NEW ZEALAND LAW CONFERENCE

DUNEDIN

WEDNESDAY 22 APRIL 1981, 11 A.M.

FREEDOM AND INFORMATION : MORE INFORMATION

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

April 1981

NEW ZEALAND LAW CONFERENCE

DUNEDIN

WEDNESDAY 22 APRIL 1981, 11 A.M.

FREEDOM AND INFORMATION: MORE INFORMATION

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

A DANGEROUS TOPIC

The charitable amongst you will sympathise with me as I introduce my paper on the topic 'Freedom and Information'.

The written paper was required by early January 1981 so that it could be printed in time for this conference. Dutifully, I complied, only to see my carefully fashioned prose overtaken by important, relevant events:

- In Canada, the Government's Bill for an Access to Information Act and a Privacy Act were debated in the Canadian House of Commons in late January 1981 and unanimously referred to the Committee on Justice and Legal Affairs.[1]

- In New Zealand, in February 1981, the report of the Committee on Official Information was published.[2] Mr. Muldoon was reported as saying that the Committee had done a 'reasonable sort of job',[3] a phrase which, when translated from the New Zealand language, I understand to connote high praise.

- In Britain, in February 1981, the House of Commons turned to debate a Private Member's Bill for a Freedom of Information Act for that country. Against Ministerial opposition, but on what appears to have been a free vote of Members, the House denied a Second Reading to the Bill.[4] Though early legislation does not appear likely, important and fundamental differences were exposed.

- In Australia, in April 1981, the Federal Parliament began to debate a reintroduced Freedom of Information Bill. That Bill amended in significant ways its 1978 predecessor, adopting about 20 of 90 changes suggested by a Senate Committee, rejecting the others and including new, controversial provisions, which have guaranteed a lively debate as the measure is considered by the Australian Parliament.

There are other inevitable difficulties for a speaker in my position dealing with a topic so controversial as this. It is a topic assigned to me by the organisers of this conference. It would have been so much easier for me to have prepared a paper on the reform of the law of Mortmain, the modern relevance of the Rule against Perpetuities or the future in Australia and New Zealand of Lord Wensleydale's Golden Rule. In all of the democracies I have mentioned, the debate about freedom of information has provoked strong passions and deep divisions. Some of these are between those in Government and those in Opposition: for those out of power always seem to be more enthusiastic for access to information than when they were in power. Those in Government tend to be more readily persuaded to the advantages of confidentiality. The debate is also a party political one. Whether in Canada, Australia or New Zealand (and to some extent in Britain) political commitments of various kinds have been given and of course I must avoid these. The issue is specially sensitive in Australia and Canada, for legislation is actually before the Federal Parliaments of each country. In Australia, the sensitivities are exacerbated by the fact that the Government, mid year, will not have a majority in the Senate and some of the current Senators on the Government side have publicly expressed misgivings about the current legislation.[5]

The issue of freedom of information is not one which has been referred to the Australian Law Reform Commission, though the facility of rights of access to government information is clearly relevant to one topic which has been referred, namely the protection of individual privacy. I generally endeavour to confine my public comments to the controversies the Law Reform Commission has, rather than those entrusted to others.

In New Zealand, I need to be even more circumspect. I am here as a guest, the issue is still a live one and may even be relevant in the forthcoming elections. I must at once avoid the Scylla of politics and the Charybdis of boring tedious irrelevance. Over the past six years I have become well acquainted with the dangers of negotiating this passage.

THE THESIS : INFORMATION IS NOT ALL

My distributed paper is titled 'Freedom and Information' not 'Freedom of Information'. It is a small indulgence which the organisers were prepared to grant. I resisted the notion that the freedom of information issue, however important, should be looked at during this conference in isolation from the conceptual setting in which I believe it should be seen. That setting, at least in its legal manifestation, is the tension between laws and practices which facilitate the flow and supply of information and laws and practices which restrict and inhibit them. 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: as for example claims to orderly government, national security and defence, personal privacy, the fair administration of justice, respect for personal honour and reputation and so on.

Leaving aside that part of my paper which deals with the moves towards legally defined and individually enforceable rights of access to government information, the balance of the paper is addressed to some of the other relevant legal developments which impinge upon the ability to get at information:

. Official secrets. Most of the countries of the Commonwealth of Nations inherited, in one form or another, the Official Secrets Act, introduced in language of defective generality into the Westminster Parliament in 1911. In Britain and Canada proposals have been made for its reform. The British attempt in October 1979 foundered on the coincidental happening of the exposure of Sir Anthony Blunt and the fact that the reformed measure would have maintained Blunt's guilty secret. Ironically, Blunt's espionage was disclosed only because an author thought to use the United States Freedom of Information Act. In Australia, the High Court had to consider a government claim for an injunction against newspaper reproductions of extracts from a book containing documents on defence and foreign policy. Although a copyright claim is still current in the courts, Mr. Justice Mason declared it to be 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'.[6]

