AUSTRALIAN NATIONAL UNIVERSITY

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CANBERRA, 27-29 MAY 1983

SUMMING UP : FOI IN AUSTRALIA - FIRST TERM REPORT

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Judge of the Federal Court of Australia
Member of the Administrative Review Council*

INTRODUCTION AND OUTLINE

This was the fourth in the series which the Faculty of Law of the Australian National University has organised around the theme of 'Australian Lawyers and Social Change'. At the outset, I should congratulate the Faculty and especially Professor Pearce for the persistence with the series. Anything done to confront lawyers in Australia with the consequences and implications of a time of rapid social change is to be applauded. I speak for all participants in thanking the lead speakers and commentators. Theirs have been valuable and timely contributions. Especially, I would wish to thank Professor Glen Robinson (University of Virginia, United States) and Mr Stephen Skelly QC (Department of Justice, Ottawa, Canada) for enlivening the proceedings with insights from the two great English-speaking Federations, with whose legal systems we have so much in common.

I have Vice-Regal authority, no less, for the assertion that summing up the discussion of this seminar, on topics so diverse and far reaching, is a 'forbidding' task. To contain these large debates within a brief report requires the imposition of discipline on topics, at once novel and fast expanding. I therefore propose to confine my remarks to the following:

* First, a few preliminary coments on the methodology of the seminar.
* Secondly, a brief recapitulation of the course the seminar took.
* Thirdly, an analysis of the rationale offered for the Australian moves towards greater access to government information.

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* Views expressed are personal views only.

* Fourthly, a collection of the words of caution offered by the critics or sceptics.
* Fifthly, I shall collect some of the proposals for reform of the present law ventured during the discussion.
* Sixthly, I shall suggest a few pointers to an early evaluation of the reforms - necessarily preliminary and tentative at this stage.

PRELIMINARY COMMENTS ON METHODOLOGY

Openness of debate. The first thing to notice about our methodology is that we did not ourselves fully practise the philosophy we have heard preached. The seminar was not a public one, save for an opening ceremony that did attract a few strangers until they learned that we were not the Architects' Dinner. True it is there were participants who were from outside the University and the Departments of State. There were even two journalists present as participants. But they were under constraints and the seminar proceeded between the invitees and behind closed doors. If, as seems to be the case, there is confusion, ignorance and uncertainty about the Freedom of Information Act (FOIA), there is surely room for more open debate : at least allowing representatives of the media and of special interests to attend, if they choose to do so. Australia, seemingly, has a long way to go before it finds ideas in the sunshine congenial and acceptable.

Interdisciplinary participation. Secondly, one might criticise somewhat the composition of the seminar. Though we had a political scientists (Dr Colin Hughes) - and two if we allow Dr Peter Wilenski a last academic performance, it was still very much a lawyer's exercise with legal examination of what is, by every account, a great political, administrative and social change. I acknowledge that this is a seminar in the Law School and that there were some non-lawyer administrators present, some social workers (Mrs McClintock and Ms Petre). But where was the economist to help with cost/benefit analysis of the reforms? Where was the unionist to deal with industrial relations perspectives? Where was the statistician to deal with methods of monitoring such large changes? Save for Senator J Haines, there were no politicians present, whether to learn or to teach. Lawyers must increasingly enter into dialogue with other disciplines. This seminar has pushed the door ajar. But I hope that, at the fifth in the series, the door will be opened more widely. As we have found in the Law Reform Commission, the dialogue is mutually rewarding, sometimes even surprising.

Search for principles. Thirdly, we would, I feel sure, be criticised by lawyers of the civil law tradition — if any had chanced to stray into our midst, for being too ad hoc and pragmatic. Ernst Willheim (Attorney-Generals) — perhaps in irony — said that we

were 'spared' the usual analysis of the reasoning behind FOI. Yet unless seminars like this spend time on fundamental principles, concepts and aims, no-one else will. And there will then be a danger that reforms of the kind we have been discussing will advance in an intellectual vacuum -- or at least in an intellectual haze. We should have spent more time analysing why we favour FOI. The technicalities of the Act — or of the other administrative law Acts — can later be brought into line with de'ined those objectives. The divisions of opinion, below the surface — and not so far below : between Alan Rose and Derek Volker, for example, and Peter Wilenski and John McMillan, will not be fully explored until there is much more discussion of basic matters of social philosophy concerning the functions of modern government and the respective roles of Ministers, public servants, judges and citizens.

