

CHAPTER 1

INTRODUCTION

Terms of reference

1.1 On 29 November 1985, the Senate resolved:

That the following matter be referred to the Senate Standing Committee on Constitutional and Legal Affairs: the operation and administration of the Freedom of Information legislation.

1.2 Both the reference and the Committee lapsed with the dissolution of the Parliament on 5 June 1987.

1.3 On 22 September 1987, the Senate appointed the Legal and Constitutional Affairs Committee, and referred to the Committee the review of the operation and administration of the Freedom of Information legislation.

Background to inquiry

1.4 The Freedom of Information Act 1982 had a long gestation period. The Act had its origins in a 1972 policy commitment of the Australian Labor Party. The proposal for such an Act was examined by several bodies in the 1970's,¹ and in 1978 the Liberal Government introduced a Freedom of Information Bill. The Bill was referred to the Committee's Parliamentary predecessor, the Standing Committee on Constitutional and Legal Affairs, and was the subject of a detailed inquiry. The Committee reported on 6 November 1979.

1. See FOI Annual Report 1982-83, pp. 14-24 for details.

1.5 In that report, the Committee examined the concept of freedom of information, and its implications for the Westminster style of Government. The Committee also examined the clauses of the proposed legislation. However, the Committee recognised that a theoretical analysis of the freedom of information legislation might be inadequate to quell the concerns about the impact of this legislation.

1.6 One of the recommendations of the 1979 Report was that operation of the freedom of information legislation should be the subject of a review three years after its proclamation.² Together with many of the Committee's other recommendations, this was accepted by the Government.³

1.7 A revised Bill, incorporating the accepted recommendations, was introduced into the Senate on 2 April 1981. The Bill was subjected to extensive amendment by the Senate. The amendments gave effect to a number of the Committee's 1979 recommendations which had not been accepted by the Government. The Bill was assented to on 9 March 1982 and came into operation on 1 December 1982.

1.8 The ALP Government, elected in 1983, had a commitment to expand the scope of FOI. The Government introduced a Bill to amend the Act into the Senate on 2 June 1983. The Bill gave effect to a number of the Committee's 1979 recommendations which had not been incorporated in the 1982 Act. During passage of the 1983 Bill, an amendment was successfully moved to provide for an enhanced role for the Ombudsman in dealing with complaints relating to FOI. The Freedom of Information Amendment Act 1983 commenced operation on 1 January 1984. The Government also accepted that there should be a review by the Constitutional and Legal Affairs (now Legal and Constitutional Affairs) Committee.⁴

2. 1979 Report, para. 32.21.

3. Senate, Hansard, 11 September 1980, pp. 797-806.

4. Senate, Hansard, 7 October 1983, p. 1335.

1.9 The Freedom of Information (Charges) Regulations (Amendment) took effect on 1 July 1985. These Regulations significantly raised the charges to FOI access-requesters. The Regulations were disallowed by the Senate on 13 November 1985, with the result that the original charges Regulations revived.

1.10 Miscellaneous amendments of a minor nature were made to the FOI Act in 1984, 1985, and 1986. More significant amendments to both the Act and charges Regulations were announced as part of the 1986 Budget. The purpose of the resulting Freedom of Information Laws Amendment Bill 1986 was 'to reduce administrative costs and increase revenues'.⁵ Amendments were successfully moved in the Senate to delete some of the clauses of the Bill not directly concerned with revenue. The Bill, as amended, received assent on 4 November 1986, and commenced operation on 18 November 1986.

Conduct of the inquiry

1.11 Advertisements were placed in the major national newspapers seeking submissions from interested persons. Letters were written to various individuals and organisations known to have an interest in the freedom of information legislation, such as the councils for civil liberties, academics, journalists, public interest groups, etc.

1.12 Despite written invitations, followed up by telephone solicitation, no civil liberties organisation volunteered any comments upon the operation of Freedom of Information legislation. Only two submissions were received from public interest organisations - a joint submission from the Australian

5. Senate, Hansard, 25 September 1986, p. 803 (2nd Reading Speech).

Consumers' Association, the Public Interest Advocacy Centre, the Inter Agency Migration Group and the Welfare Rights Centre (Sydney), and a late submission from Australians for Animals.

1.13 In addition, the Committee noted that submissions from Commonwealth agencies were cleared by the Attorney-General's Department before being submitted to the Committee. The Committee was advised that 'the basis for clearance [was] factual accuracy and consistency with general Government policy'.⁶ In the absence of the original submissions, the Committee is unable to comment upon this. However, the Committee noted some uniformity in the views advanced in the submissions received from Government agencies.

1.14 The Committee received 120 written submissions, of which nearly half were from agencies and Ministers. The list of individuals, organisations and agencies making submissions to the Committee is attached as Appendix I to this report.

