

Procedures under the Archives Bill

34.1 This chapter deals with issues arising under the Archives Bill that are more procedural in nature. In particular, we deal in turn with the procedures that must be observed by any applicant when requesting access to a document, with the special procedures for accelerated and special access to documents, with the mechanisms for review of decisions internally and by the Administrative Appeals Tribunal, and lastly with the role of the Advisory Council on Australian Archives.

Access procedures

34.2 Three different access procedures are specified in the Bill: open, accelerated and special. They will be dealt with in turn. The most common procedure relates to the period of *open access*, which commences in respect of any record thirty years from 31 December of the year in which the record was created. The Director-General is expected to have examined all records before they reach the open access period in order to determine whether they are exempt (clause 33). The examination by the Director-General is to be carried out in accordance with arrangements entered into between him and the responsible minister. If it is decided that a record is not exempt, the Archives staff is required to grant access when a request is received. Pursuant to clause 34, access may be given in one of a number of forms: inspection of the document, for which no fee is imposed; provision of a copy of the document, for which a copying fee is levied; access by use of a computer or projector or use of other similar equipment, for which a prescribed fee is levied; access in a different form from the form requested if that would infringe copyright, interfere unreasonably with the operations of the Archives, be detrimental to the preservation of the record, or would not be appropriate having regard to the physical nature of the record. When it is determined that a record is exempt, access would be refused whenever a request was received; it appears that the Archives is not intended to exercise a discretion to release exempt records, other than pursuant to the provisions for special access.¹ There are procedures laid down in the Bill for the review of determinations that a record is exempt. Such a determination must be reviewed, first, whenever an application for reconsideration is received under clause 38 (which is discussed below) and, secondly, 'at such intervals as the Director-General thinks appropriate having regard to the nature of records concerned and any other relevant circumstances' (clause 33 (4)).

34.3 It appears to us that these procedures for access are sensible ones, and we would draw attention to only two small matters that in our opinion require amendment. First, it would appear that the Administrative Appeals Tribunal cannot review the amount of a fee imposed on access. The Tribunal does have this power under clause 37 (6) of the Freedom of Information Bill, and in our opinion

¹ Cf. clause 41 which may be susceptible to the interpretation that Archives does have a discretion to release exempt records (see *infra* para. 34.17). See also the statement in the Explanatory Memorandum to the Bill, which indicates that clause 41 is designed to preserve other legislation which confers rights of access upon named people or the public (e.g. the *Ombudsman Act 1976* and the Freedom of Information Bill). Australia, Senate, *Archives Bill 1978 Explanatory Memorandum*.

it should have a similar power under this Bill. Secondly, there is no indication in clause 33 as to whether the arrangements entered into between the Director-General and the minister will be recorded in writing. In our opinion, these arrangements could be important ones that materially affect the nature of the right of access, and in that light they should be formal arrangements that are recorded in writing. If this is done, opportunity could thereby be given for public scrutiny of the arrangements by having them tabled at a meeting of the Advisory Council on Australian Archives, which is likely to include representatives of the public.

34.4 Recommendation:

- (a) **Power should be conferred upon the Administrative Appeals Tribunal to review the amount of a fee imposed on access to documents under the Archives Bill; and**
- (b) **Clause 33 of the Archives Bill should be amended to provide that the arrangements made by the Director-General in consultation with the responsible minister pursuant to clause 33 (1) for the review of records shall be recorded in writing and tabled before the Advisory Council on Australian Archives.**

34.5 The second method of access is *accelerated access*, which may occur when the minister, in accordance with arrangements approved by the Prime Minister, causes all records in a class of Commonwealth records that have not reached the age of thirty years to be made available for public access. According to the Director-General, accelerated access is not a practice which has been adopted by the Archives in the past, except for documents such as weather reports.² Accelerated access is a procedure by which whole categories of documents of any age can be made available to the public in general. It is a procedure that can lessen the rigor of both the thirty-year rule and the exemptions in the Freedom of Information Bill; to that extent we applaud the insertion of this procedure in the Archives Bill. The only matter to which we would draw attention is the wording of clause 39 (1) which appears to be potentially restrictive. The clause empowers the minister or person authorised by him to make available for public access 'all records in a class of Commonwealth records not in the open access period'. The choice appears to be one of making all records available, or none at all; it is not open to the minister or an authorised person to make available some records in a class of Commonwealth records. This matter has not been explained either in the Explanatory Memorandum³ or in the evidence presented to us, and we draw attention to the matter lest this apparent restriction was not intended.

