NEW ZEALAND LAW CONFERENCE

DUNEDIN, 22 APRIL 1981

FREEDOM AND INFORMATION

The Hon. Mr. Justice M.D. Kirby
Chairman of the Australian Law Reform Commission

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OF WORDSWORTH AND INFORMATICS

> We must be free or die, who speak the tongue
> That Shakespeare spake.[1]

In the days when poetry was still learnt by rote at school, New Zealand and Australian lawyers were invariably instructed in Wordsworth's self-confident dictum. British freedom, we were taught, should be likened in its amplitude to the Flood. It earned the world's praise. It was imperishable.

In our more sceptical and uncertain times, few would make such uncritical assessments. Yet the English-speaking people remain in the vanguard of attempts to improve the quality of freedom and to provide laws apt to safeguard and uphold it.

No civilised society guarantees unlimited, enforceable rights of access to all information. Access to information is not an absolute good; but one relative to other legitimate social claims: claims to orderly government, national security and defence, personal privacy, fair administration of justice, respect for personal honour and reputation and so on. Precisely where the balance between these competing claims is struck, and according to what criteria, differs from one society to another. Yet the English-speaking countries of the common law are traditionally in the forefront of those which extend the boundaries of access to information. The tension between demands for information and claims of legitimate restriction upon access to that information is an enduring feature of every modern society: whether relatively 'open' or relatively 'closed'.

The last decade or so has seen the introduction of new dynamic forces, which add a new ingredient of urgency to the debate. Education which is free, universal and compulsory is at last producing, in combination with other social movements, articulate, assertive and numerous groups demanding access to information, and the power which accompanies it. More importantly, the new technology of information expands enormously the collection, movement and storage of information, bringing at once potential threats to freedom and, properly directed, the means of enhancing freedom. The new technology includes the photocopier, optical and listening surveillance equipment, word processors, the computer and now data bases linked by virtually instantaneous telecommunications. The aggregation of this new technology is called 'informatics'. By remarkable developments of photo-reduction technology, circuitry of enormous complexity can be reduced onto minute chips of silicon and there can store and transmit information of ever-increasing quantity. Telecommunications, by advances in terrestrial and satellite technology, have expanded dramatically man's ability to move information about, at ever-diminishing cost and with seeming indifference to distance. These developments are of great significant to countries such as New Zealand and Australia, until lately the isolated victims of the 'tyranny of distance'.

The fast developing technology produces many social problems relevant to freedom which will not be explored in this note. The suggested net loss of employment, as informatics takes over routine work, will obviously have implications for social quiet, if left unattended.[2] The 'wired society' of informatics is much more inter-dependent and therefore more vulnerable to terrorism, industrial or individual disruption, accident and mistake.[3] A more vulnerable society may demand a different balance between authority and the individual, because of the greater risks of disruption that can attend damage to or interference with vital information. The same phenomenon of dependence can be observed at the international level. Already some European countries have voiced their fear of the potential loss of freedom of action and cultural independence that may accompany the hegemony of a few countries over data bases containing vital information. It is not intended to review here the ownership of the media, although inquiries in Canada[4] and Australia[5] illustrate concern about the implications for freedom of too many of the means of public information falling into the hands of too few.

Instead, this paper will essay a modest look at some of the recent legal developments of common law countries relevant to the balance between claims to information and other competing values. In the nature of things, it can be no more than a sketch — for the canvas is broad. Furthermore, this is not a static area of the law; technology alone requires rapid changes. The thesis of this paper is that freedom implies choice: of opinions, of issues, of parties and of governments.[6] Without adequate access to information, choice may be illusory. Occasionally, the rights and freedoms of others will necessitate legal limitations upon access to information. The business of the law should be to strike the balance in a way sensitive to changing times and responsive to changing technology.

FREEDOM OF INFORMATION LAWS

Legislation to provide an enforceable right of the citizen to gain access to official information possessed by government officials and agencies was introduced into the common law world by the United States' adoption of a Swedish precedent. All Scandinavian countries have adopted some form of freedom of information legislation. But the oldest is that of Sweden, in existence with two short interruptions, since 1776. The relevant Swedish law is one of the three statutes comprising the Constitution of that country. It grants a right of access to all individuals, whether citizens or aliens, to 'official documents'. Exemptions are provided and disputes resolved, in the first instance by the Ombudsman, and ultimately by the administrative courts.[7]

The United States was probably the most natural gateway for a law of this kind in the common law world. It enshrines a commitment to free speech and a free press in the First Amendment to its Constitution. Furthermore, the strict division of powers between the three branches of government, which so distinguishes the United States from the Westminster system, also encourages 'checks and balances' by one branch in its relations with the others. The almost 'adversarial' relationship[8] between the branches of government encourages detailed scrutiny of each, putting at a premium access to the information upon which such scrutiny can be effectively carried out. The Freedom of Information Act 1966 (U.S.) came into effect on 4 July 1967. Any person may request access to government records under the Act. Certain records are exempt from disclosure. Procedures for internal review of refusals may lead on to court review.[9] Nine exemptions are provided[10] but all of them are permissive, not mandatory. The total annual cost of providing the facility of access is unknown, although recent figures suggest it runs at approximately $25 million.[11]

So far, two only of the jurisdictions of the Commonwealth of Nations have adopted freedom of information laws: the Canadian Provinces of Nova Scotia and New Brunswick. The Nova Scotia legislation was adopted in November 1977.[12] Unlike the United States legislation, the Act does not confer a general right of access to information subject to certain exemptions. Instead, the rights of access contained in the statute apply only to certain specified classes of information, although exemptions are also specifically spelt out. The New Brunswick Right to Information Act 1978 was proclaimed to commence in January 1980. Like the United States legislation, it confers a general right to information subject to specied exceptions. If a Minister refuses to grant access, a right of review is provided either by the Ombudsman or a Judge of the Provincial Supreme Court.[13] In Ontario, a Commission on Freedom of Information and Individual Privacy in 1980 published a report proposing a general right of access to information in the possession of 'all institutions of government', including local and municipal government. Exceptions are to be determined in the first instance by a public official, the Director of Fair Information Practices, and in the second by a Fair Information Practices Tribunal. Judicial review, along orthodox lines, is also envisaged.

At a federal level in Canada, the proximity of the United States inevitably led critics of the more secretive Canadian bureaucratic tradition to demand the enactment of similar legislation.[14] Some administrative directions for greater openness were given but in June 1977 a Parliamentary Committee proposed firm legislation after the American model. The Government, however, made it clear that it opposed independent review by the courts of ministerial decisions to withhold information. In October 1979 the Clark administration, elected on a mandate to do so, introduced a Bill for a Canadian Freedom of Information Act.[15] It provided a general right of access, listed exemptions and a right to independent review of decisions to withhold information from the public. With the return of the Trudeau Government, a revised version of this Bill was introduced for an Access to Information and Privacy Act.[16] Presenting it on 17 July 1980, the Minister declared it a 'victory for open government advocates inside and outside government'.[17] Under the proposed law, departments and agencies are required to meet an information request within 30 days or show why it should not be produced. An appeal lies to the Information Commissioner and thereafter to the Federal Court of Canada.

In Britain, despite a number of inquiries, successive governments have resisted the introduction of any legislation which would diminish the discretion of ministers to decide what official information should be available to the public. In 1968 the Fulton Committee on the British Civil Service concluded that the United Kingdom public administration was surrounded by an unnecessary degree of secrecy.[18] In 1972 the Franks Committee recommended revision of the Official Secrets Act, though it did not recommend a freedom of information statute.[19] Although some administrative changes were adopted for a declared policy of greater openness[20], and an abortive attempt made to reform the Official Secrets Act[21], no support could be found in governments of different political persuasions, for the Swedish-American approach. A Private Member's Bill by Mr. Clement Freud M.P., a Liberal, fell at its committee stage with the demise of the Callaghan Government in March 1979. A new Private Member's Bill, sponsored by Mr. Frank Hooley M.P., Labour, is promised for 1981.[22] It envisages seven exemptions with resolution of disputed claims by the Parliamentary Commissioner for Administration (The Ombudsman) with an ultimate appeal to a High Court judge.

