JUSTICE

BRITISH SECTION OF THE INTERNATIONAL COMMISSION OF JURISTS

FORTIETH ANNIVERSARY LECTURE SERIES

LONDON WEDNESDAY 17 DECEMBER 1997

FREEDOM OF INFORMATION: THE SEVEN DEADLY SINS

The Hon Justice Michael Kirby AC CMG

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The Hon Justice Michael Kirby AC CMG*

JUSTICE AND ALL THE DEMONS

I must start with a tribute to Justice. It is the jewel in the crown of the International Commission of Jurists (ICJ). Founded by an all-party group of lawyers in 1957, when autocracy was showing its true colours in South Africa and Hungary, it has become an indispensable guardian of human rights and the rule of law in the United Kingdom and far beyond. As ICJ President I am proud to pay tribute to forty years of achievement. And to add my voice to that of Lord Chief Justice Bingham and other

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* President of the International Commission of Jurists. Justice of the High Court of Australia.

leading jurists of this great country. May Justice continue, in Lord Bingham's words, to sharpen perceptions, deepen insights, voice concerns, challenge preconceptions and illuminate dark corners well into the new millennium that is about to commence[1].

Some of the problems which existed in 1957 have gone away. Pluralist democracies now exist in South Africa, Hungary and many other States. Yet we should take seriously Václav Havel's warning[2]:

> "The demons that have so fatally tormented European history - most disastrously of all in the twentieth century - are merely biding their time. It would be a tragic mistake to ignore them because of technical preoccupations with transfer funds, quotas or tariffs."

Those demons continue to stalk the world, not only in Europe. In comparison with countries such as Rwanda, Cambodia, Tibet and Bosnia, we in Britain and Australia have been blessed by a constitutional system that tends to fend off the worst of the demons. Yet we should never be complacent. Indeed, we must

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1 Lord Chief Justice Bingham's tribute to Justice appears in the Justice membership pamphlet, 1997.

2 V Havel, "The Hope for Europe", Address in Aachen, Germany, 15 May 1996 reproduced in *New York Review of Books,* 20 June 1996 at 88.

be in a constant stage of vigilance: demanding constant renewal of our governance so that it meets the needs of the people.

Thirteen years ago, in November 1984, I gave the Granada Guildhall Lecture, here in London. In the post-Watergate era, there were many demands for reform of the law governing the media and access to information[3]. I remember circumstances of the lecture well. Cold night. Historic setting. Mr Willie Whitelaw (as he then was), Deputy Prime Minister, in the chair. He introduced me fulsomely. Then, picking up my speech, which had been tenderly laid on the podium, he walked resolutely back to the chair. Puzzled, and apparently a little reluctant, he eventually surrendered my papers on my insistent demand so that I could make my speech. I remember thinking at the time that the acquisitive tendencies of government in the United Kingdom knew no bounds.

I finished my speech, thirteen years ago, with words which remain relevant. This is what I said[4]:

> "We in Australia, who inherited the ideas of freedom that sprang up and flourished not far from this

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3 M D Kirby, "Media Law Reform - Beyond Shangri-La" (1985) 6 *Media Law and Practice* at 117.

4 *Ibid*, at 134.

> famous Hall, owe many debts, intellectual and emotional, to you and to your laws. We share many institutions. Necessarily, we share many of the same problems and defects. But I believe, boldly, that for once we have some ideas ripe for your consideration. It will be a signal of the maturity of our relationships if you, who gave us so much, can now accept a little in return. Being an Anglophile, I would give you many things. But if you would accept one only, I would give you freedom of information. The wave is coming. It is borne forward by technology and by example. It renews accountable democracy. It stimulates responsible freedom in the media. It obviates the plagues of leaks that spring up in a world of too many secrets. It encourages a questioning and self confident citizenry. It deserves your belated attention. ... Impertinently [I] throw down this antipodean gauntlet."

The Swedish law on freedom of information (FOI) was first enacted in 1776. The United States federal law, in 1966. The Canadian *Access to Information Act* came in 1982. The New Zealand *Official Information Act* in the same year. The Australian federal Act immediately followed. Most major European nations have enacted FOI legislation[5]. The United Kingdom has remained, until now, the exception. A Private Member's Bill was introduced in the House of Commons in 1993 but was rejected by the then Government[6]. It is true that

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5 For the position in Ireland, see D Meehan, Freedom of Information Act 1997: Public and Private Rights of Access to Records held by Public bodies (1997) 15 *Irish Law Times* at 178.

6 Right to Know Bill 1993 (UK).

guidelines on open government were adopted as a Code of Practice[7]. But the code is not legally enforceable, although complaints can be made to the Parliamentary Commissioner[8]. My gauntlet, like that of Simon de Montford, remains unrequited. But at last, on 11 December 1997, the government's proposal was published. It promises action[9].

