COMMENTARIES

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Back in 1972-1973 when the idea of freedom of information legislation was first floated in Australia, a decision was made — and never seriously challenged — that our legislation should be modelled on the United States Freedom of Information Act.[1] The result, as Professor Robinson points out, is that a remarkable parallel exists between the Australian and United States legislation.

In another respect too United States experience became relevant to Australia at an early date. Proponents of FOI in Australia learned from a close study of United States experience that legislation might not be received enthusiastically nor readily by some key Ministers and public servants. Legislation, particularly strong and workable legislation, would be enacted only if a vigorous and unyielding public campaign was undertaken. Indeed, the fact that an Act exists in Australia owes much to the campaign waged or supported by groups like the Freedom of Information Legislation Campaign Committee, Rupert Public Interest Movement, the Australian Council of Social Services, the Library Association of Australia, the Administrative and Clerical Officers' Association, the Australian Consumers' Association, and by a small number of parliamentarians and sympathetic senior public servants.

It is those lessons that provide much of the context in which the Australian FOI Act should be assessed. The Act is not just another administrative law reform, and certainly not one whose existence is attributable solely to the wisdom, foresight or benificence of political leaders and their advisers. More so than in many other areas, public, press and parliamentary pressure had a strong influence in fashioning the Act more suitably towards the objective of conferring upon the public a realistic and enforceable right against the government administration.[2]

Just how well that objective has been secured has been disputed. The Australian Labor Party in opposition felt that the right of access was too constricted, and acted quickly when in government to introduce new amendments. In turn, that Government has been criticised for having dropped from its list of reforms some of those which it had earlier identified as the central planks in its legislative reform programme. The time has not passed it seems when we cannot usefully contrast Australian and United States FOI developments. In short, are there any lessons that can be drawn — first, about how satisfactory the scope of our Act is; and secondly, about future developments that might merit our attention?

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[1] For a brief account of the history of FOI in Australia, see *Freedom of Legislation* — Report of the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978 and Aspects of the Archives Bill 1978, Parl Paper No 272/1979, Ch 2.

[2] For a discussion of the amendments made to the Act during its initial parliamentary passage, see J McMillan, "Freedom of Information Update", [1981] Rupert Journal, Nos 6 and 7, 30. (A publication of the Rupert Public Interest Movement Inc, Canberra, Australia.)

1 SCOPE OF ACT

A central feature of the United States FOI scheme was the rejection (since 1974 in particular) of any notion that the Executive should have an overriding, conclusive or unchallengeable right to withhold information from the public. Any denial of access in the United States can be reviewed by the courts and, distant though the prospect may be, even the propriety of a national security classification can be queried.

In Australia too the notion of executive sovereignty received a general battering in a number of areas in recent years. The High Court rejected the notion in cases like *Sankey* v *Whitlam*[3] and the *Defence Papers* case;[4] Parliament did likewise in legislation that empowers federal courts and tribunals to invalidate decisions made by the most junior official up to the most senior of Ministers;[5] and, even in the context of FOI, the Senate Standing Committee on Constitutional and Legal Affairs,[6] and the federal Labor Opposition of the time, argued strongly (in the words of Senator Evans in 1979) that

> So long as ministerial discretion in any form is retained absolutely and conclusively to deny access to . . . documents without being subject to second guessing or review by anyone else, . . . freedom of information legislation is simply not worth having. . . .[7]

It has been decided instead by Labor that it would be "premature" to implement that long-standing policy commitment.[8] Ministers and senior public servants will retain their conclusive power to exclude the public from access to Cabinet documents and those relating to national security, defence, or federal/state relations (ss 33-35).

Another group excluded from the operation of the Act in Australia are the intelligence agencies — the Australian Security Intelligence Organisation ("ASIO"), the Australian Secret Intelligence Service, the Defence Signals Directorate, and the Joint Intelligence Organisation (Schedule 2). By contrast, comparable United States agencies like the Central Intelligence Agency are fully subject to the FOI Act and, indeed, have been the subject of some of the most well-publicised disclosures.[9] Moreover, as Professor Robinson points out, the proposals occasionally made to exempt the Central Intelligence Agency altogether from the operation of the United States Act are unlikely to attract much support, as no-one has shown that even the risk of occasional error in disclosure in the field of security will outweigh the general benefits of disclosure.

Why then is ASIO exempt — a status it seems that will perpetuate?[10] On

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[3] (1978) 142 CLR 1.

