

Processing access requests

The obligation to facilitate access (clauses 9 and 13)

8.1 The premise on which the whole Freedom of Information Bill is constructed is that access to information is a matter of right and not something which is dependent on a showing of interest or need to know in any particular case. We wholeheartedly endorse that premise, which is incorporated in Clause 9 of the Bill in the following terms:

9. Subject to this Act, every person has a legally enforceable right to obtain access in accordance with this Act to—

(a) a document of an agency, other than an exempt document; or

(b) an official document of a Minister, other than an exempt document.

As the Attorney-General put it in his Explanatory Memorandum, this clause 'embodies the basic principle of the legislation which is that an agency must justify the withholding of a document instead of the person seeking access having to justify his request'.¹

8.2 We see the importance of clause 9 as more than purely formal. Not only ought it to colour the whole approach that is adopted with respect to the interpretation and application of the exemption clauses in the Bill—discussed at length in Part C of this Report—but it ought also, in our view, to influence departments and authorities in their practical administration of the access procedures now under discussion as Part B. We regard clause 9, together with the even more explicit provisions in clause 13 discussed further below, as amounting to a clear legislative instruction to departments and authorities to do everything in their power to clear the applicants' path and to avoid putting any but the most obviously necessary obstacles in their way.

8.3 Regrettably, these points do not yet appear to have met with universal or wholehearted acceptance. There is still something of a rearguard resistance, discernible in the submissions to us of a number of departments and authorities, to the fundamental character of the Bill as one based on 'rights' rather than 'need'. A number of those who made submissions or appeared before the Committee wished to restrict the right by making it conditional upon a demonstration of need. The basis of this need was not clearly specified to us, but seemed usually to be bound up with notions about the 'reasonableness and unreasonableness' of requests, as one witness put it, from the departmental point of view.² Clause 13 (3) of the Bill, which we mention below and discuss in detail in Chapter 13, covers cases where requests may 'interfere unreasonably' with the operations of an agency; but that is different from assessing the reasonableness or otherwise of the request itself. This fundamental point needs to be understood clearly. The Director-General of Social Security also argued that information should desirably be made available only 'when it is needed'.³ He thought it worth exploring the possibilities of creating a system which would permit access to information to be

¹ Australia, Senate, *Freedom of Information Bill 1978. Explanatory Memorandum*, Canberra, 1978 p. 5.

² *Transcript of Evidence*, p. 816.

³ *Transcript of Evidence*, p. 2181.

'declined on the basis that its cost is wholly out of proportion to the need which can be demonstrated by the person who is asking for it'.⁴ However, he did not 'feel confident that [he had] a solution that would be acceptable' and he added that his department would 'comply faithfully with whatever decision emerges in the legislation'.⁵

8.4 Other departments did try to suggest some ways to determine need. The Department of Immigration and Ethnic Affairs, for example, thought that access to information should not be extended to 'illegal immigrants and temporary entrants' who were 'without any claim to the benefits of the legislation—given that they are not part of the taxpaying Australian community'.⁶ The Department also argued that access should be refused 'on the grounds of potential for improper use of information acquired'.⁷

8.5 We cannot accept these views, understandable though they may be. We believe that such solutions would create more difficulties than they would solve. On practical grounds it would be possible for those with a 'need' under such legislation to claim access to information on behalf of those who had no such legally enforceable right deriving from need. To police the operations of the Act to prevent this happening would not be administratively feasible. Certainly it would be very costly. Much more important, such an attempt would be undesirable. We are not able to discern a philosophical basis for determining need in some agreed fashion and we believe the attempt should be abandoned.

8.6 There are certain circumstances in which individuals requesting information should be required to establish their identity, but this is a different matter from establishing need. The Department of the Capital Territory, for example, pointed out that when a person seeks access to a document concerning him or herself personally it would 'be necessary . . . to develop procedures to ensure that persons seeking access to personal or confidential commercial material can establish their identity and interest before access is given'.⁸ We take 'interest' to be used in a narrow sense. The Department of Health also said that

specific provision may be needed to ensure that medical records are . . . released only to the person concerned or to the nominated doctor. In view of the particularly private nature of medical records it is suggested that consideration could be given to the adoption of requirements firstly, that an applicant should produce proof of identity when applying for access to his medical record and secondly, that the nomination of the doctor, where the record is not to be directly disclosed to the person seeking it, must be made in writing.⁹

It is clear that departments are well able to establish suitable procedures.