. Privacy protection. The proliferation of privacy protection laws in Western Europe and North America reflect concerns that must now be addressed in the Antipodes. The growing computerisation of personal data has led to legislation in many countries similar to our own, designed both to limit rights of access to such data, particularly aggregate 'data profiles', and to permit the individual rights of access and direction to ensure that such proliferated data is accurate, up to date and relevant for the decision-making purpose. In Australia, the Law Reform Commission is working towards a report on comprehensive privacy protection legislation, to be ready by the end of 1981. It is plain that such legislation must be closely related to the government-sponsored freedom of information law. Each has as the central machinery the right of the individual normally to have access to information possessed by government. The principle of individual access was recently adopted in a recommendation to member countries, by the Council of the O.E.C.D. Australia and New Zealand are members of the O.E.C.D. Though New Zealand has ratified the principle, and thus accepted the idea of individual access, Australia is still conducting Federal-State negotiations on the subject.

. Closed courts. Another limitation on freedom to information with which lawyers will be familiar is that relating to closed courts. Although overwhelmingly our courts are conducted in public, some courts sit in private. Controversies have surrounded the closure of children's courts and the Family Court in Australia. Moves are afoot to permit media reports on condition that they do not identify participants. The debate here is between the familiar one concerning the open administration of the law and the interests of individual litigants to privacy, and the harm and personal hurt that can be done, without counterveilling social benefit, by widespread publicity of some cases.

. Defamation. A fourth limitation known to lawyers is the law of defamation. Both in New Zealand and Australia proposals have recently been made for the improvement of the law of defamation. The Australian proposals are contained in a report of the Law Reform Commission. Significantly, each proposal envisaged the widening of the power to publish matters of public concern. Each proposed a form of defence available in the event that a facility was offered by a media defendant for reply, explanation or rebuttal. There is little doubt that Australia's laws and practices governing defamation unduly impede the flow of information on public affairs, imperfectly protect legitimate claims to personal privacy and provide inefficient means for vindicating reputation.

Contempt law. The reform of the law of contempt, which inhibits information flows, has been proposed in Britain, New Zealand and elsewhere. The pace of reform in Britain was hastened by an adverse decision of the European Court of Human Rights arising out of a report in the Sunday Times thought to be relevant to the thalidomide litigation. Again, the British measure coincided with developments by which its terms could be tested. Doubts about the scope of pretrial inhibition on legitimate reporting were raised by the prosecution for contempt of a legal officer of the National Council for Civil Liberties who showed a reporter documents which had previously been read out in open court. She was held to have committed a 'serious' contempt, thought a reporter with speedy shorthand could, with impunity, have reported counsel's curial recitation. On the other hand, the need for some form of contempt law appeared to be underlined by the widespread coverage given to the suspect charged with the so-called 'Yorkshire Ripper' murders. The London Times pronounced that public curiosity could not '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'.

Journalists' privilege. Another relevant matter upon which New Zealand and Australian law reformers have reported has also lately come before the courts. I refer to journalists' privilege: the extent to which journalists should be required to disclose sources and the countervailing extent to which the law of evidence should protect their confidences in the name of the benefit to society of investigative journalism and the free flow of information. In the Granada Television Case the House of Lords rejected the claim for privilege.[8] In Australia, this is a topic which the Law Reform Commission is examining in connection with its inquiry into Federal evidence laws. It is a sobering fact that when the United States Federal Evidence Rules were adopted in 1975, such were the controversies surrounding the scope of privilege that this item alone was excised from the Rules and left to be developed by the law of several States.

Quite apart, then, from the debate about freedom of information legislation, it can be seen that important developments are occurring in the law relevant to the balance to be struck between claims to information and claims which would restrain such access. Neither this review nor my paper have exhaustively covered the debates. Nothing is said about the ownership of the media of information itself. Nothing is said about ownership of information. Nothing is said about the changing laws of obscenity, indecency, summary offences or the like. But enough is said to show that the balance between claims to information, on the one hand, and claims to secrecy, confidentiality and limitation of access on the other, are undergoing significant changes. It is important to see the debate about freedom of information legislation as one part only of the mosaic of the

law's treatment of information as a whole. Generally speaking, the law appears to be moving towards enhanced enforceable rights to more information. I want to pause briefly to question why this should be so and then to turn to an identification of what seem to me to be the major issues of principle which must be considered in any country determining the shape of freedom of information laws.

WHY FREEDOM OF INFORMATION?