In the Antipodes, too, things are stirring. In Australia, the most notable initiative is that of the Commonwealth Government. Mr. Whitlam, in the 1972 election campaign, committed a Labor Government to the introduction of a Freedom of Information Act 'along the lines of the United States legislation. ... Every Australian citizen will have a statutory right to take legal action to challenge the withholding of public information by the Government or its agencies'.[23] The first of two Interdepartmental Committees was established. The report recommended the adoption of the scheme in the United States Act with modifications thought to be necessary as a consequence of Cabinet Government and ministerial reponsibility.[24] The debate was complicated by the contemporaneous delivery of the report of the Royal Commission on Australian Government Administration. A minority report by one of the Commissioners, Mr. Paul Munro, contained a draft Bill envisaging fewer exemptions, stricter time limits for response and more ample powers of review of claims for exemptions.

Following a second interdepartmental committee report[25] a Freedom of Information Bill was introduced into the Australian Federal Parliament on 9 June 1978. The Commonwealth Attorney-General (Senator P.D. Durack) described it as a 'unique initiative' and 'a major step forward in removing unnecessary secrecy from the administrative processes of government'.[26] The Bill was widely discussed throughout Australia. In September 1978 the Senate resolved to refer the measure and the accompanying Archives Bill to the Standing Committee on Constitutional and Legal Affairs. That bipartisan committee in 1979 delivered a report proposing 93

recommended changes to the principal measure.[27] In September 1980 the Attorney-General tabled on behalf of the government the response to the committee's recommendations.[28] Among the principal points of difference which emerged were a refusal to accord retrospective operation of the legislation, a postponement of rights of access to personal information pending the privacy report of the Australian Law Reform Commission, a refusal, in terms, to reduce the 60-day period for responding to access requests to 45 or 30 days as proposed by the Committee, and 'the major difference of opinion', the scope of the appeal jurisdiction conferred on the Administrative Appeals Tribunal to review a decision to deny access.[29] Briefly, the Senate Committee rejected conclusive ministerial determination which would deny access by the Tribunal (whose Presidential Members are judges of the Federal Court of Australia) to certain documents, including Cabinet documents. The Senate Committee drew support from the decision of the High Court of Australia in Sankey v. Whitlam.[30] In that case the Court held that the ultimate responsibility for deciding whether the claim of privilege should succeed rested with the Court, after balancing the competing public interests at stake. The Attorney-General explained the Government's resistance:

> [T]here are documents which pertain to the most sensitive areas of government, the defence and security of the country, the conduct of international relations and the maintenance of proper relations between the Commonwealth and State Governments. Secondly, there are documents which are central to our Cabinet system of government and to relations between Ministers and their advisers. Ministers should feel free to exchange views amongst themselves and with senior officials with complete frankness and in the knowledge that they are entitled to keep the records of their discussions confidential. Whatever may be the case where the public interest may require the production of documents in judicial proceedings, a matter on which the courts have held that they are entitled to rule, the need to protect confidentiality in the deliberative and policy-making processes of government must take precedence over the more diffuse public interest recognised by the Freedom of Information Bill. In that context it is entirely proper that the final decision on whether a particular document should be made available should rest with Ministers and officials who are responsible to them. The Parliament itself provides the proper forum in which such a decision may be challenged.[31]

The Government's response has been criticised in the Parliament[32], in academic writings[33] and in the media. At the time of writing, the final form of the Australian Federal measure is not known. The 1978 Bill lapsed with the general election of October 1980. A commitment to its reintroduction was given in the Liberal Party's Policy Speech.[34]

About the need for less secrecy in federal administration and for a generally wider, enforceable right, without special interest, to access to Federal Government information, there is now virtually no debate in Australia. The Australian Senate Committee explained the need for freedom of information legislation by reference to three principal arguments. The first concerns the right of the individual to inspect files held about him or relating to him: an attribute of individual rights. Some see this as an aspect of privacy.[35] Secondly, the Senate Committee urged that a government more open to public scrutiny would become more accountable and would therefore need to be more efficient and competent. 'Too much secrecy' declared the Australian Prime Minister, Mr. Fraser, 'inhibits people's capacity to judge the government's performance'.[36] Thirdly, the Committee expressed the view that greater access to information would lead to greater public participation in the processes of policy-making and government. It would expand the sources of informed, relevant advice, and make citizen participation more significant and effective; taking it beyond the occasional symbolic gesture at the ballot box. A fourth reason is hinted at, namely the need to do something effective to remove the firmly entrenched bureaucratic tradition of secrecy which unacceptedly denies knowledge to others in the name of firm government by a few ministers and their select advisers.[37]

The Federal measure is by far the most important in Australia. But it is supplemented by moves in the Australian States. In New South Wales, an interim report into government administration has foreshadowed that the final report (due mid 1981) will contain draft freedom of information legislation. In Victoria, the government is said to be awaiting the final outcome of the Federal moves. Meanwhile, the Opposition Labor Party has prepared a draft Bill for the coming session of the Victorian Parliament, reportedly modelled on the Canadian measure.[38] In South Australia a Working Party on Freedom of Information was established in 1978 and it published a paper early in 1979.[39] Following a change of government in the State, there is no indication of the priority now attached to this reform. Just as Australians can utilise the United States legislation to secure information that would be denied them in Australia, so it is likely that the passage of one measure in Australia will lead on to pressure in most, if not all, of the States for the adoption of like legislation. When the administrative tradition of secrecy gives way to greater openness, it is unlikely that the haemorrhage will be contained in one jurisdiction.

In comparison to Canada and Australia, the debate in New Zealand has been muted. True it is, in 1979 a Committee on Official Information was established under the chairmanship of Sir Alan Danks. The report of this Committee was delivered to the Government in December 1980. At the time of writing, its contents have not been disclosed. It has been speculated whether the committee will 'simply ... recommend more efficient measures to circulate current Government information or ... recommend the introduction of a full-fledged Freedom of Information Act'.[40] According to a survey, a high proportion of New Zealanders 'are convinced that too much secrecy exists in government'.[41] The former Chief Ombudsman, Sir Guy Powles, is reported to have said that 'in New Zealand the habit of secrecy is so deeply ingrained that nothing short of positive commitment to a policy of maximum freedom of information is likely to produce more than a minimum of change'.[42] Sir Guy organised a conference of interested national organisations in Wellington in December 1980, in anticipation of the Danks report, to debate the need for legislation, the form it should take, proposals for the reform of the New Zealand Official Secrets Act and the need to protect privacy. The conference urged the adoption of a new law providing for public access to official information, with disputes settled in the courts.[43] Now, the New Zealand Labour Party has announced a commitment to reform, although proposing that disputes over access should be settled by the Ombudsman. Plainly this is a debate about which we will hear more.

Critics of the Swedish-American measure point to its costs. Law reformers of the future will need to adopt a more realistic approach to the costs and benefits of their proposals than has tended to be the case in the past.[44] It is, of course, relatively easy to identify and quantify the costs of public access to government documents. The numbers of applications may be multiplied by the average time taken and the public servant's salary. The cost of copying, posting and reporting must be added. All of this is ultimately ascertainable. The benefits are more intangible. But they may be just as important. The Franks Committee stated the problem thus:

> A totalitarian government finds it easy to maintain secrecy. ... A democratic government ... cannot use the plea of secrecy to hide from the people its basic aims. ... A government which pursues secret aims, or which operates in greater secrecy than the effective conduct of its proper functions requires, or which turns information services into propoganda agencies, will lose the trust of the people. It will be countered by ill-informed and destructive criticism. Its critics will try to break down all barriers erected to preserve secrecy, and they will disclose all that they can, by whatever means, discover.[45]

The Australian Senate Committee reminded the readers of its report of how 'destructive of the fabric of democracy itself excessive secrecy can be'.[46] It referred to the loss of trust and public confidence in government institutions which arose from the Watergate 'cover-ups' in the United States and, closer to home, illustrated the difficulties which even elected Members of Parliament had in extracting information about government activities.[47]

