in clause 31, *and any other records not specified* in clause 31, or even in clause 32.<sup>11</sup>

21.7 The other major objection appears to be that there is no prescribed period of time upon the expiration of which a Minister shall be obliged, subject to the requirements of clause 32, to make arrangements for the records, in respect of which a determination has been made in accordance with clause 28(1) or (2), to be transferred to the custody of the Archives under clause 26.

21.8 Notwithstanding the foregoing objections, however, there would appear to be in the Society's view, adequate protection against the abuse of the power conferred under clause 28(1) and (2) of a Commonwealth institution or a Minister to determine that Commonwealth records shall be withheld from transfer to or access by the Archives.

21.9 It is the Society's understanding that, even though Commonwealth records may be withheld from transfer to the custody of Archives (pursuant to clause 28(1) (a) and 28(2) (a), *for reasons which may be undisclosed, and for an indefinite period*, such records, *with the exception of those* for which a certificate under clause 32 is in force, must pursuant to clause 28(6) and 28(7), be regarded as records to which the Archives is entitled to have access for inspection *when in the open access period* (that is to say, 30 years after the date on which the records came into existence).

21.10 Such records as may be exempted under clause 32, and for which a certificate under that clause is in force, shall not be subject to examination under clause 33 by the Archives. But *all other records shall* be made available for access to the Archives, and such determinations of exempt records as are made, shall be made in accordance with the categories of exemption in clause 31.

21.11 It is the Society's understanding, therefore, that these provisions sufficiently ensure that no records may ultimately be exempted from public access *for reasons which are not specified in the bill*, nor *for any unspecified or indefinite period*, except with respect to the latter,

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11. This concern is not allayed by the statement in the Explanatory Memorandum (p. 18) that 'generally, two kinds of records will be exempted:

- records with a continuing administrative purpose which could not be met if the records were transferred to the Archives (e.g. certain registers maintained by law); and
- records of a highly secret or confidential nature relating to matters of defence or security or to international relations'.

The bill itself appears to make no express provision for specifying these, or any other reasons mentioned in the Explanatory Memorandum (p. 18), for withholding Commonwealth records from transfer to or access by the Archives. Thus records may be withheld under this clause by certain Commonwealth institutions 'for exhibition purposes' or with the consent of the Archives, and in accordance with clauses 46 and 47, in order 'to make its own archival arrangements', although there is no obligation upon the institution or the Minister to make known these reasons.

in the case of records falling within the categories of exemption under clause 31. Even then, such determinations as are made of exempt records, shall, under clause 33(4), be reviewed at such intervals as the Director-General thinks appropriate.

21.12 Further, records of the kind referred to in clause 31(a), (b) or (c)<sup>12</sup> which have been exempted by a certificate in force under clause 32 may not necessarily be regarded as records to which the Archives is *not* entitled to have access permanently; provision is made under clause 32(3) for the regulations to prescribe a period as the period during which such certificates remain in force unless sooner revoked. In this respect, however, the Society acknowledges in good faith that there may be some records, of the kind referred to in clause 31(a) (b) and (c), which, in the national interest, must be withheld from both access by the public and by Archives absolutely. In the last resort the Government must be the arbiter in determining the extent to which public access to such records may be facilitated consistent with the national interest.

21.13 The Society takes the view that these powers are not indiscriminately conferred. The interests of the Commonwealth are protected by virtue of the provisions in clause 28 which permit records in the closed period to be withheld from transfer to, *or* access by, Archives for an indefinite period except if they are determined, under clause 32, to be exempt records containing information or matter of a kind referred to in clause 31(a), (b) or (c).

21.14 The interests of the research scholar and members of the public are safeguarded by the provisions of the bill which

- require that all Commonwealth records in the open access period (other than exempt records) *shall* be made available for public access (clause 30(1));
- require the *Director-General* in consultation with the responsible Minister, to determine the extent to which partial access may be given to exempt records (clause 33(1));
- require the Director-General, at such intervals as he thinks appropriate (having regard to the nature of the records concerned and any other relevant circumstances), to *review* such determinations of exempt materials as are made under clause 33(1), and *whenever necessary* for the purposes of reconsideration of a decision under clause 38.

