

Freedom of Legislation Act 1982

'better than no law at all'

The much-delayed Commonwealth Freedom of Information Act 1982 is now due to come into operation on 1 December 1982. Kevin O'Connor comments that: "It is better than no law at all".

"Nonetheless", says O'Connor, "it contains a number of deficiencies which leaves the state of access to government information enjoyed by Australians well short of anything conjured up by the expression 'freedom of information'". O'Connor continues*:

Even though all decisions to deny documents will be amenable to judicial review, those related to the most significant classes of documents from the viewpoint of democratic rights cannot be overruled by a judicial body. In these cases, the judicial body - the Document Review Tribunal - can only proffer its opinion to the Minister who may well ignore it. Under the Act, there is no general right of access to documents which have or which will have come into existence prior to the commencement date of the new legislation.

There are still far too many exemptions and some are expressed in very wide language though legitimate on their face. Many of the criticisms of the Senate Standing Committee on Constitutional and Legal Affairs in its bipartisan 1979 Report in these regards have been rejected by the Government without any substantial reasons being given.

The law leaves individuals unhappy with a decision to refuse access with the right to utilise the necessary but sometimes cumbersome and off-putting machinery of internal agency review and appeal to the Administrative Appeals Tribunal or referral to the Document Review

Tribunal. The Government has failed to take up the recommendations of the Senate Standing Committee on Constitutional and Legal Affairs to give a range of powers to the Ombudsman for assisting individuals in exercising their rights under the new law.

Commonwealth statutes will abound with secrecy provisions preventing the release of information which are given precedence over the new freedom of information rights.

The point should be emphasised that this law applies only to the Commonwealth government and certain territories within responsibility. State governments have no freedom of information laws.

By the end of 1982, Victoria is likely to have become the first Australian State to have enacted a Freedom of Information Act.

Credit for this situation should be given to the Premier and Attorney-General, John Cain, who as Shadow Attorney-General did considerable work on the subject, culminating in the release for public discussion in April 1981 of a draft private member's bill. That action stimulated the Victorian Cabinet of the day to take up the issue, and shortly after Mr Cain had tabled his private member's bill in Parliament, the former Government tabled its own measure, the Freedom of Information Bill 1981.

With the change of Government, the Cain Bill formed the basis of Government policy on the subject. The proposed Labor Bill represents a considerable improvement on the Commonwealth's Freedom of Information Act 1982. Whilst the Bill adopts a structure similar to the Federal legislation, it does not

have as many or as wide exemptions. The smaller number of exemptions is partly attributable to the narrower scope of State Government functions, e.g. States do not have interests to protect by way of exemptions in such areas as defence, national security and international relations which are a Commonwealth domain.

But the key limiting feature of several exemptions in the Bill is the requirement that, in addition to establishing that a document falls into a protected category, an agency must demonstrate that non-disclosure is in the public interest.

The Bill applies to the documents of all State Government agencies. Furthermore the Government intends to apply the principle of freedom of information to local government records by separate legislation to be introduced in 1983. The Bill gives applicants who have been denied access a right of appeal to a County Court judge.

The proposed Bill goes significantly further than the Commonwealth Act in relation to retrospective access. It sets down no limit on access to personal records, and in relation to other records permits access to them if they were brought into existence within five years prior to the date of commencement.

If the proposed Bill is enacted substantially in its present form, Victorians will have a right to access to State Government records much broader than that which applies to Federal Government records.

SUMMARY OF THE MAIN FEATURES OF THE COMMONWEALTH FREEDOM OF INFORMATION ACT 1982:

RIGHT OF ACCESS

The individual's right of access to government information is expressed in these terms:

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. (s11)

The key terms, "agency", "document", "document of an agency", "exempt document" and "official document of a Minister" are defined by the legislation (s4(1)). Of these, the critical term is "document". It is defined as including:

any written or printed matter, any map, plan or photograph, and any article or thing that has been so treated in relation to any sounds or visual images that those sounds or visual images are capable, with or without the aid of some other device, of being reproduced from the article or thing, and includes a copy of any such matter, plan, photograph, article or thing, but does not include library material maintained for reference purposes. (s4(1))

Separate provision is made for permitting access to computer-stored material by means of print-out or similar means (s17).