8.7 If, as seems clear, the idea of a right of access to information is not well understood and accepted throughout the public service, then work still needs to be done inside the public service to clarify that 'basic principle' of the legislation. This is a task for departmental management which must be undertaken without delay, and with support from other agencies as appropriate.

⁴ *Transcript of Evidence*, p. 2182.

⁵ *ibid.*

⁶ Submission no. 158, incorporated in *Transcript of Evidence*, p. 2331.

⁷ *ibid.*

⁸ Submission no. 149, incorporated in *Transcript of Evidence*, p. 2231.

⁹ Submission no. 83, incorporated in *Transcript of Evidence*, p. 1031.

8.8 Clause 13 (4) requires an agency to assist a person making a request to comply with the legislation:

(4) It is the duty of an agency, where practicable, to assist a person who wishes to make a request, or has made a request that does not comply with this section or has not been directed to the appropriate agency or Minister, to make a request in a manner that complies with this section or to direct a request to the appropriate agency or Minister.

An inquirer may often need to be told that the request should be put in writing or that it should be directed to a particular agency or minister—to permit, in short, the provisions for making a request described above to be met. As the Attorney-General has explained it, this means that 'an agency must therefore attempt to assist a person who has made a request that does not sufficiently identify a document to provide sufficient information to identify the document concerned or to specify within a broadly stated subject matter the particular document to which access is sought'.¹⁰ Clause 13 (5) reinforces this provision by providing that requests for access should not be refused without giving the inquirer a reasonable opportunity of consultation with a view to removing the barrier to access.

8.9 These are important provisions, even to people who are knowledgeable about government and have a reasonably clear idea about the nature of the documents they seek. As the Freedom of Information Legislation Campaign Committee pointed out:

since there is no requirement that internal filing indexes be released, or that lists of such things as committee reports be prepared, few requests will be able to identify particular documents and might be regarded as framed by reference to subject-matter It will be difficult for a person who does not have substantial knowledge of any agency's filing system or record holdings to challenge an assertion that it would be burdensome to locate those documents. Any request should be answered which sufficiently identifies a document to enable it to be located.¹¹

The 'duty' placed on agencies 'to assist a person who wishes to make a request' was commended in numerous submissions made to the Committee. We note that the Attorney-General has himself claimed that this positive obligation on agencies to assist applicants is a feature of the Australian Bill, not found in the United States legislation.¹²

8.10 While we thus welcome the inclusion of clause 13 (4) in the Bill, we believe that it should be strengthened, by the deletion of the words 'where practicable', to make it unequivocally clear that it is the duty of an agency to assist a person to make a request. It may be said that this would be to place too heavy a burden upon departments to be helpful with requests which are without merit. But this objection is unacceptable to us. This is not because we think that all requests will indeed have merit. There are bound to be inquiries which are of a frivolous or vexatious nature. This is not a situation peculiar to freedom of information. All government organisations receive a proportion of frivolous requests but they cannot refuse co-operative service generally because of the actions of a few. We do not support such frivolous requests but neither do we exaggerate their significance.

8.11 More significant are those requests which cannot be accommodated under the Freedom of Information legislation, but which are made for quite defensible

¹⁰ *Explanatory Memorandum*, cited footnote 1, p. 8.

¹¹ Submission no. 9, incorporated in *Transcript of Evidence*, p. 116.

¹² Australia, Senate, *Hansard*, 9 June 1978, p. 2698.

reasons. Countless requests are made for information which the government simply does not have. By no means will all these requests be made frivolously or with intent to waste the government's time. Many will come from individuals who want information and look to the government to provide it. This is legitimate, even if they are going to the wrong place. It is important that citizens, courteously, be told this. Indeed such explanations should be part of the informal procedures which take place before formal requests are made under the legislation.

8.12 There is, however, a point which may appear to lie in the opposite direction. The Australian Advisory Council on Bibliographical Services put the issues well in its submission to the Committee when it pointed out that clause 13 (4) 'is open to some abuse' if the assistance given to inquirers turns out to be 'on the agency's terms'. The inquirer could be 'placed in the position of having to give considerable information to the agency, information which many people may not want to give'.¹³ It is right that departments and authorities should be under a positive obligation to assist applicants for information. But this means all applicants. Departments must not be helpful to some applicants and unhelpful to others: that would be to introduce a hidden 'needs' criterion dependent upon bureaucratic preference or prejudice. We emphasise again, however, that clause 13 (4) is valuable and that a positive statement of departmental obligations can be met by a straightforward change to it.

