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Freedom of Information laws in Australia

The attempts to secure the passage of freedom of information (FOI) legislation in the United Kingdom have a somewhat discouraging history. The *Official Secrets Act* 1911 (UK) s 2 made the unauthorised disclosure of any information in the possession of government an offence. This statute, copied in most parts of the British Empire, established a régime of administrative secrecy which, in Britain, has survived to this time. The common law buttressed the statutory system of secrecy. Even before the *Official Secrets Act*, in 1907, it was said that "[m]ere curiosity and desire to see and inspect documents is not sufficient".[1]

In Australia, the importance of protecting from disclosure the "counsels of the Crown" was upheld for many years by the High Court.[2] However, following the passage of the United States *Freedom of Information Act* in 1967, moves were set in train to secure similar legislation in Australia. In 1973, the newly elected Whitlam Labor Government initiated an inter-departmental committee to consider whether the United States legislation was suitable to Australia's system of Parliamentary and Cabinet Government. This set in train the steps which ultimately led to the passage of the *Freedom of Information Act* 1982 (Cth) during the Fraser Government.

A statute of the same name was enacted in the State of Victoria in 1983. The New South Wales Act was passed as a key measure of the Greiner Government's administrative reforms. It was enacted after two earlier Bills, proposed by the Labor Government, had failed to secure passage.

During 1991 and 1992 a flurry of legislation in the States of South Australia, Tasmania, Queensland and Western Australia saw the passage of Acts in those Australian jurisdictions. By the end of 1992 every State, as well as the Federal and ACT legislatures, had enacted FOI legislation. The Queensland Act commenced on 19 November 1992. The Western Australian *Freedom of Information Act* 1992 was not proclaimed at the time of the preparation of this note.

The Australian legislation follows a generally common pattern. The machinery for enforcement of the right of access to information (typically "documents") in the possession of Government, Ministers and agencies varies. The machinery for evaluating claims for exemption from the obligation to produce the document and for considering the application of exceptions provided by law falls into two main categories. In most jurisdictions (Cth, NSW, Vic, SA and Tas) provision is made for internal review, reconsideration by the Ombudsman and external review by the Administrative Appeals Tribunal (Cth, ACT and Vic) or by the District Court (NSW and SA). In two jurisdictions (Qld and WA), the model of the Canadian legislation has been preferred. The legislation provides for an Information Commissioner and adopts a régime of persuasion in preference to the power of an independent tribunal or court to order production of the document in question.

Ten years after the passage of the first Australian FOI Act, the new régime of greater access to government information is well established in Australia. Assessments of the legislation have

stressed the slowness with which the administrative culture changes, the caution of tribunals and courts in evaluating disputed claims to access and the inescapable balancing of the competing interests involved.[3] Australian administrative critics of FOI legislation tend to emphasise the costs involved (currently an estimated $247 for processing each request). But it is notable that for the year 1989/90 applications under the Federal FOI Act numbered approximately 16,000. They produced a 75.1% provision of access in full; 21.6% in part and only 3.3% refusals of access. FOI appeals to the Federal AAT are running at about 80 each year. Notable discoveries by FOI have resulted in the resignation of at least one Federal Minister and the occasional revelation, by journalistic or political investigation, of matters which would certainly not have been disclosed before the FOI legislation was enacted.

The slow British path to reform

In contrast to the Australian developments (which are also mirrored by FOI legislation in New Zealand[4] and Canada)[5] the moves to greater openness of administration in Britain have been slow in coming.

In 1962, the Franks Report called for the abolition of s 2 of the *Official Secrets Act* and its replacement by a much narrower legal prohibition on the disclosure of government information. For a long time this recommendation was ignored. In 1977, the then British Government authorised the so-called Croham Directive (named after the then Head of the Civil Service). This promised the readier release of background papers on policy decisions made by government. In fact, the Directive was little used and it was soon forgotten. Its author, Lord Croham, came to believe that a FOI Act was necessary to change the British administrative culture and expressed that view publicly.