Three objections of principle are frequently mentioned whenever F.O.I. legislation is proposed in a Commonwealth country. First, it is said to be inconsistent with the Westminster system of ministerial government. However, the growth of the role and expectations of government, of the size and duties of the public service, and of the development of quasi-autonomous statutory authorities, make the theory of Ministerial control and responsibility, at least as a universal rule, dubious and unworkable. Already, particularly in Australia, important reforms have been adopted which expose increasing numbers of administrative discretions to administrative and judicial review, including in some cases, on the merits.[48]

Secondly, it is said that the proper scope of Executive and Crown privilege and the limitation of the courts to their proper functions would be undermined by freedom of information laws which committed to courts rather than ministers ultimate decisions about the public interest. The decision of the High Court of Australia asserted for that Court the power to rule on any claim of Crown privilege. No claim by the Executive Government, whether in respect of Cabinet documents, national security, diplomatic relations or otherwise was to be conclusive against review by the Court.[49] Specifically, the claim that disclosure would imperil the frankness and candour of official advice to government was held not to outweigh the interests of justice. Mr. Justice Stephen asserted that 'recent authorities have disposed of this ground as a tenable basis for privilege'. The argument about candour was described as 'the old fallacy'. Public servants, it was declared, were 'made of sterner stuff'.[50] Likewise, Mr. Justice Mason, who was himself at one time the Commonwealth Solicitor-General, dismissed the argument about candour as being:

> so slight that it may be ignored. ... I should have thought that the possibility of future publicity would act as a deterrent against advice which is specious or expedient.[51]

In respect of some claims for exemption under the Australian Freedom of Information Bill, these judgments have not persuaded the Australian Government (or those who advise it).

Thirdly, it is said that an effective freedom of information law would diminish the traditional role of Parliament and the function of the member to secure, on the public's behalf, or on behalf of a particular constituent, such access to official information as may be allowed. The same argument was advanced against the establishment of the Office of Ombudsman, the success of which in New Zealand so profoundly influenced its adoption throughout the Commonwealth of Nations. The Australian Senate Committee voiced its view that far from diminishing Parliament, a wider range of access to official information would revitalise the Parliamentary ability to scrutinise and question government and administrative action, and to hold the Executive accountable.[52]

It does not require any special prescience to predict that public rights of access to official information will expand greatly in New Zealand and Australia during the next decade. The growing computerisation of information, official and otherwise, will not only expand the quantity of information stored. It will also facilitate efficient, swift and inexpensive access in a great many cases. Information technology will come to the aid of important legal and political reforms. The debate in New Zealand and Australia will probably be about the extent of access, the exceptions, the machinery for determining the public interest, the costs and the pace of change. A sceptical New Zealand editorialist spoke for both our countries when he suggested that the passage of amending legislation would be the easy part. 'A much more difficult task lies in persuading the bureaucracy to change its attitude'.[53]

OFFICIAL SECRETS REFORM

Inevitably linked to the provision of an enforceable general right of access to information in the hands of government and its agencies is reform of official secrets legislation.

New Zealand[54], Canada[55] and other jurisdictions of the Commonwealth adopted an Official Secrets Act copied, substantially, from the United Kingdom Act of that name first enacted in 1911. Although popularly imagined to be aimed at countering espionage, the legislation in terms reinforces an administrative regime of confidentiality, even secretiveness. For this reason, the legislation, both in its source and in its various manifestations, has been the subject of local criticism and calls for reform. In Canada, in 1969, a Royal Commission on Security described it as 'an unwieldy statute couched in very broad and ambiguous language'.[56] The Franks Committee described its provisions as 'a catch-all' and 'a mess'.[57] The Macdonald Commission in Canada, inquiring into certain activities of the Royal Canadian Mounted Police, described the Canadian equivant of s.6 of the New Zealand Official Secrets Act 1951 as 'too wide in that it imposes

criminal liability in many unnecessary situations'.[58] The Macdonald Commission recommended that the Canadian Act be repealed and that espionage and leakages of government information be dealt with in separate legislation carrying different punishments and providing different defences. For example, it was suggested that it should be a defence to a charge of unlawfully disclosing information relating to the administration of criminal justice that the accused believed, on reasonable grounds, that the disclosure was for the public benefit.[59]

In Britain, in October 1979, the Thatcher Government introduced a Protection of Official Information Bill, designed to replace s.2 of the 1911 Official Secrets Act, and instead to protect against disclosure a limited range only of specified official information. Under the Bill, categories of official information to be protected against disclosure were to be limited to (1) defence and international affairs; (2) security or intelligence; (3) the enforcement of criminal law and the safekeeping of people in custody; (4) the authorised interception of telecommunications or postal communications; (5) confidential material received from foreign governments or international organisations; and (6) confidential information obtained from or relating to private citizens or companies and nationalised industries. Prosecutions for offences under category (1) could not be initiated without a minister's certificate. For categories (3), (5) and (6) it would be a defence to show that the information concerned, although protected, was in any case available to the public or a section of the public.

The Bill, on the motion of the Lord Chancellor, Lord Hailsham, received an unopposed Second Reading in the House of Lords. It was criticised in the media as expanding, not contracting, the criminal liability for possession of official information. Debate on the Bill coincided with the espionage scandal known as the Blunt Affair. Claims were made, in the Commons that the Bill would have prevented 'even our present stage of knowledge' about the Blunt case. As a result of the ensuing controversy, the Prime Minister, Mrs. Thatcher, announced that no more action would 'at present' be taken on the Bill. In Parliament it was pointed out that the Blunt matter would still have been concealed from the British public, had it not been for the utilisation by an author of the United States Freedom of Information Act'.[60]

In Australia, the provisions equivalent to the United Kingdom, Canadian and New Zealand Official Secrets Acts are to be found in the Crimes Act 1914 (Cwlth), Part VII. Section 79 of the Act, dealing with official secrets, is in language whose lineage is plainly the imperial Act of that name. The ready availability of photocopying equipment, a group of ever eager political journalists, growing questioning of and frustration with perceived administrative secretiveness, and other motivations -- some of them pure, some of them less so — have led in Australia to an almost weekly rash of revelations of

supposedly secret official information. Much of this has been innocuous, merely reflecting the excessive caution of current rules. Occasionally, 'leaks' appear even to be officially inspired. But it is not always so. In August 1980, the Australian budget, traditionally one of the most secret of secret documents — fell into the hands of a journalist, and was disclosed two days before it was delivered in Parliament. Later, a confidential telegram from the Australian High Commissioner in New Delhi, containing comments on one view critical of the Indian Prime Minister, was published in the Australian press. In another matter, in the early hours of Saturday 8 November 1980, the Commonwealth of Australia acted. A book titled 'Documents on Australian Defence and Foreign Policy 1968-1975' was to be serialised in a Sydney and Melbourne newspaper. The Commonwealth obtained an ex parte injunction from Mr. Justice Mason of the High Court of Australia. The Department of Foreign Affairs claimed that the documents, to be published in the book and extracted in the newspapers, included classified material and were of 'current sensitivity'. The injunction was issued but not before large numbers of the newspapers had already been distributed and a number of copies of the book itself sold by booksellers, including to Embassies in Canberra of countries said to be affected by the disclosures.

On the motion to continue the injunction, Mr. Justice Mason heard arguments based upon s.79 of the Crimes Act, the disclosure of confidential information and the infringement of copyright. Only on the last ground did the judge decide to continue the injunction, pending the hearing of the action.[61]

The issue of the injunction to restrain a breach of the criminal law was declined. It was described as 'exceptional'. The provision of s.79 of the Act was appropriate to create 'a criminal offence' and 'that alone'.[62] The Commonwealth's claim for the injunction against the publication of confidential information improperly or surreptitiously obtained was more relevant for present purposes. Reflecting a view entirely consistent with the approach of the court in Sankey v. Whitlam, Mr. Justice Mason stressed that the claim for protection was not self-evident and would not be established merely by the asking:

> The equitable principle [of protection from breaches of confidence] has been fashioned to protect the personal, private and proprietary interests of the citizen, not to protect the very different interests of the executive Government. It acts, or is supposed to act, not according to standards of private interest, but in the public interest. This is not to say that Equity will not protect information in the hands of the Government but it is to say that when Equity protects Government information it will look at the matter through different spectacles.