21.15 The Society believes that in considering this aspect of the bill, it should be emphasised that it is the *Director-General of the Archives*, in consultation with the responsible Minister (or a person authorised

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12. Exempt records, the release of which would be

- prejudicial to the defence, security or international relations of the Commonwealth (cf. clause 31(a));
- a breach of confidence with another government in respect of information or matter supplied by that government to the Commonwealth (cf. clause 31(b));
- prejudicial to relations between the Commonwealth and any state (cf. clause 31(c)).

by him) who is empowered to make the arrangements for the identification of records as exempt records in accordance with clause 33(1), and it is also the *Director-General* who is deemed, in accordance with clause 37(2) (for the purposes of applying for a review of decisions of the Archives by the Administrative Appeals Tribunal) 'to be the person who made the decision'.

21.16 The Society does not therefore perceive any reason why it should be thought that clause 28 'provides too great an opportunity for agencies to frustrate the operations of the Archives under the legislation'. In the Society's view, the decisions on the exemption of records in the open period under any of the categories contained in clause 31 are properly taken by the *Director-General*, in consultation with the responsible Minister, except, of course, where a Minister so certifies, in accordance with clause 32, that certain records are exempt for the reason that they contain information or matter of a kind referred to in clause 31 (a), (b) or (c).

#### **22.0 Exemption of certain records from transfer to the custody of, or access by the Archives.**

22.1 The comment has been made to the Society, in respect of clause 28, that it 'appears to allow two classes of people to say whether records should be transferred or not'.

22.2 There is some uncertainty as to what is implied by this statement, although it may reasonably be assumed that it refers to the fact that *either* a Commonwealth institution (or a person having authority to act on behalf of a Commonwealth institution) with the concurrence of the Director-General, *or* a responsible Minister may determine that certain Commonwealth records shall be exempt from transfer to the custody of, or access by, the Archives.

22.3 However, it is difficult to see how if the responsible Minister were not empowered to determine which Commonwealth records may be withheld from transfer to (or access by) the Archives (if that is the implication of the objection), the Director-General of the Archives could determine this, since it would, in effect, mean that no Commonwealth institution could override the Director-General on the matter of whether or not such records could be withheld from transfer to or access by the Archives. Nor would it be possible to implement such a procedure as is provided in clause 32 for exempting records under that clause from examination by Archives under clause 33.

#### **23.0 Clauses 30-31:**

##### **23.1 Scope of exemption categories under clause 31.**

23.2 Only one objection with respect to this clause was brought to the Society's attention. It was that the clause 'seems to permit too many restrictions on access', and that sub-clause 31(f), relating to the disclosure of information or matter which would constitute a breach of confidence, 'could extend to all papers'.

23.3 The Society makes no comment with respect to this objection, except to acknowledge that the categories of exemption appear to be

reasonable in view of the range of interests which they are intended to protect.

23.4 One comment received by the Society, and which it wholeheartedly endorses, is that, 'by defining the classes of exempt records in clause 31 the bill ensures that they cannot be extended except by amendment of the Act'.

24.0 *Clause 32:*

**24.1 Extension of powers conferred on a 'Responsible Minister' under clause 28(2) to other Ministers to apply exemption certificates.**

24.2 The Society's attention has been drawn to 'one oddity of this clause' which is that

it uses the phrase 'a Minister' rather than 'the responsible Minister' and that the delegation powers (sub-clause 7) refer to 'the Permanent Head of a Department'. Thus any minister may exercise these powers in relation to the records of any agency (not only his own department) and that he or she may delegate the power to any one of a very wide range of officials. The Explanatory Memorandum is silent on the reason for this peculiarity.

24.3 The Society notes that clause 32 does appear to empower *any minister* to sign a certificate of exemption in respect of such records of *any agency*—including agencies other than those for which he has Ministerial responsibility—as may contain information of a kind referred to in clause 31(a), (b) or (c).