[4] *Commonwealth* v *John Fairfax & Sons Ltd* (1980) 32 ALR 485.

[5] *Eg,* Administrative Appeals Tribunal Act, 1975 (Cth); and Administrative Decisions (Judicial Review) Act, 1977 (Cth).

[6] *Freedom of Information, supra* n 1.

[7] Sen Deb, Vol 90, 2379 (29 May 1981); see also Sen Deb, Vol 86, 817-818 (11 September 1980).

[8] See the Attorney-General's Second Reading Speech, regarding the Freedom of Information Amendment Bill 1983: Sen Deb, 1179 at 1180 (2 June 1983).

[9] A good summary of examples is contained in the Appendix to "Freedom of Information Trends in the Information Age" (1982) 3 Journal of Media Law and Practice 144.

[10] In earlier Parliamentary debate the ALP Opposition had proposed that the security intelligence agencies be made subject to the Act (though this stance was never fully articulated): see Sen Deb, Vol 90, 3250-3251 (12 June 1981).

one side of the scales is the possible security risk arising from subjecting a highly secret and sensitive organisation to an openness law. No doubt our security intelligence agencies have much information that would be of critical interest to our enemies, maybe even information that is crucial to the preservation of democratic government in Australia. But it is difficult to imagine that the information is different in any material respects to the secrets held by the Central Intelligence Agency, the sister agency of our closest defence ally. The defence interests of both countries are common to a large extent, and if United States citizens can regularly gain access to hitherto classified information (including information about United States bases in Australia!)[11] it is difficult to imagine what interest is being protected by a complete and absolute exemption from disclosure of similar information in Australia. The position is reminiscent somewhat of former President Nixon's invocation of "national security" to suppress any disclosure concerning details of the blanket bombing of Cambodia by United States bombers. As critics had pointed out: Cambodians knew that somebody was dropping bombs on them; the Communist enemy knew there was a war on; the only people who were uninformed were those supposedly waging the war.

Counterbalancing those considerations are the possible benefits arising from subjecting the intelligence organisations to an openness law. If it is agreed — along the lines of recent newspaper reports[12] — that security intelligence agencies should not be breaking into the homes of potential Prime Ministers; if it is agreed that information of a party-political nature should not be given to organisations like the National Civic Council; and if it is agreed that ASIO's definition of "agents of influence" should perhaps be subject to second guessing for the purpose of ensuring that there is no unnecessary surveillance of political dissidents, then certainly an effective way of imposing those controls is through a system like freedom of information under which the possibility always exists that misdeeds and naivety may be disclosed. Publicity, and equally the possibility of publicity, is one of the key factors that distinguishes parliamentary democracy from more authoritarian forms of government. Unless that threat of publicity is applied to intelligence agencies, ministerial control is the only other external restraint available. Opinions differ, but certainly there is a body of belief that recent disclosures before the Hope Royal Commission on Australia's Security and Intelligence Agencies indicate that ministers — even the sceptics, in receipt of a full ASIO briefing — cannot be relied upon as a sufficient and effective safeguard of the interests of the public and of some of its most vulnerable members.

The third general area of exclusion in the Australian FOI Act is for business information, both government and private. One aspect of this exclusion is that a wholesale exemption from the operation of the Act is given to the large range of agencies established by the Commonwealth to undertake competitive commercial activities (for example, in banking, transport, insurance, telecommunications and broadcasting, and primary product marketing) — see Schedule 2. That is not so in the United States. The other aspect relates to those documents held by the Government containing information relating to

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[11] Particularly through US Congressional hearings — see, *eg*, Desmond Ball, *A Suitable Piece of Real Estate: American Installations in Australia* (1980) 25.

[12] See "The Austeo Papers", *National Times* (6-12 May 1983) 3.

the business affairs of a private or government undertaking. Those documents are subject to the Act, and may be requested, but the central exemption under which the documents can be withheld has such great breadth and uncompromising generality that the exclusion is well-nigh absolute (s 43). For example, one circumstance in which the exemption applies is where disclosure could destroy or diminish the commercial value of information. (Interestingly, the exemption for *personal* privacy is textually narrower, subject to a criterion that disclosure be "unreasonable" — s 41).

