ARCHIVES BILL 1981

Date Introduced: 2 April 1981
House: Senate
Presented by: Senator the Hon. P.D. Durack, Attorney-General

Purpose

To put the Australian Archives on a statutory basis and establish firm procedures governing the custody, destruction, retention, storage, conservation and public accessibility of the archival resources of the Commonwealth.

Background

The organization and functions of the Australian Archives have until now been based upon ad hoc administrative arrangements developed over a number of years to meet changing circumstances. In 1943, following a report by an interdepartmental committee, the Prime Minister directed the formation of a War Archives Committee to arrange for the preservation of war records. Following recognition that war archives could not be separated from peacetime archives, the name was changed, in 1946, to the Commonwealth Archives Committee. In 1952 the National Library became the sole archival authority for the Commonwealth and the Chief Archives officer became the Executive Officer for the Committee. Following a recommendation of the National Library Inquiry Committee, the Archives Division of the National Library was reconstituted as the Commonwealth Archives Office within the Prime Minister's Department. The office was renamed Australian Archives from March 1974 and, under the present administrative arrangements, is within the responsibility of the Minister for Home Affairs and Environment.

A Bill to give the Archives a statutory basis was introduced in the Senate on 8 June 1978 by the Attorney-General in conjunction with the Freedom of Information Bill 1978. When that Bill was referred to the Senate Standing Committee on Constitutional and Legal Affairs the Archives Bill 1978 was also referred insofar as it related to common issues. Subject to this the Bill was referred to the Senate Standing Committee on Education and the Arts.
The Constitutional and Legal Affairs Committee's report (the FOI report) was tabled on 6 November 1979 and Part F of the Report relates to the Archives Bill. The Education and the Arts Committee's report (the Archives Report) was tabled on 11 October 1979. On 11 September 1980 the Attorney-General announced the Government's response to the two reports. The recommendations made by the two Committees related to exemptions for documents, especially Cabinet and Executive Council documents or ASIO documents and the role of the Advisory Council.

One recommendation accepted by the Government relates to Cabinet and Executive Council documents. The Archives Bill has been amended to enable regulations applying the arrangements for access in the Bill to Cabinet and Executive Council records and also to records of Governors-General, the Parliament and the courts. Only Cabinet and Executive Council records will be prescribed in the first instance. Other recommendations - e.g. that all categories of records should be subject to the open access provisions of the Bill - are not accepted; nor are recommendations that would allow an appeal in all situations or relating to the role of the Advisory Council in making decisions about special access.

Main Provisions

The clauses of the Bill are discussed in detail in an Explanatory Memorandum circulated by the Minister.

1. Organization, Functions and Powers

The Bill establishes an organization to be called the Australian Archives. It will be organizationally within a Department of the Commonwealth Public Service.

The major functions of the Archives are:

- to determine what material constitutes the archival resources of the Commonwealth and to ensure its conservation and preservation
- to encourage and foster the preservation of other Australian archival resources
- to promote the efficient and economical preservation of current Commonwealth records
- to have the custody and management of non-current Commonwealth records
to make Commonwealth records available for public access.

The expression "archival resources of the Commonwealth" is defined in sub-clause 3(2) as consisting of those Commonwealth records and other material as are of national significance or public interest and relate to the history or government of Australia; the legal basis, origin, development, organization or activities of the Commonwealth or a Commonwealth institution; a person who is, or has at any time been, associated with a Commonwealth institution; the history or government of a Territory; or an international or other organization the membership of which includes, or has included, the Commonwealth or a Commonwealth institution. It does not include material that should be in another country's archives or those of an international organization, material relating mainly to the States or Northern Territory (including material of former colonies) or exempt material.