> It may be sufficient detriment to the citizen that disclosure of information relating to his affairs will expose his actions to public discussion and criticism. But it can scarcely be a relevant detriment to the Government that publication of material concerning its actions will merely expose it to public discussion and criticism. It is unacceptable in our democratic society that there should be a restraint on the publication of information relating to Government when the only vice of that information is that it enables the public to discuss, review and criticise Government action. Accordingly, the court will determine the Government's claim to confidentiality by reference to the public interest. Unless disclosure is likely to injure the public interest, it will not be protected.[63]

Mr. Justice Mason was not impressed by the security classifications ranging from 'TOP SECRET' downwards. He examined the documents and was 'not prepared to assume that publication of any of the documents will now prejudice national security'. Specifically, he was critical of the fact that 'no regular procedure for reconsidering the classification of documents' existed with the consequence that 'the initial classification lingers on long after the document has ceased to a security risk'.[64]

Mr. Justice Mason claimed for the Court the entitlement to balance the degree of embarrassment to Australia's foreign relations against the interim protection of confidential information which would flow from continuance of the injunction. The decision was greeted with paeans of praise in some quarters. The Age (Melbourne), published by one of the defendants, declared that the case has 'laid down general principles that may signficantly advance the cause of public information. Official secrecy has long been a debased currency in Australia'.[65]

The Annual Report of the Federal Attorney-General's Department in Australia for 1979-80 discloses that a Task Force to review ss.70 and 79 of the Crimes Act 1914 'has now been re-activated' under one of its officers.[66] The report discloses that the activities of the Task Force had been temporarily suspended for reasons which included the need to ensure consistency of its proposals with the freedom of information proposals. A newspaper statement ascribed, typically enough, to unnamed 'sources in the Attorney-General's Department' said that no one incident had triggered the examination of the Act but 'no doubt it had been done with leaks in mind'. It was also conceded that imprisonment of journalists was one of the options being studied, as well as 'action against anyone else involved in handling leaks of secret information'.[67]

The Australian cases cited probably have their parallels, to a greater or less extent in most countries with an uncontrolled press and freely available photocopiers. They illustrate the difficult balance which must be struck between the public's 'right to know' and the legitimate claims to secrecy of some information. Some of the criteria to be considered in striking the balance are mentioned in Mr. Justice Mason's judgment. But the adoption of new procedures, of greater sensitivity than the old official secrets legislation, providing for regular review of classifications, more realistic penalties and appropriate defences, needs to be worked out. Most responsible journalists accept that there are certain areas, notably those relating to national security and personal privacy, that require protection. In Australia, as in Britain and elsewhere, most media interests are voluntary parties to the 'D' Notice system under which they agree not to publish material relating to specified areas of national security.[68] Even this sytem is now subject to proposals for reform.[69] Freedom requires the defence of the secrecy of at least some government communications. Different views may be taken concerning the publication of 'a morass of official prose about stale news'[70], on the one hand, and a contemporaneous assessment from a serving diplomat, on the other. As in Sankey v. Whitlam, in advance of legislation, the Australian High Court has asserted its ultimate right to review and to determine where the balance is to be struck. As an extraordinary measure in an unusual case, that may be necessary. As a routine procedure for review, it is patently undesirable and unworkable. Lawyers will watch whether the Attorney-General's Task Force in Australia can do better than counterparts in England, in the endeavour to reform this controversial legislation.[71]

PROTECTION OF PRIVACY

The proliferation of files and personal dossiers about most people in society has expanded and diversified concern about the scope of privacy and its legal protection. As a result of 'data profiles', increasingly in computerised information systems, large numbers of vital decisions are made affecting individuals, sometimes adversely. Initially, the law confined its protections to interests in bodily integrity and territorial surroundings. Outside the United States, the common law did not develop comprehensive rules for the systematic protection of the quality and security of information about an individual.[72] It is for that reason that a series of reports in Britain[73], Canada[74] and Australia[75] have addressed the legal reforms necessary to provide adequate protection for the information concerning an individual 'on the basis of which he may be perceived by his fellows and decisions made vitally affecting him'.[76]

Concern about private information has a dual aspect, each reflecting the legitimate claim of the individual generally to have some control over (or at least knowledge of) the way others are still perceiving him. The first is the concern to ensure that access by strangers to personal information is subject to proper limits. The second is to ensure that the personal information is accurate, complete and kept up to date for the purposes for which it is to be used. Determination to maintain these principles has led, over the past decade in Europe, North America and elsewhere to privacy legislation. Because of the universal and instantaneous nature of the technology of information, it has also led to attempts in a number of international organisations to define the 'basic rules' of information privacy, in order to harmonise domestic laws on the subject. A draft International Convention for the Protection of Individuals with Regard to Automated Data Files was agreed to by the Committee of Ministers of the Council of Europe in September 1980. The Convention is open for ratification from January 1981, including by countries not Members of the Council of Europe.[77] As well, the European Parliament has adopted a resolution recommending a Directive requiring strict observance of member countries with certain 'basic rules' of data protection.[78] But the international regime of most interest to New Zealand and Australia in this connection is that recommended by the Council of the Organisation for Economic Co-operation and Development in Paris (OECD). In September 1980, the Council of the OECD adopted Guidelines concerning trans border data barriers and the protection of privacy. New Zealand concurred in the Guidelines. Australia abstained, to permit Federal/State consultations.

The Guidelines contain a number of 'basic rules' of domestic application.[79] They are concerned, at the international level, with the subject matter of this paper: the balance to be struck between free flow of information, on the one hand, and respect for other competing values (in this case, privacy) on the other. The most notable provision of the Guidelines is the so-called 'individual participation principle'.[80] That principle states the general rule that:

> an individual should have the right:
>
> (a) to obtain from a data controller, or otherwise, confirmation of whether or not the data controller has data relating to him;
>
> (b) to have communicated to him, data relating to him:
>
> (i) within a reasonable time;
>
> (ii) at a charge, if any, that is not excessive;
>
> (iii) in a reasonable manner; and
>
> (iv) in a form that is readily intelligible to him;
>
> (c) to be given reasons if a request made under sub-paragraphs (a) and (b) is denied, and to be able to challenge such denial; and

(d) to challenge data relating to him and, if the challenge is successful, to have the data erased, rectified, completed or amended.

The explanatory memorandum accompanying the Guidelines acknowledges that this principle 'is generally regarded as perhaps the most important privacy protection safeguard'.[81] It is the safeguard reflected in the legislation of all those countries which have at present enacted information privacy or data protection laws.[82] It is a principle reflected in New Zealand in provisions of the Wanganui Computer Centre Act 1976. In Australia, the principle has been embraced in discussion papers of the Australian Law Reform Commission.[83] The Australian Senate Committee on the Freedom of Information Bill stressed the desirability of a Right of Privacy Act and the power to have correction of personal files in the possession of Government or its agencies, found, on access, to be inaccurate or misleading.[84] The Attorney-General's statement on the Bill indicated that this recommendation would be reconsidered in the light of the final report of the Australian Law Reform Commission.

Public hearings held throughout Australia at the close of 1980 disclosed a number of controversies concerning the scope of the right of individual access. The definition of agreed exceptions, such as records kept for national security or certain police intelligence, needs to be determined. But beyond this group, access was disputed in such areas as referees' reports to employers, medical and hospital records and parental access to children's school and health records.[85] It is difficult to lay down hard and fast rules on the definition of the scope of access, immutable and right for every information system and every individual file. For that reason, machinery to strike the appropriate balances must be devised. In some countries a data protection authority exists[86] or has been recommended.[87] In other countries, an Ombudsman-like Privacy Commissioner or Committee has been established for limited purposes[88] or has been recommended.[89] The growing bulk, variety and importance of information systems, their linkage by telecommunications, the capacity of computers to manipulate and aggregate information and to store it, never forgetting and always able to retrieve it at low cost, provides a social challenge which most Western communities are now facing. It seems safe to predict that New Zealand and Australia will move tentatively towards general data protection legislation. With appropriate exceptions and safeguards and machinery for striking just balances, it also seems safe to predict the adoption of the principle of the individual's general right of access to data concerning himself.

