CHAPTER 15

AMENDMENT OF PERSONAL RECORDS

Introduction

15.1 Part V, entitled the 'Amendment of Personal Records', was inserted by a Government amendment during passage of the original Bill through the Senate.[1] The drafting was not as carefully thought through as other parts of the Act.[2] Also, Part V has been viewed as a stop-gap measure until comprehensive privacy legislation is enacted.[3] The Part V 'usage rate remains substantially below expectations'.[4]

15.2 The Department of Veterans' Affairs informed the Committee:

> Problems associated with Part V of the FOI Act are creating confusion and uncertainty in the most difficult area of the Act to administer.[5]

15.3 Other agencies[6] and the Administrative Appeals Tribunal have also found Part V difficult to apply.[7]

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1. Senate, Hansard, 29 May 1981, p. 2364.
2. Evidence, p. 157 (Attorney-General's Department).
3. Australian Law Reform Commission, Privacy [ALRC22. AGPS. Canberra. 1983], para. 1003. (Hereafter ALRC, Privacy).
4. FOI Annual Report 1986-87, p. 22. In 1986-87, 127 requests for amendment were received by 20 agencies.
5. Submission from the Department of Veterans' Affairs, para. 104 (Evidence, p. 579).
6. E.g. Submissions from the Department of Health, pp. 31-32 (Evidence, pp. 1251-52); the Public Service Board, p. 7 (Evidence, p. 1099); and the Attorney-General's Department, p. 48 (Evidence, p. 53).
7. Evidence, p. 1160 (Public Service Board). See for example Re Corbett and Australian Federal Police (1986) 5 AAR 291, p. 300.

15.4 The Committee has set out its views on amendment of records at greater length than it would otherwise have done because it is apparent that the full implications of amendment have not been carefully thought through in the privacy context. This is the case with both the privacy legislation which was introduced in the Senate in 1986 and lapsed on the dissolution of the Parliament on 5 June 1987, and the Law Reform Commission Report, Privacy,[8] on which the legislation was to some extent based. The difficulties with Part V which have been brought to the Committee's attention have implications for any comprehensive privacy legislation which is enacted.

15.5 The Committee notes that the draft privacy legislation included in the Law Reform Commission's Report on Privacy provided for the repeal of Part V. Instead, provision for amendment of records was to be contained in the proposed Privacy Act.[9] The Committee also notes that the comprehensive privacy legislation first introduced into the Senate in 1986 did not follow this model. Part V was to remain, amended only in minor respects.[10]

15.6 The Committee takes the view that amendment of records is more closely related to other elements of comprehensive privacy legislation than it is to freedom of information.[11] In particular, it relates to the privacy principles which govern the quality and types of information governments may keep and the purposes for which information may be used.[12] The 1986 Privacy Bill conferred additional power upon the Data Protection Authority (which was to have been established by section 87 of the Australia Card Bill 1986), such as the power to investigate

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8. See the unhelpful discussion at paras. 1278-81.
9. ALRC, Privacy, Appendix A: Draft Privacy (Consequential Amendments) Bill, cl. 13; Draft Privacy Bill, cl. 68.
10. Privacy (Consequential Amendments) Bill 1986, cl. 7.
11. Cf. submission from the Privacy Committee (NSW), pp. 1-2.
12. E.g. see Information Privacy Principles 7 and 8 in the Privacy Bill 1986, cl. 13. Cf. 1979 Report, para. 24.17(c).

complaints that agency records are inaccurate,[13] and in some cases, to direct agencies to add annotations to documents.[14]

15.7 Therefore, **the Committee recommends that provision for the amendment of records containing personal information be transferred from the FOI Act to comprehensive privacy legislation, should the latter be enacted.**

15.8 The remainder of this chapter is written on the assumption that any provision for amendment is to remain in the FOI Act, at least for the immediate future.

Role of Part V

15.9 Some of the difficulty experienced with Part V relates to matters of detail considered later in this chapter. But the core problem is a lack of clarity about what can be amended, and what Part V is intended to achieve. At its narrowest, amendment under Part V could be limited to simple factual information such as dates of birth, periods of employment, addresses and the like, that have been inaccurately recorded due to clerical error. At its broadest, Part V could be interpreted to permit the Administrative Appeals Tribunal to hear evidence and determine the correctness of any fact, opinion, determination or decision relating to personal affairs recorded in a document of any agency or Minister.

15.10 The narrow interpretation appears to be too narrow. There is no need for elaborate statutory provision merely to correct clerical errors. Agencies have no interest in refusing to correct these errors. The broadest interpretation of Part V, however, is clearly too broad. Chaos would result if Part V could be used to re-litigate before the Tribunal disputes resolved by

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13. Cl. 19. See also the first supplementary submission from the Attorney-General's Department, p. 4.
14. Cl. 23(1).

other tribunals, courts, boards of inquiry etc. The problem is to define in workable fashion an appropriate role for Part V between the two extremes.