1.15 It should be noted that, with few exceptions, these submissions were received before the 1986 amendments were proposed.

Public hearings

1.16 The Committee held six public hearings: one in Sydney; two in Melbourne; and three in Canberra. A total of 65 witnesses appeared on behalf of 31 individuals and organisations. This list of witnesses is attached as Appendix II to this report.

Unreliable statistics on costs

1.17 The Attorney-General's Department publishes an annual report on the operation of the Freedom of Information Act 1982.

6. Letter to the secretary of the Committee from the Attorney-General's Department, dated 25 February 1986.

As is noted at various points in this report, some of the figures contained in these annual reports appear to conflict with the costs as reported by agencies.

1.18 On 20 February 1986 the Government established an inter-departmental committee, comprising representatives of the Attorney-General's Department (Chair), the Departments of Prime Minister and Cabinet, Finance, Social Security, Defence, Special Minister of State, and Industry, Technology and Commerce, and of the Commissioner of Taxation. The brief of the inter-departmental committee (the IDC) was to 'review costs and workload associated with the administration of the FOI Act' and to 'recommend improvements in administration'.⁷

1.19 A copy of the IDC Report was provided to the Committee on 15 October 1986.

Scope of inquiry

1.20 The 1979 Report contained an extensive analysis of the philosophical and political foundations of the concept of freedom of information. The wording of the terms of reference, and the history of the proposal for a review of the freedom of information legislation after three years operating experience, suggests that this inquiry should be concerned to fine-tune the FOI Act, rather than to re-examine the philosophical foundations of freedom of information.

1.21 Consequently, this inquiry has focused upon the practical administration and operation of the freedom of information legislation. The IDC was required to focus on the costs of FOI. This inquiry has adopted a broader focus. Costs and possible ways of reducing costs have been considered as an important but not dominant element within this broader focus.

7. IDC Report, p. 8.

Archives Act 1983

1.22 The Committee has interpreted its terms of reference as requiring it to examine only the operation and administration of the Freedom of Information Act 1982, and subsequent amendments. Consequently, the Committee has not examined the operation of the Archives Act 1983.⁸

1.23 However, the Committee is conscious that the Archives Act is intended to complement the FOI Act, and some provisions are common to both Acts. Some of the recommendations contained in this report will, if implemented, undermine the congruence between these two Acts. A list of the relevant pairs of provisions is annexed as Appendix III.

1.24 The Committee is of the view that, at least from this aspect of congruence, the operation and administration of the Archives Act should be reviewed after the Government has responded to this report.

1.25 The Committee recommends that, 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.⁹

8. 1979 Report, para. 34.30 recommended that the Archives Bill (as it then was) should be reviewed by a parliamentary committee after it had been in operation for three years.

9. In making this recommendation, the Committee is conscious that the Prime Minister foreshadowed a review of the Archives Act for 1987 - House of Representatives, Hansard, 22 May 1985, p. 2889.

Theme of report

1.26 The Committee remains committed to the concept of freedom of information. The position taken in the 1979 Report is reiterated in this report. Once again the object of the report has been

to ensure that a maximum amount of information is made publicly available, and that the barest minimum of restriction is placed on the public disclosure of such information.¹⁰

1.27 Both agencies subject to the FOI Act and freedom of information users noted the complexity of the legislation. In the view of the Library Association of Australia, the Act is 'overly legalistic and not understandable by ordinary citizens'.¹¹ In the final paragraph of its submission, the Department of Territories commented:

It would, however, appear to be against the spirit of the Act itself if its administration is clouded by the complexities of judgments and precedents that would be virtually unfathomable to the layman who would be competing against full resources of an agency which wishes to withhold documents. It would also be unfortunate if the administration of the Act becomes too burdensome in many instances for the general administrative staff of any agency and has therefore to be handed over to officers with appropriate legal qualifications.¹²

1.28 The Committee does not suggest that the entire Act is 'unfathomable' to laypeople (nor did the Department of Territories). However, some sections of the Act - such as section 51 which provides for the review of requests for amendment - are unlikely to be readily understood by laypeople.

10. 1979 Report, para. 3.7.

11. Submission from the Library Association of Australia, p. 4.

12. Submission from the Department of Territories, p. 20.

Consequently, the Committee has attempted to identify and, where possible, recommend some means of simplifying excessively complex provisions in the Act.

1.29 As was noted previously, the FOI Act was amended in 1986. The FOI Act has not since been reprinted. Implementation of many of the recommendations which the Committee makes in this report will also require legislative action. In the Committee's view, it is desirable that the FOI Act should be reprinted after these amendments have been made.

1.30 Accordingly, the Committee recommends that as soon as amendments have been determined and enacted, the FOI Act be reprinted.