EXEMPTIONS FROM ACCESS

A wide range of documents are the subject of exemption: documents affecting national security, defence, international relations and relations with the States; Cabinet documents; Executive Council documents; internal working documents; documents affecting the enforcement of the law and public safety; documents to which secrecy provisions of enactments apply; documents affecting financial or property interests of the Commonwealth; documents concerning certain operations of agencies; documents affecting personal privacy; documents affecting legal proceedings or subject to legal professional privilege; documents relating to business affairs; documents affecting national economy; documents containing material obtained in confidence; documents disclosure of which would be contempt of Parliament or contempt of court; privileged documents; and certain documents arising out of companies and securities legislation (Part IV, s32(f)).

An agency is not bound to refuse

disclosure of a document which falls within an exempt category; the exemptions are permissive. Nonetheless the sheer number and range of exemptions will produce considerable conflict over their interpretation and application.

REVIEW OF DENIALS OF ACCESS

Administrative Appeals Tribunal In the case of all but four categories of exemption, an individual denied access may apply for review of the denial to the Administrative Appeals Tribunal which may overrule the decision of the Minister or agency concerned (s58(1)). The four categories to which this right of review does not apply are, in the view of many, the most significant documents affecting national security, defence, international relations and relations with the States; Cabinet documents; Executive Council documents; and internal working documents.

In earlier drafts of the legislation, the Government had steadfastly refused to permit any form of review. However, the Government ultimately relented to the extent of enabling applications for review of denials of access in these areas to be referred to a Document Review Tribunal (s58(4) and (5)).

Document Review Tribunal The Tribunal is to be constituted by one or three members of the statute of a Supreme Court judge or equivalent, the number of members being determined according to the public importance of the question referred to it (s81).

In the case of application for review of decisions under the first three categories, the Document Review Tribunal's jurisdiction is limited to considering the question whether the Minister or public servant empowered to issue certificates that a document falls within one of these categories had reasonable grounds for that claim (s58(4)).

In the case of applications relating to the fourth category, internal working documents, the Tribunal's function is to consider the question

whether there was reasonable grounds for the decision that disclosure would be contrary to the public interest (s58(5)). (The AAT is entitled to consider the other question arising under this category of exemption - whether the document is properly classifiable as an internal working document.) The findings of the Document Review Tribunal on these questions are merely advisory. It is left to the responsible Minister to decide whether to accept the Tribunal's opinion and revoke a certificate (s67(3)).

The Tribunal will normally sit in public. If it wishes to inspect the documents the subject of a claim for exemption, it may do so on a confidential basis (s68). This solution to the problem of reviewing denials of access to a number of classes of government information of a particularly sensitive character is, undoubtedly, an improvement on the previous approach.

It remains to be seen whether the mechanism of accountability to Parliament will work to reverse the decisions of Ministers who refuse to accept a Document Review Tribunal opinion that a claim is unreasonable. This approach falls far short of the robust United States position under which all claims to exemption (and their compass is considerably narrower than in Australia) may be overruled by the judiciary.

ACCESS TO PERSONAL DOCUMENTS

The combined effect of the general right of access and the exemption relating to personal privacy is, normally, to limit access to personal records held by government about an individual to that individual (s41, esp. s4(2)). This right is likely to be utilised by many members of the community, especially those who have been adversely treated in areas such as social security, repatriation and taxation.

In line with a number of overseas laws on access to personal data, the legislation makes detailed provision for a right to seek amendment of statements contained in personal records released to the subject

(Part V, s48F). Moreover, the subject is entitled to receive access to personal documents created up to five years before the commencement of the legislation (s12(2)(a)).

ACCESS MACHINERY

Requests for access to documents must be made in writing and provide such information as is reasonably necessary to enable the agency to identify the document sought. Requests must be dealt with as soon as possible with a maximum time limit of 60 days (s19).

Narrow grounds for deferring a response to a request for access are also provided (s21).

A document may be supplied in response to a request with exempt matter deleted provided that is practicable and the document as supplied would not be misleading (s22).

Information Access Offices will be established by agencies, and agencies will be required to give access to a document at the Information Access Office nearest to the residence of the applicant which has appropriate facilities to provide access in the form requested (s28).

Detailed provision is also made in relation to the levying of charges for access. The criteria governing the setting of charges seek to limit them to direct costs of providing access and confer a wide discretion on the agency to remit charges (ss29, 30 and 94(2)).