15.11 In illustrating this problem, it is assumed that the person seeking amendment wishes to alter a record by making a correction (as opposed to a notation) and the agency refuses to make the requested change. Part V is unnecessary where an agency agrees to make requested alterations to records. Having illustrated the problem in this way, consideration is given to whether a solution, in whole or in part, is to provide for notation only.[15] The person would be permitted to attach to the record a statement setting out her or his view why the record requires alteration. The record would not itself be altered.

Fact/opinion distinction

15.12 The Administrative Appeals Tribunal has not confined Part V to the amendment of factual information. The Tribunal has considered records of professional judgments, opinions, or subjective evaluations of personnel,[16] and information conveyed by innuendo[17] to be within the scope of Part V.

15.13 The Committee notes the view that Part V amendment should be limited to factual information, to the exclusion of

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15. Both correction and notation may result in material being added to the original document. But additions in the form of notations would be made in such a way as to leave it clear that the added material did not constitute part of the original document and was not necessarily by the same author.
16. Re Resch and Department of Veterans' Affairs (1986) 9 ALD 380, p. 385.
17. Re Wiseman and Department of Transport (1985) 4 AAR 83, p. 92.

expressions of opinion.[18] However, the Committee does not think that any easily applicable distinction between fact and opinion can be made.[19] Further, the Committee would not regard it as appropriate to deny the opportunity to correct all records of opinions, even if a workable fact/opinion distinction could be drawn. 'The right of amendment is particularly valuable when the information consists of opinions and evaluations'.[20] In addition, the facility to amend facts but not opinions can produce illogical results:

> It would defy common sense to suggest that only factually erroneous assertions should be deleted or revised, while opinions based solely on these assertions must remain unaltered in the individual's official file.[21]

Collateral attack on determinations

15.14 A second possible limitation identified in submissions is that Part V should not be able to be used to mount a

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18. Submission from the Department of Health, pp. 31-32 (Evidence, pp. 1251-52); first supplementary submission from the Attorney-General's Department, p. 4; second supplementary submission from the Department of Local Government and Administrative Services, p. 2 (adopting IDC Report recommendation A10). See also the discussion in the submission and Evidence from the Department of Veterans' Affairs, para. 111 (Evidence, p. 581) and Evidence, pp. 605-6.

19. Evidence, pp. 158-59 (Attorney-General's Department); pp. 1158-59 (Public Service Board). For example difficulties would arise even within the limited area of medical records. A report kept by a doctor that a patient has a broken leg would usually be regarded as factual. But a report that the patient is suffering from a particular nervous disorder or even a specific back complaint may be an expression of opinion over which specialists disagree. Cf. Re Resch and Department of Veterans' Affairs (1986) 9 ALD 380. See also Evidence, pp. 604-5 (Department of Veterans' Affairs); pp. 1157-58 (Public Service Board).

20. ALRC Privacy, para. 1278. The subjective opinion of a supervisor as to an employee's attitude would presumably be classed as opinion. It is difficult to see why the record of this opinion should not be open to Part V amendment, at least if it can be shown to be based on, say, misunderstanding, inaccurate observation or malice.

21. R.R. v Department of the Army 482 F. Supp. 770, p. 774 (D.D.C. 1980) quoted in Re Resch and Department of Veterans' Affairs (1986) 9 ALD 380, p. 388.

collateral attack on a determination made pursuant to statute.[22] The Administrative Appeals Tribunal has refused in specific cases to amend records where amendment would in effect be an over-ruling of a determination.[23] But the Tribunal has not found it necessary to articulate general guidelines on the relationship between Part V amendment and statutory determinations.

15.15 The Committee is strongly of the view that amendment under Part V should not be available for records of statutory determinations where the only argument for amendment is that the determination is wrong in substance, as opposed to incorrectly recorded. Other avenues of review are generally available for the review of determinations. Where no other avenue is available (either because it never existed or it has become time-barred), it must be assumed that, as a matter of policy, there is to be no review: Part V is not to become a catch-all.

15.16 A more difficult issue arises where the amendment request relates to the facts or opinions upon which the determination rests rather than the record of the determination itself.[24] The accuracy of the record may have been the only issue in the original litigation. Part V review will therefore result in the same issue being re-litigated.

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22. Submissions from the Department of Health, p. 32 (Evidence, p. 1252), the Public Service Board, p. 8 (Evidence, p. 1100), second supplementary submission from the Department of Local Government and Administrative Services, p. 2 (adopting IDC Report recommendation A10).