RECAPITULATION OF THE SEMINAR

After these words of, I hope, constructive criticism, let me trace briefly the course which the discussion took:

* The intellectual context was set by the Governor-General's opening remarks. The tone of questioning, nagging self doubts on words written in an earlier life, was sounded by the opening allusion to T S Eliot's questions : 'Where is the wisdom we have lost in knowledge? Where is the knowledge we have lost in information?' By challenging the basic rationale of FOI - by asking whether concealment is not sometimes a more natural and desirable human condition, Sir Ninian really urged us to look again at what the law is up to. In part, at least, the seminar responded.

* Mr Curtis, in the first lead paper, offered us an historical review of the history of FOI — even longer in gestation than the elephant : 10 years short by three weeks from those heady days in December 1972 when Attorney-General Murphy took the first step. Disputes broke out as to the precise relationship of various participants to the infant - I will not say foundling. Mr Curtis was the father; Mr McMillan, the mother; Sir Clarrie Harders was the grandfather; Mr Whitlam almost disowned the child; Dr Wilenski (saving his religion) was the godfather — and the Victorian cousin was produced by in vitro fertilization , Elizabeth Proust and John Cain officiating at the birth. Mr Curtis, momentarily only, at the end of his oral presentation, dropped the facade of the bureaucrat as a mere receptacle into which are poured the thoughts of Ministers. He took a moment's proper, personal pride in his handiwork. In his paper, he asked whether FOI would be seen, in this century, as universal suffrage in the 19th Century - liberating other great forces?

* Mr Curtis even gave us a glimpse at the future : outlining the further reforms to the FOIA promised by the Hawke Administration. These were contrasted later by John McMillan with the promises made when the Government was in Opposition. It seems that Oppositions love FOI more than most Governments. And that the longer Governments are in office the more sensible appear the merits of secrecy.

* Dr Colin Hughes and Sir Clarrie Harders offered two very different perspectives of history by way of commentary. Dr Hughes expressed doubts about the judicialisation of administration inherent in FOIA. Sir Clarrie, whilst believing FOI was 'here to stay', lamented that, in the future, the judges would be 'the stirrers' and that this might be at the price of further decline of the elected arms of Government.

* The seminar then turned to the lessons to be learnt, or not learnt, from the United States experience with FOI. Professor Robinson outlined the 'second thoughts' that have arisen in the United States especially because of disproportionate resources devoted to some notorious 'horrible' cases and misuse of FOIA in gaining access to business confidences. He outlined the provisions of the Hatch Bill designed to cure these defects but concluded that the effort was largely cosmetic and that the problems were tolerable anyway when measured against the benefits to society secured by FOI.

* Dr Peter Wilenski, clearly edgy about what he saw as symptoms of a 'New Conservatism', sprang to the defence of FOI with the zeal of an acknowledged convert. He praised the relative openness of United States society : and contrasted the open discussion of secrets — even terrible dictu, budget secrets — with Australian practice. He saw FOI as being associated with the shift in power — belatedly secured at the ballot — by poor and disadvantaged people and their representatives — which they could not secure through the economic system. He cautioned that cost/benefit analysis must take into account the intangible benefits of FOI. His spirited defence was reinforced by John McMillan, who urged the continuation of the reforms : removal of conclusive certificates, submission of intelligence agencies to FOI as in the United States, and tightening up on limited access to business information. In all of these reforms we could learn from the United States.

