TAKING STUDENT RIGHTS SERIOUSLY : RIGHTS OF INSPECTION AND CHALLENGE

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I. INTRODUCTION

A recent survey by *Choice,* the journal of the Australian Consumers Association, of student and parent rights of Australian State and Territory public schools revealed that most of the responsible public education authorities still maintain a high degree of secrecy in relation to student files and that where access is permitted it is often at the broad discretion of the school principal and subject to any limitations he may impose.[1] Decisions are therefore made about students from information based on documents to which students and parents are unable to gain access, nor are they able to challenge the accuracy or validity of such documents.

Specifically according to the *Choice* survey the following State and Territory practices exist:

1. In New South Wales and Queensland the students' files are not available to either student or parents.
2. In South Australia parents may have access to their children's files on written request but they must be looked at in the principal's office.
3. Australian Capital Territory parents may also see the files and they will be invited to the school to discuss the contents whereas in the Northern Territory the decision whether or not to allow access rests with the principal.

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1 *Choice,* February 1985, 9-13.

4. In Western Australia principals may allow parents to see the file but not the detailed guidance reports (such as I.Q. tests) although the contents of these will be discussed.
5. Tasmania was reported as "seeking legal advice on the subject and declined to comment."[2]
6. Victoria was reported as adopting a position where "the matter rests with the school council and the policy varies from school to school."[3] (This statement regarding Victoria appears to be misleading given the application of the Freedom of Information Act 1983 (Vic.) to student records in that State and this is discussed later in this article.)

No mention was made in the survey of any public school authority which had a procedure permitting parents or students to correct, expunge or challenge the contents of school records. Moreover those public school authorities which permit limited rights of access to parents to their children's records do not appear to have recognised any independent right of access in the child.

Access to student records may be of special significance in States such as New South Wales where selective public high schools exist which set a special examination for entry and which are strictly zoned. The general issues raised in regard to inspection and challenge however are not limited to primary and secondary education. They are just as relevant in tertiary education. Such issues are likely to be raised with increasing frequency as public education authorities continue to pursue strategies to further involve parents in their childrens' education and as students become more aware of their rights.

It is illuminating to compare the above practices with relevant provisions in Commonwealth and State Freedom of Information legislation, investigations of the State Ombudsman in New South Wales and American legislation designed specifically to create rights and balance interests in this area.

It should be noted first however that courts historically have adopted a non-interventionist approach in educational cases. For example in *Ex parte Forster, Re The University of Sydney*[4] the Full Court of the Supreme Court of New South Wales considered the application of the *deletagus non potest delegare* maxim (he who himself is a delegate of a certain power cannot further delegate the exercise of that power to a sub-delegate), to the delegation by the University Senate to a committee of the Faculty of Economics of its power under the University and University Colleges Act 1900-1959 (N.S.W.) to exclude unsatisfactory students from the University. The Full Court concluded:

2 *Id.*, 12.
3 *Ibid.*
4 [1964] NSWR 1000.

> Without the most ample facility for delegation the affairs of a university could not be carried on at all. It is a matter of common knowledge . . . that the affairs of a university are for the most part carried on, under authority delegated from its governing body, by its officers, both executive and academic, and by a multitude of subordinate bodies – faculties, boards, committees or by whatever other name called. The importance of the subject-matter may have a bearing on the permissibility of delegation or on the appropriateness for the purpose of the body or person to whom the delegation is made. Thus the question whether a candidate has passed or failed in an examination in a particular subject is commonly delegated to the individual examiner in that subject with, perhaps, some supervision over the result by a board of examiners; but the question whether a professor should be removed from his office would be quite another matter. At all events we are not prepared to say that there has been an invalid delegation.[5]

Where a university or college has a visitor the court will not interfere in any matter within the visitor's province.[6] Thus in *Thorne* v. *University of London* [7] the English Court of Appeal held that the High Court had neither jurisdiction to hear a claim for damages by a student against the University of London for "negligently misjudging"[8] the plaintiff's examination papers nor to make "an order of mandamus commanding the University to award him the grade at least justified".[9] The court upheld the principle of non-interference by the courts in domestic disputes between members of a University which are within the exclusive jurisdiction of the visitor of the University.

A further illustration of judicial self-restraint in educational matters is found in *Ex parte McFadyen*[10] in which an enrolled student at the University of Sydney having failed to pass certain tests held in his faculty in accordance with the by-laws made under the University and University Colleges Act 1900-1937 was refused a deferred examination. He thereafter claimed that his failure and the later refusal was due to his examiner's personal vindictiveness and he protested without success to the Dean of his faculty, and later unsuccessfully petitioned the Governor as visitor for an investigation of the circumstances. The said Act provided, inter alia, that "[t]he Senate shall have the entire management of . . . the affairs . . . of the University."[11] Section 17 of the same Act provided that "[t]he Governor of New South Wales shall be the visitor of the University, with the authority to do all things that pertain to visitors so often as he deems meet."[12] Upon an application for a rule nisi for mandamus to direct the making of an inspection by the Governor, Davidson J. refused the application and held that it was