By clause 6 the Archives is given extensive powers to enable it to perform its statutory functions. These include:

- the establishment and control of repositories
- the survey, appraisal, accessioning, arrangement and indexing of Commonwealth records
- the acquisition of material forming part of the archival resources of the Commonwealth
- publishing material which is part of the archival resources of the Commonwealth
- publishing indexes of archival material
- authorising the disposal or destruction of Commonwealth records
- training
- providing information and facilities for persons using the material of the Archives.

The Bill provides (clause 7) for the establishment of an office of Director-General of the Australian Archives who will be a public servant. The Minister will have power to give directions to the Director-General, not inconsistent with the legislation, in relation to the exercise of his powers and duties.
There is to be established an Advisory Council on Australian Archives whose membership is 13 and includes a member of the House of Representatives and a Senator, to be chosen by their respective chambers.

2. Commonwealth Records - Handling and Access

The provisions discussed under this heading do not apply to: records of the Governor-General or a former Governor-General; records in the possession of the Houses of Parliament or a Parliamentary Department; records in the possession of a court or the registry of a court; Cabinet records, including Cabinet submissions, or proposed submissions and records whose disclosure would involve the disclosure of any deliberation or decision of Cabinet, except an official publication of such a decision; Executive Council records, including submissions or proposed submissions and a record whose disclosure would involve the disclosure of any deliberation or advice of the Executive Council, except a record which officially publishes an act of the Governor-General acting with the advice of the Executive Council. The Bill provides that a certificate signed by specified officers in the case of Cabinet records, Executive Council records and records of Governors-General will be conclusive evidence that the records in question are of the nature certified (clauses 18, 19 and 20).

Clause 21 enables regulations to be made that the procedures to be discussed apply to records referred to in clauses 18, 19 and 20 and may prescribe modifications. Subject to any such regulations these arrangements may provide for the Archives to have custody and control of such records and the extent to which access may be provided. Clause 22 enables similar arrangements to be made where there are no regulations. Clause 23 makes special provision for the records of Royal Commission which are to be kept in such custody as the Minister administering the Royal Commissions Act 1902 may direct and do not automatically come within the custody of the Archives. Clause 24 exempts records under secrecy provisions in other legislation that are prescribed. Clause 25 enables regulations restricting or excluding the operation of the legislation to records of intergovernmental authorities.

Clause 28 requires the transfer to the Archives of all Commonwealth records when they are no longer required and, in any case, when they are 25 years old. Clause 29 gives the Archives full and free access at all reasonable times to all Commonwealth records in the custody of another Commonwealth institution. Exemptions from these requirements are dealt with in clause 30. Any Commonwealth
institution may, with the Director-General's consent, exempt some or all of its records from the requirements of clauses 28 and 29 (sub-clause 30(1)). It is also open to the Minister responsible for the records in question to exempt some or all of the records of a Commonwealth institution although he must notify the Archives. Sub-clause 28(8) provides that the concurrence of the Director-General is not required to exempt records of ASIO, ASIS, DSD, J10 or ONA if a person having authority to act on behalf of the organization concerned determines they should be exempt.

Clause 32 contains a general requirement that the Archives make all Commonwealth records in the open access period available for public access. The "open access period" is the period which commences 30 years from the end of the year in which the record came into existence (sub-clause 3(7)). Excluded from this requirement are exempt records, classes of which are defined in clause 33 and the classes of records specifically excluded from the provisions dealing with handling and access as discussed above.

Exempt records are those containing information or matter of any of the following kinds set out in clause 33:

- information whose disclosure would prejudice the defence; security or international relations of the Commonwealth

- information communicated in confidence by other governments, the disclosure of which would breach that confidence

- information whose disclosure would prejudice Commonwealth/State/Northern Territory relations

- information whose disclosure would have a substantial adverse effect upon the Commonwealth's financial or property interests

- information whose disclosure would have a substantial adverse effect on the Commonwealth's position in any legal proceedings

- information whose disclosure would constitute a breach of confidence

- information whose disclosure would interfere with the administration or enforcement of the law

- information whose disclosure would unreasonably release information about the private affairs of a person
information, including commercial or financial information, whose disclosure would unreasonably disadvantage the material aspects of a person, organization or undertaking.