23. Re Resch and Department of Veterans' Affairs (1986) 9 ALD 380 (Repatriation Commission determination); Re Olsson and Australian Bureau of Statistics (18 April 1986) (declaration made pursuant to s.9 of Commonwealth Employees (Redeployment and Retirement) Act 1979); and Re Olsson and Public Service Board (18 April 1986) (certificate issued pursuant to s.14 of the same Act).

24. A pension claimant, for example, may seek to amend her/his medical history record rather than the decision of the review board based on that record. E.g. Re Resch, ibid. See Evidence pp. 604-5 (Department of Veterans' Affairs).

15.17 United States courts have consistently refused to permit the amendment of records provision in the Privacy Act[25] to be used to attack agency determinations collaterally.[26] The courts have said that the provision is not intended to permit the alteration of evidence presented in the course of judicial, quasi-judicial, or quasi-legislative proceedings.[27]

15.18 Giving effect to this intent will represent a significant limitation on the ability to obtain amendment in some cases. Even where the motive for seeking amendment is unrelated to the determination, amendment will not be available. If it were, the agency would have two versions of the record, an unamended one as used in evidence leading to the determination and an amended version, available for other purposes. This is plainly undesirable. The Committee takes the view that the evidence upon which a determination relies should not be open to amendment under Part V.

Jurisdiction of other tribunals

15.19 A further issue arises out of the relationship between Part V review and other review bodies. For example, a claimant may wish to alter an agency record of her/his marital status from 'single' to 'married'. An inquiry to determine marital status may involve, for example, the validity under Australian law of a marriage entered into overseas under foreign law. It might be questioned whether the Administrative Appeals Tribunal is the appropriate body to make such a determination, bearing in mind the jurisdiction of the Family Court of Australia. As a further example, should a contract of employment dispute be able (in effect[28]) to be litigated under Part V on the basis that the

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25. 5 USC 552a.
26. Pellerin v Veterans Administration 790 F.2d 1553, 1555 (11th Cir. 1986).
27. Rogers v United States Department of Labor 607 F. Supp. 697, (D.C. Cal. 1985), pp. 699-700.
28. In a formal sense, the AAT does not exercise the judicial power of the Commonwealth and hence cannot make judicial decisions.

written document does not accurately contain the terms of the contract?

15.20 In a case arising under the Victorian FOI Act's equivalent to Part V, amendment of the minutes of a council meeting of an Institute of Technology Council was sought on the grounds that they were misleading. The amendment would have had the effect of altering the record of a resolution to dismiss a staff member so as to show that the resolution was not valid. The Victorian Administrative Appeals Tribunal held the Act should not be interpreted to require this amendment:

> This is because what the applicant is seeking to do by her application is to challenge the legal competence of the governing body of the respondent Institute in carrying out its task of governing the Institute. In my view these are matters properly to be determined by declaratory proceedings in the Supreme Court.[29]

The Tribunal reasoned that the amendment provision could only deal with whether the minutes accurately reflected what the council purported to do. It could not be used to raise the issue of the legal effectiveness of the council's resolution.

15.21 As a commentator on the Tribunal's reasoning pointed out, the distinction relied upon by the Tribunal between factual accuracy and legal consequences is not always able to be drawn neatly.[30]

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29. Re Setterfield and Chisholm Institute of Technology (No. 2) (1986) 1 VAR 202, pp. 208-9. The position was complicated because a Supreme Court action had previously been commenced by Setterfield, who then tried to achieve by amendment what she had failed to achieve in the consent settlement of that action.

30. Kyrou, E.J., Victorian Administrative Law [Law Book Co. Sydney. 1985], loose-leaf, para. 2416/1. E.g. amendment of a factually inaccurate statement that a quorum was present has legal implications for the validity of resolutions recorded elsewhere in the minutes.

15.22 The Committee acknowledges that it is difficult to devise an effective rule to prevent matters being litigated under Part V on the ground that they are more appropriately dealt with by other tribunals or courts. Most, if not all, matters which could be litigated under Part V could also be resolved either directly or indirectly by proceedings before another body. Therefore, the test cannot be that Part V review is excluded where some other avenue of redress is available, else Part V review will seldom, if ever, be available.

15.23 On the other hand, if a line is not drawn somewhere, the amendment process will trespass on the jurisdiction properly given to other courts and tribunals. One option would be to identify particular areas into which the Part V review is not to enter.[31]

15.24 The identification of all such areas would be difficult, of course, and some general rules would be preferable.

Scope of Tribunal inquiry

15.25 The proper relationship between review rights under Part V and the jurisdiction of other (specialist or general) courts and tribunals overlaps with a further issue: what are the limits on the inquiry to determine whether information should be amended?[32] An example illustrates the difficulty. An employee evaluation report includes an assessment of conduct as 'unsatisfactory'. Amendment to 'satisfactory' is sought. It can be argued that inquiry should be limited to whether the report accurately records the unbiased view of a competent and appropriately qualified evaluator. Alternatively, it can be

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31. E.g. the United States Internal Revenue Code provides that the amendment provisions of the Privacy Act: 'shall not be applied, directly or indirectly, to the determination of the existence or possible existence of liability (or the amount thereof) of any person for any tax, penalty, interest, fine, forfeiture, or other imposition or offense to which the provisions of this ... [Code] apply'. (26 USC 7852(e)).