In 1978 a major attempt was made to introduce FOI legislation in the form of a Private Member's Bill sponsored by Mr Clement Freud MP. However, the Bill lapsed when the 1979 election was called. The new Prime Minister, Mrs Margaret Thatcher, opposed FOI legislation. Her opposition to it spelt defeat for the series of Private Member's FOI Bills which were introduced into the House of Commons in 1981 and 1984.

The rigorous prosecution of Mr Peter Wright in the *Spycatcher* litigation[6] demonstrated that the *Official Secrets Act* was far from a dead-letter in the United Kingdom. So did the prosecution in 1984 of a young foreign office clerk, Sarah Tisdall, for "leaking" information on the government's plan to handle the public relations aspects of the arrival of cruise missiles in Britain. Ms Tisdall was convicted and sentenced to 6 months imprisonment which she served in Holloway Prison. The prosecution in 1985 of another Defence Ministry official, Mr Clive Ponting, for "leaking" information to suggest that Ministers had misled Parliament over the sinking of the cruiser *Belgrano* during the Falklands War resulted in the acquittal of Mr Ponting at the hands of the jury.

Small successes were achieved in Britain by the passage of the *Access to Personal Files Act* 1987; the *Access to Medical Reports Act* 1988 and the *Environmental and Safety Information Act* 1988. In 1989, under pressure arising from the *Spycatcher* cases, the government proposed the amendment of s 2 of the *Official Secrets Act* to narrow the offence there provided to the disclosure of information about security, defence, international relations and law enforcement. But a further attempt in a Private Member's Bill to secure a *Freedom of Information Act* failed in 1992. In the British election of that year the major political parties proposed reforms. Both the Labour election manifesto and that of the Liberal

Democrats promised the introduction of a *Freedom of Information Act*. The Conservative Party acknowledged that in Britain "government has traditionally been far too reluctant to provide information". That party promised, "We will be less secretive about the working of government". However, instead of enforceable rights, the government proposed a Citizens' Charter. It objected to an FOI statute on the ground that it would "significantly erode Westminster traditions". The government promised a White Paper for some time in 1993 setting out its plans to implement a new "open government" policy.

Right to Know Bill introduced

This was the background against which a Labour member of the House of Commons, Mr Mark Fisher MP, won the ballot to introduce a Private Member's Bill which is the latest attempt to secure an FOI Act in Britain. Titled "The Right to Know Bill", it has been drafted with the assistance of the Campaign for Freedom of Information, a body in Britain having the support of a wide range of non-governmental organisations.

The Bill contains an enforceable general public right of access to government records; a definition of records exempt from access; and provision for independent external review by an Information Commissioner. Persons dissatisfied with the decision of the Commissioner may appeal to the Information Tribunal having the power to examine records and, if necessary, to require their disclosure. Somewhat controversially, the Bill also contains clauses proposing a further tightening of the operation of the *Official Secrets Act*; a right of access to employment records both in the public and private sectors; and a requirement upon companies to publish additional information in their annual reports.

The Bill was the subject of a public conference held in London

on 8 February 1993. The conference was addressed by the writer concerning the Australian experience in FOI legislation. The Canadian experience was outlined by Mr John Grace, Canadian Information Commissioner and shortly also to hold the office of Privacy Commissioner under new administrative arrangements to be adopted in Canada.

The aspect of the Australian experience which was of the greatest interest to the British audience was the cost, and statistics of applications for, and refusals of, access. Also of interest were the decisions of the AAT in Australia and the jurisprudence they have developed which has provided guidance to officials on the operation of FOI legislation. The absence of such a developed body of jurisprudence is often cited as a criticism of the Canadian Information Commissioner model. The point was made that, on the whole, the AAT in Australia had dealt cautiously with challenges to administrative refusals to provide access to documents. Such academic commentary as exists on AAT decisions tends to suggest that they are often unduly sensitive to administrative claims for maintaining secrecy.[7] A particularly controversial issue in Australia has been the claim for confidentiality in respect of documents submitted to Federal Cabinet. The fear has been expressed that a cloak of confidence can be manufactured by the simple expedient of marking documents "for Cabinet".[8] Apart from the utilitarian arguments for FOI legislation, it was emphasised that an important principle was at stake:

> *"... the tables are turned. The questions are reversed. Ask not what advantage your country derives from your gaining access to information necessary for your political decisions to be informed. Ask rather by what right your country may deny you such access? And who is it on behalf of your country who is doing so? Often the answer comes back: it is none other than the people you put in power for a time who have a very real interest in preventing access to information about their*

actions."[9]

It was suggested that the opening of public administration in Britain was the completion of the process of accountable government which British rule has brought in the courts and the legislature but not in Executive Government.