A CHANGE IN GOVERNANCE

To a friendly outsider, the last few months appear to have brought about, or foreshadowed, a very considerable - even constitutional - change in the governance of Britain. Perhaps the news that has caught most attention of lawyers in other countries of the common law has been the introduction of the Human Rights Bill into Parliament. Presenting the Bill, the Lord Chancellor (Lord Irvine of Lairg) paid tribute to Lord Scarman, present in the House, for his long advocacy of such a measure.

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7 *Code of Practice on Access to Government Information* (UK), commenced 4 April 1994. See House of Commons, Select Committee on the Parliamentary Commissioner for Administration, Second Report, *Open Government,* 1996. cf P Birkinshaw, "'I only asked for Information' - the White Paper on Open Government" [1993] Public Law 557-558.

8 *Code*, cl 11.

9 United Kingdom, White Paper, *Your Right to Know,* 1997 Cm 3818. See House of Commons, Parliamentary Debates (Hansard), 11 December 1997, at 1183.

The Lord Chancellor also paid tribute to Lord Lester of Herne Hill, an indefatigable advocate of human rights legislation. The latter in an article in *The Times* has said that the Bill, if enacted, would bring about the end of the "elective dictatorship" which the second Lord Hailsham had said was the special feature of the government of Britain.

In future, people in this country with complaints that the law breaches fundamental human rights will not have to go to Strasbourg. They will be entitled to bring their complaints to the courts of this country. Lord Irvine has explained the purpose of this measure as being "to restore faith in democracy". He has said that it is to be seen as part of "the most ambitious and extensive programme of constitutional reform and modernisation this century". He has promised that the Government "will govern with a new spirit of openness ... [in] partnership with the people"[10].

Judges and lawyers throughout the Commonwealth are watching closely the passage of this new human rights

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10 Lord Irvine of Lairg, "Constitutional Reform and a Bill of Rights" [1997] *European Human Rights* 483. See also by the Lord Chancellor "My Pivotal Role in the Constitutional Revolution", *The Times,* 12 July 1997 at 20. See also Parliamentary Debates (Hansard), *House of Lords,* 3 November 1997 at 1227ff.

legislation. Nowhere more so than in Australia where constitutional reform is also being considered on the eve of the centenary of our federal charter. We, like Britain until now, have remained stalwart in our resistance to a general constitutional or statutory statement of human rights. In future Australia we will be flying solo.

In harmony with the new Bill of Rights legislation for Britain, the Lord Chancellor promised that the new Government would "introduce a *Freedom of Information Act* to give people the right to know what Government is doing in their name"[11]. In a speech to a conference in July, he denied reported fears of back-peddling concerning FOI[12]. My trusted informant, Maurice Frankel of the Campaign for Freedom of Information, has told me that there is a fair chance of legislation, based on the White Paper, in the Second Parliamentary Session in 1998. However, that is a year away and eighteen months into the life of the new Government. For those for whom government by the people is more than a slogan, the progress of British reforms in governance is truly fascinating.

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11 Lord Irvine of Lairg, *The Times*, 12 July 1997.

12 Lord Irvine of Lairg, "Constitutional Reform and a Bill of Rights" (1997) *European Human Rights Law Rev* 483 at 484.

In his address to the Lords in support of the Human Rights Bill, Lord Chief Justice Bingham, a jurist admired throughout the Commonwealth of Nations, cited Milton's poem, written 350 years ago[13]:

> "Let not England forget her precedence of teaching nations how to live."

It is true that in many things, in government, the law, in literature and sport, England has taught the nations of the world. But it also taught them the business of bureaucracy. It was a stern lesson. Its officials throughout the Empire were almost wholly uncorrupted. After the 1850s they were chosen by open, competitive examinations. They followed steady routine. They observed the rule of law, not the whim of rulers. But they also followed a regime of high secrecy[14]. However suitable that regime of the *Official Secrets Act* was for imperial and colonial times, it became seriously unsuitable for times in which political theory, egged on by information technology, preached that the century of the common man had arrived.

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13 Lord Bingham of Cornhill, in Parliamentary Debates (Hansard), House of Lords, 3 November 1997 at 1245 citing from Milton's *Areopagitica*.

14 *Attorney-General for the United Kingdom v Heinemann Publishers Ltd* (1997) 10 NSWLR 86 (CA) at 147. Cf S Bell, "The Culture of Secrecy" (1996) 146 *New LJ* 346.

England still has lessons to teach. The majority of the countries of the Commonwealth of Nations cling, in various forms of democracy and autocracy, to the regime of official secrets. The belated acceptance of FOI and the promise of enforceable rights, more than two hundred years after the loss of the American colonies, thirty years after the United States statute and fifteen years after Canada, New Zealand and Australia, will still be timely. It will encourage moves that are beginning in the new Commonwealth to follow Britain in this legal matter yet again. Indeed, it is propitious. In India, a draft Freedom of Information Bill has been circulated[15]. It will now be in abeyance pending the general election called for March 1998. Parallel Bills have been introduced into the Legislative Assemblies of Tamil Nadu[16], Rajasthan[17] and Goa[18]. The only other Asian jurisdictions to have considered such legislation were Hong Kong[19] before the handover and Japan[20]. In legal matters many

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15 See Right to Information Bill 1997 (India) noted *The Hindu,* 31 July 1997 at 13.

