"Freedom of Information - a view from Australia"

*Conference on Freedom of Information*

Hong Kong 6-8 March 1994

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CONFERENCE ON FREEDOM OF INFORMATION

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# FOI - A VIEW FROM AUSTRALIA

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## AN INHERITANCE OF SECRECY

The government of Australia is, overwhelmingly, the gift of the laws and traditions of England. Our legislatures are modelled on the Parliament at Westminster. Our system of Cabinet Government, with Ministers sitting in Parliament, follows the English tradition. It has many advantages of accountability which other, presidential systems lack. Our courts are independent of the other branches of Government. Most judicial officers enjoy independence derived from promises of permanent tenure modelled on the *Act of Settlement*.[1] The common law of Australia is developed from the common law of England.

Only in the Federal constitutional arrangement, and the provision of a written constitution necessitated by it, did we follow the model of the United States. Our Founding Fathers rejected the notion of a Bill of Rights. Successive attempts to introduce such rights into the constitution by referendum have failed. In 1992, however, the High Court of Australia found that certain rights of free expression on matters of politics and economics were necessarily implied in the democratic system of government enshrined in the written constitution. The Court struck down, as invalid, Federal

legislation which sought to prohibit paid political advertising at elections.[2]

With these inestimable gifts - which have produced a polity of relative freedom and enduring stability - also came English notions of public administration. They had their good side: general integrity; the absence of widespread financial corruption; competitive entry to the service; advancement, normally on merit, and a tradition of political neutrality. But with these desirable qualities came an aura of secrecy which still infects the public administration of most countries of the Commonwealth of Nations. Like Barbados, India, Jamaica, Malaysia, Mauritius, Nigeria and Zimbabwe we adopted legislation based on the *Official Secrets Act* 1911 (UK) prohibiting disclosure of broad and vaguely defined categories of government held information. Even where disclosure would serve the public interest by revealing criminal activity, abuse of authority or other misconduct, the obligation of secrecy was upheld. And this tradition of secrecy long preceded the Act of 1911. In fact, it grows out of the hierarchical nature of British society. It derives strength from the assumptions of the class system, unequal educational opportunities and the very notion that people are "subjects" of the State. Everyone has his or her place. In the governance of society, as it has been said, nanny knows best.

The atmosphere of secrecy which we inherited drew upon the historical development of the central administration in England around the person of the Sovereign. One of Australia's greatest jurists, Sir Owen Dixon, described it thus:[3]

> *"The counsels of the Crown are secret and an inquiry into the grounds upon which the advice tendered proceeds may not be made for the purpose of invalidating the act formally done in the name of the Crown by the Governor-General in Council. It matters not whether the attempt to invalidate an order, proclamation or other executive act is made collaterally or directly. One*

*purpose of vesting the discretionary power in the Governor-General is to ensure that its exercise is not open to attack on such grounds ..."*

One of Sir Owen Dixon's successors as Chief Justice of Australia, Sir Harry Gibbs, defended, as lately as 1978, the need for a high measure of confidentiality at the centre of government in Australia in these terms:[4]

> *"... the law recognizes that there is a class of documents which in the public interest should be immune from disclosure. The class includes cabinet minutes and minutes of discussions between heads of departments ... papers brought into existence for the purpose of preparing a submission to cabinet ... and indeed any documents which relate to the framing of government policy at a high level ... One reason that is traditionally given for the protection of documents of this class is that proper decisions can be made at high levels of government only if there is complete freedom and candour in stating facts, tendering advice and exchanging views and opinions, and the possibility that documents might ultimately be published might affect the frankness and candour of those preparing them. Some judges now regard this reason as unconvincing, but I do not think it altogether unreal to suppose that in some matters at least communications between Ministers and servants of the Crown may be more frank and candid if those concerned believe that they are protected from disclosure. For instance, not all Crown servants can be expected to be made of such stern stuff that they would not be to some extent inhibited in furnishing a report on the suitability of one of their fellows for appointment to high office, if the report was likely to be read by the officer concerned."*

Chief Justice Gibbs acknowledged that these considerations did "not justify the grant of a complete immunity from disclosure to documents of this kind". But he gave voice, at a time which was relevant, to one of the chief arguments against the introduction in Australia of freedom of information (FOI) legislation.

FOI legislation had a long history in Sweden. Its passage in another common law federation, the United States of America, in 1967 gave the initial impetus to the Australian debate. The United States measure attracted academic[5] and political[6] praise and

commentary.

## THE AUSTRALIAN FOI ACT

The election of the Australian Labor Party to government in 1972 after 23 years in Opposition heralded a platform promise to introduce "open government". The new Prime Minister, Mr Gough Whitlam, had strongly criticised the ethos of secrecy which the Menzies Government and its successors, ever Anglophile, had adopted.[7] The result was an inter-departmental committee of 1973 specifically to review the US *Freedom of Information Act* and to consider its suitability in the Australian system of Parliamentary and Cabinet government. The committee secured little public or political attention. Its report was criticised by a following Royal Commission on Australian Government Administration. A dissenting member of that Commission (Mr Paul Munro) proposed a draft FOI Bill - the first in a series.

The return to government of the Liberal and National Parties Coalition in 1975, far from halting the moves towards FOI legislation, saw the process gather momentum. Within the Coalition there were strong supporters for legislation which would confer enforceable rights. The mere promise of an ethos of openness was considered insufficient, given that FOI tends to be more popular with politicians in Opposition than in Government. More favoured on the brink of an election than in the long haul of politics.

