OPENING THE DOOR TO JUSTICE: QUESTIONS ABOUT AUSTRALIA'S NATIONAL INFORMATION REGIME

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I FOUNDATIONS OF JUSTICE?

A Introduction

This paper is a meditation[1] on tensions in what has variously been characterised as the information society, the information economy and the information state.[2]

The author aims to provoke discussion at the 2011 *Justice Connections* conference rather than to provide a report on work in progress, to offer definitive answers regarding legal and public policy conundrums, unpack the nature of rights and responsibilities in a pluralist liberal democratic polity, supply a formal analysis of a legal *cause célèbre* or critique an exemplary text.[3]

The following paragraphs accordingly ask some questions and pose challenges for legal scholars, administrators and citizens. They suggest that there is value in thinking about the relationship between justice and information at the level of principle and practice.

The paper's coverage is not exhaustive and it does not purport to examine philosophical and technical issues regarding professional privilege, the secrecy of jury deliberations, freedom of speech, the national security regime and suppression orders. Instead, the paper initially identifies the role of information as a basis for retrospective, contemporary and future justice.

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[1] The following paragraphs provide a symposium paper. They thus do not purport to take the form of much law journal writing, in which a thesis is posed and critiqued, a legal judgment is unpacked or a statute is glossed through invocation of authorities such as HLA Hart, Richard Posner, Owen Dixon, Jacques Derrida, Michel Foucault, Lord Denning or Carl Schmitt. Access to justice requires an occasional questioning of legal disciplinarity, of conventions regarding scholarly style and of 'taken for granted' institutional performance mechanisms, highlighted in Frank Larkins, *Australian Higher Education Research Policies and Performance, 1987-2010* (Melbourne University Press, 2011) and Philip Mirowski, *Science-Mart: Privatizing American Science* (Harvard .University Press, 2011).

[2] Debate about the meaning and origins of those characterisations continues, with observers pointing to: Fritz Machlup, *The Production and Distribution of Knowledge in the United States* (Princeton University Press, 1962); Daniel Bell, *The Coming of Post-Industrial Society* (Basic Books, 1973); 'The Social Framework of the Information Society' in Michael Dertouzos and Joel Moses (ed) *The Computer Age: A Twenty Year View* (MIT Press, 1979) 500; Eugene Garfield, '2001: An Information Society' (1979) 1(4) *Journal of Information Science* 209. Other perspectives are provided in works that privilege mass entertainment and marketing, such as: Michael Wolf, *The Entertainment Economy* (Times, 1999); Thomas Davenport and John Beck, *The Attention Economy* (Harvard Business School Press, 2001); and Ian Ward, 'Mapping the Australian PR State', in Sally Young (ed), *Government Communication in Australia* (Cambridge University Press, 2007) 3.

[3] The author expresses his appreciation for the opportunity to read an advance copy of Dr Sarah Ailwood's paper on testimony and Tegan Wagner.

The paper then offers some observations on particular information access mechanisms and some questions about rights and responsibilities.

Consideration of duties, barriers, gateways and entitlements is desirable, given that both justice and information access are dynamic. Government is not a docile cow with an inexhaustible information teat; it instead consumes, generates and dispenses information in ways that directly and indirectly shape participation in civil society. Provision of information about law is not necessarily an unalloyed good: as Sol Encel and colleagues noted in *The Elephant in the Room: Age Discrimination in Employment*,[4] awareness of law often leads to 'nimble side-stepping – compliance with the letter rather than the spirit of the law'. Recent Commonwealth government justice and access initiatives, such as the *Freedom of Information Amendment (Reform) Act 2010* (Cth) and emphasis on alternative dispute resolution, are important but we should not mistake procedural rights for substantive rights.

Mechanisms discussed in later sections of this paper are the:

- Freedom of Information statute that has been promoted as a major part of the current Government's reform agenda[5] and as embodying a Commonwealth 'open access' philosophy that is consistent with the 2009 national *Strategic Framework for Access To Justice in The Civil Justice System*;[6]
- archives statutes and regulations that deal with retention and creation of the records of Commonwealth and State/Territory agencies;
- Commonwealth Ombudsman, an entity construed in terms of information access rather than mediation;
- movement towards pro-active electronic publication of information about Commonwealth agencies, albeit with uncertain recognition of 'digital divides' that inhibit identification and use of electronic resources and with inadequate funding of the cross-jurisdictional legal publishing initiative known as AustLII;
- use of Crown Copyright and Creative Commons licensing in conjunction with that movement;
- judiciary, in particular efforts to provide a more effective 'voice' for engendering both an understanding and appreciation of the law;
- traditional and new media (eg 'citizen journalism' and tools such as Twitter), with questions about whether disintermediation is increasing access to data but reducing an understanding of information;
- engagement by academia with the legislature and national bureaucracy to inform and restrain lawmaking and administrative practice.

Questions in the following pages reflect the recognition in the *Strategic Framework* that:

> Access to justice is not just about courts and lawyers, but is also about better and early access to information and services to help people prevent and resolve disputes.
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> While courts are an important part of the justice system, there are many situations where other options for resolving a dispute will be faster, cheaper and more suitable in the circumstances. Often a full blown court case will be completely disproportionate to the issues in dispute.

[4] Sol Encel, Penelope Nelson and Maria Stafford, *The Elephant in the Room: Age Discrimination in Employment* (National Seniors Productive Ageing Centre, 2011) 31.

[5] See for example Australian Information Commissioner, 'The Australian Information Commissioner will Protect Information Rights and Advance Information Policy' (Media Release, 1 November 2010) 1 <www.oaic.gov.au/news/media_release_oaic_launch.html>.

[6] The *Framework* is available at www.accesstojustice.gov.au. The absence of detailed public critique by the legal academy of that document is indicative of a barrier to justice that is discussed below.

> Sometimes, simply having access to good information can help people to resolve their own disputes quickly and effectively.[7]

That statement is indicative of our society's faith in information, which – like sunlight, vitamins, tax reductions or a mother's love – cures all ills.

It is also indicative of cost-shifting in the post-industrial information economy or information society, where disintermediation results in the consumer and the database undertaking activity that was formerly the preserve of the person behind the counter (minor official, sales assistant, claims processor, notary).[8] Governments are concerned with bureaucratic rationality rather than the highly individualised 'markets of one' envisaged by e-commerce enthusiasts and that disintermediation tends to result in people being treated as abstractions – as data subjects rather than as individuals, embodiments of a particular attribute (eg 'eligible' versus 'non-eligible') rather than persons with substantive rights. Do notions of an online Fordist efficiency in public administration (including the operation of the justice machine that we know as the courts) militate against justice?

B An Information Lens

It is a truth everywhere acknowledged, but – unlike Jane Austen – alas little critiqued, that most Australians are living in an information society.[9]

What is an 'information society' and what is its significance for justice?

In 1979 Eugene Garfield offered a concise and pragmatic definition, characterising an information society as one

> in which we take for granted the role of information as it pervades and dominates the activities of government, business and everyday life.[10]

Unlike 'cyberselfish' policy advocates[11] – such as John Perry Barlow, George Gilder, Nicolas Negroponte, Alvin Toffler, Clay Shirky and John Gilmore[12] – for whom information is an

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[7] *Access To Justice* (2011) Commonwealth Government <www.accesstojustice.gov.au>.

[8] Nicholas Gruen, chair of Australia's Government 2.0 Taskforce, commented that 'If Government 2.0 is realised, citizens won't just be consulted by government they'll actively collaborate with government.' Government 2.0 Taskforce, 'Government 2.0 Taskforce Paper Released for Public Comment' (7 December 2009).

[9] Merely leading some horses to the information pipeline doesn't mean that they will or can drink. The elision of difference by enthusiasts for the National Broadband Network and for other initiatives, such as provision of laptops for all students, reinforces a range of digital divides and construes access as the availability of infrastructure.

[10] Eugene Garfield, '2001: An Information Society' (1979) 1(4) *Journal of Information Science* 209.