32. E.g. Evidence, p. 1160 (Public Service Board).

argued that the inquiry should hear evidence as to the employee's conduct, reach its own conclusion on whether the conduct is satisfactory, and determine the question of amendment accordingly.

15.26 The Administrative Appeals Tribunal has indicated a preference for the narrower inquiry.[33] United States courts interpreting the amendment of records provision in the Privacy Act[34] have indicated a similar preference:

> Although the Privacy Act directs the district court to make a de novo determination of requests to amend individual records, ... the act does not contemplate that a court will constitute itself as a personnel rating authority to substitute its judgment for the evaluation of performance conducted by a government employee's superiors ... A court should be very hesitant to second-guess subjective evaluations and observations by an employee's superiors where such matters are within the competence and experience of those superiors. The trial court should, however, carefully review the record to eliminate clear mistakes of fact, inaccurate opinions based solely upon such erroneous facts, and plainly irresponsible judgments of performance or character.[35]

15.27 The effect of refusing the wider inquiry is to leave intact the impugned opinion, though the Tribunal may order a notation to be appended which indicates that the applicant challenges the accuracy of the opinion. The question whether this is appropriate raises the larger issue of correction versus annotation of records. In practice, the distinction between second-guessing the opinion and testing the basis on which the opinion was formed is likely to become blurred. By showing that other unbiased, qualified, properly informed people would not

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33. Re Corbett and Australian Federal Police (1986) 5 AAR 291, pp. 298-99.
34. 5 USC 552a.
35. Hewitt v Grabicki 794 F.2d 1373, 1378 (9th Cir. 1986).

have reached the same opinion as that claimed to be incorrect, a presumption can be raised that the initial opinion maker was biased, insufficiently or incorrectly informed etc.[36]

Correction or notation?

15.28 An amendment of records provision could provide for notation only. This would resolve disputes over the accuracy of records by allowing the competing views to be attached to the record by notation. Such a provision would not attempt to resolve the substantive dispute. The dispute would only be resolved if a decision was made in reliance upon a disputed record, for example, failure to promote an employee or to grant a pension or a benefit. The forum for resolving the dispute would be that provided for challenging the decision.

15.29 Alternatively, the amendment process could itself provide for resolving substantive disputes and adjusting records accordingly. Only where the dispute was incapable of resolution due to, say, records having been lost or the death of relevant witnesses would notation to reflect the opposing views, rather than correction, be done.

15.30 Confining the amendment process to the first of these alternatives, notation, has several advantages. It would avoid the problems identified above. Because no attempt would be made to resolve substantive disputes, the amendment process would not be able to become an avenue for either direct or collateral challenge to statutory determinations. The problem of dispute resolution under the amendment process trespassing on matters more appropriately resolved by other tribunals or courts would not arise. There would be no need to attempt any fact/opinion

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36. Cf. Re Corbett and Australian Federal Police (1986) 5 AAR 291, p. 299.

distinction. Where the disputed record is that of an opinion or subjective judgment, it would be possible to avoid the problem of when, if at all, the body resolving the amendment dispute should hear evidence to enable it to substitute its opinion or judgment.

15.31 The 'notation only' option would also avoid the need to consider how corrections should be made, that is whether the original should be obliterated or just scored through so as to leave it legible while indicating it is no longer applicable.[37] The latter ensures that the file remains a coherent record of events where, for example, the agency acted in the past on the basis of the information which the person to whom the information relates now seeks to have obliterated. But scored through material remaining on file may be disadvantageous to the person to whom the information refers. It may, for example, call attention to events which the person to whom the record relates prefers should be forgotten.[38]

15.32 The 'notation-only' option also has disadvantages. It confines the applicant to an after-the-event remedy. Only after a decision has been made based on the disputed record will it be possible to resolve the dispute. Even if the dispute is ultimately resolved in favour of the applicant, s/he may have been disadvantaged in the period between the time of decision and the ultimate resolution of the dispute. A related disadvantage is that postponing resolution of a dispute until the disputed record is relied upon by a decision-maker may make it more difficult to resolve. In some cases, the passage of time will make evidence more difficult to obtain.

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37. Cf. Evidence, p. 608 (Department of Veterans' Affairs); submissions from the Attorney-General's Department, p. 48 (Evidence, p. 53) and the Department of Territories, p. 14; Re Wiseman and Department of Transport (1985) 4 AAR 83, p. 85. See also Re Leverett and Australian Telecommunications Commission (2 September 1985) (Correction had effect of adding words to a report which were not those of its author).