* Mr Peter Bayne's paper seemed daunting : but his oral exposition was admirably lucid. He examined the exemptions to FOIA, commenting especially on s.36 (Working Documents); s.41 (Privacy) and s.45 (Breach of Confidence). He made a few provocative remarks about the Administrative Appeals Tribunal's (AAT's)

techniques in confining its resort to evidence in and of construction that would be used in the courts — remarks which ultimately secured a response from Mr Justice Davies that the law had only one meaning — and even if a public servant could telephone a politician to find what he meant, the AAT would not do so.

* Mr Alan Rose of the Department of the Prime Minister and Cabinet gently put the case for hastening slowly on FOI. Many decisions are made, he said, on the run, in great haste and in reaction to unexpected circumstances. He was obviously worried that FOI might become a vehicle to disclose the frequent nakedness of our Australian emperors -- and their advisers : just to coin an allusion. Ms Proust outlined the Victorian legislation which, because it came later, had advantages over the Federal Act. In particular it has no Schedule 2.

* In the final session, Mrs Robin Burnett took the seminar on a different tack. The 'package' of administrative reforms enacted at a Federal level over a decade, by three Governments, has included a number of important new means to gain access to government information. FOI is but one. It must be seen as part of a series. The other components -- the Ombudsman, AAT and Judicial Review in the Federal Court, all enhance the individual's means of access. Indeed, so large is the right to reasons in the Federal Court that some judges, throwing off judicial restraints, are availing themselves of the opportunity to examine the evidence to approach very closely 'review on the merits', much as offered in the AAT.

* This development is an obvious source of concern to Derek Volker (Department of Veterans' Affairs), always a doughty reliable in seminars such as this. He is concerned by costs and numbers : though it is true the potential rather than the actual figures concern him. He described the phenomenon of administrative law reform as a 'lawyer's growth industry'. In view of the recent announcement of the New South Wales Law Reform Commission's program for accident compensation reform, perhaps it comes just in time.

* Mr Roger Gyles QC, a former member of the Administrative Review Council injected a new perspective : that of counsel for clients who, before the reforms, had struggled like Hercules to get documents from the Commonwealth. He suggested that there was scope for 'standard reasons' and that complaints about complexity of the legislation should not be exaggerated. He noted that a large number of FOI and other cases were concerned with Commonwealth employees. Perhaps this just proves the relative lack of awareness about the new law in the wider community.

THE RATIONALE FOR FOI?

General statement. Although the seminar did not tarry over a detailed analysis of the rationale for FOI, inevitably an important part of the discussion was devoted to the criticism and justification of the legislation : parry and thrust — revealing sometimes deep differences i : self conception of senior administrators and in perceptions of power, and where it should lie in our country.

It was Mr Bayne who reminded us of the three basic reasons offered by the Senate Committee for FOI:

* Every individual has the right to know what the Government knows about him.
* Every citizen has the right to evaluate what the Government has done.
* Every citizen has the right to participate in what the Government is doing.

Particular offerings. In the other offerings to the seminar, other explanations were ventured as to why the access movement had gained such a momentum. Understanding the rationale more clearly may help to explain the role and to assess the permanency of this 'revolution', and whether it is apt for extension or curtailment.

* Motherhood. The Governor-General started on a slightly jarring note by suggesting that perhaps, by now, in the Federal sphere at least, it was a motherhood statement : not now open to rational discussion.

* Power. Retreating somewhat from this explanation, Sir Ninian then offered the familiar 'information is power' thesis. It reflects shifts in power in the community : what was astonishing 30 years ago and treasonous, perhaps, 60 years ago, is now approved — virtually agove party politics. Clearly Dr Peter Wilenski thinks the debate is about power : those without economic power are now being armed by legislation with ways of breaking open the chest of bureaucratic secrets, to enlarge the prospect of a more equal society run for their interests. Precisely because of a fear of conservative backlash, Dr Wilenski cautions against complacency about FOI. Professor Robinson was not so sure about the shift in power. In answer to a question from Clare Petre, as to whether the United States FOIA had shifted power from the powerful to the people, he said that the cynic in him required him to give a negative answer. He could not, he said, identify such a shift in the United States.