5 *Id.*, 1010.
6 See *Dunsheath; ex parte Meredith* [1951] 1 KB 127; *Thorne* v. *University of London* [1966] 2 QB 237.
7 *Ibid.*
8 *Id.*, 239.
9 *Id.*, 237.
10 (1945) 45 SR (NSW) 200.
11 University and University Colleges Act 1900-1937 (N.S.W.) s.14(2).
12 *Id.*, s.17.

contrary to the proper interpretation of the sections that the visitor's functions should be "called in aid by any student who might be dissatisfied with the conduct or result of his examination."[13] His Honour remarked:

> Whether or not the Court would interfere to compel the intervention of the visitor in some matters concerning elections, or the rights and obligations of corporations, it would be most undesirable that his functions should be capable of being called in aid by any student who might be dissatisfied by the conduct or result of his examinations. The applicant's claim, for example, if upheld would involve an interference with the management and concerns of the University, to the degree of constituting the visitor an appellate tribunal in matters in dispute decided by the Senate, in connection with the most constantly operating branch of its activities.[14]

There are indications however that courts and tribunals recently armed with new statutory powers are now adopting a more activist approach to reviewing public education administrative decisions and granting access to information in the possession of public education authorities.

II. FEDERAL LEGISLATION

The Freedom of Information Act 1982 (Cth) ('the Act') commenced operation on 1 December 1982 and gives members of the public a legally enforceable right of access to a document of the Commonwealth and its agencies. An "agency" is defined as either a "department" or a "prescribed authority".[15] A "prescribed authority" is either a body established for a public purpose by a Commonwealth Act or a body declared by regulation to be a prescribed authority or a person holding a statutory position or person holding a prescribed appointment. Certain bodies are exempt.[16] Thus according to this statutory definition of prescribed authority, the Australian National University and Canberra College of Advanced Education are both subject to the Act since each has been created by a Federal Act, unlike other tertiary education institutions created by State Acts. Since the Commonwealth Act has been seen as a model for the States however, cases concerning its interpretation should be of more general interest.

A person has no right to obtain access under the Act to an exempt document. Amongst the categories of exempt documents are deliberative or internal working documents,[17] documents in respect of which disclosure would or could reasonably be expected to, inter alia, prejudice the effectiveness of procedures or methods for the conduct of tests, examinations or audits by an agency or prejudice the attainment

13 Note 10 *supra*, 205.
14 *Ibid.*
15 Freedom of Information Act 1982 (Cth) s.4(1).
16 *Ibid.*
17 *Id.*, s.36.

of objects of such tests[18] and documents in respect of which disclosure would constitute a breach of confidence.[19] Section 36 provides, so far as relevant, as follows:

> (1) Subject to this section, a document is an exempt document if it is a document the disclosure of which under this Act –
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> (a) would disclose matter in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of an agency or Minister or of the Government of the Commonwealth; and
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> (b) would be contrary to the public interest . . .
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> (5) This section does not apply to a document by reason only of purely factual material contained in the document.
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> (6) This section does not apply to –
>
> (a) Reports (including reports concerning the results of studies, surveys or tests) of scientific or technical experts, whether employed within an agency or not, including reports expressing the opinions of such experts on scientific or technical matters.

Each of these three sections was relied upon by the Australian National University in *Re James and Australian National University.*[20] The University refused James and four other graduates with Honours in History, access to information held by the University relating to the assessment of their performance as students, particularly in relation to work completed for the Honours components of the course. It was not the practice of the History Department to allow students access to the record sheets maintained by the teaching staff recording their comments as an aid to the assessment of student performance in each unit.[21] The University identified the following documents as access related: record sheets, lecturers' notes, notes on an Honours essay, supervisor's certificate of completion of the Honours thesis, examiners' reports on

18 *Id.*, s.40.

19 *Id.*, s.45.

20 (1984) ADMN 92-037.

21 One applicant gave evidence that it was often the student's understanding that what was written on the record sheets was not what was conveyed to the students on their essays and in conversation with lecturers. She said that "she would like to see exactly what lecturers thought of her" and wished to see lecturers become more accountable for the sort of things they write on record sheets (*Id.*, 70,266). Another witness Dr Baker, saw dangers in the practice of retaining record sheets containing comments made on essays and comments about the intellectual capacity of students.