24.4 In the Society's view, this is a much wider discretion than that conferred under sub-clause 28(2) wherein only the 'responsible Minister'<sup>13</sup> may determine that a record is not required to be transferred to the custody of, or made accessible to, the Archives.

24.5 The Society acknowledges that there are some constraints upon the extent of the power conferred under this clause:

- Certificates of exemption applied under this clause are confined *only* to those records the release of which would be
  - prejudicial to the defence, security or international relations of the Commonwealth (clause 31(a));
  - a breach of confidence with another Government in respect of information or matter supplied by that Government to the Commonwealth (clause 31(b));
  - prejudicial to the relations between the Commonwealth and any State (clause 31(c)).
- It would be not unreasonable to assume that such certificates would *normally be applied only* by those Ministers (or those to whom such powers might be lawfully delegated) whose responsibilities required that they should possess a knowledge of information or matter of such a kind as is referred to in clause 31(a), (b) or (c). Conversely, whilst Cabinet Ministers generally might possess such knowledge, it would seem to the Society an unwarranted intrusion into the responsibilities of the most appropriate or 'responsible'

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13. A 'responsible Minister', in relation to a Commonwealth records, means the Minister to whose ministerial responsibilities the record is most closely related (Sub-clause 3(1)).

Minister if any other Ministers, to whose responsibilities such records were not *closely related*, or *perhaps unrelated*, should attempt to apply a certificate in respect of them. Moreover, the Society conceives it possible that, in the absence from office for any extended period for any reason of the 'responsible Minister', it may be necessary for another Minister to assume responsibility for the signing of such a certificate.

- Finally, it is the Society's understanding that the power to apply an exemption certificate in respect of any record 'containing information or matter of the kind referred to in paragraph 31(a), (b) or (c)' may not in every case be attributable unquestionably to the responsibilities of a *particular Minister* or to *only one Minister*. Ministerial responsibilities are by their nature, loosely defined and may not infrequently overlap. With respect to such important matters as international and Commonwealth-State relations, the Society acknowledges the complexity of attempting to define arbitrarily the bounds of ministerial responsibility between, for example, the Executive arm of Government, the Department of the Prime Minister and Cabinet, the Department of the Treasury, the Department of Foreign Affairs and the Department of Defence.

24.6 The Society concedes, therefore, the necessity of incorporating within the bill a measure of flexibility sufficient to enable such records as may contain information or matter of a kind referred to in clause 31(a), (b) or (c) to be identified and certificates of exemption applied in respect thereof *by any one of the Ministers to whose responsibilities such records may most closely relate*, without the necessity of specifying or defining such records in relation to any one Minister's responsibilities.

24.7 It has been contended to the Society, in support of the above view, that

the term 'responsible Minister' is inappropriate to clause 32 because it opens the possibility of an appeal against a closure by certificate on the grounds that the Minister issuing the certificate is not the Minister 'to whose responsibilities the record is most closely related' . . . The clear intention of clause 32 is that such a certificate should be conclusive but doubt could arise, for example, as to who is the responsible Minister for a document dealing with a defence matter found on a Foreign Affairs file. No good purpose could be served by forcing the Commonwealth to defend actions against such decisions on the ground that the wrong Minister issued the certificate. Unnecessary and costly litigation would be encouraged by the proposed amendment and the only practical result would be that the Commonwealth could be forced to get a new certificate signed by the responsible Minister once a court had determined who he was.

24.8 A similar view has elsewhere been expressed to the Society to the effect that

if the phrase 'the responsible Minister' were used, there would be a possibility of appeal on the grounds that the Minister who issued the certificate was not the 'responsible Minister' as defined in 3(1) although the appellant could not in fact judge this. Such appeals would be inconclusive, assuming that the Minister who was considered to be the responsible Minister subsequently certified the record.

24.9 In summary, therefore, the Society apprehends no objection to *more than one Minister* exercising the power to apply an exemption certificate in respect of a record containing information or matter of a kind referred to in clause 31(a), (b) or (c).