For example he estimated that 85% of Food & Drug Administration FOI requests were being made by business competitors. Perhaps the Act is about power — but only the already powerful will use it with skill.

* Reaction to big government. A third, related, explanation was also offered by the Governor-General : FOI is a reaction to big government : people distrust big government and have more reason to do so than small government. Is FOI the 20th century's practical equivalent to the universal suffrage reforms of the last century? Dr Colin Hughes thinks this too bold a claim. And he is cautious about the trend to judicialisation. But how many times do we in Australia turn to the judges — as the last, fairly universally trusted arm of government, to do hard tasks? The dangers of this trend were mentioned by Sir Clarrie Harders and are well stated by Gordon Reid in his prize-winning essay on Judicial Imperialism in Quadrant, January/February 1980.

* Educated citizens. Other explanations were also offered. Derek Volker said that individuals should be able to have reasons and information on government decisions affecting them. Not only is this rational and just for the individual : it is an aspect of good public administration. This point was hinted earlier by Sir Clarrie Harders' lament that if only Federal Departments had previously had a more just and rational access policy, FOI would not have been needed. The FOIA was the stimulus to many to re-examine and question the secrecy of the past. A community better educated and better informed about individual rights is likely to insist on nothing less. Robin Burnett explained the move to statutory rights to reasons as an aspect of giving people satisfaction with administration affecting them. It is notable that the overwhelming majority of FOIA applications so far appear to be about the subject's personal affairs.

* Shifting the onus. Mrs Burnett also made the point that the law has virtually sought to shift the onus from the seekers to the withholders of information, to justify their position. This is a subtle but important change : reflecting a shift in the psychology of Australian public administration. Westminister — the nursery of our administrative traditions — appears very much more reluctant to shed the mantle of secrecy. Viewers of the BBC series 'Yes Minister' may have a few clues as to why this should be so.

* The role of the media. The Governor-General hinted, ever so gently, that the media may have played a significant role in stimulating reluctant administrators, disinterested politicians and an uninterested community to this change. Mr Jack Waterford (Canberra Times) has certainly taken credit as the most visible early

litigant. But Mr Curtis complained about the general press indifference during the long haul to FOI. Ms Proust chronicled the same position in Victoria. And Dr Wilenski was positively scathing in his assessment of the Australian media's dependence on handouts, leaks and liquid luncheons. For once it seems the media can taken neither the accolades nor the brickbats. Much more relevant — both in the Federal and Victorian spheres — were supportive Party leaders, committed groups of politicians — often fresh from Opposition — a few able and sympathetic bureaucrats and the usual measure of luck that is necessary to achieve law reform in this country.

NOTES OF CAUTION : THE SCEPTICS AND CRITICS

Value of concealment. Criticism makes us question our values and justify our actions — if only to ourselves. It was therefore salutory — if bracing — to have the words of caution from the Governor-General at the opening. He spoke of the occasional positive value of concealment. He extrapolated this value in personal life to value in administration and government:

> Perhaps then, within government and in the dealings of governments with the public there is some room for polite reticence. If only to preserve our societal framework. This is not, for a moment, to deny the virtue of open government but only to suggest that there may be limits to frankness which our own earthy natures impose and beyond which we go at our peril.

Something of the same thought was developed by Alan Rose in his explanation that we must taken into account - in seeking access — psychology and social behaviour, the standing of individuals, confidence and trust between people (including Ministers and officials). Dr Paul Finn quoted Lord Fraser's ringing (and very British) words that the definition of the 'public interest' includes a 'strong' interest in protecting the confidences of an organisation and in securing the loyalty of its officers. Loyalty, candour, frankness in dealings : are these really incompatible with open revelation to the inquisitive? Does the fact that the inquisitive may not be a scholarly seminarist but an Opposition politician with a deadly desire for your defeat (or the downfall of your Government) offer at least some, occasional justification for secrecy, lest candour be lost? These are the questions Sir Ninian posed — and they stayed with us to the end of the seminar.