16 Tamil Nadu Right to Information Bill 1997 (TN).

17 Freedom of Information Bill 1996 (RJ).

18 The Goa Right to Information Bill 1997 (Goa). Cf *Asian Age,* 3 August 1997 reports "Goa press against Bill". The criticism related to fines for publishing "false information".

19 Hong Kong, *Code on Access to Information* (January 1997). This Code was in practice at the time of the handover of

Footnote continues

Commonwealth countries, which equally boast of elective, and not so elective, dictatorships, still watch legal developments in this country. That is why it is important for Britain to keep the faith with the FOI promise, to secure its passage through Parliament and to establish its principle in a strong and modern statute, as a model for other wavering countries to follow. Alas, in some of them - from Palestine to Singapore - it is the anti-terrorism legislation of late colonial days that modern rulers cling to. Let a new, confident Britain send out a fresh message of accountable government.

FOI: SEVEN DEADLY SINS

So far I have said little more than I did in 1984 in the Granada Lecture. But on the brink of the consideration of freedom of information legislation for Britain, it is as well to identify the seven deadly sins of FOI which experience in Australia, and elsewhere, in the intervening years has suggested you should be on your guard to repel. These are the special demons of FOI legislation. It is desirable that you should be alert to them.

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sovereignty and remains in force. Letter from Hong Kong Government Information Services, 15 December 1997.

20 Model Guidelines for Freedom of Information in Japan Civil Liberties Union *Universal Principles,* No 7, Spring 1997 at 15.

I Strangled at birth:

The first sin is the danger that this brave but novel idea could be strangled at birth. One of the most popular of British television exports has been *Yes Prime Minister*! In Australia it was said that Prime Minister Hawke and the Head of his Department, Sir Geoffrey Yeend, used to watch it together each Monday night. They were observed to laugh; but at distinctly different times. All of us have seen the way the unforgettable Paul Eddington portrayed the intermittently idealistic politician, Jim Hacker, as an occasional proponent of FOI legislation. How frequently, and comparatively easily, Sir Humphrey led him on. Only to win the last battle on grounds of supposed principle, urgent economy or the dangers of political embarrassment.

Do not under-estimate this danger to your FOI proposals. Many a White Paper has come to nothing or emerged into final legislative form a pale shadow of its former self. As the days and months tick away, it will be important for British proponents of the fundamental change of administrative culture which FOI signals, to remain vigilant, despite political assurances. An Australian politician (Mr Gareth Evans QC) once said that it was imperative for any government proposing a FOI law to get the legislation enacted within the first year of office, lest the skeletons

accumulating in the governmental cupboard thereafter render the prospect of enforceable rights of access to information too politically uncongenial to press on with.

Victoria was the first Australian State to introduce FOI legislation[21]. Its form is very similar to the federal Act. But late this year, the State Government has begun to signal the possibility of substantial changes. The Melbourne *Age*[22] reminded the Government how its predecessor, which had introduced the law:

> "... seemed to fall out of love with its own creation after the then Opposition health spokesman ... began using FoI applications frequently and effectively. But now [he] is a member of a party in government and positions have reversed. Some of his colleagues think the FoI Act should be amended again and the [Opposition] is springing to its defence."

The moral is clear and based on Australian experience. Opposition MPs and "investigative journalists" soon become amongst the chief users of well-targeted FOI requests. They do it for the purpose for which Opposition MPs and journalists exist - to embarrass and harass the

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21 *Freedom of Information Act* 1982 (Vic).

22 Editorial, 15 September 1997 at A14.

government. Ministers, advised by their officials, rarely appreciate such harassment. Typically, they seek to avoid it wherever possible. The longer the delay in the passage of the long heralded United Kingdom FOI Bill, the greater the risk that Sir Humphrey will have the last laugh yet again. You can readily imagine the well-tuned arguments. "Contrary to our long established principles of government". "Weakening and distracting the firm government hand on the tiller needed to achieve the government's essential programmes". "Need for further study". "Embarrassing to the back-benchers". "A God-send to the Opposition and the media". "Cripplingly expensive". Like castor oil in childhood, FOI is best not tarried o'er, lest the constant contemplation of the brave leap makes it too hard actually to accomplish.

II *Retaining secrets:*

The second deadly sin is to pretend to FOI but to provide so many exceptions and derogations from the principle as to endanger the achievement of a real cultural change in public administration. As countries introduce FOI legislation, the sharpest debates tend to be about the exemptions. One criticism of the Federal Act in Australia was that the cautious approach in framing the exemptions meant that, in practice, few documents had become available to inform political debates which would not have

been available before[23]. The United States FOI Act has only nine exemptions. The Australian Federal Act has nineteen. Most of the State Acts in Australia have fewer exemptions than the federal. In recent years there has been a tendency to introduce special exemptions for documents (such as Cabinet notebooks and electoral rolls) which might already have been effectively protected by existing exemptions[24]. Sir Humphrey got the jitters. Acute questions have arisen in many jurisdictions as to how the public interest is to influence disclosure or exemption? Whether the interests or motives of the applicant are to be judged irrelevant? How vexatious and repeated applicants are to be handled? Whether conclusive Ministerial certificates are to play any part? Specific problems have arisen as to the scope of the exemption of Cabinet documents. But if that exemption is cast in language that is too wide, it will embrace, and thereby exempt, a vast range of governmental documents which might be, or become annexed to, Cabinet material. Similarly internal working documents may be of legitimate interest to the

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23 See criticism by EARC Report on Freedom of Information, Brisbane, 1990 par 7.6.