38. Joint submission from the Australian Consumers' Association, the Public Interest Advocacy Centre, the Inter Agency Migration Group, and the Welfare Rights Centre, p. 8 (Evidence, p. 857).

15.33 A further disadvantage is that the disputed record (even as annotated) may be used without the knowledge of the person about whom it contains personal information. Additionally, or alternatively, the record may be relied upon to the subject's detriment in ways that do not result in anything that would qualify as a 'decision' in the administrative law sense.[39]

15.34 The Committee has no means of estimating how serious all these disadvantages are likely to be in practice. It may be that few disputes about correction of records arise other than in the context of a dispute about substantive decisions based on those records.[40]

15.35 A separate disadvantage of the 'notation-only' option is that it can be seen as encouraging bad record-keeping by agencies. When a complaint is received about the accuracy of an agency record, the agency can take the easy option of annotating the record rather than the perhaps more difficult one of deciding if the complaint is justified. The retention of disputed records without attempting to resolve the dispute arguably conflicts with privacy principles.[41] In the absence of evidence, however, the Committee is not prepared to assume that agencies would degrade the accuracy of their files by merely recording conflicting views in cases where investigation would readily resolve the conflict.

15.36 In summary, the Committee considers that there are definite advantages to a scheme in which no right of review arises under Part V of agency decisions not to make requested corrections. However, the Committee agrees that some people will be disadvantaged by this absence of a review right. The issue is

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39. Cf. Evidence, p. 544 (Dr F. Peters - attempt to have amended an answer to a Parliamentary Question).
40. But see Re Corbett and Australian Federal Police (1986) 5 AAR 291 where the applicant was concerned about possible future use of the record.
41. See the obligation as to accuracy, completeness, etc which arises under Information Privacy Principle 7(1) in the Privacy Bill 1986, cl. 13.

whether the occasions when people about whom information is recorded are disadvantaged will be frequent and serious enough to outweigh the benefits of operational simplicity and certainty of application which removal of the review right would bring.

Repeal of Part V

15.37 Repealing Part V would achieve all the advantages identified above as flowing from the 'notation only' option. It can be argued that, if review of correction decisions is removed, and thus all Part V is able to achieve is notation, it can be dispensed with altogether. (If a person disputes the accuracy of an agency record, the evidence of the dispute is likely to be recorded in the agency's files even in the absence of any formal requirement to annotate the disputed record).

15.38 Review rights would be unnecessary on this analysis. People have no interest in seeking review because they are obtaining the maximum possible: their version of events is being recorded. Agencies might wish to seek review where the requester's version is too voluminous, or is irrelevant, defamatory etc. But, in practice, agencies would find it cheaper to place the version on file rather than contest the point.

15.39 Basically, the argument for repeal of Part V rests on the view that amendment rights are unnecessary. It is critical that access rights exist in order to enable the accuracy of records to be assessed by the people to whom they relate. But where inaccuracies are found, amendment will be made either voluntarily or as a consequence of litigation or review undertaken independently of Part V.

15.40 The Committee considers that it is useful to retain Part V, with the provision for review rights confined to agency decisions to refuse to make notations. This will formally establish an agency's obligation to note the views reported by

people who dispute a record containing information about them. It will also ensure that this view is noted on or attached to the relevant record rather than stored in such a way that a subsequent user of the record might not be made aware of it, and that where the record is disclosed outside the agency the complainant's view is also disclosed.[42]

Retaining Part V in present form

15.41 The main argument for leaving the basic structure of Part V in its present form is that the Administrative Appeals Tribunal has, to date, shown itself able to resolve the major issues relating to Part V. In particular, some major uncertainties have been clarified by a number of decisions made in 1986.[43]

15.42 The Committee considers that the great variety of factors which may be present in relation to a request for correction preclude the resolution of all uncertainties by comprehensive rules contained in legislation. Flexible guidelines will be necessary. The Tribunal, rather than the legislature, is arguably the body suited to develop these guidelines. The Attorney-General's FOI Memoranda provide a mechanism by which the results of Tribunal decisions can be disseminated to agency decision-makers and others.

Add rules and guidelines to Part V

15.43 The Department of Veterans' Affairs acknowledged to the Committee that Tribunal decisions assist in interpreting Part V. It considered, however, 'that the enunciated principles should be

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42. Cf. FOI Act s.51(4)(b)(ii).
43. E.g. Re Resch and Department of Veterans' Affairs (1986) 9 ALD 380; Re Olsson and Public Service Board (18 April 1986); and Re Corbett and Australian Federal Police (1985) 5 AAR 291.

embodied in the Act'.[44] On balance, the Committee is of the view that guidelines should be stated in the Act.

