Chapter 32

Parliamentary monitoring

32.1 It has been a constant assumption of this Report that the 'right to information' inheres in Australian society as a whole, although it is of course exercisable by individuals and groups within the society. Every request granted to a person is a gain and benefit for Australian society as a whole; every request illegally or needlessly refused is a detriment to the society as a whole. It is therefore appropriate that the elected representatives of that society should ensure that this far-reaching social advance is secured and improved. If Parliament is to achieve this end, it must be put in an informed position to enable it to assess the current operation of the legislation and suggested amendments.

Reports by agencies

32.2 A full and comparable set of reports on the operation of the Freedom of Information legislation should therefore be placed before the Parliament at least annually to enable it to put under close scrutiny the performance of agencies in relation to the Freedom of Information Act. We would anticipate that the necessary information for this purpose would be contained in the annual reports of agencies which in accordance with a recent government decision[1] are to be published and tabled in the Parliament, and especially in the annual report which the Attorney-General is required under clause 48 (1) to table in the Parliament.

32.3 Agencies are required under sub-clause 48 (2) to furnish to the minister administering the Act whatever information he requires to enable him to prepare an annual report as required under sub-clause 48 (1). This requirement will provide agencies with the opportunity to collate valuable information as to their operations under the legislation, which we expect would be included in their annual reports on their normal activities. In our view, each such report should contain a statistical evaluation of the duties executed in relation to the Bill including the number of agency determinations to withhold information requested; the reasons for such denials of access; the number of appeals against such adverse determinations with the result and summary of the reasons for each; a copy of the agency's fee schedule with the total amount of fees collected by the agency during the year; and any other information which evidences the agency's efforts to properly administer the legislation.

32.4 Recommendation: Agencies should include in their annual reports to Parliament sufficient information concerning their operations in relation to freedom of information as will enable adequate parliamentary review.

The Attorney-General's report

32.5 The report which the Attorney-General, as minister responsible for the Bill, is required to make pursuant to clause 48 (1) will provide comparative information concerning agencies' performance of their obligations under the Bill and details of the overall impact of the legislation. We believe that it is important for clause 48 to lay down the specific matters which should be included in the

[1] Australia, Senate, *Hansard*, 9 June 1978, p. 2689. Ministerial Statement on 'Access to Official Information' by Senator the Hon. P. D. Durack, QC Attorney-General.

Attorney-General's report to Parliament. The Attorney-General's Department will play a vital role in monitoring agencies' compliance with the legislation and the Attorney-General's annual report to Parliament will be a valuable source of information on the operations of the legislation. Expressly providing in the Bill for the matters to be covered in the annual report will ensure that important matters are not overlooked. These matters should include: the number of requests for the year per agency; the number of deferments; the rank of persons refusing access; exemptions claimed under the legislation; the number of freedom of information requests refused for contravention of a prescribed secrecy provision under clause 28; information on appeals activities; administrative manhours, costs and fees collected in relation to freedom of information requests; average time for compliance; extra staff positions sought and/or approved; changes in administrative procedures occasioned by freedom of information; guidelines issued by the Attorney-General's Department; and description of efforts by that department to encourage compliance with the legislation.

32.6 We have proposed in Chapter 9 that agencies publish in their annual reports the titles of officers with authority to refuse access. We also propose that in the Attorney-General's report there should be a comparative table indicating for each agency of the Public Service the rank of all officers with authority to refuse access. We note that in the United States it is common practice not only to identify by rank and name those officers with authority to refuse access but also to specify the number of refusal decisions made by them in a particular year. We do not go so far as to suggest that, in Australia, the number of refusals made by any particular officer should be published in any annual report, either the general report from the Attorney-General or the report from the particular agency. Although it might be thought that to do so would be a disincentive to any given officer making excessive refusals, we believe on balance that information of this kind would be more likely than not to mislead. Certainly the number of decisions a particular officer may make has no necessary connection with the quality of each such decision and, in the absence of a finding from the Administrative Appeals Tribunal, it would not be possible to indicate whether any particular refusal was squarely in accordance with the legislation or not. We note that clause 22 of the Bill requires that the statement of reasons which is provided to an applicant who is denied access to a document should state both the name and rank or designation of the person giving the decision; this is a sufficient statutory guarantee that the identity of a particular refusing officer will become known when this is necessary for the proper administration of the Act.

