That the repo.t do lie upon the Table and be printed.

Question put and passed.

[See paper No 662.]

FREEDOM OF INFORMATION BILL

Second Reading

Debate resumed from 26 November.

HON PETER FOSS (East Metropolitan) [11.18 pm]: The Opposition welcomes this Bill and the fact that at long last this Government after having promised the electors it would introduce such legislation when it came into office in 1983 has got around to introducing it. It has taken a while and probably the only reason it has developed some enthusiasm for it is becau.e members opposite do not think they will be in Government for very much longer.

Hon Kay Hallahan: That is not true.

Hon PETER FOSS: It is interesting that it has taken so long because the Liberal Party tried to introduce freedom of information legislation some years ago. Hon Bill Hassell did so without receiving any support whatever from the Government. It has been disgraceful that this legislation has been delayed for so long that Western Australia is lagging behind all other States of Australia and the Commonwealth in this respect. I am pleased to see that it did get support from the Royal Commission and that the Bill at long last has come forward. It is becoming almost as much a perennial from this Government as four year olds in kindergarten. It is a good Bill; not only is it good in principle, but the setting out and drafting provisions of the Bill are good.

This Bill is t.ie second Bill tc come before the Parliament because the first Bill that was put up was withdrawn following comments, many of them made by the Opposition; but this Bill picks up many of the changes recommended. The Opposition will be supporting much of the legislation because it contains changes sug.estedby the Opposition when the first Bill came into this place.

What is missing is the rest of the administrative group of measures. The first substantial administrative measures were brought in by the Commonwealth in a group of Bills. The first was the Freedom of Information Act. In order to be able to investigate, we need to obtain information. One cannot bring action if one does not have the information. The first thing to do was to give people information and the Freedom of Information Act qualifies people's access to documents. The Admin' trative Decisions (Judicial Review) Act entitles people, pursuant to an Act of the Commo..wealth to require an administrator to give reasons for a decision. That works hand in hand with the Freedom of Information Act because a person is then able to take some measure against Executive power if he believes it is not being properly carried out.

The third measure is the right to judicial review. In Western Australia at the moment the only way in which one can challenge Government if one does not like what it is doing is by prerogative writ. Anybody who has been involved in a prerogative writ knows there are a number of disadvantages; it is an expensive, highly technical and extremely unsatisfactory sort of relief. Sometimes it can be quite useful, but all too often the relief is unsatisfactory. The Commonwealth in its Administrative Decisions (Judicial Review) Act allowed a much cheaper and easier form of administrative review than we have in Western Australia. The final part of the Commonwealth system is the Administrative Appeals Tribunal which allows the decision to be rethought, as opposed to challenging the basis upon which the decision was made saying that mistakes were made in the way the decision was made.

Admittedly, there are limited circumstances under which that can be done. However, members must bear in mind that many administrative decisions are not made by a Government or a ministry - that is, Executive Government - but by lower ranking administrative bureaucrats. In that respect, the Administrative Appeals Tribunal was a good relief. If there is one thing missing, it is not in this Bill so much, but there should be other legislation at the same time. That was recognised by the Royal Commission into Commercial Activities of Government and Other Matters. Recommendation 3 in the second report stated -

An Administrative Decisions (Reasons) Act be enacted as a matter of urgency in accordance with the 1986 report of the Law Reform Commission of Western Australia in Project No 26 Part II.

It is interesting that the freedom of information legislation was recommended to be enacted as a matter of priority, whereas the suggested Administrative Decisions (Reasons) Act was to be enacted as a matter of urgency. The only recommendation on the Commission of Government Bill, which will be before the House soon, was that it be enacted without delay. If the three Bills were to be prioritised I would list them in the following order: Urgency, priority, and without delay. For some reason the Bill which was defined as "urgent" is not even being looked at. I am pleased to see that we are dealing with the Bill which was defined as "a matter of priority"; however, the one which was defined as only "without delay" appears to have been rammed through at the last minute. That is very strange. However, that is the way things go with this Government. Obviously the other Bill did not seem quite as politically beneficial to the Government and it has not given it the urgency which was requested for it.

One of the good things about the Freedom of Information Bill is that it is not only confined to the State Government but also deals with local government. That is a sensible approach. People are probably affected more in their daily lives by local government and minor matters. It is important that that ability exists. The Ombudsman's annual reports show that a large proportion of complaints he receives relate to local government. People cannot have their complaints satisfied effectively without the ability to receive information. Ultimately, I hope that freedom of information will not lead to more disputes, but to fewer. Much dispute in our community arises out of misunderstanding and poor communication. People think of all sorts of terrible things which the Government is doing. How many times have members heard rumours, particularly in this Parliament? All sorts of rumours are circulated and people get quite uptight about things which apparently are going to occur. Then, when the information becomes available, they find that the concerns all too often are not justified.

Hon Derrick Tomlinson: It is even worse.

Hon PETER FOSS: The sooner people find out about those rumours and deal with them, the better. The communication that is to be afforded by the Freedom of Information Bill will be good for the community. The principles of administration are also excellent. As stated in clause 4 it -

(a) assists the public to obtain access to documents;

(b) allows access to documents to be obtained promptly and at the lowest reasonable cost; and

(c) assists the public to ensure that personal information contained in documents is accurate, complete, up to date and not misleading.

That is an excellent idea. If problems do apply to the granting of access it may relate to exempt agencies. Two principles for exemption are contained in the Bill; exempt agencies and exempt matter. Generally, the exempt matter would cover everything that is needed to be covered anyway. I am concerned that some bodies are listed under the exempt agencies that should not be. The only basis for which the exemption of those agencies could be justified is upon the principles that are set out in the list of exempt matter. One of the requests for change of procedure which came forward and which the Opposition suggested, and which also was endorsed by the Law Society of Western Australia, is the basis on which people are to respond. The concept is of a permitted period, which was set at 45 days after the access application was received. Generally, that may be a reasonable period.

Many times in the law a date is set, not so much because that is time in which it is thought the action will occur, but to provide a trigger point for somebody who wants to take further action to say, "The 45 days have passed; now I may take action to require them to do something." The problem about setting a trigger point date such as that is that sometimes more time is required, and other times less time will be adequate. The Law Society suggested that the real obligation should be to do it as soon as possible. The trigger point is recognised only as a trigger point. However, situations may arise where it is essential to an individual who wants to take some form of action - admittedly, it would have to be a prerogative writ because the other administrative procedures do not apply - and requires the

document urgently, and the Government has the document and could provide it. Does the agency play a waiting game and use the ability to put it off for 45 days so that the person is effectively defeated from exercising his or her remedy? Quite plainly, if it is put that way, the answer must be that agencies should not be allowed to do so. Clauses 13(4) and 13(5) indicate that the commissioner is entitled to reduce the time allowed to an agency to comply with subclause (1). Clause 13(1) states -

> . . . the agency has to deal with the access application as soon as is practicable (and, in any event, before the end of the permitted period) . . .

Opportunities also exist to extend the period, but the essential point is that when urgency is required, there can be urgency.

I am concerned also about some of the provisions relating to charges. The Opposition was concerned to make certain that the charges were reasonable, not so much reasonable for the time taken, because that may be a reasonable charge, but that it may be beyond all possible means of the applicant. That has been set out in some detail in clause 16. However, I am concerned that a provision in the Bill goes against the principle; that is, clause 16(1)(g) which states -

> a charge must be waived or be reduced if the applicant is impecunious . . .

The concern about that is that we may end up with the straw applicant. Anybody is allowed to make an application. If a person is impecunious he may soon become non-impecunious by offering to make applications for information under this legislation. He could say, "I am impecunious; therefore, you must waive the charges for me." A person may then receive the information free, and the whole basis of making charges is lost.

Hon Mark Nevill: Would you contemplate an amendment to that clause?

Hon PETER FOSS: I would certainly contemplate an amendment to that clause. It is of concern to me. The ideal of totally waiving a charge is silly and goes beyond the basic principle of the Bill. At the Opposition's request an amendment has been included in clause 27 relating to electronic information. Nowadays some of the most important information is reported electronically. The classic example of that was a case reported by the Ombudsman about a year or two ago of a man who was detected by a radar gun speeding along Mounts Bay Road, I think. He challenged the policeman who had charged him with speeding saying that he could not possibly have had the correct radar reading. When the police officer insisted that it was done correctly, the man reported the matter, which was investigated internally. The result of the investigation indicated that the radar gun had been used quite properly and that the radar reading was correct. The man then complained to the Ombudsman who investigated the matter and found that the internal investigation was wrong. The radar gun had been used by the police officer in a following car. The instructions relating to the radar gun stated that it should not be used in a following car. However, if it were used in that way, it had to be used by somebody who had been specially trained to use it in that manner. Nobody in Western Australia had been trained that way and, certainly, the constable had not been trained to use it in that manner. Of course, it was subject to error if it was used in that manner and the internal investigation was wrong. The Ombudsman found that the man had been wrongly charged with speeding.

One may ask what that has to do with freedom of information legislation. By coincidence, in passing, while making the investigation, the Ombudsman saw a reference to a thing called a field note. He asked what it was and was told that it is a note made by an officer on the computer noting things of relevance to other officers' investigations including suspicious circumstances, known consorting of criminals and things of that nature - basic background criminal information. The Ombudsman asked to see the field note about that man which the officer had put on the computer. The field note said, "This man is a troublemaker and tells lies about police." It might be said that was vaguely correct in that he made trouble for them, but he made it correctly in that the police had acted wrongly. However, telling lies about the police was totally wrong. The concern was that if this man had been stopped by a policeman anywhere in Western Australia and, I understand, under certain circumstances anywhere in Australia, the police officer would have quick access to a computer and would get up, "This man is a troublemaker and tells lies about police." Apparently, any policeman has the right to put nasty notes about people on a computer. This man, who had quite rightly objected to

what the police said and showed up their internal investigations and procedures, faced the possibility of really getting himself into trouble no matter where he went in Australia simply because of the computer note. Apparently that information would have even been available to police overseas if it were requested through Interpol. Therefore, this man's reputation with police worldwide stood the chance of being damned where ever he went. That information was recorded electronically.

We have asked for clause 27(1)(g) to be included in the Bill because of the manner in which electronic information is stored. It could be given in a totally incomprehensible manner - it might be the way it is on the computer - but it could be handed over in such a way that the person -

Hon Garry Kelly: Binary numbers.

Hon PETER FOSS: That is right; work them out if you can. That did not seem to be a very good idea.

Hon Mark Nevill: I can only count to two.

Hon PETER FOSS: The Parliamentary Secretary has only to count to one with binary information. Obviously, that electronic information is not just restricted to those sorts of records; very large quantities of the records we will be talking about here that are essential to the current day will be in that form.

Clause 32 concerns me although I will not be moving an amendment to it because it needs to be dealt with in the second reading stage. I think the words "third party" are in the wrong spot. I think it should read, "An individual other than the applicant, but the third party". Clause 32(2) sounds quite reasonable. However the trick is in the definition "personal information". This Bill has a slightly different form than usual in that instead of having the definitions at the front of the Bill, they are contained in a glossary at the back. The definition of "personal information" appears on page 91 of the Bill and it states -

> **"personal information"** means information or an opinion, whether true or not, and whether recorded in a material form or not, about an individual, whether living or dead -
>
> (a) whose identity is apparent or can reasonably be ascertained from information or opinion; or
>
> (b) who can be identified by reference to an identification number or other identifying particular such as a fingerprint, retina print or body sample;

It seems to me a letter on a Government file in a Government office with a name and address on it contains personal information about the addressee. The mention of a name anywhere on a Government document is personal information about a person. Does that mean that any document other than one with a name in it has to be referred under this clause? I made a point of raising this matter with the administrative law committee of the Law Society. I have not moved an amendment to this clause but have raised it in the second reading debate because I think it is important that we clarify that that interpretation is not intended.