Decline of Parliament. It has already been mentioned that Sir Clarrie Harders expressed fears lest FOI would further erode Parliament's standing and the role of the Members -- their functions fast being taken over by an army of officials and judges. Dr Wilenski said this was not so. Senator Baume, the Shadow Minister for Education, was already using the FOI Act to secure information to aid the Opposition in Parliament in scrutinising Government action. Mr Stephen Skelly recounted the way in which, in Canada, the Privacy Act had been used by Members of Parliament to serve their constituents. He described the efforts to restore the flagging fortunes of Parliament by TV coverage : apparently popular but whether beneficial, still unknown.

Judicial imperialism. Dr Hughes questioned the converse of the decline of Parliament : the ideology of judicialisation of problems, as for example FOI claims. He asked, politely I thought, whether judges (and AAT members) would have the training and background to make the finely balanced decisions at least as well as present machinery in the bureaucracy. Sir Clarrie Harders agonised over judges becoming, through FOI, a mere section of the bureaucracy. He questioned the requirement of decisions in the form of recommendations — as uncongenial and inappropriate to the judicial status. Dr Wilenski then offered a telling rebuttal. True it was undesirable that judges should review elected Ministers' decisions. But the truth was now being faced that all but a few decisions were in fact made by bureaucrats. Once it was seen and acknowledged -- however painfully -- that bureaucrats themselves actually make decisions — judges reviewing bureaucrats was not so offensive : merely one unelected official reviewing another. Various other comments were made on this controversy. Peter Bayne appealed for realism in judicial interpretation; Robin Burnett, for a return to judicial restraint and Derek Volker cautioned gravely about the perceived excesses of certain Australian judicial activists who had entered the bureaucratic fray with gusto.

Effective government. Behind these last remarks is the familiar concern about whether FOI advances or impedes effective, decisive government. Dr Hughes obviously had his reservations about the unbridled individualism of a concentration on rights of people -- possibly to the loss of rights of the aggregate community, to firm swift administration. This point was also made by Alan Rose and Derek Volker.

Costs. The costs of FOI are an aspect of effective government. Professor Robinson revealed the concerns in the United States from 'horrible' requests, for example 'all documents on the assassination of President Kennedy'. Mr Volker sought to raise a spectre of similar problems in Australia — especially in large client departments. However, Mr Curtis quickly made soothing noises. Australians are not so inquisitive as Americans. Proportionately, our total cost should be no more than $3m per annum. That

fits in with privacy costs in Canada disclosed by Mr Skelly (about $3m per annum). Costs are contained by the general rule against costs in the AAT — a matter under investigation by the ARC — in any case Mr Curtis thought the cost worthwhile. In this he was echoed by Professor Robinson who compared the United States costs of FOI ($50-60m per annum) with United States expenditure on overseas information costs. Dr Wilenski fairly conceded that account must be taken of opportunity costs — ie what officials would have been able to do if they were not attending to FOI requests. But it soon emerged that this concession was made to confront participants with contemplation of the opportunities lost by the United States Central Intelligence Agency deflected from their mission by the US FOIA. Mr Volker's serious point was really about opportunity costs. Do we advantage our society by spending hundreds of dollars to service a handful of individual FOI requests — or would this money and effort be better spent on informing people who are ignorant of their rights — and actualling improving those rights? To this, had he been here at this point, Dr Wilenski would doubtless have responded : but would the sums be so spent? Dr Wilenski made a point — stressed also by the Senate Committee — that many requests for information would be granted anyway : just because we live in a relatively open and politically democratic society. The true cost of FOI is therefore the marginal cost of the cases which are fought and which would have been disputed under the Ancien Regime.

