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BOOK REVIEW

"PUBLIC ACCESS TO GOVERNMENT-HELD INFORMATION"

By Norman Marsh QC (Ed), Stevens & Son Limited, London, 1987

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THE HON JUSTICE M D KIRBY CMG

Norman Marsh QC (Ed), Public Access to Government-Held Information, Stevens & Son Limited, London, 1987, i-vi; contents vii-x; table of cases xi-xv; table of statutes xvii-xxi, 1-324; index 325-341. Price A\$85.80

The advert of a new Government in New South Wales, committee to the introduction of legislation for Freedom of Information (FOI) makes this new book on the subject a timely one for Australian readers. FOI legislation already exists in the Federal sphere and in Victoria. In the other States, it has either been talked about and nothing done or has been rejected as unnecessary and prohibitively expensive.

The mandate of the NSW Government to introduce FOI is not in doubt. Senator Gareth Evans' aphorism should be kept in mind: that FOI legislation must be introduced very early in the life of a government. Once it is long in office, it is said, a government gathers too much of a commitment to secrecy, too many bones clanking in the bureaucratic cupboards. The book is described as a "comparative symposium". It arose out of a lecture which Mr Marsh gave to a conference in September 1982. The book is published under the auspices of the Institute of International and Comparative Law, and this gave it its flavour and approach.

Mr Marsh's interest in FOI was stimulated by his reading about developments in Canada, Australia and New Zealand which took place about the time of his lecture. Those developments

took generally the same form. They were, in turn, the local reaction to the Freedom of Information Act 1966 of the United States of America. That Act was likewise a belated response, almost 200 years to the day, to a Swedish Act of 1766 which established a regime of openness and access to "public documents" in that country. In its influential study of the grounds of dissolution of marriage, the Law Commission, during Mr Marsh's term, had demonstrated the way in which "waves" of legal ideas begin in one jurisdiction and then, like ripples in a legal pond, reach out to influence other legal systems. So it was with the simple Swedish idea of "irretrievable breakdown of marriage". So it is proving with the equally attractive idea of access to public documents.

One of the cherished boasts of the British Empire was the establishment of an uncorrupted civil service, chosen by public examinations and offering promotion on that safest of criteria: seniority. The prime example was the Indian Civil Service - the Heaven-born. Lesser examples were scattered wherever the globe was all painted red. Their watchword, from the earliest colonial days was secrecy. It was a régime in harmony with the philosophy of élitism and authoritarianism in which it developed. There is a sharp contrast between the gradual democratisation of political institutions and the largely impervious resistance to change of the permanent civil service. With the enormous growth in the numbers and significance of that service during and after the Second World War - in newly independent developing countries as well as in the developed world - it is not surprising that the FOI movement should have belatedly gained momentum. For here was

great power, nominally under the charge of elected ministers who, in the nature of things, could not be expected personally to know and take actual responsibility for the many decisions daily made in "their" department. This simply historical fact lies at the heart of the world-wide moves for FOI. It is the counterpart to political democracy. Secret bureaucracies are the last rotten boroughs.

Mr Marsh begins the book with an introduction which examines the philosophical conflict between those who urge more or less access to public information. The case of the opponents to FOI is faithfully recorded. There is, for example, the need to protect specially secret or confidential data the revelation of which would do harm to national security, foreign relations, the public interest or individuals. As well, there is the notion that democracy depends on trust and the people should not have an obsessive interest in detail but should leave "firm government" to their elected representatives. It is all somewhat paternalistic. But it is doubtless a view sincerely believed in some quarters. The most potent reason against FOI, frequently pressed, is that a regime of comparative openness would diminish the candour of public service advice and the consideration of available policy options.

Having got this introductory chapter out of the way, the symposium begins. It starts with a chapter on the Swedish law, dating back to the Act of 1766. This section is offered by Gustaf Petren, former Judge of the Supreme Administrative Court of Sweden. He outlines the history and operation of the Swedish law. Of course, there are exceptions to access,

including for national security. But it seems that there are thousands of applications for access to public documents. Most are successful. On average there are 284 appeals each year to the administrative court. Most of these appear to result in partial success for the claimant. So far as is known, the Swedish administration continues to operate with the efficiency of a Volvo engine.

There follows a chapter on the United States experience by James Michal, author of the popular The Politics of Secrecy (Penguin, 1982). The FOI Act of 1966 was part of the package of civil rights legislation which President Johnson introduced before the snares of Vietnam overcame him. The FOI Act was later supplemented by the Privacy Act 1974. Most national and international rules for privacy protection work on the principle that the best protection against abuse of information concerning one's self is the right of access to it. Michal recounts the way in which FOI worked during Watergate and the growing resentment of it, voiced most trenchantly by President Ford.

The chapter on access laws in France is written by Roger Errera, a Conseiller of the Conseil d'Etat of France. He outlines the procedures for access to administrative documents in the highly centralised bureaucracy which is Napoleon's lasting stamp on public administration in France. There is a candid acknowledgement that long established habits of confidentiality will take time to change. But the tone is generally optimistic and it seems that the initiatives for a right of access to public documents which culminated in the Law of 17 July 1978, is operating effectively and changing time honoured bureaucratic practices.