Hon Mark Nevill: What do you mean by "referred"? You said the document has to be referred.

Hon PETER FOSS: If a document makes any reference whatsoever to a person's name, I ask whether the matter has to be referred. Clause 33(2) states -

> The agency is not to give access to a document to which this section applies unless the agency has taken such steps as are reasonably practical to obtain the views of the third party . . .

As I said, I have not moved an amendment because, having raised it with the administrative law committee of the Law Society, I was given to understand that this is in common form. It is certainly in the Victorian Act and it may well be in the Commonwealth Act. There the view has not been taken that the mere reference to a name is enough to constitute personal information; there must be something of the character of personal information in it, not merely a passing reference, but it has to go further. The definition of "personal information" refers to "an individual whether living or dead whose identity is apparent". It is not enough merely if the person's identity is apparent; the character of information must be personal

information. In some ways that definition of "personal information" is not so much a definition but an expansion of the ordinary meaning of the term. It is not a pure definition saying it is information about a person whose identity is apparent. It still has to be personal information about them as opposed to being merely a form of identification. I would like the Parliamentary Secretary to clarify that matter because I think it would make a huge difference to the effectiveness of this Bill if it were given too tight a reading. I think it would defeat the whole thing because I imagine that most documents mention somebody's name somewhere and I would not like it thought that every time a document is mentioned somewhere it has to be referred. If the Parliamentary Secretary can confirm that it is his belief that it is to be of a personal nature, I would feel happier about that. Division 4 causes some concern. I must say this is one area where, although generally speaking this is a fairly well laid out Bill, it gets rather confusing. It deals with exemption certificates but it is necessary to go forward to part 4, division 3 on page 51, under clause 77 which deals with a review where an exemption certificate has been issued, to get an idea of what happens. It is necessary to read division 4 of part 2 together with clause 77 to understand the net effect of an exemption certificate. The exemption certificate deals with exempt matter under clauses 1 and 2 of schedule 1. Clause 1 relates to Cabinet and Executive Council and clause 2 relates to intergovernmental relations. They enable the Premier to sign a certificate saying it is exempt matter under clauses 1 or 2. Clause 36(2) states -

> An exemption certificate may be issued in a form that neither confirms nor denies the existence of a document but states that if it did exist it would contain matter that would be exempt matter under a specified provision of clause 1 or 2 of Schedule 1.

Clause 37 states -

> An exemption certificate establishes, without the need for further proof, that the document mentioned in the certificate contains matter that is exempt matter under the provision mentioned in the certificate, or would, if it existed, contain matter that would be exempt matter under the provision so mentioned.

It states under subclause (2) -

> Subsection (1) does not apply to section 77.

That is interesting. It obviously does not bind the commissioner so far. Clause 38 states that an exemption certificate ceases to have effect at the end of two years after it is signed unless it is withdrawn by the Premier or ceases to have effect under section 77 before the end of that period. However, subsection (1) does not prevent the Premier from signing a further exemption certificate in respect of the same document. Going forward to clause 77, it allows the commissioner, on the application of the access applicant, to consider the grounds on which it is claimed that the document contains exempt matter or would, if it existed, contain exempt matter. The clause further states that the agency is a respondent to an application and the Premier is entitled to be a party to proceedings in relation to the application. Subclause (3) states -

> If, after considering the matter, the Commissioner is satisfied that there were no reasonable grounds for claiming that the document contains exempt matter or would, if it existed, contain exempt matter, the Commissioner has to make a decision to that effect, and has to include in the decision the reasons for the decision and the findings on material questions of fact underlying those reasons, referring to the material on which those findings were based.

That sounds pretty good. The certificate has been issued, and if nobody challenges that, it is the end of the matter; but a person can go to the commissioner and ask for it to be reviewed. Subclause (4) states -

> If a decision is made under subsection (3), the exemption certificate ceases to have effect at the end of 28 days after the decision was made unless, before that time, the Premier notifies the Commissioner in writing that the certificate is confirmed.

As soon as the Premier comes back the certificate is effective. Subclause (5) states -

> The Premier has to cause a copy of a notice given under subsection (4) -
>
> (a) to be laid before the Legislative Assembly and the Legislative Council within 5 sitting days of that House after it was given.

Subclause (7) states -

> If the Premier withdraws the exemption certificate before the end of the period of 28 days referred to in subsection (4) the Premier has to notify the Commissioner and each party as soon as is practicable.

The effect of that is that it can be reviewed and the commissioner can say it is not exempt material but, if the Premier within 20 days says that it is confirmed that is the end of the matter.

Hon Mark Nevill: It is transferred to the Parliament.

Hon PETER FOSS: It comes to the Parliament but Parliament cannot grant access to that person. I find that quite offensive for a number of reasons and mainly because it is turning back the clock about 40 years, at least. I refer the House to a decision of the High Court of Australia in 1978 in the case of Sankey v Whitlam, detailed at page 1 in volume 142 of the *Commonwealth Law Reports*. As the name indicates, Sankey v Whitlam was the case involving as defendant Mr Whitlam and others. The others were R.F.X. O'Connor, Dr J.F. Cairns and the Hon Mr Justice Murphy who were being prosecuted for alleged offences under section 86(1)(c) of the Crimes Act of the Commonwealth. In the course of that prosecution a number of documents were sought to be subpoenaed and used. The question arose as to whether they were subject to Executive privilege. The court considered it and held that it was not so much the fact of whether they were subject to Executive privilege, but rather a fairly important point previously decided in the Conway v Rimmer case in the United Kingdom, which is referred to in a number of places in this case. Prior to Conway v Rimmer, it had been considered that the exemption certificate related to Executive privilege by a Minister of the Crown was the end of the matter. If the Minister said it was subject to Executive privilege, then it was subject to Executive privilege. Furthermore, it was thought that Executive privilege overrode any other considerations and that was the end of the matter. Conway v Rimmer was fought in 1958 and is referred to on page 948. It was decided by the High Court, which followed Conway v Rimmer and went further than it, first of all that the court had the right to inspect the documents to determine whether there was Executive privilege or not. The exemption certificate was not the end of the matter, it was a question for the court to decide whether Executive privilege applied to the document. The second point was that even if Executive privilege applied to the documents, it was still a matter of competing public interests and the court could decide that, notwithstanding that Executive privilege applied, there was nonetheless an overwhelming interest in the public to do something else. At page 38 of the report, Acting Chief Justice Gibbs says -

> I must now attempt to state the principles according to which we must decide whether the documents which the Commonwealth seeks to withhold should nevertheless be produced and admitted in evidence, and whether the documents which the Commonwealth is willing to produce should nevertheless be withheld.

Although the Executive can take the point of privilege, another rule is that the Executive privilege must be enforced by the court if it comes to its notice, whether or not anybody has taken the point. It continues -

> For convenience I have spoken of the claims that the documents should be withheld from production as claims to privilege . . .

It then goes into whether that is an appropriate wording. It continues -

> The decision in *Conway V. Rimmer* . . . did more than merely decide that an objection validly taken to the production of a document on the ground that it would be injurious to the public interest is not conclusive; it threw a new light on the principles governing the exclusion of evidence whose admission would be contrary to the public interest. The principles which I am about to discuss apply in relation to oral as well as to documentary evidence, but since in the present case it has been agreed that it would be premature to deal with the objections taken to oral evidence, I may confine my remarks to the application of the principles to documentary evidence.
>
> The general rule is that the court will not order the production of a document, although relevant and otherwise admissible, if it would be injurious to the public interest to disclose it. However the public interest has two aspects which may conflict. These were described by Lord Reid in *Conway V. Rimmer* . . . as follows:

> "There is the public interest that harm shall not be done to the nation or the public service by disclosure of certain documents, and there is the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done."
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> It is in all cases the duty of the court, and not the privilege of the executive government, to decide whether a document will be produced or may be withheld.

That is an important point. It is appropriate that matters of public interest be decided by the court rather than be treated as a privilege of Government. It is ill-advised in a matter such as this to make it subject to a political decision. We are trying to give the ordinary person a right of access to these documents. It may be said that the ordinary person already has access to these documents through the Parliament because any document can be produced if the Parliament so orders. However, we are trying to take this matter out of the political arena and give the ordinary citizen a direct right to documents. If we believe that is right, we should not allow to be left out documents subject to Executive privilege. If documents are not subject to Executive privilege, they should be handed over. If a court decides that the documents are not subject to Executive privilege, why on earth should the matter go to the Parliament? What possible basis would there be for referring it to the Parliament? An independent body which is the highest court in our State has said, "We have looked at these documents and you are wrong. That is our finding. We have read the Act, we have looked at the facts, and the documents do not fall within paragraphs (1) or (2)." Why on earth should the Premier be able to say they do? Why should the Parliament be consulted about whether the Premier is correct? We can be absolutely certain that those members in the same party as the Premier will say, "Of course the Premier is right", and that those people on the other side will say, "Of course the Premier is not right." Where does that get the ordinary citizen? He will be caught in the middle of a political battle when all he wants is access to his documents, documents which the Supreme Court has already decided are not subject to Executive privilege. Why are we making a political battle of this matter when the facts and the law have already been decided against the Executive?

It seems to me to be quite muddled thinking that the Executive cannot trust the Supreme Court to make these decisions. That was the sort of belief that existed prior to Conway v Rimmer in 1968 and in Australia prior to Sankey v Whitlam in 1978. It is a fair time ago that that idea disappeared. Since then, we have had the first Bropho case, where again the concept of the immunity of the Executive, by reason of the hangover from the time when it was a king on a horse, has been dispelled. It seems rather strange to have a Labor Party, which, generally speaking, has an anti-royalist sentiment, putting forward these sorts of concepts of Executive privilege and immunity which are derived from a monarchical system. That seems to be quite foreign to the sorts of pretensions which are being put forward. I cannot understand why members opposite are taking this attitude. Perhaps people who have been in Government for this long tend to get monarchical ideas.

Hon Tom Helm: Not maniacal!

Hon PETER FOSS: That is probably right too.

The decision continues -

> The court must decide which aspect of the public interest predominates, or in other words whether the public interest which requires that the documents should not be produced outweighs the public interest that a court of justice in performing its functions should not be denied access to relevant evidence.

In this case, we do not have that form of conflict because we say that if the documents do fall within those groups, they are not disclosed. There is no competing public interest. The case is even stronger when we are not even making a decision about competing public interest, but where we just say, "Is it in the group?" If it is not, why should it go to the Parliament?

Hon Mark Nevill: Are you not talking here about producing documents as part of a normal legal case?

Hon PETER FOSS: Yes.

Hon Mark Nevill: Freedom of information legislation does not interfere with that.

Hon PETER FOSS: No. I am saying that in a legal case there would also be the further

competing interest about whether a document, even if were subject to Crown privilege, should nonetheless be produced. I am saying that is not the case here because if it were subject to Crown privilege, it would not be produced, and if it were not subject to Crown privilege, it would be produced. The reason I have cited that case is that, in the case of ordinary litigation, the court is allowed to look at the document and to make the decision, not the Executive, and in a legal case the court goes one step further and says, "Not only do we make the decision about whether the document is subject to Crown privilege, but we then also make another decision about whether the Crown privilege is so important that the public benefit to be gained by that would outweigh the public benefit of the document's being allowed into the court case." I am saying that we do not even have that second step, but there seems to be no reason at all why we should not have the first step. We have a law, and why should not that law be interpreted by a court in the normal way? In respect of every other law which we have, the final decision on that law is made by the Supreme Court. In this case, the final decision is made by the Premier.

