

Internal review

Procedures generally

28.1 The internal review procedure proposed by the Bill is fully set out in clause 38:

38. (1) Where a decision has been made, in relation to a request to an agency, otherwise than by the responsible Minister or principal officer of the agency (not being a decision on a review under this section), the applicant may, within 28 days after the day on which notice of the decision was given to the applicant in accordance with section 22, apply to the principal officer of the agency for a review of the decision in accordance with this section.

(2) A person is not entitled to apply to the Tribunal for a review of a decision in relation to which sub-section (1) applies unless—

- (a) he has made an application under that sub-section in relation to the decision; and
- (b) he has been informed of the result of the review or a period of 14 days has elapsed since the day on which he made that application.

(3) Where an application for a review of a decision is made to the principal officer in accordance with sub-section (1), he shall forthwith arrange for himself or a person (not being the person who made the decision) authorized by him to conduct such reviews to review the decision and to make a fresh decision on the original application.

(4) Where—

- (a) an application for a review of a decision has been made in accordance with sub-section (1); and
- (b) the applicant has not been informed of the result of the review within 14 days after the day on which he made that application,

an application to the Tribunal for a review of the decision may be treated by the Tribunal as having been made within the time allowed under the *Administrative Appeals Tribunal Act 1975* if it appears to the Tribunal that there was no unreasonable delay in making the application to the Tribunal.

Put shortly, this means that when a decision is made otherwise than by a minister or agency head refusing or deferring access to documents, the applicant may—and if he intends to appeal to the Administrative Appeals Tribunal, must—apply to the head of the agency for the decision to be internally reviewed, that is, reconsidered by a different officer and a fresh decision made.

28.2 We believe that internal review, if properly administered, has a number of beneficial aspects, and are essentially in agreement with the procedure laid down. For one thing, it should encourage delegation of the primary power to decide whether documents should be disclosed and permit requests to be handled in the first place more expeditiously than an agency might otherwise consider advisable. The Department of the Capital Territory regarded internal review as a critical element in freedom of information matters for the very reason that it allowed greater delegation.¹ Internal review would also permit an agency to ensure that a decision of refusal or deferral did not go to the Tribunal without the full authority of the minister or head of agency and certainly not without reconsideration by a responsible officer who appreciates the full implications of his decision. In

¹ Submission no. 149, incorporated in *Transcript of Evidence*, p. 2226.

supporting the concept of internal review the Department of Social Security advised that an internal review procedure which had been adopted by the Department in relation to various disputes with members of the public had succeeded in reducing appeals to the Social Security Tribunal by half.²

28.3 We recommend no significant variation to the various procedural details laid down. We acknowledge that it is appropriate to dispense with the need for an applicant to apply for internal review before proceeding to the Administrative Appeals Tribunal when the initial decision refusing and deferring access was made by the minister or head of agency concerned: internal review in such circumstances would be superfluous. Nor do we object to the limit of twenty-eight days from notification of an adverse decision placed on the applicant's right to seek an internal review. To allow an indefinite period for review could seriously inconvenience agency operations and in many cases the time limit will not be crucial, for a person's right to make a fresh request for the same document is not excluded by the Bill.

28.4 Again, we support the requirement that internal review must be formally requested by making application to the principal officer of the agency concerned. A minor detail which could, nevertheless, be a source of confusion, is the fact that clause 38 requires application to be made to the 'principal officer' of the agency, yet under clause 22 an agency is not obliged to include this item of information in its statement of reasons and other particulars. Neither is there any mention as to whether the request should be in writing. We believe these omissions ought to be rectified, and recommend accordingly.

28.5 Recommendation: The notice required to be supplied to the applicant under clause 22 should include particulars of the manner in which application for internal review should be made.

28.6 The agency is free, except in one respect, to conduct its internal review as it sees fit. The one stricture placed on the agency's freedom is provided by clause 38 (3) which requires the review to be conducted by a person other than the person who made the original decision. We were advised of a new procedure for handling complaints which had recently been adopted by the Department of Social Security.³ Under this informal procedure an officer is designated as a Review Officer to examine and review a decision made by another officer in the department which has been objected to by the member of the public concerned. The Review Officer is required to perform the task of an impartial arbiter in so far as he is able, but in the event of the dispute remaining unresolved the formal appeal procedure would then be engaged. Designating a review officer in an agency to hear all internal reviews concerning freedom of information may or may not have merit. The experience which such an officer would accumulate and the expertise which he would develop might make this proposal an attractive one for an agency in the long term. Initially, however, such a rigid system might work against the agency's interests. We consider that these are essentially matters of internal organisation which are best left to the principal officer of each agency. However we do support, in principle, the development of an effective internal review procedure and express the hope that agencies will give serious consideration to the appropriate mechanism for their requirements.