[11] For a critique of the social and political implications of US digital transcendentalism see: Richard Barbrook and Andy Cameron, 'The Californian Ideology' (1996) 26 *Science of Culture* 44; Richard Barbrook, *Imaginary Futures: From Thinking Machines to the Global Village* (Pluto, 2007); Thomas Streeter, 'That Deep Romantic Chasm: Libertarianism, Neoliberalism and the Computer Culture' in Andrew Calabrese and Jean-Claude Burgelman (ed) *Communication, Citizenship and Social Policy: Rethinking the Limits of the Welfare State* (Rowman & Littlefield, 1999) 49-64; Paulina Borsook, *Cyberselfish: A Critical Romp Through the Terribly Libertarian Culture of High Tech* (PublicAffairs, 1999).

[12] Esther Dyson, George Gilder, George Keyworth and Alvin Toffler, Cyberspace & the American Dream: A Magna Carta for the Knowledge Age (1994) Progress & Freedom Foundation <www.pff.org/issues-pubs/futureinsights/fi1.2magnacarta.html>.

unalloyed good (if indeed not god),[13] Garfield cautioned against a simplistic evaluation of information access. Realists have recognised that the creation, dissemination and consumption of information has political and social implications that are not adequately addressed through sound-bites such as 'information just wants to be free'[14] or the imminent demise of the State, which will supposedly evaporate like a mothball when exposed to the beneficent warmth of the internet.[15] Garfield for example differentiated between an 'information conscious' society in which users take information for granted and an 'information literate' society in which users know how to handle information.[16] Are we an information literate society, particularly in relation to justice? That question is worth posing after recent national and state elections that featured claims about knife-crime, the 'refugee menace' and the efficacy of closed circuit cameras or mandatory sentencing that are at odds with reality.

From a justice perspective we are an information society because information is a commodity[17] (publishing and education are major sectors in the Australian economy) and because much employment involves what Bell dubbed 'symbolic analysts' (workers using, processing and creating information rather than widgets).[18]

Both the justice system and public administration are founded on information, with for example:

- the State construing the allocation of welfare and other entitlements through the individual's membership of particular classes of needs or rights, ie as an abstraction that in a world of bureaucratic rationality potentially denies personhood by treating the individual as a number rather than someone who is unique and that may be inconsistent with notions of individualised justice;[19]
- the publication of statute and case law, in principle readily accessible to legal practitioners and non-specialists alike rather than being unrecorded (with consequent inconsistency in judicial and administrative decision-making) or carefully restricted to an elite that is thus not publicly accountable;[20]

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[13] For expressions of futurism about digital information and cyberspace as the 'noosphere' see David Batstone, 'Virtually Democratic' (RMIT Alfred Deakin Lecture, 17 May 2001) and Kevin Kelly, 'We Are The Web', (2005) 13(8) *Wired Magazine* <http://www.wired.com/wired/archive/13.08/tech.html>.

[14] 'Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind ... I declare the global social space we are building to be naturally independent of the tyrannies you seek to impose on us. You have no moral right to rule us nor do you possess any methods of enforcement we have true reason to fear': John Perry Barlow, *A Declaration of the Independence of Cyberspace* (1996) < http://editions-hache.com/essais/pdf/barlow1.pdf>.
Australian prisoners – along with the digits – presumably yearn to be free; their confinement reflects certain realities that are not answered with a libertarian repackaging of Marx's exhortation for the oppressed to throw off their chains or assumptions that 'being digital' will make you rich, hip and cool.

[15] Nicholas Negroponte, *Being Digital* (Vintage, 1995) 238. A succinct response was provided by Bart Kosko, *Heaven in a Chip: Fuzzy Visions of Science and Society in the Digital Age* (Three Rivers Press, 2000) 43: 'we'll have governments as long as we have atoms to protect'.

[16] Eugene Garfield, '2001: An Information Society', 1(4) *Journal of Information Science* (1979) 209.

[17] Dan Schiller, *How To Think About Information* (University of Illinois Press, 2007) 21.

[18] Carl Shapiro and Hal Varian, *Information Rules* (Harvard Business School Press, 1999). For the analysts see: Daniel Bell, *The Coming of Post-Industrial Society* (Basic Books, 1976) 477; Robert Reich, *The Work of Nations* (Simon & Schuster, 1993) 169.

[19] Murray Gleeson, 'Individualised Justice: The Holy Grail' (1995) 69 *Australian Law Journal* 421.

[20] It is axiomatic that the rule of law, as distinct from rule by law (in particular a politicised, non-transparent and idiosyncratic rule by law, involves citizen and practitioner access to statute and case law. Lon Fuller, *The Morality of Law* (Yale University Press, 1969) 39 for example emphasises wide promulgation of rules as a basis

- documentation of government policies and of administrative actions, with decisions in principle being made on the basis of compliance with the policy and associated law rather than on the basis of personal connections or illicit payments;
- reporting and commentary, credible or otherwise, in the mass media regarding crimes, sentencing, rights, responsibilities and policies;
- public policy-makers drawing on suggestions, criticism and advice from voters, advocacy bodies and independent experts, whether as a manifestation of 'consultation theatre' that serves to legitimise power differentials in a non-plebiscitary democracy or as an expression of bureaucratic incapacity through several decades of outsourcing.

This discussion began by noting that most Australians are living in an information society and can take for granted the role of information in their daily lives. Use of the word 'most' is deliberate. Information and the infrastructure for the delivery of that information is, like the future (to adapt William Gibson's famous quip about digital modernity),[21] unevenly distributed and people in particular locations or with particular attributes may not have the same opportunities for access and to justice as those enjoyed by their peers.

Examples include some Indigenous peoples in what is dubbed 'remote Australia' (although their ancestral lands may not be remote to them); the urban poor; the deaf and blind or people with mobility problems;[22] and – more subtly – people whose cultural values militate against higher education, against use of public libraries or merely against a fact-based analysis of claims in the mass media.[23]

Initiatives such as the National Broadband Network will address some of those divides and reinforce others.[24] They will provide physical – or a surrogate – access to information about law and public administration but will not necessarily increase information literacy and thereby enhance access to justice. Having more information – footnotes, video clips, web pages, ministerial statements, justice strategic frameworks – does not automatically increase

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for justice. Randall Peerenboom, *China's Long March Toward Rule Of Law* (Cambridge University Press, 2002) 245 notes issues regarding lack of access to legal information in a contemporary rule by law regime.

[21] 'The future is already here – it's just not very evenly distributed'. The past of course is also here, also unevenly distributed and presumably going to remain so. Gibson is quoted in Christopher Meyer, 'If It's An Information Revolution, Where Are The Peasants?' (2000) 5 *Perspectives in Business Innovation: The Connected Economy* np. Works such as: James Beniger, *The Control Revolution: Technological and Economic Origins of the Information Society* (Harvard University Press, 1986); JoAnne Yates, *Control Through Communication: The Rise of System in American Management* (Johns Hopkins University Press, 1993); Richard Barbrook, *Imaginary Futures: From Thinking Machines to the Global Village* (Pluto, 2007); Frank Webster, *Theories of the Information Society* (Routledge, 2002); Alfred Chandler, *The Visible Hand: The Managerial Revolution in American Business* (Harvard University Press, 1977) have highlighted antecedents of what we call the information society.

[22] Among local works on digital divides see: Gerard Goggin and Christopher Newell, *Disability in Australia: Exposing A Social Apartheid* (UNSW Press, 2005) 199; Suzanne Willis and Bruce Tranter, 'Beyond the "Digital Divide"': Internet Diffusion and Inequality in Australia' (2006) 42(1) *Journal of Sociology* 43; Tony Vinson, *Dropping Off The Edge* (Jesuit Social Services, 2007).

[23] Graham Murdock and Peter Golding, 'Information Poverty and Political Inequality: Citizenship in the Age of Privatized Communications' (1989) 39(3) *Journal of Communications*, 18-195; Oscar Gandy Jr, 'The Surveillance Society: Information Technology and Bureaucratic Social Control' (1989) 39(3) *Journal of Communications*, 61-76.