It is not necessary to traverse at length the reasons that lie behind the moves towards general freedom of information laws. Most of these have been rehearsed in the Danks Report[9] which contains, as well, particular mention of the social and historical circumstances which give New Zealanders a special reason for wanting to know what their government is doing and why.[10]

Quite apart from the dubious inheritance of the Official Secrets Act, the public service model which Australia, New Zealand, Canada and other countries inherited from Westminster (though it had the qualities of general honesty and merit recruitment) suffered from a tradition of intense secretiveness. Several reasons have now conspired to render this tradition unsuitable and unacceptable. There are five main forces at work, all of them pointing towards freedom of information legislation of some kind or other:

(i) Modern democracy. The first is a growing appreciation that a modern democracy can and should mean something beyond a triennial encounter with the electorate at the ballot box. The issue is not just one between individual citizens and the Executive Government. It also extends to the relationship between Members of Parliament and the Executive of the day:

> Information has been described as the currency of democracy and it is argued that the sword of democracy is blunted by the indifferent voter who is ignorant about what is going on in his country. The conventional argument is that without an informed public, political accountability is illusory. In order to play any meaningful role in the political process, the voter needs information about political affairs and usually turns to the mass media, the professional collectors and disseminators of information in society.[11]

In a paper for the Summer School of the Australian Institute of Political Science, Professor Peter Wilenski, who is himself conducting an inquiry into government administration and freedom of information laws for the New South Wales Government, urged that effective freedom of information legislation is an absolute sine qua non of any effective reform aimed at achieving accountability, beyond the purely symbolic:

> There is no way in which democratic control over official decision-making processes can take place if the public and the parliamentarians do not know what those decision-making processes are, and often do not know what the decisions are.[12]

In a comment on the new Australian Bill and under the banner 'Why We Have a Right to Know', the lead writer of the Melbourne Age ventured into a rationalisation in somewhat different terms:

> Sometimes it seems that our governments have grown so large and remote that they no longer understand their basic relationship to society. We have allowed governments to evolve because there are things we need to have done that we cannot do as individuals, or that are more conveniently done by some organisation that represents everyone. The government is not supposed to be something apart from the people. The money it spends is the public's money; the tasks it performs are the public's tasks; the knowledge it gathers is the public's knowledge.[13]

But whether it is for reasons of ensuring an informed democracy or because the public's consent is the ultimate source of government power, there is now an insistent and growing community assertion which is profoundly inimical to the traditions of administrative secrecy, so comfortably followed for so many years. One Australian Senator has suggested that the high level of secrecy surrounding government is a reason why the public does not trust politicians.[14] In New Zealand, a recent weekend seminar of National Party Women described the need for a more open administration and accountability of the government as 'the burning issue' of their deliberations. Misgivings were expressed about 'a government machine grinding out legislation' and concern was voiced about the loss of respect for Parliament and the need to do something to correct this.[15] However this may be, it does seem generally agreed that an urgent priority of Western countries is to make representative

democracy work better. Introducing the Canadian Bill, Secretary of State Francis Fox declared that it would, over time, become one of the corner stones of Canadian democracy. The access legislation would, he declared, be an important tool of accountability to Parliament and to the electorate.

(ii) A reaction to big government. A second force, which adds a cutting edge to the generality of political theory, is the reaction which is undoubtedly in train against the administrative power which grew during and after the Second World War with the expansion of the public sector and the proliferation of functions assigned to it. The reaction takes many forms: resistance to the qango, staff ceilings and budget cuts. Freedom of information legislation can be seen as one more reaction. But in addition to the emotional impetus provided by an unsettling fear of large bureacracies with their own momentum, there is an important institutional issue at stake. Methods of doing things suitable in an earlier time and in a small administration become unsuitable in a time of vastly expanded government functions:

> Enormous growth of governmental activity since 1940 has brought about a greatly expanded need for decision-making at the civil service level with corresponding increase in the power of the administrative machinery of government. But the departments continue to speak through the Minister only; they are to a large extent out-of-bounds to the public and journalists seeking information.[16]

One close observer of the Canberra scene asserted:

> In Canberra there are many senior public servants who regard information not as a public good, to be used and shared, but as a power base. ... There can be no real accountability without information which is the basis for asking pertinent questions, and making reasoned judgments on the answers and on the decisions and policies stemming from the same information, and judging also the public servants and politicians involved in the answers, the decisions and the policies. Our Constitution gave the overriding powers to Parliament. But our party system serves to totally enshrine the Executive of the day, supported by a bureaucracy whose allegiance is regarded as being only to the Executive and not to the whole Parliament.[17]

Another Senator, given to more colourful language, declared that the Chairman of the Australian Public Service Board saw himself as General Gordon of Khartoum, believing that freedom of information 'will be won only over his dead bureaucratic body'.[18]

The feeling of frustration about the tradition of administrative secrecy comes to a head from time to time in anger when the so-called secrets are revealed and prove either to be thoroughly innocuous or to be matters which should long since have been disclosed for the kind of debate that is legitimate and appropriate in a free society.[19] It took many months of sustained pressure by the Doctors' Reform Society to extract from the Australian Department of Health figures showing the carbon monoxide content of smoke from 132 types of cigarettes. It was suggested that the results of the laboratory tests had 'succumbed to a toxic component of Canberra life: unnecessary secrecy'.[20] For reasons that are not clear, news about the possible presence of legionnaire's disease in the Australian Prime Minister's parliamentary office air conditioning system (which also services the 2,000 people working in Parliament House, Canberra) only found its way into the public media by 'leakage' to a public interest organisation.[21] The instant photo copier is a dread enemy of secretiveness.