He was especially critical of the practice of some academics in consulting at the beginning of a new academic year the record sheets maintained in respect of their students during the previous academic year. This he feared could cause a lecturer to prejudge the capacities of his students. A witness called on behalf of the respondent supported the non-disclosure of record sheets on the basis of distinguishing between what was helpful to the student and what was helpful to examining academics. Thus he suggested that it was not of much assistance to tell a first year student that he is "practically illiterate" while it was helpful to tell him that he needs some special remedial assistance in English. In recording the comment "practically illiterate" on the record sheet he would do so in the knowledge that the comment was confidential (*Id.*, 70,268). The applicant ultimately submitted that the fact that disclosure may mean in the future academics may be less prone to record dramatic general comments (such as one that a student is practically illiterate) is an effect of the Act which is in the public interest (*Id.*, 70,282).

the thesis and a grade compilation sheet maintained by the Head of the Department recording new and final grades for each component of the Honours course and the final grade awarded. The reasons for seeking access included a desire to identify weak spots in a thesis in order to improve it before publication, maximisation of the information available to a student in making course and career choices, prevention of allegations of bias and impropriety and encouraging confidence that examiners' comments to students were the same as those the examiners made to each other.

The Administrative Appeals Tribunal (A. N. Hall, Deputy President) held that the documents were not exempt under sections 36 or 40 of the Act. Liberty to apply was reserved in respect of the claim for exemption under section 45. It should be noted that the precise question for decision was whether students who had graduated were entitled to access to information which they were denied during their undergraduate years, and that therefore the Tribunal was not strictly concerned with the question as to whether undergraduate students have a right to access to such documents prior to graduation. It was also held that the documents for which exemption was claimed came within section 36(1)(a) because disclosure would reveal matter recorded for the purposes of the University's academic assessment of students. The Tribunal concluded that the words of section 36(1)(a) should be interpreted in accordance with their natural and ordinary meaning:

> The care that has been taken to describe in the most ample terms the deliberative process documents that are to be comprehended as falling within section 36(1)(a) militates against any narrow or pedantic construction of the ambit of that paragraph.[22]

The student applicants however submitted that even if the materials came within section 36(1)(a) they were nevertheless excluded from the exemption category because they contained "purely factual material".[23] The Tribunal dealt with this part of the application by recognising that in some cases selection of facts may reflect a deliberative process which section 36 is intended to protect. Thus it held that the face page of each of the record sheets recorded purely factual material supplied by the student giving personal details and past academic performance. The

22 Note 20 *supra*, 70,276. The applicants submitted that the decision of Beaumont J. in *Harris* v. *Australian Broadcasting Corporation* (1983) 50 ALR 551 and the decision of the Full Court of the Federal Court in *Harris* v. *Australian Broadcasting Corporation (No. 3)* (1984) 51 ALR 581 were authority for the proposition that only documents relating to the policy forming processes of an agency are within s.36(1)(a). This was rejected by the Tribunal which relied on its earlier decision in *Re Waterford and Department of the Treasury (No. 2)* (1984) ADMN 92-002 wherein both these Federal Court decisions were considered not to require such a construction to be placed on the words "deliberative processes". The Tribunal reaffirmed its earlier expressed view that for the purposes of s.36(1)(a) the "deliberative processes involved in the functions of an agency are its thinking processes – the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action" (*Id.*, 70,018).

23 Freedom of Information Act 1982 (Cth) s.36(5).

face page was therefore not exempt for the purposes of section 36. However the comments made on the reverse side of each record sheet were characterised as a summary of conclusions involving opinions as to the performance of the student in the particular aspect of the unit. This information was not therefore purely factual material and therefore remained exempted by section 36. Although a summary of facts, it was of such a character as to disclose a process of selection involving opinion, advice or recommendation for the purpose of the deliberative process and hence within the protection of section 36.

With respect to the supervisor's certificate, some parts thereof were serviceable and did record purely factual material. Thus paragraph one of the certificate merely certified as to the completion of the thesis and paragraph three recorded in a factual way any personal difficulties that may have beset the candidate during the preparation of the thesis. The remaining paragraphs were not of this purely factual nature and included an assessment of the originality of the thesis and any matters which the supervisor thought the examiners should consider.

The applicant students next submitted that the reports of the examiners on the performance of the applicants as students in their various units were properly characterised as reports of "scientific or technical experts", which were excluded from section 36 by sub-section 6 of that section. In this submission, an academic in assessing the performance of a student in History, was making an objective judgment which has qualitative elements to it. Thus a report prepared by an academic in respect of an essay or thesis submitted by a student was also a report of a scientific or technical expert on this view. This argument was rejected by the Tribunal however on the grounds simply that "as a matter of ordinary English" the reports of the various examiners in the History Department of the Faculty of Arts could not be described as reports of scientific or technical experts.