Hon Mark Nevill: But she is accountable to the Parliament.

Hon PETER FOSS: Yes. However, why have a law where the ultimate tribunal is the Premier? Why do we have a judiciary? The Constitution reveals that the whole point of having a judiciary is that it look at the law, hear the facts, and make decisions on the law. With every other law, that is the situation. However, in this case, the person who looks at the facts and reads the law is the Premier.

Hon Tom Helm: It may be because a political decision needs to be made.

Hon PETER FOSS: It is not a political decision. The Bill states that we will exempt certain documents. If it is not the type of document which is to be exempt, it is not subject to Executive privilege. If we say that the document is subject to Executive privilege - and that would be wrong; it is not subject to Executive privilege because it does not fit within the Bill - why should we be entitled to maintain it simply because we have issued a certificate? We might have a battle in the Parliament about it, but what will happen if we have control of both Houses of the Parliament, which it is likely we will have after the election? What will be the point then of having it go to the Parliament?

Hon Mark Nevill: What is the point of having an FOI Act?

Hon PETER FOSS: If we have an FOI Act, people will not be dependent upon the Parliament at all. The whole point of having an FOI Act is to prevent people from having to rely upon the political system and to give them a direct right of access of their own. People have a right of access now through their parliamentarians. If they really wanted a particular document, they could go to a member of Parliament, and that member could theoretically move that that document be tabled. There are some disadvantages in that. Firstly, if it applied to all documents people wanted we would spend all our time moving motions of that nature in the House. Practical problems would arise as Government members would be constrained by partisan considerations and members of the Opposition would be more inclined to pursue documents which would embarrass the Government.

Hon Tom Helm: There would be no constraint on the Supreme Court in that regard in being answerable to the Parliament, as in the matter of the use of the media during election campaigns and the decision made by the court?

Hon PETER FOSS: I am afraid that the High Court has made a number of political decisions of which I do not approve. I approve of the result, but the idea of High Court judges amending the Constitution, rather than the people of Australia, is wrong.

Hon Mark Nevill: They should interpret it, not turn it on its head.

Hon Derrick Tomlinson interjected.

Hon PETER FOSS: Yes, it has been happening since 1901, and it is getting worse. This is a phenomenon of the High Court and not the Supreme Court. It is a classic example of how things go wrong when the court makes a political decision. It should make only judicial decisions. However, the matter with this legislation is a judicial decision, not a political one.

Hon Mark Nevill: I disagree.

Hon PETER FOSS: I do not know how the Parliamentary Secretary can say that. It is straight law. It reads -

> Matter is exempt matter if its disclosure would reveal the deliberations and considerations of an Executive body, and without limiting that general description, matter is exempt matter if it -
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> (a) is an agenda minute or other record of the deliberations or decisions of an Executive body;
>
> (b) contains policy options or recommendations prepared for submission . . .

It is either exempt matter or it is not. Why should an exemption certificate not be issued if the matter is within that definition? We will have a law and the only basis on which exemptions are defined is in clause 1 of schedule 1. If it does not apply in there, it is not exempt. However, by giving the Premier the opportunity to make a decision the application of the law is taken away from the judiciary. Under our constitution judicial decisions are given to the Supreme Court; under this provision they would be given to the Premier. That is fundamentally flawed. If members read Conway v Rimmer and Sankey v Whitlam, they will realise that it is contrary to the trend of law over the years. To apply this type of provision would be a monarchical decision by which the Executive can make the decision.

We certainly insist on the sovereign right of this Parliament. In the Bropho case Parliament was not affected by discussions about it no longer being a sovereign body in the same way as the Executive. We claim to be sovereign body, and will continue to do so. The only way to do that is to not submit ourselves to the Executive or the judiciary. In our Constitution we run both of those areas.

In the case of the administration of law it is clear that the sovereign-type Executive is just not acceptable. That has been reinforced over the years. The whole idea of having a Constitution has cut back the right of the monarch to, as they say, sit on a horse and lead the army. We have plainly made most things subject to judicial interpretation. Here we have had an arm of the law and an Act of Parliament which say that a person can request information from agencies, but if they are exempt they will be unavailable.

Hon Mark Nevill: What about 2(1)(a)? Surely that is a political decision?

Hon PETER FOSS: Clause 5(2) of schedule 1 should not be part of the Bill at all. If someone wants to justify his or her position, the evidence is submitted to the external arbitrator. That person is either right or wrong. The Parliamentary Secretary is assuming that the court will not pay any attention to the facts. The cases of Sankey v Whitlam and Conway v Rimmer refer to Executive privilege, although not necessarily for a document like this, but based on the public interest. It reads -

> In other cases, however, as Lord Reid said in *Conway v Rimmer*, . . . "the nature of the injury which would or might be done to the nation or the public service is of so grave a character that no other interest, public or private, can be allowed to prevail over it". In such cases once the court has decided that "to order production of the document in evidence would put the interest of the state in jeopardy", it must decline to order production.
>
> An objection may be made to the production of a document because it would be against the public interest to disclose its contents, or because it belongs to a class of documents which in the public interest ought not to be produced, whether or not it would be harmful to disclose the contents of the particular document. In the present case no suggestion has been made that the contents of any particular documents are such that their disclosure would harm the national interest. The claim is to withhold the documents because of the class to which they belong. Speaking generally, such a claim will be upheld only if it is really necessary for the proper functioning of the public service to withhold documents of that class from production. However, it has been repeatedly asserted that there are certain documents which by their nature fall in a class which ought not to be disclosed no matter what the documents individually contain; in other words that the law recognises that there is a class of documents which in the public interest should be immune from disclosure. The class includes cabinet minutes and minutes of discussions between heads of departments . . .

It continues -

> According to Lord Reid, the class would extend to "all documents concerned with

policy making within departments including, it may be, minute . . . and the like by quite junior officials and correspondence with outside bodies":

One reason that is traditionally given for the protection of documents of this class it (sic) that proper decisions can be made at high levels of Government only if there is complete freedom and candour in stating facts, tendering advice and exchanging views and opinions, and the possibility that documents might ultimately be published might affect the frankness and candour of those preparing them. Some judges now regard this reason as unconvincing, but I do not think it altogether unreal to suppose that in some matters at least communications between Ministers and servants of the Crown may be more frank and candid if those concerned believe that they are protected from disclosure.

It further reads -

For instance, not all Crown servants can be expected to be made of such stern stuff that they would not be to some extent inhibited in furnishing a report on the suitability of one of their fellows for appointment to high office, if the report was likely to be read by the officer concerned. However, this consideration does not justify the grant of a complete immunity from disclosure to documents of this kind. Another reason was suggested by Lord Reid in *Conway v Rimmer* . . .

> "To my mind the most important reason is that such disclosure would create or fan ill-informed or captious public or political criticism. The business of government is difficult enough as it is, and no government could contemplate with equanimity the inner workings of the government machine being exposed to the gaze of those ready to criticise without adequate knowledge of the background and perhaps with some axe to grind."

Of course, the object of the protection is to ensure the proper working of government, and not to protect Ministers and other servants of the Crown from criticism, however intemperate and unfairly based. Nevertheless, it is inherent in the nature of things that government at a high level cannot function without some degree of secrecy. No Minister, or senior public servant, could effectively discharge the responsibilities of his office if every document prepared to enable policies to be formulated was liable to be made public. The public interest therefore requires that some protection be afforded by the law to documents of that kind. It does not follow that all such documents should be absolutely protected from disclosure, irrespective of the subject matter with which they deal.

Although it is sometimes categorically stated that documents of this class will not be ordered to be disclosed, at least if proper objection is taken, it has been acknowledged in some authorities that the protection which this class enjoys is not absolute. In *Conway v Rimmer*, . . . Lord Reid recognised one exception - that cabinet minutes and the like can be disclosed when they have become only of historical interest.

In *Lanyon Pty. Ltd.* v. *The Commonwealth*, Menzies J. said . . . that there might be "very special circumstances" in which such documents might be examined. In *Attorney-General* v. *Jonathan Cape Ltd*, . . . Lord Widgery C.J. accepted that no court would compel the production of cabinet papers, but nevertheless refused an application to restrain publication of the diaries of a former cabinet Minister, which revealed, amongst other things, details of cabinet discussions and of advice given to cabinet. He said . . . :". . . it seems to me that the degree of protection afforded to Cabinet papers and discussion cannot be determined by a single rule of thumb. Some secrets require a high standard of protection for a short time. Others require protection until a new political general has taken over."

Later his Lordship said . . .:

> "The Cabinet is at the very centre of national affairs, and must be in possession at all times of information which is secret or confidential. Secrets relating to national security may require to be preserved indefinitely. Secrets relating to new taxation proposals may be of the highest importance until Budget day, but public knowledge thereafter. To leak a Cabinet decision a day or so before it is officially announced is an accepted exercise in public

> relations, but to identify the Ministers who voted one way or another is objectionable because it undermines the doctrine of joint responsibility."
>
> He concluded that there cannot be a single rule governing the publication of such a variety of matters. These remarks, although directed to a different issue, afford useful guidance in considering the present question.
>
> Although the statement that cabinet documents and other papers concerned with policy decisions at a high level ("state papers", as I shall henceforth call them) are immune from disclosure was repeated in *Conway* v. *Rimmer* . . ., it accords ill with the principles affirmed in that case. The fundamental principle is that documents maybe withheld from disclosure only if, and to the extent, that the public interest renders it necessary. That principle in my opinion must also apply to state papers. It is impossible to accept that the public interest requires that all state papers should be kept secret for ever, or until they are only of historical interest.

Leaving aside the Bill for the time being, if a court case takes place, the law is, firstly, that Executive privilege may apply. Whether it applies is decided by the court. That is a combination of fact and law and, to some extent, opinion because of the national interest. The second thing is that the court then weighs up the public interest in keeping Executive privilege and the public interest in the case. The courts have the ability to do that. It is a matter of applying the law - of looking at the facts and of testing the allegations. It is a perfectly normal judicial procedure. That can be done in a court case as well as the further step of deciding whether that Executive privilege should be allowed to stand.

In this case we do not even have the balancing of the two public interests. All we are asking is, does it actually fit within the law, or is the Premier giving a certificate outside the law, and wrongly? Why do we not have that decided by the court? It seems to be quite extraordinary that we are prepared to trust the courts to do it and take a further step of balancing the public interest in an ordinary case. Yet with freedom of information we cannot trust the courts to take even the first step. It runs contrary to the general trend in our community; to the idea of frankness in giving the citizens a right of access. It seems to me to be an "I do not want to let go" type of attitude; we cannot trust anybody else to look at our secrets. Executive Government should be prepared to reconsider that matter.

I refer now to part 3, division 1 - the right to apply for information to be amended. I understand this is the common form of legislation throughout Australia. However, I have some problems with it, particularly clause 44(1)(a). The ability to apply for personal information is a very important part of the Bill. It was suggested by the Opposition, and I note the Royal Commission thinks it is important. Clause 44 reads in part -

> (1) an individual (**"the person"**) has a right to apply to an agency for amendment of personal information about the person contained in a document of the agency if -
>
> (a) the person has had access to the document under this Act or by some other means;
>
> (b) the information has been used, is being used or is available for use by the agency for an administrative purposes; and
>
> (c) the information is inaccurate, incomplete, out of date or misleading.

Why is paragraph (a) included? What if one had not been able to get access to the document? One may have been refused access to it because it was exempt matter or with an exempt agency.

Hon Mark Nevill: Are you concerned that a person needs to have seen it?