Misuse and hard cases. The problem of the misuse of FOI occupied much discussion. Even the generally sympathetic baulk at some of the 'horrible' United States cases. Fear is also expressed about misuse of FOI -- not for good government or open government but to get information on individuals or commercial creditors. This point is raised in Professor Robinson's paper and oral comments. Mr Roger Gyles also expressed concern that proper decentralisation of decision making might lead to revelation of personal affairs to third parties in some cases by reason of uneven decision making. He was reassured partly by Mr S Skehill (Social Security) and Dr V Kronenberg (Defence). But the Immigration Department rule ('When in doubt give out'), disclosed by Secretary McKinnon, though consistent with the spirit of s.3 of the FOIA, could sometimes be too bald an injunction for due attention to the other interests at stake. Again Mr Curtis came to the rescue of the doubters. The limits are clear. So far as disproportionate cost of compliance is concerned, there is a special Australian head of exemption (s.24(1)(a). And in any case the occasional hard case or even mistake should not deflect us from the true path of FOI righteousness.

Other concerns. Other concerns and doubts were expressed. Many criticised the legislation as too complex. Mr Volker and Mrs Burnett commented on the variety and, perhaps, the confusion of remedies to secure access. Some fears were expressed about the

drying up of commercial, criminal and intelligence information. On this last point Professor Robinson was robust. As in Australia, in the United States, intelligence was well protected by the law (indeed more so in Australia). Agencies were engaged in a self fulfilling prophecy if they constantly and publicly bemoaned their inability to guarantee security to informers.

REFORM PROPOSALS

It would be a misfortune — at least for a professional law reformer — if the seminar were to disperse without collecting some of the main ideas proposed for reform or reconsideration of the current Australian FOIA. Mr Curtis announced the immediate reforms intended by the Hawke Government. He also indicated the intention to reduce the compliance period, in stages, from 60 days to 45 days to 30 days by 1986. Other suggestions made during the seminar include:

* Instruction of public service. Although there was praise for the efforts to date, many commentators appealed for more instruction throughout the public service, not just in the letter but also the spirit of the FOIA. Mr Bayne referred to the need to convey the attitude apparently enjoined by s.3 of the Act. He suggested that there was already over-use of s.36. Mr Volker confessed that he found the FOIA provisions eminently forgettable because of their complexity. He also criticised as too obscure the guidelines issued by the Administrative Review Council, on giving reasons — a view in which he was joined by Mrs Burnett's paper. Only Mr Willheim referred specifically to the need to do more to inform the public of its rights under the FOIA.

* Role for Ombudsman. A number of speakers suggested the need for better, more cost-effective means of resolving disputes. Mr Curtis ruminated that the Canadian and New Zealand legislation (with the greater use of the Ombudsman remedy) might yet prove more effective. Mrs Burnett called attention to the adversarial nature of so much of the new administrative law. Dr Hughes confessed himself attracted to the Ombudsman model. Mr Waterford stressed the need for a better, quicker, cheaper system of dispute resolution. Court door settlements in which he has been involved have cost the Commonwealth large sums and have done nothing for civilian respect or officer morale. Some would urge a larger co-ordinating role

on the Attorney-General's Department : a role the Attorney-General's Department was reluctant to assume, lest it appear to take over decision-making functions imposed by the FOIA on the client agencies. Mr Curtis drew an important distinction between the role of the Attorney-General's Department in the general interpretation of the legislation and the responsibility of each agency to make its own decisions within the scope of that general interpretation. He conceded that the department had to become more active in respect of its proper role.

* Review exemptions. Despite the Attorney-General's announcement, many were the calls for review and narrowing of the present exemptions:

  ** Listed agencies exempted. Mr Pursell asked whether Schedule 2 would be changed. The answer was negative.

  ** Business exemptions. Sir Clarrie Harders called attention to the weaknesses in the rights of review of access and business secrets. Ms Proust foreshadowed further review of equivalent provisions in Victoria.

  ** Intelligence. Dr Wilenski, Mr McMillan and Mr Sedden suggested the need to bring intelligence services within the ambit of the Act. Mr Curtis said that the new Royal Commission on Intelligence and Security under Mr Justice Hope could examine this issue.