24.10 Nor does the Society apprehend any objection to the power of applying a certificate of exemption under clause 32 being conferred upon 'a Minister'—rather than the 'responsible Minister'—provided such powers may be exercised *in respect only* of those records containing information or matter of a kind referred to in clause 31(a), (b) or (c), and *only by such Ministers* (or those persons to whom the powers under this clause may be lawfully delegated) as properly exercise responsibility for information or matter of a kind referred to in clause 31(a), (b) or (c) to which such records relate.

24.11 In principle, then, the Society concedes that, according to its interpretation, under clause 32 'any Minister may exercise these powers in relation to the records of any agency', and that these powers may be delegated, under sub-clause 32(7) (c) to persons holding a prescribed office or class of offices, *which are not specified in the bill*.

24.12 In practice, on the other hand, the Society acknowledges that only those Ministers, or the persons to whom their powers under this clause may be delegated, may be expected to exercise the powers conferred under this clause in relation *only* to such records as contain information or matter of a kind referred to in clause 31(a), (b) or (c) and as appertain *to their own* Ministerial responsibilities.

24.13 The Society takes the view, therefore, that provided such certificates as may be applied under this clause are signed *only* by such Ministers, or their delegates, as exercise the responsibility conferred under this clause, *and* in respect *only* of those records containing information or matter of a kind referred to in clause 31(a), (b) or (c) as pertain to their own Ministerial responsibilities, it raises no serious objection to this provision.

#### **25.0 Exclusion of appeal to the Tribunal against exemption certificates in force in relation to certain records under clause 31.**

25.1 It has been alleged that a major criticism of this clause is that under cl. 37(9) the certificates issued under cl. 32 are absolute and not subject to appeal to the Administrative Appeals Tribunal—as are exemptions made under sub-clause 33(1) by the Archives. On the face of it one would think that if the judge at the head of the A.A.T. can be trusted with the information prejudicial to the 'financial or property interests of the Commonwealth' (cl. 38(2) (d)), he should also be trustworthy in relation to Federal/State relations (cl. 28(2) (c)).

25.2 The criticisms laid against the bill in the above statement appear to be:

- (i) that no appeal is allowed by the bill against the application by a Minister under sub-clause 32(1); thus any questioning of the basis of the decision upon which records may be exempted under this clause is not permitted;
- (ii) that the categories of exemption for which a certificate under clause 32 may be applied should not include the category provided under clause 31(c).



25.3 Some reference has already been made to the Society's view with respect to the categories of records for which a certificate under clause 32 is in force, and to which access by the Archives is withheld.

25.4 Where a certificate is applied by a Minister under clause 32, in respect of a record containing information or matter of a kind referred to in clause 31(a), (b) or (c), the record is *not* subject to examination<sup>14</sup> in accordance with the arrangements otherwise to be made by the Director-General in consultation with the responsible Minister for records in, or prior to, the open access period under clause 33.

25.5 The Society expressed its serious concern that since such records are *not* subject to examination the determinations in respect of Commonwealth records exempted by certificate under clause 32, cannot, by reason of sub-clause 32(6) be reviewed (as can determinations made under sub-clause 33(1) ),

- (i) at such intervals as the Director-General thinks appropriate having regard to the nature of records concerned and any other relevant circumstances; and
- (ii) whenever necessary<sup>15</sup> for the purposes of reconsideration, by the Administrative Appeals Tribunal, of a decision (of the Director-General in consultation with responsible Minister) in accordance with clause 38.

25.6 Furthermore, since such a certificate as is applied under clause 32, so long as it remains in force, *establishes conclusively* that the record is an exempt record referred to in the relevant paragraph of clause 31, *the powers of the Tribunal* (as expressly provided in sub-clause 37(4)) *do not extend to reviewing the decision to give the certificate or the existence of proper grounds for the giving of the certificate.*

25.7 Finally whereas the Tribunal does have power to require production of material documents where it is necessary in the Tribunal's view 'to establish whether the record is an exempt record, or whether part of an exempt record can be released in accordance with clause 36', it *does not*, by express provision of sub-clause 37(9), have power to require production of a record in respect of which a certificate made under clause 18, 19, 20 or 32 applies'.<sup>16</sup> (Explanatory Memorandum, p. 23).