(iii) Overseas initiatives. A third consideration is the rapid development of freedom of informtion legislation both at a national and sub-national level in many countries with political systems like our own. The Swedes have had a form of freedom of information for 200 years. Other Scandinavian countries followed suit in the early 50s. The United States Act was adopted in the 60s and strengthened after Watergate in 1974. Austria, France and the Netherlands have adopted legislation for public access to government information in the 1970s. Two Canadian Provinces have legislation in force. The Canadian and Australian Governments are sponsoring major Bills. The momentum is up. Inevitably, there is a 'spill-over effect' from the developments occurring in like, friendly countries.[22] A free press, always valiant for freedom of information for its own purposes, begins to question and to compare. Of the recent Australian Bill, the West Australian, for example, said:

> It is a pale shadow of the freedom of information legislation introduced or contemplated in countries with which Australia ought to be at least on a democratic par — the U.S., Canada, Sweden and Denmark, for example. Finland, of all countries, has had wide powers of public access to information since 1951.[23]

Moreover, the Blunt case showed that once the veil of secrecy can be pierced by effective legislative rights of access to government information in one country or State, it is difficult to contain the haemorrhage. Blunt's perfidy, the disclosure of which to the British community would have been a grave breach of the Official Secrets Act, was revealed through the machinery of the United States Freedom of Information Act. There are many like examples.

(iv) Universal education. A fourth consideration, relevant to the urgency for change, is the product of the system of education, free, universal and compulsory. Now more people are going on to tertiary education of one form or other. Through the instantaneous media, they are better informed. Modern education is designed to make them more questioning and critical of institutions, rules and of the law itself. Here in part lies the explanation of the need for continuous reform of the law. In the context of which I am speaking, the British White Paper on the Official Secrets Act in July 1978 put it well:

> Over recent years, it has become accepted that the government must pay greater attention to the needs and expectations of the public in explaining its policies and actions. In this respect a present day government works in a climate different from that of, for example, 20 years ago.[24]

As the Danks Report notes, today's complex and difficult issues often require community participation in a way that was neither possible nor necessary in earlier times.[25]

(v) The new technology. Above all, there is the fifth element which forces the pace of the debate. I refer to the new technology of information which will so revolutionise our time. The capacity of computers linked by telecommunications to move about exponential masses of information, both personal and non-personal, at once exacerbates the problem of effective political control and provides the technological means for the solution. The capacity of the computer can be harnessed for effective rights of access, if there is the political will to ensure that, in the future, the individual is to be able to assert himself effectively against the daunting combination of big government, big business and big technology.

THE CORE DEBATE

I have identified the context of the freedom of information debate and I have sought to explain the forces which are at work in societies such as New Zealand, Australia, Canada and Britain that make it plain that freedom of information legislation of some kind will come. There remain, however, in the laws and proposals for laws that have been presented in these otherwise similar democracies, important controversies. In drawing up a Freedom of Information Bill, no government can hope to satisfy all of the interested parties and considerations. In Britain, this has been cited as the reason why 'no government has summoned up the nerve to do anything on this important subject'.[26] Certainly, the calumny and vilification that have accompanied media discussion of the recent Australian Bill, stand as a warning to any politician who thinks this path is an easy one. 'It would be a disgrace to any country worthy of the name of democracy', declared the West Australian.[27] It is the 'triumph of [the public service bureaucrats'] campaign', and 'nothing more than a cosmetic fake', declared the Sydney Morning Herald.[28] According to the Melbourne Age, it is 'a fraud'.[29] Other commentators were no more kind.

The debate is continuing with a stalwart defence for the measure by the Federal Attorney-General of Australia (Senator Durack) asserting that it strikes the right balance between the community's right to know, on the one hand, and sound government under Ministerial responsibility, on the other.

Whether one takes the Canadian or Australian Bills, the debate in the Westminster Parliament or the Danks Report, a number of recurring themes stand out. Of these, I would list three as central for any consideration of freedom of information:

(a) The exemptions. First, there is the list of exemptions. The merit of the position in Australia, New Zealand and Canada is a general commitment to the notion of freedom of information legislation, less government secrecy, prima facie access to government information, a change of the onus to assure access and the provision of independent machinery to weigh the claims for exemption. In Britain, this consensus would appear to be further off. Much of the Australian debate has focused on the list of exemptions. Common to every list I have seen are exemptions for national security and defence:

> From the outset it is essential to debunk the notion that open government means licence to give away, say, military secrets to anyone who asks. Nowhere is such a provision embodied in open government legislation nor should it be.[30]

Exemptions covering relations with overseas countries (and in federations with constituent members) are also common. Exemptions to protect the privacy of other persons, confidential business information and the integrity of criminal investigations and proceedings, are also commonplace.