8.13 Recommendation: The words 'where practicable' should be omitted from clause 13 (4) in order to make unequivocally clear the responsibility of agencies to respond helpfully to persons making requests.

8.14 Here as elsewhere, to give this recommendation force will require some positive action from government agencies. The significance of sub-clauses 13 (4) and (5), and indeed provisions like clause 9 making it clear that access to information is a matter of right rather than need, must be brought systematically to the attention of those public servants who will receive and process freedom of information requests. The supervisors of staff at counter and inquiry positions will be in an especially important position. A further way to support the intent of the legislation, then, will lie in the fields of staff training and development. We have emphasised this in general terms already in Chapter 6; and we emphasise it again in the present context.

8.15 Recommendation: The training given to public servants to equip them to implement the legislation should emphasise the underlying principles of the legislation and make it clear that the assistance they give inquirers should be given in an equitable, even-handed way without regard to the public servant's view as to the quality of the application or its likely outcome.

A Freedom of Information Handbook

8.16 Action is also necessary to ensure that agencies are helpful to potential applicants for documents even before inquiries under the legislation are made. To a great extent the publication of manuals and indexes, as provided for in clauses 6 and 7, is designed to ensure this, and we have discussed those clauses at length in the previous chapter. However, it is also important that agencies, or the government as a whole acting on their behalf, should draw the attention of members of the public to their rights under the legislation. They must take an active part in doing this. It is also in their own interests that they do so: an informed public will not create administrative difficulties of the sort apparently feared by so many officials.

¹³ Submission no. 75, p. 22.

8.17 A number of submissions to the Committee argued these points. The Law Institute of Victoria, for example, criticised the Bill because it 'does not require that guidelines for the making of an application be published and made freely available to the public'.¹⁴ The Women's Electoral Lobby (Victoria) assumed 'that some sort of guidelines will be drawn up for the public so that the workings of the legislation and procedures which are to be followed will be explained'.¹⁵ We are not so confident. Special action needs to be taken by departments if this is to happen and particular attention must be paid to the language in which any such explanatory material is written or otherwise disseminated. The submission of Mrs K. Millar thus said that attention must be paid to 'people whose native language is not English'¹⁶ and a representative of the South Australian Council of Social Service also spoke of the need for an explanatory brochure in 'lay language, the language of the people'.¹⁷

8.18 We support these arguments and believe that a handbook explaining the operation of the legislation and nature of the rights conferred by it would meet the difficulties identified. Such a handbook should be distributed free or at a minimal charge and would include such matters as explanations in plain language of the working of the legislation; examples of government documents which might be of interest to citizens; explanations of the different sorts of information that are available—documents, tape recordings, computer printouts, maps and so on; indications of the limitations to the Act (for example, departments will not do research for people or analyse documents or collect information that they do not have); indications of the scope of exemptions under the Act and of the appeal provisions and procedures; references to relevant agency publications and contact points; examples of how to write or telephone a department; advice that requests should be as accurate as possible to avoid searching and to keep costs down; and full details of the fee structure, giving illustrations and explaining ways in which waivers or reductions of fees and charges can be sought.

8.19 A good example of what we have in mind is the *Citizen's Guide on How to Use the Freedom of Information Act and the Privacy Act in Requesting Government Documents* prepared in the United States by the House of Representatives Committee on Government Operations.¹⁸ In Australia, such a handbook could well be prepared in the first instance by the Attorney-General's Department, which will have the general responsibility for overseeing the administration of the freedom of information legislation. It may be desirable for those departments and authorities which are likely to be heavy recipients of freedom of information requests to produce their own handbooks, brochures or other such literature. Certainly we believe that the basic handbook we propose, or if necessary some abbreviated version of it, should be published not only in English but also in the principal migrant languages.

8.20 Recommendations:

- (a) Preparatory work should commence at once on the production of a Freedom of Information Handbook, explaining the nature of the rights conferred by the Freedom of Information legislation and the procedures by which they might be exercised.**

¹⁴ Submission no. 112, p. 4.

¹⁵ Submission no. 7, incorporated in *Transcript of Evidence*, p. 366.

¹⁶ Submission no. 120.

¹⁷ *Transcript of Evidence*, p. 1807.

¹⁸ United States, House of Representatives, *A Citizen's Guide on How to Use the Freedom of Information Act and the Privacy Act in Requesting Government Documents: Thirteenth Report by the Committee on Government Operations*, House Report no. 95-793, Washington, 1977.