24 Australian Law Reform Commission, *Freedom of Information,* (Issues Paper 12) (1994) at 32.

public so that the people know how they are governed and why. There are several elements in the White Paper that are encouraging. The test of "substantial damage" for exemptions; the extension to all existing records [par 2.7]. The provision of some access to civil service advice and internal discussion which will "not cause harm". These are welcome indications of a commitment to openness. However, the proof of the pudding will be in the final form of the legislation and how it is administered.

III *Exemptions:*

The third deadly sin consists of surrendering to too many requests for exemption from the application of FOI legislation. In several countries, including Britain and Australia, a wide range of activities which was formerly performed in governmental corporations has now been "privatised". Some such bodies will take on the character of purely private corporations. But if they are established by statute and if they draw on the Consolidated Revenue, the arguments for including them in the ambit of FOI legislation are substantial. Their executives will squeal endlessly, if Australian experience is any guide, about the

need for them to escape the "chains of government legislation" and to take on the "true character" of private companies[25]. Some of these demands may be justified by reference to the non-reciprocal weapon that is sometimes handed to their competitors. It is reassuring to note that the White Paper extends coverage to various privatised utilities and public bodies working on contracted out functions [par 2.2]. Based on Australian experience, I predict many battles here as the legislation goes to the wire. Given the many legal exemptions applicable, many of the objections of privatised activities are unconvincing. They should be kept to an absolute minimum.

IV Costs and fees:

The fourth deadly sin is to render access to FOI so expensive that it is effectively put beyond the reach of ordinary citizens. This is a development that is becoming of concern in Australia. The critics of the administrative reforms in Australia (of which FOI was one) tend to find ready allies in the government of the day. During the

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25 Cf New Zealand, House of Representatives, Report of the State-Owned Enterprises (*Ombudsman and Official Information Acts*) Committee, Government Printer, Wellington, 1990 noted in ALRC Issues Paper 12 at 101.

Hawke Labor Government, one of the most constant critics was Senator Peter Walsh who lambasted the costs of the administrative law. He sometimes seemed reluctant to take into account the efficiency gains, improved accountability, increased political legitimacy and the other positive features of the new system[26]. Calls for the containment of costs are particularly persuasive when directed to a Minister under pressure to reduce, or curtail, the costs of his or her administration. In Australia, we have been watching the debates about the increases of up to 150% in civil court fees in Britain[27]. We have had similar debates where the government moved in 1997 to increase court fees by as much as 500%. This would have increased enormously the cost of bringing an appeal to the highest court. The Australian Senate disallowed the increases[28] which had been justified on the principle of "user pays". It is important for governments, whatever their political complexion, to understand that some basic activities of government simply have to be provided at the

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26 P Walsh in R Tomasic, "Administrative Law Reform - Who Benefits?" (1987) 12 LSB 262 at 263.

27 F Gibb, "Law Chief Faces Challenge Over Civil Court Fees", in *The Times,* 11 July 1997 at 7.

28 Reported *Sydney Morning Herald,* 26 July 1997 at 15.

general cost of the taxpayer. They represent the price of governing a civilised community. To expect the user to pay fully for basic government services, such as a day in court, is surely wrong. The same, is true of FOI charges.

Initially the Australian federal Act did not contain application fees. Charges were imposed for photocopying[29]. When these were increased in 1985, they too were disallowed by the Senate. In 1986, an initial application fee of $30 was fixed and an internal review fee of $40 was introduced. These have been common fees in Australia. In the United States and New Zealand there are no application fees. In Canada, at least until recently, there was a $5 application fee. However, search fees have been introduced and differential costs are sometimes provided for commercial applicants. In some States of Australia, the maximum limit on the charge that may be levied has been abolished. Astonishingly, one political opponent of a State government was reportedly presented with a bill of $30,000, allegedly the cost of carrying out her FOI inquiry[30].

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29 Freedom of Information (Charges) Regulations 1982 (Aust).

30 Reported M Chulov, "Freedom in Chains", *Sun-Herald*, 10 August 1997 at 49. The Opposition Spokesman on

Footnote continues

According to a report I read in *The Times,* the Lord Chancellor is said to be properly prudent with public funds[31]. The cost of FOI will, of course, be assigned to each separate governmental unit. There is undoubtedly a cost. But it is a cost of running the kind of government that renders authority accountable to the people. It would be a sad irony if FOI were attained but at a price which frightened off deserving users. The White Paper proposes an application fee of up to £10 modelled on the fee for access to computerised files under the *Data Protection Act.* The Data protection Registrar in Britain has warned that such fees "may be a deterrent to those seeking to exercise their rights". But the more ominous comment is that "additional charges" may be made for requests which "involve significant additional work"[32]. There are jurisdictions where fees have been used to discourage FOI requests.