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14. The purpose of the examination under clause 33(1) is to determine the Commonwealth records in the open access period that are to be treated by the Archives as being exempt records and the extent to which access *in part* may be given to such records without disclosing the information or matter by reason of which they are exempt records.

15. i.e. when an application for a reconsideration of a decision is made to the Administrative Appeals Tribunal in accordance with sub-clause 38(4).

16. With respect to all other exempt records (i.e. excluding those exempted under clause 32) the Tribunal has power to require a record to be produced for inspection to establish that it is an exempt record (sub-clause 37(7) ) or for the purpose of determining whether, and to what extent, it is practicable for part of the record to be released under clause 36.

25.8 In the light of the above, the Society acknowledges that certificates relating to material exempt under clause 32 are *conclusive* (according to sub-clause 32(1)); and the review of such determinations as are made under that clause, and the existence of proper grounds for making them, are *not* within the powers conferred on the Tribunal (according to clause 37(4)).

25.9 It is thus clear to the Society that the Government has reserved to itself *absolute discretion* with respect to the determination of whether, and to what extent, it is prepared to permit public access to those records containing information or matter of a kind referred to in clause 31(a), (b) or (c).

25.10 That it is prepared to exercise some discretion and not *restrict absolutely*<sup>17</sup> public access to these records is *implied* in those provisions of the bill which

- (i) provide that certificates, or any class of certificates, may remain in force, *unless sooner revoked* or *unless a further certificate in respect of the record is signed* (pursuant to sub-clause 32(5), for such period as may be prescribed in the regulations; and that should such period expire (and the certificate not be renewed under sub-clause 32(5), or be revoked), such records, would, according to the Society's interpretation, then become subject to examination by the Archives under clause 33;
- (ii) provide that where a Minister is satisfied that only a particular part or particular parts of a record contain information or matter of a kind referred to in clause 31(a), (b) or (c), a certificate applied under sub-clause 32(1) shall identify only that part or those parts by reason of which the record is exempt (clause 32(2));
- (iii) provide that where there is in force a certificate under sub-clause 19(3), 20(3) or 32(2), which identifies a part or parts of the record, the Administrative Appeals Tribunal is *not* prevented from requiring the production, in proceedings before the Tribunal, of 'a copy of so much of the record as is not included in the part or parts so identified', (clause 37(10)); with the effect that, insofar as the Society understands, the Tribunal may, if it considers it practicable to give access to, or to a copy of *part of an exempt record* without disclosing the information or matter by reason of which the record is exempt, direct that access be given accordingly (clause 37(5)); and
- (iv) provide that the Minister, or a person authorised by him, may, in accordance with arrangements approved by the Prime Minister, cause Commonwealth records which are not available for public access under this Act to be made

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17. In the sense both of a *permanent and irreversible* decision to exempt such record or records from public access, and of the *exemption or closure of the whole of such record or records* as may contain information or matter of a kind referred to in clause 31(a), (b) or (c) from public access without exemption.

available to a person for a purpose specified in the regulations as a purpose for which access may be given (in accordance with sub-clause 39(2)).

25.11 The Society acknowledges, therefore, that mechanisms do exist within the bill to provide that

- (i) certificates of exemption under clause 32 remain in force, unless sooner revoked or a further certificate is signed, *for such period only as is prescribed by the regulations*; and
- (ii) only that part or those parts of a record by reason of which it is an exempt record may be exempt by certificate under clause 32, thereby facilitating access to that part or those parts which do *not* contain information or matter of a kind referred to in clause 31(a), (b) or (c).

25.12 Whilst the existence of these mechanisms can in no way be conceived of as guarantees that such highly sensitive and important records of the nation will ultimately become accessible for research and scholarship, it is the Society's principal concern that the bill should make provision to *require* that the records containing information or matter of a kind referred to in clause 31(a), (b) or (c), and to which a certificate under clause 32 may be applied

- (i) should not be destroyed or otherwise disposed of, transferred in custody or ownership, or damaged or altered (as provided for under clause 24); and
- (ii) should ultimately be made available for public access for the benefit of research and scholarship.