Mr Grace drew on the Canadian experience which, on a *per capita* basis, suggested a lower total number of applications for access to documents but a higher dissatisfaction with internal review than evidenced in the Australian experience. He instanced numerous cases where disclosure of information had caused embarrassment, particularly in the misuse of official and public funds. He suggested that the availability of access introduced greater honesty for fear of exposure. Commissioner Grace encouraged the British audience to overcome their fear about FOI legislation. He was cautious about a "judicialized" tribunal. He suggested that more disputes would be solved by informal negotiation rather than enforceable orders. But he acknowledged that the most difficult areas included those involving alleged national security interests. He said it was important to avoid detailed engagement in the management of the information policies of departments under the guise of FOI.

The London conference was also addressed by three politicians from the main United Kingdom political parties, each of whom supported the proposed Bill. The first of these was Mr Mark Fisher, the Bill's sponsor. He drew attention to the fact that it was an "all party issue". He suggested that the general commitment of the Government to opening up administration provided a propitious moment for the enactment of a FOI statute for the United Kingdom. He argued that it would enhance respect for democratic institutions which, he claimed, had been damaged in Britain in recent years.

Mr Fisher's theme was supported by Mr Richard Shepherd MP (Conservative) who had sponsored earlier legislation for amendment of the *Official Secrets Act*. Mr Shepherd said that the "self-regard" of British people should lead them to insist upon measures which would enhance accountable government. He cited the recent *Matrix Churchill* prosecution as an instance where grave injustice could have occurred had not the processes of the courts extracted from unwilling administrators the exculpatory documents which led to the termination of the trial. Interestingly, Mr Shepherd suggested that the ethos of secrecy in Britain was a product of the mentality deriving from the special perils faced by the Second World War generation of politicians and judges. He stated that it was time to put the *Defence of the Realm Act* out of the nation's psyche.

Mr Archie Kirkwood MP (Liberal Democrat) outlined the earlier legislation which he had introduced to open up particular records in Britain. He chronicled remarkable and even ludicrous cases of documents marked "secret" but subsequently disclosed as inconsequential. In a recent instance officials had denied that a crashed US air-fighter, on a practise mission in Scotland, had been targeting a castle near his constituency in South Eastern Scotland. Documents accessed under the United States *Freedom of Information Act* showed that the denials were false.

The London conference was rounded by a description of the legislation given by Mr Maurice Frankel, long-time Director of the CFOI in Britain. In harmony with the theme of openness, all participants, including the Director of the British Consumers' Association, Dr John Beishon, submitted to interrogation from the audience, not a few of whom bore the worried look of Sir Humphrey Appleby, the apocryphal character in the television series *Yes*

prime Minister, as popular in Australia as in Britain.

Considering the wider context

Three important and wider issues were cited during the conference as reasons for moving to establish enforceable FOI rights in the United Kingdom. It is as well, in Australia too, to keep these considerations in mind in the development of FOI legislation.

The first is the human rights context in which FOI must now be seen. Long before current legislation, the right of access to information was asserted as basic to individual rights in a democratic society. In the first session of the General Assembly of the United Nations the importance of "freedom of information [as] a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated" was stressed in a resolution.[10] The General Assembly emphasised that it was "an essential factor in any serious effort to promote the peace and progress of the world". The right to freedom of opinion and expression and to receive information necessary for such a freedom was recognised in the *Universal Declaration of Human Rights,*[11] repeated in the *International Covenant on Civil and Political Rights*[12] and reflected in regional conventions such as the *European Convention for the Protection of Human Rights and Fundamental Freedoms*[13] and the *Inter-American Convention of Human Rights.*[14] Distinguished scholars are now asserting that access to information is a "new human right - the right to know".[15] The Director General of the International Telecommunication Union recently emphasised the importance for human rights of the right to communication.[16]