The difficulty of defining the 'hard core' of exemptions is not to be under-estimated and was explained by the Canadian Minister Fox in these terms:

> The difficulty facing the drafter is that defining the exemptions requires addressing, in a single statute, the fundamental responsibilities of government. This must be done with enough breadth to capture all the areas where protection is necessary and in the public interest. But it must also be done with sufficient precision to allow general access to the inner workings of government which it is in the public interest to see.[31]

It should not be a matter for surprise that in comments on the exemptions proposed in the Danks Report, some of the focus of criticism has been upon the breadth of the exemptions proposed. The list of exemptions were singled out by editorial comment in New Zealand[32] and by political[33] and other commentators as a weakness of the Danks proposals. Most commentators agreed that the 'real business' of critical scrutiny would only start when the draft Bill was produced.[34]

(b) Neutral umpire. Possibly even more intractable are the controversies which surround the identification and powers of the 'neutral umpire' who is to weigh, in some cases at least, the claim for access against the claim for exemption. Here, there is a spectrum of views revealing specially sharp differences of opinion. At one end of the spectrum is the Canadian approach. Under the Bill introduced by the Canadian Government, disputes about the entitlement to access are dealt with in the first instance by an Information Commissioner (a kind of ombudsman). If his intervention fails to resolve the dispute, the Federal Court of Canada has jurisdiction for authoritative, binding review. To reconcile the competing claims of judicial review and Ministerial responsibility, in the cases of some grounds of exemption, the Minister is entitled to deny access and the court is only empowered to order release if it determines that the Minister did not have "reasonable grounds" for refusing access. In all other cases, the court is empowered to give full de novo review and ultimately to substitute its opinion

for that of the Minister as to whether or not an exemption applies. Speaking of this Canadian approach, the Minister, Mr. Fox, took a bold stand:

> I want to make absolutely clear that in all cases the commissioner and the court will have the right to examine any government record. In all cases the burden of proof is squarely on the shoulders of government. In all cases the commissioner and the court will be empowered to refer evidence of illegal activity to the proper authorities. In all cases the court is empowered to overturn the Minister's decision and to order release.[36]

Whilst there is a fair degree of bipartisanship in the Canadian debate, the Leader of the Opposition, Mr. Clark, whose administration introduced the first Canadian Freedom of Information Bill, urged the government to go even further and to empower the Federal Court of Canada to undertake de novo review in every case.[37]

The Australian Bill approaches the compromise between ultimate Ministerial responsibility and judicial review in a somewhat different way. Certain of the specified grounds of exemption, judged to be at the heart of the functions of government, are not subject to review at all by the quasi-judicial Administrative Appeals Tribunal. The process of review may be entirely avoided in these cases by a conclusive certificate. The classes of case to which this 'by-pass' machinery applies include documents affecting national security, defence, international relations and relations with the States, Cabinet documents and Executive Council documents.[38] The decision to give such a certificate is not subject to review by the Administrative Appeals Tribunal.[39] The Tribunal may not require the production of the document referred to in the certificate.[40] The result of these provisions, if enacted, will be to narrow the access by the Tribunal to documents which a court in Australia might require the Crown to produce in order to judge a claim of Crown privilege.[41]

Third in the spectrum is the Danks proposal. The New Zealand committee suggested, in addition to the necessary policy and procedure changes within the administration, enhanced powers in the Ombudsman to review Ministerial decisions concerning the release of official information. It also proposed the creation of a new independent body (an Information Authority) with a number of functions of a general kind. The Authority would not be concerned with proposals for the release of particular pieces of information but only with the

release of general categories of information.[42] In respect of particular information, if a dispute arose between the Ombudsman and the Minister 'the Minister would retain the final power of decision about the release of a particular document'.[43] The Information Authority could make public recommendations about release of categories of information. But here too, the Executive Government would have the last say. Though the Authority's recommendations would be public, it would be necessary for any effect to be given to them, for Orders in Council to be adopted by the Executive Government.[44]

This, as it seems to me, is the key issue for the New Zealand debate. It is, perhaps, the reason why the Prime Minister said that the Danks proposals would not please the 'extremists'.[45] Naturally enough, this issue has caught the attention of critics. It has been suggested that a system designed to change well-entrenched attitudes may not be effective, without the goading of an authoritative 'umpire' in at least some cases.[46] Certainly, the Conference on Freedom of Information held in Wellington in December 1980, adopted unanimously a declaration which included as one of the key principles for a freedom of information law:

> It must provide an easy appeal to an independent authority, including a final binding appeal to the courts, and allow a successful applicant to recover costs.[47]

The issue of the 'umpire' has been quickly picked up as the principal subject of comment both of editorialists in New Zealand[48], politicians of differing persuasions[49] and by other commentators:

> The independent tribunal, the Information Authority as it is to be called, has no power — although it may hold hearings and make judgments ... in particular cases about whether some matter is to be exempt from disclosure, or not. Its judgments shall be recommendations which the government of the day may choose to put into effect through Orders in Council. It may also, of course, choose to ignore them.[50]

One frequently mentioned weakness of resort to the Ombudsman only, instead of an authoritative court or tribunal, is that the Ombudsman is limited to persuasion. Even well researched reports and recommendations of the Ombudsman are sometimes rejected. His sanction of Annual Reports to Parliament may allow too much time to elapse to be effective. In any case such reports may be impotent against a resourceful, determined, opinionated administrator or Minister.

At the end of the spectrum is the British position. It is evidenced by the fact that even without the Whips, it was not possible to secure a Second Reading of the Bill introduced by a Private Member who was fortunate enough to win the ballot.

