

## ACCESS TO JUSTICE

### Finding the law

#### KATHRYN COLE discusses the availability of legislative materials.

*Checks and Imbalances*, the second report of the Senate Standing Committee on Legal and Constitutional Affairs Cost of Justice inquiry, and the House of Representatives Committee on Legal and Constitutional Affairs report, *Clearer Commonwealth Law*, recently focused attention on a variety of issues concerning legislation. This brief examines three of those issues:

- the availability of legislation,
- the difficulty of gaining access to extrinsic aids for the purpose of assisting to interpret legislation, and
- public notification of subordinate legislation.

The first two matters are relevant to users of legislation and explanatory materials who lack the financial resources that are often necessary to ensure ready access to those materials. The third issue is important as it could open the way for much greater public consultation in the process of making subordinate legislation – a process which at present does suffer extensive public scrutiny.

#### Availability of legislation

The House of Representatives Committee received few complaints about problems caused by delays between the enactment of legislation and its publication. More problematic was the delay in publishing official consolidations of legislation. Many major pieces of legislation which impact critically on citizens' lives are amended several times each year. This means that consolidations (consolidated reprints of Acts) are often out of date almost as soon as they are published (paras 11.24-11.25).

The need for readier access to consolidated legislation was highlighted by the extent to which legislation is consolidated 'unofficially'. The Committee's report noted that the lack of up-to-date official consolidations has resulted in private publishers producing loose-leaf services. For users of legislation, the costs of purchasing these services is very high, often putting the publications beyond the reach of groups and organisations with limited resources. In addition, people and organisations (including government departments) with a particular interest in a piece of legislation maintain their own 'unofficial' consolidations of legislation. Maintenance of such a resource has significant cost implications. For example, the Department of Social Security advised the Committee that it produces unofficial consolidations of the *Social Security Act 1991* for distribution to staff and welfare groups. Each consolidation costs about \$65,000 to produce. The Department advised the Committee that it expected to produce three consolidations in the 1992-93 financial year and at least four the next year (paras 11.37-11.39).

The electronic dissemination of legislation was canvassed by the House of Representatives Committee, which noted that though important, this method of access to legislation

... is no substitute for an adequate system of publishing printed (and reprinted) legislation. The cost of electronic access and the special skills needed to operate systems for electronic access means that not everyone will be able to gain access to legislation electronically. Printed legislation is likely to be more accessible for many people for many years to come. [para. 11.56]

The Committee recommended that:

The Attorney-General's Department, in conjunction with public and private sector partners as appropriate, should, by 30 June 1994:

- (a) consolidate, in electronic form and as the official consolidation, all Commonwealth primary [Acts] and subordinate [regulations, etc.] legislation;
- (b) publish, in printed form, a complete consolidation of all Commonwealth primary and subordinate legislation; and
- (c) put in place means of ensuring ready public and parliamentary access to the complete consolidation in electronic form. [para. 11.66]

A similar recommendation was made by the Senate Committee (recommendation 12).

In addition, the House of Representatives Committee 'encouraged' consolidation of each piece of legislation as soon as possible after it was amended.

While production of a complete consolidation of all Commonwealth primary and subordinate legislation is a laudable objective, in the current climate of financial restraint it may not be achievable. Given the volume of legislation which is enacted each parliamentary sitting, a consolidation would be out of date before it hit the bookstands. The speedy, regular production of pamphlet reprints may be a more efficient use of resources.

#### Extrinsic aids to statutory interpretation

Ease of access to extrinsic material has become increasingly important since the enactment in 1984 of s.15AB of the *Acts Interpretation Act 1901*, which permits courts to examine extrinsic material in interpreting legislation. Such materials include explanatory memoranda, second reading speeches, relevant parliamentary committee and royal commission reports and Law Reform Commission reports.

The accessibility of extrinsic aids to interpretation of the law was noted in submissions to the House of Representatives Committee. While some departments distribute extrinsic material to clients, or otherwise make it available (for instance, through commercial publishers) the Australian Law Librarians' Group observed in its submission to the Committee:

Location of legislative sources of law is made increasingly difficult as a range of interpretative materials is required.

...