In 1978 an FOI Bill was introduced into the Australian Federal Parliament. It was referred to a Senate Standing Committee on Constitutional and Legal Affairs. That Committee produced its report in 1979. The report proposed many amendments to the Government's Bill, particularly to reduce the power of Ministers to determine conclusively categories of exempt documents. The report also sought to enhance external review of exemption decisions by the

Administrative Appeals Tribunal - an independent Federal body run on judicial lines.

The Government responded to the Senate Report in 1980. On the key issues the Government rejected most of the Committee's proposals. The Bill, modified in minor respects, was passed through the Federal Parliament. But its commencement was delayed. It came into operation in December 1982, just three months before the defeat of the Fraser Government and the election of the Hawke Labor Government. Upon its election, in accordance with its electoral promise, that Government introduced amending legislation which was enacted in 1983 and came into force on 1 January 1984. The amendments gave effect to many (but not all) of the proposals of the Senate Committee.[8]

It will be observed how there is a constant tension between the executive government (Ministers and their officials) and the legislature. One distinguished member of the Australian Federal Parliament (later, for a time, a Minister), Mr Barry Jones, described a feeling which may not be unknown at Westminster or to other legislators:

> *"In Canberra I feel like a member of a football team which never plays at home - the public servants have collectively about 85% of the information and we have about 15% - much of which is acquired from leaks and newspaper reports."*[9]

The Australian Federal FOI statute requires three kinds of disclosure:

1. Disclosure by publication of information concerning the operations of agencies so as to make known the utility of FOI (s 8);
2. Disclosure by publication of certain documents (the "internal law") of agencies (s 9); and

3. Disclosure of documents to persons who make an FOI request for documents which are not excluded from the Act, exempt from disclosure or amenable to discretionary withholding in particular circumstances.

These are minimum requirements. The Federal *FOI Act* in Australia does not *prohibit* any kind of disclosure or publication of documents or information. Section 14 of the Act recognises this by providing that nothing in it is intended to prevent or discourage the publication or provision of access to documents (including exempt documents) otherwise than as required by the Act.

Provision is made for the amendment of personal records which are accessed under the Act, for internal review and for appeal to the Administrative Appeals Tribunal (AAT) against refusal to correct such records. These provisions are now supplemented by separate Federal privacy legislation in Australia.

The decision of a Minister or a Federal agency to deny access or to withhold documents is, in most cases, subject to review. A person may request an internal review by the principal officer of the agency. Generally, this is a precondition to external review. If the person is still dissatisfied with the response the jurisdiction of the Federal Ombudsman may be invoked. There are, however, certain limits on the Ombudsman's powers: specifically, he may not investigate action taken by a Minister. In those cases where the applicant still remains dissatisfied, an application can be made in the majority of cases for review by the AAT of whether the document is "exempt" under the *FOI Act*. Where an exemption is claimed by virtue of a certificate given under certain provisions of the Act, the AAT has no function other than to refer the request to a Presidential Member(s) to consider whether there exists reasonable grounds for the claim to be made. Any decision is then simply a

recommendation to the appropriate Minister. He or she retains the power to decide whether or not to revoke the certificate.

Outside these administrative functions the Federal Court of Australia retains a general power of judicial review on questions of law. Such decisions may, in turn, by special leave, be considered in Australia's highest Court, the High Court of Australia.

When the legislation was enacted, the response of the Federal bureaucracy was mixed. One apocryphal administrator was reported as saying "look on this and weep". Various extravagant claims were made, namely that the Act would result in:[10]

* The fall of the Westminster system of government as we had known it;
* The loss of frankness and candour amongst public servants, particularly in giving advice to Ministers;
* The inability of the Government to function properly when its every action was open to public scrutiny; and
* The imposition of inordinate costs and the ultimate triumph of lawyerly concern with the *process* rather than the *outcome* of administrative action.

As I shall endeavour to show, none of these dire prognostications has been borne out. That is not to say that there have not been problems with the Australian legislation and its operation. I shall revert to these problems. But first I wish to trace the spread of the FOI idea throughout Australia, beyond the Federal jurisdiction.

## THE FOI IDEA SPREADS IN AUSTRALIA

The Federal *FOI Act* in its original form came into force on 1 December 1982. Since then, all of the States of Australia, and the Australian Capital Territory, have introduced FOI legislation modelled substantially (but with local differences) upon the Federal

statute. A table sets out the commencing dates:[11]

Each measure listed creates a legally enforceable right of access to information contained in documents, except for Tasmania where the right is to access to information in "records" defined in a similar way as "documents" in other legislation. "Documents" are typically defined widely, to encompass any record or information which is capable of being reproduced. Thus, the term includes, as well as ordinary paper documents, photographs, holograms, maps, plans and computerised records.

In all Australian jurisdictions the legislation applies to documents in the possession of a Minister, held in the Minister's official capacity; a government department; and a public body or office, other than those specifically exempted (eg security intelligence agencies, courts in their judicial function, royal commissions, parliament, and various commercial operations of government). In Tasmania there are no exempt governmental bodies or agencies (other than the judicial functions of the courts). Some of the exemptions appear, as expressed, unnecessarily wide. In Victoria, for example, school councils are exempt. In South Australia and under the West Australian Act, the Parole Board is exempt but not in other States. In most jurisdictions the legislation applies to Local as well as State government. However, in Victoria it does not extend to Local Government. In New South

Wales it extends to Local Government only in respect of personal information documents. In South Australia separate legislation (Local Government, (*Freedom of Information Amendment*) Act 1992 (SA)) extends a similar régime to Local as to State government.