15.44 The Committee acknowledges that guidelines will be difficult to draft and would not cover all possible situations that might arise. But guidelines in the Act will be more authoritative and accessible than guidelines developed on a case-by-case basis by the Tribunal.

15.45 Without purporting to draft the guidelines, the Committee would wish to see the following points reflected to constrain any review of decisions relating to correction of records:

- review of a correction decision should not be available as a means of direct or collateral challenge to a statutory determination or a decision of a court or Tribunal. Guidelines on the meaning of 'collateral' in this context should be provided, together with a definition of 'statutory determination'.

- review should not generally be available as a means of resolving questions of law more appropriately resolved by other specialist tribunals or by courts.

- opinions should not be open to review solely because it can be shown that another qualified person would have reached a different opinion. Review should be available where the original opinion rests on a clear mistake of fact, or the opinion-maker was biased, unqualified or can be shown to have acted improperly in inquiries leading to the formation of the opinion.

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44. Submission from the Department of Veterans' Affairs, para. 111 (Evidence, p. 581).

- correction, when decided upon, should be made by a means that does not obliterate the original, unless it can be shown that obliteration would not leave past administrative actions unexplained.

Conclusions

15.46 The Committee considers that inserting guidelines into Part V would reduce, although not eliminate, the uncertainty created by the present text. (In reaching this conclusion, the Committee recognises that guidelines cannot cover all possible situations which may arise.) Allowing review of correction decisions will provide a means of resolving disputes in those (probably few) cases where no other method of resolving a genuine dispute exists. A modest amount of uncertainty in the operation of Part V is regarded by the Committee as a reasonable price to pay for this benefit.

15.47 **Accordingly, the Committee recommends that, 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.**

Notation without seeking Tribunal review

15.48 Where an agency refuses to accept a request that a record be annotated, the requester seeks review of the refusal, and the Tribunal affirms the agency's decision, the requester may nonetheless still require the agency to add the requested notation to its record (s.51 (3)). The applicant has no right to require notation without first obtaining the Tribunal's decision. Agencies are reluctant to add a notation to a record voluntarily

(ie. in the absence of a Tribunal decision) lest it be seen as an admission that their record is incorrect.[45]

15.49 The submission from the Attorney-General's Department was that this whole situation 'has proven to be very costly for little benefit'.[46] The Department suggested that

> [t]he right to addition of a notation could be made a separate right in the expectation (based on experience) that such notation would often be acceptable to the applicant as an alternative to amendment and would avoid the need for AAT proceedings. Alternatively, a provision similar to s.14 could make it clear that voluntary notation did not constitute an admission by the agency that the record was wrong.[47]

Either alternative will lead to broadly similar results in practice.

15.50 The Committee has a preference for creation of a separate right. This will facilitate the distinction made above between requesting a correction and requesting a notation of a record, with distinct conditions attaching to each type of request.

15.51 The Committee takes the view that the right to have a notation added should be subject to few conditions. In particular, a notation should not be able to be refused only because the agency disagrees with the accuracy of its content, even if the agency has good ground for disagreeing. A notation should be able to be refused, however, if it is unnecessarily voluminous, irrelevant, or defamatory. Also, there should be no bar to an agency in turn adding its comment to a notation.

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45. Submission from the Attorney-General's Department, p. 48 (Evidence, p. 53.
46. Ibid.
47. Ibid. See also the submission of the Privacy Committee (NSW), p. 2.

15.52 If applicants want to obtain review of agency decisions to refuse notations, they should be bound by the results of the review. The present right to require notation notwithstanding an adverse decision on review should be removed. There should be no right to make a fresh request to annotate a record following an adverse decision on a previous request where the two requests are, in substance, the same.

15.53 **The Committee recommends that 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. The Committee further recommends that 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. The Committee further recommends the repeal of the right to require notation notwithstanding an adverse decision upon review.**

Onus of proof

15.54 The Department of Immigration and Ethnic Affairs informed the Committee of what it saw as a problem in the way in which the onus of proof is placed on agencies in respect of Part V decisions.[48] Section 61, which applies to Part V decisions by virtue of sub-section 51(1), places upon an agency the onus of establishing that its decision was justified or that the Administrative Appeals Tribunal should give a decision adverse to the person seeking amendment. In essence, the perceived problem is that the best evidence of the correctness of the impugned record may be in the possession of the amendment-seeker, and

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48. Submission from the Department of Immigration and Ethnic Affairs, pp. 20-21 (Evidence, p. 710).

there is no obligation on that person to give the agency access to the evidence.