Finally, the Tribunal considered and rejected the University's submission that pursuant to section 36(1)(b) disclosure of the documents would be contrary to the public interest. That a document is an internal working document does not in itself make the document an exempt document under section 36. To justify refusal of access the agency must also show that it would be contrary to the public interest to give access to the document and specify the ground of public interest involved. In arriving at this conclusion the Tribunal rejected the University's submission that the interests of individual students in obtaining information about themselves was a private or personal interest and not truly a public or community interest. Referring to an earlier Tribunal decision in *Re Burns and the Australian National University,*[24] the Tribunal reaffirmed the concept of public interest as

24 (1984) ADMN 92-009.

embodying public concern for the rights of an individual and concluded that the University's submissions as a whole failed to accord proper weight to the "right to know" established by the Act.[25]

It was also argued on behalf of the University that disclosure would prejudice or limit the exchange of opinions between examiners.[26] The moderating part of the assessment process, where different examiners met to resolve their differences, being dependent on the full and frank exchange of views, would therefore be inhibited. It was further submitted that to disclose the information sought would allow students to exert pressure on examiners to reconsider or review their position and this was an undesirable factor in the assessment processes. This, it was argued, would lead to examiners being classified by reputation as hard or soft markers and this was not in the best interest of maintaining high academic results. Moreover, it was argued there was also the possibility that full disclosure may inhibit the capacity of younger academics to develop their assessment techniques. It was acknowledged that these undesirable consequences of disclosure would be greater whilst the student was still at university. These candour and frankness arguments did not attract much weight in the Tribunal's final balancing exercise.

Eventually there seemed little difficulty in identifying the legitimate interests to be weighed in the balance, the real problem being where the balance was to be struck. It is worth quoting at some length from that part of the Deputy President's decision where he analyses the effect of fuller disclosure on the performance of the academic task:

> I am mindful of the fact that the assessment of the relative academic merits and the objective academic worth of a student thesis can be a very difficult, complex and subtle task requiring a breadth of academic expertise, knowledge and integrity. Particularly is this so at Honours level in a discipline such as History, where a student is not being examined simply as to the student's grasp of essential facts, but rather as to his capacity to marshall, interpret and evaluate a range of source materials and to develop and sustain a particular theme. It is almost inevitable, in such circumstances that differences of opinion are likely to emerge between examiners. These differences will be reflected in the raw grade and the range within that grade awarded by particular examiners – information at present withheld. The present system does not shrink from exposing differences of opinion, in that students are allowed access to the edited reports prepared by their examiners. It is significant, in my view, that, where there are differences of view, a process of moderation follows of which no record is kept in writing except a record of the final agreed result. The fact that that is the present practice and, on the evidence before me, is a practice that is likely to continue is, I think, of considerable relevance when one considers the potential risks that may be involved in disclosing, after completion of the Honours year, the full details of raw assessments and the names of the examiners . . .
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> I accept that some examiners may feel threatened by such disclosures and that there is a possibility that their approach to assessment of student work may be consequentially affected. On the other hand there is, I think, much to be said for

25 Note 20 *supra*, 70,281.
26 *Id.*, 70,280.

> the view expressed by Dr Merritt and Dr Moore that an academic in assessing the work of a student must be prepared to make judgments honestly and impartially and be prepared to stand by those judgments. Indeed, those are the characteristics of a good academic that Dr Baker referred to when he spoke of academic independence from authority, on the one hand, and from students on the other. The question is whether graduate students should be denied access to information about their undergraduate performance because of fears that open disclosure may prejudice the assessment system by exposing some members of academic staff to pressures with which they may be unable to cope. However, the pressures flowing from greater accountability are, in my view, an inescapable concomitant of more open government. To react too timorously to every anticipated situation of pressure could well negate the principles underlying the Freedom of Information Act. Whether those principles fit comfortably upon an academic institution such as the Australian National University may be another question. But it is not a question to which I need to address myself. Parliament has made the decision that the Act is to apply.[27]

It is submitted however, that the 'fit' between the nature of a tertiary institution and the general principles in the Act is the core question that arises for decision in cases such as this. It serves no useful purpose to obscure this by referring to a category of illusory reference[28] such as the public interest.

Later in its judgment the Tribunal concluded that:

> [w]hen it comes to the question as to the weight that should be given to those fears and concerns, therefore, the absence of any evidence of actual harm from more open assessment procedures is a fact to which, I think, I am entitled to have regard. It is obvious from the evidence before me, there is no uniform approach to open disclosure within the Australian National University itself nor is there any uniform approach within other tertiary institutions in Australia.[29]

In relying upon the alternative categories of exemption under sections 40(1)(a), (b) and (d) the University argued that at the heart of the problem was a fundamental question of academic freedom. What the University was seeking to protect was the right of each faculty and

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27 *Id.*, 70,282 – 70,283.

28 Stone critically analysed how, according to conventional legal theory, such categories are employed in our common law legal system of precedent as "non-contemporaneous legal propositions" from which, by a process of legal deduction and without entering upon social and ethical enquiries, courts can reach conclusions well adapted to contemporary problems. As Stone demonstrated however the "logical form" is often "fallacious" and the exclusion of considerations of social needs, social policies and personal evaluation by the courts is correspondingly illusory. Stone also identified various categories of illusory references in the common law which gives rise to such fallacies and shows "how they serve as devices permitting a secret and even unconscious exercise by courts of what in the ultimate analysis is a creative choice". "Public interest" as a legal standard is an example of the legal category of indeterminate reference in the Stonian sense since when such a standard is applied "judgment cannot turn on logical formulation and deductions, but must include a decision as to what justice requires in the context of the instant case".
The category of indeterminate reference is illusory in the sense that "it does not usually lead compellingly to any one decision in a concrete case, but rather allows a wide range for variable judgment in interpretation and application, approaching compulsion only at the limits of the range".
Stone identifies a category of indeterminate reference as "an ubiquitous category of the law having a chronically wide area of penumbral doubt": J. Stone, *Legal System and Lawyers Reasonings* (1964) 263-264.