34.6 The third method of access is *special access* which may be granted to a particular individual. It is provided for in clause 39 (2). Special access may be given to records which

are not available for public access under this Act . . . for a purpose specified in the regulations as a purpose for which access may be given under this sub-section.

The records may be made available to the person on a condition and if that condition is contravened, the person may be fined a maximum of \$200.

34.7 The Australian Archives has already had some experience in according special access to individuals. For instance, the Agricultural Research Unit of the Australian National University has access to records created in the last

² *Transcript of Evidence*, p. 730.

³ Clause 39 is dealt with on p. 25 of the *Explanatory Memorandum*, cited footnote 1.

thirty years (including very recent records) on the agricultural development of northern Australia.⁴ Another of our witnesses, Dr C. A. Price, Professional Fellow in the Department of Demography, Research School of Social Sciences, Australian National University made a useful submission to the Committee outlining the benefits that he had gained by acquiring special access to immigration records for the purposes of a study on the settlement and integration of immigrants and their families in Australia.⁵ On the other hand, the procedures for special access are not free from criticism. It would appear that there is a feeling that the power to grant special access to some but not to others is akin to a power of censorship. Mr L. Dillon, Archivist, University of Wollongong, termed the power one of 'patronage'.⁶ Dr H. Radi thought it was discriminatory to grant access to some and not to others. In her opinion, emphasis should be placed upon granting special access to particular documents, not conferring the right upon specific individuals.⁷ Another possible danger that could arise is if a condition is imposed on special access to the extent that any manuscript subsequently written will be submitted to the Archives for vetting. If permission to publish is refused, there may be a lingering feeling that the Archives has engaged in censorship. Another problem that arises with the procedure for special access is the inconsistency that it creates with the Freedom of Information Bill. A person may use either that Bill or the special access provisions to seek access to a record that is less than thirty years of age. However, under the Freedom of Information Bill, it is unnecessary for the applicant to prove any interest in, or need for a document, whereas this may be the prime consideration under the Archives Bill. While these criticisms do not to our mind undermine the utility of the special access provisions, they do suggest the need for circumventing them where possible. When a request for special access is received, emphasis should be placed not only on making documents available to the applicant alone, but also on reviewing the documents with a view to determining whether they can be released. In some cases this may entail release to the public generally; in others, Archives may decide that special access can be given to other individuals.

34.8 Recommendation: When the Archives is considering a request for special access to documents made pursuant to clause 39 (2), the Archives should also consider the question whether the documents could be released generally to the public or to other special applicants.

34.9 Some of the doubts about the special access provisions would have subsided had some information been available as to the circumstances in which, and the conditions on which, special access would be granted. The Director-General in evidence indicated that the Australian Archives was already in the position of being able to draft regulations specifying the circumstances in which special access would be granted, and he indicated that a copy of guidelines outlining those circumstances would be provided to the Committee.⁸ Unfortunately, these have not been received. In our opinion it would assist public analysis of this Bill if guidelines of this nature were published in the near future. We note also that under clause 39 (2) special access is to be given 'in accordance with arrangements approved by the Prime Minister'. For reasons similar to those

⁴ *Transcript of Evidence*, p. 706.

⁵ Submission no. 143, incorporated in *Transcript of Evidence*, pp. 1515-6.

⁶ Submission no. 22, p. 3.

⁷ *Transcript of Evidence*, p. 1563.

⁸ *Transcript of Evidence*, p. 740.

we have already stated in paragraph 34.3, we are of the opinion that arrangements such as these should be recorded in writing and tabled at a meeting of the Advisory Council.

34.10 The only remaining matter we would mention is that a person who is denied special access to records cannot appeal against the refusal, nor can a person who has been granted access subject to conditions appeal against the imposition or the terms of those conditions. We have not proposed that such a right of appeal be created, as we recognise that practical difficulties could arise. For instance, if an appellant had been refused special access to a very large volume of records, a tribunal may feel that inspection of the records is the only way of determining whether the denial was warranted. Further, a tribunal may not be possessed in some cases of the necessary expertise to determine whether special access is warranted. The judgment may be a professional one to be made by the Director-General of Archives, who could balance a number of factors including the value of contemporary historical research, the practical difficulties in placing large categories of Commonwealth records at the disposal of individuals, and other relevant Commonwealth interests which may incline against special access. However, these same considerations do not necessarily apply to the Advisory Council on Australian Archives which is a body that is so constituted that it is representative of a number of interests. It is among the functions of the Advisory Council to deliberate generally on archival matters. While it would obviously be impractical to confer upon an advisory council appellate functions such as hearing and determining individual grievances, we can see merit in requiring the Director-General to table on a regular basis before the Advisory Council details of all requests for special access and the determinations made on those requests. By this procedure the Advisory Council may also express opinions on the purposes for which special access should or should not be given.