15.55 The Committee interprets the onus provision as requiring the agency to justify its decision, not to prove that its record is accurate:

> Unless a claimant, when requested to do so, produces evidence in support of his contention, or the record is, on its face, incomplete, incorrect, out of date or misleading, an agency would be justified in refusing to amend the record.[49]

15.56 The Committee is not aware of any decisions of the Administrative Appeals Tribunal that are inconsistent with this view.[50]

15.57 Accordingly, the Committee is not convinced that it is necessary to clarify the onus of proof provision in its application to Part V. However, the Committee would not object if, in the process of redrafting section 51 (see below), the matter were to be clarified. In addition, a recommendation is made below that sub-section 49(2) be redrafted to specify in more detail the information which a person requesting amendment is required to provide. This will clarify the obligation on requesters to provide information to support their requests.

The form of section 51

15.58 Section 51 (review of requests for amendments) has been drafted to operate by the substitution of words in other sections

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49. FOI Memorandum No. 28, para. 25 (13 September 1982).

50. A statement in Re Leverett and Australian Communications Commission (2 September 1985), para. 17 repeated in paraphrase in Re Resch and Department of Veterans' Affairs (1986) 9 ALD 380, p. 387 is capable of being interpreted as meaning that the onus lies on an agency to prove the accuracy of its record. However the better interpretation is that an agency may elect to justify its decision to refuse amendment by asserting the accuracy of its record and, if it does so, bears the resulting onus.

of the Act. Several submissions suggested that as a result the section is too confusing for applicants.[51] The Committee agrees.

15.59 **The Committee recommends that the Act be re-drafted so that review rights under Part V are set out in a form readily intelligible to the layperson.**

Amendment of non-FOI-accessed documents

15.60 The Committee notes that cl. 7(b) of the Privacy (Consequential Amendments) Bill 1986, would amend section 48 of the FOI Act to permit amendment requests in respect of all documents lawfully provided to the claimant, whether under the FOI Act or otherwise. (At present, this right is confined to documents obtained under the FOI Act.)

15.61 The Committee favours this extension, independently of whether comprehensive privacy legislation is enacted. Where applicants have been lawfully supplied with (allegedly inaccurate) records, there is no point in requiring them to seek access to the records again under FOI as a prerequisite to requesting amendment.

15.62 Accordingly, **the Committee recommends that 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'.**

Ambit of 'personal affairs'

15.63 The heading to Part V reads 'Amendment of Personal Records'. The operative section, section 48, however, refers to a wider category, documents containing information relating to the

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51. Submissions from the Inter-Agency Consultative Committee on FOI, p. 7; the Department of Veterans' Affairs, para. 115 (Evidence, p. 581); and the Department of Local Government and Administrative Services, p. 16.

personal affairs of the person seeking amendment. Also, differences have emerged in decisions of the Administrative Appeals Tribunal on whether 'personal affairs' bears a wider meaning in section 48 than it does in the other sections of the Act in which it is used, sections 12 and 41.[52] In addition to this issue, the Ombudsman suggested that Part V could be extended to 'records of business affairs'.[53]

15.64 Amendment is generally perceived as privacy related. It is a vexed and complex issue whether non-natural legal persons - bodies corporate - should enjoy privacy rights accorded to natural persons.[54] The general trend in other countries is that they should not, and the privacy legislation introduced into the Senate in 1986 reflected this trend.[55] Exclusion of corporations, however, raises a difficult demarcation problem where an individual operates through a 'one-person company' and individual and company affairs are entwined.[56]

15.65 Amendment of records could be detached from privacy. Instead (or additionally) it could be justified for the contribution it makes to accurate government record-keeping. On this justification, amendment should be available for all categories of government records lawfully obtained by the person seeking amendment. A question would arise whether the person requesting amendment would need to show some special interest in the correctness of the record not held by the members of the community generally (ie. a standing or locus standi test). If the categories of documents open to request for amendment are limited

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52. Compare Re Wiseman and Department of Transport (1985) 4 AAR 83, p. 91; Re Anderson and Department of Immigration and Ethnic Affairs (1986) 4 AAR 414, p. 430.
53. Submission from the Commonwealth Ombudsman, p. 12 (Evidence, p. 1319).
54. ALRC, Privacy, paras. 27-28.
55. See Privacy Bill 1986, cl. 16(1).
56. ALRC, Privacy, para. 29.

to those relating to the personal or business affairs of the requester the need for a separate test of standing does not arise.

15.66 The absence of any perceived need and, to a lesser extent, the difficulty of resolving the matter of a standing test, lead the Committee to reject any provision for amendment not limited to specific categories of documents.

15.67 On balance, the Committee does not support extension beyond the present category of 'personal affairs' so as to include documents containing information relating to 'business affairs'. Again there is an absence of perceived need: no business representation to the Committee requested such an extension. More importantly, the Committee is reluctant to make a recommendation which, though ostensibly based on improving accurate record-keeping, has implications for the complex issue of whether corporations have rights of privacy in the same way as individuals.

