Recommendations

The Senate Standing Committee on Legal and Constitutional Affairs Report on the Operation and Administration of the Freedom of Information Legislation

1. After the Government has responded to this report, the operation and administration of the *Archives Act* 1983 be reviewed by either the Senate or the House of Representatives Standing Committee on Legal and Constitutional Affairs from the viewpoint of congruence between the two Acts. (para. 1.25)

2. As soon as amendments have been determined and enacted, the *FoI Act* be reprinted. (para. 1.30)

3. If no privacy legislation is enacted, s.3 be amended to incorporate appropriate reference to the right to seek amendment of personal records. (para. 3.4)

4. Section 48 be amended by the deletion of the clause 'who is an Australian citizen, or whose continued presence in Australia is not subject to any limitations as to time imposed by law'. (para. 3.33)*

5. The *FoI Act* be amended to provide that, where the consent of the person about whom the document contains personal information is necessary before the document may be released, charges should be imposed upon the applicant upon the same basis as would apply if the person whom the document contained personal information were the FoI applicant. (para. 3.42)

6. Charges reflecting full cost recovery be applied in respect of applications for access to documents by a person whose presence in Australia, at the time of lodging the FoI application, is illegal by reason of the applicant's lack of possession of a relevant lawful entrance/residence permit. (para. 3.44)

7. The Government take steps to require people seeking access to personnel documents to seek access under the Guidelines contained in the Personnel Management Manual which was issued by the then Public Service Board rather than under the *FoI Act*. (para. 3.52)

8. Recourse to the *FoI Act* be available only where access requests under the Guidelines contained in the Personnel Management Manual have failed to give a result satisfactory to the applicant. (para. 3.52)

9. The costs of granting freedom of information access to personnel documents to which the Guidelines contained in the Personnel Management Manual which was issued by the then Public Service Board relate, be treated, for statistical purposes, as a cost of personnel management, not freedom of information. (para. 3.52)

10. The definition of 'document' contained in the *FoI Act* be deleted, with the rider that the provision that 'document' 'does not include library material maintained for reference purposes' be retained. (para. 4.8)

11. The definition of 'prescribed authority' be amended so as to avoid the exclusion of bodies from the operation of the *FoI Act* only because they were created by Order-in-Council. (para. 4.21)

12. The Attorney-General maintain a watching brief in respect of the inclusion in the *FoI Act* of appropriate references to the Australian territories and, when necessary, devise appropriate amendments. (para. 4.24)

13. The *FoI Act* apply to documents relating to the public functions only of bodies which discharge a mixture of functions. (para. 4.27)

14. The Attorney-General examine the agencies listed in Schedule 2 to determine whether their inclusion is appropriate. (para. 4.45)

15. Further, this examination should pay particular attention to the question of total or partial exemption. (para. 4.46)

16. The *FoI Act* be amended to provide a ground of exemption similar to that contained in paragraph 34(4)(b) of the Victorian *FoI Act*. (para. 4.56)

17. Further, this new provision should (i) not be confined to scientific or technical research; and (ii) not be confined only to the results of research. (para. 4.56)

18. An additional paragraph be inserted into the *FoI Act* providing that sections 91 and 92 of the *FoI Act* apply where agencies provide access to documents created more than 5 years before the commencement of the operation of the Act. (para. 5.4)

19. Paragraph 12(2)(a) of the Act be amended to substitute for the phrase 'to the personal affairs of that person' the phrase 'directly to that applicant's personal, business, commercial or financial affairs'. (para. 5.11)

20. The two-tier access request structure be abandoned. (para. 5.14)

21. All requests for access to documents under the Act attract the time limits specified in the Act. (para. 5.14)

22. The abolition of the system of prescribed addresses. (para. 5.20)

23. Sub-section 19(2) be amended to provide that the 'appropriate address' be 'the address of any regional or central office listed in any current Australian telephone directory'. (para. 5.27)

24. Sub-section 19(4) be amended by the substitution of the period of 30 days for the period of 15 days. (para. 5.45)

25. The Act be amended to provide for access in the form of provision by the agency or Minister of a computer tape or disk containing a copy of the requested document. (para. 6.9)

26. The Act be amended to provide for the transfer of parts of requests. (para. 7.4)

27. It be made clear, by amendment of the Act if necessary, that an agency to which an access request is transferred is not required to treat the request afresh, but rather to process only those individually identified documents which provided the basis of transfer. (para. 7.9)