Hon PETER FOSS: It may be with the Official Corruption Commission. What if it contains inaccurate information? One would not be able to have access to that document because the Official Corruption Commission is an exempt agency. One may know darn well that the commission has it, but one cannot prove that. The document could be with the Parole Board, the Director of Public Prosecutions, the internal investigations unit of the Department of Corrective Services, the Bureau of Criminal Intelligence, the protective services unit, or the internal affairs branch of the Police Force of Western Australia. Those are the ones most likely to hold nasty information to which one would not be given access. For all I know, the

example I gave earlier concerning the Ombudsman and that field note could be a similar situation. Every time one meets a policeman and he says, "Hang on, you're a trouble maker, aren't you?", one would have a feeling there was something written about one somewhere to which one could not gain access to have it corrected. What does that provision add to the clause? If the Information Commissioner can see the document is there, why should one need to have access to it?

Hon Mark Nevill: If it exists, it might help identify the document. One could go on a wild goose chase.

Hon PETER FOSS: I would rather people did that than have a Kafka-ish situation of chasing something they know exists, but are told they cannot see it and because they cannot see it, it cannot be amended. I can see how the convenience applies, but it is wrong in principle. To make people prove that a document exists before they are allowed to have access to it is a situation straight out of a Franz Kafka story. It is a bureaucratic solution that I think should be deleted.

Clause 44(1)(b) of the clause requires that the information has been, is being, or is available for use by the agency for an administrative purpose. That will create problems for the same reason. How does one know it is being used if one has not had access to it and been denied it because it is with an exempt agency? One really wants someone to fix the information. Those two matters are fundamental.

The next issue is purely a drafting matter, although it has some potential problems. What if the information is out of date and not misleading? What if a record in the State Archives says I am 20 years old?

Hon Derrick Tomlinson: Could I have one?

Hon PETER FOSS: That would be out of date, but it does not make the recent paper misleading. We may have on a Government file a letter that says the person under consideration is named Peter Foss and he is 20 years old and unmarried. When I was 20, that was my age and I was not married, but that is not now the case. Why should we give people the right to correct information that is out of date but is not misleading? If the information is out of date and is misleading, it is already dealt with in paragraph (c). The only reason we would correct it would be if it were inaccurate, incomplete or misleading. Why should we change it if it is not misleading? Under this paragraph, each year I could approach the Government agency to have my record that says I am 20 years old updated to show my correct age and status. If the information is not misleading, what are we worried about? Why do we want to correct the information if it is not misleading? I do not want to labour the point. This seems to me to be a fairly clear point. I suggest that paragraphs (a) and (b) be omitted and the words "out of date" taken out of paragraph (c).

I commend the Government for the provisions in part 4. I am not sure who suggested the excellent idea for the Information Commissioner. I have always been concerned with freedom of information issues. When we talk to people in the Commonwealth Government involved in freedom of information agencies, there seem to be a number of problems. We tend to get a bit of a run around, to put it mildly, when we ask for information under their legislation. There are a number of reasons for that. People do not want to put aside their normal work and go to old files to get information. If people have a guilty conscious about their actions, the last thing they will want to do is to show the relevant documents; yet the applicant is the person who wants to look at those documents. People in charge of files have the primary responsibility for their care.

There are advantages in having a responsible independent person to oversee the provision of information. Firstly, it would be the main job of those people. Secondly, we would be able to identify the cost of the provision of the information more accurately. Government departments always make a huge fuss about how much it costs to comply with freedom of information legislation. Some of the costs shown are a featherbedding exercise. Thirdly, the appointment of an independent person would get around the problem of people who have a guilty conscience about an issue being reluctant to show the documents. Further, this independent person could help a stranger who wants access to documents but does not know where to look. This would be a reasonable compromise. It enables people to look at a file quickly to see what documents should be produced. That is an effective way of dealing with this issue.

We believe the commissioner should be independent of Government and, therefore, the appointment, although by the Governor, should be subject to the approval of both Houses of Parliament. There are a number of suggestions in the report of the Royal Commission about having this approval. We would get an appointee who is satisfactory to both sides of the political fence. One of the good things about this legislation is part 6, which covers miscellaneous matters, where it deals with the burden of proof. Clause 100(2) states that, except where subsection (2) or (3) applies, in any proceedings concerning a decision made under this Act by an agency the onus is on the agency to establish that its decision was justified or that a decision adverse to another party should be made.

Obviously all the cards are in the hands of the agency which knows what is on the file, and it is quite appropriate that the onus should be on it.

Clause 110 is another important one as it deals with a person who conceals, destroys, or disposes of a document, or part of a document, who has knowingly involved in such an act for the purpose solely or otherwise of preventing the agency being able to give access to that document. I am a little concerned about the breadth of this clause. I would like to know whether that can be taken as prospectively doing it, even though an access application is not in train. An example is the yellow tabs that were removed from Mr Burke's files. They were removed to prevent anybody reading what was on them. If freedom of information legislation had been available then, it would have prevented the agency giving access to the documents. I would like to know whether the Government believes I have described this clause correctly.

I have already mentioned the exempt agencies which concern me. I cannot see why this exemption includes some agencies, but not others. The R & I Bank of Western Australia Ltd and the State Government Insurance Commission should not be included. The sorts of commercial information for which they should be exempt is already covered by the clause on exempt matter. Why should they be generally exempt from giving information when they already have all the protection they need?

I find clause 3 in schedule 1, which deals with personal information, puzzling. It makes sense, but I just do not understand it. To some extent this does bear on the question of personal information in the other question I raised. Clause 3 of schedule 1 states -

> ***Exemption***
>
> (1) Matter is exempt matter if its disclosure would reveal personal information about an individual (whether living or dead).
>
> ***Limits on exemption***
>
> (2) Matter is not exempt matter under subclause (1) merely because its disclosure would reveal personal information about the applicant.

I ask the Parliamentary Secretary to work that out.

Hon Mark Nevill: There is a similar provision in the Companies Code.

Hon PETER FOSS: I understand it in respect of subclause (2) but not subclause (1). Subclause (3) reads -

> Matter is not exempt matter under subclause (1) merely because its disclosure would reveal, in relation to a person who is or has been an officer of an agency, prescribed details relating to -
>
> (a) the person;

These make it exempt matter, but it does not get past the problem I raised earlier about whether a person has to consult before he does it. It means that a person does not have to restrict it, but does it allow him to consult?

I am pleased to advise the House that the Opposition supports the Bill.

HON DERRICK TOMLINSON (East Metropolitan) [12.21 am]: I am somewhat reluctant to follow on from Hon Peter Foss because I feel I might be accused of descending from the sublime to the ridiculous, but since we are debating the Freedom of Information Bill, probably one of the most important pieces of legislation to be presented to this Parliament this session, at this ridiculous hour I do not mind being ridiculous.

We have before us a most entertaining piece of legislative rhetoric. We have a freedom from information Bill masquerading as a Freedom of Information Bill; we have a Freedom of Information Bill masquerading as a privacy Bill. I am not quite sure whether it is freedom from information, freedom of information or a privacy Bill. I suggest the confusion between the Freedom of Information Bill and a privacy Bill is that at one stage the Government intended to introduce the two Bills conjointly. For some reason the privacy Bill fell by the wayside. It is part of the Government's perennial excuse that its legislative program is so full it cannot bring the legislation forward. Because its legislative program is so full, what it has done in this Freedom of Information Bill is introduce a series of clauses which are really privacy Bill clauses. Hence we have that confusion between a Freedom of Information Bill and a privacy Bill. On the question of the confusion between freedom of information and freedom from information, this Bill operates in a fashion similar to that of the Equal Opportunity Amendment Bill. Members might recall from the debate we had on that Bill last week it was pointed out that the principal Act operates by exemption. It states that all people are equal except under certain circumstances. In this Bill information is free except under certain circumstances. By these exemptions, this freedom of information becomes freedom from information.

I refer to the rhetoric of the Bill. Clause 3 deals with the objects and intent of the Bill and it states under subclause (1) that the objects of the proposed Act are to -

(a) enable the public to participate more effectively in governing the State; and

Commendable principles of democracy. To continue -

(b) make the persons and bodies that are responsible for State and local government more accountable to the public.

These two principles could have been taken directly from the Royal Commission's second report, which expounded these two very principles as the basic principles of democratic Government. Clause 3(2) states that the objects of this proposed Act are to be achieved by -

(a) creating a general right of access to State and local government documents;

(b) providing means to ensure that personal information held by State and local governments is accurate, complete, up to date and not misleading; and

(c) requiring that certain documents concerning State and local government operations be made available to the public.

Again commendable, but commendable rhetoric. When we turn to clause 20 of the Bill we come to the too hard basket clause. Subclause (1) states -

> If the agency considers that the work involved in dealing with the access application would divert a substantial and unreasonable portion of the agency's resources away from its other operations, the agency has to take reasonable steps to help the applicant to change the application to reduce the amount of work needed to deal with it.

That is stage one of the too hard basket. I refer members again to the rhetoric of clause 3(2). We then run into the too hard basket; if it is too hard and if there is too much work to be done and will divert the resources of the agency, the applicant should be assisted to change his mind. Clause 20(2) states -

> If after help has been given to change the access application the agency still considers that the work involved in dealing with the application would divert a substantial and unreasonable portion of the agency's resources away from its other operations, the agency may refuse to deal with the application.

When we move from rhetoric to reality we have a denial of access on the simple grounds that it is too hard to do what the objectives of the Bill state it is intended to do - give people access to documents. We then turn to clause 21, which states -

> If the applicant has requested access to a document containing personal information about the applicant, the fact that that matter is personal information about the applicant must be considered as a factor in favour of disclosure for the purpose of making a decision as to -
>
> (a) whether it is in the public interest for the matter to be disclosed; or

(b) the effect that the disclosure of the matter might have.

If a person makes an application for documents about himself or herself it is an important factor, according to this clause, in determining whether the disclosure of that document is in the public interest. We have here a confusion between public interest and private rights.

Here we have freedom of information which says that in determining whether an individual has right of information about himself held in a public document we must determine whether his right to personal information is in the public interest. Not only do we have to determine whether the right of access to private information is in the public interest, but also we have to consider the effect the disclosure might have.

Hon Mark Nevill: Reference to exempt documents is in schedule 1.

Hon DERRICK TOMLINSON: Why should it be an exempt document? If we pursue the notion of freedom of information, what should be exempt? I will tell the Parliamentary Secretary what should be exempt: Only a handful of things which are governed by protection of the national security, protection of the national economy, protection of the judicial process, protection of police processes and that is about as far as one can go. So far as this nanny State saying that a document relating to an individual will be taken from that individual or denied him because it is an exempt document is concerned, that is nanny State gone mad. It is certainly not freedom of information - it is freedom from information.

Hon Mark Nevill: It maybe a document the Director of Public Prosecutions has.

Hon DERRICK TOMLINSON: So what? The member is suggesting that because the Director of Public Prosecutions has a document affecting an individual that individual has no right to know what the Director of Public Prosecutions knows about him.

Hon Mark Nevill: That may be a case where it is not in the public interest.

Hon DERRICK TOMLINSON: In that case, it would be covered by the question of protection of judicial or police procedures and that is about as far as it would go. It is certainly denying the individual's right to information about himself or herself.

Hon Peter Foss interjected.

Hon DERRICK TOMLINSON: I think the limitation on police procedures does not relate to the individual himself but to the proper conduct of police activities. I move to the question of refusal of access. This again follows the notion that the State has the right to deny information to an individual who requests it. Clause 23 states -

(4) If a document contains personal information and the applicant, or the person to whom the information relates, is a child who has not turned 16, the agency may refuse access to the document if it is satisfied -

And this is the important thing; not the fact that a minor is being protected but the reason for the denial -

if it is satisfied -

And "it" is the agency holding documents or information about the child -

that access would not be in the best interests of the child -

The "best interests" of the child is a value judgment. This Bill seeks to empower public officials, at whatever level, to make a decision to deny information about a child because that individual adjudges it to not be in the child's best interests -

and the child does not have the capacity to appreciate the circumstances and make a mature judgment as to what might be in his or her best interests.