True it is, Private Member's Bills have been introduced regularly in recent years. The media have called for legislation, contrasting the 'clutter' of secrecy in Britain with the openness of administration in the United States and the moves for reform elsewhere in the Commonwealth. A responsible and thoughtful Liberal Member of the House of Lords, Lord Avebury, has described as a 'mania' the secretiveness of public administration in Britain. In December 1980 the Press Council called for a Freedom of Information Act enforceable in the courts or before an independent appeal body, with the onus on the government to justify withholding any information sought.[51]

But when the Private Member's Bill came before the Commons in February 1981, criticism was voiced from both sides of the House about the key provision relating to enforcement. The Bill proposed that if the government agency concerned declined to comply with the [Ombudsman's] recommendation for access to the document, provision should be made for an appeal to the High Court. The judge in chambers should be empowered to look at the document concerned and should have power to order disclosure if the ground for exemption was not made out.[52] Resistance to this notion was described by the sponsor of the Bill as 'some sort of constitutional neurosis'.[53] The former Labour Attorney-General, Mr. Silkin, whilst supporting the Bill, was not so sure about judicial review:

> I have reservations about the provision regarding judicial review. I do not believe that judges want to be involved in what may often appear to be political decisions. In fact, I see no reason for the provision. Since the time when the Parliamentary Commissioner [Ombudsman] was first appointed, I cannot remember a case — certainly, there cannot have been many — in which his advice was ignored. If his decision is ignored, the High Court of Parliament could put right to defects of the Executive. Why do we need to entrust this to a long stop in the form of judges whose independence on political matters they themselves regard as important?[54]

Other speakers had more fundamental objections. Sir Angus Maude, a previous Minister and himself a former journalist, objected to the notion of a 'right' to information whilst conceding that departments, Ministers and civil servants were from time to time, 'if not by disposition' unnecessarily secretive, he felt that legislation was not necessarily the solution and urged:

> The whole concept of open government is founded upon a fallacy. My Hon. Friend ... said that we should have open Cabinet meetings and open Cabinet committee meetings. That shows the fantasy world in which people can be led when they take an interest in this subject. The more we try to open up the decision-making meetings and bodies and decision-making processes, the less likely it is that those decisions will be taken in Cabinet or in Cabinet committees or anywhere where they can be discovered and explained. If Cabinet meetings and Cabinet committee meetings are not secure, and if Cabinet documents are not secure, the decision-making process is pushed further and further back, from Cabinet to Cabinet committees and then down to two or three people. No civil servant will put on paper a policy recommendation for a Minister if it is likely to be published, purloined or revealed within a short time. ... How can people argue, discuss and take sensible decisions about a number of options if they will be called to account immediately if the options that they rejected are pillaried as ridiculous?[55]

Mr. Clement Freud, Member for the Isle of Ely and himself a sponsor of a previous Freedom of Information Bill, declared that he could not disagree more. He gave one instance of what he described as 'the marvellously unnecessary' secrecy practised in the United Kingdom:

> The Boundary Commission has looked into the boundary changes of Cambridgeshire. It came to conclusions, which it published in a letter to a District Council on Friday of last week. It told Members of Parliament that they would be notified on Tuesday, and it said that the news was to be embargoed until Thursday. As a result, the clerks in the Boundary Commission knew, the post people in my local district knew on Monday, I knew on Tuesday, the Leader of the House did not know until Wednesday, but my local newspapers had known since Friday afternoon. The secrecy was such that we were not consulted. If we had been consulted, we would have been able to say something because [the report] mistook my constituency of Isle of Ely and made in 'the Isle off Ely'. It has taken away

> [from my constituency] the city of Ely. As a result of the secret deliberations of the Boundary Commission ... I now have the patients but not the hospital, the pupils but not the school, the vicar but not the bishop, the buses but not the depot, the trains but not the station. Politically, I do not think that it makes a very great deal of difference, but it is still unnecessary secrecy.[56]

The final speaker for the Bill called on the Backbenchers:

> on whichever side of the Chamber they sit to notice the instinctive attraction that Ministers on the Treasury Bench suddenly feel for the secrecy that protects them and their administration. The defence of secrecy and opposition to the freedom of information from the Treasury Benches is one of the main reasons why we should vote for the Bill today.[57]

As I have said, the motion was lost. No Minister spoke on the substance on the Bill. The existence of a natural desire of those who hold power over information to maintain that power may be a reason for considering the need for more neutral determination of at least some of the claims for access. As to the contention that this will place the judges in jeopardy of political involvement, it is apt to bear in mind what Professor J.A.G. Griffith said in commenting on the House of Lords decision in the Journalists' Privilege case:

> The Granada case demonstrates how deeply and inevitably the judges are part of the political process. In the name of the public interest they prevented the Sunday Times from publishing information about Distillers Limited and the Thalidomide children. In the same ... name they now require the media to disclose the name of sources. If 'political' is thought too strong a word, consider the vast range of options, the huge area of discretion, the great variety of courses open to Their Lordships in the present case. No doubt they will say something about the advantages of investigative journalism, as did Lord Denning. But the principles which should govern disclosure of sources can vary from Lord Justice Templeman's view that there should be disclosure except in trivial cases ... to a view that disclosure should be ordered only in the most serious situation.[58]