15.68 The phrase 'personal affairs' is used in sections 12, 41 and 48 of the Act with no clear indication that the meaning is intended to differ between uses. Section 41 provides exemption for documents if disclosure 'would involve the unreasonable disclosure of information relating to the personal affairs of any person'. Put simply, in a borderline case in which the Tribunal or court wishes to grant access, the decision can rest on either of two grounds. The phrase 'personal affairs' can be given a narrow reading and the requested document found not to relate to personal affairs. Alternatively, the word 'unreasonable' can be made to bear the burden: the information may be found to fall within the scope of 'personal affairs' but its disclosure held not to be 'unreasonable'.

15.69 As far as section 41 is concerned, it will often not matter which alternative is used. But any narrowing of the

meaning given to 'personal affairs' in section 41 will carry across into section 48 where it will limit the right to seek amendment.[57] This broadly is what has occurred. Matters relating to work performance have been held in some cases not to relate to 'personal affairs' for the purposes of section 41.[58] However it has appeared to the Tribunal that documents relating to work evaluation ought to be open to Part V amendment.[59]

15.70 **The Committee recommends that Part V not be constrained by any narrow interpretation given to the phrase 'personal affairs' in the context of section 41.**

15.71 It may be that implementation of this recommendation is best achieved by replacing the phrase 'personal affairs' in either section 41 or section 48.[60] The Committee leaves the method of implementation to the draftsperson.

Form and content of requests

15.72 The Department of Veterans' Affairs informed the Committee that many administrative difficulties arise because persons requesting amendment are confused about the format of their request and the type of information they are required to provide.[61] The Department proposed that 'the Act be amended to prescribe the format and content of an application for amendment of record'.[62]

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57. Re Anderson and Department of Immigration and Ethnic Affairs (1986) 4 AAR 414, p. 432.
58. E.g. Re Williams and Registrar of the Federal Court of Aust. (1985) 8 ALD 219; Re Dyrenfurth and Dept of Social Security (15 April 1987).
59. Re Wiseman and Department of Transport (1985) 4 AAR 83, p. 91 referring to earlier cases.
60. Cf. Privacy Bill 1986, in which the operative phrase is 'personal information'.
61. Submission from the Department of Veterans' Affairs, para. 105 (Evidence, p. 580). See also Re Telfer and Australian Telecommunications Commission (13 October 1986) para. 7.
62. Submission from the Department of Veterans' Affairs, para. 108 (Evidence, p. 580).

15.73 The Committee does not accept this proposal insofar as it relates to format. However, the Committee takes the view that neither requesters nor the vast majority of agencies (which seldom receive Part V requests) will be unduly inconvenienced if requests have to be made containing prescribed details.

15.74 The Committee agrees that sub-section 49(2) should be more specific. At present sub-section 49(2) requires that an amendment request

> shall give particulars of the matters in respect of which the claimant believes the record of information kept by the agency or Minister is incomplete, incorrect, out of date or misleading and shall specify the amendments that the claimant wishes to be made.

15.75 The Department of Veterans' Affairs identified the following as being needed from the applicant in order to determine amendment requests:

- identification of the documents containing the information claimed to require amendment;
- description of the information and a statement on whether it is incomplete, incorrect, out of date or misleading;
- reasons why the information is considered to be incomplete, incorrect, out of date or misleading;
- evidence to support the contention that the information is incomplete, incorrect, out of date or misleading; and
- description of the way in which the record should be amended.[63]

15.76 The Committee supports the re-drafting of sub-section 49(2) so as to specify that requesters must supply such particulars. With respect to evidence, however, the provision

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63. Submission from the Department of Veterans' Affairs, para. 106 (Evidence, p. 580).

should make it clear that requesters are only required to supply whatever evidence is in their possession. No implication should arise that the onus of proof in all respects lies on the requester.

15.77 **The Committee recommends that sub-section 49(2) be amended to specify in greater detail the information which a request for amendment must contain.**

A workload test?

15.78 The Department of Defence observed that Part V contains no equivalent to section 24, which permits refusal of access requests in some circumstances where providing access would involve excessive work.[64] It would be unacceptable if agencies were able to refuse bona fide requests for appropriate amendments on workload grounds. The Committee considers that recommendations made elsewhere in this chapter will assist in eliminating misconceived requests and simplifying the processing of requests.

Computer-stored records

15.79 Notation of records held in computer format may be difficult. If the format is such that no annotation is possible, the only solution may be to alter the programs that create and access the record so as to expand the record format or otherwise to accommodate the required annotation.[65] This solution will be expensive and require time to implement in most cases.

15.80 The Committee has not received any information that suggests problems of this type have arisen under Part V.

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64. Submission from the Department of Defence, p. 15.
65. E.g. see Canada, Privacy Commissioner, Annual Report 1984-85, p. 35.