- (b) Such handbook should be written in plain and accessible English, produced also—if necessary in abbreviated form—in the principal migrant languages, and distributed free or at a minimal charge.
- (c) The Attorney-General's Department should have the responsibility for producing the basic handbook, but other agencies should consider, where appropriate, producing their own information brochures and other publicity.
- (d) The basic handbook if possible should be available at the time of proclamation of the legislation, but delays in its production at that time should not be used as an excuse to delay such proclamation.

Form of requests (clause 13)

8.21 Clause 13 (1) states that a person who wishes to obtain access to a document 'may make a request in writing' to the agency or minister concerned. Oral requests for documents may in practice evoke an affirmative agency response in certain circumstances, but they will not have any formal status under the present legislation. (In technical terms, the satisfaction of such requests will be contingent upon the exercise by the minister or agency of the residual discretion conferred by clause 12.) This is made clear—but not as clear as it could be—by clause 16 (1), which provides, among other things, that 'where a request is *duly made* . . . the person shall be given access to the document'. In his Explanatory Memorandum, the Attorney-General states that 'the only formal requirement comprehended by the term "duly made" is that the request be in writing'.¹⁹ He goes on to note that further formalities are required if a request is to evoke not merely an access response, but a response within the 60 day time limit fixed by the Bill: this follows from clause 17 which requires, as a condition of this time limit being satisfied, that a request be both 'made in writing and . . . expressed to be made in pursuance of this Act'.

8.22 We make it clear at the outset that we accept the appropriateness of this general scheme. It must be acknowledged that it is difficult administratively to contemplate a system where statutory obligations could be founded on other than written requests. Equally, we regard it as not unreasonable that an applicant who wishes to specifically rely on the Freedom of Information legislation in making his request, and in particular to get the benefit of such time limits on response as that legislation imposes, should be required to expressly make clear that his request is made pursuant to that legislation. There is a difference between freedom of information requests and those made, for example, by school children seeking project material, and we would not regard it as appropriate that an agency should be bound by the present legislation to meet strict time limits in relation to the latter (although, needless to say, we of course believe that agencies should meet such non-freedom of information requests as soon as possible). But while we do accept the general scheme, we make the point that it does not emerge as clearly as it might from the language of the Bill. The Attorney-General's Memorandum makes clear the intended relationship between the formality requirements in clauses 13, 16 and 17, but the language of the Bill does not. Matters would be assisted in this respect if the expression 'duly made' in clause 16 (1) were abandoned in favour of the expression 'made in writing', and we recommend accordingly.

¹⁹ *Explanatory Memorandum*, cited footnote 1, p. 10.

8.23 Recommendation: For purposes of clarification, the requirement in clause 16 (1) (a) that a request be 'duly made' should be replaced by one that it be 'made in writing'.

8.24 We commend the simplicity of the requirement that requests simply be made 'in writing'. There are no provisions requiring the use of special procedures or forms of requests, and this is as it should be. (This is not to say that it might not be appropriate to spell out in regulations or the proposed handbook a pro forma request—but as a guide rather than a mandatory direction.) Simple procedures are best. However, procedures which appear simple to the educated or experienced may be mysterious to other people. Making a written request may not be simple to them, but their legitimate desire for governmental information will not be any the less for that.

8.25 Many welfare groups, such as the South Australian Council of Social Service and the Women on Welfare Group, urged these considerations strongly upon us. Requests for information from government come in many forms; they are certainly not all made in writing or to the correct 'address of the agency or of the Minister' (clause 17 (b)). It is essential that the provisions of the legislation are not interpreted so that it is easily operated only by the knowledgeable or by those who are already so adept that they scarcely need its help. The present Bill contains in sub-clauses 13 (4) and (5), and in clause 14 which relates to transfers of requests, provisions which make possible its flexible application in this respect, and we make no specific recommendations for changing them. We do emphasise again, however, the crucial importance of their being interpreted and applied with sensitivity.

8.26 Many requests will not be made in writing initially, and some may remain unwritten even though the request for information is successful. The proportion of written to non-written requests will vary from agency to agency. The Department of Employment and Youth Affairs, for example, said that it

would envisage that the great bulk of requests would be for access to personal records and would not be in writing. It is estimated that eighty per cent of such requests will not involve consideration of potentially exempt material. These 'simple' requests could be dealt with by local office counter staff.²⁰

Other departments, particularly those concerned primarily with policy matters or those which have restricted functions of service delivery, will probably receive written requests as a matter of course and this has been in fact the assumption of most departments. We trust that in respect to those service-delivery and other departments where a high percentage of requests can be expected that are not in proper form, the attitude of the Department of Employment and Youth Affairs will prevail, and such requests will either be met anyway where it is convenient to do so, or the applicant will be given every assistance to put his application in proper form.