(c) Costs. The third chief ground of controversy relates to costs. In Australia, the Senate Committee investigating the 1978 Freedom of Information Bill proposed a power in the Administrative Appeals Tribunal to provide for costs of successful applicants. This was not agreed to by the government. On the other hand, the 1981 Bill empowers the making of regulations including in relation to amounts or rates in respect of requests for access and requirements for deposits on account of such charges.[59]

The Danks Committee pointed out that the cost of supplying information is already considerable and that in proportion to agency costs, the additional costs involved would not be great. 'Charges to offset costs may be necessary'.[60]

In the English debate, the spectre of costs was raised by the opponents of the Private Member's Bill. However, it seems now to be generally accepted that though some cost is involved, difficult in a time of public sector constraint, it does not approach the amounts gloomily predicted by some public service critics, is concentrated in a small number of key agencies, may be partly offset by the great efficiency of information systems and technological changes necessary to implement a regime of access and is small in proportion to the costs of current information activities of government, let alone government activities generally:

> The cost of the United States F.O.I. Act in 1977 [the most recent year for which figures are available] according to the official Congressional Study was a little under $26 million. ... This is a substantial sum but needs to be seen in the perspective of other government spending, for example, expenditure in 1978 of $35 million for the maintenance of Defence Department golf courses, and more pointedly, $1.5 billion for U.S. Government public relations exercises. The stark contrast between the P.R. and F.O.I.A. costs is symbolic of the open government debate; acquiescence in the enormous costs of government telling the people what the government wants them to know, and criticism of the relatively low costs of the government telling the people what the people want to know. At least in the latter case, somebody was sufficiently interested to write and ask. Furthermore, no-one has calculated the costs incurred through secrecy in areas such as industrial injuries, the ineffectiveness of the Rhodesian naval blockade, dangerous vehicles and ineffective and

dangerous pharmaceutical products. It is clear that open government is a tool which enhances democratic rights and it is inevitable that the maintenance and furthering of those democratic rights has a cost.[61]

On the cost implications of freedom of information, the Danks Committee surely got it right when it said that ultimately the question of costs was 'one of priorities'.[62] The proposal for the effective use of the Ombudsman, as outlined in the New Zealand suggestions, has the advantage of providing a low-key, accessible, inexpensive procedure for securing access. The Senate Committee proposed an enhanced role for the Ombudsman in the Australian Bill, but though some changes were made, the key machinery provisions of the Australian legislation are those dealing with internal review, conclusive certificates and the binding decisions (in some cases) of the Administrative Appeals Tribunal. The Australian machinery itself will not be inexpensive. Indeed one criticism has suggested that in the case of documents disclosed, 12 steps are needed. In a more difficult or negative case, 20 or more steps may be involved, requiring labour-intensive activity at a time of public service staff cuts.[63] It will be a misfortune if costs, either levied for the initial right of access or effectively required by curial litigation, undermine the effectiveness of freedom of information laws. But the history of English-speaking people is fortunately replete with determined litigants of principle. It may be preferable to have enforceable rights of access which are occasionally expensive to pursue than to have approachable and inexpensive procedures for mediation and negotiation but with no right of final authoritative determination in a neutral venue by a dispassionate umpire.

CONCLUSIONS

There are many other issues which we could debate. They include retrospective application of freedom of information laws, the relations between such laws and effective privacy protection, the extension of such laws to local government[64], to commercial operations[65], the relation of reform of official secrets legislation and the initiatives that will be necessary, beyond the letter of a statute, to change entrenched attitudes of administrative confidentiality and secrecy.

That this is an issue of our time and one worthy of its prominence in this Law Conference is beyond dispute. Lawyers have certain privileges in society. To these privileges are attached special responsibilities. Amongst our responsibilities is the vigilant defence of what Lord Hailsham has called the 'banner' of Western democracies: the Rule of Law. In an age of big government, big business, big moral and social changes and big science and technology, it is scarcely surprising that the role of the law and of its practitioners should be changing too. Lawyers should be vigilant to redefine the legal indicia of freedom, where changes in society and changes in technology require this. In the anonymous, technological world of tomorrow, it will be more important than ever for the law to provide effective institutions and rules for the defence of the individual, whether as human being or as citizen. Anyone who is in doubt of this should read again Aldous Huxley's 'Brave New World'. Written precisely 50 years ago, it predicted a world of overweaning science, which Huxley said might come in 600 years. In 1946, he revised his prediction to 100 years. In an age of test tube fertilisation, the microchip, interplanetary flight and nuclear fission, lawyers must find new roles of their own. One worthy of our traditions and talents is the redefinition of 'freedom' and a vigorous contribution to the debate about the institutions and laws that are necessary to provide and uphold freedom today. Lawyers of our tradition can fairly claim that one of the chief reasons we are able to talk freely about these matters, and to assert boldly the claim to push forward the frontiers of freedom, is precisely the courage, determination, independence and intellectual ability of the judges and lawyers of the past. In a world of rapid change and dazzling technological advances, may we be worthy of their precedent and relevant to our time.