Sensitivity to privacy and concerns about data banks are on the increase. Complaints and inquiries to the New South Wales Privacy Committee are now being received at the rate of more than 300 per month. That committee, which has general functions to investigate and conciliate privacy complaints in the State of New South Wales, has experienced sharp annual increases in the numbers of complaints made to it. From 327 in 1975, they have risen to 3097 in 1979, the last year for which aggregate figures are available. The concerns that accompany automation of personal information are likely to increase still further the numbers, complexity and seriousness of complaints concerning personal information files.

COURTS, CONTEMPT, DEFAMATION AND JOURNALISTS' PRIVILEGE

In addition to the developing areas of law so far reviewed, a number of other relevant rules have lately come up for criticism and reconsideration. The first of these relates to the closure of the court, and the limitation on republication or other restrictions on reporting what goes on in the courts of the land. In Australia, certain long-established legislation, providing for the closure of courts in the case of female first offenders has now been repealed as discriminatory.[90] Legislation providing blanket protection against public attendance at or media reportage of cases involving children and young persons, has been criticised.[91] In a recent custody battle before the Supreme Court of New South Wales, Mr. Justice Helsham, in the Equity Court, ordered that the hearing should proceed in a closed court. He said that the media had 'generated a disproportionate interest' in the case. In response, a newspaper urged:

> It is fair to point out that had the media not generated an interest, disproportionate or otherwise, in this case, Mr. Justice Helsham would not be dealing with it. The boy's future would have been decided upon in virtual secrecy by a Ministerial edict against which there would have been no appeal. Whether the judge should now be considering it in secret is debatable and should be a matter of public concern. There are great dangers in removing the law and those who administer it from public scrutiny.[92]

The same concern about the proper balance to be struck between the parties' interest in private resolution of their intimate disputes and the public's interest in the open administration of justice, accompanied from the start the provisions of ss.97 and 121 of the reformed Family Law Act 1975 (Cwlth). Section 97 provides that the proceedings of the Family Court shall be heard in closed court. Section 121 precludes the publication of information about or evidence given in proceedings under the Act. Commenting on these provisions, Mr. Justice Gibbs, in the High Court of Australia, said:

> It is the ordinary rule of the Supreme Court, as of the other courts of the nation, that their proceedings shall be conducted 'publicly and in open view' (Scott v. Scott [1913] AC 417 at p.441). This rule has the virtue that the proceedings of every court are fully exposed to public and professional scrutiny and criticism without which abuses may flourish undetected. Further, the public adminstration of justice tends to maintain confidence in the integrity and independence of the courts. The fact the courts of law are held openly and not in secret is an essential aspect of their character. It distinguishes their activities from those of administrative officials for 'publicity is the essential hall-mark of judicial as distinct from administrative procedure' (McPherson v. McPherson [1936] AC 177 at p.200). To require a court invariably to sit in closed court is to alter the nature of the court. Of course there are established exceptions to the general rule that judicial proceedings shall be conducted in public; and the category of such exceptions is not closed to the Parliament. The need to maintain secrecy or confidentiality or the interests of privacy or delicacy may in some cases be thought to render it desirable for a matter, or part of it, to be held in closed court.[93]

The closure of the Family Court of Australia was based upon the view that no special public interest was served by exposing private domestic disputes to public gaze. Furthermore, divorce court proceedings in the past had been exploited by some media interests. From the start, however, the closure of the Family Court generated a keen debate. The Family Law Council, for example, recommended that except in cases concerning children, proceedings should be conducted in open court, the Court having a discretion to exclude the public in a particular case.[94] A recent Australian Joint Select Committee Inquiry into the Family Law Act invited the views of the Judges of the Family Court. They were divided on the issue, the majority being in favour of opening the Court, but some holding strongly 'to a contrary view'.[95] The majority of the committee concluded that the decision to close the Family Court went further than was necessary to protect the privacy of the parties. It had undermined other attributes of freedom, including the 'psychological impact on some litigants who complained that they had been denied justice and ... the right to have their grievances against the system made public'.[96] The committee recommended that the Family Court be open to the public, provided that the judge should retain a discretion to exclude persons from the Court. It also recommended relaxation of the restrictions on publication, provided that the names of the parties and any other identifying information is prohibited from disclosure. The Commonwealth Attorney-General has announced acceptance of the recommendation to open the Family Court to the public at the discretion of the Court. He has promised a free vote on a Bill for that purpose in the Australian parliamentary session beginning in

February 1981. The case illustrates the difficulty of formulating absolute rules which will acceptably strike the balance between access to information and other competing rights. The same editorial which criticised the closure of the Supreme Court of New South Wales in a custody case declared that 'more than 40% of the International Press Institute's list of threats to press freedom in Australia emanated from the judiciary'.[97] This is a serious charge and lawyers ought to respond to it. Neither New Zealand nor Australia approach this debate from the standpoint of the United States constitutional guarantee that 'Congress shall make no law ... abridging the freedom of speech, or of the Press'.[98] Complaints about the law in our two countries tend to concentrate on the law of defamation, the law of contempt of court and the law governing the privilege of journalists.

Little needs to be said about the first. The law of defamation both in Australia and New Zealand has been the subject of recent, major, national law reform inquiries. At the last New Zealand Law Conference, I catalogued the points of similarity and difference in the emphasis and approach of the New Zealand and Australian proposals.[99] Though there were important differences, a significant similarity was the provision of a wider defence in the event of a reply, explanation and/or rebuttal promptly published.[100] Each inquiry concluded that the defence of truth should suffice as justification in a civil action for defamation. The Australian report went on to propose a certain protection against the publication of defined 'private facts'.[101] The principal effort of the Australian report was to secure a simplification and unification of the complex and disparate State laws of defamation in Australia. The report has been committed to the Standing Committee of Commonwealth and State Attorneys-General. Its fate is unknown. Meanwhile, current Australian defamation laws are inefficient in vindicating reputation, unduly impede the flow of information on public affairs and imperfectly protect legitimate claims to personal privacy.[102] These defects and imperfections undoubtedly diminish freedom, dependent upon a vigorous but responsible public media.

The law of contempt limits the public reporting of material pending a trial, civil or criminal, where public disclosure in advance of the trial would be bound to affect the fairness of it. Although the scope of the inhibitions of the law of contempt are often exaggerated in the mind of the public and on the part of the press[103], the fact remains that the media in New Zealand, Australia and Britain are under restraints of a contempt law which is much more severe than in the United States. Proposals for reform have been made in Britain[104] and New Zealand.[105] In Britain, a decision of the European Court of Human Rights, in a case arising out of a report in The Sunday Times relevant to the thalidomide litigation, criticised the English law of contempt, stressing that the courts cannot operate in a vacuum:

> Whilst they are the forum for the settlement of disputes, this does not mean that there can be no prior discussion of disputes elsewhere, be it in specialised journals, in the general press or amongst the public at large.[106]

Following the criticism, the United Kingdom Government in December 1980 introduced a Contempt of Court Bill[107] based substantially on the report of the Phillimore Committee of 1974.

As with the earlier attempt to reform the law of official secrets in Britain, the introduction of this reform measure coincided with relevant public controversies which caused the scope of the measure to be questioned. The first was a decision by Mr. Justice Park in November 1980 that the legal officer of the National Council for Civil Liberties was guilty of a 'serious' contempt of court in showing to a reporter documents which had previously been read out in open court.[108] Contrasting this assessment with the reform Bill published the previous day, The Times asserted that far from being a serious contempt, as found by the judge, it was 'an extremely trivial contempt':

> Had there been a reporter there at the time to take down the details, there could have been no question that he could have used what was said in court for any article he wished to write. Instead, a reporter was later shown by Miss Harman the document which had been made public knowledge. It is common practice for reporters covering a trial to be shown documents whose contents had been read out, to ensure the accuracy of their report. This has up to now been considered a help to the fair reporting of court proceedings. ... It has certainly been approved, at least tacitly, by the judges. Now it seems the legality of that beneficial practice (both for the administration of justice and for the press) has been put in doubt.[109]

The editorialist criticised the reform Bill as extending the scope of pre-trial inhibition on reporting too far, both in the civil and criminal spheres. For one clause there was praise. The Bill lays down the moment of arrest without warrant or the issue of a warrant for arrest as the critical time from which the risk of contempt should run. This was declared to be an improvement on the criterion of 'imminence' adopted in the English Administration of Justice Act 1960. The recommendation of the New Zealand committee that that provision be adopted as part of the law of New Zealand[110] will need to be reconsidered in the light of Lord Hailsham's Bill and the general approbation of this aspect of it.