[24] Tanya Notley and Marcus Foth, 'Extending Australia's Digital Divide Policy: An Examination of the Value of Social Inclusion and Social Capital Policy Frameworks' (2008) 7 *Australian Social Policy* 1.

understanding.[25] Although criticisms of the internet as fostering inattention and superficiality[26] are polemical[27] and overstated (laments about the 'shallows' are evident from at least the first era of Yellow Journalism[28] and are a recurrent feature of criticism of television) we might question the contemporary enthusiasm for Twitter,[29] Facebook[30] and crowd-sourced[31] reference material such as Wikipedia.[32] Does access to information through such mechanisms underpin justice or instead foster an information illiteracy that values incident over context, sound bites over sense?[33]

C International framework

Is there an international right of 'access to information', a right that can be invoked for example in the High Court to address deficiencies in the development of legislation or that offers a strong foundation for provision of free access to the proceedings of all Magistrates' Courts? Is access to information a human right?

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[25] Herbert Simon, 'Rationality as Process and as Product of Thought', in David Bell, Howard Raiffa and Amos Tversky (eds), *Decision Making: Descriptive, Normative, and Prescriptive Interactions* (Cambridge University Press, 1988) 73 comments that: 'In a world where information is relatively scarce, and where problems for decision are few and simple, information is almost always a positive good. In a world where attention is a major scarce resource, information may be an expensive luxury, for it may turn our attention from what is important to what is unimportant.'

[26] Nicholas Carr, *The Shallows: How the Internet is Changing the Way We Think, Read and Remember* (Atlantic, 2010); Lee Siegel, *Against The Machine: Being Human in the Age of the Electronic Mob* (Serpent's Tail, 2008); Evgeny Morozov, *The Net Delusion: How Not To Liberate The World* (Allen Lane, 2011); Sven Birkerts, *The Gutenberg Elegies: The Fate of Reading In An Electronic Age* (Faber, 1994).

[27] For an egregious example see Neil Postman, *Technopoly: The Surrender of Culture to Technology* (Knopf, 1992) 70: 'Like the Sorcerer's Apprentice, we are awash in information. And all the sorcerer has left us is a broom. Information has become a form of garbage, not only incapable of answering the most fundamental human questions, but barely useful in providing coherent direction to the solution of even mundane problems … the tie between information and human purpose has been severed, ie, information appears indiscriminately, directed at no one in particular, in enormous volume and at high speeds, and disconnected from theory, meaning, or purpose ... We are a culture consuming itself with information, and many of us do not even wonder how to control the process. We proceed under the assumption that information is our friend, believing that cultures may suffer grievously from a lack of information, which, of course, they do. It is only now beginning to be understood that cultures may also suffer grievously from information glut, information without meaning, information without control mechanisms.'

[28] W Joseph Campbell, *Yellow Journalism: Puncturing the Myths, Defining the Legacies* (Praeger, 2003); Shannon Petersen, 'Yellow Justice: Media Portrayal of Criminal Trials in the Progressive Era' (1999) 1(1) *Stanford Journal of Legal Studies* 72.

[29] Bernardo Huberman, Daniel Romero and Fang Wu, 'Social Networks That Matter: Twitter Under the Microscope' (2009) 14(1) *First Monday*.

[30] David Kirkpatrick, *The Facebook Effect* (Simon & Schuster, 2010)

[31] James Surowiecki, *The Wisdom of Crowds* (Doubleday, 2004); Jeff Howe, *Crowdsourcing: Why the Power of the Crowd is Driving the Future of Business* (Crown, 2008); Adam Thierer and Clyde Crews Jr, *What's Yours Is Mine: Open Access and the Rise of Infrastructure Socialism* (Cato Institute, 2003); Axel Bruns, *Blogs, Wikipedia, Second Life and Beyond: From Production to Produsage* (Peter Lang, 2008). Readers who have encountered the notion of penal populism, for example in works cited below n 95 below, might be wary about an uncritical reliance on the wisdom of the crowd.

[32] Joseph Reagle, *Good Faith Collaboration: The Culture of Wikipedia* (MIT Press, 2010); Dan O'Sullivan, *Wikipedia: A New Community of Practice?* (Ashgate, 2009); Andrew Keen, *The Cult of the Amateur: How Today's Internet is Killing Our Culture and Assaulting Our Economy* (Nicholas Brealey, 2007).

[33] At a less polemical level, does the uncritical recycling evident in much online writing by non-professionals about law encourage assumptions in Australia that justice – in particular rights and responsibilities regarding cyberspace – has a US flavour, with for example a global *Lex Informatica* tacitly embodying a Jeffersonian interpretation of US constitutional law regarding free speech?

Landmark statements of principle such as the 1948 United Nations *Universal Declaration of Human Rights* (UDHR) identify human rights as being held by all people equally, universally, and forever.[34] Those rights are interdependent, inalienable, indivisible[35] and independent of technology[36] but are broad and subject to interpretation in practice.[37]

Article 18 of the UDHR indicates that 'Everyone has the right to freedom of thought, conscience and religion', a right that has been reflected in debate about censorship and privacy. Article 19 enshrines:

> the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 26 identifies a salient right to education, 'directed to the full development of the human personality' and implicitly requiring access to information.

UNESCO has argued that access to information (aka right to information or RTI) is a fundamental human right in the 21st century, in line with the UDHR. In 1997 the UN's Administrative Committee on Coordination (ACC) issued a *Statement on Universal Access to Basic Communication and Information Service*s, foreshadowing a 'Human Right for Universal Access to Basic Communication & Information Services'.

Such an RTI has not been enshrined in an international agreement that binds Australian legislatures. During early 2003 the UNHCR argued that 'the right to access information would also entail the availability of adequate tools to access information, and has implications for the sharing of knowledge as well'.[38] Although cited at gatherings such as the 2003 World Summit on the Information Society,[39] there has been little progress in moving beyond generalities. For an overarching right of access to information Australians will presumably need to look to the legislature rather than the High Court, Geneva or New York.

We might ask why we do not have a statutorily recognised right to information and whether a right would be restricted to government information?[40] Do restrictions on access to non-government information, through for example privacy, confidentiality and contract law, fundamentally inhibit access to justice or merely represent an inconvenience?

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[34] Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press, 1989).

[35] Interdependence, for example, means that an individual's right to free expression and to participation in government is directly affected by rights to the physical necessities of life, to education, to free association and non-interference by police or other agencies. Inalienability means that those rights are innate: a person cannot lose those rights and cannot be denied a right because it is 'less important' or 'non-essential'. It is common to differentiate between two classes of rights: civil and political rights (sometimes labelled as fundamental rights) and economic, social and cultural rights (complementary rights).

[36] William McIver Jr, William Birdsall and Merrilee Rasmussen, 'The Internet and the Right to Communicate', (2003) 8(12) *First Monday*.

[37] For a revisionist view see Andrew Williams, *European Union Human Rights Policies: A Study in Irony* (Oxford University Press, 2004).

[38] Office of the Commissioner for Human Rights, *Background Note on the Information Society and Human Rights* (2003) United Nations Commissioner for Human Rights <www.itu.int/dms_pub/itu-s/md/03/.../S03-WSISPC3-C-0178!!MSW-E.doc>.

[39] Marita Moll and Leslie Shade, 'Vision Impossible? The World Summit on the Information Society' in Marita Moll and Leslie Shade (ed), *Seeking Convergence in Policy and Practice* (Canadian Centre for Policy Alternatives, 2004) 47.

[40] Alasdair Roberts, 'Structural Pluralism and the Right to Information' (2001) 51(3) *University of Toronto Law Journal* 243.

One answer might be that an abstract right is overly broad, implicitly requiring courts to make unpopular value judgments about that valorises types of information (access to legal literature but not to comics?) and encourages a State intervention through, for example, government funding of access mechanisms such as public libraries.