  ** Defence. Mr Bayne suggested linking the defence exemption to the Protective Security Handbook.

  ** Secrecy. Mr Bayne also proposed scheduling to the FOIA the secrecy exemptions (s.38). Mr Curtis said a review of these provisions would be completed by 1 December 1985.

  ** Privacy. It was acknowledged that s.41 would need reconsideration in the light of the forthcoming report of the Law Reform Commission on privacy. One special problem which may require attention is the right of privacy of young persons as against parents and guardians; and doctors against patients who seek to obtain their records.

  ** Conclusive certificates. Mr McMillan urged review of the conclusive certificate provisions. Mrs Burnett pointed out that the certificates often excempt documents that would now be disclosed to courts under the common law. Mr Gyles added his criticism of the failure to reform conclusive certificates.

* Extend scope. A number of commentators proposed expansion of the scope of the FOIA in various ways:

** Companies and media. Dr Cranston raised the lessons from public sector accountability for the accountability of corporations and the media itself. Mr Curtis pointed out that corporations are already accountable in a number of relevant areas affecting access to corporate information.

** Privacy legislation. Mr McMillan saw privacy laws as a next step, to follow up and refine the provisions in s.41. Mr Skelly stressed the important interaction between privacy and FOI laws, as contemplated in the Canadian law.

** Public interest advocacy. Mr McMillan also urged the need for such centres in order to work the machinery of FOI for the presently weak and powerless, lest it fall entirely or largely into the use of already powerful and well lawyered interests.

** Sunshine laws. Mr McMillan drew attention to further developments in the United States where the enactment of 'sunshire' - or open meeting laws - followed soon after the enactment of open records laws.

** Creation of documents. Mr Waterford urged the reasonableness (sometimes at least) of creating requested documents, where they do not already exist.

** Monitor FOI. Ms Petre stressed the importance of better monitoring of the operation of the Act — to distinguish personal applications from policy; private from business; Mrs McClintock added : radical groups from establishment applicants. Though tiresome and expensive, careful monitoring is essential to the success of the reforms. The legislation is a beginning, not an end.

** Secrecy laws. Mr Bayne recommended a review of s.70 of the Crimes Act 1914 (Cwlth) with a view to facilitating greater voluntary disclosure of information by public servants. He added that legislation specifically to protect 'whistle blowers' might be warranted.

* Miscellaneous. A number of miscellaneous suggestions can also be noted:

** Recommendatory jurisdiction. Sir Clarrie Harders' reservations have been noted.

** Reform of s.3. Mr Bayne has suggested a logical weakness in the language of s.3(1) — in that it may import exemptions into the objectives of the Act.

** Clarification of 'public interest'. Mr Curtis was resistant but Dr Finn identified how slippery the concept of 'public interest' may be : yet it is now to play an enhanced role in the FOIA following the proposed 1983 amendment.

** Reconsideration of the 'reasons' obligation. Mrs Burnett referred to the dangers of ex post 'sanitised' reasons. Mr Skehill suggested that the legislation ignored practical administrative techniques.

Doubtless there are many other suggestions that will repay careful reading of the papers and commentaries presented to the seminar.

EVALUATION OF FOI : A PROGRESS REPORT

It deems generally agreed that it is too early to start a serious evaluation of the FOIA in Australia. The Act has been operating for six months only. More amendments are now pending. Statistics are few. Experience is only now being accumulated. Nonetheless, a few early impressions can be ventured:

* The floods still awaited. The fear of the inundation — those floods that are the special enemy of law reform in cautious Australia -- once again seems to have been unjustified. Derek Volker is still anxious. But the Trade Practices Commission has closed down its FOI unit for want of business -- and many departments and agencies report nil returns.

* It would have come anyway. As Sir Clarrie Harders suggests — much of the FOIA at least is just common sense and good administration. Greater openness should have been introduced years ago. The FOIA has just been a catalyst for a change that would — in large measure — probably have happened, and should have happened, anyway.