Under all Australian statutes and legislative proposals, jurisdiction is available to documents which came into possession of the Minister or agency before the FOI legislation commenced. Generally speaking, the operation of retrospectivity is five years for non-personal information with unlimited retrospectivity for access to personal information.

Each Australian statute contains an objects clause, except the South Australian *Local Government Amending Act* where the object is self-evident. A typical objects clause is s 3 of the Federal Act which reads:

> *"3(1) The object of this Act is to extend as far as possible the right of the Australian community to access to information in the possession of the Government of the Commonwealth by:*
>
> *(a) making available to the public information about the operations of departments and public authorities and, in particular, ensuring that rules and practices affecting members of the public in their dealings with departments and public authorities are readily available to persons affected by those rules and practices; and*
>
> *(b) creating a general right of access to information in documentary form in the possession of Ministers, departments and public authorities, limited only by exceptions and exemptions necessary for the protection of essential public interests and the private and business affairs of persons in respect of whom information is collected and held by department and public authorities."*

The FOI legislation in Australia typically contains no restrictions on who may have access to government held information. Thus residency, citizenship or age qualifications are not imposed. In

some jurisdictions a fee is fixed. Its payment is a precondition to the provision of the documents requested.

It will therefore be observed that within Australia, we have passed beyond debates on the philosophical, political and practical questions of whether FOI, as such, is desirable and should be introduced. It is now generally accepted that it is, that the worst prognostications of disaster have proved unfounded and that generally good outcomes have followed the legislation in those jurisdictions where it has now been in operation for some time. Most of the debate in Australia has centred around the definition of exempt documents, ie those in respect of which requests may be refused, or those concerning activities which are exempted from disclosure, and those for which an exemption can be claimed on specific grounds or until particular steps are taken (eg consultation with an individual whose personal interests are affected or a business whose secrets possessed by government might be disclosed).

One of the more controversial exemptions is that where the work involved in processing the request for access would involve "an unreasonable diversion of the agency's resources". This is provided under the Federal Act,[12] its Australian Capital Territory (ACT) counterpart,[13] the South Australian[14] and Tasmanian[15] statutes. The Queensland Act[16] contains a like provision. There are no similar provisions in Victoria, New South Wales or Western Australia. Some exceptions are common to all statutes. They include:

* Disclosure affecting national security, defence and international relations;
* Commonwealth and State relations;
* Cabinet documents;
* Executive Council documents;

- Internal working documents;
- Law enforcement and public safety;
- Compliance with secrecy provisions in other statutes;
- The financial or property interests of the government;
- Operations of agencies;
- Personal privacy;
- Legal professional privilege;
- Business affairs of others;
- Disclosure which would involve a breach of confidence; and
- Disclosure which would involve contempt of parliament or of a court.

All of the Australian statutes provide for procedures of internal review. In all jurisdictions except Queensland and Western Australia, provision is made for the Ombudsman of that jurisdiction to provide various forms of review. In the Queensland and Western Australian Acts, the Canadian model has been preferred: an Information Commissioner is proposed and that office-holder will have the power to determine matters in contest. No other form of external decision-maker is provided. Under the Federal, Victorian and ACT statutes the Administrative Appeals Tribunals have, in specified areas, determinative functions. In New South Wales and South Australia the District Court is given such powers, there being no State AAT in those States.

In all jurisdictions a time is fixed within which a decision must be made upon the request for access to official documents. Under the Federal and ACT statutes this time is 30 days. In all of the States it is 45 days (with minor variations). All jurisdictions impose fees or charges. Typically no charge is made for access to personal information of the requestor. But otherwise an hourly fee is levied. In some jurisdictions, charges are laid down for

photocopying documents.

## THE GENERAL IMPACT OF THE FOI LEGISLATION

It is obviously premature to attempt in 1993 any general assessment of the Australian FOI legislation. In one jurisdiction, the Act is not yet law. In others, it has only lately been passed. Even in the Federal sphere, and in the State of Victoria, the legislation has only been in operation for a decade. It is difficult in a decade to change the fundamental attitudes of public administration. In the State sphere these go back to colonial times. The government of what began as prison colonies was not fruitful territory within which to harvest the ideas of FOI transplanted from their Nordic origins via the right-asserting citizenry of the United States. Yet within the past twenty years the same process of transplantation had occurred with respect to the reform of divorce law (irretrievable breakdown of marriage) and in the acceptance throughout the Commonwealth of Nations of the Ombudsman idea. In a global community, we must be ready for the reception of legal notions from outside the common law world. Increasingly, the ideas of the civil law system are entering English law through the jurisprudence of the European Court of Justice. "Proportionality" as an additional, fourth ground for judicial review is one such notion.[17] Having gained a foothold in England via Europe, its influence is now spreading to other common law countries, including Australia.[18]

This said, it is appropriate to see FOI as a notion in a different class. It is properly perceived as relevant to central, even constitutional, notions of the relationship between the governed and their governors. In that sense, the idea carries with it notions of citizen empowerment[19] which are quite different from those which, before FOI, buttressed the administrative and political

systems of the English tradition. The notions of confidentiality and secrecy of administration were "so firmly rooted in our political tradition" that it was difficult for some Australian observers before FOI[20], and many still in Britain, to imagine that their system of government could properly function without such confidentiality and secrecy. Naturally enough, the common law buttressed these constitutional notions. Access to public records was denied in 1907 with the explanation:

> *"Mere curiosity and desire to see and inspect documents is not sufficient."*[21]

This notion is fundamentally antithetical to the central idea of FOI. An Australian commentator has described the new notion:

> *"Freedom of information ... places government and governed on a more equal footing. It opens a dialogue between them through which the interplay of interests and values can be given fuller rein. Sound decision-making is the principal beneficiary.*[22]