A response to criticisms that a 'right to information' is as broad and meaningless as a 'right to health' or 'right to communication' is that Australian courts and legislatures over the past century *have* grappled with questions about rights and social policy, with the Constitution, for example, endowing the national parliament with a head of power regarding pensions for the aged and infirm[41] and the High Court in a succession of cases finding and circumscribing an implied freedom of political communication,[42] often characterised as a positive right rather than as a freedom from inappropriate interference.

D An Australian right?

Given the preceding comments it is unsurprising to note that in Australian law there is no broad statutory right of access to information.

We might, after consideration, decide that articulation of a positive right is not necessary, as justice is served through a patchwork of Commonwealth, State and Territory statute law and common law that addresses particular types of information/communication and uses of information.

That patchwork, for example, covers:

- institutional and personal confidential information;
- copyright;[43]
- privacy;[44]
- national security and law enforcement;[45]
- information acquired by government agencies through mandatory data collections, eg the national census;[46]
- the electoral roll;[47]
- obscene or offensive content;[48]
- trade practices;[49]
- the operation of Parliament and the courts;[50]
- restrictions on access by prisoners;[51]

[41] Australian Constitution, s 51(xxiii), s 51(xxiiA). Note that these sections provide a head of power rather than providing Australian citizens, residents and aliens with a justiciable right.
[42] eg: *Coleman v Power* [2004] HCA 39; (2004) 220 CLR 1; *Stephens v Western Australian Newspapers* [1994] HCA 45; (1994) 182 CLR 211.
[43] *Copyright Act 1968* (Cth).
[44] eg: *Privacy Act 1988* (Cth); *Workplace Video Surveillance Act 2005* (WA); *Health Records (Privacy and Access) Act 1997* (ACT).
[45] eg: *Crimes Act 1914* (Cth), s 15HK, s 15KP.
[46] eg: *Census & Statistics Act 1905* (Cth), s 10, s 11.
[47] eg: *Parliamentary Papers Act 1908* (Cth); *Parliament of Queensland Act 2001* (Qld), s 8, s 25, s 29, s 50.
[48] eg: *Broadcasting Services Amendment (Online Services) Act 1999* (Cth); *Re Bauskis* [2006] NSWSC 908; *Police v Pfeifer* (1997) 68 SASR 285.
[49] eg: *Competition & Consumer Act 2010* (Cth), Sch 2.
[50] eg: *Supreme Court Act 1970* (NSW).

- defamation[52] and vilification;[53]
- operation of government entities;[54]
- spent convictions;[55]
- witness protection schemes;[56]
- restrictions on reporting of legal proceedings;[57]

all of which potentially impinge on access to justice. That law embodies inescapable tensions and on occasion will result in outcomes or practices that some people will consider to be unjust.[58] Do we need an overarching and justiciable right to information?[59]

II AN AUSTRALIAN FRAMEWORK?

Recent Commonwealth Government statements have referred to a 'right to information'.[60] Those statements are rhetorical rather than justiciable.

The 'right' is not comprehensive and instead relates to community access to information provided to and/or created by the national government.

It does not encompass the information of the State/Territory governments, responsible for the agencies with which many Australians deal most frequently. That restriction reflects the federal nature of government in Australia; there appear to have been no significant suggestions that all levels of government move towards an integrated 'open access' regime.

The 'right' also does not cover the private sector, with people instead having to rely on mechanisms such as discovery in the course of litigation, mandatory publishing of financial statements by listed corporations, information analysis and dissemination by the mass media (which might be chilled through defamation or other tools),[61] and statutory requirements under the patchwork of privacy statutes for data subjects to be access information that is held by credit providers and other non-government entities.

Tensions in access to information as a basis for justice are evident in that privacy law: should we be able to access non-government information about other people rather than about

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[51] eg: *Corrections Act 1968* (Vic), s 47A, s 47B, s 47D.
[52] eg: *Defamation Act 2005* (NSW).
[53] cf Luke McNamara, *Regulating Racism: Racial Vilification Laws in Australia* (Sydney Institute of Criminology, 2002); Lisa Hill, 'Parliamentary Privilege and Homosexual Vilification' in Katherine Gelber and Adrienne Stone (ed) *Hate Speech and Freedom of Speech in Australia* (Federation Press, 2007) 82.
[54] eg: *Financial Management & Accountability Act 1997* (Cth); *Public Service Act 1999* (Cth).
[55] eg: *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld); *Criminal Records (Spent Convictions) Act 1992* (NT).
[56] eg: *Witness Protection Act 1991* (Vic).
[57] eg: *Supreme Court Act 1986* (Vic), s 20.
[58] eg: *Hogan v Hinch* [2011] HCA 4, for which see: Skye Masters, '*Hogan v Hinch*: Case Note' (2011) 10 *Canberra Law Review* 197.
[59] See in particular the discussion in Bede Harris, *A New Constitution For Australia* (Cavendish, 2002) 27, 70. The lucid analysis in that work contrasts with much legal writing, where a serious tone and lofty diction disguises the paucity of analysis and the shallowness of research.
[60] For example: Australian Information Commissioner, above n 5.
[61] The ABC reported on 18 May that immigration centre operator SERCO regards an 'unauthorised media presence' at one of its facilities as the highest possible threat level, ie equivalent to a bomb threat or escape: *Unauthorised Media on Par with Bomb Threats: Serco* (18 May 2011) ABC News <www.abc.net.au/news/stories/2011/05/18/3220131.htm>.

ourselves? Should we, indeed, like citizens of some Scandinavian countries, be able to see full or abstracted tax returns from our fellow citizens?[62] (Realisation that some extremely wealthy individuals, along with leading corporations, are paying little or no tax might encourage meaningful tax reform rather than outbreaks of *poujadism* about 'The Very Big Tax', aka a carbon tax regime.)

We might also want to revisit notions of a broad national information policy (NIP), considering access to information generally rather than in terms of narrow silos labelled 'library', 'school', 'archives', 'print media', 'broadcast', 'freedom of information', 'the Internet' and so forth.

A A national information policy?

At the beginning of the 'Internet Age' in 1974, amid visions of technocratic rationality[63] and provision of access to cultural resources through flagships such as the National Library of Australia, Donald Lamberton characterised 'national information policy' as

> embracing efforts to put into practice the basic notion that the social and economic system will function more efficiently if improved information-flows to the decision-making centers can be ensured. This notion underlies much of the effort directed to such seemingly diverse activities as mass education, market research, financial analysis, research and development (R and D) and social management techniques, such as national income accounting and input-output analysis.[64]

Antecedents of such a policy are evident in prior decades and in the writing of public intellectual Barry Jones.[65] In practice national information policies have typically been an exercise in badging rather than in sustained substantive change,[66] with governments hoping for an image of modernity or activity through statements about information rights and a coherent policy that addresses community needs by integrating the activity of competing bureaucratic interests. Reality has always been less exciting, with resistance by agencies (a NIP has generally been exploited as an opportunity to gain/retain funding) and failures to implement the grand vision on a day by day basis in delivery of services to ordinary consumers.

In October last year the national Government announced that:

> Information policy reform is of growing importance in Australian Government. With a view to strengthening government information policy and practices, the Australian Government has recently commissioned a number of reviews. Issues canvassed in this reform process include opening public sector information to greater use and reuse outside of government; using good

[62] See for example the discussion of Norway in: Joshua Blank, 'In Defense of Individual Tax Privacy' (New York University Law & Economics Working Papers No 263, 2011) 49; Joel Slemrod, 'Taxation and Big Brother: Information, Personalization and Privacy in 21st Century Tax Policy' (Annual Lecture, Institute of Fiscal Studies, London, 2005) 19; Makato Hasegawa, Jeffrey Hoopes, Ryo Ishida and Joel Slemrod, 'The Effect of Public Disclosure on Reported Taxable Income: Evidence From Individuals and Corporations in Japan' (Social Science Research Network Paper 1653948, 2010) 6.