² *Transcript of Evidence*, pp. 2201-2.

³ *ibid.*

28.7 Recommendation: Agencies should give consideration to the most appropriate internal review machinery for their own needs and take steps to ensure that such machinery is fully operational by the time of proclamation of the Act.

Time limits

28.8 We accept the need for an agency to be under some time constraint in conducting its internal review, otherwise it will be claimed that this internal review process is being used to delay the making of a final decision. Clause 38 provides, in effect, a time limit of fourteen days for internal review, this being under paragraph 38 (2)(b) the time after which an appeal can be made to the Tribunal notwithstanding that the result of the review has not been notified. We believe on balance that this period is appropriate. One department which did indicate that a fourteen day time limit would place undue administrative burdens on its operations was the Department of Immigration and Ethnic Affairs.⁴ The Department requested that the time be extended for a further seven or fourteen days. This would mean that a request for access to information which was ultimately denied might conceivably take three months before an application could be made to the Administrative Appeals Tribunal. The Women's Electoral Lobby (Victoria) (WEL), having rejected the need for internal review, described the following scenario:

An applicant is refused access to a document (maximum time lapse—60 days from date of request). If this request is refused by other than a Minister or Principal Officer, the dissenting applicant must ask for an internal review of the decision (maximum time lapse—14 days). If this review supports the denial, the applicant may then apply to the Tribunal. The applicant has now been seeking information for a potential 74 days.⁵

An additional two weeks for internal review would make this total period three months. While, contrary to the views expressed by WEL, we support the concept of internal review, we cannot agree with the Department of Immigration and Ethnic Affairs that there is any justification for further extending the period of fourteen days. Since the necessary information on which to base a decision will have already been assembled, or could be reassembled in minimum time, delay is likely to be justified only by the fact that particular personnel are not, at times, available, in which case responsibility for internal review should, we believe, simply be delegated to other available personnel.

Internal review and the Ombudsman

28.9 Given that an applicant is required by clause 38 to await the outcome of an internal review, or the expiration of a period of fourteen days, before proceeding to the Administrative Appeals Tribunal, we considered whether an applicant's right to complain to the Ombudsman should be similarly delayed. We concluded that it would be to everyone's advantage, if there were the slightest possibility of settlement without the intervention of an independent party, for internal review to take its course before the Ombudsman commences an investigation. At the same time there will conceivably be occasions when early intervention by the Ombudsman might be advisable; for example where an application is important, extremely urgent and the agency concerned has reached a decision and is merely marking time.

⁴ Submission no. 158, incorporated in *Transcript of Evidence*, p. 2343.

⁵ Submission no. 7, incorporated in *Transcript of Evidence*, p. 368. Also see p. 370.

28.10 The Ombudsman's present general jurisdiction under the Ombudsman Act would allow him to investigate a complaint before the completion of internal review, although section 9 (4) of that Act does allow him a discretion to refuse such an investigation pending a department's or authority's own review of the decision in question. We considered whether it might be appropriate to incorporate in the Freedom of Information Bill a specific provision (analogous in some respects to the present section 9 (3) of the Ombudsman Act) requiring that the Ombudsman should not investigate a complaint before the completion of the time specified for internal review unless in his opinion, taking into account the urgency and importance of the complaint and the attitude of the agency concerned, his intervention was warranted. Certainly we envisage that such intervention would be unnecessary save on the rarest occasions. On balance, however, we believe that the Ombudsman can, as a practical matter, be relied upon not to unwarrantably or unnecessarily intrude on the internal review process, and it is unnecessary to place a legislative restriction upon him in this respect. We couch our own recommendation, then, in this respect, in purely administrative terms.

28.11 Recommendation: For the purposes of freedom of information the Ombudsman should make it a practice not to investigate a complaint before the completion of internal review unless he is of the opinion, taking account of the urgency and importance of the complaint and the attitude of the agency concerned, that his intervention is warranted at that time.