* Most seek personal files. The great majority of cases seem to be personal applications — privacy claims in reality. Mr Stewart (PSB) reported that 48 of his 60 claims were for access to personal files. And the Board is encouraging claims for access to files to proceed outside FOI, under pre-existing access rules.

* Officer apprehension persists. Within the service there is still much apprehension and uncertainty. In part, this arises from the length and opaque qualities of the legislation and its complexity reinforced by lack of experience with it, and fading memories of unmemorable seminars. There is a desire by busy officials that the pace of reform should be slowed, that judges should be understanding and that citizens should be patient.

* State reforms are slow. It appears that the spread of the Federal experiment to the Australian States -- though begun in Victoria — will be a languid process. The longer a government is in office, the less its enthusiasm, typically, for open government laws. Indeed, Mr McMillan asserted that a sea change had come over the present Federal Government, in but a few weeks of gaining office. Progress in New South Wales remains slow, despite the report completed for that State by Dr Wilenski four years ago.

. Need to aggregate experience. Although our efforts systematically to collect data on the operation of the FOIA seem, on the whole, better than those of the United States Government, this does seem an area of weakness. It would appear that more should be done, more systematically, to aggregate experience — to identify areas of hold-up, error and weakness. And then to translate experience in FOI to improve public administration. This point was made effectively by Mrs McClintock, Ms Petre and Mr Waterford. If accepted, this point suggests that more investment in identifying weaknesses and expenditure on prevention might improve Federal administration and save money too.

* The judicial response. The Australian judiciary seem to be rising to the challenge — some have said rising too vigorously. Professor Robinson says that it was the 'relentless' attitude of US Federal judges that ensured the vindication of the United States FOIA. Mrs Burnett's paper suggests that the same spirit is alive and well in the Australian Federal Bench. As to whether there will be a tempering understanding of larger social, administrative and political forces — as doubted by Dr Hughes — only time will tell.

* Need for better monitoring. Though Dr Wilenski cautioned against complacency, it does seem that Sir Clarrie Harders is right and that FOI is here to stay in the Federal sphere. The real issue now is whether the Act will operate as intended, whether the gloomy prognostications will be fulfilled and whether the intended beneficiaries or others will be the users of these bright new rights. We need an ongoing examination of the legislation. Obviously the Administrative Review Council should have a vital role to play in this regard. This conclusion emphasises a need for the enlargement of that Council's range of expertise and interest groups and possible enlargement of its statutory charter.

FAMOUS LAST WORDS

Finally, the seminar was notable for elegancy of language, wit and even wisdom. A few examples:

* The Governor-General, apart from quoting T S Eliot and promising a 'cottage industry' in administrative law reform, took a gentle tilt at the media — so recently rude to his high Office — suggesting that it 'makes for a dull day if there is nothing by way of startling revelations ... to start the morning with'.

* Mr Curtis seriously alleged that many FOI applications against the Department of Veterans' Affairs followed Anzac Day ceremonies and their aftermath.

* Dr Hughes quoted a splendid passage from W S Gilbert's 'Utopia Limited'.

* Sir Clarrie Harders alleged he was only called out of 'retirement' because Mr John Stone, the Secretary to the Treasury, was not venturesome enough to face the seminar.

* Mr Stephen Skelly told the seminar that Canadians, a people with a high threshold to pain, not willing to make do with daily servings of parliamentary television, watch it live in the day and repeated at night.

* Professor Robinson offered the plural of 'anecdote' as 'data'. He also described self igniting flammable memoranda, found on files in the US — something that does not seem to occur in Australia.

* Dr Peter Wilenski it was who uttered the immortal lines that in most countries there is a backlash after reform, but 'it is only in Australia that we get the backlash before the reform .

* Mr J. Stewart (Public Service Board) assured us that the Board was 'not bloody minded about FOI claims' though he conceded that, in its early days, it was 'on a learning curve'.

To sum up : a memorable, useful and enjoyable seminar. We are all on that learning curve.