25.13 Whilst the Society acknowledges that it may be the Government's intention and prerogative that some records within the categories referred to under clause 31(a), (b) or (c) should not be made available for public access, the question is raised as to whether the confidentiality and sensitivity of such records may not, in the very long term perhaps, be diminished to the extent that it may be appropriate for some mechanism to be provided within the bill by which the decisions to exempt them may ultimately and automatically be subject to review presumably by a Minister, but perhaps also by the Administrative Appeals Tribunal.

25.14 The Society believes that it is possible to make provision within the bill for such records to be subject *ultimately* to review while at the same time reserve (at least as long as is considered necessary) absolute discretion with respect to their exemption from both transfer to and access by the Archives.

25.15 Such a provision might appropriately be incorporated in the bill as would have the effect of permitting the review by the Tribunal of the decisions of the Minister to exempt material under clause 32 *after the elapse of such time, or in the light of such altered circumstances* as may be considered appropriate to ensure that the disclosure of such information or matter would not be prejudicial to the defence, security or international relations of the Commonwealth; in breach of confidence in respect of information or matter communicated by the government of another country or a State to the Government of

the Commonwealth; or prejudicial to the relations between the Commonwealth and any State.

**26.0 Delegation of powers of the Minister under clause 32(7).**

26.1 It is argued that this clause allows for a dangerous diffusion of power. The Society has accordingly been told that, 'if anyone, only the Minister should exercise this power, not public servants who are notoriously conservative in this matter'.

26.2 As an opinion, this statement is, in the Society's view, difficult to reply to. Whilst the Society acknowledges that a delegation of Ministerial powers is authorised, by this sub-clause, in respect of the important matter of the exemption of certain records referred to in clause 31(a), (b) or (c), from examination by the Archives under clause 33, it nevertheless seems reasonable to the Society to assume that in any case the responsible Minister will be dependent upon the advice of the Permanent Head of the Department to which the records relate. It may also be impracticable for the Minister to exercise this power personally should the volume of such certificates be considerable, or should the Minister be absent for any extended period. The Society apprehends no serious objections to this sub-clause.

27.0 *Clause 34-35.* No specific comment. In general, however, the Society is strongly in support of the provisions of clause 34(2) which are designed to ensure the physical preservations of the records where the giving of access may be detrimental to the physical nature of the record.

28.0 *Clause 36.* In general, the Society welcomes adoption of the provisions in this clause designed to facilitate public access to the non-exempt parts of exempt records.

29.0 *Clause 37-38.* In general, the Society considers the provisions of these clauses reasonable. Sub-clause 37(9) has already been alluded to with reference to paragraph 25.7.

29.1 An objection was raised in respect of the 'appeals method' provided in clause 37 that 'it seems most bureaucratic and is likely to discourage users'. The Society finds it hard however to see how it can be improved from that point of view. The intention of imposing the internal review is presumably to ensure that the Administrative Appeals Tribunal will not be burdened with appeals based on past decisions which the Archives would not be willing to reverse.

29.2 In respect of clause 38 the Society has been told that in general it should be appreciated that (with certain exceptions), all access decisions will be reviewable and the Administrative Appeals Tribunal will not only be valuable to users in that sense, but in the sense that its decisions will both define the limits of interpretation of the categories of exempt records for use in future determinations and will necessarily cause reviews of whole classes of records which have been exempted in the past. By defining the classes of exempt records in clause 31, the bill ensures that they cannot be extended except by amendment of the Act.

30.0 *Clause 39.* The Society considers that this clause provides a very useful area of flexibility in the facilitation of accelerated or *special* access, and if used liberally will be a very good feature of the legislation.

31.0 *Clauses 40-43.* No comment.