There then follow three chapters on developments in the three Commonwealth countries which first stimulated Norman Marsh's interests. Jill Wallace, Senior Counsel with the Department of Justice in Ottawa, contributes a section on the Canadian Access to Information Act 1982. A chapter on the FOI statutes in Australia is offered by Lindsay Curtis, Deputy Secretary of the Federal Attorney General's Department in Canberra. Professor Michael Taggart then contributes a chapter on the Official Information Act 1982 of New Zealand. Each of these chapters is interesting, tracing the gradual adoption of a new principle of access in the three countries which had inherited the régime of secrecy and, to lesser or greater extent, had copied the Official Secrets Act 1911 of the United Kingdom. Each chapter analyses the exceptions which have been provided by statute to the primary right of access; the mechanisms established to decide disputes about claims to access which are denied; and the administrative arrangement adopted to make the system work without crippling cost. Cost is a major consideration in the introduction of FOI legislation, given the broad ambit of many enquiries and the expenditure necessarily involved in searching for responses and, where applicable, providing copy documents, sometimes edited for privacy or other grounds.

The final chapter lists the attempts to modify access to government-held information in the United Kingdom. The Chief Justice of New Zealand recently described the book Spycatcher as "probably the most litigated book in history". Equally the Official Secrets Act 1911 must vie for the most criticised enactment to emanate from Westminster.

As Lord Scarman has made clear, (see Scarman, The Right to Know, 1985, 71) s 2 of the 1911 Act, so long as it remains the law, is a legal barrier to FOI in the United Kingdom. The attempts to remove this impediment are chartered by Mr Marsh. He runs through the proposals of the Franks Committee in 1971, the unimplemented Labour Party manifesto of 1975, various White Papers and a litany of private members' Bills which have so far come to nothing. Whilst the present government of the United Kingdom has promised to "make available as much information as possible while preserving the confidentiality essential to the effective working of government", Mrs Thatcher has specifically rejected introduction of FOI legislation, declaring that it would be "inappropriate and unnecessary". There have been some positive developments in that country (see Public Records Act 1958 and 1967; in the Data Protection Act 1984 and the Local Government (Access to Information) Act 1985). All of these are set out. But for the moves that will bring the United Kingdom into harmony with the other major English-speaking democracies, which derived their institutions and legal regimes from Britain, it is clear that a change of government and new political commitments will be necessary.

The dénouement of Mr Marsh's book is what is modestly described as "a selective comparative study". Here the editor attempts to draw together the approaches of the legislation outlined in earlier chapters. There is a great deal of similarity in the exceptions provided under the successive statutes adopted since 1966. The general conclusion is stated in a modest section of 18 lines. There is no call to the

barricades here, simply a scholar's expression of hope that countries, like the United Kingdom, which do not possess a system of public access to government-held information may "move more closely to that ideal".

This conclusion signals the strengths and limitations of the book. It is basically a scholarly exposition of comparative law in jurisdictions which have already provided for access to the burgeoning information held by the public service. Even in the postscript about the Spycatcher case (written before the case had gone on appeal in Australia) the treatment is brief and restrained. In the appeal court, attention was drawn to the different legislative and common law approaches to official secrecy in Australia and the United Kingdom. These differences were put forward as one reason for possibly different outcomes in the two jurisdictions. See Attorney General (UK) v Heinemann Publishers Australia Pty Limited & Anor (1988) 75 ALR 353, (NSWCA). The even more recent Spycatcher decision of the Court of Appeal of New Zealand evidences a similar recognition that attitudes to secrecy in that country may be different to those in England. See Her Majesty's Attorney General v Wellington Newspapers Limited, unreported, CANZ, 15 March 1988 (Cooke P).

Each jurisdiction is entitled to strike its balance between openness and secrecy in administration differently, and in a way in tune with its perceived social needs, governmental traditions and resources. But the result of Mr Marsh's painstaking analysis is a devastating intellectual attack on the jurisdictions without FOI laws - including by inference, most of the Australian States. They are now out of step, not

only with the other main English-speaking jurisdictions but also with many European legal regimes. Even as Mr Gorbachev's Soviets embrace Glasnost, the secret bureaucracies increasingly look isolated and antique.

A few criticisms of the book can be mentioned. For my part, I should have preferred shorter expositions of the legislation in different countries and more analysis of the comparative features that emerge. A chapter or two by political scientists and philosophers could have placed the debate about open government into a wider perspective. An economic analysis of the arguments for FOI is hinted at in a few of the contributions but it is not developed. In one sense, it might be said that FOI is a counterpart to the moves for privatisation: opening up an unresponsive bureaucracy to the bracing air of true public accountability.

But these are criticisms of detail. Within the chosen format of the book, it is first class. It is comparatively up to date. It is handsomely produced, with excellent introductory material and a comprehensive index, imperative in a work structured as this one is. It deserves the widest possible distribution amongst the politicians who are, as yet, unconvinced. But they should disguise it in a plain cover, in case Sir Humphrey catches them reading it.

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