29 Note 20 *supra*, 70,283.

department within the University to determine the methods and procedures to be used in assessing the performance of students and the degree of communication appropriate to be made to students. It was acknowledged however, on behalf of the University, that there was difficulty whether this degree of academic freedom was compatible with the principles of the Act. The Tribunal accepted that the disclosure sought by the applicants could reasonably be expected to cause some prejudice to the effectiveness of the procedures adopted within the History Department for the conduct of tests. The claim of exemption in respect of the thesis reports ultimately related to withholding the names of the examiners where they did not agree to disclose and to withholding the raw grades awarded by the individual examiners.[30] It was also accepted for the purposes of section 40(1)(b) that a further consequence could become prejudice to the attainment of those objectives.[31] The diversity of reaction amongst academic witnesses to more open assessment procedures however mitigated this effect. Prima facie however, the grounds for exemption relied upon under section 40(1)(a) and section 40(1)(b) were made out but subject to the public interest question arising under section 40(2). Ultimately therefore the same issue as to the public interest in disclosure arose under section 40 as under section 36(1)(b) and the same result followed in each case: in the circumstances here, there was an overwhelming public interest in disclosure.

The precedential value of this decision should not be overestimated. It concerned an application for disclosure where the assessment process was completed and hence the dangers of premature disclosure less. There had already been disclosure by some of the members of the History Department of several of the documents sought. It was held that a legitimate ground for concern by the University was that even an *ex post facto* disclosure of comments recorded on student record sheets and of the precise range within a grade accorded to a particular piece of student work may prejudice the History Department's assessment procedures by discouraging academics from expressing opinions freely and candidly or by encouraging academics to assess a student's performance less rigorously than they otherwise might do, so as to court favour with students. That concern was recognised as a particular expression of the public interest but not one with sufficient weight to balance the overwhelming weight of the public interests in the individual's right to know in the particular circumstances of the case.

30 *Id.*, 70,280.
31 *Ibid.*

III. STATE LEGISLATION

To date only one State has enacted Freedom of Information legislation. Such legislation has been promised in South Australia. A Freedom of Information Bill was introduced into the New South Wales Parliament in December 1983 by the Premier and allowed to lie on the table, prior to debate, for public comment, and "constructive amendment" proposals were invited from the community at large.[32]

The Victorian Freedom of Information Act 1982 ('The Victorian Act') is modelled for a substantial part on its Federal counterpart. However the Victorian Act contains some additional categories of exemption relevant to student records, namely sections 30(4) and 34(4)(c). These sections are examined below. The New South Wales Bill has no counterpart provisions to these sections. Section 13 of the Victorian Act gives every person a legally enforceable right to obtain on request access in accordance with the Act to documents of any agency which are not exempt documents. "Agency" is defined in identical terms to the Federal Act. The statutory definition of "prescribed authority" however refers to "a body corporate established for a public purpose by, or in accordance with, the provisions of an Act, or a body unincorporate created by the Governor in Council or by a Minister",[33] but expressly excludes school councils (an association of parents and teachers who perform limited management functions not including supervision of assessment of students, at Victorian public schools). Thus, documents of school councils are not subject to the Victorian Act. However, student assessment documents, it is submitted, are not school council documents, but documents of the Victorian Department of Education and hence subject to the Victorian Act.

Like the Federal Act, the Victorian Act provides for procedures whereby a person may request the correction or amendment of any part of a document containing information relating to his personal affairs where it is inaccurate, incomplete, out of date or where it would give a misleading impression.[34] The New South Wales Bill contains similar provisions.[35]

The New South Wales Bill adopts a similar definition of "agency" and "prescribed authority"[36] to the Victorian Act so far as relevant to the purposes of this article except that "a Teaching Service within the meaning of section 4(1) of the Education Commission Act, 1980"[37] is

32 N.S.W. Parliamentary Debates, Legislative Assembly, *Hansard*, 1 December 1983, 4258 *per* Mr N. Wran.
33 Freedom of Information Act 1982 (Vic.) s.5(1).
34 Freedom of Information Act 1982 (Cth) ss 48-52; Freedom of Information Act 1982 (Vic.) ss 39-43.
35 Freedom of Information Bill 1983 (N.S.W.) ccl. 46-61.
36 *Id.*, cl. 6(1).
37 *Id.*, cl. 6(1).

expressly included in the definition of prescribed authority in the New South Wales Bill.[38]

Under both the Victorian Act and the New South Wales Bill universities and colleges of advanced education established by State Acts are within the statutory definitions of prescribed authorities. In any proceedings before the Victorian Administrative Appeals Tribunal or the New South Wales District Court for review of a decision refusing access, the respondent and not the applicant has the onus of proof of establishing that such decision was justified.[39]

Section 30(1) of the Victorian Act – the internal working document exemption – is in similar terms to section 36 of the Federal Act except that the Victorian section includes an additional limitation on its scope pursuant to section 30(4):

> [t]his section does not apply to the record of a final decision, order or ruling given in the exercise of an adjudicative function, and any reason which explains that decision, order or ruling.

