

PART B
ACCESS PROCEDURES

Directories, indexes and manuals

Introduction

7.1 An effective system of freedom of information demands not merely that members of the public have rights, but that they be able in practice to exercise them. In this Part of the Report we consider the adequacy of the various machinery and procedural provisions set out in Parts II and III of the Bill. The present chapter is concerned specifically with Part II, 'Publication of Certain Documents and Information', one of the least known and publicised parts of the Bill, but in our view one of the most important.

7.2 The first thing that Part II of the Bill is concerned to do is to assist the process of identifying those documents that may be available for public access. In many instances, of course, applicants for information will be able to identify with some precision what exactly it is they are seeking, and will have a clear idea of whom to ask for it. But on many other occasions applicants will be in difficulties in either or both these respects unless they receive a good deal of official co-operation and assistance. There are other provisions in the Bill (discussed further in Chapter 8 below) which create obligations to facilitate in various ways access requests once made, but it is an indispensable part of the scheme of the legislation that the public be given, at the outset and without this being contingent on any particular request having been made, as much information as possible as to what information is in fact available and where it can most conveniently be found. Whether Part II of the Bill, and in particular clause 6, adequately serves this purpose is one of the questions to which we direct our attention below.

7.3 The second subject area with which Part II of the Bill is concerned is the 'internal law' of departments and agencies, i.e. the internal rules, policies and guidelines which supplement the formal text of statutes and regulations and in fact do more to determine how discretionary decisions are made in the great majority of cases than do the legislative texts themselves. Clause 7 requires that manuals and other documents incorporating these 'interpretations, rules, guidelines, practices or precedents' be made available for public inspection and purchase, and that an index of such documents be prepared and published in the *Gazette* and updated every twelve months. These requirements need only to be stated for their importance to be appreciated, and we applaud the Government for introducing them. Whether, however, they are, as presently drafted, fully adequate to meet their apparent purpose, is a further matter requiring detailed attention in this chapter.

The meaning of 'documents'

7.4 There is a preliminary matter which it is appropriate to mention at this point. Although the Bill is expressed to be concerned with freedom of 'information', nearly all its clauses in fact refer not to information as such, but to 'documents'. This has led in turn to some concern being expressed to us about, first, the application of the Bill generally to non-documentary forms of information (e.g. that held on tape or film or in computer storage), and, secondly, the status of

requests for information which are imprecise to the extent that they are not couched in the form of requests for particular, clearly identified, documents or non-documentary material.

7.5 By and large, we regard these kinds of fears as unfounded. As to the first point, the definition of 'documents' employed in clause 3 of the Bill, does appear wide enough to encompass information that is stored or recorded by electronic means, on computers and/or tape and film and the like:

'document' includes any written or printed matter, any map, plan or photograph, and any article or thing that has been so treated in relation to any sounds or visual images, that those sounds or visual images are capable, with or without the aid of some other device, of being reproduced from the article or thing, and includes a copy of any such matter, map, plan, photograph, article or thing, but does not include library material maintained for reference purposes.

We regard the exclusion of 'library material maintained for reference purposes' as reasonable, provided the manifest spirit of the clause is observed and departments and agencies do not try to conceal behind this proviso reports and other material which would otherwise be available under the legislation, but which happens to be stored in the library of the department or agency concerned.

7.6 As to the second general criticism mentioned in para. 7.4, it is true that a request for 'information', as such, may not have to be met by an agency. The Bill does not impose an obligation upon agencies to compile information which does not presently exist in retrievable documentary form at the request of an applicant; established mechanisms, such as the parliamentary question, are available for this purpose. We have not recommended any change to the Bill in this respect, as we recognise that considerably more agency resources would be required to implement the Bill if there were an obligation to answer imprecise requests of this kind. Furthermore, in our opinion the restriction of the Bill to requests for documents does not seriously reduce its utility. Departments already carry out some activities designed to make information available to the public upon request (for instance, the public and community relations sections of departments), and we expect that these activities will continue. In addition, the Bill itself contains some mechanisms to assist an applicant to identify whether there are any documents that record information that may be sought on a particular matter. In particular, there is an obligation upon agencies to assist a person in identifying documents that are sought under the Bill. Clause 13 (2) requires only that a request 'provide such information concerning the document as is reasonably necessary to enable a responsible officer . . . to identify the document'; clause 13 (4) imposes a duty on the agency 'to assist a person . . . to make a request in a manner that complies with this section'; and clause 15 deals specifically with the provision of information where it is 'not available in discrete form in documents of the agency' but is stored on tape, within a computer data-bank or in some analogous manner.