8.27 Whereas the interests of the applicant are protected by sub-clauses 13 (4) and (5), sub-clauses 13 (2) and (3) are largely directed towards protecting the interests of the agency. Clause 13 (2) provides that:

a request shall provide such information concerning the documents as is reasonably necessary to enable a responsible officer of the agency, or the Minister, as the case may be, to identify the document.

While the language of clause 13 (2) cannot reasonably be objected to, it is again important that it be approached by public servants in the right spirit, and with

²⁰ Submission no. 164, para. 4.16.

due appreciation of the difficulties confronting most applicants—even with the help of the material required to be made available under clauses 6 and 7—in identifying with greater precision the particular documents they want. Similar considerations apply to clause 13 (3)—dealing with categorical requests, compliance with which ‘would interfere unreasonably with the operations of the agency’—which we discuss in detail in Chapter 13. It is a matter, in essence, of balancing sub-clauses (2) and (3) against sub-clauses (4) and (5); since it is the agency which will largely determine how the balance works out, its officers must approach this part of the legislation with a full understanding of it, and with sensitivity to the underlying aims of the legislation as a whole.

Transfer of requests (clause 14)

8.28 However well agencies prepare for the legislation and however well they deal with particular requests which come to them, it will of course be the case that not all requests will be sent to the right agency. Clause 14 thus enables the transfer to the appropriate agency of requests for access to documents that have been sent to the wrong agency or that involve the functions of another agency more closely than those of the agency which received the request. This is a necessary provision which will demand thought from agencies if it is to work properly. It is clear from clause 14 (2) that requests which are transferred from one agency to another do not have any effect on the time limits which apply. That is to say, a request is deemed to be received in a second agency at the time the request was made to the first agency. Departments and authorities cannot therefore transfer requests among themselves in order to keep the time limits running by a process of multiple transfers of requests. There may still be problems: because time is running, some agencies may be tempted to argue that transferred requests which are received rather late will interfere, say, with their ordinary operations, and they may therefore attempt to claim exemptions under clause 13 (3).

8.29 There are, however, good reasons for departments making prompt transfers of requests. Only by doing this can they ensure that inquirers are not sending the same request to many different agencies in the hope of getting better treatment from one of them. If there are to be uniform standards throughout the public service, then rapid transfer of requests is essential. This underlines the fact that departments will have to develop consistent procedures to guide the transfer of requests. We were not reassured by the evidence we heard. In fact this issue seems to have generated very little attention. The Public Service Board said that consultation between departments would be necessary. But more needs to be done. As the Postal and Telecommunications Department said ‘. . . it could be a difficult judgment whether the subject matter of a document has a closer connection with a statutory authority than with the Minister or his Department’.²¹ It would appear that the Attorney-General’s Department, as the Department responsible for the overall administration of the legislation, would be in the best position to co-ordinate the development of guidelines in this area, and we recommend accordingly.

8.30 Recommendation: The Attorney-General’s Department should, in consultation with the agencies most closely concerned, consider the arrangements which will guide transfers from one agency to another, and formulate guidelines for the effective administration of all aspects of clause 14.

²¹ Submission no. 98, incorporated in *Transcript of Evidence*, p. 950.

Requests for non-written information (clause 15)

8.31 Clause 15 (1) provides for the granting of access where information does not exist in discrete form in documents of the agency but could be put into such form through the use of a computer or through the making of a transcript from a sound recording. Clause 15 (2) enables an agency to refuse a request if doing this would interfere unreasonably with the operations of the agency; an appeal against such refusal lies to the Administrative Appeals Tribunal.