Health was asked to pay $30,000 for information about the change to nurses' shifts in State hospitals.

31 Reported *The Times,* 27 June 1997 at 8.

32 White Paper [2.28] ff.

V Decision-makers:

A fifth deadly sin to watch is the threat of undermining the essential access to an independent decision-makers who can stand up to government and require that sensitive information be provided. If an applicant is discontented with an initial departmental response in Australia, at the federal level (with parallel arrangements in most States), access can be had to the Ombudsman or an independent quasi-judicial tribunal. In mid-1997 proposals were considered to change the federal tribunal involved in a way that was thought likely to diminish its independence[33]. The proposals were said to be "driven" by the federal public service. It is true that a tension exists between officials and the independent tribunal which conducts merit reviews of their decisions. The officials argued that the tribunal was too expensive, too court-like, too formal and too costly. There was such an outcry at the proposal (including by business interests which rather liked an independent body to be reviewing government decisions) that the Australian government withdrew the change. The

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33 "Independence of AAT under threat", *Courier Mail* (Brisbane), 4 July 1997 at 18. The AAT is the Administrative Appeals Tribunal of Australia.

Law Council of Australia welcomed this decision. It emphasised that it was a very important right in a democratic society for the citizen to be able to have an objective merit review of important governmental decisions[34]. In 1996 the Australian Law Reform Commission recommended the creation of an Information Commissioner to oversee the operation of the federal Act[35]. Such proposals appear useful. However, the ultimate recourse to courts or court-like bodies is a necessary assurance of the independence and courage of decisions when political pressure could otherwise be exerted to prevent sensitive documents being disclosed at embarrassing times. It is reassuring that the White Paper proposes the appointment of an Information Commissioner with powers to enforce decisions. Courts are expensive. Administrative remedies are cheaper and more accessible. But it is vital to have a link to the courts for the truly hard case. Putting it quite bluntly, judges with tenure, independence and entire separation from the civil service,

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34 Law Council of Australia, Media Release, 14 July 1997. cf D M Williams QC, Attorney-General, "Merits Review Tribunal to Stay Independent", News Release, 13 July 1997.

35 Australian Law Reform Commission, Open Government: A Review of the Federal *Freedom of Information Act* 1982, 1995 (ALRC 77).

are used to doing unpleasant things to powerful people where the law requires it.

VI *Interpretation:*

The sixth deadly sin is one for which the judiciary, and not the politicians, may be accountable. Judges also grew up in the world of official secrets and bureaucratic elitism. Sometimes they may share the sympathies and the outlook of the Sir Humphreys of this world. In the way in which the common law often follows a course harmonious with statutory law, it is desirable that judges, in their decisions, should also embrace the culture of FOI. It is a culture which asks not why *should* the individual have the information sought, but rather why the individual *should not* - at least where the information concerns the government of that individual's country or documents in some way relating to the individual personally.

My judicial life now spans 23 years. I was appointed to my first judicial office in December 1974. I can say without boast that I am one of the longest serving judges in Australia. I have seen a lot of changes. Over the years I have, like Lord Denning, sat in many cases when the majority of my colleagues fell (in my respectful view) into error. Take these examples:

* In 1984, in the New South Wales Court of Appeal, I upheld the submission that the common law had moved to the point that it would require a donee of statutory power, to give reasons for a decision affecting an individual's statutory promotion rights. This seemed to me to be a basic right to information from a body established by Parliament and therefore with a legal obligation to act fairly[36]. The majority decision of the Court of Appeal was reversed by the High Court of Australia, on which I now sit[37].

* In 1994, towards the end of my service in the Court of Appeal, I held, in dissent (following a decision of the Canadian Supreme Court[38]) that although the common law would not provide a patient with an enforceable right of access to her medical practitioner's records

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36 *Osmond v Public Service Board of New South Wales* [1984] 3 NSWLR 447 (CA).

37 *Public Service Board of NSW v Osmond* (1986) 159 CLR 656. See now *R v Civil Service Appeal Board; Ex parte Cunningham* [1994] 4 All ER 310; *R v Secretary of State for the Home Department; Ex parte Doody* [1994] 1 AC 531; *R v Higher Education Funding Council; Ex parte Institute of Dental Surgery* [1994] 1 WLR 241 and *R v Ministry of Defence; Ex parte Murray*, unreported, Queen's Bench Divisional Court, 15 December 1997.