FOOTNOTES

1. Canada, House of Commons, Debates, 29 January 1981, 6689 (hereafter Canada Hansard).

2. New Zealand, Committee on Official Information, General Report, 'Towards Open Government', 1980 (hereafter Danks Report).

3. New Zealand Herald, 29 December 1980, 1.

4. United Kingdom, House of Commons, Official Report, 6 February 1981, 573-4 (hereafter U.K. Hansard).

5. See e.g. Senator Alan Missen, reported in the Canberra Times, 9 April 1981, 14 ('Seven Deadly Sins of Omission in the Government's Freedom of Information Bill').

6. Mason J. in The Commonwealth of Australia v. John Fairfax & Sons Limited & Ors (1981) 54 ALJR 45, at 49.

7. The Times, 7 January 1981, 11.

8. British Steel Corporation v. Granada Television Limited [1980] 3 WLR 774, 818.

9. Danks Report, 14.

10. ibid.

11. A. Siegel, 'Communications and Politics : Canada's Cautious Steps Towards Open Government', (1980) Canadian Journal of Communication, 20, 21.

12. P. Wilenski, quoted National Times, 2 November 1980; 13.

13. The Age, 4 April 1981, 19.

14. Senator A. Missen, quoted the Age, 23 March 1981, 4.

15. As reported in the New Zealand Herald, 23 March 1981, 3.

16. Siegel, 23-4.

17. G. Davidson, 'The Morality of Government and Bureaucratic Secrecy' in the Canberra Times, 25 November 1980, 2.

18. Senator G.J. Evans, quoted in the Age, 23 March 1981, 4.

19. Melbourne Herald, 19 September 1980 (editorial).

20. Sydney Morning Herald, 9 January 1981, 6 (editorial).

21. Rupert Public Interest Movement, described Sydney Morning Herald, 4 April 1981, 8.

22. Siegel, 27.

23. West Australian, 10 April 1981, 8.

24. White Paper, cited F. Hooley, U.K. Hansard, 514.

25. Danks Report, 15.

26. F. Hooley, U.K. Hansard, 514.

27. West Australian, 10 April 1981.

28. Sydney Morning Herald, 3 April 1981.

29. The Age, 4 April 1981.

30. The Outer Circle Policy United (U.K.), 'Open Government : Lessons from America', 1980, 1.

31. Canada Hansard, 6690.

32. The New Zealand Herald, 6 February 1981.

33. Dr. G. Palmer, cited in the Christchurch Star, 16 February 1981.

34. e.g. Mr. David Thorpe (President, Public Service Association), cited in the Dominion, 7 February 1981.

35. Mr. M. Minogue, the Evening Press, 11 February 1981.

36. Canada Hansard, 6691.

37. Mr. J. Clark, Canada Hansard, 6694-5.

38. Freedom of Information Bill 1981 (Aust), cl. 28, 29 and 30.

39. id., sub-cl. 48(4).

40. id., sub-cl. 54(3).

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

42. Danks Report, 35.

43. ibid.

44. id., 36.

45. Mr. R.D. Muldoon, press statement, 5 February 1981 ('The committee's recommendations will not please the extremists, but I believe it has put forward reasonable proposals that can be the basis for action').

46. Mr. M. Minogue, n.35.

47. 1980 Conference on Freedom of Information and the State, Wellington, N.Z., 6-7 December 1980, Declaration. See also Coalition for Open Government, Freedom of Information and the State, Discussion Paper for 1980 Conference, Wellington, 1980.

48. See Auckland Star, 6 February 1981.

49. Dr. G. Palmer, the Star, 16 February 1981. See Mr. M. Minogue, op cit.

50. K. Ovenden, 'Open Government? No. Just a Cosmetic Change', in the Star, 25 February 1981.

51. The Times, 18 December 1980, 3.

52. U.K. Hansard, 518.

53. ibid.

54. id., 516. See also Mr. Johnson Smith, id., 538.

55. id., 530.

56. id., 541. Emphasis added.

57. ibid, 570.

58. J.A.G. Griffith, 'The Dilemma of Disclosure' in The Listener (U.K.), 14 August 1980, Vol. 104, 194, 195. At the time Griffith wrote the House of Lords decision was announced but the reasons were unavailable. See now [1980] 3 WLR 818.

59. Freedom of Information Bill 1981 (Aust), para. 59(1)(a).

60. Danks Report, 37.

61. Outer Circle Policy Unit, 132-3.

62. Danks Report, 37.

63. The Canberra Times, 5 April 1981, 1. ('Tortuous Passage Provided for Information Requests').

64. The Dominion, 7 February 1981, 21.

65. See Freedom of Information Bill 1981 (Aust), The Schedule (Part I, Exempt Agencies; Part II, Agencies Exempt in Respect of Particular Documents).