28. The Act be amended to provide for the transfer of requests for the amendment of records. (para. 7.17)

29. Further, provision be made requiring the transferee agency to notify the transferor of the outcome of the transferred request. (para. 7.17)

30. Where a request for amendment is transferred, and the transferee agency makes and informs the transferor agency of a decision which results in the amendment or annotation of that record, the transferor agency must amend or annotate its record accordingly. (para. 7.19)

31. The Act be amended to permit agencies or Ministers to delete material that is irrelevant prior to granting access. (para. 7.22)

32. Further, decisions to make such deletions on the grounds of irrelevance be reviewable in the same way as decisions to refuse access. (para. 7.22)

33. The deletion from paragraph 22(1)(b) of the words 'and would not, by reason of the deletions, be misleading'. (para. 7.29)*

34. The Act be amended to permit decision-making to be delegated with respect to matters arising under sub-sections 9(4), 41(3) and 54(1). (para. 7.32)
35. Section 24 be amended to make clear that applicants' motives are not to be treated as relevant in applying the 'substantially and unreasonably' test in paragraph 24(1)(b). (para. 7.44)*
36. Section 24 be amended to prevent the aggregation of requests for the purposes of that section. (para. 7.55)*
37. Paragraph 24(1)(a) be deleted and a consequential amendment be made to paragraph 24(1)(b). (para. 7.59)
38. Sub-section 24(2) be amended to delete references to the concept of 'class' requests. (para. 7.67)
39. The Act be amended to provide that, upon appeal from a refusal of access under sub-section 24(2), agencies be required to prove that the documents to which access was refused are exempt. (para. 7.70)*
40. Section 24 be amended to permit regard to be had to the resources likely to be spent in both consultation with third parties and in examining documents for exempt matter. (para. 7.75)
41. Before refusing requests under s.24, agencies be required to notify the applicant in writing of the intention to refuse to process the request, and to provide positive suggestions and information as to how the request may be narrowed, and identifying an agency officer with whom the applicant can consult with a view to narrowing the request. (para. 7.82)
42. The Act be amended to provide that an agency may formally respond to a request for access by stating that it has reason to believe it possesses the requested document, but is unable to locate the document having taken all reasonable steps to do so. (para. 7.87)
43. Further, the decision to respond in this manner be able to be reviewed in the same ways as are decisions to refuse access. (para. 7.87)
44. Sub-section 27(1) be amended to remove the requirement that, before engaging in reverse-FoI consultation with a business or person, an agency or Minister must decide that that business or person might reasonably wish to contend that a document is exempt under s.43. (para. 8.16)
45. Section 91 be amended so that the protection otherwise conferred by that section against actions for defamation and breach of copyright or confidence will not be lost if a required reverse-FoI consultation is omitted. (para. 8.20)
46. Further, the failure to consult should not, of itself, be sufficient to found an action against the Commonwealth or its officers. (para. 8.20)
47. Where, but for the fact that a document contains exempt matter, the reverse-FoI process would be mandatory prior to granting access, that process also be mandatory where it is proposed to grant access to an edited version of the document. (para. 8.24)
48. The clauses 'arrangements have been entered into between the Commonwealth and a State with regard to consultation under this section', and 'in accordance with these arrangements', be deleted from sub-section 26A(1). (para. 8.36)
49. Sub-section 26A(1) be amended to refer to consultation between the relevant Commonwealth and State Ministers and/or their authorised delegates. (para. 8.38)
50. The Act be amended to ensure that documents do not acquire any greater protection from disclosure as a result of the reverse-FoI process than other documents which are exempt from disclosure under Part IV of the Act. (para. 8.44)
51. Internal review be available to, and be required to be used by, parties consulted under reverse-FoI who wish to seek the review of the decisions to grant access. (para. 8.47)
52. Further, the availability of internal review and the requirement that it is used be subject to the same qualifications as apply to internal review of decisions to refuse access. (para. 8.47)
53. The right to seek reverse-FoI review not be contingent upon the third party having been consulted, but instead rest upon the appellant being a party who/which should have been consulted under reverse-FoI. (para. 8.52)
54. An agency have a duty to notify a business or State that the agency's decision is under review by the Tribunal. The duty should only arise where the agency would have had an obligation to notify the business or State under reverse-FoI had the agency proposed to grant access. (para. 8.61)
55. The Attorney-General should initiate whatever steps are required (including legislation if necessary) to ensure that a business or State that would be affected by a successful appeal against an agency's decision to deny access may defer its appearance before the Tribunal. The third party should be able to defer until the point where the Tribunal, after hearing the evidence of the agency, is still not satisfied that the document is exempt. (para. 8.61)
56. A State or business seeking review by the Administrative Appeals Tribunal of an agency's decision to grant access should not be restricted to reliance upon the s.33A or 43 (as the case may be) grounds of exemption. (para. 8.67)
57. The Act be amended to place the onus of establishing that the Tribunal give a decision adverse to the applicant upon any party (whether or not an agency) that argues against allowing access. (para. 8172)
58. The Act be amended to provide that:
(a) the Administrative Appeals Tribunal be empowered to award costs in favour of a reverse-FoI party appearing before the Tribunal to oppose the grant of access;
(b) such costs be payable by the Commonwealth but not the applicant;*
(c) costs recoverable be limited to costs relating to appearance, and not include costs relating to reverse-FoI consultations with an agency or internal review of an agency decision; and
(d) costs be awarded only where the party seeking costs was successful or substantially successful in opposing access, and its intervention was reasonable and necessary in the opinion of the Tribunal. (para. 8.77)

