

# The right to know and the freedom to speak

*What happens if you take away the right to information? You are left without trust and confidence in the operation of a democratic society*

**T**he claim to freedom of speech is often made as if it were an end in itself. This may be true but it overshadows the principles which give rise to this freedom. Free speech is not merely the right to say what you think, it is the sharing and exchange of views and information which lead to opinion forming and opinion shifts. It is the circulation of information and views from different sources and perspectives.

For free speech to be an integral component of our democratic processes, the means where society exchanges and forms opinions, a concomitant principle must exist: that of the right to know, or the right to be informed - should we so choose.

One of the many ironies of the information age is that inundation of information is disguising the invisible but incremental loss of the information that citizens need to form viewpoints. What information provision there is by government or the private sector is most commonly generated by the public affairs branch, leaving it almost impossible to determine what is spin and what is information. For hard data you get referred to the website - pity if you aren't linked up.

The reduction of information in the public realm relating to the "business" of government has been drastic. The reasons for the withdrawal are complex but appear to be partly a consequence of the particular philosophical and economic paradigm within which current government decisionmaking and service provision is constructed.

A welcome aspect of government accountability mechanisms in the 1970s and 1980s was an increased obligation on the part of government for openness in the administration of policy. Performance audits became an accepted part of government departments' accountability requirements. This allowed comparisons to be made across departments and interstate and internationally, and for the development of performance indicators and benchmarks. But with the contracting out of many government services these audits are now dependent on the availability of information from private companies.

Problems associated with this form of service provision and ensuring the accountability of government to parliament and population have recently been the subject of considerable comment by state Auditors General. Most notably the South Australian Auditor General recently made substantial criticism of the consequences of privatisation and contracting out for public monitoring and scrutiny. In his 1997/1998 annual report he warned that the foundations of democracy are undermined by the increasing use of commercial in confidence to remove information from the public sphere.<sup>1</sup>

Citizens have an expectation that participation in democratic processes should be undertaken in an informed manner. This means

that we are reliant on parliament to obtain the information we need in order to make our assessment of government behaviour at election time and in between. Parliament, in turn, relies on the government for much of its information.

The continuing suspicions surrounding the tender for the Melbourne Casino have largely been fuelled by repeated refusals on the part of the government and the successful bidder to open the process to public scrutiny. In NSW, the *Sydney Morning Herald's* freedom of information request to the Olympic Coordinating Authority (OCA) for details of the tenders for the Olympic Village and Stadium was refused, with OCA claiming that the release of this information would be against the public interest. The NSW Auditor-General challenged the decision, indicating that he failed to see what public benefit arose from this refusal.

Ironically, at the same time as political debate is being limited by decreasing access to information, we are seeing the development of a judicial formulation of a right to an informed debate about the processes and activities of government. Sir Anthony Mason, former Chief Justice of the High Court, provided a foundation for this consideration with his views on the disclosure of government information:

*"It is unacceptable in a democratic society that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticise government action."*<sup>2</sup>

Ordering the release of documents relating to the casino tendering process Judge Wood, of the Victorian Civil and Administrative Tribunal, spoke of the benefit to the public which attaches to the disclosure of information:

*"That benefit being, to be placed in a position whereby they are better informed and thus able to promote public debate on a matter that affects them."*<sup>3</sup>

Tom Brennan, from Corrs Chambers Westgarth, on a recent Background Briefing program "Shrinking Democracy"<sup>4</sup>, raised the possibility that a body of legal precedent was emerging which might provide a capacity to challenge a government's claim of commercial in confidence. He relied on the principle, emerging from the Lange v ABC defamation action, that there is a limitation on the power of governments to deny information to the electors. The particular section of the High

Court judgment reads:

*"Each member of the Australian community has an interest in disseminating and receiving information, opinions and argument concerning government and political matters that affect the people of Australia. The duty to disseminate such information is simply the correlative of the interest in receiving it."*<sup>5</sup>

Increasing government secrecy, commercialisation of the public sector and infrastructure provision being privately financed means that without legislative or judicial intervention there may be little left in the way of information that is available to the citizen. What form does freedom of speech take when information disappears or is priced out of reach? The right to know must be a precondition to freedom of speech.

In 1998, the Communications Law Centre in Melbourne made an initial exploration of some of these

issues through its Victorian Information Audit. In 1999, it will undertake a range of projects which will explore aspects of what we are terming "The Right to Know and the Freedom to Speak".