***PART VI — OBJECTS OF ARCHIVAL SIGNIFICANCE.***

32.0 *Clause 44:*

**32.1 The place of objects in the Archives.**

32.2 Objections have been raised to the inclusion in the bill of provisions empowering the Archives to acquire 'objects of archival significance', although the only basis for the objection appears to have been that it is 'a somewhat odd phrase in the Australian context', and, in any case, 'apart from the odd seal (usually attached to a record) we see few if any objects of archival significance'.

32.3 Similar objections have been raised to the specific inclusion, under clauses 45(3), (c) and (5), of samples of notes printed by the Reserve Bank of Australia, of current coins of the Royal Australian Mint, and current postage stamps, issued by the Australian Postal Commission. It has further been suggested that such a provision is possibly 'a needless duplication'. The question is raised as to why these institutions could not look after their respective objects 'since presumably they will already have experts anyway'.

32.4 Although there are differences of opinion on this matter within the Society, there is evidence to support the view that 'archives' are not necessarily limited by their particular form or nature; and furthermore, if they may be regarded as part of the archival resources of the Commonwealth because of their national significance or public interest, and their relationship to any of the aspects included in clause 3(2), then they ought strictly to be placed within the custody of the Archives, which may properly lay claim to them. Moreover, it may be reasonable to assume that more adequate measures and facilities may be provided by the Archives to ensure the proper treatment and permanent preservation of such objects than could be provided by any other Commonwealth institution not being a custodial institution.

32.5 On a matter of archival principle, however, the Society is firmly of the view that in certain circumstances (including those, for example, mentioned below) objects may have important archival significance in relation to their administrative connections.

32.6 Apart from seals (such as the Great Seal of the Commonwealth) which form an indispensable part of the record they may also include a wide variety of objects which form attachments to files or are otherwise part of the record (such as samples of various kinds); they may represent a stage in the administrative process (such as stamps and coins); and they may offer evidence of, or be of value for research (such as geological core samples and samples of materials tested).

32.7 The Society considers, on the basis of demonstrated experience, that if such objects are to be preserved it is essential that they be subjected to normal archival procedures (including appraisal, description, storage and conservation) in their archival and administrative context. The Society accepts that they may, of course, under the provisions of the bill, be in the custody of an institution other than

the Archives, but they should, in its view, remain under the supervision of Archives.

*PART VII — CARE OF MATERIAL OF THE ARCHIVES.*

33.0 *Clauses 46-47.* No specific comments. In general, the Society endorses the principles underlying the provisions in clause 46 which take account of the special nature of the archives and of the needs of the persons and institutions which will use them.

*PART VIII — REGISTERS AND GUIDES RELATING TO ARCHIVES.*

34.0 *Clauses 48-50:*

34.1 These clauses, dealing with the Australian National Register of Records, the Australian National Guide to Archival Material and the Australian National Register of Research Involving Archives are warmly welcomed by the Society. The degree of success attained in the establishment and maintenance of the Australian National Register of Research Involving Archives will depend upon the resources which the Archives is able to devote to them and the degree of co-operation it can achieve with archival and academic institutions respectively. It is therefore in the interests of the academic and archival communities to co-operate as fully as possible. It is also to be hoped that full and free consultation will be instituted by the Archives on the form the registers are to take and the machinery for co-operation.

**35.0 The Australian National Guide to Archival Material.**

35.1 The Society notes that this Guide shall contain particulars of all Commonwealth records in the open access period which have been examined in accordance with clause 33(1), with the exception of records for which a certificate is in force under clause 32 exempting them from examination by Archives under clause 33.

35.2 Whilst some reservations have been expressed about the omission, from the Australian National Guide to Archival Material, of records exempted by clause 32 from examination under clause 33(1), since this effectively denies the public the knowledge of what records are exempt under the provisions of clause 32, it is rightly pointed out, on the other hand, that it would be inconsistent if a Minister were to certify a record in accordance with that clause, and then reveal the nature of it in the Guide. It is worth noting that the Guide will cover *all* records examined for clearance and that at least one copy will be available in each state or territory.