34.11 Recommendation: Clause 39 of the Archives Bill should be amended to provide that the following matters will be tabled by the Director-General at a meeting of the Advisory Council on Australian Archives:

- (a) details of all decisions made pursuant to clause 39 (2) either granting or refusing to grant special access to records; and
- (b) arrangements approved by the Prime Minister, pursuant to clause 39 (2), for regulating special access to documents.

Review and appeal

34.12 *Internal review.* In respect of certain decisions an applicant has two avenues of appeal: first, an internal review of the decision may be sought within twenty-eight days of the decision being notified; and if that review is not favourable to the applicant an appeal may thereafter be taken to the Administrative Appeals Tribunal. The internal review is regulated by clause 38 of the Bill. An internal review or reconsideration is conducted by the Director-General or the person authorised by him to deal with such applications, and must be completed 'as expeditiously as practicable' provided that if the applicant is not notified of the outcome within fourteen days, he or she may appeal directly to the Tribunal. If the earlier decision is confirmed, the notice to the applicant must state the findings on any material questions of fact, referring to the material on which those findings are based and the reasons for the decision, and must inform the applicant of the right to apply to the Tribunal for a review of the decision.

34.13 There are three aspects of the internal review procedure which in our opinion require amendment. First, the applicant who wishes to challenge a determination that a document is exempt may be required to comply with an unnecessarily complicated procedure. Even though the applicant has ascertained from the Australian Guide to Archival Material that a record is exempt, the applicant is still required to make an initial application for the document, and when this is rejected, seek an internal review. In cases where it is clear from the National Guide that a document is exempt, in our opinion an applicant should be entitled to proceed directly to the internal review stage. The Archives would then have an opportunity to reconsider the earlier decision before any proceedings are instituted in the Tribunal. Secondly, there is no time limit specified within which the initial application for access must be considered. In our opinion a sixty-day time limit, similar to that in the Freedom of Information Bill, should be established. Although it is possible that the Archives will be dealing with requests for large volumes of documents, the likelihood is that these documents will already have been reviewed pursuant to clause 33 before the open access period was reached. In any case, we do not think a sixty-day period imposes unnecessary restrictions on the Archives. We consider that some time limitation is necessary for the protection of the public rights conferred by this legislation. Thirdly, there is no requirement in the legislation that, when an initial decision refusing access is notified, the applicant is to be informed of the right to seek an internal review. Such an obligation should be cast upon the Archives.

34.14 Recommendations:

- (a) Where it is clear from the Australian National Guide to Archival Material that a record is exempt, an applicant who seeks access to that record should be permitted to seek an internal review of the decision pursuant to clause 38 of the Archives Bill without being required to make an initial application for access to the document;**
- (b) The Archives Bill should be amended to require the Australian Archives to make a decision on any request for a document within sixty days of receiving the request; and**
- (c) The Australian Archives should be required to notify an applicant who has been refused access to a document on the ground that it is exempt of the right to seek an internal review of that decision under clause 38 of the Bill.**

34.15 *Review by the Administrative Appeals Tribunal.* A person may appeal to the Administrative Appeals Tribunal on a decision of the following nature:

- that a document is exempt;
- that the access provisions do not apply to the document;
- that partial access will not be given to the non-exempt portions of the records; or
- that access in a particular form will not be given.

The Bill provides that in any proceedings before the Tribunal the Director-General is the defendant, and has the onus of establishing that a record is an exempt record. The Tribunal exercises much the same powers as it exercises under the Freedom of Information Bill.

34.16 It has been suggested to us that the Archives Bill should be amended so that a residual discretion is conferred upon the Tribunal to order that an exempt

document be released.⁹ We have not proposed this course, as we have earlier recommended that some of the exemptions contain a public interest criterion which can be balanced against the interests to be protected by the exemptions, and to our mind this provides sufficient leeway for the Tribunal to consider all relevant matters in appeals that arise before it. However, we would draw attention to what in our opinion appears to be a doubt arising from the drafting of the Archives Bill as to whether the Tribunal in fact has the discretion to make an exempt record available. There are three reasons for thinking that the Tribunal has this discretion. First, paragraph 37 (3) (b) provides that

the Tribunal is not restricted by any determination made at any time under section 33 in relation to the record.