The mention of the ITU draws attention to the importance of new information technology in the context of FOI. The case of the Scottish air crash is an illustration of the difficulty of containing

information, once haemorrhaged. This was also one of the lessons of the *Spycatcher* litigation. New information technology often permits data bases to be interrogated from one jurisdiction to another. This makes attempts in one country, or part of a country, to maintain secrecy of information more difficult where other jurisdictions permit access under FOI statutes or their equivalents. The case is yet another instance of the impact of technology upon human rights.[17]

The third point was to see FOI legislation in the context of a wider movement for more open government, to which British law and traditions have made such important contributions. Many cases attest to the principle of open administration of justice in the courts.[18] The open conduct of debates in Parliament, even in time of war, and the facility of question time contrasts with the governmental procedures of other countries. The rapid growth of public administration in the 20th century has not been matched in Britain by an equal growth in the machinery of accountability. The worst fears about FOI, like the most starry-eyed projections, have tended to be exaggerated. But whether an enforceable statute will pass the House of Commons remains to be seen.

FOOTNOTES

1. See *R v Southwold Corporation; Ex parte Wrightson* (1907) 97 LT 431, 432; P J Bayne, *Freedom of Information*, Law Book Co, Sydney, 1984, 2.
2. See *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1, 179 (Dixon CJ) and *Sankey v Whitlam* (1978) 142 CLR 1, 39-40 (Gibbs CJ). See also L J Curtis, "Freedom of Information in Australia" in N S Marsh (ed) *Public Access to*

Government-Held Information: A Comparative Symposium, Stevens, London, 1987, 172ff; E Campbell, "Public Access to Government Documents" (1967) 41 ALJ 73 and K Harrison, *Documents, dossiers and the inside dope*, PIAC, Sydney, 1984, 15.

3. See S Zifcak, "Freedom of Information - Torchlight But Not Searchlight" in Canberra Bulletin of Public Administration, *Fair and Open Decision-Making: Administrative Law Reform*, Record of 1991 Australian Administrative Law Conference, No 66 (October 1991) 168.

4. *Official Information Act* 1982 (NZ). See I Eagles, M Taggart and G Liddell, *Freedom of Information in New Zealand*, OUP, Auckland, 1992.

5. *Access to Information Act* 1982 (Canada).

6. See *Attorney-General for the United Kingdom v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30; (1987) 10 NSWLR 86 (CA); *Attorney-General v Observer Ltd & Ors [No 2]* [1990] 1 AC 109, 254 (HL).

7. See eg Zifcak, above, n 3 and see also M Patterson, "FoI and Information Privacy: A Reasonable Balance?", (1992) *Law Inst J* 1001 (Vic); J Elliott, "The Freedom of Information Act (Cth) and its Effect on Business-Related Information and Confidential Information in the Possession of Commonwealth Agencies" (1988) 14 *Monash Uni L Rev* 186.

8. See *Re Porter and the Department of Community Services and Health* (188) 14 ALD 403 (AAT).

9. See M D Kirby, "FOI - A View From Australia", unpublished paper for the London Conference on the Right to Know Bill, 8 February 1993, 14.

10. *Res* 59(1), 1946, GA, 14 December 1946.

11. Article 19.

12. Article 19.

13. Article 10.

14. Article 13.

15. See C Weeramantry "Access to Information: A New Human Right: The Right to Know", unpublished paper for the Commonwealth Law Conference, Nicosia, Cyprus, May 1993, forthcoming.

16. P Tarjenne, "Telecom: Bridge to the 21st Century" in *Transnational Data and Communications Report*, July/August 1992 (vol 14 no 4) 42.

17. See M D Kirby, "Human Rights - The Challenge of the New Technology" (1986) 60 ALJ 170.

18. See eg *Raybos Australia Pty Limited v Jones* (1985) 2 NSWLR 47 (CA); *John Fairfax and Sons Limited v Police Tribunal of New South Wales & Anor* (1986) 6 NSWLR 465 (CA) applying *Scott v Scott* [1913] AC 417.