**36.0 Privacy implications of the Australian National Register of Research involving Archives.**

36.1 Reservations have been expressed to the Society in relation to certain privacy implications arising from clause 50 which provides for the establishment and maintenance of a register to be known as the Australian National Register of Research Involving Archives. The concern expressed is that 'the compulsory compilation of such a Register may be considered an infringement of the researcher's rights to privacy and freedom of thought through the disclosure of information on material used'.

36.2 The Society's view, however, based upon its own interpretation of the clause, cannot be expressed in quite the same way. It appears to the Society that the Archives is *required* to establish and maintain such a Register in which it *shall endeavour* to list all current and former research in or in relation to Australia that 'has involved or will involve, the use of archival material'. Whilst it does appear to the Society that the establishment and maintenance of the Register shall be *obligatory* for the Archives, it does not interpret the clause as empowering the Archives to *compel* 'all persons and organizations interested in research of the kind referred to' to contribute to, or register their research in it. Sub-clause 50(1) requires that the Archives 'shall endeavour' to list such research and sub-clause 50(2) requires it to 'seek the co-operation' of persons and organizations interested in research in, or in relation to Australia involving the use of archival material. Whilst the establishment and maintenance of the Register may be *mandatory*, it does not appear to the Society that the Archives is empowered *compulsorily* to require the registration of all research.

36.3 Notwithstanding this, the Society notes that the clause does not specify the precise nature of the information to be recorded in the register, and assumes that this will be a matter for the discretion of the Archives. In this event, it is the Society's view that the Archives may be expected to exercise this discretion in the same responsible manner, and with the same precautions as it may be expected to do in respect of the nature of the research that has been, or is being conducted through its search rooms and reference services.

36.4 The impartial and confidential facilitation of the use of the archives is, in the Society's view, a pre-eminent and accepted<sup>18</sup> responsibility of the archivist; and the Society apprehends no reason to doubt that the Archives would not be fully cognisant of the responsibilities imposed upon it equally in respect of its reference and search room services as in its maintenance of the Australian National Register of Research Involving Archives.

36.5 The Society supports the intention of the clause for the reasons proposed by Dr Lamb in his report (p. 15):

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18. The current policy of most archival institutions is that a scholar may expect privacy as to the details of his own work, but not exclusive access to sources . . . The archivist should protect the researcher's work to the extent that he does not tell others *in detail* what documents the researcher is using or the way in which he is developing his theme. The researcher has reason to assume that as a matter of propriety the staffs of repositories will avoid disclosures, in idle conversation or otherwise, that would give away the product of thought and time that the researcher has invested in his own work.

Avoidance of work duplication by mentioning the topics of other scholar's work, however, is normal procedure. Several publications serve this end (for example, the American Historical Association's triennial *List of Doctoral Dissertations in History in Progress*), but a broad subject can often be worked over productively by two or more researchers, often emphasising different sources to bring out their conclusions. This is increasingly true as the plethora of unpublished sources increases. (Philip C. Brooks, *Research in Archives: The use of unpublished primary sources*, Chicago, University of Chicago Press, 1969, p. 48).

*A National Register of Research in Progress would be of great use to scholars. In practice this would probably consist in great part of a list of theses in preparation, but scholars would be invited to register their research projects and indicate the books that they had in preparation. The corresponding guide to research projects that has been compiled and published in Canada has proved to be a most useful means of tracing unpublished studies, and incidentally, has much reduced the possibility that a scholar will begin work on a subject upon which another is already engaged.*

**PART IX — MISCELLANEOUS.**

**37.0 Clauses 51-54:**

**37.1 Printing of Annual Report of the Archives.**

37.2 It has been drawn to the Society's attention that, while the Archives, in accordance with clause 51, is required to prepare and furnish to the Minister, for presentation to the Parliament, an annual report, there is no assurance in the bill that the report of the Archives is to be printed.

37.3 The Society therefore strongly requests that an amendment be made to the clause so as to provide for the printing of the annual report; and that the suggested report of the Advisory Council on Australian Archives (paragraph 8.2) be incorporated and printed with it.