The assumption there seems to be that the child has made the application. Let us turn to the procedures whereby application is made. Under clause 12 the application has to be in writing, give enough information to enable requested documents to be identified, give an address in Australia where the notice under the Act can be received and give any other information or details required under the regulations and be lodged at an office of the agency with any application fee payable under the regulations. I suggest that any child who might be able to do that would pass any test of capacity to make a judgment as to his appreciation of circumstances of what is in his best interests. I turn to clause 23(5) which states -

> If a document contains personal information and the applicant, or the person to whom the information relates, is an intellectually handicapped person, the agency may refuse access to the document if it is satisfied that access would not be in the best interests of the person.

When are we going to stop being so damn patronising and paternalistic about intellectually handicapped people? Intellectually handicapped people may make application for documents relating to themselves in the form that I have just read to the House with a full written application, identification of the document and explanation of the document so that it can be identified, and any other relevant information. Intellectually handicapped persons, some of whom probably sit on the Government benches, may be adjudged by the agency that it is not in their best interests to have access to the documents.

It is mind boggling to entertain the circumstances in which a public official in an agency can make that judgment on the simple ground that he believes that the intellectually handicapped person would be somehow damaged by gaining access to that information. How does one define an intellectually handicapped person? Is it someone whose IQ is below the norm? If the norm is somewhere between 90 and 110 or 95 and 105, is a person with an IQ of 90 not qualified to have that information? Does a person with an IQ of 80 not qualify? This is nothing more than an insult to the intelligence of this Parliament and the dignity of people who may be deemed to be intellectually handicapped. Even if they are so handicapped, why should they be denied the same civil liberties as every other individual; that is, the right to information about themselves? Because they are on the lower end of the scale of intelligence are they to be denied civil liberties?

Why do we not reverse that and say that those at the upper end of the scale of intelligence, because they too are abnormal, shall not have the same civil liberties? If one is to apply a test of abnormality for the denial of civil rights then one cannot discriminate on abnormality at one end of the scale and not at the other end of that scale. If we were to say that it is not in the best interests of the intellectually handicapped person to have access to documents we should also be saying that under this clause it is not in the best interests of the intellectually superior person to have access to such documents. I see one or two intellectually superior persons sitting smugly in the corner feeling quite secure that we have descended from the sublime to the ridiculous.

Hon Peter Foss: We could say that intellectually superior people have more rights and make it completely illogical.

Hon DERRICK TOMLINSON: The question of exempt matter, which turns this freedom of information Bill into a freedom from information Bill, reaches its climax in schedules 1 and 2. In those schedules the exempt matter and the exempt agencies identify another hypocrisy of the legislation. I have suggested that there are very few conditions which should apply to the exemption of freedom of information. Those exemptions are spelt out clearly in the Victorian Act and in the Commonwealth Act. They relate to documents affecting national security, defence or international relations; Cabinet documents; Executive Council documents and those related to business affairs, and so on.

In schedule 1 of the Bill before us some of that exemption is contained: Cabinet and Executive Council, intergovernmental relations and commercial or business information. I have no objections to those, with the exception that the moment one specifies the exemption of a document, the moment it is defined, the definition becomes an inhibition upon access to information. I illustrate by reference to intergovernmental relations, which describes an exemption as -

> Matter is exempt if its disclosure should reasonably be accepted to damage relations between the Government and any other Government or would reveal information of a confidential nature communicated in confidence of the Government whether directly or indirectly by any other Government.

That, on the surface, is quite reasonable but the application of a reasonable proposition can become unreasonable. I illustrate: As a postgraduate student I poured for 10 years over the proceedings of what was then called the Premiers' Conference. Access to the proceedings of the Premiers' Conference was relatively easy. I simply wrote to the Department of the Prime Minister and Cabinet annually and asked it to send the proceedings of the Premiers'

Conference to me. The department did so. The proceedings were in three parts. I was always sent parts 1 and 3; part 2 related to the Loans Council and the documents were confidential, not to be released. I was not interested in them anyway. I did that for 10 years.

Then, in 1982, the FOI Act was introduced in the Commonwealth. I was no longer allowed access to those documents. They were confidential. So I applied under the FOI Act for access. The response was that someone from Canberra rang to say that it would cost $75, yet the same documents for 10 years had been granted free. It took simply a letter to the Department of the Prime Minister and Cabinet and they were sent to me. If the ministry officers did not have them, they photocopied them and sent them over; but after the FOI Act was introduced it would cost me $75. The person asked me whether I still wish to proceed. I think the $75 was there to inhibit me from proceeding. Being a financially well-endowed postgraduate student, brushing that aside, I said, "Go ahead; $75 is nothing." Then came the next telephone call, "Mr Tomlinson, we are dreadfully sorry but we will have to deny you access." I asked why, because I had had access for 10 years. The answer was, "Under the FOI Act, if the access to the document damages relations between the Commonwealth and the States, they are exempt, so you cannot have them." He said that he had phoned around the States and that Queensland said that I could not have them. I was asked what I wanted them for and I told him. I was asked to wait for a moment and then he said, "Just a moment. It's not there; save your $75." That is a ridiculous consequence of imposing exemptions because we then have the - I hesitate to say it - bureaucratic application of the rule, the inflexibility of the written law, the constraint of the regulation; commonsense goes by the board. Those things which were previously readily available, in the case I illustrated, became no longer available because they threatened relations between the Governments of the Commonwealth and the State.

In his address Hon Peter Foss referred to the 10 years between the conception and the reality of this FOI legislation. It was introduced as a plank of the Labor Party's electoral platform in 1983; in December 1992 it will be given birth. It is a long and troubled gestation. On 12 January 1985, an article published in *The West Australian* under the heading "Delays to WA information Bill attacked" read -

> The State Government is unnecessarily and purposely holding back on its promised freedom-of-information legislation, according to a former WA fighter for civil liberties, Mr Bruce Bell.
>
> Mr Bell, currently head of the New South Wales freedom-of-information committee has returned to Perth to investigate the progress of the legislation in WA.
>
> After discussions at the office of the Attorney General, Mr Berinson, yesterday he is not happy with that progress.
>
> "I was told that the legislation was intended to be introduced in the Burke government 's second term of office . . .
>
> "I was also told that the legislative programme for this year was so full that the Government couldn't fit it in even if it wanted to."

That sounds familiar. I can understand Mr Evan's wry laughter because for how many weeks have we been sitting here twiddling our thumbs waiting for legislation? We find ourselves now at 12.50 am dealing with the legislation, which has finally arrived - only nine years late. Another interesting reason for the delay is given in the newspaper article and attributed to a spokesman for Mr Berinson -

> A spokesman for Mr Berinson said that the Government was not deliberately delaying the introduction of legislation.
>
> The Government was keen to investigate the Victorian legislation and the proposed South Australian legislation to iron out the loopholes.
>
> The Government's commitment to introducing the legislation would be honoured.

In 1985 one of the reasons for the delay was that the Government was waiting for the Victorian legislation to iron out the loopholes. In the Legislative Assembly on Thursday, 9 October 1986 Mr MacKinnon asked a question on notice to the Minister representing the Attorney General -

(1) Has the Government received any approaches from organisations within the community to legislate to provide a "Freedom of Information Act" for Western Australia?

(2) If so, is the Government giving consideration to legislating along these lines?

Mr Dowding replied -

(1) Yes.

(2) The Government is monitoring the operation of the Commonwealth Freedom of Information Act, together with the various State's legislation.

No legislative proposals are currently before the Government.

Following the introduction of a private member's Bill for freedom of information, on 17 September 1989 Mr Hassell asked a question of the Minister for Justice in another place -

(1) Will the Government recommend the provision of a Message so that the Freedom of Information Legislation can be properly debated by the House?

(2) If not, why not?

(3) Is the Minister correctly reported in suggesting that the Bill presented by the Opposition does not go far enough?

(4) If not, what is the position, correctly stated?

(5) Why does the Government not propose amendments to the Opposition Bill?

(6) Will the Government Bill be introduced in the first part of 1990?

(7) If not, when?

The Minister for Justice provided the following reply -

(1)-(7)

The Government will not be recommending the provision of a Message, as the Member's Bill appears to be based largely on the relevant Victorian Act which is itself under comprehensive review.

It is the Government's intention to introduce appropriate legislation on this matter in the next session of Parliament, after there has been sufficient opportunity to take into account reviews such as that proposed in Victoria, and other information relating to the efficiency or otherwise of similar Acts in other States or the Commonwealth.

From 1985 until 1989 the consistent excuse of the Government was, "We are waiting for a review of the Victorian legislation." The thirty-eighth report of the Legal and Constitutional Committee of the Parliament of Victoria on the Victorian legislation was published in November 1989. The very first conclusion, which this Government was waiting for before it could proceed with its own legislation because it wanted the Victorian legislation to iron out the faults before it proceeded, stated -

> The Committee recommends that there be no exemptions by agency under the Freedom of Information Act.

The reason given by the Committee is instructive. Paragraph 3.21 states -

> . . . the Committee is satisfied that the existing exemption provisions of the FOI Act have proven to be effective in protecting confidentiality where this is required for the proper and efficient conduct of government. With very limited exceptions, which will be dealt with shortly, each agency appearing before the Committee to argue that it should be exempted acknowledged that the FOI Act had not forced it to disclose information which it believed should remain confidential. Considering that the Act has now been in operation for seven years, this is an impressive record. Given that record, the Committee does not believe that the case for specific agency based exemptions has been made out.

Schedule 2 of the Bill before the House lists exempt agencies, which include the Legislative Council or a member or a committee of the Legislative Council; the Legislative Assembly or a member or a committee of the Legislative Assembly; a joint committee or Standing

Committee of the Legislative Council and the Legislative Assembly; and a department of the staff of Parliament. Every word spoken in this Parliament is recorded in *Hansard*, which is a publicly available document, yet this Legislative Council and the other place are exempt from the freedom of information legislation. Each of us in this place and our staff are exempt from that legislation. The Government in the rhetoric of this Bill states in clause 3 that the objects of this Act are to enable the public to participate more effectively in governing the State and to make the persons and bodies that are responsible for State Government and local government more accountable to the public. However, the very institution which is the prime institution responsible for governing the State, this Parliament, is exempt. The Parliamentary Secretary is referring me to clause 6, which applies to documents already available. That does apply to *Hansard*. If we as parliamentarians are accountable, not merely through *Hansard*, but in every action that we undertake, if this House should be open to public scrutiny, if this House should facilitate the dissemination of information to enable an informed public to participate more meaningfully in the process of government, how can we claim to be an exempt agency? It is nothing more than stuff and nonsense.

The R & I Bank of Western Australia and the State Government Insurance Commission are also exempt agencies. I can understand to some degree that the commercial operations of the R & I Bank should be protected by a clause which prohibits access to information which would in some way threaten the operations of a bank or any other institution. That is not the case, because the R & I Bank is an exempt agency. I am sure Mr Keith Simpson would be grateful for that, because a few years ago the R & I Bank was not an exempt agency and information about the confidential records of financial transactions of Mr Simpson was leaked.

Hon P.G. Pendal: That cost Mr Pearce his job.

Hon W.N. Stretch: A couple of others in this place would not joke about it either.