The formulation in the New South Wales Bill of the internal working document exemption is much wider than either the Federal or Victorian Act. Clause 34 of the Bill unlike its counterparts contains no requirement that disclosure would be contrary to the public interest. Nor is its application excluded where a document contains only purely factual material. Nor is there any limitation in the New South Wales Bill corresponding to section 30(4) of the Victorian Act. The absence of such limitations on the scope of this exemption is, it is submitted, a serious defect in the New South Wales Bill.

The exemption provisions in section 30(1) of the Victorian Act were relied upon by Monash University in *Hart* v. *Monash University.*[40] In this case Monash refused to grant the request of Hart, who was a student in its Economic and Politics Faculty, that he be informed of the percentage marks allocated to him in six subjects. Monash submitted that the document containing the percentage mark was prepared by the Chief Examiner as an assessment and forwarded to the Board of Examiners in the nature of opinion, advice or recommendation which the Board of Examiners may or may not accept or adopt.[41] It was further submitted that under statutes dealing with the duties of examiners and examination boards a two stage process was provided for, namely, the Assessment by the Chief Examiner and the determination of the results by the Board of Examiners.[42] The applicant student submitted that the information required was "of purely factual material" and therefore not subject to the exemption.[43] He also relied

38 School Councils have not as yet been introduced into New South Wales public schools.
39 Freedom of Information Act 1982 (Vic.) s.55; Freedom of Information Bill 1983 (N.S.W.) cl. 57.
40 Unreported judgment of County Court of Victoria, *per* Hogg J., 18 June 1984.
41 *Id.*, 7.
42 *Id.*, 11.
43 Note 40 *supra*, 10.

on section 30(4), quoted above, and section 34(4)(c) in submitting that the document was not an exempt document.[44] Section 34(4)(c) provides that a document is an exempt document if

> it is an examination paper, a paper submitted by a student in the course of an examination, an examiner's report or similar document and the use or uses for which the document was prepared have not been completed.

The document in question was not an examination paper nor was it a paper submitted by a student in the course of an examination. Since the requested document contained no report within the ordinary meaning of the word on the applicant, save that it contained his percentage marks and grades, Hogg J. concluded that it did not consitute an examiner's report or similar document within the meaning of section 34(4)(c).[45]

His Honour accepted the University's threshold submission that the percentage marks were in the form of a recommendation made by the Chief Examiner to the Board of Examiners and that the Board used the percentage marks in the course of, or for the purpose of, the deliberative process involved in its function.[46] (It may be noted at this stage that under the wide formulation of the internal working document exemption in the New South Wales Bill this conclusion would have disposed of the whole case.) Hogg J. then went on to conclude that the percentage marks were not purely factual material so that the University was not thereby deprived of the protection of this exemption and that they were also not a record of a final decision, order or ruling given in the exercise of an adjudicative function since the final decision was given by the Board of Examiners.[47] Having accepted the University's basic submission the Court then examined its second submission that the disclosure of the document would be contrary to the public interest.

In regard to the public interest Monash argued, inter alia, that there was public interest in the accuracy of the information supplied by Monash relating to examination results and that it should be recognised that percentage marks do not bear the same precision as grades because of the necessity to have a number of assistant examiners to mark papers whose assessments may vary. Hogg J. suggested that any problem here could be overcome or at least reduced by Monash issuing a document containing percentage marks and adding a notation to such which would clearly indicate to the public the attitude of Monash to percentage marks awarded to students.[48] The University's commitment to the grade system rather than the percentage mark system of examination results could still continue to operate once this change was introduced. Monash also raised the candour and frankness arguments

44 *Ibid.*
45 *Ibid.*
46 *Id.*, 11.
47 *Id.*, 10.
48 *Id.*, 13.

in a similar way to that of the Australian National University in *James'* case[49] but they attracted a similar lack of weight here as they did there.[50] As Hogg J. concluded:

> Most positions of responsibility in the community involve pressure of some degree, and giving an honest and accurate percentage mark, in my view, is what the community should expect from University examiners.[51]

Monash subsequently adopted the procedure suggested by Hogg J. and also issued a form to be completed by students applying for access to numerical marks.[52] Contained on the said form is the following "information for applicants":