The improvement of the quality of decision-making is a constant theme of the proponents of FOI, at least in Australia. Senator G J Evans, now Foreign Minister but then Attorney-General, piloted the 1983 amendments to the Federal Act, based upon the Senate Committee's recommendations. In a Foreword to an Australian book on FOI law, he suggested three "basic aims" for FOI legislation:

> *"The first is simply to protect the rights of individuals - to give people the right of access to information about themselves held in government files, and the right to correct that information if it is misleading or untrue.*
>
> *The second is to ensure wider dissemination of information gathered at the public expense on topics such as product safety, engineering feasibility, environmental hazards and so on.*
>
> *The third, and perhaps most important of all, is to improve the quality of decision-making in the public sector - both by keeping people informed of the workings*

*of the decision-making process in policy formulation and administration, and by throwing the spotlight of public scrutiny on Government mistakes in the past to ensure that they are not repeated in the future."*[23]

Improved quality of decision-making is mentioned in virtually every Australian commentary on the objects of FOI law.[24] However, some observers remain sceptical, asserting that there has been little noticeable improvement.[25] Still others contend that there have been distinct gains.[26] Yet the more fundamental question goes behind the arguments of utilitarian character which are dutifully paraded by supporters of FOI. This is a question which is posed by conceptions of the wider political and constitutional framework in which FOI operates. It is essential to understand that framework and to see FOI as an aspect of it.[27] Seen in this light, 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 may have a very real interest in preventing access to information about their actions. And if it is not them, it is the unaccountable public "service" whose power has been greatly enhanced this century by the growth of the complexity of decisions which have to be made and by the decline of Parliament effectively to supervise those decisions. These are not just local problems for Britain or for Australia. They are universal problems of adapting the Westminster system of government to the realities of modern administration in a complex world.

One of the most balanced reviews of the impact of the Australian Federal FOI legislation was written by a Melbourne

barrister, Mr Spencer Zifcak.[28] He lists a number of achievements of the first decade of FOI:

1. The Federal administration has become more open. Increasingly, access to information is granted informally without the need for formal procedures. Many people have thus become more aware of agency operations giving rise to greater understanding of issues and, sometimes, to more well targeted criticisms;
2. Systematic changes have been introduced in information management and record keeping in order to permit the more timely response to FOI requests as required by the statute. Manuals and rules of procedure may now be accessed. They often affect, in practice, the rights of individuals. Their rules have been revised to take into account the right of public access to them;
3. Whilst there is some evidence that less material is now committed to paper which can be accessed, this "detriment" is "outweighed significantly by improvements in the quality of what is written". The possibility that official records may be accessed often acts as an incentive to "reason and discretion"; and
4. Errors, once disclosed, have been corrected. Political embarrassment has sometimes been caused but not unduly or undeservedly so. The parliamentary institution is enhanced. Its procedures for rendering government accountable have been improved to the benefit of our constitutional arrangements.

This author gives a number of practical instances where the Australian FOI Act operated in a beneficial way:[29]

* The Australian Army intended the purchase of land near Bathurst in New South Wales for training purposes. The proposal was

resisted by the local community. They used the FOI Act to obtain certain Army documents. These demonstrated that the proposed acquisition would not meet the Army's stated requirements. This information undermined the evidence which had been presented by the Department of Defence to an Australian Senate Enquiry. The proposed purchase was abandoned. The saving to the Federal Treasury was considerable;

* The Shadow Attorney-General secured access to documents under the FOI Act which showed that the Minister for Tourism had misled the Federal Parliament. As a result the Minister was obliged to resign;

* The Minister for Justice was embarrassed by the release of documents showing that he had failed, in answering a Parliamentary Question, to disclose part of advice given to him by the Federal Police about an applicant for a casino licence in Canberra; and

* The Federal Government was forced to reverse its decision to exclude the Australian Bicentennial Authority from the coverage of the FOI Act after documents, obtained under that Act, cast doubt on a legal opinion advising the basis on which the Authority should be excluded completely from the Act's operation.

Thus, so far as Australia is concerned, whether your concern be the fundamental issue of principle about the nature of the country's political and constitutional system or whether it be the practical determination to improve the operation of that system, it can be said that most observers would acknowledge that FOI legislation has proved justifiable. Its spread to every jurisdiction on the Australian continent is the result.

## SOME PROBLEMS IN AUSTRALIAN FOI

Passing beyond the question *whether* FOI should be introduced to *how* FOI may best operate, a number of problem areas have been exposed in Australia. It is appropriate to call these to the notice of a jurisdiction about to embark on such legislation. I pass over the machinery of external review. There are arguments for the use of independent tribunals and courts. There are also arguments for the creation of an Information Commissioner with contingent powers to decide disputed claims for access to official documents.[30] In Australia, both systems have found supporters. Some of the criticism of the Federal FOI Act has been directed at the "judicialised" procedures adopted by the Federal AAT. These are seen by some observers as dilatory, expensive, intimidating and likely to lend themselves to the determined administrator or powerful corporation seeking to deny access.[31]

The analysis of particular formulations of exemptions and exceptions would be an unproductive project. The Australian Federal, State and Territory legislation shows a high measure of commonality but also a variety of differences which permit different choices to be made. Some of the decisions of the Federal AAT have reflected a cautious approach to key exemptions under the Federal Act. According to Mr Zifcak, this caution has "increased rather than decreased with time".[32]