HON DERRICK TOMLINSON: Now we have the R & I Bank Ltd blanket exemption and the State Government Insurance Commission blanket exemption. One then starts to wonder about the purpose of this exemption from freedom of information. Let us return to clause 6 of schedule 1, which states -

> (1) Matter is exempt matter if its disclosure -
>
> (a) would reveal -
>
> (i) any opinion, advice or recommendation that has been obtained, prepared or recorded; or
>
> (ii) any consultation or deliberation that has taken place,
>
> in the course of, or for the purpose of, the deliberative processes of the Government, a Minister or an agency;
>
> and
>
> (b) would, on balance, be contrary to the public interest.

If that were to apply, nothing relating to WA Inc would ever have come out. This Government, which is all fired up with enthusiasm for demonstrating openness and accountability, in the light of the first and second reports of the Royal Commission and in the light of the Premier's comments, "Let's not look back on the past; let's look forward to the future", has introduced legislation exempting documents which are absolutely essential if a properly informed public are to participate in the government of this State.

I began my remarks by saying that what we have in this Bill is a conflict between freedom of information and freedom from information. A conflict exists between this freedom of information and a privacy Bill. Those issues are not satisfactorily resolved in this Bill. It is nothing more than a piece of legislative rhetoric. In that legislative rhetoric, given the history and the deviousness of this Government, one cannot help but ask, "Why?" What are the Government's motives? On the one hand it is espousing openness and accountability, but on the other hand it is making sure that enshrined in this law is the very secrecy which enabled all of the excesses of the 1980s to be perpetrated.

Finally, I draw members' attention to the Supplementary Notice Paper where an amendment

is foreshadowed by Hon Mark Nevill, the Parliamentary Secretary in charge of the passage of this Bill, to exempt from the provisions of the Freedom of Information Bill the records of the Royal Commission into Commercial Activities of Government and Other Matters. Mr Deputy President, I smell a rat.

HON MARK NEVILL (Mining and Pastoral - Parliamentary Secretary) [1.03 am]: I am in a dilemma about how many of the questions which have been asked should be responded to in the second reading debate and how many should be responded to during the Committee stage of this Bill. Perhaps if I focus on the clauses which do not have amendments it may help to avoid duplicating the debate.

Firstly, I thank members opposite for their support of the Bill, even if that support is qualified to some extent. The Bill is certainly an improvement on what is available now, even if the changes do not go as far as some members would like. Hon Peter Foss mentioned the Commonwealth and its administrative Bills - the Freedom of Information Act and the Administrative Decisions (Judicial Review) Act - and also the Administrative Appeals Tribunal which was set up by the Commonwealth. A lack of those sorts of provisions has existed in this State. The Freedom of Information Bill is seen as an important step in the process here because, as in the Commonwealth, its first step is to grant access to information before people can appeal decisions and take matters further.

Hon Derrick Tomlinson complained about the lack of other companion Bills coming before the Parliament and mentioned the privacy Bill. That is a valid comment. The Government has been working on the Administrative Decisions (Reasons) Bill, but that will not be debated this session, simply because of the Government's legislative program.

Hon Derrick Tomlinson: That has been said for nine years.

Hon MARK NEVILL: That does not mean that work has not progressed on those Bills. Enough legislation is before members in this session without adding further Bills.

Hon Peter Foss commented on some of the Royal Commission's recommendations. He referred to the difference between recommendations being implemented without delay, with urgency and as a priority. I can honestly say that my interpretation of the degree of priority of urgency of those three was the exact opposite to that of Hon Peter Foss. That probably reflects on the Royal Commission to some extent; that is, that it did not indicate clearly enough which recommendations it considered should be implemented first or in what order they should be implemented.

Some of the comments of Hon Peter Foss do not require reply from me. He was pleased to see that the Bill included local government. He also referred to exempt agencies and exempt matters. He said that he did not think any exempt agencies should exist and that the schedule which covers exempt matters should cover most of those areas. That matter can be dealt with more specifically during the Committee stage. It highlights the differences between approaches. If an agency is exempt, no application for access can be made. The internal appeals process in that case would not apply.

The member referred to clause 16 of the Bill, which relates to charges for access to documents. That can probably be dealt with better in Committee. I agree with his comment about clause 16(1)(g), which states -

> A charge must be waived or be reduced if the applicant is impecunious;

I agree that, if a person is impecunious, he can be set up as a straw man and make applications for journalists and all sorts of other people without any cost. That does, to a large degree, open the floodgates. It would be subject to regulation. Perhaps the regulations could put some controls on the straw man situation to which the member has drawn attention. That amendment was put in the Legislative Assembly by, I think, one of the Independent members. It does not say that a charge must be waived; it says it should be "waived or be reduced". It does not necessarily mean that if a straw man keeps putting in applications for access to documents, charges for those have to be waived in every case. Perhaps, if a person makes a habit of that sort of thing, the fees can be increased or reduced to a lesser extent than previously.

Hon Peter Foss' next comment related to clause 32, documents containing personal information. He asked me to confirm whether the information contained in these documents

needs to be of a personal nature and not just include a person's name. I think it is fairly clear that it has to be more than just a person's name. I wish also to draw attention to clause 32(6) which states -

> This section does not apply if access is given to a copy of the document from which the personal information referred to in subsection (1) has been deleted under section 24.

Therefore, a person can be provided with access to an edited document.

Hon Peter Foss: The problem is that it is incomprehensible.

Hon MARK NEVILL: Not necessarily.

Hon Peter Foss: If you have deleted all the names, you can't tell who is doing what to whom.

Hon MARK NEVILL: The Bill refers to a third party. Another name may not be critical to that document. In that sense, it can be edited and provided to the person.

Hon Peter Foss: Have you ever got a police document with names blanked out?

Hon MARK NEVILL: My lawyers have made application under the Federal Freedom of Information Act. It cost me a lot of money.

Hon Peter Foss: All of the names are obliterated, and you can't tell who is saying what to whom. Every time a name comes up it is blanked out.

Hon MARK NEVILL: A person who gets a document under clause 24 that has matter deleted from it does not have to go through all of the consultation process that he has to go through when it does not contain material that is deleted. The member referred to the Sankey and Whitlam case which I think dealt mainly with matters that come before the courts about gaining access to particular documents. I do not really think that this assists a lot in this situation because that is a normal process that occurs in the courts every day. Freedom of information legislation does not apply in that situation.

Hon Peter Foss: It is an answer; I am not sure it is a very good answer.

Hon MARK NEVILL: To tell the member the truth, the member was reading from the judgment so quickly that I could not follow most of it. I followed it for about 10 minutes. However, with my short term memory, I had difficulty in keeping up with it. I understand there is an indirect relationship between FOI and arguments about access to documents. However, that is a normal matter that occurs in the courts.

The member asked why exemption certificates were in division 4 of the Bill. The main reason for that is that part 2 deals with all general matters relating to the access to documents. A Premier's certificate would prevent that initial access to the document.

The next point raised related to clause 3 in schedule 1. The member saw some contradiction between subclause (1), which states that matter is exempt if its disclosure would reveal personal information about an individual, whether living or dead, and subclause (2), which states that matter is not exempt under subclause (1) merely because its disclosure would reveal personal information about the applicant. The word "merely" is included because the matter may be exempt under another exemption.

Hon Peter Foss: If it is under another exemption why bother having it at all because you end up with two exemptions?

Hon MARK NEVILL: I said by interjection that there is a similar provision in company law. It has changed now but in some cases a second reason is needed to justify an exemption. In relation to clause 110 the member asked whether the provision relating to the destruction of documents applied prospectively. It does apply prospectively because it states that -

> A person who conceals, destroys or disposes of a document or part of a document or is knowingly involved in such an act for the purpose (sole or otherwise) of preventing an agency being able to give access to that document or part of it, -

The next part is the critical section -

> - whether or not an application for access has been made, commits an offence.

Hon Peter Foss: Even if it is not even contemplated and you think that nobody knows it exists and would not be thinking of looking for it, you are still caught as long as in your mind is the possibility of avoiding FOI.

Hon MARK NEVILL: Basically the member is saying that if a person thinks that someone will apply and conceals or destroys the document before an application is made -

Hon Peter Foss: He would definitely be caught up in those circumstances. I am thinking that you have a document, you do not have anybody in mind who might apply, but you think that one of these days somebody might want to look at that document and could get it under FOI. Before that eventuality even occurs, you decide to get in now and destroy it. That should be covered.

Hon MARK NEVILL: That person would be preventing an applicant from getting access to the document, and that situation is covered.

Hon Derrick Tomlinson made some general comments about freedom of information and referred to the Bill as the freedom from information Bill. However many shortcomings he considers the Bill has, every aspect of this Bill provides greater rights of access to documents than is currently the case. Even if the range of exemptions were too broad for the member's liking at this stage, there will always be a need for some exemptions and it is a question of where to draw the line. This Bill goes a long way towards giving people more access to documents. The member also referred to clause 20, which states that an agency may refuse to deal with an application in certain cases. If an application were refused under the provisions of this clause, the applicant could still go to the Information Commissioner and, if need be, to the Supreme Court at the end of the day. The applicant has that right of appeal. I could not understand the member's problem with this clause.

Clause 21 relates to the nature of information to be provided. This clause applies where an exemption contains a public interest test. The fact that it actually applies to the applicant personally must weigh in favour of saying that access is in the public interest.

The next point Mr Tomlinson raised was in relation to his research on the Premiers' Conferences. He mentioned that the information to which he had access disappeared when the Commonwealth FOI Act was proclaimed. That exemption on intergovernmental relations exists in all FOI Acts to my knowledge. If the information is publicly available, access can be obtained under clause 6. The FOI Bill will not apply in situations where the information is already available. Clause 23(5) refers to intellectually handicapped persons. If such persons are denied access to information under this clause, they can apply to the Information Commissioner or to the Supreme Court for a review of that decision. Applications can also be made on such persons' behalf by other persons who are specified in clause 98.

Hon Peter Foss made fairly strong criticism of the exemption for Parliament. That exemption probably has more to do with the separation of powers than any other aspect. The FOI Bill is directed basically at the Executive, and the Parliament should not be subject to an arm of the Executive. If the R & I Bank Ltd and the State Government Insurance Commission were not exempt agencies and had to rely upon specific exemptions, they would be subject to all of the costs of processing applications, when none of their competitors in the private sector would face costs associated with the FOI Bill.

I do not know whether I have answered all of the matters raised during the debate and, if I have not, perhaps they can be dealt with at the Committee stage, when I will only have to remember them one at a time rather than in large tranches. With those comments, I thank members for their support.

Question put and passed.

Bill read a second time.

Committee

The Chairman of Committees (Hon Garry Kelly) in the Chair; Hon Mark Nevill (Parliamentary Secretary) in charge of the Bill.

Clauses 1 to 7 put and passed.

Clause 8: Effect on other enactments -

Hon MARK NEVILL: I move -

Page 4, after line 25 - To insert the following subclause -

(4) The application of subsection (1) is subject to clause 16 of Schedule 1.

Hon PETER FOSS: The Opposition does not see any reason for this amendment, and opposes it.

Hon MARK NEVILL: This amendment relates to the amendment to clause 16 of schedule 1 in respect of the records of the Royal Commission into Commercial Activities of Government and Other Matters. This amendment, together with the amendment which I shall move later to schedule 1, is consequent upon the passage of the Royal Commission (Custody of Records) Bill 1992. That Bill provides for the custody, control and access to documents of the former Royal Commission. The Bill is expressed to apply notwithstanding any other Acts. As currently drafted, the Freedom of Information Bill would also apply to access to documents of the former Royal Commission. That Bill is also expressed to apply notwithstanding other Acts. This amendment, together with the later amendment which I foreshadow, will make it clear that access to documents of the former Royal Commission will be governed by the Royal Commission (Custody of Records) Bill 1992 by excluding those documents from the Freedom of Information Bill.