The Contempt of Court Bill 1980 was still before the Parliament when in January 1981 a suspect was charged with one of the so-called 'Yorkshire Ripper' murders. Banner headlines in the English press, and widespread coverage in the electronic media, exceeded the bounds normally observed, consonant with the presumption of innocence and other fundamental principles of our criminal jurisprudence. The Solicitor-General, Sir Ian Percival, wrote to the editors of newspapers and controllers of radio and television programmes, reminding them of their responsibilities under the law in reporting the case. His letter followed complaints received from private citizens and from a government minister about the way the case had been reported.[111] The Times newspaper criticised the police for the manner in which they announced the arrest of the suspect, asserting that their enthusiasm unhappily exceeded their sense of duty to the administration of justice.[112] But it acknowledged that police conduct did not exonerate the media itself:

> The existing test is that contempt starts to run from the time when a charge is imminent. ... The press could not have been in much doubt about imminence. Nevertheless one newspaper at least published a photograph of the accused, when it must have known that there was a strong possibility that identification would be in issue at the trial.[113]

The editor then returned to the subject matter of this essay: the problem in defining freedom, of striking the balance between the respective rights of the public to information and other competing claims which would restrict access to that information:

> Much of the information contained in the contemptuous articles was interesting to the public. But it was not in the public interest to publish it. There are some circumstances in which a newspaper might justifiably believe that the benefits to society of publishing articles which would or might be in contempt of court outweighed the public interest in the defendants' being entitled to a fair trial. The thalidomide case was perhaps an example. But no such issues arise in the Sutcliffe case. Public curiosity cannot be an excuse for harming an individual's right to have the presumption of innocence applied to him and to his right to a fair trial. ... What the coverage of the past three days has demonstrated is that it does not matter to many organs of the media what the law of contempt says. They will break it anyway if the case is spectacular enough and engenders sufficient curiosity on the part of their viewers or readers. Yet it is precisely in that sort of case — where a heinous crime is alleged — that the defendant most requires

> the protection of the law. These decisions are not unconsidered. Newspaper editors are not children; newspapers have lawyers; who can doubt that many newspapers and television producers had carefully weighed up the possibility of prosecution and decided to go ahead with a known contempt?[114]

The events in Britain excited many like press comments in Australia condemning 'trial by newspaper'.[115] The coincidence of an important effort to define and reform the law of contempt with contemporary disobedience of that law, in a dramatic and highly publicised case, poses most clearly the competing claims before society. I believe that there are few in New Zealand or Australia, and not just in the legal profession, who would prefer the virtually unrestricted prejudicial trial and pretrial publicity which occurs in the United States to the more restrained course we have adopted, partly as a result of the law of contempt.[116] It must be frankly acknowledged that the price of a fair trial for an individual accused may involve some frustration of the public's desire for information. Determining when the inhibitions start and cease and what rules should govern them is a difficult and sensitive matter in respect of which vital attributes of freedom compete.

A similar tension can be illustrated by reference to the claim by journalists to a privilege against revealing in court the sources of confidential information upon which they have based news or other stories. Despite the constitutional guarantee of a free press, the Supreme Court of the United States has held that the countervailing importance of the administration of justice in the courts will displace the interest of the press in protecting its confidential sources.[117] In Australia a similar rule has been adopted[118], although, at the discovery stage, a media defendant will not be required to disclose its sources.[119]

In Britain, the reporter's claim for privilege was rejected during official inquiries which followed the Vassall revelations. Lord Denning suggested a residual effort of the courts to 'respect the confidences which each member of these honourable professions receives in the course of it and will not direct him to answer unless not only is it relevant but also it is a proper and, indeed, necessary question in the course of justice to be put and answered. A judge is a person entrusted, on behalf of the community, to weigh these competing interests'.[120] The extent of this residual discretion was further explored in the House of Lords in the recent case, British Steel Corporation v. Granada Television Ltd.[121] The corporation sought to extract from the television company the identity of the person who had 'leaked' highly confidential internal documents. A television broadcaster had given an undertaking that no steps would be taken that might reveal or risk disclosure of the source's identity. Proceedings were commenced seeking an injunction against further breaches of confidence and copyright, an order for delivery up of the documents, an inquiry as to damages and an account of profits.

The issue arose as to whether a public interest in the media not being forced to disclose their sources of information had been recognised by the law or ought to exist. The Vice-Chancellor ordered the broadcaster to state on affidavit the names of the persons responsible for supplying them with the documents.[122] The Court of Appeal upheld this decision.[123] Lord Denning repeated his contention that there was a public interest in seeing that newspapers should not invariably be compelled to disclose their sources of information. However, the principle was not absolute. In the current case, it had been lost by the conduct of the broadcaster. The House of Lords confirmed the decision as to disclosure.[124] Lord Wilberforce explained the approach of the common law:

> [T]here is the alleged right to a free flow of information, or the right to know. ... [T]hat use of the word 'right' here will not conduce to an understanding of the legal position. As to a free flow of information, it may be said that in a general sense it is in the public interest that this should be maintained and not curtailed. Investigatory journalism too in some cases may bring benefits to the public. But, granting this, one is a long way from establishing a right which the law will recognise in a particular case. Before then, it is necessary to take account of the legitimate interest which others may have in limiting disclosure of information of a particular kind.[125]

Rejecting the claim of journalists to an absolute privilege against disclosure, Lord Wilberforce said that, accepted, it would reverse 'every reported case':

> Such a reversal would place journalists (how defined?) in a favoured and unique position as compared with priest/confessors, doctors, bankers and other recipients of confidential information and would assimilate them to the police in relation to informers. I can find nothing to encourage such a departure even with the qualifications sought to be introduced to the general principle asserted.[126]

Predictably, the decisions attracted media and academic criticism.[127] The Director-General of the B.B.C. called for a change in the law to provide for the protection of media sources.[128] However, it is significant that two law reform bodies which recently examined the issue, in advance of the House of Lords decision, reached similar conclusions. In New Zealand, the Torts and General Law Reform Committee, in its report 'Professional Privilege in the Law of Evidence'[129] reviewed case law and the arguments that concluded against granting journalists a special privilege:

> We recognise that journalists will sometimes have a strong claim to confidentiality which will need to be weighed carefully against the need for disclosure in the interests of justice in the particular case. The proper weighing of these competing considerations can best be done by the court in the exercise of a general discretion.[130]

Likewise, the Law Reform Commission of Western Australia, in its report on Privilege for Journalists[131] recommended against the granting of a journalists' privilege expressed in absolute terms and 'at this stage' against the adoption of any form of qualified privilege.[132] Specifically, the Western Australian Commission did not favour the attempt of the New Zealand Committee to put into statutory form a general discretion[133], preferring to 'await further judicial developments' in an area of the law in which 'judicial attitudes appear to be changing fairly rapidly'.[134] The Australian Law Reform Commission and other State Commissions[135] are presently engaged in general inquiries into reform of the law of evidence. These will provide a further opportunity for consideration of the proper scope of the privilege to defend confidential information even as against the courts.[136] Perhaps it is notable that when, in 1975, the new United States Federal Rules of Evidence were adopted, one of the few areas left outside the Rules was the law of privilege, upon which bitter differences of view, strongly held, threatened to impede success unless excluded.