38 *McInerney v MacDonald* (1992) 93 DLR (4th) 415. Cf *Indata Equipment Supplies Ltd v ACL Ltd* [1997] TLR 459.

about her, principles of equity, developed from the fiduciary character of the doctor/patient relationship, would uphold that right[39]. The High Court of Australia rejected my reasoning and, by inference, the Canadian and American decisions on which it drew. It also declined to follow a decision of the English Court of Appeal[40]. Access to the patient's medical records unless provided by statute was denied[41]. Of course, in public hospitals and under some privacy legislation , access to medical records about one's self can already sometimes be obtained in Australia. After the case, the Australian Federal Minister for Health announced that, for more general access, he would propound a voluntary code[42]. Legislation has been introduced in one jurisdiction to give a statutory right[43].

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39 *Breen v Williams* (1994) 35 NSWLR 522 (CA).

40 *R v Mid-Glanmorgan Family Health Services* [1993] 1 WLR 110.

41 *Breen v Williams* (1996) 138 ALR 259 (HC).

42 A Cornwall, "Access to Health Records - Where to Next?" (1997) 5 *Aust Health Law Bulletin* at 81; S Dorsett, Comparing Apples and Oranges: the Fiduciary Principle in Australia and Canada After *Breen v Williams*" (1996) 8 *Bond LR* 158.

43 See Health Records (Access and Privacy) Bill 1997 (ACT) noted *Canberra Times,* 14 November 1997 at 3.

* Increasingly, cases about the operation about FOI legislation are coming before the higher courts in Australia. Choices must be made by judges. So far, the courts have generally favoured access over secrecy[44]. However, it is necessary for courts themselves to move with the new culture of openness.

One commentator in Australia has pointed out that in such battles "the bureaucracy ... by virtue of their staff resources, money and limitless time can simply outlast and outwit any member of the community who goes there with a serious policy issue to raise"[45]. The Commissioner and, where necessary, the judges have the duty to ensure that the principle of access to information is upheld. This is true, not only in decisions on FOI legislation.

VII Changing administrative culture:

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44 *Commissioner of Police v District Court of New South Wales* (1993) 31 NSWLR 606 (CA).

45 H Selby, "Ombudsman Inc: A Bullish Stock with a Bear Performance" in R Tomasic, "Administrative Law Reform - Who Benefits?" (1987) 12 *Legal Service Bulletin* 262 at 264.

This brings me to the to the seventh deadly sin. This is the notion that the passage of FOI legislation is enough of itself to work the necessary revolution in the culture and attitudes of public administration. Going on Australian experience, it is not. In a series of lectures in 1994 and 1995, Sir Anthony Mason, the past Chief Justice of Australia, confessed to a doubt that a "significant change in the administrative culture" and "an improvement in the quality of administrative decision-making" had actually been achieved as a result of the administrative reforms in Australia, including FOI[46]. Apart from anything else, if little is done to promote knowledge of the FOI facility and to enhance the citizen's view that this is a right (and not an exceptional petition), an FOI Act is unlikely to be put to general use. In recent reports on the operation of the New South Wales Act, the State Ombudsman, Ms Irene Moss, criticised the lack of publicity and education programmes, the high levels of refusal or resistance to FOI applications, the lack of monitoring, auditing and centralised consideration of lessons for good administration and the under-utilisation of the FOI Act measure in Australia's most

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46 A F Mason, "Administrative Law - Form versus Substance", unpublished address to the 1995 Administrative Law Forum - Australian Institute of Administrative Law", 27 April 1995 at 17.

populous State[47]. A report released earlier this month castigated sternly the delays and resistance which had marked efforts to gain access to documents involved in a public project. Refusal of access was described as "unreasonable" and contrary to the public interest. A particular technique for attempting to circumvent the FOI Act, "confidentiality agreement" was singled out for special attention[48].

Passing laws on FOI is only the first step. Learning from the experience of erroneous, misleading or incomplete records and deriving lessons for improved administration which will apply throughout the civil service is the big leap that must still be taken.

In some jurisdictions of the Commonwealth of Nations, FOI legislation has gone beyond being a reactive measure.

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47 New South Wales Ombudsman, *FOI Act: A Snapshot*, (1997) noted *Sun-Herald*, 10 August 1997 at 49. For legal criticisms of the New South Wales Act see A Cossins, *Annotated Freedom of Information Act New South Wales*, 1997, LBG, 17-19.

48 New South Wales Ombudsman, *Prince Alfred Private Hospital Project*, NSW, 1997, 41.

Thus, s 25 of the *Freedom of Information and Protection of Privacy Act* of British Columbia in Canada provides[49]:

> "25(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information:
>
> (a) About a risk of significant harm to the environment or to the health or safety of the public or a group of people; or
>
> (b) The disclosure of which is, for any other reason, clearly in the public interest."

This provision completely turns on its head the secret world of Sir Francis Walsingham and the Royal court bureaucracy from which the ethos of British public administration ultimately derived. Instead of a rule of secrecy, a primary rule of openness is substituted with the authority of law. I feel sure that there are still a few Sir Francises and Sir Humphreys lurking in the corridors of power in Whitehall and Canberra who would snuff out any attempt to introduce s 25 into our law. But it is a thought to conjure with, especially in the world of new information technology which has revolutionised the public information

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49 G J Levine, "Disclosure Information in the Public Interest Pursuant to Freedom of Information and Protection of Privacy Legislation" (1997) 11 CJALP, 1 at 5.

systems and virtually demands a new and more open legal regime.