Clause 35 deals with procedures for identifying exempt records. The Director-General and the responsible Minister are to make arrangements for the examination of records to determine which records are exempt and the extent to which access in part may be given to them without disclosing the reason or matter by virtue of which they are exempt. This may occur before they become records in the open access period. These procedures may be either overridden or by-passed where a Minister is satisfied that a record contains information or matter in the first three exemption categories listed above. If the Minister is so satisfied he may sign a certificate to that effect and such a certificate, while it remains in force, establishes conclusively that the record is an exempt record under the relevant paragraph of sub-clause 33(1) (clause 34). The effect of this conclusive certificate is to prevent the Administrative Appeals Tribunal from reviewing the decision to give the certificate or the existence of proper grounds for the giving of the certificate. Regulations under the legislation may prescribe a period during which ministerial certificates are to remain in force unless revoked earlier. If a ministerial certificate is in force the examination procedures under clause 35 will not apply, although - as noted above - if they have been held they may still be overridden by a ministerial certificate. The Minister may delegate his powers under this clause to a Permanent Head or an office-holder with the powers of a Permanent Head or to the holder of an office that is prescribed by the regulations for the purposes of this provision.

Forms of access to those records available for public access are provided in clause 36. This may be by inspection, by provision of a copy or by a transcript or by the use of equipment. Access in one form may be refused and given in another form if:

- giving access in the requested form (other than an opportunity to inspect the record) would interfere unreasonably with the operation of the Archives or of a Commonwealth institution

- giving access in the form requested would not be appropriate having regard to the physical nature of the record
giving access in the form requested would be detrimental to the physical preservation of the record

giving access in the form requested would involve an infringement of copyright (other than Crown Copyright) subsisting in the record.


Clause 42 provides that an application may be made to the Administrative Appeals Tribunal for review of a decision of the Archives about access to a record. The decisions subject to such review are:

- those refusing access on the ground that the record is an exempt record or a Commonwealth record to which the access provisions do not apply
- those refusing to grant an extension of partial access on the ground that a record is exempt and it is not practicable to allow further access in a form which would not disclose information which led to the record being made exempt
- those refusing access to a record in a particular form because of any of the reasons given in clause 36 other than the ground that access in the form sought would be detrimental to the record's physical preservation.

The Tribunal is prevented from reviewing a decision to give a conclusive certificate or the existence of proper grounds for the giving of the certificate.

In proceedings before the Tribunal the onus of establishing that a record is an exempt record rests upon the person so claiming. The Tribunal is not restricted by any determination made by the Director-General under the clause 35 procedures.

Clause 41 provides that before appealing to the Tribunal, a person must apply in writing to the Archives for a review of its decision within 28 days of the notice of the original decision.

Where a decision on reconsideration does not grant access, the notice of that decision must state the findings on any material questions of fact and the reasons for the decision and inform the applicant of his right to appeal to the Administrative Appeals Tribunal for a further review.
The role of the Ombudsman is set out in clause 45. The fact that there is an appeal to the Tribunal does not preclude the exercise by the Ombudsman of his ordinary powers.


Clause 46 provides that the Minister or a person authorised by him may, in accordance with arrangements approved by the Prime Minister, cause all records in a class of records not in the open access period to be available for public access. It is possible under similar arrangements for records not available for public access to be made available to a person for a purpose specified in the regulations.

Other provisions deal with objects of archival significance (Part VI, clauses 51, 52), the maintenance of the Australian National Register of Records, the Australian National Guide to Archival Material, and the Australian National Register of Research Involving Archives (Part VIII, clauses 55-57). Clause 58 requires the Archives to prepare an annual report for the Minister for presentation to Parliament.

For further information, if required, contact:

6 April 1981

Law & Government Group
LEGISLATIVE RESEARCH SERVICE.