Directory of government activity (clause 6)

7.7 Clause 6 envisages that an expanded Commonwealth Government Directory will be published annually, containing in the future a statement of the categories of documents possessed by each agency, plus a summary of the organisational structure of each agency—its functions, decision-making powers, and agency arrangements facilitating consultation or representation of views by members

of the public. The clause does not specifically confine such publication to the Directory itself, but it is clearly contemplated that this volume will be the primary means by which the information in question is conveyed.

7.8 One objective of this clause is clearly to enable members of the public to exercise effectively their rights under the Act. We would be concerned however if this were thought to be the only objective of clause 6. Yet sub-clauses (1) and (2) provide that the information referred to in the clause will be 'in a form approved by the Minister administering this Act' and that the form shall be such as the minister 'considers appropriate for the purpose of assisting members of the public to exercise effectively their rights under Part III' (which outlines the procedures applying to requests for access). The Bill contains no provisions empowering a citizen to challenge the form approved by the minister, and we foresee a possible danger that the minister will approve a form that concentrates on those aspects of an agency's organisation that are relevant only to this Bill.

7.9 The objectives that can be achieved by clause 6 are far broader. In the first place, it can afford to a greater number of persons the opportunity to participate in government decision making. The size and complexity of the national government apparatus and its geographical isolation from the large population centres has meant, it seems, that most people, however concerned, balk at the prospect of trying to play a participating role in government regulation and formulation of policy. Only those who are familiar with Canberra corridors—lobbyists and established pressure groups, in the main—can capitalise on the opportunities for participation that presently exist. We believe that clause 6 should place more emphasis, therefore, on the identification of those consultative and other participatory mechanisms which do exist. We return to this point below.

7.10 Clause 6 could also describe more fully and require the publication of the resources of agencies that are available for public use, particularly resources that are related to an open government policy. For instance, it is the practice of some departments to list in the Directory publications that are available to the public, though this practice is neither uniform nor complete.

7.11 Lastly, it has become apparent to us, from submissions and evidence received from librarians and their representative associations that libraries have, and are anxious to perform, an important role in any open government policy. They already possess extensive holdings of government reports and publications and could readily expand their present role: they could be used both as regional centres for the perusal of published manuals, indexes and guidelines that are to be specifically made available under the Bill, and as advice centres on available government material in general. The Directory could promote their role in this respect.

7.12 Arising out of these considerations we make a number of specific recommendations for the amendment of clause 6, going respectively to the expansion of the list of matters to be included in the Directory, the matters to be considered by ministers in approving the form of the information conveyed, and the time-limits which should apply to the updating of such information.

7.13 In expanding the list of matters to be included in the Directory, as set out in sub-paragraph 6 (1)(a)(i), particular attention should be given to the expression

particulars of any arrangement that exists for consultation with, or representations by, bodies and persons outside the Commonwealth administration in relation to the formulation of policy in, or the administration of, the agency;

It appears that there are a number of formal and informal arrangements for public participation that might not qualify as arrangements for 'consultation' or 'representations' on a strict reading of this provision. One example is the provision in the *Environment Protection (Impact of Proposals) Act 1974* enabling a person to request an agency to indicate what steps it is taking to assess the environmental impact of a proposal or activity. Again there are many advisory committees established with community representatives of one kind or another: they should be included in the Directory—and identified accordingly as accessible to requests and representations—even if they have not established any consultative machinery of a formal kind. Other matters that should in our view be listed are the nature of agency facilities (reading rooms, libraries and the like) that are available for public use, and the informational literature (press releases, statistical series, booklists, periodicals and the like) which is available from each agency on a subscription service or free mailing list basis. We also believe that the Directory should contain at least a summary account of the nature and operations of the Freedom of Information legislation itself, indicating the procedures to be followed in making access requests (not least a full description of the initial contact point for each agency); a more detailed account should certainly be published in the form of a 'Freedom of Information Handbook', a matter to which we return in Chapter 8.