59. Further, where the reverse-FoI appellant fails to succeed in any of the contentions s/he advances, the Administrative Appeals Tribunal be empowered to award costs against the reverse-FoI appellant and in favour of both the applicant and the Commonwealth. (para. 8.78)
60. If the *Privacy (Consequential Amendments) Bill* 1986 is not enacted, that the *FoI Act* be amended in the manner contemplated by clause 5 of the Bill, modified by the Committee's recommendations with respect to reverse-FoI and business documents. (para. 8.86)
61. Further, where a person enters into reverse-FoI proceedings as a result of this amendment, that person possess the same capacities, rights and responsibilities as any other reverse-FoI party. (para. 8.86)

62. Agencies make reasonable efforts to locate individuals; but that agencies should not be precluded from exercising their own judgment where they are unable to locate individuals about whom documents contain relevant personal information, or they have died. (para. 8.89)

63. A Minister be obliged to report to the Parliament within five sitting days whenever a conclusive certificate has been issued, regardless of whether the certificate has been signed by the Minister, an authorised delegate, or an officer for whose actions the Minister is accountable to the Parliament. (para. 9.11)*

64. Further, the report to Parliament should, at a minimum, identify the issuing agency or Minister, and the claim made in the certificate. (para. 9.13)*

65. The responsible Minister be required to table in each House of Parliament the notice of non-revocation of a conclusive certificate. (para. 9.16)

66. Section 58B be repealed. (para. 9.19)

67. Conclusive certificates remain in force for only two years from the date of issue. (para. 9.21)*

68. Section 33A be re-drafted so as to make it clear that any certificate issued under sub-section 33A(2) is conclusive of both the type of document and whether disclosure is in the public interest. (para. 9.31)

69. Sections 34 and 35 be re-drafted to clarify that the respective conclusive certificates be conclusive of both the type of documents and whether disclosure would be in the public interest. (para. 9.35)

70. The reference to the public interest in sub-section 33(1) be deleted, and the appropriate consequential amendment be made to sub-section 33(2). (para. 9.47)

71. Section 44 be amended so as to introduce into s.44 a public interest test of the same type as is contained in sub-section 39(2). (para. 9.49)

72. Where a ministerial council formally so requests, exemption be conferred upon that council by inclusion within Schedule 2 of the Act. (para. 10.18)

73. (i) The more specific, and arguably narrower, public interest test of whether the disclosure of the document would, 'on balance, be in the public interest' be adopted in s.36; (ii) the public interest test be imposed by a discrete sub-section (along the lines of the s.39 public interest test); and (iii) a conclusive certificate issued under s.36 be conclusive of both the type of the document (under sub-section 36(1)) and the balance of the public interest. (para. 11.26)

74. 'Crime intelligence agencies' be specifically identified by express inclusion in Schedule 2 of the *FoI Act*, and that documents that have originated with, or have been received from, such specified 'crime intelligence agencies' be brought within the protection of sub-section 7(2A). (para. 12.25)

75. There be an exhaustive list of secrecy provisions, and that that list of secrecy provisions be contained in a schedule to the *FoI Act* rather than in regulations. (para. 12.31)