**Kate MacNeill and Vic Marles. This is an extract of a speech made at Soapbox during the Melbourne International Festival, October 1998**

<sup>1</sup> **The Office of the Auditor-General, 1997/98, (www.audit.sa.gov.au)**

<sup>2</sup> **Commonwealth v John Fairfax & Sons Ltd (1980) 147 CLR 39**

<sup>3</sup> **Victorian Civil and Administrative Tribunal, 1 December 1998**

<sup>4</sup> **Radio National 1 November 1998**

<sup>5</sup> **Full Court of the High Court of Australia, 8 July 1997**

## Trust me

I am going to talk about the importance of information. Information about the operations of government. Information about industries which impact on the environment or which impact on our health. Information about essential services like gas or water. Why? Because information is:

- at the core of democracy;
- the currency of openness and accountability in government;
- the source of active citizenship. It is what makes democracy more than a vote at the ballot box. It makes for inclusive and informed debate.

Any loss of information or the ways of getting it is harmful to the health of democracy. What

a paradox. Information loss in the information age.

And there are losses. Here are some examples:

- Freedom of information law does not cover as much information. It doesn't cover our now privatised service utilities. Services we all must use.
- Freedom of information laws cost more to use.
- Reference to domestic activities of utilities may only constitute one paragraph in an annual report of the overseas parent company.

And with the loss of information comes other losses. Trust. Loss of information is loss of honesty. We seek trust in our relation-

ships with our friends and our families. In personal relationships we see the value of providing information and we know about the suspicion that secrecy breeds. Should it be any different between a citizen and the government?

We know that people become suspicious when information is withheld, not provided, avoided, substituted, blacked out. There is no way out of it. Secrecy - dressed up as confidentiality - does not inspire trust and confidence in the operations of government.

**Extract of speech made by Vic Marles at Soapbox during the Melbourne International Festival, October 1998**

## **The Right to Know and the Freedom to Speak: 1999 Program of the Communications Law Centre, Melbourne**

### **International Conference - The right to know and freedom of information**

Organised with the International Commission of Jurists. Australian and overseas speakers will explore the themes of the "right to know", information as the currency of citizenship, and freedom of information.

### **Free Speech in the New Millennium - A framework for discussion**

As Australia is seeking to present a modern united face to the world we are struggling with the apparent tensions between free speech and human rights such as privacy, the right to freedom from discrimination and racial respect. This project will establish a framework for the consideration of free speech and expression in Australia.

### **Information - access, loss and cost**

A stocktake of the health of

information provision in Victoria. This project seeks to determine the extent of reduction in information in the public domain and develop indicators to monitor information production, access and affordability.

### **"Commercial in confidence" and public accountability**

A proposal for a research project exploring the financial and economic rationales for commercial confidentiality and how these might be balanced with the public interest. <

## **From The Archives**

### **Remote Aboriginal Broadcasting**

**While remote communities attempt to organise the right to broadcast in their own languages over their own facilities, the Broadcasting for Remote Aboriginal Communities Scheme (BRACS) is emerging as another ill-conceived Department of Aboriginal Affairs (DAA) initiative with inappropriate technology.**

The BRACS project is another lesson in how to not implement broadcasting policy. BRACS is designed to provide some 74 aboriginal and islander communities with satellite-delivered TV and radio services and the capacity to produce and broadcast their own programs over the same terrestrial facilities.

The DAA allocated up to \$35,000 to each community for a standard package of hardware, initially to pick up and rebroadcast only ABC TV and radio.

Pressure from BRACS recipients led to the DAA including a switch so there could be a choice between rebroadcasting the ABC, a remote commercial service, or their own TV and radio programs.

Much of the \$35,000 went toward the purchase, transport and installation of facilities such as a TV mast, transmitters and satellite-receiving and channel-switching equipment.

The production package included: one VHS-C domestic camera; two domestic VHS video cassette recorders; a mike; and a dual audio cassette recorder. This package is worth about \$4,000-5,000 and, as anyone with hands-on audiovisual experience knows, it is suitable for home video not broadcasting.

One BRACS community claims it was told to "take extra care" of the equipment because "it can't take the pressure of normal broadcasts and will only last three years".

The DAA came under fire for its failure to consult communities and the lack of any training program before BRACS even commenced.

Yuendumu Media Association asked

to nominate the equipment required as it had already established its own TV service and did not want radio as well. It told the DAA it would prefer some of the \$35,000 go toward renovating a building so its videotapes could survive the heat and dust.

But Canberra proved incapable of responding to the variety of needs in the different aboriginal and islander communities. The DAA moved ahead with its standardised approach and a standard equipment package designed by Telecom was transported for installation in BRACS communities.

Meanwhile, Department of Communications bureaucrats in Canberra spent five years trying to work out a licensing regime that could be applied to all communities. A standard regime is almost in place in the form of Limited Licences. The next step may take some time: each community must apply to and be granted a licence by the Broadcasting Tribunal.

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