8.32 These provisions, particularly as they relate to computer-stored information, have been the subject of some criticism. It is at this point, as one submission put it, that the Bill 'is most like a freedom of access to documents instrument and least like a real freedom of information initiative'; it was argued that an agency 'may legally avoid answering questions from the public on the grounds that the question does not constitute a request for access to any existing document, storage or transcript'.²² At the very least it does appear that clause 15 may permit certain sorts of information to be unrecoverable under the terms of the legislation. As the submission of Mr P. R. Munro suggested, 'clause 15 provides a procedure enabling an agency to search its computer records' but the 'opaque legalistic and discretionary means of including computer records within documents covered by the Act is to be contrasted with the extremely explicit definition of "information storage device" contained in clause 3 of the *Audit Amendment Act 1978*. . . . it should be made abundantly clear that the matters coming within the definition of "information storage device" will require adequate identification and definition as being within " a category of documents maintained" under clause 6'.²³ This view received some confirmation from the Chairman of the Public Service Board who indicated that information would probably not be available if a new program for its retrieval had to be written. As he put it 'if data is held in an organization but it is not accessible even to the permanent head unless he authorizes a major research program or, alternatively, diverts the computer programs to produce a new stream of information, that does raise a question as to whether that information is available'.²⁴

8.33 We believe that, by and large, it would be an unreasonable interference with the operations of an agency to require it to write a wholly new program for the retrieval of information stored in a wholly different, or differently aggregated, form, in computer data files. It would not, on the other hand, be at all unreasonable for it to be required to supply to an applicant particular data which can readily be printed out without the necessity for a new program to be written at all. Between these extremes there are a number of intermediate situations which can be envisaged, where modifications to an existing program are required to a greater or lesser extent. How each agency might handle such requests is essentially a decision for it to make: we make recommendations in Chapter 11 below which would enable it to recover an appropriate fee for the amount of computer and computer finance time involved, and no doubt this would be a relevant consideration for the agency to weigh. The only specific recommendation we make with respect to clause 15 is the modification of the language of sub-clause (2) to bring it into line with our proposed amendment to clause 13 (3), discussed in Chapter 13 below. Although it may not make an important difference to the legal meaning of the sub-clause to express the requisite degree of interference as 'substantial and unreasonable' rather than merely 'unreasonable', we

²² Mr R. Clarke, Submission no. 13, p. 3.

²³ Submission no. 12, incorporated in *Transcript of Evidence*, p.601.

²⁴ *Transcript of Evidence*, p. 883.

believe this kind of terminology will convey more precisely the spirit of what is intended, and help to ensure that this escape route is not relied upon by an agency more than is absolutely necessary.

8.34 Recommendation: The qualification in clause 15 (2) should be amended to require that compliance interfere 'substantially' as well as 'unreasonably' with the operation of the agency.

Time limits (clause 17)

8.35 Clause 17 requires an agency to 'take all reasonable steps to enable the applicant to be notified of a decision on the request as soon as practicable but in any case not later than sixty days after the day on which the request is received'. For the time limits in this clause to apply to a request, it must be made in writing, expressed to be made pursuant to the Act, and it must be sent to a specified address of the agency. The sixty-day time limit, it must be stressed, is the maximum time within which an agency is required to respond. The phrase 'as soon as practicable' has a force which applies regardless of what the maximum time limit may be. Under clause 39, complaint of unreasonable delay may be made to the Ombudsman before that time has expired, and if he is satisfied that in all the circumstances the delay is unreasonable, the agency's attitude may be treated as a refusal so that an immediate appeal lies to the Administrative Appeals Tribunal.

8.36 We note the Attorney-General's observation that 'in many cases it ought to be practicable for an agency to make a decision on a request in less' than the time limit.²⁵ A number of departments have indicated clearly that they recognise this fact. The Director-General of Social Security for example said that departments had a 'moral obligation' to respond to requests as quickly as possible. He said that his department 'would undertake to make the minimum use of "the sixty-day rule" consistent with carrying out [its] functions'.²⁶ The Chairman of the Public Service Board also said that

the 60 days was simply a safety valve to cope with the unknown . . . it may prove, in the light of experience, that a much shorter period is easily workable; and . . . even if on occasions it takes 60 days, I would expect that in most cases it would be done more quickly.²⁷

8.37 Where information is readily to hand and there are no difficulties in releasing it, then it should of course be speedily released. This is well understood. By the same token, an agency must tell an applicant as soon as practicable if it intends *not* to release a document. This decision cannot be kept quiet until the end of the time period as a delaying or intimidating tactic. If the time period cannot be met for special circumstances, such as staffing absences or natural disasters, then this should be communicated to the applicant. The language of the present clause 17 is such that no further amendment is required to ensure this obligation as a matter of law, but we believe, as a practical matter, that the point needs to be emphasised.

8.38 The sixty-day time limit itself has been vigorously opposed by many non-departmental witnesses. *The Sydney Morning Herald*, for example, thought it

²⁵ *Explanatory Memorandum*, cited footnote 1, p. 11.

²⁶ *Transcript of Evidence*, p. 2215.