> Access to numerical marks is given on the understanding that letter grades are official university results, while marks form the basis of advice or recommendation to Boards of Examiners. . .
>
> Copies of your examination script books are available if written application for them is made under the Freedom of Information Act within three months of the date of publication of results.[53]

IV. THE OMBUDSMAN

All Australian States now have an Ombudsman. There is also a Commonwealth Ombudsman. In New South Wales the Ombudsman is appointed under the Ombudsman Act 1974 (N.S.W.) which provides in section 12, inter alia, that any person may complain to the Ombudsman about the conduct of a public authority subject to certain exemptions. "Conduct" is defined in section 5 as any action or alleged action or inaction or alleged inaction relating to "a matter of administration". All universities and Colleges of Advanced Education established by Acts of the New South Wales Parliament are regarded by the Ombudsman as within the statutory definition of "public authority" in section 5 of the Act.

In *Evans* v. *Friemann,*[54] the Federal Court held that a decision by a Board of Examiners of Patent Attorneys failing a candidate for admission as a Patent Attorney was a decision of an administrative character for the purpose of the Administrative Decisions (Judicial Review) Act 1977 (Cth).[55] In characterising the decision to fail a candidate in an examination as being of an administrative character, Fox A-C.J. stated that

> [t]he role of the Board of Examiners is one of carrying out a purpose of the Patents Act by ensuring that there are specially qualified people to deal with applications that arise under it. The process of arranging for, and promulgating the results of, examinations are on any view distinctly administrative, as are some

49 Note 20 *supra.*
50 Note 40 *supra,* 13.
51 *Id.,* 14.
52 Interview with P.A. Fisher, Records Officer/Archivist, Monash University, 15 April 1985.
53 Form entitled "Monash University/Application For Access To Numerical Marks/ Information For Applicants", 14 March 1985.
54 (1981) 3 ALD 326.
55 *Id.,* 332.

aspects of conducting them. [However, the Court] will not itself become involved in the examination process.[56]

In his Annual Report for the year ended 30 June 1984 the New South Wales Ombudsman relied on both *Evans* v. *Friemann* [57] and the advice of senior counsel as a basis for investigating a complaint by a student at Macquarie University Law School that the University had failed to ensure that fair and just procedures were followed in deciding the grade awarded to her in a law subject.[58] The Ombudsman summarised his view of the ambit of his investigatory powers in the area of student complaints covering their assessment in the following way:

> Senior Counsel has advised the New South Wales Ombudsman that a complaint that the process by which the examination performance of a student was affected by bias or improper motivation would relate to a matter of administration and be capable of investigation under the Ombudsman Act. Clearly, on the other hand, no Ombudsman would wish as a matter of discretion to be involved in the process of investigating complaints which merely reflect a dissatisfaction on the part of a student about the marks awarded to him or her. Accordingly, generally speaking complaints about marks are not investigated unless there is something more alleged such as bias or failure to observe fair or prescribed procedures.[59]

The Ombudsman concluded in this case that the University had failed to preserve the appearance of fairness to the complainant for a variety of reasons including the fact that the Honours Committee published an allegation of plagiarism against the complainant rather than following the procedures set down by the University's Academic Senate.[60] Elsewhere in his report it was noted in regard to investigation of matters involving professional judgment that while "the choice by an expert between two or more reasonably open courses of action cannot be 'wrong conduct in a matter of administration'. . ." for the purposes of the Ombudsman Act 1974 (N.S.W.) "[n]evertheless, the most complex of technical decisions usually involves preliminary steps or parallel procedures of an administrative kind."[61] Thus for example grades should be awarded on a scale which has been made clear to students some time before their work is to be handed in.[62]

V. AMERICAN LEGISLATION

Guidelines for educational record keeping have existed in the United States since the early 1970's.[63] In 1975 over twenty-five States had laws regarding student records though they varied widely in content.[64]

56 *Ibid.*
57 Note 54 *supra.*
58 Annual Report of N.S.W. Ombudsman for year ended 30 June 1984.
59 *Id.*, 21.
60 *Id.*, 22.
61 *Id.*, 49.
62 *Ibid.*
63 C.M. Mattessich, "The Buckley Amendment: Opening School Files for Student and Parental Review" (1975) 24 *Catholic U L Rev* 588.
64 *Ibid.*

In 1974 Congress passed the first comprehensive federal statute on student records: The Family Educational Rights and Privacy Act of 1974 ('FERPA'). It was also known as the Buckley Amendment for its sponsor, Senator Buckley of New York. The statute provides for broad parental and student access to student records, provides an opportunity to challenge at a hearing any information they believe is inaccurate or misleading and places strict controls on access by third parties.[65] It also provides that at age eighteen, upon entering a post-secondary institution, a student assumes the sole right to access to his file.[66]

The parental right of access is subject to qualification. Certain types of records are excluded from the accessible category of "student records" under the Act and are thus not available for parental review.[67] These are limited to records of administrative and like personnel which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute.[68]