Hon PETER FOSS: I said that I did not understand the need for this amendment, not that I did not see how it worked. If we have a general rule that there should be access to documents, and we have the exempt matter which is provided for here, surely all of the problems we have got would be covered. I cannot see that there is anything particular about Royal Commission documents which does not allow exempt matter to deal with it completely. Surely that is the reason that exempt matter includes confidential communications, legal professional privilege, deliberative processes, law enforcement, public safety and property security, commercial business information, personal information, and the effective operations of agencies; and even precious metal transactions might lead to some exemptions!

Hon Derrick Tomlinson: A bit of fool's gold there!

Hon PETER FOSS: I was thinking about Brian Burke's trading in gold.

I do not see the need for this amendment. I think that all of the principles are enshrined in schedule 1. Hon Derrick Tomlinson and I have indicated that we think the proper way to go is to do it by the principles. Even though the Government has purported to put it in schedule 1, it is really a schedule 2-type exemption because it does not deal with the content of the matter so much as with an agency.

Hon DERRICK TOMLINSON: In addition to the matters raised by Hon Peter Foss, we should remember that the Royal Commission (Custody of Records) Bill provides that those documents shall be, under the terms of the Library Act, stored in the State Archives. In addition to the documents being stored in the State Archives, the Royal Commissioners, as public agents under the Bill, can specify that certain of those documents can be classified, which means, according to their recommendation, there will be no access for 30 years, 60 years, or whatever it is they specify. In addition to all of the constraints upon access which are contained in the Freedom of Information Bill and in the Library Act, and in addition to all of the constraints upon access which are decided through the operations of the State Archives, I suggest that exempting the Royal Commission documents from the Freedom of Information Bill is quite an unnecessary procedure.

Hon MARK NEVILL: The problem is that both Acts contain provisions which override all other Acts. Therefore, which Act would apply? This amendment will tell us which one to apply. It is a ridiculous situation with two Acts overriding all other Acts. This amendment indicates that the Royal Commission (Custody of Records) Act applies to the documents of the Royal Commission; these would not relate to the FOI legislation.

The constraints which Hon Derrick Tomlinson discussed were covered when the Royal Commission documents Act was passed, so we have been through that argument. It is more of a procedural question. Two identical provisions cannot be competing. One must take precedence so people will know which Act will apply. This amendment makes it clear that

people who want access under the Royal Commission legislation will have to apply under that Act.

Hon PETER FOSS: Frankly, I think the Parliamentary Secretary has the wrong section. Clause 8 is not the priority. The Bill contains a preservation clause with reference to the Legal Aid Commission.

Hon Mark Nevill: It is schedule 1, clause 14, on page 87. We are following exactly the same procedure.

Hon PETER FOSS: I do not like it because the only Royal Commission documents one would want to exempt from this legislation is the type which would apply to the library legislation; that should be preserved. However, no other Act should be preserved. Material that is in the hands of the Director of Public Prosecutions is dealt with separately. If the records are sent to the State Archives and no embargo is in place, why not make it subject to the freedom of information legislation? This will lead to problems as identified by Hon Derrick Tomlinson when he could not obtain records in relation to intergovernmental relationships.

Hon MARK NEVILL: The debate about who should gain access to Royal Commission documents was covered comprehensively in the debate on the Royal Commission legislation.

Hon Peter Foss: It deals with custody and not access.

Hon MARK NEVILL: Which Act would the member use to apply for records?

Hon PETER FOSS: Royal Commission documents at the moment are in the hands of the Royal Commissioners or the Director of Public Prosecutions. Otherwise they will soon be on their way to the Library Board. If they go to the Library Board and they are subject to an embargo, I would agree that the embargo should apply. If they are not subject to an embargo, access should be gained through the freedom of information legislation. Whether it is possible to obtain access through other legislation is a matter of some interest.

Hon MARK NEVILL: The question of access arises in the Royal Commission (Custody of Records) Act. This shows the difficulty in trying to read the two measures together, and highlights the need for some direction as to which Act will apply for certain information.

Hon Peter Foss: It does not say that. It makes an exempt matter. If it said that it did not take precedence over the custody of records legislation, I would understand it. Why make it subject to that Act rather than clause 16? If you want to do that, why not make it subject to the Act rather than part of this legislation?

Hon MARK NEVILL: I am advised that it is basically a drafting issue. That is the way that Parliamentary Counsel said it could be best handled this way.

Hon PETER FOSS: The clause should be postponed. I intend to vote against the Government's clause 16. If we postpone this clause and deal with clause 16, we could deal with the amendment then.

Further consideration of the clause postponed, on motion by Hon Mark Nevill (Parliamentary Secretary).

Clauses 9 to 37 put and passed.

Clause 38: Duration of certificate -

Hon PETER FOSS: I move -

Page 25, after line 18 - To insert the following new paragraph -

(c) it ceases to apply by reason of an order under section 85(4),

Page 25, line 20 - To insert after "subsection (1)" the following -

other than paragraph (c),

This will take into account the fact that the court makes an order under clause 85(4). There are certain consequences as to the duration of the certificates.

Hon MARK NEVILL: It would be helpful if we postponed the amendment until after we have dealt with clause 85 because it is consequential on that amendment. I move -

To postpone this amendment.

Hon PETER FOSS: I do not want to do that; this is a fairly minor amendment. I realise it is dependent upon clause 85, but if I do not receive support for this amendment, it is not fatal to clause 85. I would like to test the vote on this issue to see, at least, who is awake, apart from anything else.

Question put and negatived.

Hon MARK NEVILL: Will Hon Peter Foss please explain what is an order under clause 85(4). There is no order from what I can see.

Hon Peter Foss: It will be part of new clause 85.

Hon MARK NEVILL: The amendment does not make any sense without the new clause in the Bill. It would be therefore better if we postponed the matter.

The CHAIRMAN: We cannot do that because the decision has been made not to postpone it.

Hon MARK NEVILL: The Government will oppose the amendments because they do not make sense.

Division

Amendments put and a division called for.

Bells run and the Committee divided.

The CHAIRMAN: Before the tellers tell I give my vote with the Noes.

Division resulted as follows -

Ayes (14)

Hon J.N. Caldwell	Hon Peter Foss	Hon W.N. Stretch
Hon George Cash	Hon P.H. Lockyer	Hon Derrick Tomlinson
Hon E.J. Charlton	Hon Murray Montgomery	Hon D.J. Wordsworth
Hon Reg Davies	Hon N.F. Moore	Hon Margaret McAleer
Hon Max Evans	Hon P.G. Pendal	*(Teller)*

Noes (13)

Hon J.M. Berinson	Hon Kay Hallahan	Hon Sam Piantadosi
Hon T.G. Butler	Hon Tom Helm	Hon Bob Thomas
Hon Kim Chance	Hon B.L. Jones	Hon Fred McKenzie
Hon Graham Edwards	Hon Garry Kelly	*(Teller)*
Hon John Halden	Hon Mark Nevill	

Pairs

Hon Barry House	Hon Doug Wenn
Hon Muriel Patterson	Hon Tom Stephens
Hon R.G. Pike	Hon Cheryl Davenport

Amendments thus passed.

Clause, as amended, put and passed.

Clauses 39 to 44 put and passed.

Clause 45: Right to apply for information to be amended -

Hon PETER FOSS: I move -

Page 29, lines 7 to 11 - To delete the lines.

I dealt with this adequately during the second reading debate.

Hon MARK NEVILL: I oppose the amendment moved by Hon Peter Foss. Clause 45(1)(a), which he intends to delete, is included to make it clear that a person may apply to correct personal information contained in a document of an agency however the document was obtained. It is correct that the clause will require the person to have had access to it and not merely have heard about the document. It is unlikely that a person who has not had access to a document would be in a position to identify the document or the corrections required.

Clause 45(1)(b) is included to make it clear that an agency cannot be required to correct a document which it holds without making any use of it. For example, an agency should not be required to correct a general reference or fiction book held in its library.

Division

Amendment put and a division called for.

Bells rung and the Committee divided.

The CHAIRMAN: Before the tellers tell, I cast my vote with the Noes.

Division resulted as follows -

Ayes (14)

Hon J.N. Caldwell	Hon Peter Foss	Hon W.N. Stretch
Hon George Cash	Hon P.H. Lockyer	Hon Derrick Tomlinson
Hon E.J. Charlton	Hon Murray Montgomery	Hon D.J. Wordsworth
Hon Reg Davies	Hon N.F. Moore	Hon Margaret McAleer
Hon Max Evans	Hon P.G. Pendal	*(Teller)*

Noes (13)

Hon J.M. Berinson	Hon Kay Hallahan	Hon Sam Piantadosi
Hon T.G. Butler	Hon Tom Helm	Hon Bob Thomas
Hon Kim Chance	Hon B.L. Jones	Hon Fred McKenzie
Hon Graham Edwards	Hon Garry Kelly	*(Teller)*
Hon John Halden	Hon Mark Nevill	

Pairs

Hon Barry House	Hon Doug Wenn
Hon Muriel Patterson	Hon Tom Stephens
Hon R.G. Pike	Hon Cheryl Davenport

Amendment thus passed.

Hon PETER FOSS: I move -

Page 29, line 12 - To delete the passage ", out of date".

I have amply covered this amendment, and I do not wish to speak further.

Hon MARK NEVILL: I oppose the amendment. The addition of those words would not limit the clause. It gives it an extra ground. It expands the ground on which someone can apply for an amendment to a document containing personal information about that individual. I do not see that the deletion of the words will narrow the ground on which the document can be amended, and these words are in the legislation in all the other jurisdictions.

Division

Amendment put and a division called for.

Bells rung and the Committee divided.

The CHAIRMAN: Before the tellers tell, I cast my vote with the Noes.

Division resulted as follows -

Ayes (14)

Hon J.N. Caldwell	Hon Peter Foss	Hon W.N. Stretch
Hon George Cash	Hon P.H. Lockyer	Hon Derrick Tomlinson
Hon E.J. Charlton	Hon Murray Montgomery	Hon D.J. Wordsworth
Hon Reg Davies	Hon N.F. Moore	Hon Margaret McAleer
Hon Max Evans	Hon P.G. Pendal	*(Teller)*

Noes (13)

Hon J.M. Berinson	Hon Kay Hallahan	Hon Sam Piantadosi
Hon T.G. Butler	Hon Tom Helm	Hon Bob Thomas
Hon Kim Chance	Hon B.L. Jones	Hon Fred McKenzie
Hon Graham Edwards	Hon Garry Kelly	*(Teller)*
Hon John Halden	Hon Mark Nevill	

Pairs

Hon Barry House	Hon Doug Wenn
Hon Muriel Patterson	Hon Tom Stephens
Hon R.G. Pike	Hon Cheryl Davenport

Amendment thus passed.

Clause, as amended, put and passed.

Clauses 46 to 55 put and passed.

Clause 56: Appointment and terms and conditions -

Hon PETER FOSS: I move -

Page 37, line 7 - To delete the word "The" and substitute the following words -

Subject to the approval of both Houses of Parliament, the

This amendment is to pick up a general trend with regard to independent officers who will be supervising the accountability of Government. We wish to make the appointment of the commissioner subject to the approval of both Houses of Parliament. The change is obvious. The reason for it is a philosophical one. I believe it is appropriate that the Parliament should have control over the appointment.

Hon MARK NEVILL: I oppose the amendment. The Auditor General and the Ombudsman are appointed by the Governor and this amendment will mean that the Information Commissioner cannot be appointed without the approval of Parliament. If Parliament is not sitting an appointment cannot be made, and the legislation cannot operate without an Information Commissioner. Given that Parliament is scheduled to rise this week, this amendment, if passed, would mean that this legislation would not be operative until some time after the Parliament resumed next year.