76. Repeal of paragraph 40(1)(d). (para. 12.47)*

77. Courts and the Administrative Appeals Tribunal (but not agencies) be empowered to release material which would be otherwise exempt under section 41, or sub-paragraph 43(1)(c)(i), in reliance upon specific undertakings as to how the documents and the information contained in these documents will be used. (para. 13.21)

78. Where internal review is available, this be a condition precedent to such review in the Administrative Appeals Tribunal of a decision under sub-section 41(3). (para. 13.23)

79. Agencies consult with the authors of medical or psychiatric reports before deciding whether to disclose these reports to the subject/applicant either directly or indirectly under sub-section 41(3). (para. 13.32)

80. Sub-section 41(3) be amended to extend the category of information to which indirect access may be granted to include para-medical reports by psychologists, marriage guidance counsellors, and social workers. (para. 13.40)

81. Further, this extension be confined to professionally-trained and registered para-medicals whose training and vocation necessarily involves providing care for people's physical and mental health and well-being. (para. 13.40)

82. Agencies consult with the authors of such para-medical reports before deciding whether to release these reports to the same extent as they consult with the authors of 'medical or psychiatric' reports. (para. 13.41)

83. The Act be amended to make clear that 'professional affairs' relates to the running of a professional practice, not the status of an individual as a member of a profession. (para. 14.23)

84. The Act be amended to ensure that, for agencies engaged in commercial activities, exemption is available for documents relating to non-competitive aspects of those activities where disclosure would be likely to affect adversely the future commercial interests of the agency. (para. 14.27)

85. Sub-section 45(1) be amended to make clear that it provides exemption where, and only where, the person who provided the confidential information would be able to prevent disclosure under the general law relating to breach of confidence. (para. 14.34)

86. Provision for the amendment of records containing personal information be transferred from the *FoI Act* to comprehensive privacy legislation, should the latter be enacted. (para. 15.7)

87. In the absence of comprehensive privacy legislation, Part V of the Act continue to provide for review of agency decisions to refuse to make requested corrections to records, but that guidelines be inserted into Part V better to define the circumstances in which such review will be available. (para. 15.47)

88. Part V be amended to provide for two distinct types of request for amendment of a record — one for correction, and the other for notation. (para. 15.53)

89. Further, requests for notation be refused only if they are unnecessarily voluminous, irrelevant, defamatory etc., but not solely because the agency disagrees with the accuracy of the proposed notation. (para. 15.53)

90. Further, the repeal of the right to require notation notwithstanding an adverse decision upon review. (para. 15.53)

91. The Act be re-drafted so that review rights under Part V are set out in a form readily intelligible to the layperson. (para. 15.59)

92. Section 48 be amended by omitting the words 'provided to the claimant under this Act' and substituting 'lawfully provided to the claimant, whether under this Act or otherwise'. (para. 15.62)

93. Part V not be constrained by any narrow interpretation given to the phrase 'personal affairs' in the context of s.41. (para. 15.70)

94. Sub-section 49(2) be amended to specify in greater detail the information which a request for amendment must contain. (para. 15.77)

95. In addition to the present exemptions, the fee for internal review not be payable by third-parties seeking

internal review to protect 'their' documents in the reverse-FoI context. (para. 16.6)

96. The Act be amended so as to require that requests for internal review be addressed with no greater specificity than is the case in respect of requests for access. (para. 16.8)

97. The time limit for requesting internal review take into account a 15 day period for the payment of charges, plus any period during which the decision to charge may be under review or appeal, and any delay by the agency in providing access. (para. 16.12)

98. The time for internal review be extended to 30 days. (para. 16.19)

99. FoI publicity and training material emphasise the role of the Ombudsman as a means of resolving disputes relating to FoI. (para. 17.9)

100. Steps be taken to ensure that information with respect to rights of review, supplied with reasons for decisions pursuant to s.26, is sufficiently comprehensive to enable an informed choice to be made between applications to the Tribunal and complaints to the Ombudsman. (para. 17.9)

101. Sub-section 52B(2) of the *FoI Act* be amended to remove the now redundant reference to sub-section 6(3) of the *Ombudsman Actd*. (para. 17.14)

102. The Act be amended to make clear that it does not confer jurisdiction upon the Ombudsman with respect to bodies that are not 'prescribed authorities' for the purposes of the *Ombudsman Act*. (para. 17.17)

103. Section 52F be repealed. (para. 17.24)

104. Section 52D be repealed, and the Ombudsman have no special role as monitor and rapporteur of the operation of the *FoI Act*. (para. 17.33)