32.7 Recommendation: Clause 48 of the Freedom of Information Bill should be extended to expressly state the matters on which the Attorney-General, as Minister responsible for the administration of the legislation, should report to Parliament. These should include:

- **(a) the number of requests for the year per agency;**
- **(b) the number of refusals;**
- **(c) the number of deferments;**
- **(d) exemptions claimed under the legislation;**
- **(e) the secrecy provisions invoked under clause 28;**
- **(f) the level of persons refusing access;**
- **(g) information on appeals activities;**

(h) administrative manhours, costs and fees collected in relation to freedom of information requests;

(i) average time for compliance;

(j) extra staff positions sought and/or approved;

(k) changes in administrative procedures occasioned by freedom of information;

(l) guidelines issued by the Attorney-General's Department; and

(m) a description of efforts by the Department to encourage compliance with the legislation.

32.8 In addition we would expect that the Attorney-General's first report on freedom of information would contain a detailed account of agencies' compliance with the publication requirements of clauses 6 and 7 including an account of the guidance which the Department has provided to other agencies concerning their obligations under this Bill. Subsequent reports would detail agencies' efforts to update the information published or made available under clauses 6 and 7. The detailed reports of the Attorney-General on the subject of agency compliance with the requirements of clauses 6 and 7, and their scrutiny by Parliament, may be a more effective means of ensuring compliance with these requirements than an individual complaint to the Ombudsman and possible review by the Administrative Appeals Tribunal which we proposed in Chapter 30.

32.9 Recommendation: The Attorney-General's first report to Parliament should contain an extensive account of agencies' compliance with the publication requirements of clauses 6 and 7. Subsequent reports should detail agencies' efforts to update the information published or made available under clauses 6 and 7.

32.10 Clause 48 (1) requires the minister responsible for the Bill to report 'as soon as practicable after the end of each year ending on 31 December'. We were advised by the Attorney-General's Department that there was no particular reason why clause 48 (1) specified the requirement for reporting to the Parliament in terms of calendar years.[2] It is possible that clause 48 (1) is merely a copy of the United States provision. We would propose that, in common with normal reporting requirements, the Attorney-General, as minister responsible for the Bill, should be required to report as soon as practicable after 30 June each year. Furthermore, the considerable delays by some agencies in submitting annual reports to the Parliament in the past, prompts us to recommend that the Department report as soon as practicable after 30 June but in any case no later than 31 October.

32.11 Recommendation: Clause 48 (1) should be amended to require the minister administering the Freedom of Information Bill to report to Parliament as soon as practicable after the end of each year ending on 30 June and in any case no later than 31 October.

Report by the Ombudsman

32.12 The Ombudsman is presently required under sub-section 19 (1) of the *Ombudsman Act* 1976 to report to the Parliament as soon as practicable after 30 June each year on his operations during that year. In addition to these annual reports, sub-section 19 (2) enables the Ombudsman to submit reports to the minister for presentation to the Parliament at any time he considers appropriate 'during parts of a year'. In view of the active role which we advocate for the

[2] Letter to Committee from Attorney-General's Department, dated 20 April 1979.

Ombudsman in relation to freedom of information, he would be particularly well placed to observe any deficiencies in the operation of the legislation and make appropriate recommendations to resolve these difficulties. The information supplied by the Ombudsman would accordingly be valuable in assisting Parliament to evaluate the effectiveness of the Freedom of Information legislation and administrative practices in relation to freedom of information.

32.13 Recommendation: The Ombudsman should report to Parliament on the operations of his office in relation to freedom of information as part of his annual report to Parliament and by way of special reports to Parliament concerning freedom of information as required.

Future review by parliamentary committee

32.14 Our objective in evaluating the provisions of the Freedom of Information Bill in this inquiry has been to achieve the correct balance between necessary confidentiality and ease of access to information. Our investigations have gone some way toward establishing something of the real position with regard to this balance, but an element of uncertainty remains which can best be resolved by a subsequent investigation in the light of actual experience.

32.15 Various submissions made to the Committee referred to the need for review by a non-government committee. The Australian Council of Social Service, for example, put forward a tentative proposal for a 'Freedom of Information Act Implementation Advisory Committee'.