Explanatory memoranda that accompany bills are difficult to acquire, as their access is strictly limited by publishing policies which limit their numbers. Explanatory statements which accompany statutory rules are not offered for sale and generally are inaccessible, although they are public documents. [para. 11.50]

The reported difficulty in gaining access to explanatory material is a serious matter. Less well-off members of the

community may often have greater difficulty in gaining access to material of that kind and, consequently, are at a disadvantage compared with those who can afford to purchase commercial services.

The Committee concluded that explanatory materials should be made readily available. It recommended that the Department of the House of Representatives and the Department of the Senate should establish and maintain a public-access database containing the text of materials which may be used to assist in the interpretation of legislation (para. 11.71).

In addition, the Committee recommended that the Office of Legislative Drafting (that section of the Attorney-General's Department responsible for drafting most subordinate legislation) establish and maintain a public-access database of the text of the explanatory statement tabled in Parliament with each subordinate legislative instrument (para. 11.72).

While the Committee recommended that extra resources be granted to the Office of Legislative Drafting and the Departments of the House of Representatives and the Senate to establish and maintain the databases that the Committee advocated, it did not address the ticklish question of costs of public access. Moreover, it is not clear why the same arguments (the costs and the skills needed) that the Committee expressed against the electronic distribution of legislation do not apply in relation to extrinsic material. Presumably, the costs of delivering such information electronically would be quite high and, once again, would disadvantage those with fewer resources.

### Subordinate legislation – public notification

Subordinate legislation often affects people's lives as much as does primary legislation. Subordinate instruments must be tabled in Parliament within a specified period and may be disallowed by either House of the Parliament. However, subordinate legislation is not subject to the same kind of parliamentary scrutiny as Acts. The Senate Committee considered that there should be greater opportunity for the public scrutiny of subordinate legislation. The Committee considered that the notification procedure for the Commonwealth should include the following features:

- Before making a statutory rule, each department or agency should publish a notice in the *Commonwealth of Australia Gazette* and any other source which the proponent agency considers necessary to reach those affected by the proposed rule. An exception would be made in cases of emergency or on cost-benefit grounds or where the legislation is sensitive on economic, political and intergovernmental grounds. Use of the exceptions should be closely examined by the Senate Standing Committee on Regulations and Ordinances.
- The notice should give a summary of the proposed rule, state the reason for making it and give the statutory authority for it.
- Members of the public should have the right to comment in writing on the proposed statutory rule. The department could provide an opportunity for oral hearings.
- A minimum of 30 days for submitting comments should be given and the department should then be required to write a report summarising comments and addressing the con-

cerns raised. The report should be tabled in Parliament and made publicly available along with an explanatory statement (paras 2.103-2.105).

The Senate Committee recommended that a *Legislative Instruments Act* be enacted to cover all subordinate legislation, that a system of prior public notification be implemented where subordinate legislation is contemplated and that all subordinate legislation be regularly consolidated and indexed to enable it to be easily located (recommendation 11).

In view of the reach and importance of subordinate legislation, these recommendations are worth serious consideration, despite their cost implications.

*Kathryn Cole is a Canberra lawyer.*

## POLICE

### Police powers extended

**DANNY SANDOR and ROB WHITE discuss the Victorian Government's bid to grant extensive powers to police.**

The *Crimes Amendment Bill 1993* is the most recent attempt by the Victorian Government to grant police extensive powers in the areas of demanding citizens' names and addresses, fingerprinting suspects and obtaining forensic samples. The proposed legislation substantially increases the powers of the police, while simultaneously decreasing their accountability to the community at large.

#### Name and address powers

Under current Victorian law, there is no general power to demand a citizen's name and address. Refusal is not considered obstruction of police. The Bill introduces a new sweeping power to demand name and address. A citizen will be guilty of a summary offence and liable to a level 13 fine for refusal or for giving an address that is not 'full and correct'.

To demand name and address, a member of the police force will merely need to believe on reasonable grounds that the person has committed or is about to commit an offence, or that the person may be able to assist in the investigation of an indictable offence which has been committed or is suspected of having been committed.

The proposed name and address laws do not expressly recognise that there are reasonable excuses, for example, not understanding English or the officer not being in uniform. The power would not even be confined to circumstances where the citizen's identity was unknown.

The power is an exceptionally powerful tool for harassment and potential abuse. This is particularly relevant to the policing of young people. A major source of resentment on the part of young people is the use of 'move on' and 'name