[63] As points of reference see: Philip Mirowski, *Machine Dreams: Economics Becomes A Cyborg Science* (Cambridge University Press, 2002); Sonja Amadae, *Rationalizing Capitalist Democracy: The Cold War Origins of Rational Choice Liberalism* (University of Chicago Press, 2003).

[64] Donald Lamberton, 'National Information Policy', in Sandra Braman (ed), *Communications Research and Policy-Making* (MIT Press, 2003) 105.

[65] Barry Jones, *Sleepers Wake! Technology and the Future of Work* (Oxford University Press, 1982).

[66] Critiques include: Michael Middleton, 'Information Policy and Infrastructure in Australia' (1997) 24(1) *Journal of Government Information*, 9-25; Julian Thomas, 'Towards Information Policy?' (1998) 87 *Media International Australia*, 9-14.

> information policy to stimulate innovation; enhancing participation in government through use of web 2.0 tools; encouraging a coordinated approach to government information policy; and clarifying the roles of key government information management agencies.
> Concurrent with these reviews, the *Freedom of Information Act 1982* (Cth) (the FOI Act) has been substantially amended, 'to promote a pro-disclosure culture across government and to build a stronger foundation for more openness in government'. A new independent statutory office has been established, the Office of the Australian Information Commissioner (OAIC), headed by three Commissioners: the Australian Information Commissioner, the Freedom of Information Commissioner and the existing Privacy Commissioner.[67]

Given the history of information policy initiatives we might ask whether current reforms have moved beyond a rather patchy mix of ministerial exhortations, media statements and expressions of enthusiasm for potential community engagement mechanisms such as Twitter.

One example is the Information Commissioner's website, which we might reasonably assume would represent best practice. That site (along with the superseded site of the Privacy Commissioner) has yet to feature the genetic privacy *Determinations* that amend the *Privacy Act 1988* (Cth) and allow medical practitioners to indulge in large scale 'genetic fishing expeditions'.[68] If the Information Commissioner lacks the commitment or capacity to provide access to key law, we might wonder whether there is a real commitment elsewhere in the national bureaucracy.

B Freedom of Information

Use of FOI by journalists and by government 'clients' has been routinised over the past two decades.[69] The FOI reforms are valuable as a signal to officials that the Government is keen – or wants to be perceived as keen – to encourage transparency and to reverse the traditional access policy with a default position that all government documents are potentially accessible unless there is good reason (eg for the purposes of law enforcement and international relations or for the protection of privacy and public safety) for access to be denied.

From a justice perspective the removal of application fees is to be welcomed, although it unclear whether agencies in the past chose to impose application fees and thereby substantially inhibited access by individuals, commercial interests or journalists.[70] Note that processing fees have not been abolished[71] and access may be refused on the grounds of

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[67] Issues Paper 1: Towards An Australian Government Information Policy (2010) Office of the Australian Information Commissioner, 5 <www.oaic.gov.au/.../issues_paper1_towards_australian_government_ information_policy.pdf>.
[68] Bruce Arnold and Wendy Bonython, 'Relatively Speaking: Genetic Privacy and Public Interest Determinations 11 and 11A under the *Privacy Act 1988* (Cth)' (2010) 7(1) *Privacy Law Bulletin*, 2.
[69] In 2005-2006 some 41,430 FOI access requests were received, of which 14,627 were directed to the Department of Immigration & Multicultural Affairs, 13,817 to Centrelink and 8,330 to the Department of Veterans' Affairs. 85% were for personal information about the applicant and other people. The remaining 15% concerned documents featuring other information, for example government policy development and decision-making. 38,987 of the requests were determined in the reporting period and granted in full or in part. The average processing cost was $601 per request; the government at that time reported that only 2% of the total cost was recovered in fees and charges. The cost of provision of information to the community is arguably an acceptable and unremarkable part of a liberal democracy, ie should be absorbed by the taxpayer rather than assessed using a commercial metric.
[70] For the *Freedom of Information Act 1982* (Cth), prior to the recent reforms see Moira Paterson, *Freedom of Information and Privacy in Australia* (LexisNexis Butterworths, 2005).
[71] *Freedom of Information Act 1982* (Cth), s 29.

'unreasonableness'.[72] Some agencies, such as the Immigration Department, have alerted applicants that the fees for provision of some information will be more than $20,000. Do we have an expectation that all government information should be free to any applicant, irrespective of whether that information directly concerns the applicant?

The reforms are new and as yet they have been tested in only three cases.[73] A wariness about potential differences between perceptions and reality, image and actual practice, reflects uncertainty about the 'Assange Effect'. In a seminar for the Australian & New Zealand Institute for Governance in February this year, the author suggested that digital anarchist Julian Assange,[74] the proprietor of Wikileaks, was the most useful ally of bureaucrats who were concerned to restrict access to government information.

Egregious failures in US government information practice, demonstrated through dissemination by Wikileaks and its mainstream media partners of diplomatic cables that often do not go beyond cocktail party chatter, will presumably be reflected in restrictions on what information is kept, who gets to see it and how it is distributed.[75] Those restrictions will in some instances involve reliance on word of mouth – unrecorded meetings behind closed doors – as a replacement for meticulous documentation on files and the generation of drafts through email and groupware. The Assange Effect will chill information access (and generate revenue for airlines and the shredder industry) rather than liberating official and private information.

A weakness of the new FOI Act is that it does not, in practice, meaningfully address government information practice. For government recordkeeping – what gets documented, when it gets documented, how it gets documented – we need to look at statutes such as the *Archives Act 1983* (Cth) discussed below and broader public administration law such as the *Financial Management & Accountability Act 1997* (Cth).

Those frameworks provide substantial discretion to senior officials. They do not prohibit use of Post-It notes or other aids that can be removed from a file prior to provision of access under FOI or that indeed are never placed on file. The use of 'disposable media' is unclear: there has been no large-scale authoritative study on the prevalence and significance of such practice. However, it is a commonplace in discussion among mid to senior level Commonwealth bureaucrats in Canberra that some matters are routinely handled through Post-Its and through calls or face to face meetings.

If the Government wants to cement the FOI reforms it might consider a detailed and independent examination of agency recordkeeping practice that underpins substantive rather than merely procedural access, and hence substantive justice. In the absence of sustained

[72] Ibid, s 24, s 24AA.
[73] *Parnell v Minister for Infrastructure & Transport* [2011] AICmr 3; *Besser v Department of Infrastructure & Transport* [2011] AICmr 2; *Crowe v NBN Co Ltd* [2011] AICmr 1.
[74] Daniel Domscheit-Berg and Tina Klopp, [tr] Jefferson Chase, *Inside Wikileaks: My Time With Julian Assange At The World's Most Dangerous Website* (Scribe, 2011); Micah Sifry, *Wikileaks and the Age of Transparency* (Scribe, 2011); David Leigh and Luke Harding, *WikiLeaks: Inside Julian Assange's War on Secrecy* (Public Affairs, 2011); Andrew Fowler, *The Most Dangerous Man In The World* (Melbourne University Press, 2011).
[75] See for example Australian National Audit Office, *The Protection and Security of Electronic Information Held by Australian Government Agencies* (2011); Marcus Mannheim, 'Costly Veil of Secrecy Descends Over PS', *Canberra Times* (Canberra), 28 May 2011, 1 regarding classification frameworks.

engagement with agency information handling the national bureaucracy resembles St Augustine when he exhorted the Lord to give him chastity … but not quite yet.[76]

From a justice perspective one of the most valuable aspects of the FOI changes has received very little attention. The reforms require agencies to maintain and publish 'FOI Logs', ie to indicate that information has been provided in response to FOI applications.[77] Law can be characterised as an information mechanism, with decision-makers and others receiving and acting upon signals. Emulation is important. Discerning what other people have been looking at may point potential applicants in the right direction and more broadly provides an example that can be followed by potential applicants who have an weak understanding of their rights and thus lack agency.