The Minister in charge of this Bill gave an undertaking in the Legislative Assembly to provide the Opposition with a list of the names of the applicants the panel considers together with the recommendations of the panel. He said that if the Opposition believed that another person on the list should be considered he would advise the panel accordingly and ask it to reconsider its recommendation. The Minister has given this clear undertaking to the Opposition.

The amendment does not confirm the practice in other comparative positions and I put it to the Committee that the amendment will create problems, especially with the Parliament rising this week.

Hon PETER FOSS: I realise that it is not consistent with the practices of similar appointments in other States or the appointment of independent parliamentary officers. I refer to recommendation 31(a) of part II of the Royal Commission's report dealing with the Auditor General, the Ombudsman, the Electoral Commissioner and the proposed Commissioner for Public Sector Standards and Commissioner for the Investigation of Corrupt and Improper Conduct. Each of these persons are of a similar independent nature. Recommendation 31(b) states -

> *Appropriate legislative arrangements be made for the participation of the Parliament, ordinarily through its committee system, in the processes leading to the nomination of a person for appointment to each of these offices.*

We are dealing with principle, not expediency, and that is set out clearly in recommendation 31.

This Government must realise there is a change coming to this State because of the Royal

Commission's report. It is not good enough to say that appointments have not been done in this way before. We will be doing it in the future and we will do it with this officer now. The notion that the Government will not fill the position because Parliament is not sitting is wrong because under clause 59 an acting Information Commissioner can be appointed and in due course the Parliament can then appoint the Information Commissioner.

Hon MARK NEVILL: If this appointment is made subject to the approval of both Houses of Parliament only one name will be put forward at a time. Presumably we will have to keep going through the list of applicants, one by one, until a suitable applicant is appointed. I am advised that an acting Information Commissioner cannot be appointed until an Information Commissioner has been appointed.

Hon Peter Foss: It does not say that in clause 59. Subclause (c) states when the office is vacant.

Hon MARK NEVILL: My advice is that legal opinion states that an acting commissioner can only be appointed when the office becomes vacant.

Hon Peter Foss: It does not say that. We will have to debate it when we come to clause 59 to make sure that the Opposition's intention is clear in *Hansard.*

Hon MARK NEVILL: Subclause (2)(b) covers when the commissioner has been suspended and paragraph (c) covers when the office of commissioner is vacant.

Hon Peter Foss: It says when the office is vacant, not when it becomes vacant. I agree with paragraphs (a) and (b) but not with (c).

Hon MARK NEVILL: An acting Information Commissioner cannot be appointed until the position of Information Commissioner becomes vacant.

Division

Amendment put and a division called for.

Bells rung and the Committee divided.

The CHAIRMAN: Before the tellers tell I give my vote with the Noes.

Division resulted as follows -

Ayes (14)		
Hon J.N. Caldwell	Hon Peter Foss	Hon W.N. Stretch
Hon George Cash	Hon P.H. Lockyer	Hon Derrick Tomlinson
Hon E.J. Charlton	Hon Murray Montgomery	Hon D.J. Wordsworth
Hon Reg Davies	Hon N.F. Moore	Hon Margaret McAleer
Hon Max Evans	Hon P.G. Pendal	*(Teller)*
Noes (13)		
Hon J.M. Berinson	Hon Kay Hallahan	Hon Sam Piantadosi
Hon T.G. Butler	Hon Tom Helm	Hon Bob Thomas
Hon Kim Chance	Hon B.L. Jones	Hon Fred McKenzie
Hon Graham Edwards	Hon Garry Kelly	*(Teller)*
Hon John Halden	Hon Mark Nevill	

Pairs	
Hon Barry House	Hon Doug Wenn
Hon Muriel Patterson	Hon Tom Stephens
Hon R.G. Pike	Hon Cheryl Davenport

Amendment thus passed.

Clause, as amended, put and passed.

Clauses 57 and 58 put and passed.

Clause 59: Acting Information Commissioner -

Hon PETER FOSS: I turn to the circumstances under which a commissioner can be appointed. I was concerned initially whether an acting commissioner could be appointed. It appears to me quite clearly that he can. Clause 59(2) states -

An appointment may be made under this section -

(c) when the office of Commissioner is vacant.

Under clause 55(1) an office of Information Commissioner is created. Therefore, as soon as the Bill is passed the office is created and is not filled so it is vacant. I know that under many Acts someone can only act in a capacity for someone else. This is not one of those Acts. The office is created and the Governor may then appoint a person to act in the office of commissioner as set out in clause 59(2)(c). The drafting has been done in such a way as to permit an acting commissioner if a commissioner has not been appointed. It would be wise of the Parliamentary Secretary not to disagree with me here as I am sure he would like that to be the situation.

Hon MARK NEVILL: When the legislation comes into operation we will probably need the ability to appoint an acting information commissioner. My legal advice from the draftsperson is that an information commissioner must be appointed before an acting commissioner can be appointed.

Hon PETER FOSS: I understand that that may be the legal advice given. However, the intention of this Parliament is what counts. I believe it is the intention of both parties that we appoint an acting information commissioner when the office is vacant and when this legislation is passed that position will be vacant.

Hon MARK NEVILL: I must accept that that is the case.

Clause put and passed.

Clauses 60 to 62 put and passed.

Clause 63: Functions of Commissioner -

Hon MARK NEVILL: I move -

Page 43, line 5 - To delete "agency" and substitute "agency but is not a Minister".

Page 43, line 6 - To delete "is the" and substitute "is a".

Page 43, line 8 - To delete the line.

Each of the amendments just moved is of a drafting nature and is required as a consequence of the amendment to this clause in the Legislative Assembly which sought the addition of clause 63(3)(b). The amendments do not alter the substance of the provision and simply ensure consistent drafting.

Amendments put and passed.

Clause, as amended, put and passed.

Clauses 64 to 84 put and passed.

Clause 85: Appeals to Supreme Court -

Hon PETER FOSS: I move -

Page 56, line 14 - To delete "a" where it first occurs and substitute "any".

Two effects arise from this and the next amendment I am suggesting. The first will widen the power to appeal to the Supreme Court on any decision of the commissioner relating to an application. The second will specifically allow an appeal to the Supreme Court in relation to clause 77(3) which relates to an exemption certificate and against the Premier confirming a certificate, clause 77(4), and then to provide that the Supreme Court is entitled to look at the documents and make an order that the exemption certificate no longer applies.

Hon MARK NEVILL: If this amendment to delete "a" and substitute the word "any" is allowed it would allow an appeal on every ground. It would allow an appeal on questions of law to the Supreme Court on any decision of the Information Commissioner such as those related to minor matters such as amounts of advanced deposits which should be paid. Such an amendment would only benefit wealthy applicants and third parties who could afford to take matters to the Supreme Court. It would also allow considerable delay in the processing

of applications and turn this legislation into a lawyer's feast. I do not oppose the amendment.

Amendment put and passed.

Hon PETER FOSS: I move -

Page 56, lines 15 to 24 - To delete all words after the word "application" and to substitute the following -

(2) An appeal lies to the Supreme Court from a decision -

(a) of the Commissioner against an access applicant pursuant to section 77(3); and

(b) by the Premier confirming a certificate pursuant to section 77(4).

(3) The Supreme Court shall be entitled to access to and to view documents for the purpose of determining an appeal pursuant to subsection (2).

(4) The Supreme Court may on an appeal pursuant to paragraph (2)(b) order that an exemption certificate no longer apply to a document or to a class of documents.

I have maintained the deletions in proposed subsection (1) and I have deleted the last two lines of proposed subsection (2). The net result is that the exceptions in proposed subsection (2) are retained.

Hon MARK NEVILL: That is an acceptable amendment.

Amendment put and passed.

Hon PETER FOSS: I move -

Page 57, lines 7 and 8 - To delete the lines.

Hon MARK NEVILL: The amendment is acceptable.

Amendment put and passed.

Clause, as amended, put and passed.

Clauses 86 to 114 put and passed.

Schedule 1 -

Hon MARK NEVILL: I move -

Page 85, line 17 - To insert after "officer" the words "or person".

This is a drafting amendment. The addition of the words "or person" in subclause (5)(b) under the heading "exemptions" are necessary to ensure consistency with subclause (5)(a) which was amended in the Legislative Assembly by the addition of the words "or by a person on behalf of an agency".

Amendment put and passed.

Hon MARK NEVILL: I move -

Page 88, after line 6 - To insert the following clause to stand as clause 16 of the Schedule -

16. Records of Royal Commission into Commercial Activities of Government and Other Matters

Exemption

Matter is exempt matter if it is a record of the Royal Commission within the meaning of the *Royal Commission (Custody of Records) Act 1992* or an extract from or a copy of, or of part of, such a record.

The amendment relates to the amendment to clause 8 which we postponed earlier. The amendment will include the records of the Royal Commission as exempt records. If that is successful the following amendment to clause 8 will make it quite clear that this Bill does not apply to these records and the Royal Commission (Custody of Records) Act will apply. I ask members to support the amendment.

Hon PETER FOSS: The Opposition is not prepared to support the creation of a further exemption for the Royal Commission (Custody of Records) Act. Exempt matters are covered adequately by this legislation and a proposed amendment to clause 8 will deal with the problem of which legislation takes precedent. It will set the regime but not create a separate set of exempt matters.

Hon MARK NEVILL: The records of the Royal Commission should be exempt under this legislation and the Royal Commission (Custody of Records) Act should be the Act by which people apply to obtain access to those records.

Amendment put and negatived.

Schedule, as amended, put and passed.

Postponed clause 8: Effect on other enactments -

Hon Mark Nevill was granted leave to withdraw his amendment.

Hon PETER FOSS: I move -

Page 4, after line 25 - To insert the following subclause -

(4) The application of subsection (1) is subject to the *Royal Commission (Custody of Records) Act 1992*.

Amendment put and passed.

Postponed clause, as amended, put and passed.

Schedule 2 put and passed.

Title put and passed.

Report

Bill reported, with amendments, and the report adopted.

Third Reading

Bill read a third time, on motion by Hon Mark Nevill (Parliamentary Secretary), and returned to the Assembly with amendments.

BUSH FIRES AMENDMENT BILL

Second Reading

Debate resumed from 25 November.

HON GEORGE CASH (North Metropolitan - Leader of the Opposition) [2.46 am]: The Opposition supports the Bill. Members who have taken an interest in the Bill, which encompasses 25 pages, will know that it contains three areas of change. The first is the composition of the Bush Fires Board and the accountability of the board; the second is compensation payable to volunteer bushfire fighters who suffer an injury while carrying out their duties; the third is to allow people to use gas powered cooking appliances during summer months.

The current Bush Fires Board comprises 16 persons. They are the Executive Director of the Department of Land Administration, who is currently the chairman of the board, six persons, at least five of whom are actively engaged in the business of farming, three persons nominated by the Minister to whom the administration of the Department of Conservation and Land Management Act is committed, a person nominated by the Minister for Agriculture, a person nominated by the Western Australian Government Railways Commission, a person nominated as a representative of the insurance industry, a person nominated by the Commissioner of Police, a person appointed as a representative of the sawmilling industry and a person nominated by the regional director for the State of the Bureau of Meteorology. The Government in its wisdom has recognised that a board of 16 persons is unwieldy and has decided that that number should be reduced. The second reading speech suggests that the board should be reduced to nine persons. However, if one studies the Bill it is clear there is to be in excess of nine persons. Clause 5, proposes an amendment to section 8(3) of the Act and indicates that the Minister can appoint such persons having relevant specialised knowledge or experience as the Minister may from time