Secondly, there is nothing in the Bill comparable to clause 37 (3) of the Freedom of Information Bill which provides that once

it is established that a document is an exempt document, the Tribunal does not have power to decide that access to the document, so far as it contains exempt matter, is to be granted.

Thirdly, it is possible that clause 41 ('Nothing in this Act prevents a person from publishing or otherwise giving access to records (including exempt records), otherwise than in pursuance of this Act where he can properly do so or is required by law to do so') confers upon the Archives staff the discretion to release exempt records. Clause 12 in the Freedom of Information Bill, which is similarly but not identically drafted, is meant to be interpreted in this way. If the Archives does have this discretion, then the Tribunal would under its enabling Act exercise the same discretion.

34.17 Recommendation: The Archives Bill should be amended to make it clear that no residual discretion is conferred upon the Administrative Appeals Tribunal to order that an exempt document be released.

34.18 A final matter relating to appeals is whether the Tribunal should be the only appellate body under the Archives Bill, or whether the Tribunal should be differently constituted for appeals heard under the Bill. For instance, in the United States there is an Inter-agency Classification Review Committee established by Executive Order with power to oversee the security classification system and to give advisory opinions on whether documents more than ten years old should be declassified. The Committee may act of its own motion or at the request of an individual who has been denied access to classified material. This provides an alternative to judicial review under the Freedom of Information Act, and is a review that has been available frequently—for instance, in 1975 there were 1993 requests for review, 86% of which were upheld in whole or in part.¹⁰ A similar system was recommended in the Coombs Minority Report Bill. That Bill proposed the creation of a Classification Review Committee comprising representatives of agencies, the Parliament and the public.¹¹ Dr Lamb also proposed that the Tribunal hearing appeals should be constituted by three persons, one of whom is a distinguished social scientist.¹²

⁹ e.g. Dr Dan Coward, submission no. 60, incorporated in *Transcript of Evidence*, p. 1396; see also Australia, Parliament, *Development of the National Archives*, Report by Dr W. Kaye Lamb, Parl. Paper 16/1974, Canberra, 1975, p. 14.

¹⁰ J. McMillan, 'Freedom of Information in Australia: Issue Closed', *Federal Law Review* 8, 1977, p. 379 at p. 404.

¹¹ Australia, Parliament, Royal Commission on Australian Government Administration (Dr H. C. Coombs, Chairman), *Appendix Volume Two*, Parl. Paper 187/1976, Canberra, 1977, pp. 47-50.

¹² Lamb, cited footnote 9, p. 14.

34.19 In our opinion the appellate functions are best exercised by the Administrative Appeals Tribunal, and it should be constituted in the normal manner provided for in the Administrative Appeals Tribunal Act. The questions which will be appealed to the Tribunal are likely to concern the interpretation of the exemptions in the Bill and their application to various fact situations. This, it appears to us, will be akin to the normal quasi-judicial function exercised by the Tribunal, and is unlikely to involve issues where the insights of an archivist, an historian or a social scientist may be directly needed. Nevertheless, we note that the Advisory Council on Australian Archives which is established by the Bill could to some extent exercise the advisory powers that are elsewhere exercised by different bodies. While it would be impractical for the Council, which has a part-time membership of thirteen people, to exercise an advisory function as to the review of denials, we feel that it could play a useful role in monitoring in the manner it thinks fit the administration of the Act. We would urge the Advisory Council, once it is established, to adopt procedures whereby it may be regularly informed of the nature of records declared or determined to be exempt from public access under the Bill.

34.20 *Role of the Ombudsman.* In Chapter 29 we proposed that the Commonwealth Ombudsman should have a role in freedom of information cases. We recommended that, in addition to his normal functions of investigation, conciliation and recommendation, his powers in freedom of information cases should be extended so that he could investigate all matters arising under the Freedom of Information Bill (including ministerial decisions); could act as a general counsel appearing on behalf of applicants before the Administrative Appeals Tribunal; and advise agencies on freedom of information matters.

34.21 There is no reason why the Ombudsman (or more accurately, the Deputy Ombudsman for freedom of information matters) should not exercise similar powers in relation to matters arising under the Archives Bill. The access procedures in that Bill and the Freedom of Information Bill are very similar, as too are the matters that can be appealed to the Administrative Appeals Tribunal. In both statutes similar criteria are established and the role of the Ombudsman would be to seek to ensure that questions were determined in accordance with those criteria. The only relevant difference between both bills appears to be that an Advisory Council on Australian Archives provides a forum for the airing of grievances that does not exist under the Freedom of Information Bill. However, the Advisory Council is not intended (nor do we expect that it would be suited) to devote its time to investigating and resolving the grievances of individuals who have encountered difficulties in obtaining access to information. Matters such as these are within the jurisdiction of the Ombudsman. Since, under the *Ombudsman Act 1976* as it presently stands, the Ombudsman already has a general role in relation to archival matters, we think it would be illogical if his powers were not extended in relation to archival matters to the extent that we have proposed in Chapter 29 that they be extended in relation to freedom of information matters.