²⁷ *Transcript of Evidence*, p. 871.

'absurdly protracted'; the Victorian FOIL Committee that it was 'too long'; CAGEO that it was 'excessive'. The ACOA summarised a common view in saying that

The allowance of 60 days to decide requests may in some cases be justified having regard to existing reference aids, registry systems, and the likely need to secure advice on the application of the Bill or Government policy. However, for the general run of cases the limit creates an excessive, and seemingly needless potential for delay.²⁸

We strongly sympathise with these views. We recognise that departments in general opposed a reduction for reasons of administrative convenience. However departmental positions were not closely argued and there were differences of opinion among departments.

8.39 There was no disposition on the part of departments or authorities to argue for an extension of the sixty-day period. The Department of Primary Industry and the Department of Foreign Affairs, for example, thought that the period was 'reasonable' and the Department of Health 'endorsed' it. The Public Service Board summarised public service reaction as follows:

The bulk of the respondents were not confident of being able to meet a response time less than 60 days . . . without significant additional resource costs. Most anticipated an unmeasurable but probably significant increase in the time of senior officers if a 28 or 14 day response time were introduced. Departments generally supported the existing 60 day provision with the comment that it would be in their interests to respond as soon as possible within this period. Many drew attention to the appeal provisions of the Bill in relation to the response time arrangements. Many considered that responses to all requests within 28 or 14 calendar days could not be achieved within existing resources without detrimental effects on normal ongoing functional responsibilities.²⁹

There were however differences of opinion among departments as to the extent to which, if at all, the period could be reduced. Some of the smaller agencies thought that the period might be reduced without undue difficulty to their operations. The Trade Practices Commission (TPC), for example, said that:

Because the extent of the Commission's records is comparatively limited it does seem . . . that most requests for access could be the subject of decision within 28 days, so that if the time limit were reduced from 60 days to 28 days [it is doubtful] whether any increase in staff resources would be needed.³⁰

Other agencies emphasised various circumstances of staffing and demand which could influence their position. The Department of Veterans' Affairs, for example, said that:

Based on our predictions of future workloads and given that adequate staff is available, the 60 day limit would probably have little adverse effect on the Department's operations. With the above provisos it is felt that the 28 day limit could be met on most occasions.³¹

The Australian Government Retirement Benefits Office (AGRBO) said that:

The contracting of the time in which decisions on requests should be notified from 60 to 28 days would not present difficulties for straight forward requests for AGRBO

²⁸ Submission no. 42, incorporated in *Transcript of Evidence*, p. 915.

²⁹ Public Service Board, *FOI Survey January-February 1979. Notes on Departmental Responses to 28 February 1979*, incorporated in committee document no. 41, para. 13.

³⁰ Reply of 22 February 1979 by TPC to Public Service Board survey on resource implications of Freedom of Information Bill (PSB Survey) incorporated in committee document no. 41, p. 2.

³¹ Reply of 16 February 1979 by Department of Veterans' Affairs to PSB Survey incorporated in committee document no. 41, p. 2.

material if the additional staff resources envisaged were available and access to prior documents was excluded, 28 days might well be too short for more complex requests and transferred requests (Clause 14) and would certainly be too short if there was access to prior documents not held by the AGRBO.³²

There was support for a phased reduction of the time limit from the Australian Bureau of Statistics (ABS) which said that:

On the assumption that the ABS will not be inundated with requests, there should not be a great impact on resources if the period for the notification of requests was reduced from 60 days to 28 days. Due to the unknown nature and level of demand for access to documents, particularly in the early stages, it may be advisable to start the period at 60 days, say, and reduce it later, if practicable, to 28 days, say. To reduce the period to 14 days would have a significant impact because experience has shown that the shorter the period allowed, the greater the use of higher level staff who can formulate sensible recommendations from examinations of ad hoc requests.³³

8.40 The Committee has weighed these views against the suggestions from non-departmental witnesses who suggested a range of possible reductions. A number suggested that twenty-eight days would be preferable (for example the Women's Electoral Lobby); others suggested fourteen (for example CAGEO); others suggested more complex arrangements such as fifteen to twenty days with an extension if necessary to sixty (for example the Library Association). A large number suggested that ten days, or ten working days, would be sufficient (for example *The Sydney Morning Herald*, *The Advertiser*, the Queensland Council for Civil Liberties, the Australian Council of Social Service and the Hon. Lionel Bowen M.P.).³⁴ Phasing-in arrangements were also supported by some witnesses, including the Young Liberal Movement of Australia (N.S.W. Division) and the ACOA. The latter said, for example, that:

Having regard to the Government's apparent failure to allocate resources necessary to prepare the Service for administration of a Freedom of Information policy, it may be appropriate for the Committee to recommend that the time limit be retained at 60 days, to be reduced to 10 days 18 months from the coming into operation of the Act.³⁵

8.41 Most of those criticising the present sixty-day provision and urging its reduction have pointed by way of comparison to the ten-day initial limit which prevails in the United States. It is often not appreciated by those who have made this distinction that the United States reference is to ten *working* days, and that the proper comparison, given the Australian reference to calendar days, is not between sixty and ten, but between sixty and fourteen (or more than fourteen during holiday periods). It remains true, however, that—with the exception of the CIA and the FBI, both of which have been subject to an extraordinary and continuing avalanche of requests—the ten working day limit in the United States has proved to be thoroughly workable. Writing in 1977, Harold C. Relyea, the United States Library of Congress freedom of information expert, stated that:

an examination of somewhat incomplete information supplied by approximately ninety federal agencies in their 1975 FOI Act reports clearly indicates that the vast

³² Reply of 20 February 1979 by AGRBO to PSB Survey incorporated in committee document no. 41, p. 4.

³³ Reply by ABS to PSB Survey incorporated in committee document no. 41, p. 3.

³⁴ Submission no. 111, p. 3; submission no. 128 incorporated in *Transcript of Evidence*, p. 1893; submission no. 19 incorporated in *Transcript of Evidence*, p. 1341; submission no. 48 incorporated in *Transcript of Evidence*, 438; and submission no. 2, p. 3.

³⁵ *Transcript of Evidence*, p. 915.

majority of them are experiencing little difficulty in complying with the response time frame. Only about a third of these agencies cited any instances when they found it necessary to seek a ten-day extension of an administrative deadline and of these, only six entities, excepting the Central Intelligence Agency and the Justice Department, found it necessary to obtain such an extension in more than a dozen cases.³⁶

More recent commentaries indicate no basic change in this state of affairs, apart from a substantial improvement in the FBI backlog. While acknowledging, here as elsewhere, the danger of excessive reliance on overseas precedents, the United States experience does lead us to believe that there is at least a prima facie case for significantly reducing the sixty-day limit which is proposed for Australia.

8.42 The unfamiliarity of the freedom of information concept in this country, and the administrative pressures—particularly in the present economic and financial climate—that will undoubtedly be associated with its introduction, lead us, however, to be somewhat cautious in our recommendations in this area. We are of the opinion that a reduction in time limits can and should be accomplished, but that such reduction should be gradually phased in, rather than achieved at the outset on a once and for all basis. We have made clear in Chapter 6 our inability to estimate with any real precision the impact that the Freedom of Information legislation will have on departmental and authority operations: the legislation will need to be in operation for some time for its impact on agency resources to be fully and accurately assessed. While any figure that may be specified has of necessity a somewhat arbitrary character, we have determined, after full consideration of all the evidence supplied to us on this issue—particularly from the agencies themselves—that the sixty-day time limit should be reduced to forty-five days two years after the legislation has come into operation, and to thirty days after four years. Further reductions, which we would certainly like to believe are possible, should depend on reviews of the legislation as it is then operating. We believe that the initial two-step phased reduction down to thirty days should be specifically incorporated into the text of the Bill. It may be that circumstances will emerge that make the attainment of even these limited reductions quite impossible. In order to allow for this contingency, but to ensure Parliamentary debate of the question while at the same time avoiding the necessity for formal legislative amendment, we propose that any such waiver of the reduction clause should require approval in the Parliament by affirmative resolution. (Technically, this could most satisfactorily be accomplished by the promulgation of a regulation expressed to take effect only upon an affirmative resolution of both Houses: see further the discussion in Chapter 12.)

8.43 Recommendations:

- (a) the Bill should provide for the reduction of the sixty-day time limit prescribed by clause 17 to forty-five days two years after the legislation has come into operation, and to thirty days four years after its operation.**
- (b) Further reductions in the time limit are in principle desirable, but should wait upon future reviews of the legislation's operation.**
- (c) Either or both of the initial time reduction steps should be capable of waiver only by an affirmative Parliamentary resolution.**

³⁶ H. C. Relyea, 'The Provision of Government Information: The Federal Freedom of Information Experience', *Canadian Public Administration*, vol. 20, summer 1977, pp. 338-9.