C A big bureaucratic post box

Writers on administrative law have traditionally construed the Commonwealth Ombudsman[78] as a mediation or accountability mechanism. At a more subtle level we can construe the Commonwealth Ombudsman scheme as an information mechanism, with the Ombudsman's staff liaising with agencies to obtain information that addresses complaints by members of the public or that simply directs people in the right direction (eg indicates that their complaint should be made to a state/territory government agency).

The Ombudsman is not a judicial body: it cannot overturn decisions by government officials or unilaterally correct deficiencies in public administration. Where agencies are recalcitrant it relies on 'naming and shaming', an approach that has underwhelmed embattled bodies such as the Immigration Department.

The Ombudsman's emphasis on persuasion, its low resourcing and its tacit role as a directory service means that it serves as a bureaucratic post box. It lacks the staff and authority for comprehensive investigation of government agencies, instead typically investigating on an exception basis. That investigation is founded on requests for information from contact officers in the agencies of concern.

An Ombudsman need not be so hobbled, so dependent on its contacts engaging in a 'please explain' exercise. From a justice perspective we might endow the Ombudsman with more teeth, both through a greater level of resourcing and through authority for active investigation on agency premises (emulating the Australian National Audit Office) rather than relying on what its contacts say has happened.

D The View from the Past

The past offers a language for interpreting the present. Access to the 'historical record' may be important as a basis for righting continuing wrongs, addressing past injuries or gaining an

[76] Some idea of agency resistance is provided in comments featured in: *Principles on Open Public Sector Information: Report on Review and Development of Principles, May 2011* (2011) Office of the Australian Information Commissioner <http://www.oaic.gov.au/publications/reports/Principles_open_public_sector_info_report_may2011.html>.
[77] *Freedom of Information Act 1982* (Cth), s 11C(3).
[78] *Ombudsman Act 1976* (Cth).

insight into how contemporary bureaucracies may behave now and in the future (given that government agencies and large organisations are creatures of habit).

That past might have featured abuse of minors and their parents, with the destruction of documentation for example impacting on judicial consideration of claims in *Cubillo*[79] and the 'child migrant cases'.

It might have featured surveillance – in some instances little more than fantasy or malicious tittle-tattle but affecting careers – of political activists, members of the 'creative class' and jurists.[80] Contrary to expectations articulated by Richard Florida about governments greeting the creatives with a soy chai latte and subsidised fibre,[81] people who fit outside the institutional mould have often been the subject of suspicion.[82] We might want to know what the various national intelligence agencies and their State/Territory police counterparts were up to, if for no other reason than to question contemporary assurances of pressing need and good behaviour in the latest iteration of past wars on Wobblies, Communists and other enemies du jour. Access through records, and more importantly a commitment by intelligence agencies to accountability through preservation of information obviates the need for governance exercises such as the 'Murphy Raid'.[83]

Access to information for justice is not necessarily easy. In some instances it is not possible. Why?

One reason is that Australia's archival regime is fragmented. At a government level we see a dichotomy between the Commonwealth and State/Territory governments. No statute covers all government records (the different jurisdictions have discrete legislation of varying comprehensiveness) and archival law does not require the preservation of non-government documentation. The records of private sector entities – commercial enterprises, not-for-profit organisations, educational institutions and religious bodies – may not be extant. If they are still in existence and can be identified (not a certainty, given indications that the archival practice of some bodies involves throwing files into a shed and trusting that the pigeons or possums will rearrange the chaos), there is no automatic right of access. That might be unfortunate for those seeking justice in relation to claims of institutional knowledge of sexual abuse of minors in the custody of clergy or seeking information about corporate knowledge that smoking is not in fact a viable therapy for conditions such as asthma and bronchitis.

It is unclear whether the National Archives has ever used its powers to deal with misbehaviour by government agencies. The Act is weak. The commitment of both the government and the executive of the Archives to ready access by Australians to the records of the national administration is thrown into doubt by last year's announcement that the NAA would close several of its regional offices (for example in Adelaide, Hobart and Darwin),

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[79] *Cubillo v Commonwealth* [2000] FCA 1084. Among studies see: Alisoun Neville, '*Cubillo v Commonwealth*: Classifying Text and the Violence Exclusion' (2005) 5 *Macquarie Law Journal* 31.
[80] Fiona Capp, Writers Defiled: Security Surveillance of Australian Authors and Intellectuals (McPhee Gribble, 1993) 1920-1960.
[81] Richard Florida, *The Rise of the Creative Class* (Basic Books, 2002).
[82] Frank Cain, *The Origins of Political Surveillance in Australia* (Angus & Robertson, 1983); *Terrorism & Intelligence in Australia: A History of ASIO and National Surveillance* (North Australian Scholarly Publishing, 2008); Jenny Hocking, *Beyond Terrorism: The Development of the Australian Security State* (Allen & Unwin, 1993); David McKnight, *Australia's Spies and Their Secrets* (Allen & Unwin, 1994).
[83] Jenny Hocking, *Lionel Murphy: A Political Biography* (Cambridge University Press, 1997) 164.

with some material being transferred to repositories in the east coast and a pious – apparently unavailing – hope being expressed that sister institutions in the State/Territory governments would assume custody of what was left, ie many kilometres of files, registers, cards, photographs, video and computer tape. The claimed rationale was budget stringency (perhaps less than persuasive when over $200 million is being distributed to religious organisations for operation of the National Chaplaincy Program in public schools) and opportunities for savings. Unsurprisingly there has been speculation across the archival profession that the closures are a precursor of further cuts, with the Archives eventually operating only out of Canberra and Sydney.

The Commonwealth is considerably more advanced than its Australian Capital Territory counterpart. There has been no comprehensive study of records management in the ACT government and comments in this part of the paper are necessarily speculative. Complaints by people in disputes with the ACT Housing agency and other bodies suggest that ACT residents are being denied justice because recordkeeping practice centres on document exchange using email, with little attention to generation of a paper record and to backing up of documents in an electronic repository that is independent of an individual official's email account.

That deficiency is reportedly exacerbated by deletion of documents in that account when the officer leaves the agency. Some claimants appear to have sought access to information under FOI, being informed variously that information is no longer extant or that provision of information through a major search of fragmented databases would be inordinately expensive.

E Access to a commodity

Dollars talk, and not just in denying access to current or potential litigants. The national information policy espoused by the current Government characterises official information as a public resource, a resource that as far as practical is to be shared.[84]

That sharing – bounded through use of mechanisms such as Creative Commons and evident in gateways such as data.gov.au – poses challenges for officials who have a narrow view of Crown copyright[85] and who conceptualise government information as a commodity that must be guarded for commercial exploitation that funds the operation of the particular agency or contributes to general revenue. There is a tension in Commonwealth information policy between agencies that recognise geospatial, demographic or other information as saleable assets, those with an 'information just wants to be free' ethos and those who have a more nuanced understanding that encompasses recognition of privacy concerns. It would be timely to revisit the *Statement of Intellectual Property Principles for Australian Government Agencies*, with active encouragement of (rather than a mere exhortation that agencies consider) licensing of public sector information under an open access licence.[86]

[84] See in particular the Principles on Open Public Sector Information, above n 76.
[85] John Gilchrist, 'Crown Use of Copyright Material' (2010) 1 *Canberra Law Review*.
[86] Anne Fitzgerald, Neale Hooper and Brian Fitzgerald, 'Enabling Open Access To Public Sector Information With Creative Commons Licences: The Australian Experience' in Brian Fitzgerald (ed), *Access To Public Sector Information: Law, Technology & Policy Vol 1* (Sydney University Press, 2010) 71.

F Access, but for whom

Anatole France famously commented that in a liberal democratic state, both poor and rich alike were legally able to sleep under bridges, although the rich – quite unaccountably – seemed reluctant to exercise that right.

Access to justice is predicated on all people having access, not merely those who are 'digitally proficient', financially advantaged or time rich. A decade ago the SOCOG dispute[87] highlighted questions about access by the blind or other disadvantaged people to information resources. From a legal perspective we have not advanced far and arguably are falling behind, as agencies cut costs by replacing their shopfront presence – particularly in rural/remote Australia – with an online presence.