Freedom of information is important to Justice and to the International Commission of Jurists. In a world of secrecy and opaque government, serious wrongs can occur which may never come to light. FOI legislation is at once a means of casting the light of scrutiny into the dark corners of government and a contribution to a new culture of openness in public administration. I trust that Justice and its supporters will be vigilant upon this topic in the weeks and months ahead.

RENDERING OFFICIALS OUR SERVANTS

The change of political attitudes and the massive alteration in information technology that combine to require a new regime of administrative openness, even acknowledging that it will have some costs and produce diversions, annoyances and embarrassment from time to time. The true change is not merely technological. It is legal, political and attitudinal. One of the finest writers in Australia on the law of equity, Justice (formerly Professor) Paul Finn of the Federal Court of Australia, recently

explained the new world of administration in terms that drew lessons from the principles of equity which originated in London not far from here[50]:

> "To the extent that the power of the people is devolved upon institutions and officials under our constitutional arrangements, those officials and institutions become the trustees - the fiduciaries - of that power for the people. The reason is obvious enough. In a fundamental sense the power given to officials, elected and non-elected alike, is not their own. It is ours. They hold it in our service as our servants. In short, our officials exist for our benefit."

Justice Finn is concerned that many of Australia's "constitutional assumptions" which were made in Britain, have nearly wholly failed. Parliament, as an institution, is seriously weakened. The real independence of the public service has been cut away. There has been, until now, no general Bill of Rights to empower the courts. The political parties have tended to be controlled by a few. Improvisations such as Royal Commissions are created. But the fundamental institutional problems remain.

Even if Finn's hypothesis that the foundation of public administration is a trust obligation owed to the people is rejected,

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50 P Finn, "The Abuse of Public Power in Australia - Making our Governors our Servants" (1994) 5 *Public Law Review* 43 at 45f.

his opinion demonstrates the importance of administrative law reform in general, and freedom of information in particular, in the larger scheme of the political reconfiguration of countries such as ours. The other constitutional reforms which are afoot in Britain may prove an antidote to the "corrosive cynicism" which in Britain, as in Australia, has been creeping into our governmental institutions[51]. Those who feel apologetic about FOI, its costs and occasional inconveniences, do well to reflect upon the need to return to the basic principle of accountable government. In Australia, this has been described by Finn as a "republican" idea. It is the idea that power derives from the people and is not just something surrendered, gradually and reluctantly, by authority from above. The notion of popular government is now generally accepted. What we have to do, in both our countries, is to convert the idea into a more robust and practical reality. FOI is a very important ingredient.

THE IMPACT OF TECHNOLOGY ON HUMAN RIGHTS

I was asked to add a few closing words about privacy and about the impact of new technology on information rights, particularly, and human rights in general. My eyes were opened

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51 *Ibid,* at 45.

to these themes in the 1970s and early 1990s when I chaired committees of the OECD on privacy protection and information security. They are large issues. If I elaborated upon them, I would delay you here too long.

Obviously, privacy is closely related to FOI as the law in every jurisdiction where FOI has been adopted, acknowledges. Privacy today has gone beyond invasions of the person and of the person's physical space. Today privacy also concerns a measure of control over personal information about the individual, much of it now in computers or circulating by telecommunications.

The central tenet of most modern privacy laws is the right of access of the individual so that he or she can see the data upon which others make decisions affecting that person's life. As a late entrant into the FOI field, Britain has a rare chance to rationalise its rules on FOI and information privacy.

In Australia, the Federal Government, after an early promise to extend privacy protection law into the private sector[52], has now abandoned the proposal to introduce general

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52 Privacy in the Private Sector, September 1996 (1996) 3 *Public Law Review* at 81.

information privacy laws[53]. Interestingly, and as a sign of the times, many private sector bodies have actually indicated their support for information privacy laws because the existence of such laws is now sometimes a pre-condition to the supply of personal data from other countries affecting private individuals.

Freedom of information legislation ordinarily includes exemptions designed to protect the privacy of persons mentioned in the government's data collections. Where disclosure would involve revelation of the "personal affairs" of someone else, power must be given, either to exclude such disclosure, to permit it only after agreement of the person concerned or following the approval of the independent decision-maker who is appointed to decide conflicts of this kind. For example, breaches of individual privacy may sometimes be authorised where disclosure is necessary to prevent, or lessen, a serious and imminent threat to life or health; where it is required or authorised by law; where it is necessary for enforcement or investigation of the criminal law or under data protection legislation. The inter-action between FOI legislation, on the one hand, and privacy or data protection laws, on the other, should

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53 G Greenleaf, "Commonwealth Abandons Privacy - For Now" (1997) 4 *Privacy Law and Policy Reporter* at 1. See also ALRC comment, "Privacy Protection - Swimming Against the International Tide" (1997) 71 *Reform* at 3.

be a constructive one. This is because, experience teaches that many FOI requests are actually made in furtherance of the demand of individuals to have access to official data concerning themselves. Furthermore, the central provision of most modern data protection/privacy laws is the right of access of the individual to most of his or her own data. In this way, FOI reinforces, and does not endanger, privacy protection.