CONCLUSIONS

Loose talk in the media and elsewhere about the 'right to know' and the 'right to information' will not deflect lawyers from adhering to their view that access to information, though a profoundly important attribute of freedom, is not the only attribute. Sometimes access to information may diminish the freedom of others. The business of the courts and of the law is to weigh competing claims to information. The aim should be to promote the greatest possible aggregate freedom. This will include respect for the rights of individuals. As has been observed, the law is changing. This review shows that a general move is afoot to enlarge rights of access to information. Freedom of information laws are based upon the principle of access, replacing the former regime of bureaucratic confidentiality. But the need for frank and trusted exchanges and decisive responsible administration may impose some proper limits. The law of official secrets is under review: pushing back the over-ample embargos and insisting upon the regular review of secrecy classifications. But here too the State has a legitimate concern to defend certain secrets against espionage or premature disclosure, embarrassing to national interests. Privacy laws are being developed which limit the collection and retention of and access to personal data. But as a security for accuracy and up-to-dateness, a general regime of individual access to data about oneself is being adopted.

Yet here, too, exceptions must exist, if the efficient collection of some information is not to be hindered or prevented altogether. Completely unlimited access to police intelligence, referees' reports and some medical data could impede necessary and socially useful flows of information. The closure of courts, the law of defamation, the law of contempt and the law relating to journalists' privilege are all coming under the reformers' microscope. Yet few reformers would urge that there is never a case for a closed court, that there is no need for a law of defamation, that there should be no law of contempt or that journalists should have an absolute privilege, in circumstances judged solely by themselves.

Access to information is a vital and indispensable attribute of a free society. The boundaries of access are being pushed forward. The movement is a healthy and desirable one. Moreover, it is one which will be facilitated and extended by the new information technology. But it will be for lawyers and the courts to uphold, on occasion, countervailing claims to secrecy, confidentiality, privacy, honour and reputation, a fair trial, the due administration of justice and other values. Defence of these other values will often be controversial and even unpopular. Defining their limits will be contentious. The limits themselves are certainly not static. But respect for these other values may be as important to freedom as the flow of information itself.

FOOTNOTES

1. Wordsworth, It is Not to be Thought, 1807.

2. Notably the report by S. Nora and A. Minc, L'Informatisation de la Societe, Paris, 1978 (France) and Report of the Consultative Committee on the Implications of Telecommunications for Canadian Society (Clyne Report), Ottawa, 1979. See, generally, Privacy Protection Study Commission, Personal Privacy in an Information Society, Washington, 1977 (United States) and Report of the Committee on Data Protection (Lindop Report), Cmnd. 7341, London, 1978.

3. Report by a Swedish Government Committee (SARK), 'The Vulnerability of the Computerised Society: Considerations and Proposals', (Trans J. Hogg), Stockholm, 1979.

4. Canadian Royal Commission of Inquiry on Newspapers (T. Kent, Chairman), 1980.

5. In Victoria, an Inquiry into Ownership and Control of Newspapers in Victoria, has been established (The Hon. J. G. Norris QC, Chairman). See also the decisions of the Australian Broadcasting Tribunal under s.92F of the Broadcasting and Television Act 1942 (Cwlth). Cf. R. v. Australian Broadcasting Tribunal; ex parte Fowler (1980) 31 ALR 565

6. Cf. Report by the Australian Senate Standing Committee on Constitutional and Legal Affairs, Freedom of Information, 1979 (herafter FOI Report), 22, para. 3.7.

7. Freedom of the Press Act (Sweden) in Constitutional Documents of Sweden, Stockholm, 1975.

8. The Report of the Ontario Commission on Freedom of Information and Privacy, Public Government for Private People, 1980, Vol. 2, 105.

9. Freedom of Information Act 1966 (U.S.), s.6(A)(ii). 5 USC 551. See also Government in the Sunshine Act 1976 (U.S.), P.L. 94, 409 (1976), 90 Stat. 1241.

10. National defence and foreign policy: international personnel rules and practice, other statutes, trade secrets and commercial information; inter- and intra-agency memoranda; clearly unwarranted invasions of privacy; law enforcement; reports prepared in the course of regulating or supervising financial institutions and certain geological and geophysical information.

11. See H. Relyea, 'The Administration of the Freedom of Information Act: a Brief Overview of Executive Branch Annual Reports', Washington, 1977, cited in the Ontario Report, Vol, 2, 120.

12. S.N.S., 1977, c. 10.

13. S.N.B., 1978, c. R-10.3, s.7.

14. Canadian Task Force on Government Information, Report: 'To Know and be Known', Ottawa, 1969.

15. Bill C-15 (Canada), Oct. 1979.

16. Bill C-43 (Canada), ('Access to Information and Privacy Act 1980').

17. F. Fox, Secretary of State, cited in T. Riley, 'Canada Gets Information Bill', (1980) 3 Transnational Data Report, No. 6, 14. Cf. P. Hennessy, 'Canada Sheds Clutter of Secrecy' in The Times (London), 14 October 1980, 5.

18. Report of the Committee on the Civil Service (UK) (Fulton Committee), Cmnd. 3638, 1968, 91.

19. Report of the Committee on Section 2 of the Official Secrets Act, 1911, ('The Franks Committee'), Cmnd. 5104, 1972. Cf. F.O.I. Report, 24 (para. 3.12).

20. Open Government, Cmnd, 7520, 1979.

21. By the Protection of Official Information Bill 1979 (UK), since withdrawn.

22. The Times (London), 8 December 1980. See also FOI Report, 19 (para. 2.47).

23. E.G. Whitlam, Australian Labor Party, Policy Speech 1972, Sydney, 1972, 38.

24. Australia, Attorney-General's Department, Proposed Freedom of Information Legislation: Report of Interdepartmental Committee, Canberra, 1974, 2.

25. Australia, Policy Proposals for Freedom of Information Legislation: Report of Interdepartmental Committee, pp.400/1976, Canberra, 1977. See FOI Report, 8 (para. 2.12).

26. Commonwealth Parliamentary Debates (The Senate), 9 June 1978, 2699.

27. FOI Report, n.6 above.

28. Commonwealth Parliamentary Debates (The Senate), 11 September 1980, 798ff.

29. ibid, 809.

30. (1978) 53 ALJR 11.

31. Commonwealth Parliamentary Debates (The Senate), 11 September 1980, 809-10.

32. ibid. 818ff.

33. For example, (1980) 5 Legal Service Bulletin 251.

34. J.M. Fraser, Policy Speech, 10 September 1980, 27.

35. FOI Report, 21 (para. 3.3).

36. J.M. Fraser, 'Responsibility in Government', (1978) 37 Aust.Journal of Public Admin., 1, 2.

37. FOI Report, 26.

38. The Age (Melbourne), 8 January 1981, 5.

39. South Australian Premier's Department, Issues Paper on Freedom of Information, 1978.

40. T. Riley, 'A Review of Freedom of Information Around the World', London, September 1980, B-26. On 21 January 1981 it was announced that the New Zealand Cabinet had decided a Special Committee to study the Danks report chaired by the Prime Minister. Mr. Muldoon said that the report would be published 'but he could not say when'. See Auckland Star, (21 January 1981).

41. The New Zealand Herald, 9 December 1980.

42. ibid.

43. ibid.

44. Cf. Mathews v. Eldridge, 424 US 319 (1976).

45. Franks Committee Report, Vol. 1, 12 (para. 12).

46. FOI Report, 24 (para. 3.13).

47. ibid, Appendix 5.

48. G.D.S. Taylor, 'The New Administrative Law' (1977) 51 ALJ 804. As well, important provisions for persons affected by federal administrative decisions for access to government information are contained in the 'right to reasons' set out in Administrative Appeals Tribunal Act 1975 (Cwlth), s.28 and Administrative Decisions (Judicial Review) Act 1977 (Cwlth), s.13.

49. Sankey v. Whitlam (1978) 53 ALJR 11.

50. ibid, 31 (Stephen J.).

51. ibid, 44 (Mason J.).

52. FOI Report, 27 (para. 3.25).

53. The New Zealand Herald, 9 December 1980, 6.

54. Official Secrets Act 1951 (NZ).

55. R.S.C. 1970, c. O-3 (Canada).

56. Report of the Royal Commission on Security, Ottawa, 1979, para. 204.

57. Franks Committee Report, 14.

58. Commission of Inquiry Concerning Certain Activities of the R.C.M.P. (Macdonald Commission), First Report: Security and Information, Ottawa, 1979.

59. ibid, 25. See also Ontario Report, Vol. 2, 168.