> The purpose of this committee would be to advise the public service, and the Government, on the detailed implementation of the Act over its first eighteen months of operation. Its membership should consist of a mix of persons from the community with a background in law, community organisations, organisational behaviour, self help/advocacy groups, and the Freedom of Information Legislative Committee, and the public service trade unions.[3]

32.16 The South Australian Freedom of Information Working Party proposed a similar advisory committee but one which consisted of both users and providers.[4] The Law Institute of Victoria recommended review after the legislation has been in operation for two years by a Committee chaired by a presidential member of the Administrative Appeals Tribunal which would be empowered to obtain comments from members of the public.[5] The Council of Australian Government Employee Organisations (CAGEO) considered the possibilities of review by a Parliamentary Committee and review by a three member committee including a representative of the Government.[6]

32.17 In the United States, this review or oversight function has been performed by two Congressional Committees—the Foreign Operations and Government Information Subcommittee of the House of Representatives Committee on Government Operations, and the Administrative Practice and Procedure Subcommittee (formerly the Special Subcommittee on Government Operations) of the Senate Judiciary Committee. The United States Government's first Freedom of Information Act, which was signed into law in July 1966 and became effective one year later, was the culmination of years of investigation by both House and Senate subcommittees. Since that time, these subcommittees have been responsible for

[3] Submission no. 48, incorporated in *Transcript of Evidence*, p. 442.
[4] Submission no. 46, incorporated in *Transcript of Evidence*, p. 1854.
[5] Submission no. 112, p. 13.
[6] *Transcript of Evidence*, p. 1013.

a general oversight of the Act's implementation and administration. In 1971 and 1972 a comprehensive study of the operation of the Act was conducted with numerous public hearings, which resulted in the adoption of substantial amendments to the Act in 1974. Oversight of the amended Act has continued and various reports have been produced: for example, the House Committee Report on 'Freedom of Information Act requests for Business Data and Reverse-FOIA Lawsuits'.[7]

32.18 We readily support the principle of review of the operations of the Freedom of Information legislation by an independent body and favour review by a committee of the Parliament. Not only are we impressed by the record of achievement of the United States subcommittees, we also consider it highly appropriate that the operation of legislation which essentially concerns the rights of the public in relation to the Government should be subject to review by a Parliamentary Committee on behalf of the Parliament. In fact, the annual reports of the Attorney-General's Department, the Ombudsman and agencies concerning freedom of information, and the annual reports by the Attorney-General as minister responsible for the legislation will, in the normal course, be referred to the Senate Standing Committee on Constitutional and Legal Affairs. Consideration of these annual reports will provide an opportunity for further assessment of the operation of the legislation. For these reasons it may well be appropriate for this review function to be vested in the Constitutional and Legal Affairs Committee.

32.19 The Senate Regulations and Ordinances Committee would have jurisdiction to examine the report on the regulations made under the Freedom of Information legislation in accordance with its terms of reference. It could therefore not adequately perform the sort of review function we envisage as its jurisdiction does not extend to looking at matters of policy. Clearly the proposed parliamentary committee should be concerned with every aspect—both of a policy and an administrative nature—of the Act's operation.

32.20 We consider that this review by a parliamentary committee should be conducted three years after proclamation of the Act, or in the event that the Act is proclaimed into effect in stages, from the date of the first such proclamation. This three year period would allow a reasonable time to elapse in order to provide both applicants and agencies with experience of the operation of the legislation without the distortion which could otherwise arise if the period were any shorter. It is to be expected that there will be some upheaval during the early stages of the Act's operations, but after three years of operating under the Act both agencies and the public will be in a much better position to assist the reviewing committee in its task.

32.21 Recommendation: The operation of the Freedom of Information legislation should be subject to review by the Senate Standing Committee on Constitutional and Legal Affairs three years after the first proclamation of the legislation.

32.22 We emphasise that the various measures by way of reports to the Parliament, both annual and special, and culminating in the presentation of a comprehensive review by the Senate Committee three years after proclamation time are not ends in themselves. In fact, they will only be justified and significant if they

[7] United States, House of Representatives, *Freedom of Information Act Requests for Business Data and Reverse-FOIA Lawsuits*, Twenty-fifth Report of House of Representatives Committee on Government Operations, 95th Congress, 2nd Session, 1978, House Report 95-1382.

stimulate such discussion and comment within the public domain that Parliament is led to make a correct response. The great number of submissions by members of the public, both individual and within organisations, and the general level of community interest reflected in the media, lead us to expect that such public debate and evaluation will occur.