7.14 Recommendation: The list of matters required to be published under clause 6 (1) (a) should be rewritten to encompass among other things:

- (a) all possible institutional avenues presently existing (and which it is practicable to identify) for direct and indirect public participation in governmental decision making;
- (b) facilities provided for physical access to agency information;
- (c) informational literature available by way of subscription services or free mailing lists; and
- (d) basic information about Freedom of Information legislation access procedures, including initial contact points for each agency.

7.15 Paragraph 6 (1) (a) requires that the information in question be published 'in a form approved by the Minister'; clause 6 (2) states that this form 'shall be such as he considers appropriate for the purpose of assisting members of the public to exercise effectively their rights under Part III'. We stated our view above that the information made available under clause 6 should not simply be confined to that which is necessary to enable rights under Part III of the Act to be exercised, and we recommend accordingly.

7.16 Recommendation: The matters to be considered by the minister under clause 6 (2) in approving the form in which information about agencies and their documents is to be published should be widened to include what is necessary to enable members of the public:

- (a) to take advantage of existing avenues for participation in governmental policy formulation and decision making;

- (b) to avail themselves of agency facilities and information resources; and
- (c) to exercise effectively the rights conferred under the Freedom of Information legislation as a whole.

7.17 We believe that the public would benefit far more if the information in clause 6 were revised every 6 months rather than annually. Although it may not be feasible to publish the Directory twice each year, every alternate revision under clause 6 could be published in a special edition of the *Gazette*.

Publication of manuals and indexation of internal laws (clause 7)

7.18 Freedom of information legislation complements many principles that are an integral part of our legal system. Foremost among those principles is the rule of law, which requires that government decisions and the officials who make them should alike be answerable to the same system of law that applies to others. The chief way in which this principle has gained expression in our legal system is through the enactment of legislation that declares the rights, obligations, powers and duties of the Executive, and the correlative rights, liabilities and privileges of the public. However, this objective—that government should be according to law, and that all law should be published, available and accessible—is under challenge from the contemporary practice of enacting legislation that is couched in general terms and creates broad discretionary powers under which the Executive is permitted to adopt internal rules, policies and guidelines to supplement the Parliamentary word. If those internal supplements are hidden—inaccessible or unobtainable by the public—the rule of law is to that extent displaced.

7.19 That is what has happened. Almost every statute that is to be administered by the Executive is affected by an internally-adopted interpretation—whether it is part of a bound manual or another page in a file—that may be used by an official when a question arises as to the application of the statute. This is not to deny that the parliamentary word does not govern, and that frequent resort is not had to it. However, internal interpretation exists; it is a gloss upon, or supplement to, the statute and—whether correct or incorrect, prejudicial or favourable to the subject—it has a potential use. Often those interpretations are not secret, in the sense that an interested inquirer will be denied the right to inspect them. Some are published, others are digested in letters of advice to citizens, and access is given to some when that is sought. However these interpretations are nevertheless hidden, insofar as their existence is not readily known and they are not published in a form that makes them as accessible throughout the country as are the statutes which they supplement, or on occasions supplant.