34.22 **Recommendation: Powers should be conferred upon the Ombudsman in relation to the matters arising under the Archives Bill similar to those which we recommended (in paragraphs 29.9, 29.11, 29.13, 29.23, 29.28) in relation to freedom of information matters.**

Advisory Council on Australian Archives

34.23 There was much discussion in the submissions and in the evidence as to the creation and functions of the Advisory Council. Researchers appreciated clearly the importance that this body could have in shaping archival policy in Australia, and hence there was much discussion of such matters as the constitution of the Advisory Council, the preparation by it of annual reports, and its role in the collection of archival resources and destruction of Commonwealth records. By and large, questions concerning the Advisory Council fall within the terms of reference of the Senate Standing Committee on Education and the Arts. However, we have proposed at a number of points throughout this chapter that specific functions be conferred upon the Advisory Council, and we think it prudent and useful to collect and summarise briefly the various recommendations we have made.

34.24 The functions of the Advisory Council should include:

- reviewing arrangements approved by the minister pursuant to clause 33, and by the Prime Minister pursuant to clause 39;
- reviewing decisions by the Director-General on requests for special access;
- monitoring the policy of the Archives concerning the determination as to what records are exempt from public access; and
- consultation before destruction of archival material.

34.25 There is one other power of the Archives in the exercise of which, in our opinion, the Advisory Council ought also to play a role. Hitherto we have emphasised the importance of making information available to the public as to which of the Commonwealth's archival resources have been preserved. Equal emphasis must be placed upon availability of information as to which archival resources are to be destroyed. Pursuant to clause 25 of the Bill, any Commonwealth record can be destroyed by agreement between the Archives and the Commonwealth institution from which the record was received. It was conceded by a spokesman from the Archives that 'it is certainly possible that records can be destroyed without the potential users of those records knowing of that action'.¹³

34.26 Some of the witnesses stressed to us the importance of consultation between the Archives and users before records are destroyed. Mr A. Horton, from the Library Association of Australia, rated as 'the most important point we are going to make' the undesirability of a situation whereby 'the destruction of records created by a Commonwealth department should be in the hands of an official and not of a body on which the public is represented'.¹⁴ Dr Coward suggested that the Archives Bill be amended to empower,

the Archives to consult with leading scholars in the relevant fields and permit them conditional access to records proposed to be destroyed. By this means the possibility of irretrievable mistakes being made may be minimised.¹⁵

In his submission Dr Price illustrated how he, as a user, was able to assist the Archives when asked to act as a consultant on the destruction of immigration records. He further indicated how valuable records were being lost when unilateral destruction was undertaken by archival officers.¹⁶

¹³ *Transcript of Evidence*, p. 1520.

¹⁴ *Transcript of Evidence*, p. 2077.

¹⁵ Submission no. 60, incorporated in *Transcript of Evidence*, p. 1398.

¹⁶ Submission no. 143, incorporated in *Transcript of Evidence*, pp. 1515-6.

34.27 In our opinion it is possible to involve users in a consultative role via the Advisory Council on Australian Archives. Mr C. Hurley, from the Australian Archives, indicated that written destruction schedules are prepared.¹⁷ In our opinion these ought to be tabled at a meeting of the Advisory Council before any records listed in the schedule are actually destroyed.

34.28 Recommendation: The Archives Bill should be amended to provide that the Australian Archives shall not permit or approve the destruction of a Commonwealth record until the proposal to destroy the record has first been notified to a meeting of the Advisory Council on Australian Archives.

Review of operation of Bill

34.29 In Chapter 32 we have recommended that the operation of the Freedom of Information Bill should be reviewed by this Committee after the Bill has been operating for three years. We think it appropriate that the operation of the Archives Bill be reviewed at the same time, either by this Committee or another committee such as the Senate Standing Committee on Education and the Arts.

34.30 Recommendation: The administration of the Archives Bill should be reviewed by a parliamentary committee after the Bill has been in operation for three years.

¹⁷ *Transcript of Evidence*, p. 1522.