A less exclusionary approach is that adopted in the United States (and earlier supported by the Australian Labor Party[13]) under which the private commercial interests of a corporation are not automatically protected regardless of whatever public interest there may be in disclosure; protection of private interests occurs only where, for example, disclosure would unreasonably expose an undertaking to competitive disadvantage. The underlying rationale for cutting back on the scope of the protection for private corporations is that the impact of corporations on the economy, the rights of employees, consumer welfare, health and safety and the like, may be so great that they must, for some purposes, obey the same rules as government concerning accountability to the public. Corporations, it is reasoned, are artificial entities that do not have inalienable or natural rights or civil liberties. They exist only because our legal system allows them to, and their operation and their performance must therefore be compatible at all times with the public interest. Public disclosure, and public scrutiny, are sometimes the only (or the most effective) way of protecting that interest.

2 FUTURE DEVELOPMENTS

There are three points that I would highlight at this stage. It would be wrong to assume that the enactment of an FOI Act culminates the battle for more open government. The legislation enables individuals to penetrate to the centres of power in the society and, to that extent, the legislation itself becomes a new factor in a power equation that is subject constantly to strains, stresses and tensions. One manifestation of the changing equation may be that the interpretation and application of the FOI law by administrators and judges alike will vary enormously over time. A measure of disclosure which, at one time, is regarded as a democratic right may, at a later stage and particularly in a moment of crisis, be regarded as anathema under a banner like "national security", "public interest" or the like.[14] For similar reasons, it is not unforeseeable that demands will later surface to amend an FOI law and curtail the scope of access — an example in point is the new Executive Order issued by President Reagan that, on the face of things, affected quite dramatically the classification, declassification and disclosure of security information.[15]

In short, FOI advocates are well advised not to assume that others share

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[13] See Sen Deb, Vol 90, 2391 (29 May 1981).

[14] For a comparable example of judicial "backsliding" in a Crown Privilege context see, *eg*, the judgment of Lord Denning MR in *Air Canada* v *Secretary of State for Trade* [1983] 2 WLR 494, 506-509.

[15] Executive Order No 12356; discussed in K M Brown, "Government Classification: An Overview", Freedom of Information Center Report No 469 (Uni of Missouri at Columbia, 1983).

their enthusiasm, and to maintain a watching brief on whether the legislation is achieving the objectives for which it was designed.

In the second place, the enactment of FOI legislation must also be accompanied by other administrative innovations designed to inform the public that an enforceable right of access has been created, and how it can be used. To that end, many Commonwealth agencies have already taken some initiatives, for example by appointing FOI contact officers, and by preparing draft application forms, pamphlets and the like. But is that enough? The philosophical underpinning for FOI legislation (and, indeed, for other administrative law reforms) is an assumption that members of the public should receive the protection of various statutory rights and guarantees against the government administration. It would be curious then if the only source of advice on how to exercise those rights was to come primarily from the government administration itself.

A comprehensive commitment by the government to administrative reform would include direct funding of independent, community-based organisations, to perform a role of giving advice and assistance to members of the public, and to engage in some measure of independent scrutiny of the operation of the administrative law package. Such an innovation, it should be added, would be by no means novel. In other areas it is accepted, for instance, that the government's commitment to environmental protection involves funding of groups like the Australian Conservation Foundation, and similarly the social welfare programme involves funding of the Australian Council of Social Services.

In the third place, once national FOI legislation was enacted and operating smoothly in the United States, some reformers then focussed on whether there was a comparable need to apply the same basic principles of openness in other areas. Due in part to that momentum, laws that were enacted included the Privacy Act 1974, which created a more specific and extended right of access to personal records, while at the same time ensuring that private information would be more secure against wrongful disclosure; the Family Educational Rights and Privacy Act 1974, ensuring a right of access to some educational records; the Federal Advisory Committee Act 1972, which opened to the public the meetings of advisory committees; and the Government in the Sunshine Act 1976, which similarly requires open meetings for many regulatory agencies.[16] The next logical extension of the openness principle will be to the private sector, and indeed model disclosure statutes have been prepared by some public interest groups.[17] Promotion of that policy faces massive opposition and, for the moment, other reforms designed to achieve the same objective of corporate accountability have been given greater priority (like placement of consumer representatives in board rooms). The demand is nevertheless insistent and may ultimately prevail.

There is no reason why Australia's legislative reform programme should necessarily parallel that in the United States, but equally there is much to be said for keeping an eye on those developments given that the same objective of ensuring openness is now commonly accepted in both countries.

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[16] Discussed in J McMillan, "Making Government Accountable — A Comparative Analysis of Freedom of Information Legislation Statutes — Part III" (1983) 17 NZLJ 286, 287.

[17] See, *eg*, R Nader, M Green, and J Seligman, *Taming the Giant Corporation* (1976) Ch V.