105. Section 52C be repealed. (para. 17.36)

106. Provision for complaint to the Ombudsman be integrated into Part VI of the *FoI Act*. (para. 17.38)

107. Section 58C be amended to require a private hearing and/or restrictions imposed upon the publication of documents lodged with or received in evidence by the Administrative Appeals Tribunal or submissions made to it, only to the extent that the agency concerned so requests. (para. 18.7)

108. Section 64 be amended to give the Tribunal the power to oblige agencies to produce documents at any stage of proceedings. (para 18.18)

109. The Administrative Appeals Tribunal be able to award costs against both the Commonwealth and applicants; but that the Tribunal not be able to award costs against an applicant unless: (a) the agency had sought an order at the earliest phase of the proceedings, that is, at the directions hearing/preliminary conference stage; and (b) at such a directions hearing/preliminary conference, the agency satisfies the Tribunal that there is not merit to the applicant's case;** and (c) the Tribunal at that directions hearing/preliminary conference decides that the applicant should be exposed to the risk that costs may be awarded against her/him at the conclusion of the Tribunal proceedings. (para. 18.54)

110. The Tribunal be empowered to order that applicants lodge security for costs at the earliest (directions hearing/preliminary conference) phase of proceedings. (para. 18.55)

111. Further, if, at this directions hearing/preliminary conference stage, the Administrative Appeals Tribunal finds that the applicant's case is not without merit (i.e. that the application is neither vexatious nor frivolous), there be no possibility of any award of costs being made against the applicant should the application proceed. (para. 18.56)*

112. The $30 application fee be reduced to $15. (para. 19.23)*

113. There be an upper limit upon the amount of time for search and retrieval which may be chargeable in respect of any one request. (para. 19.27)

114. There be an upper limit upon the amount of decision-making time which may be chargeable in respect of any one request. (para. 19.32)

115. The Part V interpretation of 'personal affairs' be applied for the purpose of determining whether a document is a personal document for the purposes of the charging regime. (para. 19.46)

116. The maximum charge for a request for access to (i) personal documents, be application fee plus a 2 hour search/retrieval time-fee plus a 2 hour decision-making time-fee; and (ii) other types of documents, be application fee plus a 15 hour search/retrieval time-fee plus a 15 hour decision-making time-fee. (para. 19.51)

117. Further, the fact that the cost of processing a request exceeds the maximum charges not be a relevant factor for the purposes of the s.24 workload test. (para. 19.52)

118. The grounds for remission be altered so as to make it clear that the fact that documents relate to the applicant's personal affairs is not of itself sufficient reason for granting a remission automatically. (para. 19.62)

119. The wider sub-section 30(3) formula apply also to s.30A remission of application fees. (para. 19.69)

120. The s.29 and s.30 decisions be consolidated. (para. 19.89)

121. The fee for lodging applications for review of FoI decisions with the Administrative Appeals Tribunal be less than that for filing documents to commence proceedings with the Federal Court. (para. 20.14)

122. A fee of $120 be payable for lodging with the Administrative Appeals Tribunal applications for review of FoI decisions. (para. 20.15)*

123. Further, the Registrar or a Deputy Registrar of the Administrative Appeals Tribunal be empowered to waive the payment of filing fees on the same general criteria as is the Registrar of the Federal Court, *inter alia*, where payment of the fee 'would impose substantial hardship' upon the applicant. (para. 20.17)

124. Regulation 20 of the Administrative Appeals Tribunal Regulations be amended to replace the phrase 'proceeding terminates in a manner favourable to the applicant' with the same test as is applied in respect of the award of costs: where the applicant is 'successful or substantially successful' in the application for review. (para. 20.26)

125. The Administrative Appeals Tribunal (Amendment) Regulations 1987 be amended to also empower the Registrar or a Deputy Registrar of the Administrative Appeals Tribunal to refund to the applicant the prescribed filing fee paid for the lodgment with the Tribunal of an application for review of an FoI decision where her/his application is withdrawn before the dispute is heard by the Tribunal. (para. 20.32)

126. Agencies not have regard to the motives of access-seekers for statistical or any other purposes. (para. 21.9)***

* Senator Stone dissents from this recommendation.
** Senator Stone dissents from clause (b) of recommendation 109.
*** Senator Stone endorses this recommendation only insofar as it precludes consideration of motives for statistical purposes.