Going online has been celebrated as providing members of the public with 24/7 access to an official information cornucopia, a brave new world of Government 2.0 where the governed and governors alike engage in a community dialogue through Twitter, blogs, RSS and other new media.[88] We might ask whether reality is more sombre for the disadvantaged, with both the blind and the non-blind alike experiencing frustration and disengagement when encountering electronic resources that do meet international web accessibility standards and that do not supply accurate, current information. Spending 30 minutes in a fruitless search of an agency (or university) website may be a common experience but from a justice perspective it should be an exception rather than the rule. What are we doing about it?

At a more mundane level, we might question the information practice of government agencies in providing access to consultation documents and policy statements. Ministerial commitment to making information available is undermined by use of electronic content management systems that assign non-intuitive and excessively lengthy URLs to online resources, with the Commonwealth Attorney-General's Department being an example of bad practice. The URL identifying one recent A-G's document was a mere 247 characters. Inefficiencies in resource identification – which result in inequities in access to information – are exacerbated by the inadequacy of the site-specific search engines used by many agencies in aiding access to what is held on their sites. As two generations of information architects such as Jakob Nielsen have commented, if you cannot find what you are looking for, that content, in practice, does not exist.[89]

III ASLEEP IN THE SEA OF DATA

Regrettably, although this conference is graced by the presence of former High Court Justice Michael Kirby – the great articulator rather than the great dissenter – the legal consciousness of many Australians appears to be framed by consumption of *Underbelly*, Andrew Bolt,[90]

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[87] Bruce Lindsay Maguire v Sydney Organising Committee for the Olympic Games, HREOC H99/115 (24 August 2000).
[88] *Engage: Getting On With Government 2.0* (2009) Government 2.0 Taskforce <http://gov2.net.au> and <www.finance.gov.aupublications/gov20taskforcereport/index.html>.
[89] Jakob Nielsen, *Designing Web Usability: The Practice of Simplicity* (New Riders, 2000).
[90] For Bolt and peer Janet Albrechtsen see the polemical: Niall Lucy and Steve Mickler, *The War on Democracy: Conservative Opinion in the Australian Press* (Crawley: University of Western Australia Press, 2006) 69-106.

BraveHearts, *Blue Heelers*, Derryn Hinch,[91] Alan Jones[92] and Wikipedia. To use the words of legal and media scholar Geoff Stewart, 'If it bleeds it leads … and don't worry about the nuance'.[93]

A Process over outcome?

Substantive rather than merely procedural justice requires understanding, an understanding of legal principles and processes by members of the public and an understanding (informed through consultation) by legislators and official decision-makers.

It is perplexing, to say the least, that the *Strategic Framework* noted above was not accompanied by appropriate funding of the Australian Law Reform Commission, reversing several years of serious cutbacks that have seen the ALRC announce that it will be narrowing its consultation and emphasising electronic contact. One response might be that all or most substantive input to ALRC investigations now involves electronic submissions. A rejoinder is that it is important in a liberal democratic state for bodies such as the ALRC to be seen to be accessible and committed to public consultation with people who live on the disadvantaged side of the information highway.[94]

Does access to justice involve understanding of the courts?

The recent Hora report in South Australia, a jurisdiction increasingly disfigured by penal populism[95] and willingness to fetter the courts[96] amid rhetoric about a war on crime, suggested appointment of a 'Media Judge', who would encourage community understanding of the law through communication with journalists and students.[97] It is striking that the new Chief Justice of the NSW Supreme Court, at the announcement of his appointment, voiced a commitment to improving access to justice but was silent about the significance of information as a facilitator of that access.[98] Should we expect the judiciary to articulate legal principles and processes in terms that can be readily understood by non-professionals and in media other than law reports or the occasional work such as *The Quest For Justice* by former ACT Supreme Court Justice Ken Crispin?[99]

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[91] Skye Masters, '*Hogan v Hinch*: Case Note' (2011) 10 Canberra Law Review 197; Anne Twomey, 'Case Note: *Derryn Hinch v Attorney-General for the State of Victoria*' (1987-88) 16 *Melbourne University Law Review* 683-688; and Christine Everingham, *Social Justice and the Politics of Community* (Aldershot: Ashgate, 2003) 44.

[92] Chris Murphy, *Jonestown* (Allen & Unwin, 2007).

[93] Mr Stewart is a co-author with Bruce Arnold and Susan Priest of works on *Underbelly*, law and the mass media.

[94] Roslyn Atkinson, 'Law Reform and Community Participation' in Brian Opeskin and Davis Weisbrot (ed), *The Promise of Law Reform* (Federation Press, 2005) 164.

[95] For the notion of penal populism as a reflection of communication failures see: John Pratt, *Penal Populism* (Routledge, 2007); Arie Freiberg and Karen Gelb, *Penal Populism, Sentencing Councils and Sentencing Policy* (Hawkins Press, 2008); Julian Roberts, Loretta Stalans, David Indermaur and Mike Hough, *Penal Populism and Public Opinion: Lessons from Five Countries* (Oxford University Press, 2003).

[96] *Totani & Anor v The State of South Australia* [2009] SASC 30.

[97] Peggy Hora, *Smart Justice: Building Safer Communities, Increasing Access to the Courts, and Elevating Trust and Confidence in the Justice System* (2011) Adelaide Thinkers in Residence, 68 <www.thinkers.sa.gov.au/Thinkers/Hora/finreport.aspx>.

[98] Geesche Jacobsen and Anna Patty, 'New State Chief Justice Sets Out Legal Access for all as a Priority', *Sydney Morning Herald* (Sydney), 14 May 2011, 3.

[99] Ken Crispin, *The Quest For Justice* (Scribe, 2010).

When examining some public statements and litigation we might of course wonder whether the politicians and their advisers actually understood, or care to understand, the law.[100]

B Breaching the silos

The *Strategic Framework*, importantly, does not provide substantial funding for AustLII, the open source project that is the only integrated public legal database covering the Australian jurisdictions. Different governments (at a whole of government or agency level) have instead concentrated on funding jurisdiction specific databases such as Comlaw and www.consumerlaw.gov.au. Access to justice would be enhanced through sufficient funding for AustLII to be certain of continued operation (in contrast to suggestions last year that inadequate support would force its imminent closure) and improve its interface.

IV WHOSE ACCESS, WHOSE JUSTICE

Preceding pages have highlighted tensions in information policy and questions about differentials in access to information.

We might recognise those tensions in assessing comments such as the statement[101] by Deakin University academic Mirko Bagaric,[102] that:

> privacy is a middle-class invention by people with nothing else to worry about. Normally they would have every right to live in their moral fog, but not when their confusion permeates the feeble minds of law-makers and puts the innocent at risk.
>
> The right to privacy is the adult equivalent of Santa Claus and unicorns. No one has yet been able to identify where the right to privacy comes from and why we need it. In fact, the right to privacy is destructive of our wellbeing. It prevents us attaining things that really matter, such as safety and security and makes us fear one another.
>
> A strong right to privacy is no more than a request for secrecy - refuge of the guilty, paranoid and misguided, none of whom should be heeded in sorting through the moral priorities of the community.[103]

At best that is a perplexing comment from a senior academic, one belied by his apparent reluctance to share his personal information (financial records, intimate photos, medical data and so forth) with all the world. It is a reminder that there are economic and cultural differences in Australia: the rich and savvy get to shelter behind hedges and threats of defamation action, the poor – especially the stigmatised – are open to view.

One rationale for access to government information is that it reduces information differentials: we can see 'them' rather than officials enjoying a privileged position in a one-way view of us. That access might go some way to addressing disquiet about the Australia

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[100] *South Australia v Totani* [2010] HCA 39.

[101] Mirko Bagaric, 'Privacy is the Last Thing We Need', *The Age* (Melbourne), 22 April 2007. Another expression of Bagaric's disquiet regarding privacy (and, apparently, with much Australian law) is evident in ABC Radio National, 'The Law Report: Criminals and Privacy' (28 March 2006).