INDEXES, DIRECTORIES AND DEPARTMENTAL MANUALS

To make effective use of these rights, applicants need to have the means of identifying the location of information in which they may have an interest. This concern is addressed by provisions in the legislation which require agencies to publish indexes and directories outlining the contents of their information systems (s8).

Moreover, certain types of documents held in agencies must be periodically published and made available on

request. These are documents used by an agency in making decisions or recommendations with respect to the rights, privileges or benefits of people under any scheme administered by an agency.

In particular, the legislation specifies manuals or other documents containing interpretation, rules, guidelines or precedents including precedents in the nature of letters of advice (s9). The importance of giving individuals a right of access to these basic documents in the administration of Commonwealth benefits cannot be overestimated.

TOTAL EXCLUSIONS FROM THE OPERATION OF THE LAW

In addition to the wide range of exemptions listed above and enjoyed by all Commonwealth agencies, a number of Commonwealth agencies are not subject to the legislation in any respect, while several have been given exemption in regard to certain special classes of documents. These total exclusions are set out in Schedules to the legislation.

Several of the exempt agencies are engaged in commercial operations, e.g. Australian National Airlines Commission, Commonwealth Banking Corporation. The rationale for their exclusion is that they would be placed at a significant disadvantage in their competition or dealings with private sector organisations in the same field if those organisations, themselves free of any duty to disclose information, were able to obtain valuable information through FOI machinery. Others are concerned with aboriginal self-management (the Aboriginal Land Councils and Land Trusts), labor relations (National Labor Consultative Council) and possibly of most interest, national security (Australian Secret Intelligence Service, Australian Security Intelligence Organisation, and Office of National Assessments).

Nineteen agencies have exemptions in respect of particular classes of documents. Most relate to documents in respect of the agency's competitive commercial activities.

Examples of other interests given protection are: the Australian Broadcasting Commission in relation to its program material; and the Department of Defence in relation to documents in respect of activities of the Defence Signals Directorate and the Joint Intelligence Organisation. These provisions and the retention of a large number of secrecy provisions in other Commonwealth legislation (these are currently under review) represent major inroads on the principle of freedom of information.

COMMENCEMENT AND ACCESS TO PRIOR DOCUMENTS

Despite criticism, the legislation sets no specific date for commencement. The Government has promised that the law will come into operation on 1 December 1982.

Furthermore, agencies are given an additional 12 months after commencement to comply with the requirements in relation to indexes, directories and manuals.

Most importantly, it will normally not be possible to obtain access to documents brought into existence prior to the commencement date (s12(2)). This rule is subject to two significant qualifications: personal records which came into existence not more than 5 years before the date of commencement must be released if requested (as noted earlier) and documents reasonably necessary to enable a proper understanding of the principal accessed must be released (ss12(2)(a) and (b)).

* This article is based on material originally published by the Legal Service Bulletin and by the Victorian Council of Social Service and is re-published with the kind permission of those organisations. Kevin O'Connor LL.M (Melb.), LL.M. (Illinois) is Secretary of the Victorian Council for Civil Liberties.

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- Prestel was the only Videotex technology developed to the point where a public commercial system was in operation.
- Telecom would maximise private enterprise involvement in the provision of Videotex. It was estimated that over 80 per cent of employment and earnings from Videotex would have been outside Telecom.
- Public ownership of the Videotex system would ensure a national service being established. It would avoid the potential for conflict of interest between commercial owners of a system and users and it would also encourage the partial use of the system for reasons based upon social need rather than strictly profit-potential considerations. Telecom proposed unit fee access to the central computer for subscribers wherever they resided."

"Telecom's proposal meant only a small amount of capital would need to be expended to commence commercial operation of the Videotex system. This was estimated in the first year to be less than \$2 million out of total capital expenditure of around \$1100 million. Telecom, therefore, proposed to provide a new communications service to the Australian community in a manner which maximised private enterprise involvement and also took account of the national interest."

"Telecom's submission was opposed by certain private interests. In particular, it was reported that the media giant, Publishing and Broadcasting Ltd, and the retailers, Myers, were lobbying for the Minister to reject Telecom's proposals. Both organisations are members of BTS."

"On October 16, 1981, Mr Sinclair announced that Telecom had been refused permission to provide a Videotex service."

"Two days prior to the Minister's announcement, the Publishing and Broadcasting representative in the United Kingdom had passed information to British Telecom (BT) to the