An illustration can be given in respect of Cabinet documents. The fundamental rationale for exemption of such documents is to ensure that members of Cabinet can discuss sensitive matters of State freely and comprehensively without prejudice to any final decision and without the danger that they will be embarrassed in the political fora by the premature revelation of their individual views. This, it

was complained, could undermine Cabinet solidarity. It is also appropriate to remember in this connection what Lord Croham said in a BBC radio "analysis" last year:

> *"The fact that makes Ministers sensitive is that every Cabinet that I've known is a Coalition and there are plenty of members of most Cabinets who regard the people on the other side of the table as their enemies rather than their friends. So that they don't really want too much of this exposed."*[33]

The same position obtains in Australia. Nobody denies that documents should be exempt if they disclose the "views or votes of members of Cabinet expressed or given in Cabinet". However, the raw material prepared for such Cabinet deliberations continues to be protected under the AAT interpretations of the Australian exemption. That exemption is more broadly defined than would be necessary simply to protect the convention of collective Ministerial responsibility, which is undoubtedly useful to decisive Cabinet government. In *Re Porter and Department of Community Services and Health*[34] the exemption was interpreted as meaning that any and every document which had been submitted to Cabinet for consideration would be prohibited from disclosure. The ensuing risk is that documents will simply be marked "For Cabinet" and thereby slip out of the Act and return to the secrecy which is so familiar and congenial to many officials and Cabinet members. This result should be guarded against.

Similarly, "internal working documents" have been exempted upon the basis that, in deriving policy decisions, Ministers and officials should have free and candid debate without the inhibition that their opinions may be publicly disclosed at a premature stage of their development. Under the Australian Federal FOI Act such internal working documents are exempt where their disclosure would be contrary to the public interest.[35] This qualification requires the

Executive Government to state clearly the adverse effect on the public interest of any such disclosure. The AAT, in *Re Howard and Treasurer of the Commonwealth*[36], held that a number of considerations would tend to indicate that disclosure would not be in the public interest including (a) the higher the level of communication; (b) policy documents; (c) where disclosure will inhibit candour and frankness; and (d) where the documents do not fairly disclose the reasons for the decision taken. As Mr Zifcak comments, "no similar set of criteria specifying considerations which favoured disclosure was enunciated". Unfortunately in my opinion, *Howard* has become highly influential in decisions concerning "public interest" in Australia. The notion of what is in the "public interest" appears to antedate the philosophy of the FOI Act itself. It could be desirable to give statutory guidance or to make clear where the burden of proof lay so that "public interest" which often exists in *disclosure* will ordinarily be seen to take pre-eminence.

There has been some controversy in Australia concerning the exemption of documents affecting "personal affairs". To fall within the exemption it must be shown that the disclosure would be "unreasonable". The clear purpose is to prevent FOI being used as an instrument for the invasion of personal privacy without clear justification. There have been a number of inconsistent interpretations of the relevant criterion: "unreasonably affect".[37] They demonstrate the importance of coordinating FOI legislation with privacy (or data protection) legislation so that the clear purpose of the exemption is secured without closing off access to information of general importance simply because it makes passing reference to an individual.

A fourth class of exemption which has caused difficulty in

Australia relates to commercial documents. Many commercial organisations are obliged to provide information to government which they would otherwise wish to keep confidential from their competitors. Accordingly, it is common to find in FOI statutes exemption from disclosure where such disclosure would reasonably be expected to reveal "trade secrets"; diminish the commercial value of the information; have an adverse effect on the provider's professional and personal affairs; or prejudice the future supply of information to government.

As with personal privacy protection, the exemption from access must not be "unreasonable". Early decisions of the AAT recognised that the limited exemption was designed to ensure that a balance was kept in competing public interests involved here. However, in *Re Maher and Attorney-General's Department [No 2]*[38] the applicant sought access to documents regarding the government's approval of the settlement of the Westinghouse Corporation's anti-trust proceeding. This was a matter about which there had been considerable controversy. Allegations of impropriety both in Australia and overseas were made. The AAT held that the adverse effect of disclosure on the company's commercial interests prevailed over the asserted right to access.

Summing up these decisions, in aggregate they demonstrate a possible over-estimation in Australia of the potential detriment of disclosure. Whilst this has made the life of the administrator in Australia somewhat easier, it has diminished to that extent the statute's fundamental objective of a more open public administration.

## THE FUNDAMENTAL PROBLEM OF GOVERNMENT ATTITUDES

In his Reith Lectures in 1984 titled *Government and the Governed* Sir Douglas Wass observed:

*"More important, in my view, than any institutional changes is the need for a commitment on the part of all who work in the field of government positively to want an informed public. If this is lacking, little in the way of machinery will help."*

A deep-seated problem in Australia can be seen in abiding administrative and political resistance to the FOI idea. Such resistance does not die out with the passage of legislation. Indeed, the passage of FOI legislation is merely the opening salvo of a new battle to secure bureaucratic and political acceptance of the ideas of the legislative purpose. The cultures of administration and politics are not changed overnight by such measures. Resistance to their operation can be seen in many ways. Thus, in response to requests for policy documents, it is not uncommon in Australia for the applicant to be sent Ministerial Second Reading speeches and political party manifestos. The real "jewels" of internal administrative documentation will often be held back.

From the start, one of the principal sources of resistance to FOI in Australia was the alleged cost. It was said that it was quite a good idea but would simply be prohibitively expensive. Needless to say, this argument gains wider currency in times of economic hardship where the tendency is to cut back on government services, not to expand them. In Australia, exaggerated claims of cost have been made from the start. Take Harrison's gem in a book she prepared on how to use the Federal FOI Act:[39]

"The Department of Communication ... took an expansive, and expensive, approach to the Act in the beginning, and spent over 300 hours answering a request for documents relating to cable and pay TV policies. Of course some agencies have different ideas of what amounts to a large request. The ABC commented in its *Annual Report* that the requests it was getting were more time-consuming than anticipated, and noted that some requests had taken 10 hours to answer!