60. Described in Ontario Report, Vol. 2, 139.

61. Commonwealth of Australia v. John Fairfax & Sons Limited, unreported, 8 December 1980, Print Copy.

62. ibid, 5-6

63. id, 7

64. id, 8

65. 3 December 1980, 11. See also The Advertiser (Adelaide), 4 December 1980, 6. There were many editorials to similar effect, including in New Zealand.

66. Australia, Attorney-General's Department, Annual Report 1979-80, 29.

67. Canberra Times, 21 November 1980, 3 ('Change to secrets law studied').

68. The Age, 3 December 1980, 11 ('A surfeit of secrets').

69. As reported in The Times, 8 August 1980, 3. See House of Commons, Third Report from the Defence Committee: The D Notice System, 1980.

70. T. Sykes and A. Reid, The Bulletin, 25 November 1980, 26, in this way described the material in Documents on Australian Defence and Foreign Policy.

71. Cf. The recent Classified Information Procedures Act 1980 (US), P.L. 96-456, 49 LW, 187 (1980). See also Church of Scientology v. Woodward, unreported, (1980) 11 Fed.L.Rev., 102.

72. Australian Law Reform Commission, Discussion Paper No. 14, Privacy and Personal Information (DP 14) 19. See comment (1980) 15 NZLJ 329; (1980) 130 NLJ 793.

73. Report of the Committee on Privacy (Younger Report), Cmnd. 5012, 1972; Lindop Report, 1978. For criticism of the lack of action on these reports, see House of Commons, First Report from the Home Affairs Committee, Home Office Reports, London, 1980, iv.

74. Canada, Department of Communications/Department of Justice, Privacy and Computers, Ottawa, 1972.

75. W.L. Morison, Report on the Law of Privacy, Report to the New South Wales Attorney-General at the request of the Standing Committee of Commonwealth and State Attorneys-General (Australia), 1973; Law Reform Committee of South Australia, 50th Report, 'Regarding Data Protection', 1980; ALRC DP 14. Note that the Australian Law Reform Commission,. the Victorian Statute Law Revision Committee, the Law Reform Commission of Western Australia and the New South Wales Privacy Committee have current responsibility to report on privacy law reform. ALRC DP 14, 15 (para. 17).

76. ALRC DP 14, 19 (para. 22).

77. (1980) 3 Transnational Data Report, No. 6, 1.

78. Resolution on the Rights of the Individual in the Face of Technical Developments in Data Processing, 22 O.J.Eur.Com. (No. C.140) 34 (1979).

79. OECD document C.80(58)(Final), 23 September 1980.

80. ibid, 4 (OECD Guidelines, para 13).

81. ibid, 27 (Explanatory Memorandum, para. 58).

82. For an analysis, see M.D. Kirby 'Trans Border Data Flows and the "Basic Rules" of Data Privacy', 16 Stanford Journal of International Law, 27 (1980).

83. ALRC DP 14, ch. 4.

84. FOI Report, 265 (para. 24.17).

85. M.D. Kirby, Towards Effective Data Protection Laws in Australia: An Interim Review of the Privacy Inquiry, mimeo, November 1980.

86. Austria, Denmark, France, Germany, Luxembourg, Norway and Sweden had established data protection authorities by the close of 1980.

87. Lindop Report (United Kingdom).

88. In Canada, the Human Rights Act 1977 (Canada) creates a Privacy Commissioner. In New Zealand, the Wanganui Computer Centre Act 1976 (N.Z.) creates a Privacy Commissioner for that Centre. For discussion of the Act see New Zealand Parliamentary Debates, 15 October 1980, 4214 (Introduction of 1980 Amendment Bill). In New South Wales, the Privacy Committee is established pursuant to the Privacy Committee Act 1975 (NSW).

89. ALRC DP 14, 104 (para. 182).

90. See First Offenders (Women) (Repeal) Ordinance 1980 (A.C.T.) which repealed the First Offenders (Women) Ordinance 1947 (A.C.T.), and the First Offenders (Women) Repeal Act 1976 (N.S.W.), which repealed the First Offenders (Women) Act 1918 (N.S.W.).

91. See comments by Mr. Justice Hoare on Children's Services Act 1965 (Qld), s.138, 2 February 1979, reported in Forum, Vol. 2 (1979).

92. The Australian, 22 December 1980, 6.

93. Gibbs J. in Russell v. Russell (1976) 50 ALJR 594, 604.

94. Australia, Family Law Council, First Annual Report, 1977, 20.

95. Australian Parliament Joint Select Committee on the Family Law Act, Family Law in Australia, 1980, I, 158 (para. 9.3).

96. ibid, 159 (para. 9.6).

97. The Australian, 22 December 1980, 6.

98. United States Constitution, First Amendment. See D. Hunt, 'Why No First Amendment?: The Role of the Press in Relation to Justice' (1980) 54 ALJ 459, 463; Sir Thaddeus McCarthy, 'Why No First Amendment? The Role of the Press in Relationship to Justice', American/Australian/New Zealand Law: Parallels and Contrasts (1980) 147.

99. M.D. Kirby, 'Defamation Reform — New Zealand and Australian Style' [1978] NZLJ 305

100. Committee on Defamation (NZ), Recommendations on the Law of Defamation, 1977, 59ff (paras. 238ff) (hereafter the N.Z. Report); Australian Law Reform Commission, Unfair Publication: Defamation and Privacy (ALRC 11), 1979, 88 (paras. 166ff).

101. ALRC 11, 109 (Part III).

102. ibid, ix-x.

103. Hunt, 461-2.

104. Committee on Contempt of Court (Phillimore Committee), Report. Cmnd. 5794 (1974).

105. NZ Report, n.100, 130.

106. European Court of Human Rights, The Sunday Times Case Judgment, (1979), Strasbourg, Print.

107. House of Lords, Parliamentary Debates, 9 December 1980, 658.

108. Home Office v. Harman, The Times, 28 November 1980, 8 (Park J.).

109. The Times (London), 28 November 1980.

110. NZ Report, n.100, 117 (para. 527).

111. The Times, 7 January 1981, 1.

112. ibid, 11 ('The Right to a Fair Trial').

113. ibid.

114. ibid.

115. See e.g. 'The Advertiser' (Adelaide), ('A Fair Trial') (8 January 1981); The Canberra Times (12 January 1981), 2 (Justice and the Law).

116. Hunt, 461, discusses the notorious prejudicial publicity surrounding the prosecution of Dr. Sam Sheppard in 1954.

117. Branzburg v. Hays; in Re Pappas; United States v. Caldwell, 408 US 665, 690 (1972). Cf. in Re Farber, 99 S.Ct. 598 (1978).

118. McGuinness v. Attorney-General (Vic), (1940) 63 CLR 73; Re Buchanan (1965) 65 SR (NSW) 9; Hunt, 462.

119. McGuinness v. Attorney-General (Vic), op cit. See also Hall v. N.Z. Times Co. Ltd (1907) 26 NZLR 1324 and Gordon v. N.Z. Times Co. Ltd (1912) 31 NZLR 1060.

120. Lord Denning M.R. in Attorney-General v. Mulholland and Foster [1963] 2 QB 477. Dstd. Bell v. University of Auckland [1969] NZLR 1029 (referees' reports).

121. British Steel Corporation v. Granada Television Limited [1980] 3 WLR 774.

122. ibid, 780.

123. ibid, 797.

124. ibid, 774.

125. ibid, 778.

126. ibid, 780.

127. See e.g. (1980) 130 NLJ 226, 694.

128. The Times (London), 1 August 1980, 3, 13. An amendment to the Contempt Bill designed to overcome the effect of the Granada decision moved by Lords Morris, Salmon and Scarman is reported in The Times, 14 January 1981, 2.

129. Wellington, 1977.

130. ibid, 71.

131. Project No. 53, Perth, 1980.

132. ibid, 35 (paras. 5.12; 5.27).

133. ibid, 34.

134. loc cit.

135. New South Wales Law Reform Commission and South Australian Law Reform Committee. The Queensland Law Reform Commission has already reported on evidence law reform.

136. Australian Law Reform Commission, Discussion Paper No. 16, Reform of Evidence Law, 1980, 5 (para. 7).