7.20 A simple example will illustrate our point. The *Social Services Act 1947* is a slim volume of some 200 sections. In a broad sense, the Act confers rights upon the public, since it lists the circumstances and conditions under which over four million Australians presently receive, and are entitled to receive, benefits ranging through Age, Invalid and Widow's Pensions, Unemployment, Sickness and Supporting Parent's Benefits, and Family and Handicapped Child's Allowance. The Act uses a number of general phrases to confer or delimit these entitlements, such as 'permanent and bona fide domestic basis', 'of good character', and 'without just cause' and it creates an equally large number of discretionary powers, prefaced by the expression 'the Director-General may'. Discretionary powers and phrases of this nature are (as they should be) confined, structured and checked by internal interpretations and guidelines. Many officers also have to apply these standards, and others have to police whether recipients are *bona fide*. There

are an equal number of internal rules that specify procedures to be followed by those officers in the exercise of their functions. In other instances officers make decisions in novel situations, and their decisions and any reasons that support them may be regarded as a guide for the future—a ruling of precedential significance.

7.21 Many of these interpretations, guidelines and precedents of the Department are collected in internal manuals. Claims have been made to this Committee by several witnesses¹ that these manuals are not publicly available. The Director-General, on the other hand, stated in evidence to the Committee that some were available for inspection at offices of the department.² What is clear, however, is that none is available at libraries and book shops where the Act itself can be inspected or bought. Equally, manuals that are claimed to be available are not prominently on view at all, if any, of the service counters operated by the Department.

7.22 In these circumstances this internal *law*—for that is what it is—is hidden. The rights and duties of the public can be affected by laws that are not public. The law may even be a misinterpretation of the statute, but is governing nonetheless. It may correctly interpret, but be misapplied. Its silent existence is unacceptable in a system that exalts the rule of law, rather than the men and women who administer it.

7.23 This example can be multiplied. Hidden law can be found in the fields of taxation, superannuation, employee compensation, company registration, customs and excise, or trade practices. Indeed one department which gave evidence to the Committee, the Department of the Capital Territory, estimated that it would publish as many as 400 manuals if it were required by the Bill to make available its internal law.³

7.24 It is against this background that the Committee treats clause 7 as one of the most important clauses in the Bill. Briefly, that clause requires each agency to make available for inspection and purchase all documents that are part of its internal law, i.e., that which is defined as 'interpretations, rules, guidelines, practices or precedents' that are provided by an agency.

for the use of, or are used by, the agency or its officers in making decisions or recommendations, under or for the purposes of an enactment or scheme administered by the agency, with respect to rights, privileges or benefits, or to obligations, penalties or other detriments, to or for which persons are or may be entitled or subject.

In addition, an index of the documents containing these rules has to be prepared and published in the *Gazette*, and updated every 12 months.

7.25 It is to be noted that if a document is not so indexed and made available, then, under clause 8, a person who is not aware of the rule in question

shall not be subjected to any prejudice by reason only of the application of that rule, guideline or practice in relation to the thing done or omitted to be done by him if he could lawfully have avoided that prejudice had he been aware of that rule, guideline or practice.

¹ E.g. Australian Council of Social Services, Submission no. 48, incorporated in *Transcript of Evidence*, p. 445; the Women on Welfare Campaign, Submission no. 113, incorporated in *Transcript of Evidence*, p. 1774; cf. Department of Social Security, Submission no. 117, incorporated in *Transcript of Evidence*, p. 2140.

² *Transcript of Evidence*, pp. 2196–7.

³ Submission no. 149, incorporated in *Transcript of Evidence*, p. 2230.

7.26 It is interesting to note that a similar requirement appearing in the United States Freedom of Information Act has had a marked and important impact on government administration. The provisions on internal law were predicted from the outset as being one of the notable advances enacted by the Freedom of Information Act, in part because of the sophisticated United States system of administrative justice, fashioned from the constitutional requirement that individual rights would not be affected except by due process of law; but partly also because of the abhorrence of secret law—a sentiment that is more universal in its recognition. A recent article discussing the United States Freedom of Information Act gives a description of some of the material that is now available pursuant to the internal law provisions of that Act:

Literally hundreds of indexes are now published, including indexes of such things as environmental impact statements, the outside contacts of the Federal Trade Commissioners, merger clearances by the Commission, policy directives from the Immigration Commissioners, authorizations issued to banks by the Federal Reserve Board to acquire shares, invest, or undertake a merger, advisory interpretations of the Tax Code issued to individual taxpayers by the Internal Revenue Service, the Federal Power Commission's instructions to oil companies, details of the different programmes operated by agencies, and internal agency guidelines and manuals on such things as drug analysis, supervision of recipients of federal funds, Federal-State highway management, analysis of food additives, pesticides and vitamins, and security, auditing, training, administrative and legislative policies and personnel management. In addition, categories of secret law that have been disclosed pursuant to court order include the manual for tax auditors, the Parole Commission's guidelines and decisions, the Air Force's rulings on violations of the honour code, and the criteria to be applied by prosecutors when deciding whether to prosecute.⁴

7.27 The support for these sections on internal law is not confined to those outside the Administration who use the Act. It was confidently predicted by many promoters of the Act that, in time, the Administration would experience the benefit of open government, and it appears that in many quarters this has occurred. Some interesting remarks on the internal law provisions of the United States Act were recently made by William E. Williams, a Deputy Commissioner of the Internal Revenue Service during hearings on the impact of the Act on law enforcement, held by the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary:

On balance, we believe that to date these Acts have had a beneficial influence upon the tax administration process. Today, for example, all of the IRS administrative procedures and operational handbooks, with the exception of our law enforcement manual, are available to the public upon request, and portions of the manual are being published by one of the major tax services. Prior to FOI, these materials were kept confidential, although subsequent experience has demonstrated no legitimate tax administration function was served by this restriction. With this access, individuals, the media and public interest groups have done much to identify shortcomings in our procedures, which the Service, in turn, has moved to correct (e.g., improved publicity to all taxpayers regarding their appeal rights, and streamlining of our appeals procedures).

I believe that the confidence of taxpayers and tax practitioners in our administration of the revenue laws has been enhanced by this ability to see for themselves, and to comprehend the complex procedural issues inherent in the application of the tax laws. I further believe that the growing public pressure for tax law simplification

⁴ J. D. McMillan, 'Freedom of Information in Australia: Issue Closed', *Federal Law Review* 8, (1977) 379 at p. 390.

must be attributed, at least in part, to this greater appreciation for the administrative complexities inherent in the current law. In a broader context, a January, 1978, Harris Poll, citing a significant increase in the public's confidence in Federal Executive Branch institutions may well reflect, at least in part, the overall impact of this Act.⁵

7.28 Part II of the Australian Bill is not as broad in its ambit, or as demanding in its requirements, as the comparable provisions of the United States Freedom of Information Act. However, if several amendments to the existing provisions were made, we feel that Part II could operate as successfully and acceptably as its United States counterparts. Although at first sight apparently quite far-reaching in its terms, we feel that sub-clause 7 (1) has in fact been drafted too restrictively and, in its operation, may not apply to a number of documents that should be published or indexed. In particular, the sub-clause may not apply to some documents that are of precedential significance, or reflect the approach adopted by an agency concerning the interpretation or application of a particular statute. Presently the clause applies to 'manuals or other documents containing interpretations, rules, guidelines, practices or precedents' and to 'documents containing particulars of (a scheme administered by the agency)'. Categories of documents which may not be comprehended by this terminology and to which we think it should be expressly extended include letters of advice to persons outside the agency and what might be loosely described as 'statements of policy'.

7.29 *Letters of advice to persons outside the agency.* It is possible—and indeed happens—that an agency may carry on a notable proportion of its regulatory activity by way of letters of advice. A company wanting to know whether its planned reorganisation complies with trade practices requirements, an accountant inquiring as to the approach of the Taxation Commissioner, a citizen making preliminary inquiry as to his or her eligibility for a benefit, grant or subsidy—all may receive advice, on which it is understood they will act, as to the course they should take. Such advice (even though it does not bind an agency) can, in a practical sense, amount to internal law of that agency, because it reflects the approach the agency adopts in the administration of its legislation. Certainly it is advice that would be of interest to another corporation, accountant or citizen, either contemplating a similar course of conduct, or who has been treated differently by an agency in an earlier matter. While it is possible that such advice may be classified by some as an 'interpretation' or 'guideline' by an agency, we see no danger, and some advantage, in having this expressly in the Bill. We have in mind in particular that, in the early years of operation of the United States Freedom of Information Act, agencies claimed that advisory opinions and 'no action' letters were not within the scope of the internal law provisions of the Act. Legal action was necessary to establish that these were part of the internal law of an agency.⁶