These expansive practices seem to have come to a halt, and most agencies are now engaging in much more

consultation with people putting in large requests, to make them cut them down to a more manageable size."

The costs of FOI in the State spheres in Australia are not yet entirely clear. So far as the administration of the Federal FOI Act is concerned, it was estimated in 1989-90 that the Federal government spent $10.5 million as a consequence of the Act. The average cost of processing a request was $447. The Federal authorities recouped only $310,000 in fees and charges. However, this low return is misleading. Most requests for access to documents related, unsurprisingly, to personal records. The difference between the cost of administering the Act and the charges recouped was given as one of the reasons for the introduction, in 1986, of much higher charges for access than had previously prevailed. At the time, these increases sparked a controversy which continues.

Some departments in the Federal administration in Australia were cooperative from the start. Thus, the Department of Veterans' Affairs, with a well organized, defined clientele, responded positively to 97% of requests addressed to it. Other agencies were less forthcoming. Refusals increased in respect of agencies whose records consist mainly of policy, administrative or law enforcement documents. The closer the applicant comes to the political heart of government, the more likely is it that access to documents will be contested. Nevertheless, for the year 1989/90 applications under the Federal FOI Act in Australia numbering 16,000 produced a 75.1% provision of access in full; 21.6% in part. Only 3.3% resulted in a refusal of access altogether. This does tend to demonstrate a measure of success in the operation of the Act.[40]

Despite this, there has been an increasing attention to costs and more frequent noises about the need to limit the operation of the Act. The result has been an increasing number of contested cases in

which restrictive operations of the FOI Act's provisions have been advanced by the administration before the AAT and the Federal Court.[41]

Fees for access have been introduced. Costs of initiating proceedings in the AAT are now substantial. In Australia, there has been increased talk of "managerialism" in relation to the administration of justice. Thus, in my own Court, to take the facility of the right of appeal provided by Parliament it is now necessary for the litigant to pay a filing fee of $AUD1,725 (approximately £550). The notion of "user pays" has finally arrived at courts and tribunals in Australia . It is to be hoped that governments, who fix court and tribunal fees, will keep in mind the social benefits of their activities which go beyond the rights of the individual in the particular case. The individual litigant should not be expected to pay, or to pay fully, for the social benefit of a manifestly accountable and open government. This is a benefit for the whole of society.

The Head of the Federal Attorney-General's Department in Australia, Mr Alan Rose, in a paper on future directions for Australian administrative law has concluded:

> *"Having reached maturity, it is not easy to see the Commonwealth administrative and judicial review system making more than advances at the margin in improving the quality of policy development or decision-making."*[42]

Other administrators show an enlightened view of the true cost/benefit equation which is at work here.[43] But, in Australia, we are entering a phase of administrative managerialism in which user-pays notions will have an increasing impact. At this stage, charges made, both in the Federal and State spheres, do not cover the full costs of the operation of FOI legislation. That full cost is difficult to quantify.[44] The Senate Standing Committee

on Legal and Constitutional Affairs reviewed the Act in 1987. But it was largely confined to anecdotal evidence in assessing FOI's costs and benefits.[45] Informed commentators point out that a user-pays principle for the disclosure of policy documents impedes the achievement of the legislative object of FOI legislation by deterring impecunious applicants. It also damages fairness in the sense of distributive justice by which the disclosure of impropriety and the assurance of lawfulness and good administration should be borne by all who benefit from these values and not be a burden on those who take the initiative to uphold them.[46] In approaching new FOI legislation, it is important to keep these considerations in mind.

The enthusiasm for FOI of the government of the day, and of the administration under its direction, is extremely important for the success of FOI legislation, particularly at the start. If the politicians are ambivalent and if the bureaucrats are fundamentally resistant, the legislation will not be as effective as it should be. Knowledge of it, and of the right to use it, will be kept a secret by limiting promotion of awareness of the FOI régime. In New South Wales, the introduction of the State FOI Act followed two earlier failed attempts by a Labor Government to introduce such legislation. The incoming Liberal (conservative) Premier was determined to get the legislation through Parliament. And he succeeded. Moreover, he initially centralised the operations of the statute in his own Department. A unit was established there which supervised the compliance with State FOI requests. It had the support of the Premier who saw it as part of a scheme for better management and more open public administration. Later, power was devolved to the various departments and agencies of the State. But the initial support from the highest political officer undoubtedly gave the legislation a

vital boost. Moreover, the Premier's commitment led to special attention to communicating knowledge about FOI rights. An excellent procedure manual[47] was developed. Brochures were prepared. Posters were displayed in government offices. Pamphlets were prepared in the languages of major ethnic communities in Australia.[48] Books began to appear telling people how to use the legislation. It is not easy to select a political mentor of such legislation. But if he or she happens to be at the top of the political hierarchy, it certainly helps to secure the success of the FOI régime.

## THE FUTURE

Enough has now been said to show that, by 1993, in Australia, FOI is an established feature of the political landscape. Its significance for opening up the system of government should not be exaggerated. Time-honoured administrative attitudes take more than a decade to undergo fundamental change. The numbers of applications under the legislation have not been as overwhelming as the gloomy predictions of the bureaucrats in the early 1980s suggested. Nor have the costs been as gross as the doomsayers would have claimed. In terms of the total cost of administration, the marginal cost of FOI is relatively slight. Even if, in part, FOI encourages more attention to honesty, lawfulness, integrity and better decision-making for fear of subsequent disclosure, that will be no bad thing.