A larger question is the way in which privacy more generally should be defended in societies such as ours, and especially in relation to the media. Despite its adaptability and creativity, the common law of England (which has been inherited and adapted in most parts of the Commonwealth) did not develop a coherent law of privacy protection. This was curious, given the high value which the English typically ascribe to their privacy. It is a common jest that the English concept of bliss is an empty railway carriage. Lord Chief Justice Bingham has said that the courts will develop privacy law, given time[54]. Perhaps in this country they will be encouraged to do so by the Human Rights Bill when it becomes law. *The Times,* in a recent editorial[55], expressed concern that that Bill, now before

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54 Speech in the House of Lords, reported *The Times* 9 October 1997, p 4.

55 3 December 1997.

Parliament, will give enforceable protection for privacy, including as against the media.

It is natural that the media, which are not presently regulated by law in this regard, should wish to retain its high measure of legal immunity. Nobody likes to be subject to legal regulation, least of all the powerful and the opinionated. Fairly, the media points to the importance of freedom of communication and freedom of expression. These basic human rights are also reflected in the Human Rights Bill. Yet it is essential that proponents of human rights should make it clear that freedom of expression and freedom of the press are not absolute values. They compete with other basic human rights. One of these is the right to individual privacy. That right has taken a battering in recent times. But in the *International Covenant on Civil and Political Rights* it is declared that "no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation". There are similar provisions in the European Convention and in many other statements of fundamental rights. The law of this country, and all the laws that are derived from it, protect honour and reputation. Is it not time to provide an

effective measure of legal protection for privacy? It was proposed in Australia, but not yet enacted[56]

The stimulus of the demand for such protection has come not so much from the fundamental principles of human rights or legal theorists. Rather, it is the product of the revulsion of civilised people at the spectacle of serious abuses of individual privacy which have become so common. The case of Diana, Princes of Wales, is simply the most visible and vivid example of the hounding of individuals in their private lives to an extent that is intolerable and for which there should be effective redress. All that usually tends to be available for such affronts is mealy mouthed words or caning with a feather.

Years ago Lord Denning invoked the famous cry of Thomas Fuller 300 years ago. It lies at the heart of adherence to the rule of law and the control of great power. "Be you ever so high the law is above you"[57]. That principle is addressed to government, to politicians, to judges and to civil servants. It stimulates the contemporary moves to FOI law. But it is also addressed to the

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56 Australian Law Reform Commission, *Unfair Publication: Defamation and Privacy*, AGPS, 1979.

57 Thomas Fuller in Lord Denning MR, *Goriet v Union of Postal Workers* [1971] 1 QB 729 at 762.

media. It underpins the efforts, belatedly, to provide effective legal protection for individual privacy. Privacy is, after all, a fundamental human right, and yet in our societies it is largely unprotected by the law. A proper measure of enforceable protection should, in my view, be provided.

The debates about human rights and information technology have now moved far beyond privacy and information security. They embrace the problem of cryptography and whether governments should have a right to enter every data system in the name of national security, counter-terrorism, drug surveillance and so on[58]. They include the many legal and ethical issue raised by the Internet and the explosion of information and of modern media.

Twenty years watching the policy themes of information technology has taught me that one of the chief challenges to

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58 J Hill, "Trusted Third Parties and the Provision of Encryption Services" (1997) 8(1) *Computers and Law* 30; S Orlowski, "Government Initiatives in Information Technology Security" (1997) 5 *Info Mgt and Computer Security* 111 at 113. As to interception of telephones, see *Halford v United Kingdom* [1997] TLR 355 (ECHR) and see Justice, *Regulating bugging operations*, Response to the draft Code of Practice on Intrusive Surveillance", October 1997; *A Hamilton*, "E-mail: Restrictions on Employers' Snooping" (1997) 8(4) *Computers and Law* 5; J Wilson "Data Security and Fundamental Freedoms" (1997) 8(3) *Computers and Law* 24.

human rights in the coming millennium will be the impact of technology on who we are, how we are governed and how we live. This challenge goes far beyond informatics. My service on the Ethics Committee of the Human Genome Project and on the International Bioethics Committee of UNESCO teach me that, possibly, the most difficult quandaries for human rights in the future lie in genomic research. The genome, manipulated, has the potential even to change who human beings are. In this respect, it concerns the human rights of future generations and who humans and future generations will be. But to explore these issues would sorely test your saintly patience. I hope I will have another chance - and in shorter than thirteen more years.

I leave by throwing down another gauntlet. May Justice, which has been in the vanguard of the human rights movement of Britain, and in the world that still looks with hope and admiration to Britain as a haven of fairness, continue to quest out the new challenges to human rights. May Justice never rest easily on its laurels. Its greatest days lie ahead.