7.30 *Statements of policy.* Statements are sometimes made as to the manner in which a statute will be administered that do not amount to an interpretation of the statute or a statement made in the exercise of any power conferred by the statute. Equally, the statement may not amount to a guideline to staff or a practice direction, on how to administer the statute, since it might be designed

⁵ William E. Williams, Statement to Subcommittee on Criminal Laws and Procedures, United States Senate Committee on the Judiciary, 25 April 1978, incorporated in *Transcript of Evidence*, pp. 2157–8.

⁶ Australia, Parliament, Royal Commission on Australian Government Administration (Dr H. C. Coombs, Chairman), Appendix Volume Two, Parl. Paper 187/1976, Canberra 1977, p. 103.

simply to explain to the public circumstances that affect the administration of the Act. Examples might include policy statements on budgetary allocations for a particular program (for instance, legal aid subsidies, or welfare benefits), or statements on agreed Commonwealth-State arrangements that affect the administration of an Act. Again, to ensure that statements such as these are indexed and made available on an accessible basis, we propose that they be included in clause 7 (1).

7.31 A further question arises with respect to documents that are used in enforcing the law as distinct from merely administering it within an agency, the emphasis in clause 7 (1) as it is presently drafted being squarely on the latter. There is an overlap between the two concepts, and many manuals—for instance, those on tax avoidance and evasion—may already come within the terms of clause 7. But there are other matters about which there may be some doubt—for example, the internal rules relating to police fingerprinting and the use of firearms, or the procedures followed in social security investigations—and we believe it is important that they be expressly encompassed by clause 7. As a matter of general principle, documents ought, *prima facie*, to be disclosed if they are used in enforcing enactments or schemes administered by an agency where a member of the public might be directly affected by that enforcement, if they are documents containing information on the procedures to be followed, the methods to be employed or the objectives to be pursued in the enforcement of the enactments or schemes in question. Clause 27 of the Bill (discussed in Chapter 20) does, of course, provide for the exemption of certain documents the disclosure of which would actually prejudice law enforcement in designated circumstances, and clause 7 (4) preserves the full force of that exemption in the present context. While it is clear that there will be many manuals on law enforcement that will be wholly or partially exempt from publication, and properly so, nevertheless there are non-exempt documents in this field that should be indexed and accessible.

7.32 Recommendation: The categories of ‘internal law’ documents described in clause 7 (1) and required (subject to exemptions) to be published, should be extended so as to clearly encompass:

- (a) letters of advice (of precedential status) to persons outside the agency;
- (b) statements of policy; and
- (c) documents used in enforcing the law (as distinct from administering it).

7.33 Under clause 7 (2) an index has to be updated at least every 12 months. We recommend that a period of 3 months be adopted. If internal law is to be accessible, it should be made so as soon as possible. Government administration now develops at a quick pace, legislation is amended regularly, new discretionary powers are created at frequent intervals, internal procedures are amended as problems are disclosed, and new precedents arise daily as novel issues arise. Unless these changes are notified regularly to the public, the internal law that is indexed under the Bill will be of merely historical significance. It is clear that, if agencies are to meet their obligations under the Bill as it is presently drafted, they will have to prepare documents for indexation concurrently with their creation. In these circumstances there is little to be lost and much to be gained by requiring indexes to be revised at regular intervals of 3 months. We note

in passing that the United States Freedom of Information Act requires indexes to be amended on a quarterly basis, though in fact it is common for many agencies to do this sooner, when the need for amendment arises.

7.34 Recommendation: Clause 7 (2) should be amended to require the publication, where necessary, of an index-updating statement at not less than 3 monthly intervals rather than 12 monthly as presently provided.