It is too early to judge the impact of the Australian FOI legislation or of the different procedures and formulae used in the different Australian statutes. There have been disappointments. These include the relative under-use of the legislation by academics[49] and business interests and the neglect of the facility, at least at the start, by journalists accustomed to

handouts and press releases and disinclined at first to mobilize this new machinery for investigative journalism.[50] Journalists and Opposition politicians tend to be like lawyers faced with an important new principle of law. It takes most of them years to get to know of it; years more to learn how to use it and even then it is all too easy for them to slip back into their old ways. The worst fears about FOI, like the most starry-eyed projections, have tended to be exaggerated.

Just as it is important to see FOI in the constitutional setting of a society determined to devolve power and to enhance the power of ordinary citizens, so is it also essential to see FOI in the context of global politics and international technology.

So far as politics is concerned, the fall of the Berlin Wall and the dismantlement of the huge empire of espionage which sustained and responded to the governments which lay behind it, removed at least one of the major suggested reasons for upholding the ethos of secrecy in public administration in Western countries. It is true that there are new dangers. However at least the urgent peril of nuclear warfare seems to have receded. In more optimistic times it is appropriate to adopt a more open régime of access to public information. The old catch-cry about national security and national defence is much less convincing today than once it was. Behind that catch-cry lay many wrongs which could not be lawfully disclosed in Britain.[51]

One particular difficulty of persisting with a régime of secrecy is that it tends to be undermined, and even made to look ridiculous, where the rest of the world adopts a régime of relative openness. Thus it is now possible to secure access to files in Moscow, and the Stasi files in Berlin to acquire information which is not accessible in the United Kingdom. There are many similar

instances where the use of the United States FOI Act requires the disclosure of data relevant to Britain which cannot be lawfully prized from British administrators. The examples are given in the publication of the newspaper for the Campaign for Freedom of Information, *Secrets*.[52] They start with the illustration of British cruise liners crossing the Atlantic. These are checked by health inspectors on both sides of the ocean. The British reports are secret. Yet the United States reports can be secured under FOI from authorities in that country. There are very many similar illustrations. The point is that, at least where several jurisdictions are involved, each with different FOI standards, the régime with the most open standard in today's world tends to set the pace. Information, once haemorrhaged anywhere is difficult to return to its bottle.

And this is where the global technology of informatics is relevant. It is a lesson which the *Spycatcher* cases ultimately teach. Not just that the British official secrets legislation was outdated. Nor even that such legislation, once reformed, still demonstrated an unacceptably paternalistic nanny-knows-best attitude to its citizenry. But rather that, in the face of different and more open standards in other countries which have derived their legal systems from Britain and in a world of global communications, the British standards become glaringly inappropriate and unsustainable. It is in this sense that FOI must be considered in the setting of the rapid advance of information technology. Increasingly, access to data bases containing material inaccessible in Britain will secure the self-same material, on line, from jurisdictions with a more open régime. This will highlight the injustice of a society which prevents its own citizens (or subjects) from having access to most of the information possessed by those whose authority derives from them.

In a lecture in the Guildhall in London a few years back I said that, speaking as a lawyer from a Commonwealth country, profoundly indebted to England for its great legal heritage, I thought the time had come for us to repay, in part, the gifts of the legal system which we had received. And I said that if it was within my power to offer one gift in return to the United Kingdom the gift I would offer, from Australian experience, would be a *Freedom of Information Act*. The experience in my country since those words were uttered has been entirely reassuring - perhaps even too much so. The impact on our constitutional and political system has been far from disastrous. The costs have been manageable. Civilisation as we know it has survived. We are, marginally, a more open society. Our administrators are marginally more accountable. Their decisions have probably become a little better. I believe that there are lessons in this for Hong Kong. On the brink of such important changes, it will be important that you secure the practical instruments of assuring accountable administration as well as democratic government.

There should be an end to one of the last vestiges of the tyranny of unaccountable rulers. It is a régime in tune with the realities of our world and of the global technology of information. More fundamentally, it is harmonious with the basic *ideas* of liberty and human rights which remain among the greatest gifts which the English have given and defended to Hong Kong and Australia, even when not perfectly executed in *action*:

> *"We must be free or die who speak the tongue that Shakespeare spake*
> *The faith and morals hold which Milton held."*

In the chambers of Parliament, Ministers and officials are ultimately accountable in public. They face regular questioning

before the world without notice. Even in sombre days of war, the affairs of this nation at the top are transacted in the open. The judiciary also performs its daily work in open courts. Those who judge may thereby also be judged. Not for such judges the disposal of cases on written dossiers considered by them in private. Openness is the hallmark of the judicial system which Hong Kong, like Australia, has derived from England.

In these features of these branches of government, the English tradition has had a profound effect throughout the world. It has set the example of openly accountable government in the six continents. Now the time has come to extend the logic of openness to public administration in the detailed activities of the executive branch of government. The tide of history and the basic political tradition of this country favour such a move. Democratic and accountable government suggest it. The world's movement to the advancement of fundamental human rights supports the move. The global technology of information stimulates such a move. The mood of the times and the will of the people demand nothing less than an FOI Act for Hong Kong. It is a small step. It is an insurance for the future. Take this step now.

## FOOTNOTES

* President of the Court of Appeal of New South Wales. One-time Chairman of the Australian Law Reform Commission and member of the Administrative Review Council of Australia. Chairman, Executive Committee, International Commission of Jurists. Personal views. Based on an address given in London, England on 8 February 1993.