Corresponding Wisconsin legislation distinguishes between "progress records" and "behavioural records" and provides that parents view student behavioural records in the presence of a person qualified to explain them.[69] This provision balances the parents' interest in reviewing sensitive, possibly stigmatising information and the school's interest in avoiding misunder-standing and disruption of the parent-school relationship. As American schools have worked to comply with this legislation new issues emerged such as the need to protect a minor student from an abusive parent should the parent gain access to records relating to the school counselling relationship. A minor student may only seek help from school counsellors if assured that such communication will not be divulged to his parents. In such situations where there may be a serious conflict between the interests of the parent and the interests of the child Splain suggests that the best way for resolving such a dilemma is to place the burden on the school to establish that the student's best interests would be served by denial of parental access and that thereby the basic right of the parent to access in most instances would not be undermined.[70]

VI. CONCLUSION

The general issues and principles that exist in the area of access to information are perhaps relatively easy to define but their application in specific contexts such as education is often far more difficult. The danger with existing Australian legislation which applies in this area is

65 N.K.S. Splain, "Access to Student Records in Wisconsin" [1976] *Wis L Rev* 975.
66 Note 63 *supra*, 597.
67 *Id.*, 588.
68 Note 65 *supra*, 1024.
69 *Id.*, 1023.
70 *Id.*, 1020.

that it lacks any coherent strategy tailored to the special circumstances of education. There are therefore many areas in which educational administrators are left guessing as to what the law demands of them in formulating administrative procedures and decisions. What, for example, is the appropriate administrative procedure when a parent's interest in access to student records conflicts with the student's desire for confidentiality and threatens harm to the student? The residual concept of public interest found in Freedom of Information legislation is too blunt a measure to provide much guidance here.

It should also be recognised that educational authorities have a legitimate interest in ensuring that student record keeping systems are manageable and do not impose excessive administrative and financial burdens on the school as a whole nor provoke undue outside interference detrimental to their education function.[71] This however should not obscure the need to take student and parental rights seriously.

It is submitted that a more effective mechanism for balancing competing interests in the area and for providing clear administrative guidelines would be a specific statutory provision dealing with student record keeping.

By more specifically identifying all the legitimate competing interests to be weighed in the balance this type of legislative strategy may also afford a better chance of striking the right balance. The proposed amendment to the New South Wales Freedom of Information Bill annexed hereafter is an attempt to pursue such a strategy.[72]

APPENDIX

PART III A – ACCESS TO STUDENT RECORD DOCUMENTS

29A (1) In this part –

"educational records" means all records relating to individual students maintained by a public primary or secondary school or tertiary institution but does not include notes or records maintained for personal use by a teacher or other person if such records and notes are not available to others nor does it include records necessary for, and available only to persons involved in, the psychological treatment of a student.

71 Thus the Federal Act provides in section 24(1)(b), inter alia, that an agency may refuse to grant access to documents where the request "is expressed to relate to all documents, or to all documents of a specified class, that contain information of a specified kind or relate to a specified subject matter" and where "the work involved in giving access to all the documents to which the request related would substantially and unreasonably divert the resources of the agency from its other operations. . ."

72 The proposed amendment is modelled on FERPA and counterpart Wisconsin legislation together with suggested amendments thereto made by Splain, note 65 *supra*.

"behavioural records" means those educational records which include psychological tests, aptitude tests, personality evaluations, records of conversations, any written statement relating specifically to an individual student's behaviour, tests relating specifically to achievement or measurement of ability, the student's physical health records and any other educational records which are not progress records.

"progress records" means those educational records which include the student's grades, final percentage or numerical marks in subjects, a statement of the subjects the student has taken and the student's attendance records.

(2) Subject to this Act, a student or the parent or guardian of a minor student shall upon request to the educational agency be shown and provided with a copy of the student's progress records.

(3) Subject to this Act, an adult student or the parent or guardian of a minor student shall upon request be shown in the presence of a person qualified to explain and interpret the records the student's behavioural records except where such access to parents or guardians would place the student in danger of physical, mental or emotional harm or where the student requests the denial of such access and where denial of access is in the best interests of the minor. The onus of proving such danger or the best interests of the minor shall be on the agency which seeks to rely upon it. Such student or the parent or guardian shall, subject to this section, upon request be provided with a copy of the behavioural records.

(4) A parent or a guardian of a minor student shall upon request be shown, in the presence of a person qualified to explain and interpret the records, the student's psychological treatment records except where such access to parents or guardians would place the minor student in danger of physical, mental or emotional harm or where the minor student requests that such access be denied and it would be in the best interests of the minor student that parental or guardian access be denied. The onus of proving such danger or the best interests of the minor shall be on the agency which seeks to rely on it.

(5) Subject to this section each educational agency shall establish appropriate procedures for the granting of requests by parents and guardians to the educational records of their children within a reasonable time except that wherever a student has attained the age of eighteen years of age, or is attending post-secondary education the rights accorded to the parents of the student by this section shall thereafter only be accorded to the student.