[102] Dr Bagaric is co-author of *Privacy Law in Australia* (Federation Press, 2005) and other works, including *Torture: When The Unthinkable is Morally Permissible* (State University of New York Press, 2007). We might ask whether jumper leads and waterboarding are appropriate mechanisms for accessing information in pursuit of justice. Cf Elaine Scarry, *Rule of Law: Misrule of Men* (MIT Press, 2010); Friedrich Spee, tr Marcus Hellyer, *Cautio Criminalis* (University of Virginia Press, 2003).

[103] For scepticism about the media claims of an overarching 'right to know', using words similar to Dr Bagaric, see: David Salter, *The Media We Deserve* (Melbourne University Press, 2007) 40-41.

Card and its successors,[104] both in terms of how national identity schemes are developed and how they are implemented on an ongoing basis.

An informed public would also be able to contribute to official consideration of suggestions that privacy is a fundamental right and that in the global digital environment justice requires new mechanisms such as prenotification schemes.[105] Should the mass media have better access to justice, and get to shape how law articulates justice, than someone who is on welfare, wants to buy a carton of milk without disturbance by the paparazzi[106] or likes to engage in Nazi-themed consensual S&M?[107] In an era where managerial failure, exploitation by private equity (with a fixation on short-term returns) and increasing incapacity through loss of experienced journalists, do the mainstream media matter? Can we rely on 'citizen media', given that a shrill populism appears to gather more attention in cyberspace than a nuanced and informed analysis of what is happening in court?[108]

V CONCLUSION

The preceding paragraphs of this paper have concentrated on access by Australians to government information as a basis for justice. Being a citizen, however, carries with it responsibilities rather than merely rights. Do Australians, particularly people in advantageous positions, have a duty to contribute to political and administrative processes through the provision of information that may guide and inform officials and legislators?[109] Is access to justice fundamentally a demand by 'us' for information from 'them', a 'them' that exists on a different plane but on occasion unaccountably shares the same lift or queue at the departure gate?

Almost a century ago philosopher Julien Benda assailed *la trahison des clercs*, the willingness of intellectuals to betray their vocation by acting as advocates for irrationalism, violence and hate.[110] Benda called the academics and other thinkers in from the streets. We have heeded that call too well.

The disengagement of academia from providing advice, offering ideas and questioning pieties through public consultation processes such as parliamentary committee hearings and responses to calls from government agencies for submissions is striking. An in-progress tabulation of submissions to parliamentary committees demonstrates that few people are contributing and that submissions by academics, including law academics, are rare.

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[104] See for example: Margaret Jackson & Julian Ligertwood, 'Identity Management: Is an Identity Card the Solution for Australia?' (2006) 24(4) *Prometheus*, 379; Lucy Craddock & Adrian McCullagh, 'Identifying the Identity Thief: Is it Time for a (Smart) Australia Card?' (2007) 16(2) *International Journal of Law & Information*, 125.

[105] *Case of Mosley v United Kingdom* (Application 48009/08), European Court of Human Rights (4th Chamber).

[106] *von Hannover v Germany* (2004) 40 EHRR 1.

[107] *Mosley v News Group Newspapers* [2008] EWHC 1777.

[108] For perspectives on the crisis in 'dead media' see: Elizabeth Wynhausen, *The Short Goodbye* (Melbourne University Press, 2011); Robert McChesney and Victor Pickard (ed), *Will The Last Reporter Please Turn Out The Lights* (The New Press, 2011).

[109] cf Jason Brennan, *The Ethics of Voting* (Princeton University Press, 2011) 51.

[110] For Benda see in particular H Stuart Hughes, *Consciousness & Society: The Reorientation of European Social Thought 1890-1930* (Harvester Press, 1979) 413-418. A perspective on academic expression is provided in Eric Barendt, *Academic Freedom and the Law: A Comparative Study* (Hart, 2010).

One reason for that abdication of responsibility might be that the current generation of academic considers that engagement is contrary to the unwritten academic code, with the task of some law teachers apparently being only to inculcate values, impart dogma and encourage ways of thinking among students. Another reason might be that academics, along with some civil society advocates, see contribution of information to parliament and agencies as pointless, given perceptions that decision-making is driven by political expediency or lobbyists,[111] or are simply self-involved.[112]

A more subtle reason might be simply that the academic precariat,[113] operating in an environment where career prospects are denominated in terms of DIISR points and successful grant applications, are simply too busy to engage.[114] In essence, contribution to a Senate committee inquiry or to policy development by a regulatory agency may induce a warm inner glow and informal esteem among some peers but is at the expense of formally recognised activity. That is regrettable, given that parliamentary committee staff are often highly talented and dedicated but are not meant to ghost the reports of the elected representatives or speak for the electors.[115]

If, as a liberal democratic political system grappling with complex legal issues, such a genetic privacy and evidence by national security informants, we want informed and effective policymaking by the legislature it is desirable that the academy has voice and chooses to advise rather than staying off the streets. As a consequence, the legislatures may need to revisit the policy settings for the 'enterprise university' in order encourage access to information from legal academics.[116]

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[111] Note for example the Australian Privacy Foundation comment that the Senate Legal and Constitutional Committee had 'abjectly failed' in 'its responsibilities to test proposals', so that 'inadequate, even fawning behaviour by Senate Committees places in increasing doubt the preparedness of civil society to expend its resources preparing submissions to Senate Committees and making time available to provide verbal evidence'. Australian Privacy Foundation supplementary submission to the Senate Environment & Communications References Committee inquiry into The Adequacy of Protections for the Privacy of Australians Online (30 November 2010) 9. Cf Edgar Whitley, Ian Hosein, Ian Angell & Simon Davies, 'Reflections on the Academic Policy Analysis Process and the UK Identity Cards Scheme' (2007) 23 *The Information Society* 51.

[112] For the ahistorical nature of contemporary laments about academic woes see Frank Donoghue, *The Last Professors: The Corporate University and the Fate of the Humanities* (Fordham University Press, 2008); Russell Jacoby, *The Last Intellectuals: American Culture in the Age of Academe* (Basic Books, 1987).

[113] John Cross and Edie Goldenberg, *Off-Track Profs: Nontenured Teachers in Higher Education* (MIT Press, 2009).

[114] 'DIISR' points, for those outside the academy, reflect publication in specific journals, with institutions and individuals seeking to maximise the number of publications in those journals in order to retain Commonwealth government funding or retain a salaried position. In reality the quality of much DIISR-rated publication is indifferent (one rated journal is replete with pseudo-science about dowsing, remote sensing, reincarnation and 'quantum holism') and much is only read by a few academics, having no discernable impact on the legal profession or more broadly on enhancement of the Australian justice system.

[115] John Halligan, Robin Miller and John Power, *Parliament in the Twenty-first Century: Institutional Reform and Emerging Roles* (Melbourne University Press, 2007) 142.

[116] See for example Mike Molesworth, Richard Scullion and Elizabeth Nixon, *The Marketisation of Higher Education and the Student as Consumer* (London: Routledge, 2011); Simon Marginson and Mark Considine, *The Enterprise University: Power, Governance & Reinvention in Australia* (Cambridge: Cambridge University Press, 2000); John Cain and John Hewitt, *Off Course: From Public Place to Marketplace at Melbourne University* (Melbourne: Scribe, 2004).

The academy might also ask whether there is a responsibility to be intelligible and thus be read. Some law teachers might take to heart the comment by John Roberts, US Chief Justice, that:

> I think it's extraordinary these days – the tremendous disconnect between the legal academy and the legal profession. They occupy two different universes. What the academy is doing, as far as I can tell, is largely of no use or interest to people who actually practice law. Whether it's analytic, whether it's at whatever level they're operating, it doesn't help the practitioners or help the judges.[117]

[117] Bryan Garner and John Roberts, 'John G Roberts Jr' (2010) 13 *The Scribes Journal of Legal Writing* 37.