1. But see *Attorney-General for New South Wales v Quin* (1990) 170 CLR 1; cf M D Kirby, "The Removal of Justice Staples - Contrived Nonsense or Matter of Principle" (1989) *Aust Bar Rev* 1.
2. See *Australian Capital Television Pty Limited & Ors v The Commonwealth* (1992) 66 ALJR 695 (HC). Cf *Nationwide News Pty Limited v Wills* (1992) 66 ALJR 658 (HC). See note M D Kirby, "Constitutional Protections for Free Speech" (1992) 66 ALJ 775.
3. *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1, 179.
4. *Sankey v Whitlam* (1978) 142 CLR 1, 39-40.
5. E Campbell, "Public Access to Government Documents" (1967) 41 ALJ 73.
6. J Spigelman, *Secrecy: Political Censorship in Australia*, Angus and Robertson, Sydney, 1972. Cf L J Curtis, "Freedom of Information in Australia", in N S Marsh, *Public Access to Government-Held Information: A Comparative Symposium*, Stevens, London, 1987, 172 at 173.
7. Curtis, *loc cit*.
8. P J Bayne, *Freedom of Information*, Law Book Co, Sydney, 1984, 6.
9. B O Jones cited Bayne, 7.

10. M Campbell, "Freedom of Information Legislation in Australia - A Comparison", unpublished note, 1992.

11. T Sherman, "Administrative Law - The State of Play" in *Canberra Bulletin of Public Administration, Fair and Open Decision-Making: Administrative Law Forum*, the record of the 1991 Australian Administrative Law Conference, No 66 (October 1991); Hereafter *Papers*, at 63.

12. *Freedom of Information* Act 1982 (Aust), s 24.

13. *Freedom of Information* Act 1989 (ACT), s 23.

14. *Freedom of Information* Act 1991 (SA), s 18.

15. *Freedom of Information* Act 1992 (Tas), s 20.

16. Freedom of Information Act 1992 (Qld), cl 28.

17. J Jowell and A Lester, "Proportionality: Neither Novel nor Dangerous", in *Current Legal Problems, Special Issue, New Directions in Judicial Review*, Stevens, London, 1989, 51.

18. See eg *The Liquor Administration Board of New South Wales & Anor v Macquarie Bank Limited & Ors*, unreported, Court of Appeal (NSW) 24 December 1992, 24 ff.

19. British Broadcasting Corporation, "Analysis", *The Last Right?*, transcript, 25 June 1992, 11, quoting Interviewer P Hennessy.

20. E Campbell, above, n 5.

21. *R v Southwold Corporation; Ex parte Wrightson* (1907) 97 LT 431, 432. See Bayne, above n 8, 2.

22. See S Zifcak, "Freedom of Information - Torchlight But Not Searchlight", in *Papers*, 162 at 168.

23. G J Evans, Foreword to Bayne above, n 8, vii.

24. See eg K Harrison, *Documents, dossiers and the inside dope*, PIAC, Sydney, 1984, 15; cf K O'Connor, "Reflections on the *Privacy Act*" in *Papers*, 20 at 22.

25. Harrison, 8.

26. O'Connor, 22. See the comment of P S Wilenski, Senate Standing Committee on Constitutional and Legal Affairs (Aust), 1987, *Report on the Operation and Administration of Freedom of Information Legislation*, 31. The then Head of the Australian Public Service Board described the legislation as "very beneficial".

27. See C Saunders, "Lessons and Insights from Other Common Law Countries" in *Papers*, 106, 107.

28. Zifcak, 162.

29. *Ibid*, 163.

30. See I Eagles, M Taggart and G Liddell, *Freedom of Information in New Zealand*, OUP, Auckland, 1992, 494.

31. J Waterford, "Too Much Law, Not Enough Justice", in *Papers*, 143. See also Harrison, 15.

32. Zifcak, 162.

33. See BBC transcript, 2.

34. (1988) 14 ALD 403 (AAT).

35. *Freedom of Information Act* 1982 (Aust), s 36.

36. (1985) 7 ALD 626 (AAT).

37. M Paterson, "FoI and information privacy: a reasonable balance?" (1992) *Law Inst J* 1001 (Vic).

38. (1986) 13 ALD 98 (AAT). See also 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.

39. Harrison, 19.

40. Zifcak, 162.

41. See J Waterford, "Freedom of Information: How Free?" in A Kouzmin and N Scott (eds) *Dynamics in Australian Public Management: Selected Essays*, MacMillan, 1990.

42. A Rose, "Future Directions for Australian Administrative Law", in *Papers*, 137, 138.

43. O'Connor, 23.

44. M Allars, "Managerialism and Administrative Law" in *Papers*, 50 at 57.

45. Senate Standing Committee on Legal and Constitutional Affairs (Aust), *Freedom of Information Act* 1982: Report on the Operation and Administration of the Freedom of Information Legislation, pp no 441 of 1987, para 2.8.

46. Allars, 58.

47. New South Wales, Freedom of Information Unit, Procedure Manual, *Your Right to Know*, 1989. See also D Roden, "Some Considerations About Implementing FoI Legislation in New South Wales", in *Freedom of Information Review*, Issue No 41 (November 1992), 54.

48. Harrison, 122.

49. Harrison, 16.

50. J Henningham, "The Missing Exposé" in the *Independent Monthly*, October 1992, 11.

51. G Robertson, *Freedom, the Individual and the Law*, 6th ed, Penguin, London, 1989, 145.

52. No 22, July 1991, 2.